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SUSHIL AND ORS.

v.

STATE OF U.P.

NOVEMBER 8, 1994

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[G.N. RAY AND FAIZAN UDDIN, JJ.]

Criminal Procedure Code, 1973—Section 157—Delay in despatching. FIR—No Prejudice caused to accused person—Whether every delay in sending FIR fatal to prosecution—Held, No

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EVIDENCE—Murder Case—Motive—Relation witnesses—Evidence of—Admissibility—Rule of caution.

Indian Penal Code, 1860—Section 302/34—Murder Case—Motive—Eye Witness—corroboration from medical evidence—It is fully and beyond all resonable doubt established that appellants as saulted deceased by their knives which resulted in his death—Conviction u/s 302/34 legally sustainable.

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Indian Penal Code, 1860—Section 302/34—Common intention—Murder Case—Assault by knives—Appellant not armed with an weapon—No evidence that appellant was aware of fact that co-accused were armed with knives— Inconsistency and discrepancy with regard to actual part attributed to appellant—Benefit of doubt to appellant.

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Three accused were charged and prosecuted u/s 302/34 Indian Penal Code for murder of deceased. They were convicted and sentenced to undergo life imprisonment. The conviction and sentence has been affirmed by the high Court. This appeal after grant of special leave has been filed against the judgment of the High Court.

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The appellants submitted that the FIR has been recorded on 15-8-1980 at 8-10 A.M. but it was despatched on 16-8-1980 and no explanation for this delay has been offered. It was therefore, alleged that non-explanation for this delay provides legitimate basis for suspicion that the FIR was recorded much later than the stated date and hour with a view to introduce improvements with distroyed version of the occurrence.

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It was also contended that there was enmity between the complainant and the appellants, and therefore, the appellants have been falsely

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implicated. It was submitted that the prosecution witnesses are related to the deceased and since they are interested witnesses their evidence should not be accepted. A

It was urged that the appellant T has been found guilty u/s 302/34 IPC on the basis of written report lodged by PW 1 wherein the appellant was alleged to have caught hold the deceased all round and accused caused knife injuries by their respective knives. It was submitted that the report was lodged on the basis of the information received from PW 2 and PW 3 and there was no mention in the report that the appellant T had raised both the hands of the deceased so as to enable the accused to inflict knife injuries on the victim. It was further submitted that the appellant has been falsely implicated due to enmity by stating that he had caught hold the deceased. B C

Disposing of the matter, this Court

HELD: 1.1 It is no doubt true that Section 157 Cr.P.C. requires the sending of report forthwith to the Magistrate empowered to take cognizance of the offence, but every delay in sending the FIR is not fatal to the prosecution case unless some prejudice is shown to have been caused to the accused by such delay. In the present case there is no material to indicate that there was any deliberate delay on the part of the Investigating Officer in dispatching the report. This apart no prejudice is shown to have been caused to the accused persons by the said delay. On the contrary it is clear that on 15-8-1980 both the Police Inspectors remained busy in the investigation at the place of occurrence and thereafter in sending the dead body to the Hospital for post mortem. In view of the facts and circumstances, this Court is satisfied that the report was lodged on the date and time mentioned in the FIR and the sending of report by the prosecution was not delayed in order to introduce some improvement, embellishment or distorted version of the occurrence. (299-G, 300-C-D) D E F

State of U.P. v. Gokaran, AIR (1985) SC 131, relied on. G

1.2 There is no doubt that the relations between the complaint party and the accused persons were strained and they were on inimical terms. It goes without saying that enmity is a double edged weapon which cuts both ways. It may constitute a motive for the commission of the crime and at the same time it may also provide a motive for false implication. In the present case there is evidence to establish motive H

- A and when the prosecution adduced positive evidence showing the direct involvement of the accused in the crime, motive assumes importance. The evidence of interested witnesses and those who are related to the deceased cannot be thrown out simply for that reason. But if after applying the rule of caution their evidence is found to be reliable and corroborated by independent evidence there is no reason to discard
- B their evidence but it has to be accepted as reliable. (300-E-H, 301-A)

