AFR

Court No. 13.

Judgment reserved on 22.02.2021.

Judgment delivered on 18.03.2021.

Criminal Appeal No. 348 of 1984.

The State of U.P. vs. Kalim Ullah & Ors.

Hon'ble Ramesh Sinha, J.

Hon'ble Rajeev Singh, J.

(Per Ramesh Sinha, J. for the Bench.)

1. This criminal appeal has been filed by the State against the judgment and order dated 19.01.1984 passed by IInd Additional District & Sessions Judge, Barabanki by which the accused-respondents have been acquitted for the offence under sections 147, 148, 302, 149 I.P.C. in S.T. No. 410 of 1982.

2. Out of five accused persons three accused-respondents, i.e., respondent nos. 1, 2 and 5, namely, Rafiullah, Naimullah, Kalimullah have died during the pendency of the appeal and the appeal on their behalf has already been ordered to be abated by Co-ordinate Bench of this Court vide order dated 19.10.2020. Hence this Court proceed to hear the appeal with respect to accused-respondent nos. 3 and 4, namely, Habibullah and Mohammad Ansar only.

3. The brief facts of the case are that an F.I.R. was lodged by one Haji Fazal-ur-rahman at police station Zaidpur, District Barabanki stating that his brother Misbah-ur-rahman was Chairman of town area Zaidpur. He was having enmity with one Dr. Habiullah and Sajid Ali with respect to election of town

area and also with one Naimullah with regard to auction of a house. Rafiullah and Ansar Ahmad also belong to his party. On 30.5.1982 at about 9:30 p.m., Misbah-ur-rahman had gone to his old workshop (*Karkhana*) in which these days, Hakim Fatehpuri is residing. The informant, who is the cousin of Sri Misbah-ur-rahman, was sitting at the door of Misbah-ur-rahman along with Mohammad Sabir, Mohammad Muslim, Sultan Ahmad, Ali Mohammad and Atiq. When Misbah-ur-rahman did not return for a long time then the informant along with the said persons sitting at door of Misbah-ur-rahman, had gone in his search towards his workshop (*Karkhana).* When they reached on the road at the door of Mohammad Yaseen, they heard the shriek of Misbah-ur-rahman, i.e., '*bachao-bachao*' on which they rushed towards the direction from where the shriek of Misbah-ur-rahman come and reached in front of the house of one Ramzan where they saw that Ansar Ahmad had tightly caught hold the neck of Misbah-ur-rahman from behind and one Rafiullah s/o of Rahmatullah fired shot at the chest of Misbah-ur-rahman from a close range. On the alarm raised by the informant and other persons, Dr. Habibullah, Kaleemullah and Naimullah, who were standing under the *Pakar* tree had threatened them for dire consequences in case they intervened, hence on account of fear, they did not move and Rafiullah and Ansar Ahmad fled away. Thereafter, Dr. Habibullah, Kaleemullah and Naimullah also fled away on a motorcycle. On the basis of said written report of Fazal-ur-rahman, an F.I.R. was registered at police station Zaidpur, District Barabanki as case crime no. 38 of 1982 under section 307 I.P.C. against five accused persons, namely, Rafiullah, Ansar Ahmad, Dr. Habibullah, Kaleemullah and Naimullah.

4. Just after the incident, the injured was taken to Primary Health Centre, Zaidpur at 11:05 p.m. by the informant and other persons where P.W. (3) Dr. Muneeruddin, the then Medical Officer, P.H.C., Zaidpur, had conducted medico-legal examination of the injured and had provided first aid to him. The doctor had also recorded the dying declaration of Misbah-ur-rahman in the presence of certain witnesses which has been marked as Ex. Ka-3. Since the condition of the injured was very serious, he was taken to Civil Hospital, Barabanki where P.W. (6) Dr. Shahjahan has given treatment to Misbah-ur-rahman at about 12:05 A.M., on 31.06.1982. As the condition of the injured was deteriorated, he was taken to Balrampur Civil Hospital, Lucknow where unfortunately at about 3:00 a.m., on 31.05.1982, he succumbed to his injuries.

5. P.W. (1) Haji Fazal-ur-rahman had informed the concerned police station about the fact that injured Misbah-ur-rahman had died at Balrampur Civil Hospital, Lucknow.

6. Sri S.N. Singh, the then Station Officer of police station, Zaidpur, who was entrusted with the investigation of the case, had completed the investigation and submitted charge-sheet against all the accused persons before the Court concerned.

7. The case was taken up by the then Chief Judicial Magistrate Barabanki and has committed the case to the Court of Session.

8. On 03.08.1982, the Session Judge, Barabanki framed charges against all the accused persons for the offence under sections 147, 148, 302 read with section 149 I.P.C.

9. Since, all the accused persons denied the allegations and charges and had claimed trial, the prosecution was called upon to lead evidence in support of the charges.

10. Prosecution in support of its case has examined P.W. 1 Haji Fazal-ur-rahman, P.W. 2 Mohammad Muslim, P.W. 3 Dr. Muneeruddin, P.W. 4 S.I. Shiv Narain Singh, P.W. 5 Dr. S.C. Srivastava, P.W. 6 Dr. Shahjahan.

Ram Balak Mishra was examined as Court witness.

11. The accused persons were examined and their statements were recorded under section 313 Cr.P.C. All of them denied the allegations and had pleaded their false implication in the present case on account of enmity and claimed their trial.

12. The accused persons were called upon to lead evidence on which they filed certain documents in support of their case.

13. P.W. 1 Haji Fazal-ur-rahman, who was the informant of the case and cousin brother of the deceased, had reiterated the present case as has been stated by him in the F.I.R. He stated about the enmity between the deceased and accused-Dr. Habibullah on account of election of town area. He also stated about the enmity between the deceased and accused Naimullah which was with respect to auction of a house. He deposed before the trial Court that on the day of incident, while sitting at the door of Misbah-ur-rahman, he was having conversation with the deceased and Mohammad Sabir, Mohammad Muslim, Sultan Ahmad, Ali Mohammad and Atiq for convening a meeting of town area. It was moon light and after informing the informant and other persons with whom he was having conversation, the deceased went to see his workshop

(*Karkhana*) where some repair work was going on. The deceased told them that he would return after some time and talk to them. The distance of the workshop of the deceased from his house was about 200 paces. He stated that when the deceased did not return for about 45 minutes, then the informant along with the said persons sitting with him, went towards the workshop of the deceased to talk to him and when they reached on the road near the house of Yaseen, they heard the shriek of the deceased, i.e., '*bachao-bachao*' on which they rushed towards the direction from where the shriek came and on reaching near the house of one Ramzan, they saw the incident taking place in front of the house of one Abdul Hai. The witness stated that he saw that accused Ansar caught hold the neck of the deceased from behind and accused Rafiullah had shot the deceased by country made pistol from a close range and when the witness and other person tried to save the deceased, accused Dr. Habibullah, Kaleemullah and Naimullah, who were standing under the *Pakar* tree, had threatened them for dire consequences in case they come forward. The incident had taken place on the road near the house of Ramzan. After the incident, accused Rafiullah and Ansar Ahmad fled away towards West and accused Dr. Habibullah, Kaleemullah and Naimullah, who were standing under the *Pakar* tree, had fled away on a motorcycle towards South. The witness identified all the five accused persons, who were present in the Court, to be of his locality. The witness stated that he along with other persons reached the place of occurrence where the deceased was lying holding his wound with his hand. The witness along with other persons took him to P.H.C. Zaidpur where the doctor took him in his room for providing first aid and after 15-20

minutes, the doctor asked them to take the deceased to Civil Hospital, Barabanki on which the witness and other persons took him to Civil Hospital Barabanki. There he got a report about the incident written by Mohammad Shamim and after reading over the same, he found that Mohammad Shamim wrote the same what he dictated to him. Thereafter, he put his signature on the same which is marked as Ex. Ka-1. The deceased remained alive in Primary Health Centre, Zaidpur, Civil Hospital Barabanki and Balrampur Hospital, Lucknow and on the next day at 3:00 a.m. in the morning, he succumbed to his injures at Balrampur Hospital, Lucknow.

