

A.F.R.

Reserved on: 10.09.2020

Delivered on: 19.10.2020

**Court No. - 1**

**Case :-** CRIMINAL APPEAL No. - 264 of 1989

**Appellant :-** Kalloo

**Respondent :-** State

**Counsel for Appellant :-** Ram Niswas Sharma, Anuj Srivastava, Atul Tej  
Kulshrestha, Mohit Singh, Ravendra Singh, Vinay Singh

**Counsel for Respondent :-** D.G.A.

**And**

**Case :-** CRIMINAL APPEAL No. - 95 of 1989

**Appellant :-** Krishan and others

**Respondent :-** State of U.P.

**Counsel for Appellant :-** R.N. Sharma

**Counsel for Respondent :-** A.G.A.

**Hon'ble Ramesh Sinha, J.**

**Hon'ble Samit Gopal, J.**

**(Per Samit Gopal, J. for the Bench)**

1. These two criminal appeals have been filed against the judgment and order dated 05.01.1989 passed by the IX<sup>th</sup> Additional Sessions Judge, Meerut in Session Trial No. 6 of 1987 (State of U.P. Vs. Risal and others) whereby the accused appellants Kalloo, Krishan and Risal have been convicted and sentenced under Section 302/34 IPC for life imprisonment and the appellant Smt. Suresh has been convicted and sentenced under Section 201 IPC to one year rigorous imprisonment.

2. In Crl. Appeal No. 264 of 1989 accused-appellant Kalloo is the sole appellant whereas in the connected Criminal Appeal No. 95 of 1989 Krishan, Risal and Smt. Suresh are the appellants. In so far as the appellants in the connected Criminal Appeal No. 95 of 1989 are

concerned, all the three appellants have died and their appeal stands abated vide order dated 26.09.2019.

3. Accused Kalloo in Criminal Appeal No. 264 of 1989 is the sole surviving accused whose appeal is before the Court to be adjudicated against his conviction and sentence by the trial court.

4. The prosecution case as per the First Information Report lodged by Photu PW-1 is that Risal his elder brother is living separately and he along with his two other brothers live in a joint family. Risal has four sons Rajendra, Bhopal, Kalloo and Krishan. Smt. Urmila wife of Bhopal lives with her children along-with Rajendra. Kalloo, Krishan and Risal live in a joint family. Risal had about 11½ bigha of land, out of which, he had sold about nine bighas around two years back, the remaining 2½ bighas of land was agreed by him to be sold to Rajendra, for which, an agreement was entered into between them and he had taken Rs. 10,000/- from Rajendra and the remaining money was to be paid by Rajendra. Rajendra was in discussion with his father Risal for getting the said 2½ bigha land by way of a sale deed and used to say that the nine bighas land which was sold had his share and as such the money of his share be adjusted in the land he was proposing to purchase and the sale deed be executed, to which Risal was not ready. They used to enter into quarrel often regarding the same, on which, relatives and neighbours used to intervene and council both the persons. A day prior to giving of the application for lodging of the First Information Report, a dispute between the said two persons arose, on which, the first informant and other persons intervened and got the issue subsided at that moment. Around 8:00-9:00 P.M., the first informant Photu, his younger brother Chandra Bhan after counselling both the persons came out of the house and suddenly they heard Rajendra shouting to save him and he said that he has been assaulted, on which, the first informant Photu and his brother ran inside the house of Risal where a kerosene lamp was burning which was spreading light wherein they saw

Risal and Krishan catching hold of Rajendra while being on the floor and Kalloo who was armed with a *phawda* with an intention to kill Rajendra cut his neck which was also being witnessed by Smt. Urmila from a grill who was also shouting that “he has been killed, save him”. The door of the house of Smt. Urmila was bolted from outside. It is further stated that the first informant reached near the place of occurrence and saw Rajendra to be dead, on which, he said to Risal as to what he has done, and in reply, Risal stated that if he would tell it to anyone then he would also meet the same fate. It is further stated that due to fear, the first informant remained silent. Risal, Kalloo and Krishan then while leaving the house, were saying that if anyone follows them then he will also meet the same fate. It is then stated that due to fear, the persons remained near the dead body and were crying. It is stated that the first informant gathered courage after assurance of villagers that the police has to be informed, on which, he has lodged the present First Information Report.

