

Citation:- 2013(82) ACC 110

Abhilakh Singh versus State of U.P.

Case :- CRIMINAL APPEAL U/S 374 CR.P.C. No. 668 of 2002

The deposition of complainant taken down eight years after the incident, complainant not literate and cannot exactly remember the minute details of his written report.

Delay in sending report to the magistrate is insignificant if the investigation of the crime had been undertaken by the police soon after registration of the case.

Discharge of the witness who was 3,1/2 years old, by the prosecutor, held right, because of his tender age, he could not have remembered the fine details of the incident, which had taken place more than eight years ago.

Provisions of S. 134 Evidence Act do not require any particular number of witnesses to be examined in criminal trial in proof of a given fact. It is the quality of the evidence and not its quantity which is required to be judged by the Court to place reliance on statement of a witness.

Investigating officer not examined despite all efforts by the court, due to his retirement, - For non examination of investigating officer, accused should not be acquitted. (Para-14, 15, 20, 21,27)

Abhilakh Singh s/o Mahendra Singh

R/o Disauliganj, P.S. Bisauli,
District BudaunAppellant

versus

State of U.P. Respondent

Counsel for appellants : Sri Praveen Kumar Srivastava

Counsel for respondent : Sri R. Y. Pandey, AGA

Hon'ble Rakesh Tiwari, J.

Hon'ble Anil Kumar Sharma, J.

(By Justice Anil Kumar Sharma)

Challenge in this appeal is to the judgment and order dated 21.02.2002 passed by Additional Sessions Judge, Court No.2, Budaun in S.T. No. 6 of 1992, under sections 302/34 and 307/34 IPC, P.S. Bisauli, District Budaun, whereby the appellant has been convicted under the above offences and sentenced to imprisonment for life under each section. The sentences were to run concurrently.

2. Succinctly stated the prosecution story is that on 17.09.1991 at 7.30 P.M. Atishvir Singh s/o Tejpal Singh, r/o village Disauliganj, P.S. Bisauli, District Budaun submitted a written report in P. S. Bisauli stating that today at 5.30 P.M. as soon as his brother Virbhan Singh along with his son Saurabh turned towards his Gali, Abhilakh Singh son of Mahendra Singh armed with gun, Harendra Singh brother-in-law (Sala) of Chandra Bhan Singh resident of village Sartalkhera, P. S. Chandausi along with two others armed with country made pistols of 315 bore caught Virbhan Singh and dragged him towards his house, where Abhilakh Singh and Harendra Singh fired shots from close range at Virbhan Singh who instantaneously died on the spot. On hue and cry raised by Virbhan Singh and Saurabh Singh the complainant and his father, ran from their house and from other side Vijay Bahadur Singh, Dhirpal Singh and Narendra Pal Singh desisted Abhilakh Singh not to do so but he and Harendra Singh fired shots on him. Abhilakh Singh challenged to kill the complainant whereupon Harendra Singh and two other companions chased and fired three shots on them but they took shelter by the side of a wall and could manage their escape. After the incident Abhilakh Singh along with three companions went towards western side. The report further stated that up till 3-4 years there was land dispute/litigation between complainant and Abhilakh Singh but due to the intervention of relatives it was compromised. About four months ago Ahabaran Singh brother of Abhilakh Singh was killed and in this connection Dharendra Singh and others are in jail. Abhilakh Singh suspected that Virbhan Singh had conspired in the elimination of Ahabaran Singh. He made complaint to this effect to Ram Pal Singh, r/o Chandoi, P.S. Islam Nagar who was instrumental in the compromise between Abhilakh Singh and Virbhan Singh.

