

(2016) 08 AHC CK 0102
In the Allahabad High Court
Case No : Criminal Appeal No. 2966 of 2005

Babbal	Vs	APPELLANT
State of U.P.		RESPONDENT

Date of Decision : 26-08-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 149, 302, 307, 504, 506

Citation : (2016) 97 ACrC 687 : (2016) 9 ADJ 393

Hon'ble Judges : Bala Krishna Narayana and Arvind Kumar Mishra-I, JJ.

Bench : Division Bench

Advocate : Kapil Tyagi, Amit Mishra, H.P. Singh, Iqbal Narain Mulla, Lav Srivastava, Noor Mohammad, Prabhat Kumar Srivastava, Saurabh Gaur, Swetashwa Agarwal and T.K. Mishra, Advocates, for the Appellants; Govt. Advocate, K.K. Pandey, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Arvind Kumar Mishra-I, J.—This Criminal Appeal has been filed by the aforesaid appellants against the judgement and order of conviction and sentence dated 17.6.2005, passed by the Additional Sessions Judge, Court No. 5, Ghaziabad, in S.T. No. 247 of 2001-State v. Babbal @ Harendra and others, arising out of case crime no. 373 of 2000, under sections 147, 148, 149, 504, 506, 307, 302/34 120-B, I.P.C. and section 7 of Criminal Law Amendment Act, Police Station Pilkhua district Ghaziabad, whereby, the each of the appellants, has been sentenced to life imprisonment and fine of Rs. 10,000/- under sections 302/149 I.P.C., one year R.I., under section 148 I.P.C., 7 years R.I. under sections 307/149 I.P.C. and one year R.I., under section 504 I.P.C. 2 years R.I. under section 506 I.P.C. and one year R.I. under section 7 of Criminal Law Amendment Act. In case of default in payment of fine concerned appellant was directed to undergo imprisonment for one year. These sentences were directed to run concurrently.

2. We have heard at length Shri A.B.L. Gaur learned Senior Counsel assisted by

Shri P.K. Srivastava learned counsel for the appellants and Shri Indradeo Mishra, Kapildev Pandey learned counsel on behalf of the complainant as well as Ms. Meena and Shri J.K. Upadhyaya learned A.G.A. for the State and perused record.

3. The facts germane as reflected from the record, giving rise to this appeal, appear to be that one Veer Sain son of Kanak Singh resident of Chhijarsi, Police Station Pilkhua district Ghaziabad lodged written report on 27.9.2000 at 3.40 p.m. at P.S.- Pilkhua to the effect that one Gambhir and his family members of his village had murdered his brother Fakir Chandra in the year 1996. In the year 1999, Rakesh and Narendra also badly assaulted him and had been extending life threat to him and his family members and since then they had been threatening off and on. On 27.9.2000, his son Babbal and nephew Jitendra went to Qasba/ township Pilkhua for purchasing "T" for tractor around 9.00 A.M. in the morning. He along with one Naresh son of Sheoraj of his village had gone to enquire about rate of bricks to Dhaulana at some brick-kiln. As soon as they reached near Sharma Petrol Pump, it was around 11.25 A.M. when his son Babbal and nephew Jitendra were sighted coming from in front of Petrol Pump on Yamaha Motor Cycle and some white coloured Maruti Car following his motor cycle. In the meanwhile white Maruti Car hit from behind the motor cycle. The motor cycle was being driven by his son Babbal. Due to this collision, both Babbal and Jitendra fell down on the ground. As soon as they stood up, Babbal @ Harendra, Chumman @ Narendra, Gambhir and Jain Singh sons of Sardar Singh, possessing country made pistol in their hands and Kuldeep son of Bheem Singh, possessing "Farsa" alighted from car and Gambhir exhorted that they will take revenge today and it is opportune moment to kill them and while saying so the assailants opened indiscriminate firing on son and nephew of first informant. Both boys sustained gun shot injuries and fell down on the ground. In the meanwhile, Kuldeep assaulted Jitendra with "Farsa". First informant and Naresh raised alarm and tried to save them but they were threatened by firing and this compelled the first informant and the other person to take shelter behind bush. Since the first informant was unarmed, therefore, he could not do anything further. Due to indiscriminate firing on the spot, employees of petrol pump and employees of nearby factory ran away from the place of occurrence and panic and silence prevailed over the area. In the meanwhile, assailants threatened that in case, any persons tried to intervene, he will also be dealt with in the same manner. Assailants made their escape good by using their Maruti Car towards Masoorie. The incident was witnessed by a number of persons. First informant and the other person Naresh, after a short while came on the spot when the police Gypsy also arrived (on the spot), whereupon, both the injured persons were taken to Yashoda Hospital in Gypsy. Nephew Jitendra succumbed to his injury while on way to the Hospital. Condition of Babbal was serious. He is undergoing treatment in the Hospital. Dead body of his nephew has been sent to Ghaziabad Hospital. Report be lodged and action be taken. It is written in the last line of the report that occurrence has its base in deeply rooted conspiracy hatched by Subhash son of Sardar of his village, who is on inimical terms with

the first informant. This report is Ext. Ka. 1 on record.

