

A.F.R.
Reserved on 22.12.2023
Delivered on 09.01.2024

Court No. - 67

Case :- CRIMINAL APPEAL No. - 9185 of 2022

Appellant :- Hariom

Respondent :- State of U.P.

Counsel for Appellant :- Rajrshi Gupta

Counsel for Respondent :- G.A., Vikas Tripathi

And

Case :- CRIMINAL APPEAL No. - 9644 of 2022

Appellant :- Sanjeev And 2 Others

Respondent :- State of U.P.

Counsel for Appellant :- Santosh Kumar Pandey, Rajiv Lochan
Shukla, Rajnish Kumar Pandey

Counsel for Respondent :- G.A., Vikas Tripathi

And

Case :- CRIMINAL APPEAL No. - 9885 of 2022

Appellant :- Anshu Aarya

Respondent :- State of U.P.

Counsel for Appellant :- Atharva Dixit, Devendra Tiwari Deva, Sr.
Advocate

Counsel for Respondent :- G.A., Vikas Tripathi

Hon'ble Rahul Chaturvedi, J.

Hon'ble Mohd. Azhar Husain Idrisi, J.

(Delivered by Hon'ble Rahul Chaturvedi, J)

(Order on Sentence Suspension Application)

[1] The aforementioned are the three connected appeals. The respective accused-appellants have filed the three different appeals, invoking the powers of this Court under Section 374(2) Cr.P.C., assailing the legality and validity of the judgment and order dated 31.10.2022/03.11.2022

passed by Additional Sessions Judge, Court No.2, Bareilly while deciding the S.T. Nos. 599 of 2016 (State of U.P. Vs. Sanjeev and 6 others) arising out of case crime no. 210 of 2016 under Section 147, 148, 149, 307, 302 IPC, P.S. Kotwali, District Bareilly, S.T. No. 600 of 2016 (State Vs. Ranjeet) arising out of case crime no. 220 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly, S.T. No. 601 of 2016 (State Vs. Manoj) arising out of case crime no. 321 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly, S.T. No. 602 of 2016 (State Vs. Sanjeev) arising out of case crime no. 222 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly and S.T. No. 603 of 2016 (State Vs. Anshu Arya) arising out of case crime no. P.S. Kotwali, District Bareilly, by the common impugned judgement. The said judgement is before us for the judicial scrutiny.

In addition to this, learned counsel for the appellants submits that during the pendency of the appeal in exercise of power under Section 389(1) Cr.P.C., the sentence awarded to the respective appellants may be suspended in the interest of justice.

[2] From the judgment it is clear that one of the accused Kapil son of Manoj died during trial and as such the trial against him stood abated.

Today, when the case was called out, Sri Rajiv Lochan Shukla, learned counsel for the appellant in Crl. Appeal No. 9644 of 2022 informs the Court, that one of the accused-appellant- Manoj son of Shyam Swaroop, resident of Nekpur, Gautiya, P.S. Subhash Nagar, District Bareilly in the

aforesaid appeal died on 13.01.2023, when he was facing incarceration pursuant to the judgment dated 03.11.2023. We are at loss to accept the contention on its face value as the same is not authenticated, unless we receive a report of confirmation from the responsible authority. As such we direct the C.J.M., Bareilly to enquire about the aforesaid fact and furnish a proper detailed report to this Court **within next six weeks**.

[3] Registrar (Compliance) is directed to send the copy of this order to concerned C.J.M. to verify the aforesaid fact.

[4] Heard Sri Dileep Kumar, learned Senior Counsel assisted by Sri Rizwan Ahmad, Advocate, Sri Rajiv Lochan Shukla, Advocate, Sri Manish Tewary, learned Senior Counsel assisted by Sri Atharv Dixit, learned counsel for the appellants named above in three criminal appeals, Sri Sagir Ahmad, learned Senior Counsel assisted by Sri Vikas Tripathi, learned counsel for the informant and Sri Ghanshyam Kumar, learned AGA for the State and perused the records.

[5] Pleadings have been exchanged between the parties and the matter is ripe for disposal of Section 389(1) applications of the respective appeals. Since all the appeals are targetted against the judgement and order dated 31.10.2022/03.11.2022 for the sake of brevity we are proposing to decide all the three applications for suspending the sentence by a common order.

The respective counsel for the appellants have argued the case to extensive length and in its rebuttal by Sri Sagir Ahmad, learned Senior

Counsel for the informant as well as learned AGA for the State, have argued the matter upto their satisfaction.