3. On the basis of this report case at crime no. 424/91, under section 302, 307 IPC was registered, investigation whereof was entrusted to S.I. Ram Lakhnan Pandey. The Investigating Officer reached at the spot and collected samples of plain and blood stained earth and also seized two empty cartridges of 315

bore, one cartridge of 12 bore and missed cartridge of 12 bore from the spot through memo. He interrogated the witnesses and prepared site plan. The inquest on the cadaver of the deceased was prepared at 9.30 P.M. on 17.09.1991 and it was sent for autopsy in sealed cover along with usual papers. Dr. V.K. Mishra conducted the post mortem examination of the deceased on 18.09.1991 at 3.30 P.M. He found that 35-years old deceased was having thin built body. Rigor mortis had passed off from upper limb but was present in lower extremities. Post mortem staining was present in dependent parts (on dorsal aspect of body). Left upper arm was plastered. On cutting the plaster, shaft of left humerus was found fractured in the middle with callous formation showing that it was about 3-4 weeks' old fracture. The doctor found the following ante mortem injuries on the person of the deceased:

1. Large lacerated wound of the size 13 cm x 8 cm on left side of skull extending from lateral part of left eye to left ear to occipital area of skull and parietal area. Wound is cavity deep. All the bones involved in the area are fractured into multiple small fragments and brain matter have almost washed out of the wound leaving skull cavity empty. Margins of the wound are inverted. Blackening and tattooing present on left side of face and all round the wound. Direction of found is down wards to the right side.

2. Fire arm wound of entrance with blackening inverted margins of the size 3 cm x 2 cm oval in shape (above-downwards) x bone deep of medial aspect and middle part of right arm 11 cm below (sic). Direction of the wound is almost parallel to the wound (horizontal).

In internal examination doctor found that right occipital, perinatal, frontal and temporal bone were fractured. Brain matter flushed out of the wound and very little part was remaining. One cork piece, wadding piece and multiple small pellets were lodged near right mandible and from base of the skull on right half were recovered. Total 38-small pellets were recovered (caused by injury no.1). Two wadding piece and large pellets eleven in number lodged under the skull on outer aspect of right arm opposite to injury no.2 were also recovered. In the opinion of the doctor the deceased suffered death due to shock and haemorrhage as a result of ante mortem fire arm injury about one day before.

4. The Investigating Officer after completing the other investigatory formalities submitted charge sheet against appellant and other named accused Harendra Singh.

5. Charge for the offence punishable under section 302/34, 307/34 IPC were framed against the accused persons who pleaded not guilty and claimed to be tried.

6. In order to prove its case the prosecution examined complainant Atish Veer Singh as PW-1, Vijai Bahadur Singh PW-2, Dr. V. K. Mishra PW-3 and retired constable Jagdish Prasad PW-4 but did not examine the Investigating Officer during trial. The evidence of the prosecution was then closed but later on the Presiding Officer summoned the Investigating Officer as a court witness. However, due to the inaction of the police/prosecution his attendance could not be procured.

7. During trial co-accused Harendra Singh died so case against him stood abated.

8. Accused appellant Abhilakh Singh in his statement under section 313 Cr.P.C. denied the entire prosecution story and claiming false implication has stated that his brother Ahabaran Singh was killed by the family members of the complainant and in order to pressurize them in the aforesaid case, he had been falsely implicated. In defence Rama Shankar Verma, Librarian of Munna Lal Inter College, Wazirganj as DW-1 and Yogendra Pal Singh DW-2 have been examined.

9. The trial court after hearing the parties' counsel found the accused-appellant guilty for the offence under section 302/34 and 307/34 IPC and had sentenced him as noted earlier.

10. We have heard learned counsel for the parties at length and perused the record.

11. Learned counsel for the appellant castigating the findings of the trial Court and conviction of the appellant has argued before us:

i) that the FIR is ante-timed and is highly doubtful;

ii) that there was no motive for the accused to eliminate the deceased;

iii) that no independent witness has been examined and only interested and partisan witnesses have been produced by the prosecution so no reliance should be placed on their testimony;

iv) that the place of occurrence and manner of assault is doubtful;

v) that there are material contradictions in the testimony of PW-1 and PW-2, which make their deposition doubtful;

vi) that the investigating officer has not been examined in the case, so the accused has been materially prejudiced;

vii) that medical evidence is inconsistent with FIR and alleged eye witness account of the incident.