4. Contents of aforesaid report were taken down in the Check FIR at 3.40 P.M. on 27.9.2000 at crime no. 373 of 2000 under sections 147, 148, 149, 504, 307, 302/34, 120-B, I.P.C. and section 7 Criminal Law Amendment Act, Police Station Pilkhua, which is Ext. Ka.-3 on record.

5. On the basis of entries so made in the Check FIR, a case was registered against the accused persons under aforesaid case crime number and sections of IPC and Criminal Law Amendment Act at Police Station Pilkhua in the concerned G.D. Rapat No. 24 at 15.40 hours on 27.9.2000, which is marked as Ext. Ka. 4.

6. Injured Babbal was got admitted in Hospital Nehru Nagar, Ghaziabad on 27.9.2000 at 12.10 P.M. and was admitted there at 12.40 P.M. on the same day. His medical examination was conducted wherein he sustained six injuries on his person which are extracted herein below:

1. Wound 1 cm x 1 cm ragged margins over junction of cervical and thoracic region at back surrounding skin-black, profuse bleeding and viscera deep.

2. Wound ? cm x ? cm ragged margins over mid part of chest below throat, bone deep. Bleeding.

3. Wound 1? cm x 1? cm over right temporal region. Post auricular. Blackening. Bleeding on almost half of right pinna cut very severally.

4. Wound over post aspect of right chest about 1 cm x 1 cm at level of 7-8 rib, inverted margins. Bleeding and Tattooing present.

5. Abrasions both shoulders.

6. Tattooing all over right chest, shoulder, upper arm and back.

In the opinion of doctor, injuries no. 1 to 4 might have been caused by fire arm and similarly, injury no. 6 may also be caused by use of fire arm. Injury no. 5 may be caused by falling down on the ground.

Record reflects that inquest report of deceased Jitendra was prepared on 27.9.2000. It commenced at 5.30 P.M. and completed at 6.30 P.M. Inquest report is Ext. Ka.-10.

Relevant papers were also prepared for sending the dead body of Jitendra for post mortem examination. Relevant papers were prepared for the same which papers are photo-nash Ext. Ka. 14, challan dead body (Police Form-13) Ext. Ka. 15, specimen seal Ext. Ka. 12, letter to concerned Chief Medical Officer Ext. Ka. 13, letter sent to the Surgeon by R.I. Ghaziabad Ext. Ka. 11. Thereafter, the post mortem examination on the dead body of Jitendra was conducted on 28.9.2000, at 2.00 P.M. at mortuary Ghaziabad, wherein, the following ante-mortem injuries were found on the dead body by the Dr. J.R. Jiyani P.W. 5:

1. Gunshot wound of entry 1 cm x 1 cm on right side of head 4 cm above ear

brain cavity deep-communicating to Injury No.2. Blackening present.

2. Gunshot wound of exit 7 cm 6 cm x brain cavity deep communicating to Injury no.1 left parietal-temporal region underneath parietal temporal bone fractured. Brain lacerated.

3. Incised wound 10 cm x 2.5 x brain cavity deep on occipital region transversely placed underneath occipital bone cut.

4. Incised wound 8 cm x 1? cm x muscle deep left side of back, upper part, near spine.

5. Gunshot wound of entry 1 cm x 1 cm on abdomen 7 cm above umbilicus at 12 O" clock communicating to Injury No.6 underneath intestines are lacerated at places.

6. Gunshot wound of exit 4 cm x 2 cm x abdomen deep communicating to Injury No.5 on right side back at lumber region.

7. Gunshot wound of entry communicating to Injury No.8 at middle part of back, near spine on right side 1 cm x 1 cm chest cavity deep, tattooing present all around.

8. Gunshot wound of exit 2 cm x 2 cm abdominal cavity deep-communicating to Injury No.7.

9. Gunshot wound of entry 4 cm x 2 cm on left upper part of chest on mid clavicular region, cavity deep, tattooing present around in an area of 15 cm x 15 cm, a bullet, metallic recovered from chest cavity deep.

10. Gutter shaped wound 7 cm 1 cm on back of right forearm 7 cm below elbow joint, tattooing present on whole of back of forearm.

