REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 43 OF 2010

UMESH SINGH … **APPELLANT**

Vs.

STATE OF BIHAR … **RESPONDENT**

J U D G M E N T

V. Gopala Gowda, J.

This appeal is filed by the appellant aggrieved by the common judgment dated 22nd May, 2003 passed in Crl.A.Nos. 241, 247, 271 and 318 of 1998 in affirming the conviction and sentence of the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. and Section 27 of the Arms Act urging various facts and legal contentions. The appellant

herein was the appellant in Crl.A.No.318 of 1998 before the High Court. The impugned judgment passed in the said case is under challenge in this appeal.

2. The brief facts in relation to the prosecution case are stated hereunder to appreciate the rival legal contentions that are urged on behalf of the parties with a view to find out as to whether this Court is required to interfere with the concurrent finding of fact recorded in affirming the conviction and sentence imposed against the appellant.

3. The deceased Shailendra Kumar was murdered on 16.07.1996 at about 3.30 p.m. by the appellant Umesh Singh and other persons, namely, Awadhesh Singh, Sudhir Singh, Jaddu Singh, Nawal Singh, Binda Singh @ Bindeshwari Singh by shooting him with a revolver and rifle with a criminal intention for unlawful purpose in furtherance of common intention along with other accused and to have in their possession of fire arms with an intention to use it for an unlawful purpose to

commit murder of Shailendra Kumar along with accused nos.5 & 6 and another accused Moti Singh who is dead. They were charged under Section 302 read with Section 34, IPC. The case of the prosecution is that the deceased along with his cousin brother Arvind Kumar-PW2 were going to Tungi for catching a bus for Kothar on 16.7.96 at about 3.30 p.m. When they proceeded at a distance ahead of Tungi High School near Latawar Payeen, the accused persons named above surrounded them. The deceased accused Moti Singh is alleged to have exhorted his other associates to shoot the deceased Shailendra Kumar upon which the appellant herein took out a country made revolver and pumped its bullets in the temple of the deceased and accused no.2 who was having a rifle in his hand fired in the abdomen of the deceased. Accused no.4 also shot a fire causing injury in the leg of the deceased while accused no.3 also fired from his rifle. Accused no.5 was also having a rifle and he threw the dead body of

the deceased in the Payeen. It is also the case of the prosecution that during the course of the occurrence of the incident the informant PW2 Arvind Kumar was kept over-powered by the deceased accused Moti Singh and Jaddu Singh and after accomplishing the target, they left. Further, the witnesses whose names were found in the fardbeyan claimed to have seen the occurrence of the incident. The fardbeyan was recorded by ASI RS Singh at about 7.00 p.m. on the same date at Tungi High School hostel, Latawar Payeen and the inquest report of the dead body was also prepared at the place of occurrence itself at 7.10 p.m. Seizure list of certain incriminating items including empty fired cartridges which were recovered from the spot was also prepared. Formal FIR was recorded and investigation was taken up by the police. On concluding the investigation, the police submitted the charge sheet before the learned Chief Judicial Magistrate on the basis of which cognizance was taken

by him and the case was committed to the Court of Sessions. The learned Sessions Judge on his turn transferred the case to the file of Second Additional Sessions Judge, Nawadah and the charges were framed for the offence under Section 302 read with Section 34, IPC and Section 27 of the Arms Act. The accused pleaded not guilty. The case went for trial and the prosecution has examined the witnesses PW1 to PW9 and two witnesses were examined in support of the defence. The learned Additional Sessions Judge on appraisal of the evidence and record passed the judgment dated 04.04.1998 imposing the conviction and sentence against the accused persons under Section 302 read with Section 34, IPC and under Section 27 of the Arms Act and awarded sentence of imprisonment for life under Section 302 read with Section 34, IPC. The sentence awarded regarding the conviction under different heads of charges ordered were to run concurrently. The conviction and sentence passed by

the Additional Sessions Judge was challenged by the accused in the appeals referred to supra before the High Court of Patna. The High Court after hearing all the accused/appellants passed the common judgment affirming the conviction and sentence in relation to the present appellant and set aside the conviction and sentence in so far as Awadhesh Singh, Jaddu Singh and Nawal Singh who were held to be not found guilty of the charges under Section 302 read with section 34, IPC, i.e. in the appeal nos.241/98 and 247/98. However, as far as the present appellant and others are concerned, the judgment passed by the learned Additional Sessions Judge was affirmed. During pendency of the appeals the accused by name, Moti Singh died and his appeal got abated.

