
(2017) 01 AHC CK 0008
In the Allahabad High Court
Case No : Criminal Appeal No. 2220 of 1982

Bhairon Prasad

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-01-2017

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, Section 34

Citation : (2017) 4 ADJ 12 : (2017) 1 AllCrLRulings 1054 : (2017) 4 AILLJ 88

Hon'ble Judges : Bharat Bhushan and Alok Kumar Mukherjee, JJ.

Bench : Division Bench

Advocate : Jagdish Singh, Apul Mishra, C.S. Saran, J.S. Sengar, Sri P.N. Mishra, Samit Gopal and Gopal Swaroop Chaturvedi, Advocates, for the Appellant; D.G.A., Amar Saran and B.S. Rathore, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Bharat Bhushan, J.—Appellants have assailed the judgment and order dated 27.7.1982 passed by the then IIIrd Additional Sessions Judge, Banda in Sessions Trial No. 143 of 1981 (State of U.P. v. Sagar alias Shiv Sagar and others) arising out of Case crime no. 14 of 1981, under section 302 read with Section 34 Indian Penal Code (in short, IPC), Police Station (in short, P.S.) Manikpur, District Banda whereby appellants were convicted and sentenced to undergo life imprisonment.

2. Appellant no. 1 Bhairon and appellant no. 4 Rajendra Singh have died, therefore, the appeal filed on their behalf stands abated in view of order dated 6.7.1916. This Court is now concerned with the appeal filed on behalf of surviving appellant no. 2, namely, Sagar @ Shiv Sagar and appellant no. 3 Anurudh Prasad @ Pullu only.

3. Prosecution case, in brief, is that on 15.2.1981 deceased Shiv Naresh, his brother informant Ram Naresh (PW-4), Ram Raj ((PW-3) and Ramroop went to Manikpur for purchasing logs and bamboos. They could not get proper timber,

therefore, they were returning back by a Roadways Bus (Government Bus) from Manikpur to Karvi in the evening at 6:30pm. The U.P. Roadways bus No. U.T.P. 4062 was being driven by Sabir Ali (PW-2) and conducted by Shailendra Raizada (PW-1). Roadways bus stopped at Saraiya bus stand in the evening at about 6:45pm to enable the passengers to alight from the bus and also for boarding of new passengers from there.

4. As soon as the bus stopped at Sariaya Bus Stand, two accused-appellants namely, late Bhariro and Rajender armed with fire arm weapons entered into the bus from its back door. Two other surviving appellants, namely Sagar and Anurudh Prasad alias Pullu also armed with fire arm weapons boarded the bus from front door. Accused-appellants caught deceased's brother Shiv Naresh and started dragging him. The deceased resisted and his companions also made endeavour to save him but surviving appellants Anurudh Prasad alias Pullu and late Rajendra opened fire upon the deceased. Surviving appellant Sagar alias Shiv Sagar and late appellant Bhairav Prasad also exhorted in challenging manner not to spare deceased Shiv Sagar. These two persons managed to drag down deceased Shiv Naresh from the bus. Shiv Sagar also opened fire at Shiv Naresh, which resulted in his instantaneous death. It is alleged that accused-appellants had in fact, murdered father of the informant some years prior to the present incident and this assault was again committed to destroy their family.

5. This fire arm assault was committed by accused persons in the bus which included other passengers as well. Two passengers, namely, Ram Asrey of village Bharthana P.S. Karvi and Shanker Lal of District Hathras also received fire arm injuries. In fact, the condition of Ram Asrey was said to have been so serious that a dying declaration was recorded by Sri Yogesh Srivastava, Tehsildar/ Magistrate of Karvi in apprehension of his death. However, Ram Asrey managed to survive. Incidentally, injured have not testified in this case though the statement of Ram Asrey was recorded as dying declaration, which is available on record as Ex. Kha-1.

