A.F.R.
Reserved on 08.09.2020
Delivered on 15.10.2020

Court No. -1

Case :- CRIMINAL APPEAL No. - 1581 of 2002

Appellant :- Safat
Respondent :- State of U.P.
Counsel for Appellant :- S. Alim Shah,M J Akhtar,Tiwari Abhishek Rajesh,V.M.Zaidi
Counsel for Respondent :- Govt. Advocate,Siddharth Sinha,Siddharth Srivastava

Hon'ble Ramesh Sinha,J.
Hon'ble Samit Gopal,J.

(Per Samit Gopal,J. for the Bench)

1. This appeal has been preferred against the judgement and order dated 4.3.2002 passed by the Additional Sessions Judge, Court No. 8, Moradabad in Sessions Trial No. 1408 of 2000 (State of U.P. Vs. Safat and two others) whereby Safat has been convicted and sentenced under Section 302 I.P.C. for life imprisonment along with a fine of Rs.5,000/- and in default of payment of fine, he has been directed to undergo six months additional rigorous imprisonment. In so far as the other two accused persons who were tried before the trial court namely, Firasat and Liyaqat are concerned, they have been acquitted by the same judgement and order of the charges levelled against them under Sections 302/34 of Indian Penal Code, 1860.

2. The prosecution case as per the first information report lodged by Jamal (P.W.-1) is that his nephew Nasiruddin had an enmity with Safat as Safat wanted the shop of Nasiruddin to be closed. On the fateful night i.e. 18.9.2000 at about 10.15 P.M. Nasiruddin was standing outside his shop in mohalla Chaudhary Sarai, Sambhal near Bhatthi and was talking to the first informant and Rasid Hussain wherein Safat who was armed with

country-made pistol along with Firasat and Liyaqat came and Safat said that Nasiruddin will not close his shop and as such he will be finished and further, Safat fired on the hip region of Nasiruddin with an intention to kill him as a result of which he received injury and fell down on the road. It is stated that the said incident was witnessed by the first informant Jamal P.W.-1, Mohd. Subhan, who was examined as P.W.-2 and Rasid Husain, who was examined as P.W.-3, who had come there to meet the first informant, in the light of a lantern, which was burning there and spreading ample light. It is stated that the accused persons then ran away threatening all the three persons present there. It is then stated that Nasiruddin in an injured condition was taken to the hospital from where the doctor referred him to Moradabad. The condition of Nasiruddin was stated to be precarious.

3. The first information report was got registered by Jamal on 18.9.2000 at 23.10 hours under Section 307 I.P.C. The same is Ex. Ka-9 of the records. An application dated 18.9.2000 was given by Jamal for lodging of the F.I.R. which is marked as Ex. Ka-1 of which Gopal Shukla is the scribe and the same has been registered as Case Crime No. 375 of 2000 at Police Station Kotwali Sambhal, District Moradabad which is having distance of about two kilometers from the place of occurrence. Nasiruddin is the deceased in the present matter and his post mortem examination was conducted on 19.9.2000 at 02.40 P.M. by Dr. Mohammad Tareek Ali (P.W.-5) which is marked as Ex. Ka-5. The doctor found the following ante mortem injuries on the body of the deceased:-

(a) A gun shot wound of entry on the back of the left side of abdomen. Size of wound of entry is 3.0x3.0 cm X cavity deep. Blackening around the wound present. Wound is 8.0 cm below the scapular region. About 1.5 litre blood in the abdominal cavity and one cap plastic and 13 small metallic pellets recovered from the abdominal cavity. 15 small metallic pellets from left lung and 5 small metallic pellets from

left kidney recovered.

The cause of death has been opined to be shock due to haemorrhage as the result of anti mortem injuries.

4. Investigation in the present matter was taken up and a charge sheet being Charge Sheet No. 158 of 2000 dated 06.10.2000 was submitted against all three accused persons under Section 302 I.P.C. The same is marked as Ex.Ka-6 to the records.