14. In his cross examination, the witness has stated till the time when he was present at the place of occurrence, no labourer or Hakim Fatehpuri, who had taken one portion of the workshop (*karkhana*) of the deceased on rent, had arrived at the place of occurrence. He also did not meet them in the hospital though many other persons have gathered and on the next day when the dead body of the deceased was brought to Lucknow for cremation then the labourers and Hakim Fatehpuri along with other persons had come. The witness further deposed that as per his knowledge, the deceased was not having any litigation with any other person except the accused persons with whom he was having two litigations. He admitted the fact that in the year 1977 proceedings under section 107 Cr.P.C. was initiated against the deceased but he was not aware of the fact whether the witnesses Sabir and Sultan Ahmad were party in the said case or not. He further deposed that the deceased while being injured was taken from his workshop (*karkhana*) to the hospital till then the ladies of the family had not come either at the place of occurrence or at the hospital. 30-40 persons have

reached the hospital. He stated that the neck of the deceased was caught hold by accused Ansar by one hand and by other hand he caught the hand of the deceased. The accused Ansar did not have any weapon in his hand. He stated that accused Rafiullah had shot at the deceased from a close range, i.e., 4-5 finger-breadth and in his report, he has written that the deceased was shot at his chest from point blank range as it was equal distance. In the report, he had written that the neck of the deceased was caught hold from behind. It was rightly written. He further deposed that he had written in his report that the deceased had received one single shot as he had witnessed the same. It has not come in his knowledge that the doctor has mentioned only one injury. There was no conversation between him and the doctor regarding the fact that the deceased has received only one injury and did not receive any second injury. The witness further stated that on the third day of the incident, he came to know that the doctor had taken the statement of the deceased. He did not go to the hospital to see the said statement. He came to know that the deceased had given statement against two accused persons and so far as other three accused are concerned, he could not recognize them. He denied the suggestion that the deceased was not taken in the room of the doctor and was seen by the doctor in the corridor (Varandah). He denied the suggestion that in collusion with the doctor and the police, the statement of the deceased was fabricated. The deceased knew English and he could also sign in English and he occasionally used to put his signature in short in English and some time in full. It was deposed by the witness that he did not have any conversation with the deceased while he was being taken to the hospital from the place of occurrence

till he reached the hospital nor any other persons had talked to him. Till the time, he reached, P.H.C. Zaidpur, he did not disclose to anyone the name of the accused. He denied the suggestion that he did not see the incident. He further denied the suggestion that the place where the deceased was done to death is not the one which was stated but the other one. He also denied the suggestion that in collusion with the doctor and the police, he got a false report written. He also denied the suggestion that the fact with respect to conversation regarding meeting and the documents have been fabricated under some legal advise just to create evidence against the accused persons. He admitted the fact that he and the deceased are the sons of one mother though their fathers are different.

15. P.W. 2 Mohammad Muslim in his deposition before the trial Court has supported the prosecution case as has been stated by P.W. 1 in his examination in chief, hence is not repeated for the sake of brevity.

16. He denied the suggestion that he had not seen the incident and is falsely deposing against the accused persons.

17. P.W. 3 Dr. Muneeruddin in his deposition before the trial Court has stated that on 30.05.1982, he was posted as Medical Officer at P.H.C. Zaidpur, District Barabanki. On the said date at about 11:05 p.m., he had examined the injured Misbah-ur-rahman son of Hidayat Rasool and found the following injury on his person:-

> *"Injury no. 1:- An abraded fire arm wound 2.0 cm. x 2.0 cm. x intra abdomiinal with blackening of margin 6.0 cm. x 8.0 cm. situated in epigastrium. C/o severe pain in abdomen."*

18. He stated that the said injury could be caused on 30.05.1982 at about 10:30 p.m. by fire arm such as country made pistol. He recorded the dying declaration of the deceased and he has written the same word by word what was stated by the deceased. After writing the same it was also read over to the deceased and thereafter, the deceased put his signature on the same. He has proved his hand writing and signature on the dying declaration which has been marked as Ex. Ka-3.

19. In his cross examination, he has stated that when the injured was brought before him, there were 4-6 persons along with him and there was neither any police constable nor S.I. On the said date, he did not meet the S.I. till the injured was in his hospital. At the time of medical examination, no outsider is allowed to come. Generally 2-4 persons of the Qasba beside his staff were present at that time. At the time of medical examination, he had directed some persons to remain inside his room and rest were asked to go outside. The reason for keeping injured under observation was different. He could not ascertain the nature of injury. He stated that the reason for keeping the injured under observation is that whether the injured could survive and according to his observation, the injured could survive for about two hours but he did not either mention the same or told anyone about the said fact. He did not know as to what time, the injured died. Subsequently, he came to know that on 31.05.1982, he died. According to the witness, if the injured could have been operated in emergency at Barabanki hospital and proper medicine would have been given to him, he could survive. In preparing the injury report of the injured, he took about half an hour. It took ten minutes to record the dying declaration. He admitted the fact that prior to recording the said

dying declaration, he did not record any dying declaration. As it was night and there was no conveyance, he did not immediately send the injured to Barabanki Sadar Hospital but he told the family members of the injured that he may be taken to Barabanki as his treatment is not possible there. The deceased was known to the witness prior to the incident. From the person, who have brought the injured to the hospital, he came to know that no report about the incident had been lodged at the police station. He was well aware of the fact that cognizable offence has taken place, hence information to the police is necessary but he did not inform about the same either to the police Chauki or police station on his own as the persons, who brought the injured to the hospital had stated that they would go to the police station. He did not know the name of the person, who has stated that he is going to lodge the report as he did not return again. He could not tell much about the person, who told him that he is going to lodge the report. On the next day of incident at about 7-8 a.m., he came to know that a report of the incident has been lodged at the police station and from whom, he came to know about the said fact, he did not know. He had received an application from the police asking for injury report of the injured from which he came to know that report of the incident has been lodged. By the said application, the injury report and the dying declaration were asked from him. The said application was brought by one constable. He did not meet Station Officer Sri S.N. Singh either on 31.05.1982 or any other day. He had kept the said application in the register of the injury report and given to the constable, who has brought said application. He had also taken a receiving of the injury report and dying declaration in the register by the said Constable. He

was not aware of the fact that the dying declaration was to be sent directly to the Magistrate. He had kept the dying declaration in an envelope and sealed the same and sent to the police as he thought that the police would require the same with respect to investigation of the case. On the dying declaration, he did not get any signature of the police personnel. The Investigating Officer has recorded his statement under section 161 Cr.P.C. From the person, who have brought the injured to him, he had asked to bring two respectable persons before recording the dying declaration then they put forwarded two persons and said that they are respectable persons. The witness stated that out of said two witnesses of the dying declaration, he only recognize Afzul-ur-rahman as he know him from before by his face as well as by name but so far as the other witness of the dying declaration, namely, Ashfaq is concerned, he was not known to him either by name or by face and only on the asking of Afzal-ur-rahman, he has made him as witness of the dying declaration. In P.H.C., Zaidpur though there was electricity connection but at the time of examination of injury, the electricity supply of the area was disconnected and till the medical examination was being conducted, the electricity supply did not resume, hence the entire exercise was conducted in the light of lantern and torch. A car had come at the hospital in his presence which took the injury to Barabanki hospital. The said car belong to Haji Daroga and the said car had arrived before he completed the injury report. After completing the injury report, he immediately let the injured go. As the injured himself was complaining about pain and suffered pain, therefore, he wrote the same. After completing the entire exercise no respectable person had come to him either in the

night or in the morning. He denied the suggestion that as the injured was in much pain, he did not get his signature on the injury report and got his thumb impression on the same. He stated that in the injury report only thumb impression are being affixed in order to fix the identity. As in the dying declaration, he had got the signature of the injured, hence he did not get his thumb impression on the same. He stated that as the injured was in such a condition that he could put his signature, hence he got his signature on the dying declaration. At the time of recording of the dying declaration, it did not click in his mind that while recording dying declaration, a certificate has to be given that the person whose dying declaration is being recorded is in a fit state of mind and is conscious. He denied the suggestion that the dying declaration is fabricated one with malafide intention. He also denied the suggestion that in the dying declaration a forged signature of the deceased got done. He also denied the suggestion that till 31.05.1982, no dying declaration was written, hence the same was not send to the Magistrate. He told the persons, who have come with the injured, that the injury is grievous in nature but he did not remember whether he told them that the injury was of fire arm or not.

20. On the query made by the Court, the witness had stated that there is practice for getting thumb impression on the injury report and on this issue whether there is any direction or rule, he is not aware of the same.

21. P.W. 4 Shiv Narain Singh in his examination in chief before the trial Court has stated that from May, 1982 to July, 1982, he was posted as Station Officer at police station Zaidpur, Barabanki. On 30.5.1982, written report of present case (Ex.