- 1.3 The evidence of PW 2 and PW 5 is consistent and does not suffer from any discrepancy or embellishment so far as the knife assault by appellant S and R is concerned. Not only this but their evidence on this point further finds support and corroboration from
- C the evidence of PW 3 who is wholly an independent witness. Their evidence further finds corroboration from the medical evidence. In these facts and circumstances it is fully and beyond all reasonable doubt established that the deceased appellant S and the appellant R had assaulted the deceased by their respective knives which resulted in
- D his death on the spot and, therefore they have been rightly found guilty for the offence u/s 302/34 IPC they were charged with. (302,G,H,303-A)

- 1.4 The appellant T has been found guilty u/s 302 with the aid of section 34 of IPC. PW 1 has stated in his written report that T had caught hold the deceased around his waist. PW 2 who is an eye witness and uncle of the deceased deposed that the appellant T had caught hold the deceased around his waist line from the front and he also deposed that when T raised both the hands of the deceased the other two accused assaulted by their respective knives. As against this the independent eye witness PW 3 simply stated that appellant T had caught hold the hands of the victim PW 5 another eye witness also
- E stated that the accused S and R inflicted knife injuries when appellant T was catching hold the victim. There is thus some inconsistency and discrepancy with regard to the actual part attributed to the appellant T. The appellant T was not armed with any weapon nor he is alleged to have made any assault on the deceased. There is no evidence that T was
- F aware of the fact that the co-accused were armed with knives which may be used by them in the crime. The prosecution evidence is also
- G silent on the point whether these two accused took out the knives suddenly with or without the knowledge of T or came with knives openly and visible and inflicted knife injuries to the victim. In these facts and circumstances it is difficult to say with certainty as to what
- H extent, if at all, the appellant T shared the common intention with the

other two appellants. In view of these facts and circumstances, the appellant is entitled for the benefit of doubt. (302-B, H, 304-A-B) A

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 571 of 1983.

From the Judgment and Order dated 29.11.82 of the Allahabad, High Court in Crl. A.No. 1912 of 1981. B

Sushil Kumar and R.P. Wadhwani for the Appellants.

Suresh Kumar, Anis Ahmed Khan and A.S. Pundir for the Respondents. C

The Judgment of the Court was delivered by

FAIZAN UDDIN, J. 1. Sushil since deceased, Tapeshwar and Ram Niwas were charged and tried by the First Additional Sessions Judge, Muzaffarnagar in Session Trial No. 294 of 1980 under Section 302/34 IPC. for murder of one Jai Prakash. Learned Additional Sessions Judge by his judgment dated 27th August, 1981 convicted them under Section 302/34 of the Penal Code and sentenced to each of them to undergo life imprisonment. The said conviction and sentence has been further affirmed by the High Court of Allahabad in Criminal Appeal No. 1912 of 1981 decided on 29th November, 1982 against which this appeal after grant of special leave has been preferred. D E

2. According to the prosecution a day earlier to the occurrence there was an altercation between the deceased Jai Prakash and the appellant when the appellants had threatened to kill him. On 15th August, 1982 at about 5.45 A.M. the deceased Jai Prakash along with his uncle Hoshiyara PW 2 had gone to the jungle closeby to their village to answer the call of nature. At about 6.30 A.M. after they had eased themselves, Hoshiyara cleaned his hands and when the deceased Jai Prakash was cleaning his hands it is at that point of time that the accused Sushil, Tapeshwar and Ram Niwas arrived there. The accused/appellant Tapeshwar caught hold the hands of the deceased Jai Prakash, Ram Niwas attacked with a knife in the abdomen and stomach while Sushil gave knife blows on the waist and knee. When Hoshiyara saw this assault on Jai Prakash he raised hue and cry. The witnessess Charan Singh PW 3, Chandermal PW 4 and Dharampal PW 5 rushed there. The three assailants named above ran away from the place of occurrence after assailing Jai Prakash. After receiving the injuries Jai Prakash dropped on the ground and succumbed to his injuries on the spot F G H