AMBIT & SCOPE OF SEC. 389(1) CR.P.C. :-

[6] Before coming to the merit of the case, it is imperative to spell out the Section 389(1) Cr.P.C. so as to understand its true import/ambit and its reach so that the Court may appreciate the submission advanced by the counsel for the appellants.

“389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.”

[7] Hon’ble Apex Court recently got an opportunity to elucidate and explain the scope & reach of Section 389(1) Cr.P.C. in the judgement of

Om Prakash Sahni Vs. Jai Shankar Chaudhary and another etc. in **Criminal Appeal No. 1331-1332 of 2023** decided on 02.05.2023 reported in **2023(6) SCC 123** . The relevant extract of the judgment, which is useful for adjudication of the aforesaid application under Section 389(1) Cr.P.C. are as under:-

“22. Thus, when we speak of suspension of sentence after conviction, the idea is to defer or postpone the execution of the sentence. The purpose of postponement of sentence cannot be achieved by detaining the convict in jail; hence, as a natural consequence of postponement of execution, the convict may be enlarged on bail till further orders.

23. The principle underlying the theory of criminal jurisprudence in our country is that an accused is presumed to be innocent till he is held guilty by a court of the competent jurisdiction. Once the accused is held guilty, the presumption of innocence gets erased. In the same manner, if the accused is acquitted, then the presumption of innocence gets further fortified.”

[8] In continuation of the aforesaid in the judgement of **Aas Mohammad Vs. Shiv Raj Singh alias Lalla Babu and another** reported in **(2012) 9 SCC 446** has observed in para 30, which is as follows :-

“30. We may usefully state that when the citizens are scared to lead a peaceful life and this kind of offences usher in an impediment in establishment of orderly society, the duty of the court becomes more pronounced and the burden is heavy. There should have been proper analysis of the criminal antecedents. Needless to say, imposition of conditions is subsequent to the order admitting an accused to bail. The question should be posed whether the accused deserves to be enlarged on bail or not and only thereafter issue of imposing conditions would arise. We do not deny for a moment that period of custody is a relevant factor but simultaneously the totality of circumstances and the criminal antecedents are also to be weighed. They are to be weighed in the scale of collective cry and desire. The societal concern has to be kept

in view in juxtaposition of individual liberty. Regard being had to the said parameter we are inclined to think that the social concern in the case at hand deserves to be given priority over lifting the restriction on liberty of the accused.”

[9] In yet another judgement Hon’ble Apex Court in the case of **Siddharth Vashisht alias Manu Shamra Vs. State (NCT of Delhi)** reported in **(2008) 5 SCC 230**, (properly known as **Jessica Lal murder case**), after hearing the common submission with regard to the bail prayer of the appellant, it has been held that :-

“19. We are conscious and mindful that the main matter (appeal) is admitted and is pending for final hearing. Observations on merits, one way or the other, therefore, are likely to prejudice one or the other party to the appeal. We are hence not entering into the correctness or otherwise of the evidence on record. It, however, cannot be overlooked that as on today, the applicant has been found guilty and convicted by a competent criminal court. Initial presumption of innocence in favour of the accused, therefore, is no more available to the applicant.

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30.In the above cases, it has been observed that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar [(2002) 9 SCC 364 : 2003 SCC (Cri) 1195 : JT 2002 Supp (1) SC 60] that in considering the prayer for bail in a case involving a serious offence like murder punishable under [Section 302IPC](#), the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.”

[10] In this regard Hon'ble Apex Court after thrashing number of the decisions in Atul Tripathi Vs. State of U.P. reported in 2014 (9) SCC 177, Kishori Lal Vs. Rupa and others reported in 2004(7) SCC 638, Vijay Kumar Vs. Narendra and others reported in (2002) 9 SCC 364. In Vijay Kumar v. Narendra and Others reported in (2002) 9 SCC 364 and Ramji Prasad v. Rattan Kumar Jaiswal and Another reported in (2002) 9 SCC 366, it was held by this Court that in cases involving conviction under Section 302 of the IPC, it is only in exceptional cases that the benefit of suspension of sentence can be granted. In Vijay Kumar (supra), it was held that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 of the IPC, the court should consider the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, and the desirability of releasing the accused on bail after they have been convicted for committing the serious offence of murder.