Ka-1) was submitted at the police station on the basis of which chik report was prepared by Head Moharir Satya Narain Tiwari on which he has put his signature. He identified the hand writing and signature of the said Head Moharir and proved the same as Ex. Ka-4. In G.D. No. 29, Head Constable Brij Bhawan Singh has endorsed the registration of the F.I.R. in his presence which is in the hand writing and signature of Constable Brij Bhawan Singh as he is acquainted with the same. A carbon copy of which is marked as Ex. Ka.-5 on which he has also put his signature. The F.I.R. of the present case was registered under section 147, 148, 149, 307 I.P.C. The injured had not come to the police station in his presence. On 31.05.1982, he along with S.I. Bharat Tiwari, Constable Tej Bahadur Singh, Mathura Prasad Chaubey, Harnam Singh and Mukesh Singh reached the place of occurrence in Mohalla Badapur, Qasba Zaidpur and recorded the statement of the informant Haji Fazal-ur-rahman and at his pointing out he had made a spot inspection of the place of occurrence along with him and prepared site plan. He proved the same as Ex. Ka-6. He arrested accused Naimullah and Kalimullah from their house. They were hiding in their house and on getting the door of their house opened, they made an attempt to flee away from there but were arrested. On the same day, he brought the said two accused and lodged them in police lock-up for which he himself made an endorsement in G.D.-14 dated 31.05.1982. The original G.D. which was in his hand writing and signature is before him. Copy of which he had filed in the Court, is marked as Ka-7. On the same day, he received an application from Fazal-ur-rahman regarding the death of Misbah-ur-rahman-the deceased for which an endorsement was made in G.D. No. 6 by Constable

Moharir Brij Bhawan Singh and the case was converted under section 302 I.P.C. The original G.D. which was before him was written by Brij Bhawan Singh-Constable Moharir in his hand writing and signature. He proved the same as he was acquainted with his hand writing and signature, carbon copy of the which is marked as Ex. Ka.-2. On the same day, he recorded the statement of the witnesses, namely, Mohammad Sabir, Mohammad Muslim and Sultan Ahmad under section 161 Cr.P.C. He had sent Constable Mathura Prasad Chaubey to P.H.C. Zaidpur calling for the injury report and the dying declaration of the deceased so that there may not be any interpolation in the same. He had put his signature on the dying declaration so that there may not be any manipulation or changes in the same. He also perused the injury report and had send the dying declaration to the Court of C.J.M. in pursuance of the order of the Court. He also recorded the statement of the witnesses of the dying declaration, namely, Afzal-ur-rahman and Ashfaq on 1.6.1982. He further made search for the accused but they could not be traced. On 2.6.1982, he took the statement of Dr. Muneeruddin of P.H.C. Zaidpur under section 161 Cr.P.C. On 3.6.1982, he made search in pursuance of warrant issued against accused Habibullah, Rafiullah and Ansar Ahmad but they could not be traced. On 4.6.1982, he after getting order for initiating proceedings under section 82 and 83 Cr.P.C. reference of which has been made in G.D. No. 19, he got the attachment proceedings under section 82 Cr.P.C. of the house of accused Habibullah done in the presence of witnesses and list of articles which were recovered from his house was prepared and copy of the same was given to the father of accused Habibullah, namely, Siraj Ahmad. The articles which were

attached were submitted in the *Malkhana* of the concerned police station along with G.D. No. 30. He has also proved G.D. No. 9-30 prepared by Constable Brij Bhawan Singh which was in his hand writing and signature and has filed a copy of the same in his signature marked as Ex. Ka-10. He has further proved the attachment proceedings against accused Rafiullah and Ansar Ahmad executed on 5.6.1982 under his writing and signature and proved as Ex. Ka-11 and 12. The attachment of properties of two accused was submitted in police *Malkhana* endorsement of the same has been mentioned in G.D. No. 14. The original G.D. was in the hand writing and signature of Brij Bhawan Singh. He filed a copy of the same and proved as Ex. Ka-13. On 10.06.1982, he submitted charge-sheet against accused Rafiullah, Ansar Ahmad and Dr. Habibullah. He has proved the charge-sheet which is in his hand writing and signature as Ex. Ka-14. He proved the Ex. Ka-15, i.e., sealed packets by which some pellets, panchayatnama and postmortem were submitted by S.I. Raj Bahadur Singh endorsement of which is made in G.D. No. 21 which was prepared by Constable Moharir Laxman Yadav in his writing and signature. He has also proved Ex. Ka. 16-24 and further a sealed envelope in which some pellets were kept which were recovered from the body of the deceased, received at the police station from the doctor, who had conducted the post mortem of the deceased at Lucknow as material Ex. Ka-1. On opening of the said envelope 22 pellets and one tikli were received. The pellets have been marked as material Ex. Ka.-2 whereas Tikli has been marked as material Ex. Ka-3. On the information given by the informant Haji Fazal-ur-rahman about the death of the injured, there is signature of Fazal-ur-rahman. He has proved the same

as Ex. Ka-4. The S.I. Ram Chandra Gupta had interrogated the accused in jail.

22. In his cross examination, he has stated that on the Western side of the road which goes to the hospital from the workshop of the deceased, police station Zaidpur is at a distance of one and half farlong. On the date of incident he returned to the police station between 9:30-10:00 p.m. and remained in the police station whole night. The deceased was known to him. At 11:50, the information about the incident was received at police station. The informant stated that the injured has been sent to Barabanki. On receiving the information, he went to the place of occurrence but he could not receive any information about the incident. Till night, the witness did not make any report of the incident and only made efforts to search the accused. The informant had not informed him that a dying declaration of the injured was recorded by the doctor at P.H.C. Zaidpur. He was not aware of the fact about the dying declaration whole night. On 31.05.1982, at morning, he came to know about the fact that the doctor at P.H.C. Zaidpur had recorded the dying declaration of the deceased. He sent Constable Mathura Prasad to the doctor for getting the dying declaration and prior to it he had recorded the statement of the informant under section 161 Cr.P.C. He admitted that in spite of the fact that he is an experienced S.I., he did not have any knowledge about the fact that the person, who write the dying declaration is obligated to send the same to the Court concerned. He called upon the dying declaration so that there may not be any interpolation in the case and the doctor may not make any changes in the same as generally doctors make changes in the dying declaration, hence he had called upon the

same immediately. It was in a sealed cover. He opened the dying declaration and put his signature on the same but inadvertently he could not mention in the case dairy that he had broke open the seal of the envelope and taken out the dying declaration. After breaking the seal put on the envelope, he did not either kept the same or its sample seal safely with him. He sent the envelope in which dying declaration was sent to him by the doctor, to the Court which is on record. He did not send the dying declaration immediately to the Court as he thought that the same was a part of investigation. He is not aware of the fact that any application was given to the S.P. Barabanki that he in collusion with the doctor of P.H.C. Zaidpur and S.O. of Zaidpur police station, had prepared a forged fabricated dying declaration. On receiving the order of the Court, he sent the dying declaration on 31.05.1982. In the case dairy, there is no endorsement that when, how, by whom and where the dying declaration was sent. He told the fact about sending the dying declaration on 31.05.1982 as per his memory. He denied the suggestion that he had told to the Court that he had sent the dying declaration on 31.05.1982 just to make out a case. On 01.06.1982, he has sent all the documents which were prepared by him during the course of investigation upto 31.05.1982, to S.P. Barabanki. He has not mentioned about sending of documents on 1.6.1982 in the case dairy and he is making the said statement as per his memory. Though in the case dairy, he had written that he has sent papers to S.P. Barabanki on 31.05.1982 but actually it was sent on 1.6.1982. Again the witness has stated that he cannot tell whether the documents which were prepared upto 31.05.1982, were sent to S.P. Barabanki from police station between 1.6.1982 to 4.6.1982 or

not as the dispatch register is not before him. On 31.05.1982, he has given the disputed dying declaration in his office so that the same may be sent in pursuance of the order of C.J.M. as there is an order of the C.J.M. that if there is any dying declaration the same may be sent immediately. He proved paper no. 14 which was on the committing file of the present case. It was in the hand writing and signature of the witness. It was circled by red ink which is marked Ex. Kha.-1. He stated that whatever written in red circle is correct. He stated that he cannot tell whether the dying declaration was submitted by him or someone else had submitted the same. After receiving the order of the C.J.M., he submitted the disputed dying declaration. In the case dairy, he has not mentioned whether the order was a written order or oral. The date on which the order of a Court is received, its endorsement is made on the same day in the G.D. The G.D. of 31.05.1982 was before the witness in which there is no mention of any order of the C.J.M. The G.D. dated 1.6.1982 was before the witness in the same also there is no endorsement of any order of the C.J.M. Similarly the G.D. of 2.6.1982 and 3.6.1982 were before the witness in which also there was no mention about the order of the C.J.M. He cannot tell when the first paper (parcha) of the case dairy reached to the Office of Circle Officer. The first Parcha is dated 1.6.1982 which is bearing the seal but who has signed the same he cannot tell. He is not at all conversant with the signature of the then C.J.M. He denied the suggestion that on 31.05.1982, he did not receive the order of the C.J.M. At that time Harbaksh Singh was Pairokar in his police station and he also cannot identify his signature. The witness further stated that on 6.6.1982, he had gone to workshop of the deceased where he

met Hakim Mohammad Rafi and prior to it he did not go to the said workshop, hence there was no question to meet Hakim. During the course of investigation, he could not come to know that to make the workshop of the deceased running there was any repair work going on on the day of incident. Near the place of occurrence, he had not taken the statement of witness and only recorded the statement of Ramzan. He has arrested accused Naimullah and Kalimullah from their residence at 11:15 a.m. and as because of the incident there was tension prevailing, the said two accused were not sent to Sadar on the same day. On 31.05.1982 at 7:30 a.m. in the morning, the information about the death of the deceased was received at the police station. He did not record the statement of Mohammad Shamim, who was the scribe of the both the F.I.R. as well as the information about the death of the injured as he did not feel it necessary. He did not recover anything relating to the incident from the place of occurrence. He did not found any blood on the place of occurrence. 2-3 months prior to the incident, he had heard rumor that he would be transferred from police station Zaidpur. He also heard that in order to get his transfer stop a rally had gone to meet the S.P. Sadar thereafter he did not hear the rumor regarding his transfer. The deceased and his family members were influential persons of the Qasba. He did not know that the deceased and his family members belong to any party. He denied the suggestion that the said rally which was taken out was at the instance of family members of the deceased. He denied the suggestion that the report of the incident was prepared on 31.05.1982 with his consultation and thereafter a forged and fabricated dying declaration was prepared in collusion with the doctor. The site plan and other

papers were also concocted and fabricated in collusion with the informant. He further denied the suggestion that the case dairy of the present case and other papers are all fabricated and concocted.

