(2007) 08 AHC CK 0184

Allahabad High Court

Case No: None

Pappu @ Ram Narayan Kashyap (In Jail)		APPELLANT
	Vs	
State of Uttar Pradesh		RESPONDENT

Date of Decision: Aug. 23, 2007

Acts Referred:

- Arms Act, 1959 - Section 25
- Evidence Act, 1872 - Section 134, 138, 146
- Penal Code, 1860 (IPC) - Section 302

Hon'ble Judges: Shiv Shanker, J; Amar Saran, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Amar Saran, J.

This criminal appeal has been preferred against the Judgment and order dated 17.1.2006 passed by the Additional Sessions Judge, Court No. 4, Shahjahanpur whereby the appellant Pappu alias Ram Narayan Kashyap has been convicted and sentenced to life imprisonment u/s 302 IPC and to three years rigorous imprisonment and a fine of Rs. 1,000/- u/s 25 of the Arms Act, in default of payment of fine the appellant will have to undergo one month rigorous imprisonment. Both the sentences were directed to run concurrently.

2. In a short compass the case of the prosecution was that the informant had purchased a land in Mohalla Khwaja Firoz in partnership with Manoj Kumar Kashyap, the brother of deceased. The informant had constructed a room in his part of the land and had let out the same to Manoj on a monthly rent of Rs. 200/-. Pappu wanted to purchase his house, but the informant had refused, for which Pappu was nursing a grievance against him. On 27.12.1999, the informant along with his brother Krishna Murari Gupta had gone to the house of Manoj to realise the rent

and when they were returning at about 9.30 P.M. at the crossing of Aman Public School Khwaja Firoz, Pappu approached them and asked the informant to sell his house to him. When he refused, then Pappu took out a country made pistol with his right hand and fired at him with the intention of killing him, which struck his brother, Krishna Murari Gupta, the deceased on the chest, who fell down there. A mercury light was burning at the spot. On the cries of the informant, Raghuraj and Shivraj Gupta arrived there. They saw the incident and the appellant running away. Then the informant took his brother Krishna Murari to the hospital with the aid of these persons. Krishna Murari died on the way. After leaving the dead body in the mortuary of the district hospital, the informant proceeded to the police station Ram Chandra Mission with a report, which had been scribed by his brother Anil Kumar Gupta and lodged it at the police station on 20.7.1999 at 10.30 P.M.

3. CC Jai Prakash, P.W. 5 prepared chik report (Ext. Ka. 7) on the basis of the written report and made entries in the General Diary (Ext. Ka 8) about the same. SI S.C. Sharma, P.W. 4, S.O., police station Ram Chandra Mission started investigation of the case. He recorded the statements of CC Jai Prakash and the informant on the same night. On 28.12.1999 he inspected the spot and collected an empty cartridge from there (Ext. 1) whose recovery memo (Ext. Ka. 2) was prepared by him. He also prepared the site plan (Ext. Ka 3). Later on the same day at 4.30 p.m. he arrested the accused-appellant and recovered the crime weapon, a 315 bore country made pistol and one cartridge from the accused whose recovery memo (Ext. Ka 4) was prepared. On 28.12.1999 the inquest (Ext. Ka. 15) on the dead body of the deceased, which was lying in the mortuary was conducted by SI B.K. Arya. Thereafter the dead body was sent for post-mortem along with a letter for the Chief Medical Superintendent, district Shahjahanpur along with photo nash, challan nash and sample seal, which have been prepared by SI B.K. Arya.

On 28.12.1999 at about 3.00 P.M., the post-mortem was conducted on the body of the deceased Krishna Murari at the district hospital Shahjahanpur by Dr. R.K. Chaturvedi, P.W. 6. The deceased had a thin built body, eyes were opened, mouth was closed with no emaciation. Rigor mortis was present over both upper and lower extremities.

4. The doctor found the following ante-mortem injuries:

1. Gun shot wound of entry 2 cm x 1.5 cm x cavity deep situated 1 cm away from left nipple in 2 O'' clock position. No tatooing or blackening noticed. Margins inverted.