6. This gruesome and dare-devil attack in the evening left every body shell shocked. The bus conductor Shailendra Raizada (PW-1) and bus driver Sabir Ali (PW-2) ran away towards some village along with other passengers. In fact, they again came on the place of occurrence only on the next day in the morning at about 8:00am or 8:30am but Ram Naresh, brother of deceased Shiv Naresh immediately took a piece of paper from a nearby shop and scribed the report. Then, he along with PW-3 Ram Raj went to Police Station on a truck. They left their companion Ram Roop son of Bhagwati Prasad beside the corpse along with other passengers. They reached Police Station Manikpur at 19:30pm within 45 minutes of the incident along with report (Ex.Ka-1). The Police Station was located at 10kms. from the place of occurrence. A chik report (Ex.Ka-17) was prepared. The case was entered into General Diary (in short, G.D.) at Police Station by PW-10 Head Constable Bare Lal Misra. The case was registered in G.D. of Police Station Karvi, extract of which is available on record as Ex.Ka-18.

7. It appears that Sub-Inspector was not present at the Police Station, therefore, Head Moharrir Bare Lal Misra (PW-10), Constable Ranjit Singh Yadav (PW-9), Constable Maharani Deen Shukla (PW-8), Constable Gaya Dutt Pathak along with informant Ram Naresh (PW-4) and Ram Raj (PW-3) went back to the place of occurrence on a truck. Informant Ram Naresh (PW-4), Ram Raj (PW-3) and Ram Roop left for their home for informing the family members while rest of persons including police personnel remained at the place of occurrence. At about 8:30pm in the evening, S.I. Mahadev Prasad (PW-7) who later on investigated the matter also reached the place of occurrence. Injured were sent for medical treatment but inquest proceedings could not be completed on account of paucity of light. The Police personnel stayed at the place of occurrence and inquest proceedings were again started at 9:00am on 16.2.1981 and finished by 11:30am on the same day. Inquest report (Ex Ka-9) is available on record.

8. The corpse was sealed and given to Constable Ranjit Singh (PW-9) and Constable Anand Swaroop, who took it on a bullock cart to Karvi. The I.O. also took samples of blood soaked and simple earth, recorded statement of informant and witnesses. Site plan (Ex.Ka.14) was prepared on the same day. I.O. went to Karvi Hospital where statement of injured witness Ram Asrey (not produced) was taken. The accused persons continuously remained at large. Their property was attached on 23.2.1981 and 24.2.1981. Meanwhile statement of another injured Shanker Lal (not produced) was recorded on 20.2.1982. Ultimately, accused persons surrendered in the court of law. Two passengers, who were injured in the same incident, were examined by the doctors. Injured Ram Asrey was examined by PW-5. Dr. Mahesh Kumar Joshi, who found following injury on the person of injured Ram Asrey :-

"2 cm. x 1? cm x chest cavity deep in the front side of the chest 3? cm below the right nipple at 7"O clock position margins inverted & abraded collar present direction from front to back. Fresh bleeding present. Advised X-ray."

9. PW-6 Dr. Umesh Chandra Dwivedi examined another injured Shanker Lal. His injuries are reproduced below :-

1. F.A. Injury of Entrance :- 3 m. X 1 cm. X Bone deep on the of the proximal phalanx of right big toe 3 cm. below the tip of b big toe clatted blood present. U.O. Margins inverted. Adv. X-ray big toe.

2. F.A. Injury of Exit :- 3.5 cm x 1 cm. x bone deep on the solar aspect of (Rt) big toe proximal phalanx 1.5 cm. below the tip on (Rt.) big toe injury communicating injury (no. 1) U.O. Adv. X-ray (Rt.) big toe. Margins everted.

3. Gutter shaped wound :- 2 cm. x 0.5 cm. x bone deep on the medial border of (Rt) foot toe & not view. Margines lacerted.

All injuries kept U.O. Caused by Fire Arm of about 3/4 day duration.

10. The postmortem of deceased Shiv Naresh was conducted by PW-5 Dr. Mahesh Kumar Joshi. Following antemortem injuries were found on the person of

the deceased :-

1. Gun shot wound of entry :- Size 1 cm. x 1 cm. x chest cavity deep on back of right side of chest 6 cm. lateral to midline at level of T 7 vertebrae. Margines inverted & abraded. Collar present-blackening & tatooing present. Duration fromback to front -under lying bone ribs 7th fractured.