4. The appellant has questioned the correctness of the findings recorded in the impugned judgment by the High Court in affirming the conviction and sentence awarded against him along with others. Mr. Amarendra

Sharan, learned senior counsel appearing for the appellant contends that the High Court has failed to notice the discrepancies in the evidence of the prosecution witnesses, it could have disbelieved the same but it has affirmed the conviction and sentence on this appellant. Further, even according to its own findings there were no eye-witnesses to the occurrence of the incident as the PWs arrived at the scene of occurrence 15-20 minutes after the incident and the informant who was present at the spot has given different version in the evidence and the FIR regarding the role of the appellant. The statement of PW2 Arvind Kumar who is the cousin brother of the deceased is the basis on which the FIR was registered and the Investigation of the case was made by the Investigating Officer. The PW2 was present at the time of occurrence and on the basis of his statement, the accused persons have been falsely implicated in treating his statement as FIR, the same is belated FIR

which is not admissible in law and also hit by Section 162, Cr.P.C. In support of this contention he has placed reliance upon the judgment of this Court in **State of A.P. v. Punati Ramulu.**[1] The relevant paragraphs read as under:

> "**3.** In our opinion, the reasons recorded by the High Court for recording acquittal of the respondents is based on proper appreciation of evidence. The findings are not only supported by proper appreciation of the evidence but are also reasonable and sound. Thanks to the tainted investigation, the murder of Krishna Rao goes unpunished. But we must hasten to add that since the defence has been able to successfully challenge the bona fides of the police investigation, it has detracted materially from the reliability of the other evidence led by the prosecution also.
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> **5.** Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues. Though we agree that mere relationship of the witnesses PW 3 and PW 4, the children of the deceased or of PW 1 and PW 2 who are also related to the

[1] (1994) Suppl.1 SCC 590

> deceased, by itself is not enough to discard their testimony and that the relationship or the partisan nature of the evidence only puts the Court on its guard to scrutinise the evidence more carefully, we find that in this case when the bona fides of the investigation has been successfully assailed, it would not be safe to rely upon the testimony of these witnesses either in the absence of strong corroborative evidence of a clinching nature, which is found wanting in this case."

5. It was further contended by the learned senior counsel that the earlier information given by PW4 to the police was suppressed and by that time PW9- I.O. had reached the scene of occurrence, the other police officer and S.P. of the District were very much present there. They were not examined in the case to prove the prosecution case against the accused. Non-examination of the above persons as prosecution witnesses who are material witnesses to prove the prosecution case is fatal to the case as has been held by this Court in the case reported in **Mussauddin Ahmed v. State of Assam**[2]. The relevant paragraph of the abovementioned case reads as under:

[2] (2009) 14 SCC 541

> "**11.** It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference under Section 114 Illustration (*g*) of the Evidence Act, 1872 notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide *Gopal Krishnaji Ketkar* v. *Mohd. Haji Latif*)."

6. The learned senior counsel for the appellant further contended that not recording the information furnished by PW4 to the police as FIR but treating PW2 information as FIR in the case though it is hit by Section 162, Cr.P.C. creates doubt in the prosecution case and therefore benefit of doubt must be given to the accused by the trial court and the High Court. In support of the same, the learned senior counsel has placed reliance upon the judgment of this Court reported in **T.T. Antony v. State of Kerala**[3]. The relevant paragraphs are extracted hereunder:

> "18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an

[3] (2001) 6 SCC 181

officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report — FIR postulated by Section 154 CrPC. All other informations made orally or in writing *after* the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which *H* having killed *W*, his wife, informs the police that she is killed by an unknown person or knowing that *W* is killed by his mother or sister, *H* owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against *H* — the real offender — who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.