Direction:- Left to right

2. Abrasion 3 cm x 1 cm on left side of face 1 cm away from left eye.

3. Abrasion 1 cm x 0.5 cm on the chin.

4. Abrasion 2 cm x 1 cm on front of right knee and 1 cm x 0.5 cm in front of left knee.

5. On internal examination the doctor found that the 4th left rib was fractured. Pleura, left lung, pericardium and heart were lacerated. Thoracic cavity contains two and a half litres of blood. Stomach contains 210 gms. pasty food material. The small intestine contains semi digested food material and gases. Large intestine contains faecal matter and gases. The bladder was empty. The cause of death was haemorrhage and shock as a result of ante-mortem gun shot injuries.

6. On the basis of the recovery of country made pistol and cartridge from the appellant, which have been brought in a sealed condition to the police station, a case was registered at case crime No. 163 of 1999 by Constable R.C. Sharma u/s 25 of the Arms Act against the appellant. This case was entered in the G.D. and was investigated by SI Rajendra Singh, P.W. 7, who submitted charge sheet against the appellant on 30.12.1999. He also obtained sanction (Ext. Ka 12) from the District Magistrate for prosecuting the appellant under the Arms Act on 15.1.2000. In the case u/s 302 IPC, SI Suresh Chandra Sharma, P.W. 4 submitted charge sheet (Ext. Ka. 6) on 19.1.2000 against the appellant after recording the statements of the witnesses.

7. The empty cartridge, live cartridge and recovered country made pistol were received by the Forensic Laboratory, Agra on 11.2.2000, which reached the concerned department on 11.5.2000. The said goods were in a sealed condition. In one sealed bundle an empty cartridge 315 bore, which was marked as EC-I was received. In a separate sealed bundle a country made pistol 315 bore and an empty cartridge 315 bore were received, which was marked as 1/2001 and EC-2. Three cartridges were fired from the country made pistol in the laboratory for examination which were marked as TC-1 to TC-3. The said cartridges were examined by a microscopic instrument. On the empty cartridge EC-1 there was a mark of firing pin and the breach of the weapon. On the test cartridges TC-1 to TC-3 also mark of firing of fire breach and chamber were available. On comparison, it was found that mark EC-I tallied with the marks on the test cartridges TC 1 to TC 3 and all of them appeared to have been fired from the same weapon. This was mentioned in the report prepared by the Assistant Director, Forensic Laboratory, Agra on 7.3.2001.

8. The charge was framed against the appellant on 11.8.2000 u/s 302 IPC. The appellant pleaded not guilty and claimed to be tried.

9. In support of its case the prosecution has examined three eyewitness Sada Shiv, P.W. 1, the informant and brother of the deceased, Raghuraj, P.W. 2 and Shivraj, P.W. 3, who have not, however, supported the prosecution case and turned hostile.

10. Seven other formal witnesses, viz. SI S.C. Sharma, P.W. 4, S.O of police station Ram Chandra Mission, CC Jai Prakash, P.W. 5, Dr. R.K. Chaturvedi, P.W. 6, who conducted the post-mortem examination, SI Rajendra Singh, P.W. 7, Constable Raghvendra Agnihotri, P.W. 8, Constable Ram Avtar, P.W. 9 and Constable Indrapal Singh have also been examined by the prosecution in this case.

11. SI S.C. Sharma, P.W. 4, who was posted as S.O. R.C. Mission conducted the investigation of the case as described herein-above.

12. C.C. Jai Prakash, P.W. 5 prepared the chik report and made relevant G.D. entries on 27.12.1999.

13. Dr. R.K. Chaturvedi, P.W. 6 conducted the post-mortem examination on the body of the deceased at 3.00 P.M. on 28.12.1999 at the district hospital, Shahjahanpur as described above.

14. SI Rajendra Singh, P.W. 7 investigated the case u/s 25 of the Arms as described above and submitted the charge sheet on 30.12.1999.

15. Constable Raghvendra Agnihotri, P.W. 8 took the dead body of the deceased Krishna Murari for post-mortem.

16. Constable Ram Avtar, P.W. 9 proved the handwriting of Rakesh Chandra Sharma, who registered the case as case crime No. 183 of 1999 u/s 25 of the Arms Act against the appellant and prepared the chik report (Ext. Ka-13) and the relevant G.D. entry (Ext. Ka-14).

17. Constable Indrapal Singh, P.W. 10 proved the handwriting of SI B.K. Arya, who conducted the inquest on the dead body of the deceased on 28.12.1999 (Ext. Ka15) and prepared the inquest and other papers for sending the dead body for post-mortem.