23. P.W. 5 Dr. S.C. Srivastava in his deposition before the trial Court has submitted that on 31.05.1982, he was posted as Medical Officer in Civil Hospital Lucknow and on the said date he was on duty for conducting the post mortem. On the said date at 1:30 p.m. in the afternoon the dead body of Misbha-ur-rahman son of Hidayat Rasool was sent for post mortem by S.O. Wazeerganj, Lucknow to him which was brought in a sealed condition by Constable Ambrish Singh. He broke open the seal and identify the dead body. The deceased had died in Balrampur Hospital, Lucknow on 31.05.1982. He found following ante mortem injuries on the dead body of the deceased:-

> *"Injury no. 1:- fire arm wound on the front of the chest 2 cm. x. 2cm. margins (wound of entry) 1.5 cm. above xiphisternum. Blackening and tattoing present around the wound 9 cm. x. 7 cm..*
>
> *Injury no. 2:-Contusion on the left side abdomen 14 cm. x 12 cm. at the level of embolism & 13 cm. left to it"*

24. On internal examination of the dead body of the deceased, it was found that the stomach was lacerated and 12 pellets and one tikli were recovered from the body which were kept in an envelope and has been marked as Material Ex. Ka-1. The 12 pellets and tikli which were recovered he identified and proved the same as material Ex. Ka-2 and 3. The deceased wearing Kurta, Pajama, Underwear, Baniyan and in all four clothes which were recovered from the dead body of the

deceased were sealed and handed over to the Constable for being deposited in the Malkhana. He proved the same as Ex. 5, 6, 7, and 8.

25. In the opinion of the doctor, the deceased died as a result of shock and hemorrhage due to injury no. 1. He stated that the deceased after receiving the injuries could be conscious for about few hours and remained alive. Injury no. 1 may be caused by country made pistol and was sufficient in ordinary course of nature to cause death. Injury no. 2 may be caused after causing of injury no. 1 by fists.

26. In his cross examination, he stated that injury no. 2 was not in the bony part and the same could be caused by blunt object as it is 14 cm. in width. If a person is hit by hard object then the nature of injury which is injury no. 2 positively be caused and if the same is caused by fists, injury no. 2 is possible and because of the said injury it is not necessary that the sign of fingers would be made. The injury which has been caused in the abdomen is as a result of injury no. 1 and not from injury no. 2 and because of laceration of the abdomen, there could be great pain. It is not necessary that because of tearing of the abdomen, a person would become unconscious and there is also no possibility of he being unconscious. He did not try to know that as to when the deceased died prior to conducting the post mortem as the same was noted in the Balrampur hospital.

27. P.W. 6 Dr. Shahjahan has stated in his examination before the trial Court that on 31.05.1982 he was posted in District Hospital Barabanki in emergency duty. At 12:15 a.m. Misbah-ur-rahman was referred from P.H.C. Zaidpur and brought there along with him there was a reference slip of P.H.C. Zaidpur and

according to the reference slip, the injured has received gun shot injury on A.P. gastric region and his dying declaration and medico legal examination had already been conducted at Zaidpur hospital. The injured after being given emergency medical treatment was referred by him to Balrampur Hospital, Lucknow. The emergency register of that time which is from 11.4.1982 to 12.6.1982 was before him. At pages-190-191 there was serial no. 2020 and number of emergency slip was E/1754. The endorsement dated 31.05.1982 was made by him in his hand writing and signature. He proved the same as Ex. Ka.30.

28. In his cross examination, the witness has stated that in the aforesaid endorsement which was made on 31.05.1982, it was not written that in the reference slip which had come from the said hospital that any dying declaration of the injured was recorded or his medico legal examination had been conducted. The reference slip of Zaidpur hospital was sent by the witness along with its reference to Balrampur Hospital. He admitted the fact that he had not recorded any dying declaration at any point of time nor had sent for recording the same to any Magistrate as at that time it did not occur to him to record the dying declaration but as it was written in the reference slip of Zaidpur, hence he did not mention the same. As per his understanding, the dying declaration is to be recorded only once and if any higher authority states that the first dying declaration is a wrong one then the second dying declaration is to be recorded. The persons, who have come along with injured had not told him that the first dying declaration was a wrong one, hence it may be recorded again. How long the injured remained with him, he did not remember. He had endorsed the time of entry of the injured but not at what time he left. The injured was attended by

the witness and referred to Balrampur hospital. In the register which was produced by the witness there was no column indicating that at what time and where from the injured was referred or discharged. He is not aware of the format of the said register and there is no heading of the said register. He did not remember as to what first aid was given to the injured at Zaidpur hospital and he had not endorsed the same in the said register. The injured was with him for about 30-40 minutes and when the vehicle was arranged, he was taken from hospital. At that time there was Ambulance in the hospital. He did not remember by which vehicle, the injured was taken to Balrampur hospital. There was no endorsement made in the night of 31.05.1982 or after 12 hours till 7:15 in the morning. He denied the suggestion that no reference slip had been sent from Zaidpur hospital. The injured, who has been brought in emergency at that time he has not enquired from him as to how he received the injuries or he has been medically examined earlier or not. If the injured is an literate person then the information is endorsed in his hand writing and if he is illiterate then the persons bringing him are made to write the said details. In the said column of emergency register, the thumb impression of a illiterate person is being affixed. He did not ask the injured as to how he received injuries. He could not tell the reason as to why he did not ask him about the same. He denied the suggestion that the disputed endorsement made by him on 31.05.1982 in the morning. He had fabricated and concocted the same.

29. On a query being made by the Court, the witness stated that the allotment of the duty is done by the Superintendent and the Superintendent occasionally examines the register.

30. C.W. 1 Ram Balak Mishra in his deposition before the trial Court has stated that he had brought the register of the proceedings from 5.6.1968 to 2.1.1984 under the orders of the Court. He has brought the same in the condition in which it was with him and has produced the same before the Court. Beside the same, he has also brought the agenda register which is from 10.7.1970 to 3.7.1974 in which the proceedings of 1971 to 1973 are included and the same is of the year when the deceased Misbah-ur-rahman was Chairman of the town area Zaidpur. In the proceeding register the signature of Misbah-ur-rahman is in English and again at some place it is in Urdu and in rest of the place it is in English. The witness stated that when Misbah-ur-rahman was Chairman, he was not posted.

31. The trial Court after scrutinizing the evidence led by the prosecution and the defence has come to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt against the accused-respondents and has acquitted them of the charges levelled against them.

32. Aggrieved by the impugned judgment and order passed the trial Court, the State has preferred the present appeal challenging the same.

33. Heard Ms. Smirti Sahai, learned A.G.A. for the State-appellant, Sri Sudhir Kumar Singh, learned counsel appearing for accused-respondent nos. 3 and 4 and perused the impugned judgment and order and the lower Court record.

34. Learned A.G.A. for the State has vehemently argued that the trial Court has erred in coming to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt and has acquitted the accused-respondents Ansar Ahmad

and Habibullah though there was cogent evidence against them. It was argued by learned A.G.A. that the F.I.R. of the incident was lodged under sections 147, 148, 149, 307 I.P.C. on 30.5.1982 and the deceased Misbah-ur-rahman soon after the incident was taken to P.H.C. Zaidpur where he was given medical treatment by Dr. Muneeruddin-P.W. 3 on 30.05.1982 at 11:05 p.m. in the night and his dying declaration was also recorded by the said doctor which has been marked as Ex. Ka. 3 in which he has categorically stated that accused Ansar Ahmad had caught hold his neck and accused Rafiullah had shot him with pistol. The incident had taken place at 10:35 p.m. near the house of Abdul Hai and three other accused persons, who were present along with the said two accused, he could not identify them and they have fled away from the place of occurrence. She submitted that no doubt the main accused Rafiullah, who had caused injuries to the injured by country made pistol, died during the pendency of the appeal but so far as accused Ansar Ahmad is concerned, he is liable to be convicted and sentenced by this Court in view of the dying declaration of the deceased as the same is a reliable one and does not suffer from any illegality. The trial Court committed gross illegality in disbelieving the same to be not in accordance with law and has acquitted accused Ansar Ahmad in spite of there being a dying declaration against him. She further submitted that so far as the other accused Habibullah is concerned, he is named in the F.I.R. along with four other accused persons and there is eye witness account of the incident, i.e., P.W. Haji Fazal-ur-rahman, who is cousin brother of the deceased and P.W. 2. Mohammand Muslim, who is another eye witness of the incident and they have categorically stated before the trial Court that the said

accused along with two other accused were present at the place of occurrence and when the incident was being committed by accused Ansar and Rafiullah, they tried to holdup the informant and other persons along with him and threatened for dire consequences of life if they intervened because of which the deceased, could not be saved by them and they only witnessed the said incident. She next submitted that the reasoning given by the trial Court in disbelieving dying declaration of the deceased and the eye witness account of P.W. 1 and 2, is not a sound one, hence the judgment of the trial Court is liable to be set aside by this Court as the same suffers from perversity and misleading of evidence. The appeal be allowed and the accused-respondents be convicted and sentenced accordingly for the murder of the deceased.