[11] After thrashing & analysing the aforementioned judgements, the essence arrived at by Hon'ble Apex Court has come to the conclusion by providing a guidelines and the true import of Section 389 (1) Cr.P.C., that, pending appeal while deciding the application for suspending the sentence to ascertain whether the convict has fair chance of acquittal, what is to be looked into is something palpable. To put in a other words, something which is very apparent or gross on the face of the records, on the basis of

which, the court can arrive at prima facie satisfaction that conviction may not be sustainable. The appellate court should not re-appreciate the evidence at the stage of Section 389(1) Cr.P.C. and try to pick few lacunas or loopholes here or there in the case of prosecution such would not be a correct approach.

[12] In the aforesaid judgement of ***Om Prakash Sahani (supra)*** learned Apex Court in so many words have mentioned that High Court has gone the issue like the political rivalry, delay in lodging the FIR some overwriting in the FIR etc. etc., all these aspect of the issue will have to be looked into at the time of final hearing of the appeals filed by the convict appellants. Upon cursory scanning on the evidence on record, we are unable to agree with the contention of the learned Senior Counsel for the convicts that either there is absolutely no case against the convicts or that the evidence against them are so weak and feeble in nature, that ultimately in all probabilities the proceedings would terminate in their favour.

[13] Thus from taking the help of the aforesaid judgement of Hon'ble Apex Court, it is crystal clear that while deciding the application under Section 389(1) Cr.P.C., the Court is not required to have a meticulous and keen appreciation of the evidence on record. All these aspect of the issue would be well considered only at the time of final hearing of the appeal. At this stage, the microscopic analysis and appreciation would lead to a disastrous results so far as it may affect the final outcome of the appeal.

LEGAL DISCUSSION OF PRESENT APPEALS :-

[14] Now taking the aforesaid analysis as a beacon light, we are proposing to decide all the three applications under Section 389(1) Cr.P.C. in their respective appeal.

FACTS OF CASE :-

[15] As per the prosecution case contained in paragraph 3 of the impugned judgement, which could be formulated as under :-

(a) The informant of this case is Raj Kiran son of Kishan Lal, P.S. Qila, Bareilly lodged an FIR at Kotwali Bareilly that his brother Rajiv @ Raju was employed in Nagar Nigam, Bareilly as “*Safai Karamchari*”. As his appointment has become eyesore to his opponent Sanjeev and Hariom, who were opposing his appointment and in this regard in September 2014 near Nagar Nigam, Bareilly, accused-appellants Sanjeev and others have committed *maar-peet* with him for which the FIR was registered on Kotwali Bareilly on 10.09.2014.

(b) Since then accused-appellants- Sanjeev and others started nurturing an ill feeling towards him and try to eliminate him many times in past but on account of providence he was saved himself.

(c) On 22.04.2016, informant with his brother Rajiv @ Raju (hence deceased) and his father Kishan Lal went to attend the marriage at ‘*Shehnai Baratghar*’. After taking meals at 10.30 in the night, they came out and suddenly they were surrounded by appellants, namely, (i) Sanjeev

son of Ram Prakash, (ii) Ranjit son of Ram Prakash (iii) Hariom son of Om Prakash, (iv) Manoj son of Shyam Swarup, (v) Kapil son of Manoj (vi) Anhsu Arya son of Naresh Arya, all of them were armed, Hariom was saying that Rajiv @ Raju and his family members are after his service, today we have to eliminate him. Soon thereafter, Hariom fired upon Rajiv alias Raju with intention to kill. After sustaining the gunshot injury over is leg his brother rushed back to 'Baratghar', however, he was overpowered by Manoj son of Shyam Swarup, Kapil son of Manoj, Anshu Arya, Ranjit @ Ram Prakash who fallen down the deceased and caught hold of him. Thereafter Sanjeev, fired upon his brother Rajiv @ Raju. When the informant and his father rushed to save his brother then the assailants fired upon indiscriminately upon them. One Kamal son of unknown also sustained gunshot injury. After this incident there was a turmoil and upheaval among the guests and everybody was started running in order to save their lives. Thereafter the body of the Rajiv @ Raju was taken to the Mission Hospital, where he was declared dead. All the assailants are hard core criminals and while running away they have extended threats that all of them would face same treatment if anyone opens his mouth. The informant after leaving their Polo and Safari Car left on the spot and also the motorcycle. Since the 'Baratghar' was well lit and therefore the informant clearly identified the individual assailants and their respective activities in the light of 'Baratghar'.