18. Sada Shiv, P.W. 1, the informant, whom the deceased was accompanying at the time of incident, has stated that he knew the accused from before. The informant Sada Shiv had purchased a piece of land in partnership with Manoj, who was the brother of the accused appellant Pappu. In his portion of land the informant had got a room constructed, which he had let out to Manoj at a rent of Rs. 200/- per month. The appellant was putting pressure on the informant to sell the land to him. As he had refused to comply with his request, this has resulted in the accused becoming inimical to him. About three years prior to his deposition in Court, he had gone in the night to collect rent from Manoj. At that time the deceased Krishna Murari was present with him. When they were returning at about 9.00 P.M., at Aman Public School Chauraha, the appellant again exerted pressure on the informant to execute a sale deed of the land in his favour. When he refused, then the appellant fired with a country made pistol, which struck the informant''s brother Krishna Murari and the appellant made good his escape. At that time Raghuraj and Shivraj arrived there and with their help, the informant had taken his brother to the hospital on a rickshaw, but he died on the way.

19. The two other eyewitnesses Raghuraj, P.W. 2 and Shivraj, P.W. 3 have turned completely hostile and denied being eyewitnesses of the incident. After being declared hostile and on being cross-examined by the ADGC, they even denied giving 161 Cr.P.C. statements to the police or having colluded with the accused. They admit

being the maternal cousin brothers of the informant and claimed that Sada Shiv, the informant had given their names as witnesses without their consent.

20. It was argued by Shri P.N. Misra, learned senior Counsel for the appellant that this case rests on the solitary testimony of the informant Sada Shiv, who was the brother of the deceased and, therefore, he is not an independent eyewitness. Also two witnesses Raghuraj and Shivraj, who were the cousin brothers of the deceased and the informant, have turned hostile and were not prepared to support the prosecution case. There is thus no corroboration of the testimony of the solitary eyewitness as the investigating officer has found no blood on the clothes of the deceased.

21. It was further argued that it was also surprising that if the accused was principally annoyed with the informant, why would he allow him to escape and shoot his brother, the deceased instead. So far as the Khokha, which was collected from the spot and the live cartridges and country made pistol which were recovered from the

22. I accused, when he was arrested on 28.12.1999 and were sent to ballistic expert on 11.2.200, there is absence of link evidence as to whether the said items were not allowed to be tampered with when they were kept in the police station or sent to the ballistic expert.

23. It was also submitted that there was no reason for the informant to have gone on 27.12.1999 at 9.00 in the night, which was the end of the month for collecting the rent from the appellant''s brother Manoj. Also as there is evidence to suggest that Manoj used to work near the place where the informant had a business, and there was little reason for him not to have demanded the rent from him at that place and rather to have gone to the house of Manoj in the night for the purpose of collecting the rent.

24. It was further argued that the Khokha was lying from before is inconsistent with the eyewitness account as there is no allegation that the appellant re-loaded the country made pistol. Another improbable circumstance pointed out by the learned Counsel was that the informant admits to have left the dead body at the hospital and to have gone to the place of his uncle to sleep in the night there.

25. It is also pointed out that although the FIR was said to have been in existence, yet in the inquest the name of the informant Sada Shiv was not mentioned in the relevant column, but the name of ward boy of the hospital was mentioned therein. It was thus a case of blind murder in the night time and no one has seen the incident and the accused appears to have been implicated due to enmity.

26. On the other hand learned Additional Government Advocate contends that a very natural description of the incident has been mentioned in the FIR and in the statement of the informant. It is a well known fact these days that witnesses are

reluctant to give evidence in court against an accused for fear of risk to their own life. Hence, it was not very material that two cousin brothers of the informant and the deceased who were named in the FIR as witnesses have turned hostile. There was little reason to disbelieve the testimony of Sada Shiv, the informant.

27. The evidence of the informant, Sada Shiv is corroborated by the fact that the Khokha which was found at the spot tallied with the test cartridges, which were fired from the weapon, which was recovered from the accused and there is no challenge to this point in the cross-examination of the witnesses. Moreover, no explanation was sought from the investigating officer as to why he sent the Khokha, cartridges and country made pistol to the ballistic expert a little later, nor was any suggestion given to the investigating officer Shri S.C. Sharma or to any other witnesses that there was tampering of the Khokha, cartridges or country made pistol, which were sent to the ballistic expert.