2. Gun shot wound of Exit :- Size 4 cms. X 3.5 x through & through to wound of entry injury no. 1 on front of right side of chest 9 cm. below the right nipple at 5'clock position & 5 cm. lateral to midline. Margins averted. Direction from towards wound of entry. Underlying bone 10th & 11th rib fractured.

3. Gun shot wound of Entry:- Size 3 cms. X 3 cm. x abdominal cavity deep on back of right side of abdomen in iliac region 1 cm. above the iliac creast & 16 cm lateral to midline at level L3 vertebrae margins inverted & abraded collar present blackening & tattooing present direction from back right to left.

4. Gun shot wound of exit :- Size 4.5 cm. x 4 cm. x through & through to wound of entry injury no. 3 on back of left side of abdomen in lumber region 9 cm. lateral to midline at level of L4 vertebrae margins averted direction towards the wound of entry under lying bone L3 & L4 vertebrae fractured through & through.

11. Trial Judge charged accused late Bhairav, late Rajender, appellants Sagar @ Shiv Sagar and Anurudh Prasad under section 302 read with section 34 IPC on 17.10.1981. All the appellants denied the charges and claimed to be tried.

12. Prosecution adduced evidence of 10 witnesses to establish its case. They are PW-1 Shailendra Raijada (conductor of the bus), PW-2 Sabir Ali (driver of the bus), PW-3 Ram Raj (eyewitness) PW-4 Ram Naresh (informant and eyewitness), PW-5 Dr. Mahesh Kumar Joshi, PW-6 Dr. Umesh Chandra Dwivedi, PW-7 S.I. Mahadev Prasad (I.O.), PW-8 Constable Ram Rani Deen Shukla, PW-9 Constable Ranjit Singh Yadav and PW-10 Head Constable Bade Lal Misra. The statements of accused persons were recorded under section 313 Cr.P.C. wherein accused persons denied all the allegations and claimed false implication on account of previous enmity.

13. On conclusion of trial, learned IIIrd Additional Sessions Judge, Banda convicted all the appellants under section 302 read with section 34 IPC and sentenced them to undergo imprisonment for life by judgment and order dated 27.7.1982. This judgment is under challenge on behalf of two surviving appellants viz. Sagar alias Shiv Sagar and Anurudh Prasad alias Pullu.

14. Heard Sri Gopal Chaturvedi, learned Senior Advocate, assisted by Sri Samit Gopal for surviving appellant no. 2, namely, Sagar @ Shiv Sagar and appellant no. 3 Anurudh Prasad @ Pullu and Sri Ajit Ray, learned Additional Government Advocate for the State.

15. As stated earlier, two appellants namely, Bhairav and Rajendra have died and therefore, the appeal filed on their behalf stands abated in view of order dated

6.7.1916. This Court is now concerned with the appeal filed on behalf of surviving appellant no. 2, namely, Sagar @ Shiv Sagar and appellant no. 3 Anurudh Prasad @ Pullu only.

16. Learned Senior counsel has stated that there is no evidence to demonstrate that PW-4 Ram Naresh was present on the spot. Counsel for the appellant has wondered how the other witnesses of prosecution managed to save themselves despite the fact that stated enmity of appellants was almost similar with PW-3 Ram Raj and PW-4 Ram Naresh as was with deceased Shiv Naresh.

17. Submission is that even the conductor and driver of the Roadways Bus PW-1 Shailendra Raizada and PW-2 Sabir Ali have not established the presence of the informant. A claim was made that medical reports are inconsistent with the ocular testimony. Learned Senior counsel for the appellants has also raised argument that the injuries were caused by point blank range, obviating any feasibility of disbursal of pellets, therefore, injuries to two bystanders were not possible. Submission was also made that there is no evidence of third gun-fire. Lastly, a suspicion was expressed, as body of deceased reached mortuary after 24 hours. A claim was made that this creates doubt about whole investigation procedure.