5. The trial court on 3.3.2001 framed charges against all three accused persons under Section 302 I.P.C. The accused pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case examined Jamal P.W.-1 the first informant and the uncle of the deceased as an eye witness, Mohd. Subhan P.W.-2 a co-villager as another eye witness and Rasid Hussain P.W.-3 who is also a co-villager as an eye witness of the occurrence and Rakesh Pratap Singh being the second Investigating Officer from 20.9.2000 till conclusion of the same as P.W.-4, Dr. Mohamnad Tareeq Ali, who conducted the post mortem examination as P.W.-5, Surendra Singh Barach, the first Investigating Officer up to 19.9.2000 only as P.W.-6 and Ms. Rajeshwari Saxena, Assistant Sub-Inspector, who conducted the inquest on the body of the deceased at mortuary at Sadar Hospital, Moradabad on the information of sweeper of the hospital as P.W.-7. The accused denied the occurrence and claimed false implication due to enmity. No defense evidence was led.

7. The trial court after considering the entire evidence on record came to the conclusion that murder of Nasiruddin was committed by the accused-appellant Safat by firing upon him from a country-made pistol which he was carrying at the time and the place of occurrence and the

manner as stated by the prosecution, convicted him whereas found that the implication of Firasat and Liyaqat is not borne out and thus, acquitted them of the charges levelled against them.

8. We have heard Sri Tiwari Abhishek Rajesh, learned counsel for the appellant-Safat and Ms. Kumari Meena, learned A.G.A. for the State of U.P. and perused the entire record including the impugned judgement and order of conviction. Sri Siddharth Sinha and Sri Siddharth Srivastava, learned counsels for the first informant are not present though the matter has been called out in the revised list.

9. In the present case Safat was arrested on 24.9.2000 and it is alleged that he gave his confessional statement to the police and further stated that he will get the weapon of assault recovered and it is stated that on his information he was taken to the said place and then from somewhere around the root of a tree in a bush he took out a polythene having some articles which were found to be a country made pistol of 12 bore having one empty cartridge in it. The recovery memo of the same is Ex. Ka-3 to the records.

10. Learned counsel for the appellant has made the following submissions:

(i) The presence of P.W.-1 Jamal is doubtful and as a matter of fact he was not present at the time and the place of occurrence so as to witness the said incident as stated by him.

(ii) The reason for murder is other than that mentioned by the prosecution which has been specifically put to P.W.-1 in the cross-examination though it has been denied by him.

(iii) The alleged recovery of country made pistol along with empty cartridge in it is, in no manner, incriminating. The alleged recovery is manipulated as the police did not even make an attempt to secure any

independent witness to the said recovery which thus is not supported by the evidence of any independent witness. The same was alleged to be recovered from an open place easily accessible by all. The the alleged recovered weapon was sent for the ballistic examination and the ballistic report which is Ex. Ka-19 does not, in any manner, opine that the said weapon was used in the present murder. It is thus argued cumulatively that the alleged recovery of said weapon is not incriminating, in any manner, and the use of the said weapon does not find corroboration in the prosecution case at all.

(iv) The conduct of P.W.-1 is wholly unjustified which would clearly go to show that he was not present at the place of occurrence.

11. Learned A.G.A., on the other hand, opposed the submissions of learned counsel for the appellant by arguing that the presence of P.W.-1 cannot be doubted and he is a natural witness to the incident. It is argued that though he is a related witness but same would not, in any manner, go to show that he is not a credible witness. His testimony is of the nature of true and a truthful witness. The appeal lacks merit which is liable to be dismissed.