12. Oppugnation the above arguments, learned AGA has contended that the FIR is prompt and has been lodged within two hours of the incident; that there was strong motive for the accused to kill the deceased

as the accused-appellant's brother Ahabaran Singh was murdered a few months before the incident and the accused suspected hand of the deceased in it; that no doubt both the eye witnesses are closely related with the deceased, but the accused is also their collateral, so they would not leave the real culprit and falsely depose against the accused-appellant; that in friction bound village no independent witness would muster courage to depose against the accused who have killed the deceased in dare devil manner in the broad day light; that the testimony of PW-1 and PW-2 were recorded in the trial Court about eight years after the incident, so contradictions are bound to occur but the broad spectrum of their testimony prove beyond doubt that the deceased was killed by the accused-appellant along with his other associates; that in the case of indiscriminate firing the other persons present on the spot cannot say with certainty as to whose fire-arm shot had caused injuries to the deceased and that non-examination of the investigating officer is not fatal for the prosecution when its case is well proved through the testimony of eye witnesses coupled with medical evidence.

13. The alleged incident took place in village Disauliganj within the circle of P. S. Bisauli, District Budaun on 17.9.1991 at about 5.30 p.m. and its written report was submitted by complainant Atishvir Singh at 7.30 p.m. the same day. The distance between village Disauliganj and P. S. Bisauli, as per check report is about 8 Kilometres. Accused-appellant along with co-accused Harendra Singh r/o village Sartalkhera P.S. Chandausi District Moradabad is named in the written report apart from two other unknown accused persons. In the incident Vir Bhan Singh, brother of the complainant suffered instantaneous death on the spot and his inquest was performed on 17.9.1991 at 9.30 p.m. The complainant has himself written his written report, which had been proved as Ex. Ka-1. He has not been cross-examined as to when and where he wrote the written report, when he left for the police station and reached there? Thus prima facie, the report of the crime has been promptly given to the police. The importance of prompt FIR in criminal trial, particularly murder case is well known as it rules out the possibilities of concoction and embellishment on account of consultations and deliberations and gives first-hand uncoloured version of the incident. Such FIR can safely be considered and relied upon during trial in the case.

14. Learned counsel has raised doubt about the authenticity of the written report and has argued that from the facts discovered in the cross-examination of PW-1 it appears that prior to Ex. Ka-1, the complainant wrote another report because he has stated about various facts which he noted down in his report, but they do not find place therein which means that Ex. Ka-1 is not the first report of the complainant. We are not impressed with this argument. On perusal of the record, we find that the examination-in-chief of the complainant was recorded in the trial Court on 10.5.1999 and he was cross-examined on 18.8.1999, 15.9.1999 and 18.12.1999. The date of incident is 17.9.1991. Thus the deposition of the complainant was taken down in the trial Court about eight years after the incident. The complainant is not much literate. He has stated that he is High School. However, through the testimony of DW-1, the defence has tried to show that the complainant has passed Intermediate examination in the year-1972. Whether the complainant is not stating truth on this score is not significant, because it does not discredit his testimony about the manner in which the incident had taken place and the roles of the accused therein. Even a literate person cannot exactly remember the minutest details of his written report after such long time. The details are such which do not touch or adversely affect the main substratum of the incident. He had been asked whether he had written the parentage and residence of witnesses or the details of the incident which had come in cross-examination. It is trite law the FIR is not the encyclopaedia of the prosecution case. The complainant is not required to state all the facts in his written report which had been asked from him during cross-examination. The purpose of lodging FIR of the incident is to ignite investigation by the police if commission of cognizable offence is made out from its contents. On perusal of the instant written report of the complainant, we find that it contains all the vitals required for the police to initiate investigation of the crime. In the case of State of U. P. Vs. Munesh, (2012) 9 SCC 742, all details as spoken to by PWs 1 to 3 were not mentioned in FIR, yet the Apex Court held that the trial Court rightly observed that FIR need not be encyclopaedic. It is an intimation of occurrence of an incident and need not contain all facts related to it.