18. On the other hand, learned AGA Sri Ajit Ray has argued that 3rd shot hit Ram Asrey. He further argued that prompt lodging of FIR obviates any possibility of concoction and manufacturing of false case. It is stated that cadaver was transported in a bullock-cart for more-than 20 kms. during night, therefore, delay was inevitable and natural. Learned AGA has also argued that presence of informant has been established by the fact that a report was lodged within 45 minutes of the incident at Police Station which was 10 km. away from the place of occurrence, disclosing the names of not only the appellants but also deceased as well. But for his presence it would not have been possible for unknown passengers, bus driver and conductor to disclose the identity of either deceased or appellants.

19. It is pertinent to point out that incident occurred in one of the most backward area of Uttar Pradesh i.e. Bundelkhand, in the year 1981. The facility of transport, communication and other public services are pathetic in this area even today. One could very well imagine them in the year 1981. This area is also known for feudal social norms and family feuds lasting for generations.

20. The record reveals that father of deceased was also assassinated some 15-16 years prior to the incident wherein appellant Sagar alias Shiv Sagar and his co-accused were sentenced to death which was later on converted into life imprisonment. The record reveals that Sagar alias Shiv Sagar spent considerable time in jail for this crime. Thereafter, the brother of informant was also murdered. In between brother of appellant Sagar @ Shiv Sagar was also assassinated wherein grand-father of informant and late Bhairav were made accused.

21. Prosecution has claimed that initially appellant Bhairav was also prosecuted for the murder of brother of appellant Sagar alias Shiv Sagar along with grandfather of informant (PW-4). However, later on, daughter of Bhairav married one Dev Narain son of Parmeshwar Dubey of village. Due to this new relationship Bhairav accused developed affinity and friendship with appellant Sagar alias Shiv Sagar and his brothers. In any case, they belonged to same clan. Late appellant Rajender Singh always had very close friendship with the family of appellant Sagar alias Shiv Sagar.

22. The record has demonstrated that not only all the named assailants including late Bhairav and late Rajendra were friends with each other, they also had agonistic relationship with deceased, informant and their families. Several murders took place between them and most of the time, rival party was blamed for these murders.

23. Village Chillimal of informant and deceased is near village Mahuwa. Late appellant Rajender lived in village Mahuwa. For going to village Manikpur, village Mahuwa of late Rajender lies in between. Village Rajapur of PW-3 Ram Raj is 6 Kos away from village Chillimal. Village Saraiya where the incident took place lies in between village Manikpur and Karvi.

24. This topography reveals that all principal players in this episode belong to nearby places. The transport facilities in the year 1981 were bare minimum for the people to travel in that area. It was necessary for village folks to make purchase from different places and they had to use public transport for this purpose. Therefore, it was not strange to meet known people on their route to various places. It was also not difficult for people in between to gain information about the movement of rival party.

25. It is pertinent to point out that informant has mentioned the fact of prior enmity in the FIR (Ex.Ka.-1) itself which was lodged within 45 minutes of the incident. Appellants themselves have claimed false implication on account of previous enmity in their statements recorded under section 313 Cr.P.C. Therefore, there is no dispute between rival parties as far as agonistic relationship between them is concerned as they both have accepted this fact.

26. In this case, four witnesses of fact have been produced by the prosecution. Two witnesses of fact are totally independent. They are bus conductor PW-1 Shailendra Raizada and driver PW-2 Sabir Ali of bus no. UTP-4062 of roadways bus. Both are important witnesses because incident initiated in their bus and because of the fact that both of them are independent of rival parties. PW-1 Shailendra Raizada has testified that on the day of the incident, U.P. Roadways bus no. U.T.P. 4062 left Manikpur for Karvi at 6:30pm. This bus driven by Sabir Ali (PW-2) was carrying 44 passengers. This bus reached Sarai ya bus stop at 6:45pm. The conductor got down from the bus for attending the passengers. He was returning money to some of the passengers while some other passengers were boarding and alighting from the bus. Suddenly a pandemonium broke out in

the bus. One passenger was caught by some criminals. The criminals recognised that person and exhorted each other to eliminate that passenger, then this witness heard noise of gun fire. The other passengers and PW-1 Shailendra Raizada ran helter-skelter towards the village.