12. P.W.- 1 Jamal is the first informant of the present case. He is a relative of the deceased and has stated the deceased was his nephew (bhanja). He claims himself to be an eye witness of the incident. While being examined in trial court in the examination-in-chief, he has stated that the deceased Nasiruddin had no enmity with anyone. He further in his statement stated that he does not know as to which accused was armed with which weapon as he was standing there and talking. While assigning the roles to the accused persons in the examination-in-chief later on he has stated that accused Liyaqat and Firasat (two acquitted persons) had caught hold of Nasiruddin and Safat had shot him. While being cross-examined regarding motive for the appellant to commit the offence, he

has stated that the deceased had no enmity with any person. He is the resident of the same village and stated to be known to the accused persons. He stated to be present at the place of occurrence for drinking milk. He further states that in spite of the fact that he also has a shop of milk, he had on the fateful night come at around 9.00 P.M. at the shop of the deceased to drink milk and had no other work. While being cross-examined he has admitted the fact that had he not come to drink milk he would not have seen the occurrence. The purpose regarding the presence of P.W.-1 being present at the place of occurrence is missing in the F.I.R. and was also missing in his statement recorded during investigation. The same has been stated by him for the first time in the trial court while being cross-examined. Further he states that blood had spilled over on his pant which he was wearing at the time of occurrence but he did not show the same to anyone and even to the police. He states that the police arrested Safat on the same night and he was kept at the police station for about two days and then he was challaned and a recovery of weapon was effected on his pointing out. On a suggestion to him that he has not seen the occurrence and is not an eye witness, he denied the same.

13. Mohd. Subhan who has been mentioned as one of the eye witnesses in the F.I.R. and in the statement of P.W.-1, was examined as P.W.-2 who has at the very outset, denied his seeing the occurrence and his presence at the place of occurrence. He has been then declared hostile by the prosecution and was cross-examined by the prosecution but no benefit could be drawn from his statement by the prosecution.

14. Even Rasid Hussain who has been examined as P.W.-3 and was also mentioned as an eye witness to the incident in the F.I.R. and in the statement of P.W.-1, has also denied his seeing the occurrence and his presence at the place of occurrence. He has been then declared hostile by the prosecution and was cross-examined by the prosecution but no benefit

could be drawn from his statement by the prosecution.

15. Now after the evidence of P.W.-2 Mohd. Subhan and P.W.-3 Rashid Hussain was completed and they were declared as hostile witnesses by the prosecution, the present case rests on the sole testimony of P.W.-1 Jamal who is the first informant and the maternal uncle of the deceased as the sole eye witness of the incident.

16. Surendra Singh Barach P.W.-6 is the first Investigating Officer of the present matter. He took up the investigation from the date of lodging of the first information report i.e. 18.9.2000 and the matter remained with him till the next day i.e. 19.9.2000. While proceeding with the investigation he states to have recorded the statement of scribe of the first information report and the first informant and he then proceeded along with Sub-Inspector Shivraj Singh to the place of occurrence and inspected the spot of the occurrence at the pointing out of the first informant. He further states to have recorded the statement of other witnesses and prepared the site plan which is marked as Ex. Ka-7 to the records. He collected the blood stained mud and plain mud and also took in his possession the lantern which was said to be the source of light at the place of occurrence. The recovery memo of the said lantern is marked as Ex. Ka-2 and the recovery memo of the mud is marked as Ex.Ka-8. He then took steps for arrest of the accused persons and on receiving of information regarding the death of the deceased Nasiruddin the matter was converted into one under Section 302 I.P.C. The case was then taken over from him. In his cross-examination he has stated that Jamal did not inform him that he was drinking milk at the time of occurrence while he was being interrogated under Section 161 Cr.P.C. He further stated that he did not see blood stains on the clothes of Jamal and if he would have seen the blood stains, then he would have surely taken them in his custody.