> 19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.
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> 20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC."

Also, the Patna High Court, in the case of **Deo Pujan Thakur v. State of Bihar**[4], opined as hereunder:

[4] (2005) Crl.L.J. Patna 1263

> "18. Considering the entire evidence on record and the circumstances which has been brought by the defence in course of argument it transpires that the prosecution with held the first information and did not produce it before the Court for the reasons best known to it. It did not examined independent witness though some of these names have been mentioned in the evidence of the prosecution witnesses and some of them even then were charge- sheet witness only family members and interested witnesses who are inimical have been examined. The fardbeyan on the basis of which formal FIR was drawn is hit by Section 162, Cr PC. The post-mortem report as well as the evidence of PW 11 has corroborated the defence version of the case that the deceased was killed at a lonely place when he was coming after attending the call of nature. In the circumstances of the case the prosecution version is not reliable. The evidence which has been brought by the prosecution has failed to prove its case beyond all reasonable doubt. The judgment and order of conviction passed by the trial Court is not fit to be maintained."

7. It was further contended by the learned senior counsel that the other PWs who were highly interested were examined in the case. The independent witnesses were available but were not examined in the case by the prosecution. Therefore, the prosecution case is fatal for non examination of the independent witnesses to prove the charge against the accused. Hence, the concurrent finding recorded by the High Court on the charge under Section 302 read with Section 34 against the appellant is

erroneous in law. The High Court has failed to take into consideration the evidence of PW2 who, according to the prosecution, is an informant. In his evidence he has stated that the dead body was recovered thereafter the statement of PW2 was recorded and he along with the other witnesses remained at the place of occurrence and none of them went to Police Station to inform the police. PW3 Damodar Singh in his evidence has stated that no body went to inform the police but PW4 Ashok Kumar has admitted in his evidence that his statement was recorded by a Judicial Magistrate where he had stated that he sent information to the police. PW9-I.O. has admitted in his evidence that on the information of Ashok Singh-PW4 he along with Officer-in-charge of the police station and several officers had gone to the place of occurrence before the fardbeyan was recorded and the case was registered. He has further stated that the

fardbeyan was `sent to police station and then he was made as I.O. Further the High Court has failed to take into consideration the relevant aspect of the matter mentioned in the FIR under Column No.I fardbeyan was recorded at 7.00 p.m. and FIR was registered at 10.00 p.m. on 16.07.1996. The distance of the place of occurrence and the police station is about 16 kms. According to PW9, the I.O. on 16.07.1996 after 10 p.m. he was changed, therefore, learned senior counsel submits that on the basis of the evidence of PW4 Ashok Kumar and PW9 and in the light of the principles decided by this Court in the decisions referred to supra registering the FIR on the basis of statement of PW2 is not admissible in law as the same is hit by Section 162, Cr.P.C. In view of the aforesaid facts and legal evidence regarding registration of the FIR by the police the learned Additional Sessions Judge and the High Court should have drawn

judicial inference that registering the FIR on the basis of statement of PW2, which is hit by Section 162, Cr.P.C. is the result of manipulation of the case against the accused at the instance of the witnesses of this case and not registering the first information given by PW4 to the police station for the reason that it was hearsay. This vital important aspect of the matter has been omitted by the Additional Sessions Judge and the High Court. Therefore, the finding recorded in the impugned judgment on the charge leveled against the appellant and others is erroneous in law and the same is liable to be set aside. Further, the courts below have failed to appreciate the fact that there was no motive for the appellant to murder the deceased Shailendra Kumar but there is motive for false implication of the accused by the witnesses in this case. The learned senior counsel placed reliance upon PW4 Ashok Kumar's evidence wherein he

has stated that Awadh Singh is the brother of accused Binda Singh who had brought a case against him and accused Umesh Singh and Bhuneshwar Singh, father of Nawal were witness and PW5 Balram Singh who is full brother of deceased Shailendra Kumar has admitted in his evidence that there was no enmity with accused and himself and also with his two brothers, including the deceased.