5. An application dated 08.01.1986 was given by Photu (PW-1) to the police of which Mahaveer Singh is the scribe, the same is marked as Ex. Ka-1 to the records. On the basis of the said application, a First Information Report was registered on 08.01.1986 at 08:30 A.M. at Police Station Chandi Nagar, District Meerut as Case Crime No. 2 of 1986, under Section 302 IPC having Risal, Krishan and Kalloo as the accused therein. The said First Information Report which is marked as Ex. Ka- 15 to the records.

6. Rajendra son of Risal is the deceased. His postmortem examination was conducted on 08.01.1986 at 04:00 P.M. by Dr. R.S. Puri (PW-3) which is marked as Ex. Ka-2 to the records. The ante-mortem injuries found on the body of the deceased read as under:

(i) Incised wound 10cm x 3cm into bone deep on the right side of forehead. 6 cm for the middle upto upper end of the right ear oblique in direction.

(ii) Incised wound 8cm x 1.5cm into bone deep on the transverse upper eye lid just below the eyebrow, upto the cheek bone right side.

(iii) Incised wound 11cm x 1.5cm into bone deep transverse on the right side of face from the right nostril to wound right cheek.

(iv) Incised wound 23cm x 3cm into bone deep transverse along the lower side of mandible from left angle of mandible towards the right angle of mandible bone, mandible bone is cut.

(v) Incised wound 15cm x 4cm into bone deep transverse on the front of neck extending from the left to right side upper part, 3cm below the chin.

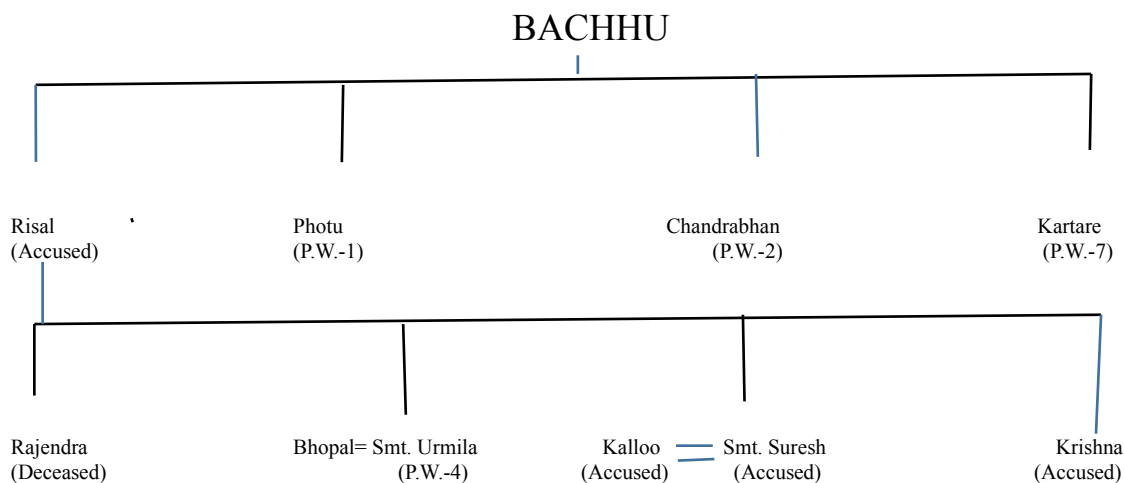
The cause of death has opined by the doctor is shock and haemorrhage as a result of ante-mortem injuries.

7. During investigation Smt. Suresh was also included as an accused in the case.

The investigation concluded and a charge sheet dated 27.01.1986 was submitted against Risal, Krishan and Kalloo under Section 302 IPC and against Smt. Suresh under Section 201 IPC, the same is Ex. Ka-16 to the records.

8. The trial court framed charges against Risal, Krishan and Kalloo under Section 302 IPC read with Section 34 IPC and against Smt. Suresh under Section 201 IPC vide its order dated 12.03.1987. The accused persons pleaded not guilty and claimed to be tried.