11. Lacerated wound 2 cm x 1 cm x bone deep on lower part of back right side near spine.

7. In the opinion of doctor, cause of death was due to shock and haemorrhage as a result of ante mortem injuries. Dr. Jiyani P.W. 5 has proved post mortem examination report as Ext. Ka. 5.

8. During the course of investigation, the Investigating Officer recorded the statement of various persons including prosecution witnesses and also prepared relevant papers, a mention of which may be made i.e. recovery memo of simple soil and blood stained soil, empty cartridges, shoes, slipper and Motor Cycle No. U.P. 15-H-3389 Yamaha red colour. This recovery memo is Ext. Ka. 7. The investigating Officer also took blood stained clothes of injured Babbal and prepared memo of the same as Ext. Ka. 8. Apart from above, the Investigating Officer also prepared site plan of the place of occurrence which is marked as Ext. Ka. 6 on record.

9. After completing the investigation, the Investigating Officer submitted charge

sheet against the appellants at case crime number no.373 of 2000, under sections 147, 148, 149, 504, 307, 302/34 and 120B IPC and Section 7 Criminal Law Amendment Act, which is Ext. Ka. 9 on record. Thereafter, the case of the accused persons was committed to the court of Session from where, it was made over for trial to the concerned Additional Sessions Judge, who after hearing the appellants on the point of charge, framed charges under sections 147, 148, 307/149, 302/149, 504, 506, 120-B, I.P.C. and section 7 of Criminal Law Amendment Act. The charges were read over and explained to the accused who denied the charges and opted for trial. Consequently, the prosecution was asked to adduce its testimony to prove its case.

10. The prosecution produced in all six witnesses. Brief reference whereof is being given herein below.

11. Veersen P.W. 1 is the first informant and claims himself to be an eye witness of the incident. He has proved written report Ext. Ka. 1. P.W. 2 Babbal Singh is the injured eye witness and is also star witness for the prosecution. He has narrated about the incident. P.W. 3 Dr. Sushil Fotedar has examined aforesaid injured witness P.W. 2 Babbal Singh on 27.9.2000 at Yashoda Hospital and has proved injury report of injured Babbal Singh as Ext. Ka. 2. K.L. Suman Head Constable is P.W. 4. He has proved check FIR as Ext. Ka. 3 and relevant G.D. entry and registration of case against the appellants as Ext. Ka. 4. P.W. 5 is J.R. Jiyani. He has conducted autopsy on the dead body of the deceased Jitendra at 2.00 P.M. on 28.9.2000 and has proved post mortem report as Ext. Ka. 5. P.W. 6 - S.I. Pyare Lal Yadav is the Investigating Officer of this case and he has described the various steps he took in completing the investigation. He has elaborated every relevant aspect of the investigation in his testimony and has proved filing of charge sheet against the appellants as Ext. Ka.9. Besides, he has proved other relevant papers either prepared by himself or got prepared from his colleagues in completing the investigation.

12. Thereafter the evidence for the prosecution was closed and statement of accused appellants was recorded under section 313 Cr.P.C. wherein the appellants termed their implication false and submitted that they have been falsely implicated on account of old enmity and village Parti-Bandi.

13. In turn, the defence got examined constable Banwari Lal as D.W. 1. As per his testimony, he has described about certain entries made by him in the City Control Room on the relevant date of occurrence (i.e. 27.9.2000). Thereafter, the case was heard on its merit by the learned Trial Judge, who after appraisal of facts, recorded conviction against the appellants and sentenced them to various terms of imprisonment and fine under sections 148, 307 read with section 149, 302 read with Section 149, 504, 506 I.P.C. and section 7 of the Criminal Law Amendment Act in Sessions Trial No. 247 of 2001. Consequently, this appeal.

14. Shri A.B.L. Gaur learned counsel for the appellants has vigorously persuaded that the prosecution has not been able to establish its charges beyond

reasonable doubt and the occurrence itself becomes doubtful. Lodging of the First Information Report is ante timed. P.W. 1 the first informant has, in fact, not seen the occurrence. Investigation is tainted. Even injured witness is not worthy of credit and he in fact did not see the real assailants. In this case, the circumstances are so placed that the injury report of Babbal, as claimed by the prosecution, has not been properly proved by Dr. Sushil Fotedar P.W. 3. Injury report Ext. Ka. 2 becomes waste paper.

