HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case No.	**Cr.A. No.1330/2008**
Parties Name	*Ajay Tiwari* *vs.* *State of M.P.*
Date of Judgment	**16/10/2019**
Bench Constituted	**Division Bench, comprising of** **Justice Sujoy Paul &** **Justice B.K. Shrivastava**
Judgment passed by	**Justice Sujoy Paul**
Whether approved for reporting	YES
Name of counsel for parties	**For Appellant: Shri Abhishek Tiwari, *Amicus curiae*.** **For Respondent**: **Shri Brindawan Tiwari, Govt.Advocate.** **For Complainant : Shri A. Usmani, Adv.**
Law laid down	1. **Evidence Act**- 'Related' and "Interested" Witness" - 'related' is not equivalent into 'interested'. A witness may be called 'interested' only when he derives some benefits from the result of the litigation or in seeing the accused person punished. Thus, there is no hard and fast rule that evidence of interested witness cannot be taken into consideration. The Court is obliged to examine such evidence with great care, caution and circumspection. 2. '**Related' and 'interested' witness** – The statement of P.W. 1 clearly shows that the accused persons and appellant were in inimical relation because of a property dispute. There were joint properties on which both the sides were claiming right. Hence, in absence of proper cooperation, it is not safe to accept the statement of P.W.1 and P.W.2 who are 'related' and 'interested' witnesses. They must be treated as interested witnesses in the facts of this case. 3. **Ocular – Medical Evidence** – If there exists a contradiction between the medical evidence and ocular evidence, it can be held that the testimony of a witness has greater evidentiary value vis-a-vis the medical evidence. However, if medical evidence

	makes ocular testimony improbable, it becomes a relevant factor in the process of evaluation of evidence. If the prosecution witnesses on which judgment of conviction is based, are held to be interested witness and expert evidence does not support the prosecution case, appellant is entitled to get the benefit of doubt. 4. **Injury by lethal weapon (gun in this case)** - where death is caused by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused.
Significant paragraph numbers	**21,22,23,24,25,26,**

J U D G M E NT
(16.10.2019)

As per: Sujoy Paul, J.

The appellant alongwith two other persons, namely, Smt. Savitri Bai and Ms. Anjali were tried for committing offence under section 302 of Indian Penal Code (IPC) in S.T.No.113/07. The court below by judgment dated 07.06.2008 acquitted the other co-accused but convicted the appellant under section 302 of IPC and directed him to undergo life imprisonment with fine of Rs.25,000/- with default stipulation.

2. Briefly stated, the story of the prosecution is that on 31.3.2006 Nidhish Tiwari (P.W.1) lodged F.I.R (Ex.P/1) in P.S. Surkhi that he was sitting with his brother Binu Tiwari in front of his house. The appellant and his mother Savitri Bai started abusing his family members. When objected by the complainant, Savitri Bai stated unless one is murdered, she will not be satisfied. At the instance of Savitri Bai, appellant brought a gun and fired at Ashish on his chest. Raju who was starting nearby also suffered bullet injury. Ashish was taken to hospital by Binu, Raju and Bali in the jeep of Sharad Tiwari. Upon receiving the information about the incident, F.I.R for committing the offence under section 307 of IPC was registered. At sagar hospital, Doctor declared Ashish as dead. Dr. B.K.Khare conducted the

postmortem and prepared the report Ex.P/24. Excessive bleeding because of bullet injuries and shock was the reason of death. Because of death of Ashish, the offence is converted into section 302 of IPC. On completion of investigation, challan was filed against the accused persons under section 302, 302/34, 307 and 307/34 of IPC. Accused persons abjured the guilt and prayed for full fledged trial.

3. The court below by impugned judgment acquitted mother and sister of the appellant. The appellant was held guilty of committing offence under section 302 of IPC.

4. Shri Abhishek Tiwari, learned *amicus curiae* urged that the eye witness were solely interested witnesses. They stand to benefit from the impugned judgment. Accused and the appellant are members of one extended family which can be seen from the statement of Nidhish Tiwari (P.W.1) and Shubhashish Tiwari (P.W.2). There is a long standing property dispute between them. There are only four members in the appellant's family and their houses are adjacent. The eye witnesses share the same hospitality which the deceased share with the appellant. Not only this, the eye witness and deceased were history sheeters which can be seen from the statement of Nidish Tiwari (P.W.1) and Subhashish Tiwari (P.W.2). The statements of eye witnesses needs to be examined minutely.