15. The Apex Court in the case of Jai Prakash Singh Vs. State of Bihar, (2012) 4 SCC 379 highlighting the importance of prompt FIR has observed that object of insisting upon prompt lodging of FIR is to obtain information regarding circumstances in which crime was committed, names of actual culprits, part played by them as well as names of eyewitnesses. Delayed FIR loses advantage of spontaneity and possibility of coloured version, exaggerated account or concocted story which may be result of consultations/deliberations. In this case also, like our case, the FIR was lodged within two hours of occurrence, which lends assurance of its veracity.

16. Learned counsel for the appellant then submitted that check report reached the office of the Chief Judicial Magistrate on 20.9.1991 i. e. three days after its alleged registration, therefore, it is ante-timed. In support of his contention he has placed reliance on the case of Shiv Lal and another Vs. State of Chhatisgarh (2012) CCSC 710 (SC). In this case copy of FIR was not sent to the Magistrate at all as required u/s 157(1), Cr.P.C. On these facts, it was observed that in absence of any explanation furnished by the prosecution to that effect, would definitely cast shadow on the case of the prosecution. It has further been noted that 'However, it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright'.

17. In the instant case, the check report Ex. Ka-3 shows that it reached the office of CJM on 20.9.1991. However, on perusal of inquest report Ex. Ka-5, we find that the inquest began at 9.30 p.m. on 17.9.1991 and was completed by 10.30 p.m. As per Form no. 13 (Ex. Ka-6), the dead body of the deceased and related papers reached the Police Lines, Budaun at 6.30 a.m. on 18.9.1991, the distance of police headquarters from P.S. Bisauli is 40 Kilometres. Along with the inquest report the copy of check report was also sent. Thus, the external checks available on record do also show that the FIR was registered at P. S. Bisauli at 7.30 p.m. on 17.9.1991 and the investigation of the crime has begun soon thereafter. Some delay in receipt of FIR in the office of the Magistrate is insignificant, if the investigation of the crime had been undertaken by the police soon after registration of the case and inquest on the cadaver of the deceased was performed promptly. Thus, we find that the instant FIR is not ante-timed at all.

18. Learned counsel for the appellant next argued that there was no motive for the accused to eliminate the deceased. This argument too has no legs to stand. In defence DW-2 Yogendra Pal was examined to prove the pedigree of both the parties, which is as under:

Phool Singh

|||
Rustam Singh Diwan Singh Baldeo Singh
Angan Singh Pratap Singh

Ramvir Mahavir |||

Lakhan Bahadur Meharban
|| Dhirendra Dinesh Singh Singh
Tejpal (Died) Narendra _____
Singh Anil Dhanvir _____

Kumar Singh |||
||| Shivraj Arjun Singh
Aishvir Virbhan Jagbhan _____ Singh
Singh (Deceased) Singh Jagannath Laxman Ram (killed)
PW-1 Singh Singh

|||||
Mahendra Pal Yogendra Pal Om Pal Durg Pal Rishipal
DW-2 _____|_____

|||||
||| Dinesh Dhirpal Satya Satendra
Abhilakh Ahabaran Singh Chander Pal Bhan Singh
Singh (Killed 4-months before Bhan
(Accused) the incident)

Yogendra Pal DW-2 aged about 60-years has narrated the above pedigree of the parties saying that the accused and complainant are his khandanis (collaterals). According to him the pedigree given by him is based on the information given by the ancestors and perusal of documents pertaining to ancestral property. PW-1 being much younger in age than DW-2 could not state much about it. This pedigree could not be controverted by the prosecution from the cross-examination of this witness. It shows that the complainant and accused had common ancestor Phool Singh. The complainant in his written report has stated about old litigation with the family of the accused, which was compromised with the intervention of the relatives about 3-4 years back. He has further stated that about four months ago Ahabaran Singh