17. Rakesh Pratap Singh the second Investigating Officer was examined as P.W.-4. He took up the investigation of the case from 20.9.2000. He states to have arrested Firasat and Liyaqat on the same day and then later on recorded the statement of the witness of recovery of lantern. He states to have arrested the appellant-Safat on 24.9.2000 and had recorded his statement and in furtherance of the same proceeded for recovery of the weapon of assault on the pointing out of Safat. He states that Safat from the bushes and roots of a tree took out a country-made pistol and a cartridge wrapped in polythene for which recovery memo was prepared by him which is marked as Ex. Ka-3 to the records. He then states to have recorded certain statement of some witnesses on 1.10.2000 and prepared the site plan of the place of recovery, sent the recovered material to the ballistic expert on 4.10.2000 and later on submitted a charge sheet no. 158 of 2000, which is marked as Ex. Ka-6 to the records. He was shown the country-made pistol and cartridge which he identifies in the court as that which was got recovered on the pointing out of accused-appellant Safat. In his cross-examination he states that he did not make any public person as witness to the recovery which is situated at about two kilometers away from the police station and is at the end of Abadi. Further he states that there is no signature of the accused on the recovery memo (Ex.Ka-3) and he does not know whether a copy of the same was given to the accused and receipt was taken from him. On the suggestion to him that the accused was not arrested on the said date he denied the same. Further on the suggestion that the said recovery is a false recovery he denied even the same. He further denied the suggestion that the first information report was lodged in consultation with the police and is ante timed.

18. Section 134 of the Indian Evidence Act, 1872 reads as under:

> “134. Number of witnesses.—No particular number of witnesses shall in any case be required for the proof of any fact.”

19. The law regarding the case where there is a single witness, has been well settled by the Hon'ble Apex Court in the case of ***Masalti Vs. State of U.P., AIR 1965 SC 202*** wherein it has been held that under the Evidence Act the trustworthy evidence given by a single witness would be enough to convict the accused whereas the evidence given by half-a-dozen witnesses which is not trustworthy, would not be enough to sustain conviction.

20. Dealing with a situation where the case rests on the testimony of a single witness, in the case of ***Vadivelu Thevar Vs. State of Madras, AIR 1957 SC 614,*** the Hon'ble Apex Court has laid down the test to assess the quality of oral evidence led by the prosecution for proving or disproving a fact. It was held therein that *".....Generally speaking oral testimony in this context may be classified into three categories, namely (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. In the first category of proof, the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is*

satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable."

21. Further in the case of ***Laxmibai (Dead) through Lrs. and Another Vs. Bhagwantbuva (Dead) through Lrs. and others, (2013) 4 SCC 97***, it has been held by the Hon'ble Apex Court as under:

> *"39. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examiprotectionned to prove/disprove a fact. It is a time honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced do not carry any weight."*

22. In the present matter the testimony of P.W.-1 Jamal is only left to be examined by this Court as he is the sole eye witness supporting the prosecution case after P.W.-2 Mohd. Subhan and P.W.-3 Rashid Hussain

have been declared hostile and the prosecution could not gain any advantage even by cross examining them.

23. In the F.I.R. lodged by P.W.-1 Jamal it has been mentioned that there was an enmity of the deceased with the present appellant Safat in regard to shop being run by the deceased. While being cross-examined he has stated that there was no enmity of the deceased with any shop keeper. In so far as the presence of P.W.-1 Jamal at the place of occurrence is concerned, he has stated that he had reached the shop of the deceased which is the place of occurrence to take milk and has further stated that even he has a shop of milk, but on the fateful night had come to the shop of the deceased to consume milk. The fact regarding the reason for the presence of P.W.-1 Jamal at the place of occurrence is conspicuously missing in the first information report and even in his statement given before the Investigating Officer during investigation.

24. He further states that his pant sustained blood of the deceased in the process of his being shifted to the hospital in an injured condition but he did not show the same to the police. Even the Investigating Officer P.W.-6 Surendra Singh Barach, who is the first Investigating Officer, has in his statement stated that he did not see any blood stains in the clothes of Jamal and had he seen the blood stains, he would have certainly taken the same in custody. Except for the reason of consuming milk on the fateful night as for substantiating the presence of P.W.-1 Jamal at the shop of the deceased, that too, which was not as a routine by him, there is no other convincing reason for his presence at the place of occurrence coupled with the fact that he claims that his pant had sustained blood stains which were not disclosed by him to the Investigating Officer and even the Investigating Officer did not see the same on his clothes with the further fact that the two eye witnesses mentioned by him in the F.I.R. being Mohd. Subhan P.W.-2 and Rashid Hussain P.W.-3 have not supported the prosecution case and have been declared hostile, the presence of P.W.-1

Jamal at the place of occurrence is highly doubtful.