5. The incident had taken place during "Navratri" i.e 31.3.2006. The investigating authority could not find out any independent witness corroborating the prosecution story. No blood mixed soil etc. was recovered from the place of incident. There are material contradictions between the court statements and statements recorded under section 161 Cr.P.C of the eye witnesses. Bali Yadav (P.W.3) and Raju Karbariya (P.W.4) who were with the deceased at the time of incident had turned hostile. They took the name of one Laxman who had fired the fatal shot on deceased. The eye witnesses have deposed that shot was fired from a distance of 10 feet. The ballistic expert Choudhary Narendra Singh (P.W.25) in his examination in chief and cross-examination has punctured the story of prosecution. As per

his version, the shot was fired from a distance of 84 feet. The seized shotgun was rusted and probably not used for last two years. Though the gun was capable of firing whether it fired that day or not could not be established by he prosecution. Reliance is placed on Modi's Medical Jurisprudence (25 Edition page 636). It is further urged that prosecution has failed to elicit from its own expert as to how fatal shot could have been fired from a distance of 10 feet. This establishes that eye witnesses implanted themselves later on owing to the old property dispute. Shri Tiwari argued that in a near shot, a very large surface area, apart from the wound, becomes black because of the gun powder. Blackness was found only inside the wound in this case. This happens because of expanding gases, gun powder gets mixed with the pellets. The shot was evidently fired from a long range i.e greater than 4 meter. The formula is the diameter of the spread of pellets (in inches) is equal to the range (in yards). The spread in this case was 28 inches. Hence, the expert opined that the shot was fired from 28 yards or 84 feet. In support of this contention, he placed reliance on the textbook of Forensic Medicine and Toxicology by Anil Aggrawal and judgment of Supreme Court in ***State of Punjab Vs. Rajinder Singh-(2009) 15 SCC-612.***

6. The next contention is that four guns viz (i) shotgun, (ii) two *Bharmars*, (iii) one air gun were seized in the same crime number. Besides this, Abhay (original accused No.4) was allegedly carrying a country made pistol (Katta). The Bharmar being smooth bore could also have fired the shot. These guns were never sent to FSL Lab. In absence thereof, it cannot be said that prosecution has established its case beyond reasonable doubt.

7. The investigating agency did a witch hunt for two months and found no evidence against the accused persons. The arrest and seizure took place only on 31.5.2006. The investigating agency was under pressure and even attempt was made to pressurize the court below.

8. Learned *amicus curiae,* in support of aforesaid contentions placed reliance on following judgments ***State of Punjab Vs. Rajinder Singh-***

(2009) 15 SCC-612, Mahavir Singh Vs. State of M.P.-(2016) 10 SCC-220, Maniram Vs. State of U.P.-1994 SCC, Supl.(2)-289, Puran Singh Vs. State of Uttaranchal-(2008) 3 SCC-795, Mohinder Singh Vs. State-1953 AIR-415 and Mahmood and another Vs. State of Uttar Pradesh-(2007) 14 SCC-16. In addition to oral submissions, Shri Tiwari submitted written submissions raising the same points.

9. *Per contra,* Shri Brindawan Tiwari, learned G.A. supported the impugned judgment and urged that there is direct evidence of the eye witnesses in the present case. F.I.R was lodged within two months of the incident. The X-ray incharge Dr. J.R.Uikey (P.W.24) proved Ex.P/18) which shows that in the entire front body of deceased, the pellet injuries were there. Dr. V.K.Khare (P.W.22) who conducted the postmortem clearly deposed that punctured wound have red/ black colour. The related/ interested witnesses cannot be discarded in view of ***Brahmswaroop Vs. State of U.P.- (2011) 6 SCC-288.***

10. Shri A. Usmani, learned counsel, learned counsel for the complainant placed reliance on statement of Dr.V.K.Khare (P.W.22). He argued that puncture/ blackness of wound shows that it has been caused by the gun "Article A". He also placed reliance on the opinion at page-125. Shri Usmani by placing reliance on ***Mahmood and another Vs. State of Uttar Pradesh-(2007) 14 SCC-16 and State of M.P. Vs. Kalyan Singh-(2011) 9 SCC-569*** urged that there is no illegality or perversity in the impugned judgment which warrants interference in the present appeal.

11. No other point is pressed by learned counsel for the parties.

12. We have heard the parties at length and perused the record.

13. The Court below on the basis of statement of Dr. Dushyant Kumar (PW/12) held that Ashish was brought to the hospital dead. He died because of excessive bleeding and bullet/gunshot injury. In the front portion of body of Ashish, 56 gunshot injuries were found which were mainly on his chest, stomach, face, arms and thighs. Most of the pallets caused injuries on chest

and stomach. All the wounds caused by pallets were punctured wounds. The size of such wounds were ½ x ½ cm in diameter. The colour of wound was red and black.