28. It is immaterial whether the shot which was fired at the informant, struck his brother because the deceased Krishna Murari, who was walking by his side, and the nature of the crime would be the same. Non-mentioning whether the accused had re-filled his weapon or ran away straight after the incident is of no consequence.

29. It is further contended that even if the investigation could have been better if some link evidence of keeping of sealed Khokha, cartridges and country made pistol at the police station, and their dispatch to the Malkhana and ballistic expert and if an attempt was made to collect the bloodstained clothes of the informant, but for some minor lapses on the part of the investigating officer the entire prosecution case cannot be discarded.

30. Finally and most importantly, it was contended that there was absolutely no reason for the informant to have implicated the appellant and not his brother for this crime.

31. On examination of the rival contention of the parties, we are of the opinion that there is no requirement in law that no conviction can be recorded on the testimony of a single eyewitness and that as held in Amar Singh Vs. Balwinder Singh and Others, and a catena of other decisions Josephy v. State of Kerala 2003 SCC (Cri) 356, Kartik Malhar Vs. State of Bihar, et al of the Apex Court and this Court that in view of Section 134 of the Evidence Act no particular number of witnesses are required in any case for the proof of any fact and what is material is the quality and not the quantity of the evidence adduced. If the testimony of the witness is cogent, reliable and in tune with probabilities and inspires implicit confidence, there is no reason to discard the said testimony only it is the evidence of a single witness and because other witnesses have not come forward to support the prosecution case or have turned hostile. It would be apt here to recall the sagacious words of the Apex Court in Appabhai and Another Vs. State of Gujarat,

11. In the light of these principles, we may now consider the first contention urged by the learned Counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused.
(Emphasis added)

In State of Rajasthan Vs. Bhawani and Another, it has been wisely observed that simply because some witnesses have not supported the prosecution case and have turned hostile is no ground for casting doubt on the unimpeachable testimony of the witnesses who remain steadfast to their version. The following lines from the aforesaid law report are pertinent: The fact that the witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the witness, no doubt furnishes no justification for rejecting en bloc the evidence of the witness. But the court has at least to be aware that prima facie, a witness who makes different statements at different times has no regard for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. The court should be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. The High Court has accepted the testimony of the hostile witnesses as gospel truth for throwing overboard the prosecution case which had been fully established by the testimony of several eyewitnesses, which was of unimpeachable character. The approach of the High Court in dealing with the case, to say the least, is wholly fallacious.
32. Furthermore, it is important for the Court not to simply act as a tape recorder and to endeavour to reach to the bottom of the case and simply because one or the two witnesses are turning hostile for any consideration, the Court must become more cautious and circumspect and seek to find out the truth of the case because Courts are not only meant for recording findings of acquittal engineered by

unscrupulous accused, who succeed in winning over witnesses by money or muscle power, but the Courts are also concerned with social defence and for upholding the majesty of the law and also for ensuring that the guilty do not escape unpunished and that justice is provided even to the victim. The following words in paragrapsh 58 and 59 in Zahira Habibullah H. Sheikh v. State of Gujarat AIR 2004 SC 3114 which take note of this problem are especially apt:

58. The Courts at the expense of repetition we may state, exist for doing justice to the persons who are affected. The Trial/First Appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The Court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where tie role of prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock Fight and making a mockery of the criminal justice administration itself.

As pithily stated in Jennison v. Backer 1972 (1) All ER 1006. "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope". Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies. Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. See Smt. Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and Another,

(Emphasis added)

The following lines from paragraphs 13 to 16 of State of U.P. Vs. Anil Singh, are also to the point: "13. Of late this Court has been receiving a large number of appeals against acquittals and in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or

embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. The Privy Council had an occasion to observe this. In Bankim Chander v. Matagini 24 Cal WN 626 : AIR 1919 PC 157, the Privy Council had this to say (at P. 628)(of Cal WN) : (at p. 158 of AIR):

That in Indian litigation it is not safe to assume that a case must be false if some of the evidence in support of it appears to be doubtful or is clearly untrue, since there is, on some occasions, a tendency amongst litigants to back up a good case by false or exaggerated evidence.

14. In Abdul Gani and Others Vs. State of Madhya Pradesh, Mahajan, J., speaking for this Court deprecated the tendency of courts to take an easy course of holding the evidence discrepant and discarding the whole case as untrue. The learned Judge said that the Court should make an effort to disengage the truth from falsehood and to sift the grain from the chaff.