- A shortly thereafter. Thereafter Charan Singh, PW 3 went to the house of deceased and narrated the occurrence to Hoshiyar Singh, PW 1, the father of the deceased. Hoshiyar Singh then rushed to the place of occurrence and after making enquiries from the witnesses and leaving some of the family members and other villagers near the body he went back to his village, got the report scribed from one Hari Prakash and took it to the Police Station,
- B Mansoorpur and gave the said written report Ext. Ka-1 to the Head Moharri, Hari Singh on the basis of which FIR Ext. Ka-4 was recorded and offence against the three accused persons named above was registered.

3. Police Inspector Bhim Singh, PW 6 commenced the investigation. He recorded the statement of the complainant Hoshiyar Singh, PW 1 and then reached to the place of occurrence and prepared the inquest report of the dead body and recorded the statement of the witnesses. He also seized the blood stained and simple earth from the spot and also seized the pajama and shoes of the deceased. He sent the dead body of Jai Prakash to the District Hospital, Muzaffarnagar for post mortem.

D 4. Dr. S.P.Sharma, PW 7 performed an autopsy over the dead body of Jai Prakash on 15-8-1980. At the time of occurrence the deceased was young man of about 30 years. As per his post mortem report Ext. Ka 11 Dr. Sharma found the following injuries on the person of the deceased :

E 1. Incised wound $2\frac{3}{4}$ " x $\frac{3}{4}$ " x chest cavity deep on the left side of the chest 1" from the left nipple with clean cut margins.

F 2. Stab wound 2" x 1" x abdominal cavity deep on the right side of the abdomen. Loops of small intestines were seen coming out of the wound.

3. Incised sound $\frac{3}{4}$ " x $\frac{1}{4}$ " x muscle deep on left side of back about $5\frac{1}{2}$ " below inferior angle left scapula and $4\frac{1}{2}$ " away from the backbone.

G 4. Incised wound $\frac{1}{2}$ " x $\frac{1}{4}$ " x skin deep on the outer surface of left knee joint at its lower part.

H On dissection fourth rib was found cut and left pleura underneath the injury number one was also cut. The left lung upper lob was punctured through and through under injury number one. The small intestines under injury number 2 were perforated. Large intestine was half full. Rectum was

empty and Gall bladder was half full. According to the opinion of Dr. Sharma the injuries were anti mortem and sufficient in the ordinary course of nature to cause death. A

5. At the trial the accused persons adjourned their guilt and pleaded false implication due to their enmity with complainant party but adduced no evidence in defence. The learned trial Judge rejected the plea of false implication and on evaluation of the prosecution evidence recorded the finding that the accused appellants were the assailants of the deceased Jai Prakash, and therefore, convicted and sentenced them as said above. This conviction and sentence has been further upheld by the High Court accepting the findings recorded by the learned trial Judge. B

6. At the very outset it may be stated that accused appellant No.1 Sushil Kumar died during the pendency of this appeal as reported by office in its report dated 20th April, 1993 which is based on the information received from the Chief Judicial Magistrate, Muzaffarnagar. The appeal of the deceased sushil therefore abates. C

7. Learned counsel for the appellants, appearing for the two appellants, namely, Tapeshwar and Ram Niwas has submitted that the FIR is said to have been recorded on 15-8-1980 at 8-10 A.M. but it was despatched on 16-8-1980 and no explanation for this delay has been offered by the prosecution which provides legitimate basis for suspicion that the FIR was recorded much later than the stated date and hour with a view to introduce improvements with distorted version of the occurrence. It was submitted that this delay may be taken into consideration to see whether the investigation is fair or not because the delay in dispatching of the FIR is a factor to be seriously reckoned while appreciating the prosecution evidence. D