8. Further the learned senior counsel contended that the High Court has failed to consider the medical evidence, which does not support the prosecution case. According to the prosecution, the occurrence of incident is said to have taken place on 16.07.1996 at 3.30 p.m. when the deceased was going to join his duty from his village home. On the basis of the post mortem report on record, in Column Nos.21 to 23, PW8, the doctor clearly stated that not only stomach of the deceased but both bladders were empty and the time elapsed since death was 30 to 36 hours. Thereby the

occurrence of the incident must have taken place in the early hours of 16.07.1996 as the deceased must have empty stomach. Further, in the evidence of PW8, the description of the injuries in the post mortem report are also not in accordance with the allegations made by the witnesses. PW8 the doctor, has categorically admitted in his evidence that the deceased must have died before 30 hours from the time of the post mortem examination. It means that no occurrence of the incident took place at 3.30 p.m. on 16.07.1996 as alleged by the prosecution and the deceased was dead before the alleged time of occurrence. Therefore, the medical evidence is not in conformity with the prosecution case rather it supports the defence version making the entire prosecution case false. In this regard he has placed strong reliance upon the proposition of law laid by this Court to the effect that once the time of death as claimed by the prosecution is drastically different

from the one as per the medical evidence, the case of the prosecution becomes doubtful and the benefit of doubt must be given to the appellant. He has placed reliance upon the following decisions of this Court, namely, **Thangavelu v. State of TN**[5], **Moti v. State of U.P.**[6], **Kunju Mohd. v. State of Kerala**[7], **Virendra v. State of U.P.**[8] **and Baso Prasad v. State of Bihar.**[9]

9. Therefore, the learned senior counsel submits that the concurrent finding of fact on the charge recorded by the High Court against this appellant is erroneous and vitiated in law which is liable to be set aside and he may be acquitted of the charges leveled against him and he may be set at liberty by allowing this appeal.

10. On the other hand, Mr.Chandan Kumar, the learned counsel appearing on behalf of the State sought to justify the finding and reasons recorded in the

[5] (2002) 6 SCC 498
[6] (2003) 9 SCC 444
[7] (2004) 9 SCC 193
[8] (2008) 16 SCC 582
[9] (2006) 13 SCC 65

impugned judgment, inter alia, contending that the High Court in exercise of its appellate jurisdiction has examined the correctness of the findings and reasons recorded by the learned Sessions Judge on the charges framed against the appellant and on proper appraisal of the same, it has affirmed the conviction and sentence imposed against the appellant which is based on proper re-appreciation of evidence on record. The same is supported with valid and cogent reasons. Learned counsel further sought to justify registration of FIR on the basis of the information furnished by PW2 which is in conformity with the decision of this Court in **Binay Kumar v. State of Bihar**[10] relevant paragraph of which reads as under:

> **"9.** But we do not find any error on the part of the police in not treating Ext. 10/3 as the first information statement for the purpose of preparing the FIR in this case. It is evidently a cryptic information and is hardly sufficient for discerning the commission of any cognizable offence therefrom. Under Section 154 of the Code the information must unmistakably relate to the commission of a cognizable offence and it shall be reduced to writing (if given orally) and shall be signed by its maker. The

[10] (1997) 1 SCC 283

> next requirement is that the substance thereof shall be entered in a book kept in the police station in such form as the State Government has prescribed. First information report (FIR) has to be prepared and it shall be forwarded to the magistrate who is empowered to take cognizance of such offence upon such report. The officer in charge of a police station is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the cognizable offence. It is open to the officer-in-charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation."

11. Further, the correctness of the same is sought to be justified by placing reliance upon the I.O.'s evidence. The counsel for the state has placed reliance upon the decision of this Court in **Dinesh Kumar v. State of Rajasthan**[11]. The relevant paragraphs are extracted hereunder:

> **"11.** It is to be noted that PWs 7 and 13 were the injured witnesses and PW 10 was another eyewitness and was the informant. Law is fairly well settled that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence.