9. In the present case, the accused persons, the deceased and the witnesses are close relatives of each other. The pedigree of the family of Bachhu is given herein-below which would show the relationship between them:



10. The prosecution in order to prove its case produced three eye witnesses being Photu as PW-1 who is also the first informant and uncle of the deceased, Chandra Bhan as PW-2 who is another uncle of the deceased being the younger brother of PW-1 and Smt. Urmila as PW-4 who is the wife of Bhopal who is the brother of the deceased. Amongst the formal witnesses Gajey Singh PW-5 was produced and examined as a witness of the recovery of *phawda*, Lahri Singh PW-6, the constable took the dead body for post-mortem examination, Kartare (PW-7) who saw Smt. Suresh hiding the *phawda* which was said to have been used in the assault, Sri Madan Mohan, the Judicial Magistrate Economic Offences, Meerut PW-8 who recorded the statements under Section 164 Cr.P.C. of Photu, Gajey Singh, Smt. Urmila and Chandra Bhan and lastly Mahipal Singh, Sub-Inspector as PW-9 who was the Investigating Officer of the case upto 14.01.1986 after which the investigation was handed over by him to Rajveer Singh Rathore, the S.H.O. of the same police station. The accused Risal, Krishan and Smt. Suresh in their statements under Section 313 Cr.P.C. denied the occurrence and pleaded ignorance as to the reason of their implication in the present matter. Accused Kalloo claimed false implication due to enmity. No defence evidence was led.

11. The trial court after considering the entire evidence on record, initially came to the conclusion that since the three eye witnesses have

denied their witnessing the occurrence, as such the present case now does not remain to be a case of eye witness account but is now a case based on circumstantial evidence and as such the Court has to look into the other related circumstances in the light of the statement of the said witnesses. It finally came to the conclusion that looking to the circumstances of the case and the fact that PW-1, PW-2 and PW-5 have been declared hostile, still there is sufficient evidence to show that the murder of Rajendra has been committed with a *phawda* by Risal, Kalloo and Krishan and Smt. Suresh had tried to conceal the said *phawda* and thus convicted the accused persons.

12. As has already been stated above, the accused Krishan, Risal and Smt. Suresh died during the pendency of the appeal filed by them and their appeal stands abated. Thus, the appeal of Kalloo only survives as of now.

13. We have heard Sri Anuj Srivastava and Sri Mohit Singh, learned counsels for the appellant, Sri Gaurav Pratap Singh, learned brief holder for the State of U.P. and have perused the record.

14. Learned counsels for the appellant made the following submissions:

(i) The three alleged eye witnesses namely Photu PW-1, Chandra Bhan PW-2 and Smt. Urmila PW-4 have not supported the prosecution case and have been declared hostile and as such there is no eye witness to the present incident.

(ii) Gajey Singh PW-5 who is a witness of the recovery of *phawda* has also been declared hostile and as such the recovery of the *phawda* is also a manipulation and a false recovery has been shown. Kalloo the accused appellant has been assigned the role of assaulting the deceased with *phawda* and cutting his neck but since the witness of the recovery of *phawda* has been declared hostile even the corroboration of use of the said *phawda* is missing.

(iii) The recovery of *phawda* as alleged by the prosecution is from the possession of Smt. Suresh as is evident from the recovery memo Ex. Ka-4 which cannot in any manner be linked and associated to have been used by the appellant Kalloo as the same has not been recovered either from his possession or from his pointing out.

15. On the other hand, learned brief holder for the State opposed the submissions of the learned counsels for the appellant on the ground that although the four witnesses including the three eye witnesses have been declared hostile but manner in which PW-1 Photu and PW-2 Chandra Bhan have been declared hostile clearly shows that they were at some point of time won over and they had thus changed their version before the trial Court. It is further argued that PW-5 has admitted his signing on papers and has also stated to have been a witness of the recovery of a blood stained *phawda* but has stated that he had signed on a blank paper. It is argued that at least the evidence of PW-1 Photu, PW-2 Chandra Bhan and PW-5 Gajey Singh can be used in drawing the conclusion that the present incident occurred as stated by the prosecution at the date, time and place of occurrence by the accused persons named therein. It is argued that the appeal lacks merit and be dismissed.