First of all, it may be pointed out that no such contention was raised either before the Trial Court or before the High Court for delay in despatching the FIR and its alleged probable consequences. No question was also put to the investigating officer Bhim Singh, PW 6 as to the cause of delay, who was the best person to explain the short delay in dispatching the FIR. It is no doubt true that Section 157 Cr.P.C. requires the sending of report forthwith to the Magistrate empowered to take cognizance of the offence, but every delay in sending the FIR is not fatal to the prosecution case unless some prejudice is shown to have been caused to the accused by such delay [See *State of U.P. v. Gokaran*, AIR (1985) SC 131.] In the present case there is no material to indicate that there was any deliberate delay on the part of the investigating officer in dispatching the report. This apart, no prejudice is shown to have been caused to the accused persons by the said delay. On the E

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- A contrary it is abundantly clear from the evidence on record that after the FIR Ext. Ka 4 was recorded the Police Inspector Bhim Singh PW 6 immediately recorded the statement of the informant in the police station itself and at 8-30 A.M. proceeded to the place of occurrence along with the ASI Om Dutt Tyagi who prepared the Panchnama of the dead body at the spot, recorded the statement of the witnesses, prepared the site plan Ext.
- B Ka-9 and seized the blood stained and simple earth from the place of occurrence as well as pajama and shoes of the deceased. He then made a search of the accused persons but they could not be traced out. These facts are not disputed and the same have been corroborated by the evidence of witnesses. It is thus clear that on 15-8-1980 the Police Inspector Bhim Singh and his ASI Om Dutt Tyagi both remained busy in the investigation
- C at the place of occurrence and thereafter in sending the dead body to the District Hospital for post mortem. In view of the facts and circumstances stated above and after going through the prosecution evidence which we shall discuss here-in-after we are satisfied that the report was lodged on the date and time mentioned in the FIR Ext. Ka 4 and the sending of report by the prosecution was not delayed in order to introduce some improvement,
- D embellishment or distorted version of the occurrence.

8. Learned counsel for the appellants next contended that there was enmity between the complainant and the appellants and therefore the appellants have been falsely implicated. It was submitted that the prosecution witnesses are related to the deceased and since they are interested witnesses their evidence should not be accepted. There is no doubt that the relations between the complainant party and the accused persons were strained and they were on inimical terms. Admittedly some litigation was going on between them and it is also clear from the evidence of Hoshiyar Singh, PW 1, the father of the deceased that a day earlier to the occurrence there was an altercation between the Jai Prakash and the accused/appellants Sushil, Tapeswar and Ram Niwas when the appellants had threatened him saying that the deceased was responsible for the beating of their grand-father by some miscreants. When after the prosecution closed its evidence the appellants were examined under section 313 of the code of Criminal Procedure wherein they also admitted their enmity with the complainant from which it is apparent that the parties were on inimical terms. It goes without saying that enmity is a double edged weapon which cuts both way. It may constitute a motive for the commission of the crime and at the same time it may also provide a motive for false implication. In the present case there is evidence to establish motive and when the prosecution adduced positive evidence showing the direct involvement of
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- H the accused in the crime, motive assumes importance. The evidence of

interested witnesses and those who are related to the deceased cannot be thrown out simply for that reason. But if after applying the rule of caution there evidence is found to be reliable and corroborated by independent evidence there is no reason to discard their evidence but it has to be accepted as reliable. We shall, therefore, examine the prosecution evidence applying the said rule of caution.