brother of accused Abhilakh Singh was murdered in which co-villagers Dhirendra Singh and others are in jail and the accused suspected conspiracy of Virbhan Singh in this incident. It is significant to note here that accused Abhilakh Singh in his statement u/s 313 Cr. P. C. has also stated that there was litigation between their families and his brother Ahabaran Singh was killed by Rajvir Singh and others, cousins of complainant. Further we find from record that co-accused Harendra Singh had also been killed during trial of the case. Thus, the immediate motive for the instant incident was the murder of Ahabaran Singh in which the accused suspected hand of deceased and family members of the complainant who were alleged to be involved, therefore, the said motive for the accused-appellant to kill the deceased stands fully proved.

19. Much emphasis had been laid by the learned counsel for the appellant that no independent witness had been examined by the prosecution and only interested and partisan witnesses have been produced so no reliance should be placed on their testimony. We have already seen that both the witnesses of fact examined in this case are closely related with each other and the deceased as well. Admittedly Vijay Bahadur Singh PW-2 is brother-in-law (sala) of complainant. However, it is not the law that the testimony of a related or interested witness is liable to be rejected on the ground of their relationship with the deceased or the victim. The only precaution in accepting their testimony is that their deposition would require close scrutiny with care and caution. In criminal trial the Courts are required to see whether on basis of the evidence available on record the accused can be held guilty or not? There would hardly be any case which does not suffer from some kind of infirmity. What ought to have been done by the prosecution to substantiate its allegations against the accused is not at all relevant in every case because of difference in facts as also the nature and quality of evidence adduced.

20. Provisions of Section 134 of the Evidence Act do not require any particular number of witnesses to be examined in criminal trial in proof of a given fact. It is the quality of the evidence and not its quantity which is required to be judged by the Court to place reliance on statement of a witness, who may be examined by the prosecution or produced by the defence. In number of cases the Apex Court has held that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible the accused can be convicted on the basis of testimony of such related witness. We may refer to the cases of Ashok Kumar Chaudhary vs. State of Bihar, 2008 (61) ACC 972 (SC), Namdeo vs. State of Maharashtra, 2007 (58) ACC 414 (SC) and State of Maharashtra Vs. Tulsiram Bhanudas Kamble, AIR 2007 SC 3042 for this proposition.

21. In the instant case, we find that at the time of attack on the deceased, his son Saurabh Singh was with him. Learned counsel for the appellant has vehemently argued that the prosecution for reasons best known to them have not examined Saurabh Singh. On perusal of record we find that on 20.2.2000, the ADGC (Criminal) discharged this witness on the premise that he is now aged about 12 years and at the time of incident he was only aged about 3½ years. In our opinion, the State counsel rightly discharged this witness who because of his tender age at the time of incident could not have remembered the fine details of the incident which had taken place more than eight years ago. Had he deposed in the Court, his statement could be termed as tutored one. The record further shows that in this case charges were framed against the accused persons on 19.10.1993 and examination-in-chief of PW-1 could be recorded on 10.5.1999. The reason is available in the record of the trial Court. Co-accused Harendra never appeared in the Court after framing of charges and ultimately his case stood abated on 13.3.1996 on account of his murder. In the meantime, the father of deceased and complainant namely Tejpal who was also an eye witness of the incident also died. Therefore, the prosecution story does not suffer from the vice of non-examination of independent witnesses.

22. The place of occurrence and the manner of assault had been proved by both the eye witnesses examined in the case and they have also corroborated the site plan. The investigating officer has also recovered plain and blood stained earth, two empties of 315 bore, one mis-cartridge and one empty of 12 bore from the spot. Recovery of these articles also fixes the place of occurrence. PW-1 has stated in cross-examination that there is galiyara in the village which runs north-south and the lane goes towards east through the house of accused to his house. PW-1 has depicted the spot situation in the following words :

"--- घर से निकलकर जब सबसे पहले मैंने अपने भाई को देखा तो वह गली के कोने पर था और उसे अभिलाख सिंह व हरेन्द्र पकड़े हुये थे और दोनों अज्ञात व्यक्ति जो तमन्चे लिए थे उसे घेरे हुये थे। ये योगेन्द्र सिंह के मकान के उत्तर