16. PW-1 Photu is the first informant and Chacha of the deceased. He was for the first time produced before the Court on 24.08.1987 for recording of his examination-in-chief, he stated regarding the inter-se relationship between the parties. For the motive of the incident, he stated that Risal had 11½ bigha agricultural land. Rajendra was a bachelor and used to live with Bhopal and his family. About 1½, years back, Risal had sold 9 bighas of the land. The said land was ancestral. Risal did not give the share of Rajendra out of the sale proceeds. About 2½ months back, Risal had executed an agreement to sell in favour of Rajendra for the remaining 2½ bighas of land on receiving Rs. 10,000/- for it. Rajendra used to ask Risal to execute the sale deed in his favour for the said land,

on which, Risal used to ask for the remaining money for it. Rajendra used to tell Risal that he had sold 9 bighas of land and the money of his share in the sale proceeds may be adjusted in the transaction of his purchase of 2½ bighas of land and the sale deed be executed, on which, there used to be fights between them. PW-1, his brother Chandra Bhan and neighbours used to intervene at the time of fights between them.

17. On the fateful day, at about 07:00 P.M. Risal and Rajendra were having a quarrel, on which, PW-1 and Chandra Bhan went there and pacified both of them. At about 08:30-09:00 P.M., when PW-1 and Chandra Bhan returned from the house of Risal, some villagers told them that Risal and Rajendra have again started fighting. He and Chandra Bhan went there and saw Smt. Urmila locked in her portion of the house and the dead body of Rajendra was lying in the house. He states that he did not see as to who assaulted Rajendra and how he died in the house. The wife of Kalloo was also present and after his reaching the place, many other villagers also came there. They cried and were there for the whole night. Then he went to the police station and on instruction of people, got a report transcribed by Mahaveer. The said witness was then recalled on 20.10.1987 and he stated that he does not know as to whether Mahaveer had transcribed what he had dictated to him or not. He states to be an uneducated person. He states that the said application was not read out to him. It is further stated that Inspector, Mahaveer and many people were present at the police station who were dictating the report. He had orally informed the police personnel present. He states that the report shown to him is the same which he had got transcribed but denies the fact that he has seen the assailants. He identifies his thumb impression on the said application which was marked as Ex. Ka-1. Then he was declared hostile and was allowed to be cross examined by putting leading questions to him. He then denies the version as stated in the First Information Report regarding Krishan and Risal catching hold of the deceased while he was



lying on the floor and assault by Kalloo with a *phawda* on him. He states that he does not know as to how Mahaveer has written the same. He also denies the presence of the kerosene lamp at the place of occurrence but later on states that it was present there. He states that he has given his statement under Section 161 Cr.P.C. to the Investigating Officer but states that the same has been recorded as per the First Information Report. He further states that he has told the Investigating Officer not to write such statement, to which, he had stated that he may give his correct statement in Court. On a suggestion that he has been won over by his relatives, he denies it. He was again recalled on 03.06.1988 and was confronted with his statement recorded under Section 164 Cr.P.C., to which, he states that although he had given the statement which was recorded but the Investigating Officer had told him to give the statement which he had given. He states that the Investigating Officer was not present in the court at the time when his statement was being recorded but he was standing outside the Court. While being cross examined on behalf of the accused, he states that he was made to give his statement under Section 164 Cr.P.C. forcibly by the Investigating Officer and resiles from the said statement.

18. PW-2 Chandra Bhan is the uncle of the deceased and brother of PW-1. He has also stated that regarding the inter-se relationship between the parties. He has stated that there was a dispute between Risal and Rajendra with regards to execution of the sale deed for land. He further states that for the same dispute, there used to be discussions often between them, in which, he also used to go and get the said dispute settled at that point of time. In so far as, the day of the present incident is concerned, he has stated that he and many other villagers heard that some fight is going on in the house of Risal, on which, he went there and intervened between them at about sometimes at dawn. He states that later on in the late night being around early morning, he came to know that Rajendra has died in the house of Risal, on which, he went there and saw Rajendra lying dead.

Risal and others were not present. Many people were present there. Smt. Urmila was present in her house and was crying. He states that he did not see Risal, Krishan and Kalloo murdering Rajendra. At this stage, he was declared hostile and was allowed cross examination.

19. In the cross examination, he denies his giving statement under Section 161 Cr.P.C. to the Investigating Officer that as soon as he came out of the house, he heard the shriek of Rajendra to save him, on which, he and Photu rushed to the house of Risal wherein they saw in the light of kerosene lamp that Risal had caught hold of Rajendra on the floor and Kalloo armed with *phawda* cut the neck of Rajendra. He states that he does not know as to how the Investigating Officer has recorded the statement. On a suggestion that there has been a settlement with Risal and others he is not speaking the truth he denies the same. The said witness was recalled later on and was confronted with his statement recorded under Section 164 Cr.P.C., to which, he states that the same was given by him on the instructions of the Investigating Officer. On being cross examined, he states that the Investigating Officer had threatened him and as such he had given the said statement and the statement which he has been given in Court is correct and true statement. His statement recorded under Section 161 Cr.P.C. is an incorrect statement.