15. D.W. 1 constable Banwari Lal happens to be an independent witness of so called post occurrence and has proved various entries and information received in the City Control Room of Ghaziabad. D.W. 1, if believed, then first information report becomes ante dated. It is claimed by the prosecution that the police arrived immediately on the spot and took the injured to hospital in Police Gypsy. As per testimony of D.W. 1, the police control room was informed about the incident around 11.30 A.M. and it was also admitted that white coloured Maruti Car has been abandoned and only two persons were seen alighting from the aforesaid Car. If this is the state of affairs on the factual side, then this must have to be repelled first in order to establish consistency of the prosecution version and the charges, but these vital facts in shape of attendant circumstances adversely make deep dent in the prosecutions story and create lot of doubt which doubt has not been dispelled. Obviously, the first information report was lodged at 3.40 P.M. and as per testimony of D.W. 1, no such intimation was given to the city control room regarding lodging of first information report by 4.05 p.m. From 3.40 P.M. to 4.05 P.M. on 27.9.2000, if no information regarding the lodging of first information report was received at the police control room then it is obvious that no information report was in existence till 4.05 on 27.9.2000. These factual aspects and circumstances show handy work of police and false implication of the accused persons. Even one person was apprehended by the police, but this particular fact was not properly brought before the trial court. All these anomalies generated lot of doubts and loopholes in the prosecution story and same cannot be believed as such.

16. Per contra, learned A.G.A. submitted that the prosecution case rests on the ground that the lodging of the first information report under the relevant sections of IPC and Criminal Law Amendment Act has been reasonably proved. The same cannot be said to be ante time. D.W.1 is working as a commentator. In common parlance, it is not necessary that each and every first information report, which is lodged, just before 4.00 P.M. will be immediately communicated to the City Control Room because, Government agencies who man the situation, take their own time and pause in which mathematical calculation and immediate execution of information cannot be expected of them. The testimony of injured witness cannot be done away merely on the asking. He has narrated the entire incident in consistent way and his presence on the spot is established and it is also established that he was fully conscious of the occurrence till he fell down unconsciously. The first informant also happened to be present on the spot and his presence cannot be doubted and his testimony regarding the details of the

incident inspires confidence. The case of the prosecution is proved consistently against the appellants.

17. Shri Indradeo and Shri Kapildeo Pandey learned counsel for the complainant added further to the above arguments of the learned A.G.A. and engaged our attention to the various injuries sustained by Babbal and submitted that there was blackening in some injuries sustained by injured witness P.W. 2. The testimony of P.W. 1 and P.W. 2 cannot be said to be contradictory in material particulars and particularly regarding the manner and style of the incident. The incident occurred in broad day light and identity of the appellants was well known to them i.e. first informant and Babbal, therefore, participation of the appellants in the commission of the crime resulting into death of one person and vital injuries to another person have been ably proved by direct testimony of prosecution witnesses of fact and the same gets corroboration from the circumstances of the case and on the whole inspires confidence in the prosecution case that the appellants have committed ghastly crime.

18. Learned counsel concluded by submitting that very motive for committing the crime is virtually admitted to the defence and the appellants have themselves stated that their implication is on account of old enmity and village Partibandi, whereas the fact of enmity has been proved by P.W. 1 in his examination in chief, and fact of enmity goes without challenge by the defence in cross-examination. Thus fact of old enmity acts as strong motive for committing offence in question.

19. We also considered the rival submissions so placed by the learned counsel for both the sides. We may scrutinise facts and circumstances of the case in the light of testimony on record.

20. Therefore, the moot point arises for adjudication of this appeal hinges on central point whether in the incident in question and participation of the appellants in the commission of the crime have not been reasonably proved and a doubt is created in favour of the appellants as claimed by them?

21. At the outset, we may take note of contents of the first information report. As per description contained in the first information report, we discover that first information was lodged at 3.40 P.M. on 27.9.2000 regarding the incident having taken place at 11.25 A.M. on the very same day. All the appellants were named in the first information report and first informant Veersain happens to be father of the injured witness Babbal and maternal uncle (Mama) of deceased Jitendra. On the motive part of the incident, it has been described in the first information report that brother of first informant Fakir Chandra was murdered by the accused side in the year 1996 and similar attempt was made on the life of first informant in the year 1999 and threat continued periodically from time to time from the accused side and in this background, instant incident was allegedly caused by the present appellants.