14. The finding in the impugned judgment is mainly based on the statement of Nidheesh Tiwari (PW/1), Shubhashish Tiwari (PW/2) and Sushil Tiwari (PW/6). These witnesses are admittedly family members/relatives of deceased. The Court below opined that there is no inconsistency in the material particulars given by these eye witnesses. They satisfactorily and beyond reasonable doubt established that appellant caused aforesaid gunshot injury on the person of Ashish because of which he died. In addition, statement of Dr. Jinesh Diwakar (PW/14) was relied upon by the Court below coupled with the statement of Dr. B.K. Khare (PW/22) who conducted the Post Mortem of Ashish. PW/14 proved the X Ray of deceased Ex.P/18 whereas PW/22 proved the P.M. Report. Since incident was reported to police and FIR was lodged within half an hour, the Court below found substance in the story of prosecution. The statement of Narendra Singh (PW/25), a senior scientific officer, FSL Sagar was not given weight for the reason it is just an opinion which cannot prevail over ocular evidence.

15. As noticed, learned Amicus Curiae Shri Abhishek Tiwari criticized the judgment on the ground (i) PW/1 and PW/2 are not only brothers/close relatives, they carry same hostility with the appellant which is evident from their deposition. Thus, conviction solely based on such statements of interested and related witnesses needs to be disturbed; (ii) in the factual matrix of present case, the Court below erred in not giving due weightage to the statement of expert (PW/25).

16. The aforesaid argument of appellant needs careful consideration. Nidheesh Tiwari (PW/1) clearly admitted that murder of his brother is an outcome of a property dispute amongst the family members. Indisputably, the appellant, deceased and PW/1 and PW/2 belong to same family. PW/1 clearly stated that appellant fired his brother Ashish from a distance of 10

feet. There was a single gunshot fired on him by appellant. In Para 24 of cross examination, he candidly admitted that certain lands of his and family of appellant are different whereas certain lands are common. In Para 31, he has admitted that he was not in talking terms with Ashish. He contested the election of Sarpanch and lost the same. The accused persons did not support him in the said election.

17. Shubhashish Tiwari (PW/2) also deposed that appellant fired on Ashish from a distance of 10-12 feet. A careful reading of statement of this witness also clearly shows that there was a previous enmity between the accused persons and family of deceased.

18. Bali Yadav (PW/3) and Raju Karbaria (PW/4) accepted that Ashish died because of a gunshot injury but did not take the name of appellant as assailant. Indeed, they took name of one Laxman who caused gunshot injuries because of which Ashish died. These witnesses were declared as hostile by the prosecution. They did not accept that Ex.P/4 and P/5 are their statements.

19. Similarly, Sharad Kumar Tiwari (PW/5) did not take the name of appellant as assailant. Although this witness admitted that he took Ashish to the hospital alongwith other persons. This witness was also declared as hostile.

20. The 12 Bore Gun No.3300902 was seized through Ex.P/13 and marked as Article 1. The seizure witnesses Vikas Kesarwani (PW/11) and PW/16 turned hostile and stated that no weapon was seized in their presence.

21. Narendra Singh (PW/25) is a senior scientific officer of FSL Sagar. This witness stated that deceased was wearing a Half Sleeve T Shirt (Article C2). 47 holes were found on this T Shirt. The measurement of these holes was approximately 0.1 x 0.1 inch which were spread in the area of 27 x 28 inch. In the trouser of deceased (Article C3), ten holes of same size were found. Same is the condition of the underwear of Ashish wherein

seven holes of same size were found. This witness stated that the said gun was full of rust which shows that it has not been used for last 2 years. This expert witness clearly deposed that the holes found on the clothes of deceased (Article C1) could appear if gunshot injury is caused from a distance of 28 yards or 84 feet. He, on more than one occasion, deposed that the size of holes on the clothes of deceased shows that gunshot injury is not caused from a distance of 10-12 feet. It is caused by a gun like Article A1 from a distance of 84 feet. The holes/injury of this nature cannot be caused if gunshot is fired from a distance of 10-12 feet. As noticed above, this expert evidence was not believed by the Court below for the simple reason that it is only an opinion and such opinion cannot be accepted when ocular evidence is trustworthy.

22. Before dealing with this aspect, it is apposite to consider the judgments cited by learned Amicus Curiae. The judgment of ***Rajindar Singh*** (supra) was relied upon to contend that in that case fatal injury was caused by a shot gun but injury was found to be by a gunshot fired by rifle. Since injuries on the person were not explained, it caused a dent on the prosecution story. In ***Mahaveer Singh*** (supra) and in ***(2007) 14 SCC 16 (Mahmood v. State of U.P.)***, it was held that if there exists a contradiction between medical evidence and ocular evidence, it can be held that the testimony of a witness has greater evidentiary value vis a vis the medical evidence. When medical evidence makes ocular testimony improbable, it becomes a relevant factor in the process of evaluation of evidence. If medical evidence goes far that it completely rules out all possibility of ocular evidence being proved, the ocular evidence may be disbelieved. Reference was made to a previous judgment ***(2010) 10 SCC 259 (Abdul Sayeed vs. State of M.P.)***. In our opinion, this judgment is very relevant and important in the instant case where ocular evidence does not match the expert evidence and eyebrows are raised on the ocular evidence because its coming from the mouth of related and interested witnesses. However, we will consider this aspect at appropriate stage in this judgment.