20. PW-4 Smt. Urmila is the wife of Bhopal who is the brother of the deceased Rajendra and accused Kalloo and Krishan and son of accused Risal. She in her statement recorded in Court states that after having her food she went out for sleep and on hearing shouts and shriek, woke up and saw that her house was bolted from outside. She denies having seen anyone committing the murder of Rajendra. She further states that on the shouts, she knocked her door for being opened which after sometime was opened by Chandra Bhan. Regarding Chandra Bhan PW-2 and Photu PW-1 she states that they had reached about an hour after the incident. She further states that she then lit the lamp and saw Rajendra lying dead and

blood was oozing out. She further states that on seeing him, she became unconscious. At this stage, she was also declared hostile and the prosecution was permitted to cross examine her. In the cross examination, she denies giving any statement to the Investigating Officer and also denies that she has disclosed any name of any accused to him and states that she does not know as to how he has written the same. She further states that Rajendra deceased used to even have his meals at the house of Risal and even sometimes in her house. She states that there were no differences between Risal and Rajendra for land but often there are disputes in a house. She denies the fact of weapon used for the assault of Rajendra and also states that she did not see any weapon with the accused persons. On a suggestion that she is giving a false statement just for the reason to save her father-in-law and *devar*, she denies it. She was subsequently recalled and confronted with her statement recorded under Section 164 Cr.P.C, on which, she initially states that the Investigating Officer had got her thumb impression affixed on the same, later on, she says that she had given the said statement and then again she states that no statement was recorded by the Magistrate but only thumb impression was affixed.

21. PW-5 Gajey Singh has been examined as a witness of recovery of *phawda*. He states that the Investigating Officer had recovered a *phawda* from the house of Risal which was blood stained. He had signed a paper there only to which Kartare is also the signatory. He further states that the said paper was a blank paper and it was not written on it as to from whose possession *phawda* was recovered. At this stage, the prosecution was permitted to cross examine the said witness though, he was not formally declared hostile. In the cross examination, he admits his signature on the said paper. On being confronted with his statement under Section 164 Cr.P.C, he states that he was called by the Investigating Officer from his house and was instructed to give the said statement. He further states that

the Investigating Officer at the time of recording of his statement was not present in Court but was standing outside the Court. To a suggestion to him that he has colluded with the accused persons and giving a false statement, he denies the same. On cross examination, he states that the statement which he has given today in Court, is correct and his statement recorded earlier, is false. It has further stated that he was threatened by the Investigating Officer that if he does not give the statement as instructed by him he will be challaned.

22. PW-7 Kartare who is the brother of the first informant and accused Risal and uncle of the deceased has stated that the Investigating Officer inquired from him about the whereabouts of Smt. Suresh, to which, he stated that she has taken the *phawda* and kept it somewhere in another room, on which, he went along with the Investigating Officer, they saw Smt. Suresh concealing the *phawda* in a room which was immediately recovered by the Investigating Officer, on which, Smt. Suresh stated that her husband Kalloo had instructed her to conceal it before police arrives. He states that the said *phawda* had blood stained on both its side.

23. In the present matter, the statement of Photu, Gajey Singh, Smt. Urmila and Chandra Bhan have been recorded by the PW-8 under Section 164 Cr.P.C, the same are marked as Ex. Ka-19 to 22 respectively of the records.

24. The motive as stated for committing the murder of Rajendra by the accused persons is the dispute regarding the distribution of money of the 9 bighas of land sold by Risal and further the purchase of the remaining 2½ bighas of land by Rajendra from Risal, for which, he had been continuously telling to Risal to adjust the price from his share in the sale consideration of the 9½ bighas land sold by him. An agreement to sell is also stated to have been executed between Risal and the deceased Rajendra for the remaining 2½ of bighas of land for which Rs. 10,000/- has been stated to have been given as advance. In so far as PW-1 Photu,

Chandra Bhan PW-2 and Smt. Urmila PW-4 are concerned, they have been declared hostile. PW-5 Gajey Singh who has not supported the prosecution case although has not been formally declared hostile but would be treated as a hostile witness.