15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other Both are public duties which the Judge has to perform.

(Emphasis added)

33. Likewise, simply because a witness is a relation, is no ground for discarding his testimony as there is no reason for the related witness to spare the real offender of the crime and to falsely nominate another accused. Suchha Singh v. State of Punjab (2003) SCC 647; Ruli Ram and Another Vs. State of Haryana,

34. Especially noteworthy are the following observations from paragraph 26 in Daleep Singh v. State of Punjab AIR 1953 SC 634:

A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is

often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

(Emphasis added)

35. In our view the version given by the witness Sada Shiv, the informant seems very natural, no reason comes to mind why this witness would invent such a story that he had purchased a piece of land along with Manoj, the brother of the appellant and that in his portion of the land he had built a room, which he had given on rent to Manoj. On the fateful night at about 9.00 p.m. he had gone to collect the rent from Manoj. After meeting Manoj, who had not paid the rent they were returning and at a short distance of hardly 25-30 paces from Manoj''s house near Aman Public School, his brother, the appellant, met them and began pressurizing the informant to sell his part of the land to him, but Sada Shiv again refused to accede to his request. Thereupon the appellant fired a shot, which struck his brother Krishna Murari, who was walking with him. There was no reason at all for the informant to have invented such a story, if the incident had not occurred in this manner.

36. We do not see any merit in the argument of Shri Misra that why would the informant collect the rent at the end of the month on 27.12.1999 and why would he go in the night when he could have demanded and obtained the rent from Manoj at the Bazar, where Manoj was working in front of his shop. No such question was put to this witness as to why he had gene at the end of the month to collect rent from Manoj and why he did not demand the said rent from Manoj at his shop in the Bazar itself. There could be many reasons for the informant not to demand the rent from Manoj as the informant may have been disinclined to embarrass Manoj at his place of work for not paying the rent in time or he may have been busy. At any rate as it is well settled that unless the suggestion which is sought to be used against the witness is put to him in cross-examination, no benefit can be derived by the other side. In this connection it has clearly been held in State of Uttar Pradesh Vs. Nahar Singh (Dead) and Others, that without questioning a witness specifically about an omission or a contradiction or a discrepancy in his testimony the accused cannot take any advantage of such a contradiction. The following passage from paragraphs 13 and 14 of State of Uttar Pradesh Vs. Nahar Singh (Dead) and Others, may be usefully perused:

13. It may be noted here that that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by

allowing a witness to be questioned:

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell. L.C. in Browne v. Dunn (1893) 6 The Reports 67, clearly elucidates the principle underlying those provisions. It reads thus:

I cannot help saving, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to co if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords. I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professions practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

(Emphasis added)

37. The contention of Shri Misra that there is no explanation as to why the appellant has spared his real target (the informant Sada Shiv) who had refused to sell his property and and had fired at his brother is not acceptable. The version of the informant in the FIR and his evidence was that he was going along with his brother, the deceased when the appellant accosted them and asked him to sell his land and on his refusal he fired at them, which struck his brother and he has even clarified in his cross-examination that he and his brother were walking side by side and there was no gap between them, in such a situation not much capital can be made of the fact that the shot struck the deceased and not the informant.

38. It is also of no consequence that the witnesses have not mentioned that the appellant had sought to re-load the country made pistol as it was argued by Shri Misra that the empty cartridge would be lying on the site only if the appellant had re-loaded his weapon. Perhaps the appellant may have tried to re-load his weapon that might not have been noticed by the witness as it was an incident which has taken place in the night although a mercury bulb was said to be burning at the spot. But in our view in any case nothing turns on such minor omissions.

39. Again we find no substance in the contention of Shri Mishra why he did not fire a second shot at the informant after the first shot had struck the deceased, the brother of the informant. The appellant could have lost heart after firing the first shot which struck the deceased and to have bolted from the spot. How the mind of a criminal works on the spur of the moment, cannot be speculated upon in the cold and calm atmosphere of the Court, which seeks to examine an incident in retrospect.

40. We think, this is a very significant circumstance that the marking of the empty cartridge, which was picked up from the place of incident when the spot was inspected in the next morning tallied with the cartridges fired from the country made pistol, which was recovered from the accused when he was arrested as per the expert report dated 7.3.2001 (Ext. Ka. 20).