23. The judgment of ***Mohinder Singh*** (supra) was pressed in support of a point that in a case where death is due to injuries and wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. A duly qualified expert alone could ascertain whether injuries attributed to the appellant were caused by a gun from a close range as it suggested in the evidence. If ocular evidence is diametrically opposite to expert evidence, the conviction wholly based upon on oral testimony cannot be upheld.

24. In view of aforesaid principles laid down by Supreme Court the factual matrix of present case needs to be tested. The Court below in the impugned judgment held the appellant as guilty mainly on the basis of statement of Nidheesh Tiwari (PW/1) and Shubhashish Tiwari (PW/2). The Court below has not paid any heed to the fact that there exists a previous enmity between the family of deceased and accused persons. We are not oblivious of the settled legal position that 'related' is not equivalent to 'interested'. A witness may be called 'interested' only when he derives some benefit from result of a litigation or in seeing the accused persons punished. Similarly, there is no hard and fast rule that evidence of 'interested' witness cannot be taken into consideration. The only burden that is cast upon Courts is that such evidence must be considered with care, caution and circumspection. Relationship can never be a factor to effect credibility of witness as it is not possible always to get an independent witness ***[See 1976 (4) SCC 369 (Sarwan Singh vs. State of Punjab), 2008 (16) SCC 73 (State of U.P. v. Kishanpal) and 2018 (3) SCC 66 (Latesh v. State of Maharashtra)]***

25. In a recent judgment reported in ***2018 (5) SCC 549 (Ganapathi and Anr. vs. State of T.N.),*** the aforesaid legal position in relation to related witnesses was reiterated. In view of these judgments, it is clear like noonday that in an incident like the present one which had taken place at around 10:30 pm in the night in front of house of deceased, normally family

members would be the natural witnesses. Thus, their statements cannot be discarded solely on the ground that they are related witnesses being family members. However, while considering the evidentiary value of statements of family members it needs to be seen whether they are merely related witnesses or interested as well. The Court below has failed to examine this facet whether they were interested witness or not. PW/1 and 2, in our view, are interested witnesses because admittedly their relations with the deceased and his family members (PW/1 & 2) were inimical. The relations between appellant accused and PW/1 & 2 were strained over property issues. Joint properties became reason because of which they were in inimical terms, hence it was not safe to record conviction on the basis of statements of PW/1 & 2 by ignoring the statement of expert witness PW/25. More so, when two prosecution witnesses have deposed that gunshot injury was actually caused by one Laxman and not by appellant Ajay. The Supreme Court recently in ***(2018) 5 SCC 435 (Sudhakar v. State)*** disbelieved the statements of PW/1 & 5, who were related witnesses because relation between the appellant/accused and said PWs were strained over property issues and they were in inimical terms. This judgment in our view is squarely applicable and it can be clearly said that PW/1 & 2 of instant case also had animosity with the appellant and they were interested in getting the appellant-accused punished. ***[See Kishanpal*** (supra)***].***

26. Apart from this, in view of judgment of ***Mohinder Singh*** (supra), we are of the opinion that in a case of this nature, where death is caused by a lethal weapon, it was the duty of prosecution to prove by expert evidence that such injuries were possibly caused with a weapon allegedly used by appellant for murder. PW/1 & 2's statements alone are not sufficient to hold the appellant as guilty. We are unable to reject the evidence of PW/25 in view of nature of wounds found on the person of deceased. In other words, the contradiction between medical and ocular evidence in this case cannot be ignored nor primacy can be given to ocular evidence because the said evidence is coming from the related and interested witnesses. The prosecution has failed to discharge its duty to prove by expert evidence that

injuries were possible from the weapon which is allegedly used by the appellant. [See ***Mohindar Singh*** (supra)]. Hence, the appellant deserves to be acquitted by getting the benefit of doubt.

27. In view of foregoing analysis, in our view, the prosecution has not proved its case beyond reasonable doubt before the Court below. It will not be in the interest of justice to give stamp of approval to the impugned judgment. Resultantly, the impugned judgment dated 07.06.2008 passed in ST. No.113/07 is set aside. If appellant's presence in the prison is not required in any other case, he be released forthwith. The appeal is allowed.

(Sujoy Paul)
JUDGE

(B.K. Shrivastava)
JUDGE

MKL & mohsin