9. Written report Ext. Ka-1 was made by Hoshiyar Singh, PW 1 who is not an eye witness to the incident. He had, however, made the report on the basis of information received by him from Charan Singh, PW 3 and others that the appellants and the deceased accused Sushil were the assailants of his son. Hoshiyara, PW 2, Charan Singh, PW 3 Chandramal PW 4 and Dharampal, PW 5 were examined by the prosecution as eye witnesses. Out of these Chandramal, PW 4 turned hostile but supported the prosecution case to the extent that Jai Prakash was murdered at the place of occurrence on the date and time alleged by the prosecution. However, Chandramal, PW 4 stated that he could not see the assailants. Hoshiyara, PW 2 is the real uncle of the deceased Jai Prakash who had accompanied the deceased while going to answer the call of nature in the morning of the fateful day. He deposed that he had gone in the jungle at a distance of about 200 yard from their house for easing themselves. He further deposed that after the deceased had eased himself and when he was cleaning his hands the three accused, namely Sushil, Tapeswar and Ram Niwas arrived there, the appellant Tapeswar caught hold his hands when he had not tied the nada of his underwear and pajamas, which fell down. He further deposed that the appellant Ram Niwas gave a knife blow in the abdomen of Jai Prakash while the deceased accused Sushil gave a knife blow in his waist. Thereafter the appellant Ram Niwas repeated the knife blow in his stomach and Sushil gave a second blow on the knee of the deceased. Hoshiyara, PW 2 saw the incidence and raised a alarm. The witnesses Charan Singh, PW 3, Chandramal, PW 4 and Dharampal, PW 5 immediately arrived there but none of them could dare to rescue the victim for fear of begin assaulted by the appellants. Charan Singh, PW 3 deposed that on the date and time of the occurrence he had also gone to answer the call of nature, near about the same place where the deceased and Hoshiyara had gone and he saw the accused Sushil, Ram Niwas and Tapeswar there. He stated that the appellant Tapeswar had caught hold a hand of the deceased while the deceased accused Sushil and appellant Ram Niwas assaulted him with knives as a result of which Jai Prakash fell down on the ground and the accused persons ran away from there. Jai prakash succumbed to his injuries on the spot. He also stated that Hoshiyara, PW 2, Drarampal, PW 5 and Chandramal, PW 4 were also present there at the time of occurrence. He

- A was asked by Hoshiyara to go to the house of the victim and inform Hoshiyar Singh about the occurrence. Charan Singh further stated that he went to the house of Hoshiyar Singh told him all about the incidence and took him to the place of occurrence. While cross examining this witness an attempt was made to show that he is related to the victim and the complainant but nothing turned out. It is clear from his evidence and the
- B evidence of other witnesses that he is not related to the complainant and he is totally an independent witness.

10. Drarampal, PW 5 is also an eye witness who deposed that at about 6.30 A.M. on the date of the occurrence. He was returning from the tube well of one Zaffar after easing himself. He saw that Hoshiyara, PW 2 and Charnu (Charan Singh) PW 3 were raising an alarm to the effect that "MAR DIYA MAR DIYA." He also saw that appellant Tapeswar had caught hold Jai Prakash and the deceased accused Sushil and appellant Ram Niwas were assaulting him with knife. He further deposed that after receiving the knife injuries Jai Prakash fell on the ground and the accused persons made their escape from the place of occurrence and Jai Prakash died on the spot soon thereafter. He also stated that besides himself Hoshiyara, PW 2 and Charnu (Charan Singh) PW 3 were also present at the place of occurrence. Dharampal PW 5 no doubt admitted that the deceased accused Sushil was prosecuted for the murder of Geeta, the daughter of his brother and the father of Sushil had also filed a cross case against him and others. It was, therefore, contended that Hoshiyara, PW 2 being the real uncle of the victim and Dharampal, PW 5 being on inimical terms with the accused persons their evidence should not be accepted in convicting the appellants. As said earlier the mere fact that the witnesses are either relative of the deceased or inimical towards the accused by itself is not a circumstance to throw away their evidence. But their evidence has to be closely scrutinised with care and caution and if found to be consistent and supportable from other independent source there is no reason to dis-credit their testimony. As discussed above the evidence of Hoshiyara, PW 2 and Dharampal, PW 5 is consistent and does not suffer from any discrepancy or embellishment so far as the knife assault by Sushil and Ram Niwas is concerned. Not only this but their evidence on this point further finds support and corroboration from the evidence of Charan Singh, PW 3 who is wholly an independent witness. Not only this but their evidence further finds corroboration from the medical evidence of Dr. Sharma, PW 7. According to the evidence discussed above the victim was attacked after he had eased himself and this fact finds support from the medical evidence of Dr. Sharma who found that the rectum was empty and Gall bladder was half full. In these facts and
- H circumstances it is fully and beyond all reasonable doubt established that

the deceased appellant Sushil and the appellant Ram Niwas had assaulted the deceased Jai Prakash by their respective knives which resulted into his death on the spot and, therefore, they have been rightly found guilty for the offence they were charged with.