22. First information report leads us to facts that the incident took place on 27.9.2000 when the injured Babbal and the deceased Jitendra were returning

home from the market at Pilkhua Kasba and as soon as they reached near Sharma Petrol Pump, it was around 11.25 A.M. with Yamaha Motor Cycle (on which both injured and deceased were riding), was hit from behind by white coloured Maruti Car, due to which, both motor cycle riders were thrown away and fell down on the ground. As soon as both the victims of vehicular collision were in the process of recovery and stood on the ground, the assailants Babbal @ Harendra, Chumman @ Narendra, Gambhir and Jai Singh, possessing country made pistol in their hands and one Kuldip possessing "Farsa" in his hand alighted from White Coloured Maruti Car and at the exhortation of Gambhir, opened fire on both the victims due to which both the victims fell on the ground, then Kuldip assaulted Jitendra by "Farsa". The first informant and his companion raised alarm whereupon, the assailants opened fire also on these persons. Though the first informant somehow escaped unhurt and took shelter behind bushes. Due to indiscriminate firing on the spot, panic was created in and around, therefore, staff of Petrol Pump and persons working in nearby factory, fled away from the scene. Due to this, the assailants waiving their weapons and threatening, made their escape good from the place of occurrence. The incident was witnessed by the first informant and his companion Naresh. In the meanwhile, some police Jeep also arrived on the spot and took both the injured to Yashoda Hospital where the nephew of the first informant Jitendra succumbed to his injuries on way to hospital and his son Babbal was admitted in critical condition in the hospital. The dead body of first informant's nephew was sent to the Government Hospital at Ghaziabad while his son Babbal was under-treatment. This first information report was scribed by Saudan Singh son of Shyam Singh.

23. Now, we may switch over to testimony of the two prosecution witnesses namely P.W.1 Veer Sain and P.W. 2 injured eye witness Babbal Singh. Testimony of P.W. 1 first informant Veer Sain, gives very motive for committing the crime. His testimony discloses fact that his brother Fakir Chandra was murdered by Gambhir and his family members of his village in the year 1996 and in the year 1999, Rakesh and Narendra had attacked first informant with intention to kill him and they kept on threatening the first informant and his family. In this view of the matter, it is obvious that motive suggested for committing crime in shape of old enmity has been reasonably established. Though in presence of eye account testimony motive loses significance. However, establishment of fact of motive as the prime cause for committing offence strengthens case of the prosecution.

24. Further, it has come in the examination in chief of P.W. 1 that Jai Singh, Gambhir, Narendra and one another person have been convicted for committing murder of Fakir Chandra, brother of first informant and have been sentenced to life imprisonment. This aspect virtually proved the existence of old enmity between the first informant and the accused persons. The testimony regarding occurrence has come forth from two eye-witnesses P.W.1 Veersain and P.W.2 Babbal Singh wherein they have described about the occurrence to have taken place around 11.25 A.M. at short distance of Sharma Petrol Pump. The first informant saw Babbal and his nephew riding Yamaha motor cycle coming from

Pilkhua side. Their motorcycle was being followed by white coloured Maruti Car. In the meanwhile, said Maruti Car collided with the motor cycle from behind causing falling down of both the motor cycle riders on the ground. As soon as both the riders of motorcycle somehow stood up or were in the process when the appellants Babbal @ Harendra, Chumman @ Narendra, Gambhir and Jai Singh who were possessing country made pistol in their hands, appeared on the spot and at the exhortation of Gambhir, they fired indiscriminately on both the motor cycle riders due to which both of them fell down on the ground. The first informant raised alarm whereupon, the appellants opened fire on him too with intention to kill him and also tried to lay hold on him.

25. However, the first informant along with other companion, took shelter behind bushes. Lot of panic was created and people working over there fled away from the scene and the accused persons also secured their escape from the spot. In the meanwhile, some police vehicle (Gypsy) arrived on the spot and took both the injured to the hospital. Nephew Jitendra died on way to hospital while informant's son Babbal was admitted in Yashoda Nursing Home and thereafter, first informant got the first information written by Saudan Singh son of Shyam Singh and made his endorsement on the same and handed over the same at the concerned police station. It has come in his testimony that both injured Babbal and deceased Jitendra had gone to purchase tractor "T" from Pilkhua market and in the meanwhile, first informant accompanied by one Naresh, had proceeded around 11.15 A.M. on 27.9.2000 for knowing price of bricks at some brick-kiln at Dhaulana. The incident as per testimony took place around 11.25 A.M.

26. Before we enter into meritorial aspect of above testimony, it would be relevant to take note of testimony of injured witness Babbal P.W. 2. His testimony carries force more than that of P.W. 1. P.W. 2 Babbal Singh has testified that on the fateful day, on- 27.9.2000, he left his home around 9.00 A.M. along with Jitendra cousin brother on motor cycle for purchasing tractor "T" from Pilkhua market. They searched for tractor "T" but could not find the same and they were returning home. He was driving the motorcycle and Jitendra was pillion rider. It was around 11.30 A.M. when they reached near Sharma Petrol Pump on Delhi road, one white coloured Maruti Car hit his motor cycle from behind due to which they fell on the ground and as soon as they stood up Babbal @ Harendra, Chumman @ Narendra, Gambhir, Jai Singh and one Kuldip came out of Car and opened fire on both of them. Due to this, Babbal fell down on the ground and became unconscious. As per his testimony, he regained consciousness thereafter on 7.10.2000, then his statement was recorded by the Investigating Officer. PW-2 has been cross examined wherein he has stated that after falling on the ground pursuant to collision, and when he stood up, the assailants appeared in front of him and then assailants opened fire from a distance of 3-4 ft. He has been cross examined as to when he fell down then he stated that he fell down after receiving 2-3 gun shots. In his cross examination, it has emerged that one fire was also made at point blank range on his right ear. On this aspect contention has been raised by the defence that there is no such