25. The law regarding the appreciation of evidence of a hostile witness is well settled and very clear. The Hon'ble Apex Court in the case of **C. Muniappan and others Vs. State of Tamil Nadu: (2010) 9 SCC 567** has in para 81 to 83 summarised the same and has held as follows:

**“Hostile Witness:**

**81.** It is settled legal proposition that:

“6..... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide *Bhagwan Singh v. The State of Haryana: (1976) 1 SCC 389*; *Rabindra Kumar Dey v. State of Orissa: (1976) 4 SCC 233*; *Syad Akbar v. State of Karnataka: (1980) 1 SCC 30*; and *Khujji v. State of Madhya Pradesh: (1991) 3 SCC 627*).

**82.** In *State of U.P. v. Ramesh Prasad Misra & Anr.: (1996) 10 SCC 360*, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543*; *Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516*; *Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P.: (2006) 2 SCC 450*; *Sarvesh Naraian Shukla v. Daroga Singh & Ors.: (2007) 13 SCC 360*; and *Subbu Singh v. State, (2009) 6 SCC 462*.

**83.** Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.”

26. The *phawda* stated to be used by Kalloo for murdering Rajendra was recovered by the Investigating Officer on 08.01.1986, for which, a recovery memo was prepared which is marked as Ex. Ka- 4 to the records. Gajey Singh PW-5 is one of the witnesses of the said recovery memo. Although he admits his signature on a paper which he states to be blank, as a result of which, the prosecution was permitted to cross examine him but he also in his statement states the fact that the *phawda* was recovered in his presence by the Investigating Officer. The said *phawda* was sent along with other articles to the chemical analyst for examination and the report of the chemical analyst which is Ex. Ka- 17 to the records shows the *phawda* was marked as an article at item no. 1 and in the report of examination, the said analyst has opined that human blood was found on the same. In so far as, the test for the identification of the group of blood was concerned, the same was found to be unfit.

27. The present case is a case in which there are three eye witnesses produced by the prosecution being PW-1 Photu, Chandra Bhan PW-2 and Smt. Urmila PW-4. Although in court, all the said three eye witnesses have been declared hostile but the fact that they are relatives of the deceased and accused and also the fact that they have in their statements recorded under Section 164 Cr.P.C, given their statements as being ocular witnesses to the incident, cannot be lost sight of. PW-1 Photu is the first informant of the present case, he admits the fact of his lodging of the First Information Report. He even admits the fact of quarrel between Risal and the deceased Rajendra preceding to the murder of Rajendra, in which, he states to have intervened along with Chandra Bhan and had got them pacified. He admits his thumb impression on the application for lodging of the First Information Report. PW-2 Chandra Bhan though has also been declared hostile, is the brother of accused Risal, Chacha of accused Kalloo, Krishan and deceased Rajendra, and although has also been

declared hostile but in the same manner of deposition of PW-1 has stated about fight between Risal and Rajendra preceding the murder of Rajendra.

28. The admitted case of the prosecution is of the dead body of Rajendra lying in the house of Risal and also being found at the same place by the Investigating Officer at the time of inquest. There is no explanation whatsoever coming forth from the accused appellant as to how he died at the place where his body was found. Risal, Kalloo and Krishan are stated to be living together.

29. It is not the case of the defence that the dead body as found at the place, is incorrect and the death of the deceased had occurred at some other place. There is no explanation by the accused persons as to how the deceased died at that place where his body was found. The Investigating Officer has recovered blood stained mud and plain mud from the place of occurrence, for which, a recovery memo has been drawn which is Ex. Ka-12, the same has not been disputed by the defence. Even the sale of nine bighas of land by Risal, his retaining the sale consideration with him is also admitted by the appellant Kalloo while giving his answer to a specific the question put to him in his examination under Section 313 Cr.P.C. The fact of Risal, Kalloo and Krishan and Smt. Suresh living together, is also admitted by the appellant in his examination under Section 313 Cr.P.C. The appellant has in his statement under Section 313 Cr.P.C stated that the present case has been initiated against him due to enmity. Except for this he has not stated anything else in his defence.