35. Learned A.G.A. with respect to her argument regarding the reliability of the dying declaration has placed reliance on the judgment of the Apex Court in the case of ***Laxman vs. State of Maharashtra; AIR (2002) SC 2973*** in which it has been held by the Apex Court that no certificate of a doctor is required stating that the person making the dying declaration is in a fit mental state to make such declaration and further there is no requirement that the dying declaration ought to be recorded by a Magistrate. Further she relied upon another judgment of the Apex Court in the case of ***Balbir Singh & Ors. vs. State of Punjab; AIR 2006 SC 3221*** in which it has also been held by the Apex Court that the dying declaration even though not recorded by the Magistrate, should not be a ground to disbelieve the entire prosecution case. There is no requirement of law that a dying declaration must necessarily be made before a Magistrate. The reliability of such declaration could be

suspected only if the statements are inconsistent and contradictory.

36. Learned counsel appearing for the accused-respondents has vehemently opposed the arguments of the learned A.G.A. and submitted that the finding recorded by the trial Court in acquitting the accused-respondent, does not suffers from any perversity and it is well considered judgment of the trial Court and the accused-respondents have been rightly acquitted by the trial Court. He submitted that the dying declaration of the deceased which has been recorded by P.W. 3 suffers from many infirmities on fact and law. He argued that the dying declaration of the deceased is a forged and fabricated document and cannot be relied upon to convict the accused-respondents. The trial Court has given cogent and good reasons to disbelieve the said dying declaration as the same has not been recorded in the presence of a Magistrate. Moreover, there is no fitness certificate given by the doctor showing whether the deceased was conscious to give such a dying declaration. He pointed out that the two witnesses mentioned in the dying declaration in whose presence it was recorded, have been withheld by the prosecution and no satisfactory reason has been given by the prosecution for withholding them. He argued that the deceased, who was Ex. Chairman of town area Zaidpur was a political person and was having some inimical relationship with others, who have committed the murder of the deceased. The accused-respondents, who were not in good terms with the deceased have been falsely implicated by P.W. 1 in collusion with the police and P.W. 3-Dr. Muneeruddin, who recorded the dying declaration of the deceased. It was next submitted that as per the dying declaration of the deceased, accused-respondent

Ansar Ahmad is said to have caught hold the neck of the deceased whereas accused Rafiullah had shot the deceased, who as per the post mortem report died on account of ante mortem fire arm injury sustained by him. He submitted that it is highly improbable and beyond imagination that the accused would caught hold the deceased, who was shot from point blank range without there being any apprehension that he would also suffer injuries which is a fire shot, as around the injury received by the deceased blackening and charing present. He submitted that the trial Court on several count had disbelieved the dying declaration of the deceased and there is no reason to disturb the finding of acquittal of accused-respondents recorded by the trial Court. He also pointed out that so far as the evidence of P.W. 1, and 2 are concerned, the incident is said to have taken place at 10:30 p.m. in the night and the reason given for being present at the place of occurrence of P.W. 1 and 2 and other persons, who were sitting at the door of the deceased for discussing about the meeting of town area and while discussion being going on, the deceased went to his workshop which was at 200 paces to see the repair work and when the deceased did not return for sometime, P.W. 1 and 2 and some other went to search the deceased at his workshop and they saw the incident, is not a reliable one. It has come in the evidence that the Investigating Officer, who reached the place of occurrence did not find any repair work going on in the workshop nor any labourers or persons of the area gathered at the place of occurrence at the time of incident. The present story for having conversation with the deceased at his door, appears to be cooked up. He has drawn the attention of the Court towards the finding recorded by the trial Court in disbelieving the evidence of P.W. 1 and 2

regarding their presence to be doubtful and argued that the same is a reasonable one. On the strength of the said arguments, learned counsel for the accused-respondents stated that the appeal filed against the acquittal of the accused-respondents is liable to be dismissed.

37. Having considered the submissions advanced by learned counsel for the parties and perused the impugned judgment and order as well as the lower Court record.

38. It is an admitted fact that the incident had taken place at 10:30 p.m. in the night and the deceased died on account of fire arm injuries and injury no. 1 is a fire arm injury which is caused on the chest and injury no. 2 is on his abdomen which is contusion 14 c.m. x 12 cm. The incident is said to have been witnessed by the witnesses in the moon light. The deceased was Ex. Chairman of town area Zaidpur and it has been stated by the informant that on account of election of town area there was bad blood between the parties and further there was enmity between the deceased and accused Dr. Habibullah with respect to election of town area and with one Naimullah with respect to auction of a house due to which it is stated that the deceased was done to death by the accused persons. The prosecution in support of its case has relied upon the dying declaration which was recorded by P.W. 3 Dr. Muneeruddin on 30.5.1982 at 11:05 p.m. at P.H.C. Zaidpur when the deceased was brought in injured condition by P.W. 1 and others in which he has categorically stated that accused Ansar had caught hold his neck whereas Rafiullah had shot him with a pistol and the incident had taken place near the house of Ramzan at 10:35 p.m. The

said dying declaration (Ex. Ka-3) had been disbelieved by the trial on the following count which are reproduced hereinbelow:-

> *"(a) Dying declaration, Ext. Ka-3, contains signatures of two witnesses. One Sri Afzul-ur-rahman and the second Sri Mond. Ashfaq. Both these witnesses have not been examined. No explanation for withholding them has been tendered in the Court. Though it is not necessary that dying declaration must be witnessed by the witnesses yet it is very necessary for bonafide case that if witnesses were present, they should be examined or there must be satisfactory reason for not examining them. Why witnesses have been withheld without any reason is very material and creates set of doubt in the truthfullness of dying declaration.*
>
> *It has come in the evidence of P.W.(1) Fazal-ur-Rahman and P.W.(2) Mohd. Muslim that injured Sri Misbah-ur-rahman was brought to the hospital by them and by certain other persons. P.W. (3) Dr. Muneeruddin has stated that the witnesses were brought forward by the persons, who had brought the injured to the hospital. P.W.(3) Dr. Munoeruddla has stated that there were certain persons in the room where he was conducting medico legal examination and recording the dying declaration., Had the dying declaration been recorded in the hospital in the manner as suggested by the P.W. (3) Dr. Muneeruddin, P.W. (1) Fazal-ur-rahann and P.W. (2) Mohamammad Muslim must have been aware of the fact of recording dying declaration by P.W.(3) Dr. Muneerudain. Both the witnesses P.W.(1) Fazlurrahman and P.W.(2) Mohammad Muslim have not stated anywhere that dying declaration was recorded by the doctor concern at the relevant time. On the contrary, P.W.(1) Fazal-ur-rahaan has stated that page 25 para 45 that after three days of the incident, he could learn that same dying declaration was recorded. First information report was lodged in the police station by P.W. (1) Fazal-ur-rahman. In the report, surprisingly there is no mention of this dying declaration. The witness did not state that he has disclosed to the investigating officer during investigation that some dying declaration was ever recorded.*
>
> *(b) Conduct of the Investigating officer is highly doubtful. Sri S.N. Singh. S.I., was posted as Station officer police station Zaidpur, He has resumed the investigation. He has stated on oath that he has sent the dying declaration on 31.5.82 to the Court of the Chief Judicial Magistrate in compliance of the C.J.M's order but this statement is absolutely false. The C.J.M. concerned has passed the order requiring the Station officer to file the dying declaration on 2.6.82. It is also clear from Ext. Kha-l that the station officer Sri S.N. Singh has submitted the dying declaration on 4.6.82. The first PARCHA*

by the investigating officer falsely shows that he has sent the dying declaration alongwith other papers on 31.582. It appears that dying declaration was prepared much after the order of the Chief Judicial Magistrate on 2.6.82. These circumstances go to show that dying declaration was never recorded on the date and time as alleged by the prosecution in 30.5.82, at about 11.05 P.M. It has been urged by the prosecution that the first PARCHA was seen by the In-charge C.J.M. and mention of time of dying declaration in first parcha makes it sure that the dying declaration was ever recorded on 30.5.82, at 11.05 p.m. But this argument is not at all tanable. The reason is that there is no proof that the C.J.M. has seen the first PARCHA,. There is also no proof that the last page in which a mention of dying declaration has been by the C.J.M. The total outcome of these circumstances is that the dying declaration appears to have been manufactured by the investigating officer for his ulterior motive. It has been suggested by the defence to P.W. (1) Fazal-ur-rahman that there was some rally in favour of investigating officer Sri S.N. Singh led by the deceased Misbah-ur-rahman. It has been also suggested that the counter rally was arranged by the accused Habibulla against the investigating officer. The suggestion has been denied by the witness P.W.(1) Fazal-ur-rahman, yet the dubious character as clear from the above circumstances indicates that there has been some such rallies and it was this fact that must have motivated the investigating officer for manufacturing the dying declaration in collusion with the medical officer. Thus, dying declaration appears to be very very suspicious.