41. Significantly, no question was even asked from the witness S.C. Sharma, P.W. 4, the investigating officer as to why the material goods which included empty cartridge and country made pistol and recovered cartridges were sent to the forensic laboratory, which reached the forensic laboratory, Lucknow on 11.2.2000 and which was forwarded to the Joint Director, Forensic Expert on 11.5.2000 and the conclusion has been reached by the forensic expert that the disputed empty cartridge (EC-I) had been fired from the seized country made pistol.

42. There is also no suggestion of tampering the said property which had been sealed as per the recovery memo (Ext. Ka 2 to 4) Hence in the absence of any suggestion of tampering and queries in the cross-examination about any omission or contradictions which are sought to be pointed out here, as required by State of U.P. v. Nahar Singh (supra) we think that non-production of any link evidence in this regard is not fatal for the prosecution case.

43. In support of his case learned Counsel for the appellant has placed reliance upon the decisions of Hon''ble Apex Court in Supramanian v. State of Kerala, (1996) 7 SCC 77 and Sohan and Anr. v. State of Haryana 2001 Cri.L.J. 1707, wherein the evidence of solitary witness was not found to be sufficient are not very relevant to the fact of this case and are clearly distinguishable.

44. Thus in Sohan Lal (Supra) the sole eyewitness was not only interested being a cousin of the deceased, but also inimical to the accused. In the present case no significant enmity of the informant and the accused has been pointed out. Also that was a case where there was no corroboration of the testimony of the solitary eyewitness whereas in the present case testimony of informant Sada Shiv has been corroborated by the fact that the forensic expert found that the empty cartridge which had been recovered from the spot had actually been fired by the country made pistol which was recovered from the accused after the incident.

45. Similarly the case of Supramanian (Supra) is also distinguishable because in that case there was political rivalry and criminal cases pending between the parties,

which also showed long drawn out enmity between the parties. The FIR was lodged by a person who was not an eyewitness and it was only after nine days that the police had come to learn about the sole eyewitness. In this case the informant is the principal eyewitness, who immediately after rushing to the hospital along with the deceased, then proceeded to the police station and lodged the report within an hour at 10.50 P.M. on the same day.

46. As we have mentioned above that the accused cannot derive any benefit from the circumstance about which the witness is not sought to give any explanation in his cross-examination.

47. So far as the clothes of the informant being not blood-soaked or not being taken by the investigating officer are concerned we do not know in what manner the informant held the deceased, who was then injured and how close he was to the deceased at that moment as according to the version of the informant Raghuraj, P.W. 2 and Shivraj, P.W. 3 were also holding the deceased who was carried on a Rickshaw to the hospital. Moreover, the investigating officer was not asked why he did not take the bloodstained clothes of the informant.

48. It is now well settled that from mere flaws in investigation, the eyewitness account and the prosecution version as a whole cannot be discarded, if otherwise on a careful and circumspect examination of the evidence, it is found to be basically reliable and believable Ambika Prasad v. Delhi Administration AIR 2000 SC 718, Baleshwar Mandal v. State of Bihar 1997 JIC 1030 SC , Dharmendrasinh @ Mansing Ratansinh Vs. State of Gujarat, ; Dhananjay Singh v. State of Punjab AIR 2004 SC 1929 and Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, Almost directly on the point we find the following observations in Baboolal v. State of U.P., (2000) 10 SCC 388

Learned Counsel next contended that if the injured person had been carried in a rickshaw as stated by the witnesses the clothes of the carrier would have been soaked in blood. We do agree that there is such a possibility. Want of evidence that the clothes of those persons contained blood does not mean that the injured would not have been carried from the place of occurrence to the hospital. That may be a lapse of the investigating officer to bring it to the Court. But that lapse is not sufficient to offset the creditability of the testimony of the eyewitnesses among whom included the injured Akbar Shah (PW 2).

49. The following words from Paras Yadav and others Vs. The State of Bihar, may be usefully recalled:

In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. For this''purpose, it would be worthwhile to quote the following observations of this

Court from the case of Ram Bihari Yadav Vs. State of Bihar and Others,

In such cases, the story of the prosecution will havo to be examined dehors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice.