11. The appellant Tapeswar has been found guilty under section 302 with the aid of Section 34 of IPC. Learned counsel for the appellants vehemently urged that Hoshiyar Singh, PW 1 had made the written report Ext. Ka-1 after Charan Singh, PW 3 and Hoshiyara, PW 2 had narrated the incident to him when he arrived on the spot and it was on the basis of the information received from these two persons that he lodged the written report Ext. Ka-1 wherein he stated that the appellant "*Tapeswar ne Jai Prakash ki kauli bhar li tatha Sushil or Ram Niwas ne apne apne hathon main liye chakuon se Jai Prakash per war kiye*" meaning thereby that the appellant Tapeswar caught hold the deceased Jai Prakash all around the waist line and accused Sushil and Ram Niwas caused knife injuries by their respective knives to his son Jai Prakash. The learned counsel submitted that there is no mention in the report that the appellant Tapeswar had raised both the hands of the deceased so as to enable the accused Sushil and Ram Niwas to inflict knife injuries on the abdomen, stomach and chest and knee of the victim. He urged that it was after seeing the medical report that the prosecution presumably thought that it may not be possible to inflict those injuries, if appellant Tapeswar had caught the deceased all around his waist line, the evidence was laid in the Court that Tapeswar had raised the hands of the deceased as deposed by Hoshiyara, PW 2. It was further submitted that the appellant Tapeswar has been falsely roped in the occurrence due to enmity by stating that he had caught hold the deceased. It is true that the informant Hoshiyar Singh, PW 1 has stated in his written report that Tapeswar had caught hold the deceased around his waist. Hoshiyara, PW 2 who is an eye witness and uncle of the deceased deposed that the appellant Tapeswar had caught hold the deceased around his waist line from the front and he also deposed that when Tapeswar raised both the hands of the deceased the other two accused assaulted by their respective knives. As against this the independent eye witness Charan Singh, PW 3 simply stated that the appellant Tapeswar had caught hold the hands of the victim Jai Prakash. Dharampal, PW 5 another eye witness also stated that the accused Sushil and Ram Niwas inflicted knife injuries when appellant Tapeswar was catching hold the victim. There is thus some inconsistency and discrepancy with regard to the actual part attributed to the appellant Tapeswar. The appellant Tapeswar was not armed with any weapon nor he is alleged to have made any assault on the deceased. There is no evidence that Tapeswar was aware of the fact that the co-accused

- A Sushil and Ram Niwas were armed with knives which may be used by them in the crime. The prosecution evidence is also silent on the point whether these two accused took out the knives suddenly with or without the knowledge of Tapeshwar or came with knives openly and visible and inflicted knife injuries to the victim. In these facts and circumstances it is difficult to say with certainty as to what extent, if at all, the appellant
- B Tapeshwar shared the common intention with the other two appellants Sushil and Ram Niwas. In view of these facts and circumstances in our opinion the appellant Tapeshwar is entitled for the benefit of doubt.

12. For the reasons stated above the appeal partly succeeds and hereby allowed. Giving the benefit of doubt the conviction and sentence of the appellant Tapeshwar under Section 302/34 is set aside. He is on bail. His bail bonds are cancelled. The appeal of the appellant Ram Niwas fails and is hereby dismissed. His conviction and sentence are maintained. He is on bail. We direct that he will surrender before the Chief Judicial Magistrate, Muzaffarnagar forthwith and on his failure to do so steps would be taken for his arrest. So far as the appeal of the appellant Sushil is concerned it
- D abates due to his death during the pendency of this appeal.

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Appeal disposed.