(c) Signature of late Sri Misbah-ur-rahman on the alleged dying declaration appears to be forged. Court has summoned proceeding register and the agenda book from the twon area Committee Zaidpur covering the period when late Sri Misbah-ur-rahman has been the Chairman of the town ares, Sri Ram Balak Mishra C.W. (1), Baksi of town area Zaidpur has brought both these records on 19.1.84. He has stated on oath that all the signatures in the agenda book are also in the English language except one signature which is made in Urdu language. I have personally checked these tw records and I am fully satisfied that the statement of the witness is quite correct. Thus, it has become clear that Misbah-ur-rahman was in the habit of making his signature in English. Nowhere he has made a signature in Hindi. Making of signature in English was his habit. Now the signature in Hindi made by Misbah-ur-rahman at the time of critical position when he was on death bed is surprising. At the time of emergency, natural flow of a particular man automatically comes into picture. Neutral flow of his signature was in English. This circumstances demolishes the whole story of dying declaration. Signature in Hindi of deceased tally with

the hand writing of dying declaration and are made by one hand.

(d) Doctor concerned, P.W.(3), Sri Muneeruddin appears to have acted in haste hurry, He has not noticed injury no. 2 as was noticed by the Dr. S.C. Srivastava, P.W.(4) who has conducted the post-mortem in the civil hospital at Lucknow. Injury no.1 gun-shot injury is apparent from above. It was noticeable even by a lay man, He has admitted that Sri Fazal-ur-rahman was known to him from before. Since Misbah-ur-rahman has been the chairman of town area, it is expected that he would have commanded influence even on the doctor. When injured Misbah-ur-rahman was brought to the hospital, the doctor concerned must have paid heed to the serious injury no.1 and must have made up his mind to provide first aid so that life of Sri Misbah-ur-rahman may be safe. P.W. (3) Dr. Muneeruddin has stated that he has conducted medico-legal examination and has provided first aid. Medico-legal is highly negligent as the Injury no. 2 was not noticed. Dr. Muneeruddin, P.M.(3), has stated that while examiing the injuries and providing the first aid, he had asked fellow men of Sri Misbah-ur-rahman to manage some vehicle so that Sri Misbah-ur-rahman may be brought to Barabanki for better checkup and treatment. He has again stated that soon after this process the vehicle was arranged and Sri Misbah-ur-rahman was sent to Barabanki Hospital. Primary automatic duty of a medical officer is to take step for saving life of the seriously injured person. It would never come in his mind that certain papers must be prepared for litigation. The doctor concerned has not recorded the dying declaration at any time so far. Thus, the idea of recording dying declaration must not have come in his mind. These circumstances go to show that there was no occasion for recording the dying declaration.

(e) Time of dying declaration and time of medico-legal examination as mentioned by the doctor concerned is 11.05 P.M. Dr. Muneeruddin has stated on oath that he has taken about half hour in medico-legal examination and 10 minute in recording the dying declaration. Since as soon as the injured brought, the doctor takes automatic step for first aid, and since doctor has sent Misbah-ur-rahman to Barabanki immediately after providing medico-legal examination and first aid, he must have conducted medico-legal first. The time being 11.05 P.M. written on the Injury report Ext, ka .. is correct but 11.05 P.M, written on the dying declaration is absolutely wrong. When he has devoted about half hour in medico-legal examination, naturally the time of dying declaration must be different. Had he recorded dying declaration first, then time of medico-legal examination must be at least 11.15 p.m. as he has according to his statement devoted about 10 minute in medico-legal examination. It appears that the dying declaration was recorded much after

and the doctor concerned has un-mindfully mentioned the time 11.05 P.M. on the dying declaration. It is humanly impossible for a man to do two things at the very same time. Thus, conduct of medical officer concerned is highly dishonest.

(f) Dying declaration, Ext. Ka--3, mentions names ofactual assailants, time of incident, manner of assault and place of occurrence. These circumstances go to show that declarant was in a position to narrate all particulars about the incident. He appears to be fully conscious of all the circumstances. There in no mention of injury no.2 in the dying declaration. Dr. S.C. Srivastava, P.W.(4), conducting the post-mortem report has mentioned that there is a contusion covering 14 CM. X 12 CM., on the stomach. This injury is also very important. How a fully conscious man can ignore this injury is very surprising. Had the dying declaration been made by Sri Misbah-ur-rahman, this injury must never have been missed. It appears that the dying declaration was prepared by a person who had no knowledge about injury no.2. Dr. Muneeruddin, P.W.(3), who has first conducted the medico legall examination of Misbah-ur-rahman, did not know injury no. 2 as is clear from the injury report, Ext. Ka-2. It appears that the dying declaration is the outcome of his mind in collusion with the Investigating Officer.

(g). It is clear from the evidence that one accused has tightly caught hold the neck of Misbah-ur-rahman from behind and the other has fired from the front. Injury no. 1 has proved fatal. As soon as Misbah-ur-rahman received gun shot injury n. 1, it was usual for him to have got much perplexed under that surcharged atmosphere, it does not appeal to reason that he had recognized the person holding his neck tightly from behind. Since there is a mention of that assailant also, it appears that implication of such person is highly improbable.

(h) Dying declaration does not contain any certificate by the doctor concerned that the declarant was fully conscious and was in a position to depose something. Dr. S.C. Srivastava, P.W. (4), has stated on oath that due to the gunshot injury no.1, stomach of Misbah-ur-rahman was damaged. He has again stated that due to damage of stomach there must have been very very severe pain. Dr. Muneeruddin, P.W.(3), has noticed that pulse rate was 80, normal pulse rate is 72. Thus, Misbah-ur-rahman was not fully conscious. Due to severe pain in the stomach, it is not expected that he would be in a position to depose something. The doctor concerned has written in the injury report, Ext, ka 2, that Sri Misbah-ur-rahman was fully conscious. Why he has not written on the dying declaration is surprising. Dying declaration and injury report were recorded at most at the same time. Due to severe pain and abnormal pulse rate fatally injured person is not

expected to be in a position to depose the dying declaration. Thus, dying declaration appears to be highly doubtful.

(i) Why the doctor concerned has sent the dying declaration to the police station is very material. The doctor concerned has stated that he has sent the dying declaration in reply to the letter sent by the police. He stated that he has taken the signature of the constable who has brought the letter of requisition and who has taken the dying declaration alongwith injury report. But this type of conduct does not get any support in record. First information report does not mention dying declaration. No public witness has informed to the police that the dying declaration was recorded. The doctor concerned says that he has not disclosed it to the police. Doctor says that he knew it very well that dying declaration is always sent to the Court. Why under these circumstances, the doctor concerned had handed over the dying declaration to the police is not clear. When the police was not in the knowledge of dying declaration, the natural conduct of the doctor was to send the dying declaration direct to the Court. There is unnatural conduct on his part. Conduct becomes unnatural when there is some sort of bungling in the affair. This circumstances goest to show that the dying declaration is highly doubtful.

(j) Dr. Shahjahan, P.W.(6), has stated that he has received Misbah-ur-rahman on reference from Zaidpur P.H.C.. He has again stated that there was a reference slip in which there was a mention that dying declaration was recorded and medico legal examination was done. Conduct of Dr. Shahjahan is also very doubtful. There is no mentioned of number of the reference slip in the register. The prosecution has not submitted the reference slip from the hospital at Lucknow. When any patient is referred to any superior hospital, the reference slip does contain the number of the register. Without such number, reference cannot be complete. This is the usual practice stated by Dr. Shahjahan that he has sent that reference slip to Lucknow hospital with Misbah-ur-rahman but that reference slip has not been filed before me. Dr. Shahjahan has conducted the first aid at 12:05 a.m., on 31.05.1982. The next entry in the refister is at 7:00 a.m. on 31.5.82. Misbah-ur-rahman had died in the civil hospital at Lucknow at 3:00 a.m., on 31.5.82. It is just possible that after his death all these things were manufacture. Dr. Shahjahan has stated that there is no column in the register to show as to what has been done in the previous hospital. He has admitted that there is a column to show that injuries, cause of injures. He has again stated that this column is filled by the injured himself or by his attendant. Register does not show that this column has been filled in this manner. Thus, Dr. Shahjahan has not discharged his duties properly. Improper discharge of duties is indication of some guilty intention."