injury being caused on the right ear at point blank range. Had the said shot been fired at point blank range, the skull of the injured would have been damaged severely, but no such injury was caused to the injured, therefore, testimony of fire from point blank range becomes wholly unreliable.

27. This contention does not carry force in view of the fact that though the attempt was so made but it has not surfaced in the testimony of the injured witness that it did in fact hit directly on the skull or somewhere else. This witness also spelled number of Maruti Car which hit the Motor Cycle. It also emerged in cross examination that after he was hit by pellet, he fell down unconscious within one and half minute (of the incident). He claims that he was conscious when the police arrived on the spot.

In view of the above testimony, we may conveniently discuss injury report of Babbal (Ext. Ka.2) which reflects that as many as six injuries were caused on his person with following description:

1. Wound 1 cm x 1 cm ragged margins over junction of cervical and thoracic region at back surrounding skin-black, profuse bleeding and viscera deep.
2. Wound ? cm x ? cm ragged margins over mid part of chest below throat, bone deep. Bleeding.
3. Wound 1? cm x 1? cm over right temporal region. Post auricular. Blackening. Bleeding on almost half of right pinna cut very severally.
4. Wound over post aspect of right chest about 1 cm x 1 cm at level of 7-8 rib, inverted margins. Bleeding and Tattooing present.
5. Abrasions both shoulders.
6. Tattooing all over right chest, shoulder, upper arm and back.

28. Dr. Sushil Fottedar PW-3 has proved medical examination report as Ext. Ka. 2 and has stated that this medical examination report was signed by Dr. Arvind Sharma whose signature appeared on the medical report. In the opinion of doctor, the four injuries might have been caused by fire arm. Injury no. 6 may have been caused by fire arm and injury no. 5 may be caused by falling down on the ground. In the opinion of doctor these injuries could have been caused around 11.25 A.M. on 27.9.2000. and these injuries might have caused death. In his cross examination, this doctor has suggested that one bullet was found at the vulnerable point embedded in injury no.3, therefore the same was not extricated. Had it been extricated, it could have caused death of injured.

29. He has also stated that one pellet was also extricated after opening chest of the injured. He has suggested that there may be margin of six hours in the timing. On this margin count, the doctor witness has not been suggested specifically by the appellants that these injuries could not have been caused at the relevant point of time on 27.9.2000.

30. In this view of the matter, obviously, causing of such injuries on the person of Babbal has been proved and the presence of at least P.W. 2 Babbal is established on the spot. He has specifically named the assailants who caused injuries to him as well as his cousin brother Jitendra.

31. Here, we may go through the contents of the post mortem report Ext. Ka. 11. From perusal of ante mortem injuries, it trickles out that as many as 11 injuries were caused on the body of the deceased Jitendra. It was conducted around 2.00 P.M. on 28.9.2000. Out of 11 ante mortem injuries most of the injuries were stated to be gun shot wounds. These injuries are as follows:

1. Gunshot wound of entry 1 cm x 1 cm right side of head 4 cm above ear brain cavity deep-communicating to Injury No.2. Blackening present.
2. Gunshot wound of exit 7 cm 6 cm x brain cavity deep communicating to Injury no.1 left parietal-temporal region underneath parietal temporal bone fractured. Brain lacerated.
3. Incised wound 10 cm x 2.5 x brain cavity deep on occipital region transversely placed underneath occipital bone cut.
4. Incised wound 8 cm x 1? cm x muscle deep left side of back, upper part, near spine.
5. Gunshot wound of entry 1 cm x 1 cm on abdomen 7 cm above umbilicus at 12 O" clock communicating to Injury No.6 underneath of intestines are lacerated at places.
6. Gunshot wound of exit 4 cm x 2 cm x abdomen deep communicating to Injury No.5 on right side back at lumber region.
7. Gunshot wound of entry communicating to Injury No.8 at middle part of back, near spine on right side 1 cm x 1 cm chest cavity deep, tattooing present all around.
8. Gunshot wound of exit 2 cm x 2 cm abdominal cavity deep-communicating to Injury No.7.
9. Gunshot wound of entry 4 cm x 2 cm on left upper part of chest on mid clavicular region, cavity deep, tattooing present around in an area of 15 cm x 15 cm, a bullet, metallic recovered from chest cavity deep.
10. Gutter shaped wound 7 cm 1 cm on back of right forearm 7 cm below elbow joint, tattooing present on whole of back of forearm.
11. Lacerated wound 2 cm x 1 cm x bone deep on lower part of back right side near spine.