25. Coming to the recovery as shown of a country-made pistol of 12 bore and one empty cartridge embedded in the same, no charge under the Arms Act has been framed and even, the charge sheet also has not been submitted by the police under any provisions of the Arms Act. There is also no sanction on record of the District Magistrate for prosecuting the appellant- Safat under the Arms Act. The appellant was not tried under the Arms Act. P.W.-4 Rakesh Pratap Singh, who is the second Investigating Officer, has in his examination-in-chief stated about the recovery of the said weapon and has proved the recovery memo as Ex. Ka-3, but while being cross-examined he has admitted the fact that he did not make any public person as a witness to the said recovery. Even from perusal of Ex. Ka-3 which is the recovery memo of the recovery of the alleged weapon, it is clear that the Investigating Officer did not make any effort whatsoever to secure the presence of any public witness. In the cross-examination he has admitted that in the Ex. Ka-3 there is no signature of the accused and he does not know as to whether any copy of the same was given to him or not and any receipt was taken from him or not. It has been lastly suggested to him that the entire process of recovery is false and there was, as matter of fact, no recovery on the pointing out of the appellant-Safat. The report of ballistic expert which is Ex. Ka-19 to the records even does not corroborate the use of the said weapon. While giving opinion after scientific examination the ballistic expert came to a conclusion that it is impossible to decipher as to whether the death of the deceased is from the cartridge found in the recovered weapon which has been marked as EC-1.

26. The testimony of P.W.-1 Jamal remains uncorroborated with any other evidence. In the F.I.R. he had assigned the role of exhortation to Firasat and Liyaqat who have been acquitted of the charges levelled

against them and has assigned the role of shooting upon the deceased by the appellant, but later on while being examined in the court he has assigned the role of catching hold of the deceased to Liyaqat and Firasat. He has even in his examination-in-chief stated in specific terms that the deceased Nasiruddin did not have any enmity with anyone, but in the F.I.R. had stated that he was having enmity with the appellant- Safat due to the reason of his running a shop.

27. Hence this Court comes to the conclusion that P.W.-1 Jamal is an interested, artificial and unnatural witness and was not present at the place and time of occurrence and is thus totally unreliable.

28. Thus the conviction of the appellant on the basis of sole testimony of P.W.-1 Jamal by the trial court is not sustainable in the eyes of law. The trial court committed error in recording the conviction and sentence of the appellant. Hence the impugned judgement and order dated 4.3.2002 passed by the trial court is liable to be set aside, which is accordingly set aside.

29. The present appeal is allowed.

30. The appellant- Safat is in jail in pursuance of non-bailable-warrant issued by this Court vide order dated 18.9.2019, he is directed to be released forthwith unless wanted in any other case.

31. Keeping in view the provisions of Section 437-A Cr.P.C. the accused-appellant Safat is directed to forthwith furnish a personal bond in terms of Form No. 45 prescribed in the Code of Criminal Procedure of a sum of Rs.25,000/- with two reliable sureties in the like amount before the court concerned which shall be effective for a period of six months along with an undertaking that in the event of filing of Special Leave

Petition against the instant judgement or for grant of leave, the aforesaid appellant on receipt of notice thereof shall appear before the Hon'ble Supreme Court.

31. The lower court record along with a copy of this judgement be sent back immediately to the trial court concerned for compliance and necessary action.

32. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad before the concerned Court/Authority/Official.

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

34. 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.

(Samit Gopal,J.) (Ramesh Sinha,J.)

Order Date :- 15.10.2020

Naresh