[11] (2008) 8 SCC 270

> **12.** In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

12. The learned counsel further submits that the dispute regarding the place of incident as contended by the learned counsel for the appellant is factually not correct. In view of the concurrent finding of the High Court regarding the place of occurrence is very much certain as it is said to be at Tungi. PW4 Ashok Kumar Singh in his evidence has categorically stated that he is not an eye-witness but on the basis of hearsay he has informed the police. The I.O. has further stated in his evidence that PW4 is a hearsay witness and therefore his information could not have been treated as FIR. Hence he has requested this Court that there is no merit in this appeal,

particularly, having regard to the concurrent finding on the charge by the High Court on proper appreciation of legal evidence and record and affirming the conviction and sentence for charge under Section 302 read with Section 34, IPC. Hence, the learned senior counsel has requested this Court not to interfere with the same in exercise of its jurisdiction.

13. In the backdrop of the rival legal contentions urged on behalf of the parties this Court has reasonably considered the same to answer the point which is formulated above in this judgment and answer the same against the appellant for the following reasons.

14. PW2 Arvind Kumar, who is the cousin brother of the deceased, accompanied him on the date of occurrence of the incident. At that point of time the appellant, along with other accused, surrounded them and it is stated that the appellant shot at the Kanpatti with revolver and other accused persons Binda Singh with

the rifle in the stomach of the deceased and Sudhir Singh with rifle in the left thigh. PW7 has stated in his evidence that the aforesaid accused persons fled away at that time Ashok Singh, Damodar Singh, Balram Singh and Shyam Sunder Singh were going to the bazaar who have witnessed the incident. His evidence is supported by the evidence of the other witness namely PW3, who has stated that he has seen Moti Singh and Jaddu Singh catching both hands of the deceased and Moti Singh ordered him to fire and the said witness also spoken about the firings by Awadhesh Singh and Nawal Singh as stated by the PW2. Further, he has supported his evidence that Awadhesh Singh pushed the dead body in the Payeen and also stated that Moti Singh and Jaddu Singh had caught hold of the informant also. PW5 also claimed to have seen Jaddu Singh and Moti Singh catching hands of the deceased and further he has stated that Umesh Singh, the appellant herein, had fired at the temple region of the deceased.

Further, he has given categorical statement stating that Binda, Sudhir, Awadhesh and Nawal also had fired at the deceased with their rifles. Therefore, the evidence of PW2 has been supported by PW3, PW5 and PW7. In so far as PW6 is concerned he has given a general statement that he has seen the several persons surrounding the deceased and killing the deceased with rifle and revolver. Therefore, the trial court was right in recording the finding on the charge against the appellant on proper appraisal of the evidence of the eye-witness PW2 supported by PW3 and PW5. The said finding of fact on the charge of Sections 302 read with section 34, IPC against this appellant and others was seriously examined by the High Court and concurred with the same and in view of the evidence of PW2 and PW9 the informant who was eye-witness and the I.O.'s evidence regarding his evidence treating the statement of PW2 as FIR is perfectly legal and valid. Therefore, reliance placed upon the decisions of this

Court referred to supra by the learned Senior Counsel in the course of his submission are not tenable in law as they are misplaced.

15. In so far as the medical evidence of the Doctor-PW8 read with the post mortem report upon which strong reliance is placed by the learned senior counsel for the appellant that death must have taken place prior to 30 to 36 hours as opined by the doctor that means it relates back to the early hours of 16.07.1996 but not at 3.30 p.m. as mentioned in the FIR. Once the time of death is drastically different from the one claimed by the prosecution its case is vitiated in law. In support of the above-said contention strong reliance placed upon the decisions of this Court on aforesaid cases are all misplaced as the same are contrary to the law laid down by this Court in **Abdul Sayeed v State of Madhya Pradesh**[12]. The relevant paragraphs are extracted hereunder:

[12] (2010) 10 SCC 259

"33. In *State of Haryana* v. *Bhagirath* it was held as follows: (SCC p. 101, para 15)

> "*15. The opinion given by a medical witness need not be the last word on the subject*. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts *it is open to the Judge to adopt the view which is more objective or probable*. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

34. Drawing on *Bhagirath case*, this Court has held that where the medical evidence is at variance with ocular evidence,

"it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant' ".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

> "*21*. … The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to

> be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

36. In *Solanki Chimanbhai Ukabhai* v. *State of Gujarat* this Court observed: (SCC p. 180, para 13)

> "*13*. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. *Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence*."