[16] The incident is said to have been taken place on 22.04.2016 at 10.30 in the night of which the FIR was registered on 12.30 in the midnight in between 22/23.04.2016 at P.S. Kotwali, District Bareilly. The police after concluding the investigation has submitted a charge sheet under Sections 147, 148, 149, 307 and 302 IPC against appellants Sanjeev, Ranjit, Manoj, Hariom, Kapil and Anshu Arya. However, against appellant Ranjit the charge sheet was also submitted under Section 3/25 Arms Act, against appellant Manoj under Section 3/25 Arms Act and against appellant Sanjeev under Section 3/25 Arms Act and against appellant Anshu Arya under Section 3/25 Arms Act. Being the cognizable offence the case was referred to the court of Sessions whereby the appellants were convicted for the offence under Sections 147, 148, 307/149, 302/149 IPC and Section 7 CrP. Law Amendment Act, besides the charges under Section 3/25 Arms Act against appellants, namely, Ranjit, Manoj, Sanjeev and Anshu Arya.

ARGUMENTS ADVANCE BY COUNSEL OF APPELLANT :-

[17] Sri Rajiv Lochan Shukla, learned counsel for the appellants primarily have spear headed the arguments on behalf of all the appellants, supported by Sri Dilip Kumar as well as Manish Tewari, learned Senior Counsel for their respective appellants by adding & elaborating their own submissions. Broadly speaking, the argument advanced by learned counsel for the appellants Sri Shukla, Advocate could be formulated as follows :-

(I) There is inter-se difference among the depositions of 'witnesses of fact' with regard to the individual's role of the assailants which considerably erodes the authenticity of the prosecution case.

(II) Manipulation made by the police with regard to the bullets and weapon of assault used by the assailants.

(III) The alleged injured Kamal was never produced as witness nor his injuries were every exhibited or proved.

(IV) Eye witnesses presence is doubtful, besides they being they are interse in relationship and as such their deposition should be taken with pinch of salt.

(V) Ambulance Driver, who have taken the deceased to the hospital in a precarious condition and he got the injured Rajiv @ Raju admitted to the hospital. The Driver of the Ambulance was never produced as prosecution witnesses.

It is further argued by the counsel, that the informant and his father and the deceased went in their own private car but instead of using their own car for carrying the injured to the hospital, they have summoned the Ambulance for the said purpose, is clearly against the normal human behaviour.

(VI) After visualizing that the deceased have sustained four gunshot wound of injury over his person and more than one weapon have been used, the prosecution witnesses tried to shift their stand just to cover up

and made their deposition in such a fashion which would in the consonance with the post mortem report.

(VII) Lastly, the history sheet of appellant-Ranjit H.S. No. 63A and appellant- Sanjeev H.S. No. 61A was brought on record by a written argument and were never exhibited. The criminal antecedents of the accused appellants of eight cases each which have been duly explained in rejoinder affidavits.

[18] Now the arguments advanced by Sri Dilip Kumar, learned Senior Counsel on behalf of appellant Hariom in Criminal Appeal No. 9185 of 2022 are as follows:-

(A) Out of six assailants and the deceased as well as informant on the other hand are belong to same caste, they know each other and probably distinctly related. It is contended that even assailants themselves are interse in the inimical relationship since recent past, they have lodged the various FIRs of *maar-peet* and kidnapping in which the charge sheet have been submitted against the accused-persons. On this factual narration, it is contended, that where the assailants themselves are in inimical relationship and as such this is highly unlikely that they would join their hands to eliminate Rajiv @ Raju.

(B) The scribe of the FIR was Khursheed Khan, though Raj Karan, the informant himself is a well educated person (M.A. pass) but instead of lodging the FIR, he asked Khursheed Khan to become scribe of the FIR. Khursheed Khan, who was never produced as a prosecution witness.

(C) After reading the FIR, the only role attributed to accused appellant Hariom that he has given a first shot to the deceased over leg. And after sustaining he ran inside about eighty to ninety paces from the original place of sustaining injury. Except this, accused appellant Hariom has not attributed any role in commission of the offence.

(D) There is no criminal history to the credit of accused appellant Hariom. He was on bail during trial. The bail order passed by the coordinate Bench of this Court when challenged before Apex Court by filing the S.L.P. of the informant, but the said S.L.P. was dismissed by the Hon'ble Apex Court after exchange of pleading.