वाले कोने पर पकड़े थे और जब गोली मारी तो ये चारों योगेन्द्र सिंह और जसबीर सिंह के मकान के कोने पर थे। जसबीर सिंह से मिला हुआ उत्तर को योगेन्द्र सिंह का मकान है। योगेन्द्र सिंह से मिला हुआ उत्तर में अभिलाख सिंह की खाली जगह है मकान नहीं है। योगेन्द्र सिंह के मकान का दरवाजा उत्तर-दक्षिण चलने वाले गलियारे पर खुलता है। मेरे और अभिलाख सिंह के मकान का दरवाजा गली में खुलता है। मेरे मकान का दरवाजा पश्चिम और अभिलाख सिंह का उत्तर की तरफ दरवाजा खुलता है। |----"

This topography of the place of occurrence is fully corroborated by the site plan Ex.Ka-11, which had been proved as secondary evidence by PW-4, as the presence of investigating officer could not be procured by the trial Court. PW-2 has also corroborated the statement of PW-1 with regard to the incident and its spot position. He has stated that the day of incident was Tuesday as he was returning from market (weekly market), which is held on Tuesday. The incident took place on 17.9.1991 and the calendar for September, 1991 corroborates the statement of PW-2 with regard to day of the incident. Both the witnesses of fact have clearly stated that accused Abhilakh Singh fired shots from 12 bore country made pistol on the deceased from close range. PW-1 has clearly stated that the fire made by accused Harendra Singh did not cause injury to the deceased. However, we are not considering the case against Harendra on account of his murder during trial because falsus in uno falsus in omnibus principle is not applicable in our country.

23. Dr. V. K. Misra PW-3 has found blackening on both the fire arm entrance wounds on the person of the deceased as ante-mortem injuries. Dr. Misra has proved his post-mortem examination report and has further stated that a cork piece, wadding piece and many small pellets (38) were recovered from injury no. 1 and two wadding pieces and 11 large pellets were found underneath the injury no. 2. The recovery of these articles also corroborates that the shots were fired on the deceased from close range, which is in consonance with the testimony of eye witnesses. The contention of the learned counsel for the appellant that no injury of 315 bore was found on the person of the deceased, which is said to have been used by co-accused Harendra is correct, but it does not affect the prosecution case regarding complicity of accused Abhilakh Singh appellant in the case. According to eye witness account the appellant had fired shots from 12 bore country made pistol and it is also proved by Dr. Misra during his cross-examination. On the left arm of the deceased plaster was found by the doctor who on opening it found humerus bone fractured and united by callous formation establishing that the injury to be about four weeks old. This fact corroborates the statement of PW-1 who in cross-examination has stated that the deceased had met with an motor-cycle accident about 20 days ago in which his hand was fractured.

24. Learned counsel for the appellant has argued that no dragging injury was found on the person of the deceased, which belies the statement of PW-1 and PW-2 disproving their presence on the spot at the time of incident. We are not convinced with this argument either. The distance of alleged dragging is only about 15 steps. The deceased was wearing a half sleeves vest, a shirt, under-wear and tahmad, so it is not necessary that dragging injuries must have been caused on his body. The eye witnesses have also not been cross-examined about the manner of dragging the deceased hence, in these circumstances, if no dragging injury was found on the person of the deceased, it does not belie the ocular evidence adduced by PW-1 and PW-2.

25. Per contra presence of PW-2 on the spot at the time of incident is proved from his evidence and other surrounding circumstances. It has come in evidence that his two sisters are married in village Disauliganj, one to the complainant and the other with Krishan Autar Singh, who was posted as Lekhpal in Tahsil Budaun. PW-1 has stated in cross-examination that Vijay Bahadur had studied in 1990-91 by residing in the house of Krishan Autar Singh. PW-2 has also stated in cross-examination that he is original resident of village Amanpur and his two sisters are married in village Disauliganj. He was regular student of 9th standard and was residing in the house of his brother-in-law Krishan Autar Singh whose children resided in the village. Krishan Autar Singh used to commute daily from Budaun.