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

16. The learned State counsel has rightly urged that if the medical and ocular evidence is contrary then the ocular evidence must prevail. This aspect of the

matter has been elaborately discussed and the principle is laid down by this Court in the aforesaid decision. The findings and decision recorded and rendered by the learned Additional Sessions Judge after thorough discussion and on proper appreciation of evidence on record held that the doctor has opined that rigor mortis starts within 1 to 3 hours and vanishes after 36 hours. The said opinion of the medical officer PW8 regarding complete vanishing of rigor mortis from the dead body after 36 hours is medically not correct and this may be lack of his knowledge on the subject and he was liberal to the cross-examination by the defence lawyer. Further the learned Additional Sessions Judge has rightly referred to Medical Jurisprudence Digest written by B.L. Bansal Advocate, (1996 Edition at page 422), which clearly mentions that the rigor mortis persists from 12 to 24 hours and then passes off but it means that the faster the rigor mortis appears, the shorter time it

persists. Further, rightly the learned Additional Sessions Judge has referred to the case decided by this Court in **Boolin Hulder** v. **State**[13] wherein it has been held that at the same climate of India, rigor mortis may commence in an hour to two and begin to disappear within 18 to 24 hours. Therefore, the learned Additional Sessions Judge has held that broadly speaking the faster the rigor mortis appears, the shorter the time it persists and further has rightly made observation that rigor mortis will be present in some parts of legs of the dead body. According to the medical officer PW8 there is no question of the time of death of the deceased. It must have preceded more than 24 hours which is the maximum limit for disappearance of rigor mortis. The said view of the medical officer PW8 was found fault with by the learned Additional Sessions Judge and held that he has not correctly deposed in his cross-

[13] 1996 Crl.L.J. 513

examination regarding the time lapse of a dead person. He has extended the time for rigor mortis to be 30 to 36 hours and further rightly held that PW8 the medical officer, has deposed in his evidence contrary to the rule of medical jurisprudence. Therefore, the learned Additional Session Judge has rightly held in the impugned judgment the same cannot be the basis for the defence to acquit the accused. The claim by the appellant that the deceased has been killed in the early morning of 16.07.1996 and the allegation that the accused has been falsely implicated in the case has been rightly rejected by the learned Additional Sessions Judge and the same has been concurred with by the High Court by assigning the valid and cogent reasons in the impugned judgment. Rightly, the learned counsel appearing on behalf of the State has placed reliance upon the judgment of this Court referred to supra that between medical and ocular evidence the ocular evidence must be preferred to hold the charge

proved. This is the correct legal position as held by both the learned Additional Sessions Judge as well as the High Court after placing reliance upon the statement of evidence of PW2, PW3, PW5 and PW7. Therefore, we do not find any erroneous reasoning on this aspect of the matter. There is no substance in submissions of the learned senior counsel on the above aspect of the matter with reference to judgments of this Court referred to supra which decisions have absolutely no application to the facts situation of the case on hand.

17. In view of the concurrent findings by the High Court as well as the learned Additional Sessions Judge and an order of conviction and sentence imposed against the appellant herein is on the basis of legal evidence on record and on proper appreciation of the same. Therefore, the same is not erroneous in law as the finding is supported with valid and cogent reasons. For the foregoing reasons the impugned

judgment and order cannot be interfered with by this Court. Hence, the appeal is devoid of merit and accordingly it is dismissed.

……..J.
[CHANDRAMAULI KR. PRASAD]

……J.
[V. GOPALA GOWDA]

New Delhi,
March 22, 2013