(E) The 161 Cr.P.C. statement of one Kishan Lal, P.W.-2 the father of the deceased was recorded by the police after inordinate delay of 10-12 days on 05.05.2016. No justification coming forward for this delay, in which he has stated that 40-50 rounds were fired during this period, but the police has recovered only five used cartridges from the place of occurrence. After perusing the post mortem report, there is embellishment in the testimony of witnesses of fact.

(F) No recovery of any weapon from the possession of the accused appellant Hariom. The recovery of weapon is shown from Manoj, Ranjit, Sanjeev and Anshu Arya, however, only three weapons were sent for F.S.L. examination. The five cartridges recovered were not matched with three so called weapons recovered.

[19] The argument advanced by Sri Manish Tewari, learned counsel appellant, appellant Anshu Arya in CrI. Appeal No. 9885 of 2022 are formulated herein below:-

(A) Out of six accused person, the role of actual firing were attributed to appellants-Hariom and Sanjeev. However, accused-appellant Kapil died during the trial and accused appellant-Manoj too has taken his last breath on 13.01.2023 during the pendency of the appeal, though, the said fact is yet to be verified by the concerned C.J.M.. The role attributed to appellants Anshu Arya and Ranjit along with two other accused persons/appellants, namely, Manoj and Kapil are of catching hold the deceased and thus it is impossible for him to suggest that he may cause any firearm injury to the deceased.

(B) Presence of P.W.-1 and P.W.-2 is extremely doubtful as the deceased was brought to the hospital and admitted by the driver of the Ambulance and the other injured Kamal was brought to the hospital by his brother Ravi.

(C) There was a feared animosity in between appellants-Hariom and Sanjeev. The deceased and appellants Sanjeev & Hariom have got a strong motive to eliminate the deceased.

(D) The said injured Kamal was never produced as prosecution witness.

(E) No direct or indirect motive was assigned to appellant- Anshu Arya.

(F) All the criminal history instituted by either the first informant Raj Karan or his relative.

(G) The scribe of the FIR was never produced as prosecution witnesses.

[20] Per contra, Sri Sagir Ahmad, learned senior counsel assisted by Sri Vikas Tripathi, learned counsel for the informant as well as Sri Ghanshyam Kumar, learned AGA submitted that the opinion of the doctor is only suggestive based on his skill and experience which comes within the category of “may be” and the corroborative in nature and it is not a substantive piece of evidence. It is only a suggestive and cannot be replaced the ocular testimony of the eye witnesses.

[21] The bail order granted to appellant Hariom by the coordinate Bench of this Court in the year 2018, which was later on confirmed by Hon’ble Apex Court while dismissing the S.L.P. would not come into the way.

[22] The finding recorded in the bail order would not go to replace the finding of the trial judge, who after having the wholistic approach, thrashing all the testimonies of different witnesses and the material on record come to a particular conclusion and condemning the accused-appellants.

There is a vast difference in the import of Section 439 Cr.P.C. and Section 389(1) Cr.P.C.. The cardinal principles of Criminal Jurisprudence persisting in our country that the accused is presumed to be innocent till he is found guilty by the court of competent jurisdiction. Once the accused is held guilty the presumption of innocence gets evaporated. In the same

manner, if the accused is acquitted then the presumption of innocence gets further fortified.

It is further contended, that the argument advanced by the learned counsel for the appellants that they have venture into the threadbare analysis of the every evidence, tried to magnify the smallest and irrelevant discrepancies in the testimony and material to establish that the judgement and order is per-se bogus and palpably wrong. It is not expected from the appellant court to have microscopic analysis of smallest discrepancies in the testimonies of various PWs and appreciate the same while dealing and deciding the respective 389(1) Cr.P.C. applications. All the submission advanced by the learned counsel may hold good at the final stage of the appeal, but when we are focusing only upon sentence suspension application, all these fine arguments cannot be looked into. It would be rather dangerous to the interest of the appellants to venture in that arena, else it may counter productive.

[23] After the rival submissions advanced by the parties and appreciating the marathon arguments advanced by the counsel, the Court has perused the judgement impugned.

The offence is said to have been committed in three parts, though in the same transaction;

Firstly, appellants Sanjeev and Hariom were nurturing a bad breath and inimical relationship with the deceased Rajiv @ Raju on account of some service/appointment. Appellant Hariom was suspecting that the deceased

Rajiv @ Raju was after his service and as such appellants Sanjeev and Hariom were nurturing inimical relation with him. They have got a strong motive to eliminate the deceased. More over, it is the appellant Hariom in order to kill the deceased fired upon him outside the road in front of marriage home for which the deceased has sustained serious injuries over his leg/thigh.