In the opinion of doctor cause of death was shock and haemorrhage as a result of aforesaid ante mortem injuries and these injuries were stated to have been caused one day prior (to post mortem report). In the opinion of doctor, death

could have occurred around 12.00 noon on 27.9.2000. Except injury no. 1, 3 and 4, rest of the injuries could have been caused by fire arm. The doctor also proved extricated pellet from the chest of deceased as material Ext. 1.

32. One thing is obvious that injuries caused to both the deceased and injured (Jitendra and Babbal) were gun shot wounds and injuries were found on their body and person respectively. Certain injuries were diagnosed with blackening and tattooing, which fact by itself reflects that some shots might have been fired from at close range and that too under the circumstances subject to actual distance between the assailants and the victim vis-a-vis actual position of the weapons and the seat of injuries, its angle, and the ultimate position of its touch point. It cannot be said that the assailants, deceased and the injured remained static and stagnant all through the incident. It cannot be said under facts and circumstances that gun shots would have and must not have caused such tattooing and blackening. As per testimony of injured witness Babbal, injuries were was caused at a distance of 2-3 ft. It is common experience that if a person is being hit by firearm he will vary his position and so the assailants. During course of commotion, injuries could have been caused, as the case may be, on person or body depending on actual positioning of the weapon used and the length covered by out stretched hand and the weapon, thus causing injuries with blackening and tattooing, whereas it can be under such circumstances that there was no such symptom (blackening and tattooing) present in other injuries. In the opinion of doctor, these injuries could have been caused on 27.9.2000 at relevant point of time.

33. In such a factual scenario, injuries caused on the person of Babbal stands corroborated by the medical testimony of the doctor. P.W. 5 who has not even been suggested that these injuries could have been caused at different point of time in different manner; but nothing adverse has come out in the cross examination of doctor witness P.W. 5 Dr. J.R. Jiyani, therefore, the medical evidence is corroborated by the ocular testimony of the injured.

34. On the point of presence of the injured on the spot, it is obvious that there is no suggestion from defence regarding whereabouts of injured Babbal at relevant point of time when he could have sustained these injuries on his person. Similarly P.W. 1 has also corroborated version of P.W. 2 and in that perspective, presence of (P.W. 1) on the spot also appears to be natural. Contention raised by the appellants to the extent that another eye witness Naresh was not examined will not by itself falsify otherwise cogent, consistent and corroborative testimony of the above two witnesses of fact. Further contention regarding non-examination of the scribe does not carry force, for the reason that the first informant was strenuously cross-examined by the defence and the defence could have at least suggested some facts which may render timing of first information report being ante time, but from his testimony (P.W.1) nothing inconsistent has come to surface, therefore, non examination of Naresh and scribe Saudan Singh would not erode the prosecution case.

35. Now, we may take note of testimony of D.W. 1 whose testimony is said to be reflecting on several aspects of the case and particularly, first information report being ante timed. Core argument advanced relates to the fact that on 27.09.2000 till 4.05 P.M., register meant for indicating number of first information report lodged did not bear description of present first information report though lodged at 3.40 P.M. on 27.9.2000. Merely because the relevant register did not contain such description will not by itself render the first information report ante timed, for the reason that lot of other activities also take place at the concerned police station after first information report is lodged and particularly a report relating to such ghastly crime will necessary take time for other follow up action. It may reasonably take half an hour or so much time to communicate about such report to the police control room. We in India know how the police authorities discharge such type of duties. Thus non description of number of FIR at 4.05 P.M. on 27.9.2000 in the register meant for it will not render the FIR ante-timed.

36. Bare perusal of the first information report entails every relevant detail and factum of death of Jitendra, which by itself indicates that the first information report cannot be treated to be an after thought or outcome of deliberation, because as per testimony of doctor witness, the death of Jitendra might have occurred around 12 noon on 27.9.2000 and this specific piece of testimony virtually went unchallenged by the defence.