39. Thus, from the above reasoning given by the trial court for disbelieving the dying declaration that the two witnesses of dying declaration, namely, Afzul-ur-rahman and Mohammad Ashfaq have not been examined and the prosecution has not given any cogent reason for withholding the same which creates doubt about the truthfulness of the dying declaration. The dying declaration appears to have been manufactured by the Investigating Officer for his oblique motive as the deceased was known to him. The deceased and his family members had got his transferred stopped by taking out a rally against his transfer. The alleged dying declaration was not sent by the Investigating Officer on 31.05.1982 to the Court of C.J.M. though he made the statement that he had sent the same which was found to be false as the C.J.M. has passed an order requiring Station Officer to file the dying declaration on 0.2.06.1982 which is evident from Ext. Kha-1 and the Investigating Officer has submitted the dying declaration on 04.06.1982 in pursuance of the order of the C.J.M. P.W. 3 Dr. Muneeruddin, who is said to have recorded the dying declaration of the deceased, from his statement also it is evident that he had not recorded any dying declaration earlier to the present one and for the first time he recorded the present dying declaration of the deceased as the deceased was known to him from before and when the deceased was brought to him soon after the incident at P.H.C. Zaidpur, he only found one single injury on his person whereas P.W. 5 Dr. S.C. Srivastava found two injuries on the person of the deceased. It has been admitted

by P.W. 3 Dr. Muneeruddin that he examined the injuries of the deceased at 11:05 p.m. and also recorded the dying declaration of the deceased at the same time. At the time of medical examination and recording of dying declaration the electricity of P.H.C. Zaidpur was disconnected. Dr. Muneeruddin in his evidence before the trial court has stated that it had not occurred in his mind that any fitness certificate is to be given before recording the dying declaration of a person, hence the trial court raised suspicion about the recording of the dying declaration of the deceased and recorded the finding that it appears to be a manipulated document and an afterthought in collusion with the S.H.O. P.W. 4 and P.W. 3 Dr. Muneeruddin. The Apex Court has expounded definition of the dying declaration and its condition which are required at the time of accepting it as an evidence was considered by this Court in the case of ***Munni Devi & Ors. vs. State of U.P.; 2020 (5) ALJ 653. Paras-33, 36 and 39*** of the said judgment which are relevent to note are reproduced hereunder:-

> "33. ... *22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi - 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:*
>
> *1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.*
>
> *2. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.*
>
> *3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.*

4. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.

5. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

6. A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

7. Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

8. Even if it is a brief statement, it is not to be discarded.

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

36. In the aforesaid judgment of Sudhakar (Supra), the Hon'ble Supreme Court has discussed the concept of dying declaration in detail in paragraph 18 by considering the case of Laxman vs. State of Maharashtra reported in (2002) 6 SCC 710 which is quoted below :-

> "18. In the case of Laxman (supra), the Court while dealing with the argument that the dying declaration must be recorded by a Magistrate and the certificate of fitness was an essential feature, made the following observations. The court answered both these questions as follows:
>
> *"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for*

this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

39. For accepting the dying declaration, the Hon'ble Supreme Court has expounded the conditions which are

necessarily to be followed. In State of Gujarat v. Jayrajbhai Punjabhai Varu reported in (2016) 14 SCC 152, the Supreme Court held in paragraph nos. 15, 17, 19 & 20 as under :

> *"15. The courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration.*
>
> *17. A number of times the relatives influence the investigating agency and bring about a dying declaration. The dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. In case of more than one dying declaration, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocent dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests.*
>
> *19. ..... A dying declaration is entitled to great weight. The conviction basing reliance upon the oral dying declaration made to the father of the deceased is not reliable and such a declaration can be a result of afterthought. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an*

> *absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.*
>
> *20. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."*

40. Hence in view of the conclusion drawn by the trial court in disbelieving the dying declaration and the law enunciated by the Apex Court as has been referred above, we do not find any infirmity or perversity in the impugned judgment and order passed by the trial court in disbelieving the said dying declaration of the deceased.

41. Similarly, so far as the direct evidence led by the prosecution in the nature of P.W. 1 and 2, who are the two eye witnesses of the incident, the trial Court has found the presence of the said two eye witnesses at the place of occurrence also doubtful because of the following reasons which are reproduced hereinbelow:-

> *"Direct evidence in the case is also not worthy of belief for the following reasons :-*
>
> *(a) Presence of the witnesses both at the door of Misbah-ur-rahman, at about 9.30 P.M. and also near the spot at about 10.30 P.M. is highly improbable. P.W. (1) Sri Fazal-ur-rahman and P.W.(2) Mohammad Muslim have stated on oath that they were present at the door of late Misbah-ur-rahman to work out as to how the management of Madarsa Islamia Imdadul Uloom could be properly conducted in future. P.W. (1) Fazal-ur-rahman has again stated that he usually sits at the door of Misbah-ur-rahman for purposes of inhaling fresh air and during that time, person were discussing some ways and means of better management of the school. It has been*

again stated that there was a meeting on 14.4.82 and in that new officer were elected for better management of the school. Why on 30.5.82 meeting was sitting is very doubtful. First there is no document to show that there was some meeting on 14.4.82. Usually procedings of some Committee are drawn in the register. In absence of such register, conference of meeting is unthinkable. Further more, there is no indication that even after 14.4.82, there was some mismanagement in the school. If so, there is no reason to call the next meeting on 30.5.82. In usual circumstances, meetings are summoned by a notice in advance. The notice may be in writing or in oral, There is no indication in the statement of both the eye-witnesses allegedly were present in the meeting of 30.5.82 that there was a written or an oral notice in advance. Thus, meeting on 30.5.82 at the door of Misbah-ur-rahman is highly unthinkable.

Even if it is taken for granted for the argument sake that some meeting has held on 30.5. 82, it is unnatural that the deceased Misbah-ur-rahman would leave the meeting and go for his private affairs. It is again unnatural for the members of the meeting to go in block to a place where Misbah-ur-rahman had gone for completing the rest of the talk. If there was an emergent meeting without notice, naturally some important matters must have there. Sri Misbah-ur-rahman was regularly going to supervise the work in his KARKHANA. It is not natural for such a person to leave the important matter being discussed at his door and to go for such private supervision of the work. It has come in the evidence of P.W. (1) Fazal-ur-rahman that son of late Misbah-ur-rahman is bold enough serve tea, water or make arrangement for sitting. Thus, this boy could have been sent to call Sri Misbah-ur-rahman from the factory. In the alternate, any one of the members of that alleged meeting could have gone to Misbah-ur-rahman back for further discussion or in the alternate, meeting must have been disbursed for discussion at the next day. But all natural conduct was abandoned and all members sitting at his door had started to go a place where Misbah-ur-rahman has gone. Unnatural conduct is indicative of guilty mind.

In the towns and villages, it is the usual habit of taking dinner at about 9 or 9.30 P.M. There is no mention that members of the committee including Late Misbah-ur-rahman had taken their dinner. A person can sit for inhaling fresh air in the summer after dinner and not before it. Post mortem report does not show that there was undigested food in the stomach of Misbah-ur-rahman. Thus, this circumstance also shows that persons were not sitting at about 9 or 9.30 P.M. on that day.

First information report does not mention that the witnesses were sitting at the door of Misbah-ur-rahman in connection with some meeting. Had this been true, detailed FIR must

have contained this fact also. There is a reference of word 'तलाश करने' in the F.I.R. Ex. Ka-1.

The term 'TALASH' (search) indicates that someone is missing without whereabouts. When Misbah-ur-rahman was to be searched, this means his whereabouts were not known to the witnesses and other persons sitting at his door. This circumstance also shows that these persons were not sitting at his door and Misbah-ur-rahman has not gone in their presence. P.W. (1) Fazal-ur-rahman has stated on oath that he has not disclosed any body that Misbah-ur-rahman has told him that he was going to supervise the work to KARKHANA. He has not told in Court that this fact was disclosed to the Investigating Officer. Thus, his statement about this fact in the Court is after thought.

There is no evidence to show that there was in fact any repair work in the KARKHANA, Had there been any repair work in the KARKHAN, workers of KARKHANA could have been examined.

The total outcome of the above discussion is that it is highly unthinkable that witnesses were sitting in the door in the manner they have narrated here. When they were not so sitting, it is again improbable for them to have gone in the direction of the incident.

(b) Injury no.2 was not seen by the witnesses. Both the witnesses P.W. (1) Fazal-ur-rahman and P.W.(2) Mohd. Muslim have not explained as to who and when injury no.2 was received by the deceased Misbah-ur-rahman. Dr. S.C. Srivastava, P.W. (4), has been suggested a very dangerous question by the prosecution. The A.D.G.C.(I) Sri A.K. Jain has put a suggestion that injury no.2 could be caused by blow after injury no.1. Doctor concerned has repleid this question in the affirmative. Thus, it becomes clear that injury no. 2 was caused soon after the injury no.1. Both the prosecution witnesses were present since the time of fire till the injured Misbah-ur-rahman was brought to the hospital. Thus, witnesses should have seen the accused causing injury no. 2 also. The witness has said that the injury no. 2 was caused in their presence. It appears that witnesses were not present at the spot. There is no contusion of abrasion on the fact including nose, on the chest and on the knees. This circumstance shows that the injured had not fallen down keeping the face downward. Thus, the injury no. 2 has not come due to fall. But the injury no. 2 has been intentionally caused by some one. Non explanation of the injury no. 2 by both the prosecution witnesses shows that the witnesses were not present at the spot.