Secondly, after receiving the initial gunshot injury, Rajiv @ Raju (hence deceased) ran away towards marriage home, however, he was over powered by appellants, namely, Manoj, Kapil, Anshu Arya and Ranjit and thereafter appellant Sanjeev has open the fire upon the Rajiv @ Raju, deceased.

Thirdly, after visualizing the gunshot upon the Rajiv @ Raju, deceased, the first informant and his father ran towards the assailants but appellants, namely, Manoj and Kapil open indiscriminate fire upon them and in this transaction Kamal has sustained firearm injury.

[24] It is argued by the counsel that ante mortem injuries of the deceased Rajiv @ Raju, the seat of injury, the nature of injury, size of injury and the surrounding circumstance for committing the offence is most dare devil, ghastly and cold blooded way by the accused-appellants. Broadly speaking, the testimony of P.W.-1 and P.W.-2 supports the prosecution case, as they were eye witnesses of the incident. The surroundings were well lit and the witnesses of facts have got ample opportunity to identify them and the individual's role. There is no question of false implication or

case of mistaken identity of the assailants. The FIR was lodged within two hours of the incident, ruling out any possibility of tutoring or embellishments. They know that the animosity with regard to the service is subsisting between them. In this charged moment, one cannot expect sane and cool and calculated behaviour by the informant or the dependant/ close relative of the deceased. It is rather impossible to chalk out the exact human behaviour in that a charged situation.

So far as, motive is concerned, it is clear from the very beginning that Sanjeev and Hariom were dead against the appointment of Rajiv @ Raju, deceased as “*Safai Karamchari*” in the Nagar Nigam, Bareilly and since then, the deceased has become, their eyesore. This was the cause of genesis of the present offence. More over, where there is eye witness account of the incident, whereby the witnesses of fact have identified the assailants in the light of marriage home and this is not a case of mistaken identity as mentioned above, then in that situation the factor of motive occupies the front seat have of considerable importance.

There is no extra ordinary or exceptional delay in lodging of the FIR as the same was lodged within two hours of the incident, the FIR was got registered by the scribe Khursheed Khan.

[25] After having the panoramic view of the issue and the testimonies of the prosecution witnesses, two persons, namely, Hariom and Sanjeev have actively participated in the process of eliminating the deceased, however, rest of the four accused persons/appellants, namely, Ranjit, Kapil, Manoj

and Anshu Arya were active partners of the incident but they have been attributed the role of catching hold only; as they over powered the deceased & facilitated the assailant Sanjeev to give lethal blows over his person.

[26] Learned counsel for the appellants have laid much emphasis upon the post mortem report of the deceased and its dimension of the injuries and the testimonies of Dr. Vijay Pal Singh, P.W.-5. No doubt that out of six injuries, five injuries were of gunshot wound of entry ad-measuring 4 cm x 2 cm right side of the head, wound of entry; 4 cm x 1 cm on the right side below above the pelvic bone, a wound of entry 3 cm x 1 cm containing tattooing inside the injury no.3 and lastly a wound of entry 3 cm x 4 cm inside above the thigh. Interestingly, all the injuries contains a bullet inside it. On this, it has been sharply contended by learned counsel for the appellants that the prosecution story and the individual's role in commission of the offence, do not tally with each other. The Court is consciously deferring to adjudicate these fine arguments advanced by learned counsel for the appellants, else it would amount to deciding the appeal at admission stage itself, which is neither desirable nor it is in the interest of justice, rather it would be detrimental to the interest of the appellants, if any finding recorded against them. We are leaving these arguments wide open, to be argued at the time of final stage of the appeals.

[27] In paragraph 37.5 of the judgement, the learned trial judge after taking the aid of Section 149 IPC have clearly recorded his finding that after hearing the fire from appellant Hariom upon the deceased to kill him, the rest of accused persons/appellants, namely, Manoj, Ranjit, Kapil and Anshu Arya, who were present over the site and have actively participated, so as to achieved the target and appellants, Sanjeev and Hariom have accomplished their mission by giving fire upon the deceased in two different innings.