50. Also we think, there is no substance in the contention of the learned Counsel as to why the informant had gone and slept at the house of his uncle Ram Vilas after the incident. He could have been extremely shocked when the fire was attempted on him and which struck his brother and there was little reason for him to have remained at the hospital for whole night once his brother had already been declared dead. The informant mentioned that as his two other brothers Ashok and Anil reached the hospital by motorcycle as it was an incident which had taken place in Shahjahanpur town. It was not necessary for him in such circumstances to have remained in the hospital, and the memo was sent in the next morning by the sweeper and the inquest report mentioned the name of sweeper of the hospital Ram Chandra as the informant who had given information of the death at about 6.45 A.M. at the police station. For the same reason that the informant may have left the police station after lodging the report it is not of much consequence that the informant admits that someone else like his uncle may have received the copy of the chik report.

51. There was no reason for suggesting that the FIR was not in existence till 6.45 a.m., the next morning because if an unknown dead body had been brought to the hospital, the full name of the deceased, his age, and parentage would all not have been mentioned in the inquest and other documents. Moreover, there was no suggestion even to the investigating officer about mention of the name of the sweeper and not of the informant for suggesting that the FIR was not in existence and when the information was communicated to the police station the same had been ante-timed.

52. The following observations of the Apex Court in a case where the situation was somewhat similar are pertinent: Hem Raj, etc. Vs. Raja Ram and Others, :

9. Another reason given by the High Court to acquit the accused is that the Fl statement must not have been given at the time and place stated therein. Two reasons have been attributed to this assumption. PW 1 deposed that he left the hospital at Sri Ganganagar and came to Ghamudwali Police Station and gave the Fl statement at about 9.00 p.m. This, according to the High Court is highly improbable, PW 1 being a close relative would not have left the dead body in the hospital, whereas PW 1 deposed that many other relatives had come to the hospital, thereafter, he left for the police station to give the Fl statement. The Fl statement reached the court on the next day at 1.30 p.m. This also was adversely commented

upon by the High Court. We do not think that there was any delay either in recording the Fl statement or sending the challan to the court. The absence of the name of the accused in the inquest report was also adversely commented upon by the High Court and it was stated that the Fl statement must have been prepared thereafter. In the inquest report, there is no specific column to mention the names of the accused and that may be the reason that names of the accused are not mentioned and the FIR number is not given. It is pertinent to note that neither the investigating officer nor the officer who conducted the inquest was questioned on this aspect.

53. Finally, there is considerable substance in the argument of learned Additional Government Advocate that there is absolutely no reason in this case for the false implication of the appellant. If the accused had been falsely implicated and the appellant had absolutely nothing to do with the incident and he had not as a matter of fact tried to compel the informant to execute the sale deed of his portion of the property in favour of the appellant, then the informant could have easily nominated the appellant''s brother Manoj, who was in fact in possession of the said property, and the property was also in the name of Manoj. Manoj was creating a problem in not paying the rent for which the informant had gone to his place, on the fateful evening but ho had not received the rent. Yet the informant is absolutely clear that Manoj had nothing to do with the offence and he only nominates the appellant (who is Manoj''s brother) as the person, who had fired the fatal shot, which struck the informant''s brother Krishna Murari when they were going back together after failing to collect the rent from Manoj. This is another circumstance which lends assurance to the testimony of the informant. He nominates only the appellant for this crime because he does not appear to be interested in falsely implicating the wrong person and because only Pappu, the appellant appears to be the author of the fatal shot. It is also not suggested that the appellant had a long criminal history or other enemies who may have committed his murder.

54. In this regard, it has been held in State of Uttar Pradesh Vs. Ram Sewak and Others, that there is no reason for assigning the main role or falsely implicating a particular accused only because the accused had contested a teachers'' election against the informant when he was not even the arch enemy or leader of the opposite fraction.

55. In Abdul Razaq Vs. Nanhey and Others, the same principle has been re-affirmed that there is little reason for a witness to spare the real assailant and to implicate another. Especially when the witnesses are not interested and when there appears no motive for false implication, there should be strong grounds to disbelieve the testimony of such a witness.

56. For all these reasons, we think that the trial court has rightly found the appellant guilty for the crime and sentenced him as above. The appeal preferred by the appellant fails and is dismissed.

57. The appellant is on bail. His bail bond is cancelled and sureties are discharged. He shall be taken into custody forthwith to serve out the sentence awarded to him by the trial court.

58. Office is directed to send a copy of this order to the Chief Judicial Magistrate, Shahjahanpur within a week for compliance and the C.J.M shall report compliance within six weeks thereafter.