30. From the entire prosecution evidence and the statement of the eye witnesses, it is clear that the accused persons were present at the time of the incident in the same house when the incident took place. No explanation whatsoever is coming forth from their side in discharge of their burden. Admittedly Risal, Kalloo, Krishan and Smt. Suresh were living together. Burden upon the accused under Section 106 of the Indian Evidence Act, 1872 is to be discharged specially under the circumstances



when it has been proved from the statements of the witnesses that the accused persons were present there along with the deceased just preceding the time of murder.

31. The law regarding under Section 106 of the Indian Evidence Act, 1872 is well settled. The unnatural death of Rajendra took place in the house, in which Risal, Kalloo, Krishan and Smt. Suresh were residing.

32. As per the requirement of Section 106 of the Indian Evidence Act 1872, the accused were required to give plausible and convincing explanation about the circumstances, in which, the deceased was found dead in their house. They have even not stated as to where they were when the murder took place. Where an offence like murder is committed inside the house, the initial burden to establish the case would undoubtedly be upon the prosecution but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases. The burden would be of a comparatively lighter character.

33. In view of Section 106 of the Indian Evidence Act, 1872, there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how crime was committed. The inmates of the house cannot keep away by simply keeping quite and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer any explanation. In the case of **Trimukh Maroti Kirkan Vs. State of Maharashtra: (2006) 10 SCC 681** the Hon'ble Apex Court whilst applying provisions of Section 106 of the Indian Evidence Act, observed in paras 14 and 15 reads as under:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the



accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (*See Stirland v. Director of Public Prosecution 1944 AC 315 quoted with approval by Arijit Pasayat, J. in State of Punjab Vs. Karnail Singh (2003) 11 SCC 271*). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

**15.** Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

34. On the interpretation of Section 106 of the Indian Evidence Act, 1872 in the case of **Shambhu Nath Mehra Vs. State of Ajmer: AIR 1956 SC 404** in paragraph 9 it was observed by the Hon'ble Apex Court thus:

"9. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary,

it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

35. In the case of **State of West Bengal Vs. Mir Mohammad Omar and others: (2000) 8 SCC 382**, the Hon'ble Apex Hon'ble Court has observed in paras 31 to 33 as under:

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the Court to presume the existence of any fact which it thinks likely to have happened. In that process Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.”

36. The trial judge in the judgment and order of conviction against which the present appeals have been filed has erroneously come to her own conclusion that since the eye witnesses have denied witnessing the incident as such the result would be that the present case would not be a case of ocular evidence but would be a case based on circumstantial evidence. The said conclusion of the trial judge is incorrect.

37. The present case rests on the testimony of eye witnesses. In the event, the eye witnesses do not support the prosecution case and are declared hostile or are permitted to be cross examined without being declared as hostile their status would be of a hostile witness but their testimony cannot be washed away and has to be looked into as per the settled principles of law and the law as enumerated in the case of **C. Muniappan and others (Supra)**. Moreso, opinion of the trial judge to this effect would have no bearing on the final outcome of the matter as the same in no manner would prejudice the accused. Even no argument has been raised on this pretext and no objection has been taken by the learned counsels appearing on behalf of the appellant. This Court is under a bounden duty to look into even this aspect in spite of the situation whether the same is argued and raised or not.

38. In the result, it is apparent that the murder of Rajendra has been committed as stated by the prosecution and as enumerated in the first Information Report at the date time and place as mentioned therein. The presence of the accused persons is fixed at the time of occurrence, place of occurrence and their participation cannot be ruled out. The dead body was found in the house occupied by Risal, Kalloo, Krishan and Smt. Suresh. The accused persons were under a bounden duty to discharge their burden under Section 106 of the Indian Evidence Act, 1872 IPC which they failed to do.

39. In the result, this Court comes to the conclusion that the prosecution has succeeded in proving its case beyond all reasonable doubts against the

appellant. The conviction and sentence as awarded by the trial court is hereby upheld. The present appeal lacks merit and is accordingly **dismissed**.

40. The appellant is stated to be in jail since 28.08.2019 in pursuance of the order dated 25.07.2019 by which non-bailable warrants were issued against him by this Court. He is directed to serve out the sentence as awarded to him by the trial court.

41. Let the lower court record and copy of this judgment be sent to the trial court forthwith for necessary information and its compliance.

42. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

43. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

44. The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

**Order Date :- 19.10.2020**

M. ARIF

(Samit Gopal, J.)

(Ramesh Sinha, J)