(c) Both the prosecution witnesses have stated that the injured has not fallen down after receiving gun-shot injury. Dr. S.C. Srivastava, P.W. (4), has stated that damage of stomach causes severe pain. It is common experience that a

person must fall on the ground after receiving a gun shot injury on the chest. Since there was severe pain due to gun shot injury in the person of Misbah-ur-rahman, it is highly probable that he should have fallen on the ground. Both the witnesses have stated that he has not so fallen, Their statement is unnatural. This shows that they were not present at the spot.

(d) It has come in the evidence of the eye-witnesses P.W. (1) Fazal-ur-rahman and P.W. (2) Mohd. Muslim that one accused had caught hold of Misbah-ur-rahman from behind and the other accused has fired at the chest from the very close range. This is also improbable. When one assailant is holding Misbah-ur-rahman from behind, there is all possibility that gun shot might hit the fellow-assailant who is holding Misbah-ur-rahman from behind. There are cases where pellets cross the body and thus, there is all possibility that the fellow-assailant holding Misbah-ur-rahman from behind might be injured. Furthermore, Misbah-ur-rahman was injured with the help of a fire-arm. The fire-arm could be shot from some distance. Purpose of assault could have been thus fulfilled and thus, there was no necessity of catching hold of Sri Misbah-ur-rahman. It appears that for purposes of raising the voice of 'BACHAO-BACHAO', this type of catching hold has been put forward.

Witnesses are said to have come from the side of East and they were standing at about 20 paces in North of the place of incident. Injured was coming from the side of South. Thus, one accused caught hold of Misbah-ur-rahman from the side of South and one accused fired from the side of North. On alarm being raised by the witnesses, the assailants have run away towards the West. During the confused atmosphere, it is not possible for the witnesses to have recognized both the assailants. At the most, they could recognize only that who was holding Sri Misbah-ur-rahman.

It has come in evidence that accused Naimullah, Kaleemullah and Habibullah were standing under the PAKAR tree near the Masjid in the West of the place of incident. It clear from the experience that 30.5.82 was the 'Ashtmi night'. At about 10.30 P.M., moon was likely to set in the West. Month of May is not the autumn season. Thus, there must have been leaves of PAKAR tree. Moon was likely to set in the West. It is highly probable that shade of Mosque must be falling on the PAKAR tree. The 'PAKAR' tree had already its own shade. Witnesses standing at some distance must not be in position to recognize the features of the standing persons under this shade of PAKAR tree.

It has come in the evidence of both the witnesses that the persons sitting under the PAKAR tree had challenged that witnesses would suffer the dire consequences in case they marched forward. It has not come in the evidence that such persons under the tree were holding any arms and

> *ammunition. When such persons had gone there to ward off any disturbance in the crime, it is very natural for them to have held certain arms and ammunition with them. Persons so standing would naturally hold the arms and ammunition also for their own safety because there would all possibility that they would be attacked by fellow men of the injured at the hue and cry. Under these circumstances, had such persons been standing for such intention under the tree, they must be holding such arms and ammunition. No witness has said that they were holding such arms and ammunition. This fact gives out two results. One is that witnesses were not in a position to see things at that distance. The second reason is that there were no such persons standing under the tree with arms and ammunition.*
>
> *Under the above discussion, I am of the definite opinion that the presence of the so called witnesses both at the door of Misbah-ur-rahman at about 9.30 P.M, and at the place of incident at about 10.30 P.M. is highly improbable. If so, accused persons must not be held guilty."*

42. As regard the view taken by the trial court in disbelieving the evidence of P.W. 1 and 2, who are alleged eye witnesses of the incident is concerned, the trial court has arrived at a conclusion that their absence at the place of occurrence appears to be doubtful on the ground that occasion for them to be at the door of the deceased along with the deceased and other persons for having conversation regarding convening of a meeting for better management of the school, at 9:30 p.m. in the night was highly doubtful. It also found that the deceased, who was discussing the issue with P.W. 1 and 2 and others, who had assembled at the door of his house and suddenly he went to inspect his workshop which was some distance from his house, shows his unnatural conduct and thereafter the witnesses P.W. 1 and 2 went in search of the deceased, who had not returned for a long time and hear the alarm of the deceased to save him and saw the accused Ansar catching his neck from behind and accused Rafiullah shot at the deceased and other accused persons, namely, Habibullah, Kalimullah and Naimullah, who were standing under the *Pakar* tree threatened them not to

move forward, appears to be quite unnatural. The trial court further recorded a finding that if the said two witnesses had seen the incident, they would have definitely mentioned in their evidence that the deceased received two injuries on his person one by fire arm and other by the person, who assaulted the deceased with fists or hard and blunt object. The trial court also found that the time and place of occurrence of the incident could not be established, hence has acquitted the accused-respondents of the charges levelled against them. Thus, the reasoning given by the trial court for acquittal of the accused-respondents, cannot also be said to be perverse one which may call for any interference by this Court in the present appeal.

43. The law has been settled by the Apex Court in its catena of decisions regarding interference of the High Court in the case of order of acquittal in an appeal.

44. Some of the judgments of the Apex Court which we would like to refer are quoted below:-

45. Paras-6, 7 and 8 of the judgment of the Apex Court in the case of ***Mrinal Das & Ors. vs. State of Tripura; AIR 2011 SC 3753*** are reproduced hereunder:-

> *"(6) In State of Goa vs. Sanjay Thakran & Anr. (2007) 3 SCC 755, this Court while considering the power of appellate court to interfere in an appeal against acquittal, after adverting to various earlier decisions on this point has concluded as under:-*
>
> > *"16.....while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not*

> *be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to reappreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with."*

7) In Chandrappa and Others vs. State of Karnataka (2007) 4 SCC 415, while considering the similar issue, namely, appeal against acquittal and power of the appellate court to reappreciate, review or reconsider evidence and interfere with the order of acquittal, this Court, reiterated the principles laid down in the above decisions and further held that:-

> *"42.....The following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:*
>
> *(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
>
> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
>
> *(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with*

acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." The same principles have been reiterated in several recent decisions of this Court vide State of Uttar Pradesh vs. Jagram and Others, (2009) 17 SCC 405, Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) (2010) 6 SCC 1, Babu vs. State of Kerala, (2010) 9 SCC 189, Ganpat vs. State of Haryana and Others, (2010) 12 SCC 59, Sunil Kumar Sambhudayal Gupta (Dr.) and Others vs. State of Maharashtra, (2010) 13 SCC 657, State of Uttar Pradesh vs. Naresh and Others, (2011) 4 SCC 324, State of Madhya Pradesh vs. Ramesh and Another, (2011) 4 SCC 786.

8) It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the

> *judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed."*

46. Para-8 of the judgment of the Apex Court in the case of ***Basappa vs. State of Karnataka; II (2014) ACC 1 (SC)*** reproduced hereunder:-

> *"8. The High Court in an appeal under Section 378 of Cr.PC is entitled to reappraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse, as held by this Court in Gamini Bala Koteswara Rao and Others v. State of Andhra Pradesh through Secretary[1]. To quote: "14. We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so." (Emphasis supplied)"*

47. This Court in para-23 of the case of ***State of U.P. vs. Moti Lal Srivastava & Ors.; 2016 (94) ACC 817*** has followed and considered the dictates and judgment of the Apex Court with respect to scope of interference by the High Court in the case of acquittal which is reproduced hereunder:-

> *"23. The Apex Court in the case of State of Rajasthan Vs. Darshan Singh, SCC 2012 (15) 789 has laid down the scope of interference in the appeal against acquittal and held that appellate court interferes with order in acquittal only in compelling circumstances and when the impugned order is found to be perverse, the appellate court should bear in mind presumption of innocence of accused. Interference in a*

routine manner where another view is possible should be avoided, unless there are good reasons for interference. "

48. In view of the foregoing discussion, we find on the appraisal of evidence as discussed by the lower appellate court that the judgment of acquittal was rightly passed. We find no merit in this appeal.

49. This appeal is dismissed accordingly.

50. It transpires from the record that the C.J.M. Barabanki vide his report dated 10.11.2020 has reported that in compliance of the order of this Court dated 19.10.2020, accused-respondent nos. 3 and 4, namely, Habibullah and Mohammad Ansar have surrendered before the Court on 9.11.2020 and have been released on bail on the same day on their furnishing personal bonds of Rs. 25,000/- each and two sureties of the like amount. It is directed that the said personal bonds and sureties of the said accused-respondent nos. 3 and 4 shall not be cancelled/discharged till the period of limitation for filing the appeal against the present judgment and order as provided under the law, is expired.

50. Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance.

(Rajeev Singh, J.) (Ramesh Sinha, J.)

Dated:-18.03.2021
Shiraz.