In paragraph 37.16 of the judgement have negated the submissions that the number of injuries sustained by the deceased is not in consonance with the prosecution story. Even otherwise, if we start appreciating fineries and niceties of the arguments advanced by the learned counsel qua, number of injuries sustained by the deceased; seat & measurement of the injuries, weapon recovered from the appellants, report from the ballistic expert etc. etc.. In this regard it would amount to decide the appeal itself at the stage of Section 389(1) Cr.P.C., which is not desireable.

[28] Even otherwise, it is contended by the counsel for the informant that one cannot give a graphic description of the incident after giving its minutest detail of the incident, namely, number of injuries, weapon used by the individual assailants, recovery of weapons and the cartridges used or empty shell recovered from the site. Under these circumstances, it is not expected from the witnesses that they would count the number of

fires, the empty cartridges recovered, the seat of injuries over the deceased. It is settled principles of law, that ocular testimony must be given a preference or edge over the opinion of the expert. There is a consistent stand that these two persons, namely, Hariom and Sanjeev have given a deadly blow over the deceased. It is also true that Hariom fired upon the deceased for making him virtually immobile. Somehow and other, he tried and managed himself to go inside the marriage home just to save himself, but in the midst he was over powered by the rest of the accused persons, paving the path for Sanjeev convenient, so that he may eliminate the deceased Rajiv @ Raju. The argument made by learned counsel for the appellant that initially it was the appellant Sanjeev alone, who are attributed the role of firing, lateron in the testimony of P.W.-1 and P.W.-2, the number of assailants were swelled from Sanjeev and another and lateron it was Sanjeev and Hariom. Fact remains, that the appellant Sanjeev was a common thread in all the three permutation and combination and thus, his name is common from the day one. So far as appellant-Hariom is concerned, he has been attributed the role of firing upon the deceased at first stage. But as mentioned above after, churning the deposition and other materials on record, the appellant Hariom was hold guilty by the trial judge. We are at loss to replace our finding, after negating the conclusion of learned trial judge at Section 389(1) Cr.P.C. stage.

[29] So far as criminal antecedent is concerned that the appellants have got a long criminal history and appellant Sanjeev is enjoying HS No. 61 A whereas the appellant Ranjeet is having HS No. 63A, appellant-Anshu Arya is having a criminal history of 10 cases. All these facts were brought to the knowledge in the form of written submission which were never confronted to the defence. It is further submitted that in most of criminal history, the author the FIR is either Raj Karan, the present informant or his relative. Under these circumstance, learned counsel for the appellants submits, that the false implication cannot be ruled out. We cannot take the judicial note of the fact that the accused-appellants were having a long criminal history to their credit, which were never confronted by the counsel for the defense so as to check its authenticity.

[30] Assessing the entirety of the circumstances mentioned above keeping in view the individual's role let the **appellant- Anshu Arya** and **appellant -Ranjit** be released on bail as the role attributed to them are of catching hold.

[31] Let **applicant/appellants-Anshu Arya & Ranjit** be released on bail in S.T. Nos. 599 of 2016 (State of U.P. Vs. Sanjeev and 6 others) arising out of case crime no. 210 of 2016 under Section 147, 148, 149, 307, 302 IPC, P.S. Kotwali, District Bareilly, S.T. NO. 600 of 2016 (State Vs. Ranjeet) arising out of case crime no. 220 of 2016, under Section 3/25 Arms Act, P.S. Kotwali, District Bareilly and in S.T. No. 603 of 2016 (State Vs. Anshu Arya) arising out of case crime no. P.S. Kotwali, District

Bareilly, on their furnishing a personal bond and two sureties each (one of which of their close relatives) in the like amount to the satisfaction of the court concerned.

[32] On acceptance of bail bonds, the lower court shall transmit photostat copies thereof to this Court for being kept on record of this appeal.

[33] 100% of the fine awarded by the Court below under the impugned judgment shall be deposited by the applicant/appellant within a month from their release on bail.

[34] So far as the accused **appellants, Sanjeev S/o Prakash and Hariom S/o Late Om Prakash** and keeping in view, their active role in the commission of offence as they are main author of the offence, we are not inclined to suspend the sentence under Section 389(1) Cr.P.C., accordingly, their application under Section 389(1)Cr.P.C. stand **REJECTED**.

(Order on Memo of Appeal)

[1] Office is directed to prepare the paper book on priority basis.

[2] List this case for final hearing in the month of May 2024 before appropriate Court.

Order Date :- 09/01/2024

Abhishek Sri.