37. Further, what compulsion was working on the first informant that instead of naming the real culprits, he would conceal their identity and would press for participation of such innocent persons like the present appellants who have nothing to do with the offence. The defence even could not suggest specifically any natural fact to the first informant, therefore, claim of false implication, under the circumstances stands ruled out. Besides ocular testimony on the point of incident we have before us testimony of D.W. 1 Banwari Lal who has given information regarding the incident to the city control room around 11.30 A.M. and the same was taken down in the relevant register by one Lala Singh. Here, it is obvious that this is an exclusive act of the police and it was incumbent on the police to have taken cognizance of such information and could have proceeded further in its own way, but to all intents and purposes, the police refrained from taking any action, for which prosecution is not to be blamed. It is further reflected from the testimony of D.W. 1 that Maruti Car was said to have been traced out near the Garg Engineering College around 12.22 hours on 27.9.2000. This was also informed that two persons alighted from the Maruti Car. This fact itself cannot be directly related and confined to the overall number of assailants and the actual car used in the occurrence.

38. As per testimony of the Investigating Officer P.W. 6 Pyare Lal Yadav, Sub Inspector, at page 43 of the paper book, it has been specifically stated that on 9.2.2001 , information was sought regarding the car used in the commission of crime and search was made on 10.2.2001. On 11.1.2001, it so transpired that

this car was stolen car. There is no such confirmation by the Investigating Officer that Maruti Car used in the crime was exactly the same as pointed out by D.W. 1 in his testimony at page 71 of the paper book. Therefore, contention raised to the extent that in case testimony of D.W. 1 is believed then the first information report becomes ante dated and ante-time stands negated under the facts and circumstances of the case.

39. In this context, we may also note of testimony of P.W. 4 K.L. Suman who has proved the lodging of the first information report at 15.40 hours at crime no. 373 of 2000 under sections referred to above, bearing first information report no. 230 of 2000. This first information report is Ext. Ka. 3 and similarly registration of the case at relevant G.D., Rapat No. 24 on 27.9.2000 at the same crime number is Ext. Ka. 4 on record. He has denied suggestion that the first information report was lodged after the inquest report of deceased Jitendra was prepared.

40. Perusal of the inquest report Ext. Ka. 10 which is proved by the P.W. 6 the investigating Office, reflects that preparation of inquest report commenced at 5.30 P.M. on 27.9.2000 and was completed at 6.30 P.M. First page of this inquest report contains details of case crime number with sections of IPC and name of the police station and these descriptions are in the same ink and same hand writing. Under circumstances, it is hard to believe that first information report came into existence only after the inquest report had been prepared. Not only this, other relevant papers Photo Nash Ext. Ka. 14 specimen seal Ext. Ka. 12, letter to C.M.O. Ghaziabad is Ext. Ka. 13 also bear case crime number and the ink used is the same, therefore, authenticity of these papers is self explained and cannot be doubted as such. In so far as contradictions appearing in the testimony of prosecution witnesses of fact P.W. 1 and 2 is concerned, there is no such material contradiction which may render the prosecution story doubtful. On the contrary, both the eye witnesses of the occurrence particularly injured eye witness Babbal is most consistent, clinching and his testimony is inspiring confidence and the same is in conformity to medical testimony on record. This way medical testimony becomes worthy of credit leaving no room for doubt regarding the occurrence.

41. We may further note that Investigating Officer also prepared memo of blood stained and simple soil and the recovery of empty cartridges, missed cartridges, slipper, shoes etc. which also confirms place of occurrence and this memo has been ably proved by the Investigating Officer Ext. Ka. 7, therefore, there is no doubt about the place of occurrence. Thus, we have no doubt in recording verdict in favour of the prosecution and we cannot doubt the very occurrence. Whatever inconsistency are there in the ocular testimony of prosecution witnesses, the same are trivial and minor in nature and they do not hit at the root of the prosecution case. The testimony of D.W. 1 in the presence of innocuous testimony of prosecution witnesses of fact P.W. 1 and 2 is rendered insignificant vis-a-vis, circumstances of this case. The learned trial court took genuine view of facts and circumstances and evidence on record, and recorded just finding of

conviction based on material on record and awarded just sentence.

42. Therefore, judgement and order of conviction and sentence dated 17.6.2005, passed by the Additional Sessions Judge, Court No. 5, Ghaziabad, in S.T. No. 247 of 2001- State v. Babbal @ Harendra and others, arising out of case crime no. 373 of 2000, under sections 147, 148, 149, 504, 506, 307, 302/34 120-B, I.P.C. and section 7 of Criminal Law Amendment Act, Police Station Pilkhua district Ghaziabad, is hereby upheld by us. This appeal lacks merit and is accordingly dismissed.

43. In this case, appellants are languishing in jail, they shall serve out the remaining sentences imposed on them by the trial court.

44. Let a copy of this order be certified to the court concerned for information and necessary follow up action.