26. Learned counsel for the appellant has vehemently argued that there are contradictions in the testimony of PW-1 and PW-2, so no reliance should be placed on their deposition. On careful scrutiny of the testimony of both the eye witnesses, we find that the alleged contradictions are not at all material so as to reject their testimony in toto in respect of role of accused-appellant in this broad-day light incident. The report of the incident had been promptly lodged with the police, investigation started soon thereafter and the ocular witnesses' evidence finds corroboration from medical evidence on material particulars. At the sake of repetition it is apt to note that the deposition of these witnesses were recorded in the trial Court about 8-9 years after the incident, so it is quite natural that some contradictions are found in their

testimony. Further we find that at the time of incident PW-2 was minor. On careful scrutiny of the depositions of PW-1 and PW-2 we find that they are trustworthy and have not exaggerated or embellished the prosecution story about the complicity of accused-appellant in the incident at all.

27. Learned counsel for the appellant has then vehemently argued that the prosecution has not examined investigating officer in the case, so the accused had been prejudiced in his defence. It is true that the investigating officer had not been examined in the case. It is always desirable for prosecution to examine I.O. However, as stated earlier non-examination of I.O. does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of eye-witnesses. If the presence of the eye-witnesses on the spot is established and the guilt of the accused is also proved by their trustworthy testimony, non-examination of I.O. would not be fatal to the case of prosecution. [Vide - Raj Kishore Jha vs. State of Bihar, 2003(47) ACC 1068 (SC), Ram Gulam Chowdhary versus State of Bihar, 2001(2) JIC 986 (SC), Bahadur Naik versus State of Bihar, JT 2000 (6) SC 226, Ambika Prasad versus State of Delhi Administration, JT 2000 (1) SC 273, Behari Prasad versus State of Bihar, JT 1996 (1) SC 93 and Ram Deo versus State of U.P., 1990(2) JIC 1393 (SC). Perusal of the order-sheet of the trial Court clearly show that it had taken all out efforts to procure the attendance of investigating officers in this case and even after defence evidence, the other Presiding Officer again passed orders for summoning the investigating officers, but the local police did not cooperate with the Court for reasons best known to them. Sometimes, the trial Courts feel themselves helpless when they do not get cooperation from the local administration in getting the witnesses served. It is not the task of the Court alone to decide cases without active help of the police wherever it is required in administration of justice. In the circumstances, where the administration or local police are not co-operative, the Courts are required to decide the cases on the basis of evidence available in the record of the case. However, it would not provide a lever to the accused to get rid of the charges levelled against them as the Court would impart its duty in an unbiased manner balancing the interest of accused and the victim or his/her family. In the instant case, the record shows that both the investigating officers have retired, so they could not be examined. In the light of the law referred above, we are, therefore, not impressed with the argument that for non-examination of the investigating officer, the accused should be acquitted.

28. In view of afore stated reasons we find that the prosecution has been successful in proving the guilt of accused-appellant in the murder of Virbhan Singh on 17.9.1991 at 5.30 p.m. in village Disauliganj P.S. Bisauli District Budaun near his house along with his other associates beyond all reasonable doubt. The appeal sans merit and is accordingly dismissed.

29. Accused-appellant is in jail and would serve out the remaining part of his sentence as awarded by the learned trial Court.

30. Let certified copy of the judgment be transmitted to the Court concerned and Chief Judicial Magistrate, Budaun for compliance which should be reported to the Court within 4-weeks. The Chief Judicial Magistrate would confirm the detention of the accused-appellant in Central Jail, Bareilly and if not then take suitable measures to verify his release and arrest to ensure compliance of the judgement. It is made clear that the accused was not granted bail by this Court during the pendency of the appeal.

(Anil Kumar Sharma, J) (Rakesh Tiwari, J)

April 12, 2013