27. PW-1 Shailendra Raizada claims to have seen and heard the contours of incident but could not identify assailants or persons who received injuries. According to him he saw the deceased next day as he had left the bus in the wake of incident to save his own life. However, this witness has given some information to give support to the contours of prosecution story. He claims that assailants were more than one in number. He, however, could not give any specific number. He stated that two or three persons armed with fire arm weapons boarded the bus from back door of the bus. He claims that his eyes were set on the back door, therefore, he could not see the front door of the bus. He heard the noise of two fires but did not see the assailants dragging the deceased as by that time he had started towards the village after hearing unpleasant sound of gunfire. This witness only went to the place of occurrence next day in the morning. Then he saw the corpse of deceased and found blood inside the bus as well as near cadaver. He was questioned by Sub Inspector at 8:10am.

28. PW-2 Sabir Ali, driver of the bus has also given virtually the same evidence. After stopping the bus, this witness Sabir Ali went to Betel (Pan) shop. He also saw that two passengers armed with fire arm weapons boarded the bus from back door. He could not see the armed intruders at the front door of the bus. He heard some noise of scuffle inside the bus. PW-1 Sabir tried to reach the bus but suddenly a gun fire broke out in the bus whereupon PW-2 Sabir Ali also scampered towards village Saraiya along with passengers and bus conductor.

29. PW-2 Sabir Ali has testified that he heard the noises of more gun fires while he was running towards village Sariaya. Therefore, Sabir Ali (PW-1) has claimed discharge of three shots. This witness has also deposed that he only came to place of occurrence on the next day at 8:00am and saw one corpse lying 8-10 steps away from the bus. He has also stated that he heard the noise of three gun fires, discharged in rapid succession. He failed to give any information about the companions of deceased.

30. Learned Senior counsel for the appellants has tried to take benefit of deposition of these two witnesses, claiming that these witnesses have not supported the presence of PW-4 Ram Naresh as well as PW-3 Ram Raj. Argument was also raised that PW-1 Shailendra Raizada has mentioned the discharge of two gun fires while PW-2 Sabir Ali is said to have heard noise of three gun fires. Learned counsel has submitted that these discrepancies attack the very root and genesis of prosecution story, therefore, these discrepancies should be taken very seriously. These discrepancies are enough for acquittal of the appellants.

31. We are not in agreement with the argument of learned counsel for the

appellants on this score. We believe that these two independent witnesses have, in fact, established the contours of prosecution case completely. The nature of witnesses has to be kept in consideration. These two witnesses PW-1 Shailendra Raizada and PW-2 Sabir Ali are not local people of the area. PW-1 Shailendra Raizada belongs to Kanpur and PW-2 Sabir Ali belongs to city of Banda. Both the witnesses were present at the place of occurrence on account of their employment. They were duty bound to carry the Roadways Bus. They were on their assigned duty on the said bus. Obviously, they were not personally aware of identities of their passengers. For them passengers were part of their employment. Both of them have established the factum of incident and murder of one person. Argument that they have not identified two witnesses is neither here and there. PW-1 Shailendra Raizada was busy in returning the money to passengers. New passengers were also boarding the bus and some other passengers were alighting from the bus. He has clarified that his back was towards front door. He has also admitted that as soon as he heard gun fires inside the bus, he started running for village along with other passengers and abandoned the bus and passengers. His eyes were set on the back door of the bus, therefore, he could only see the assailants boarding the bus from back door. He was not sure about the number of assailants boarding from the back door of the bus. He said that probably two three assailants boarded the bus from back door but his testimony clearly established that fact that more than one assailant entered from the back door of the bus. The murder in the Roadways Bus is not every day affair. The rifles and guns are not silent weapons. They create a lot of noise. Noise of gun fire can deter even a bravest person from interfering in the episode. We are sure that noise of gun fire created pandemonium at the spot as stated by these witnesses. Most of the passengers, including driver and conductor of the bus were busy in running as far away from the place of occurrence as was possible, therefore, they have naturally failed to notice the identity of either deceased or injured witnesses or assailants. But evidence of PW-1 Shailendra Raizada, bus conductor and PW-2 Sabir Ali bus driver are not meant for establishing the identities of assailants or fixing their numbers. There evidence is primarily valuable for establishing the contours of incident. We believe that their testimonies have established the following things :-

1. Bus No. U.T.P. 4062 was carrying 44 passengers including deceased, his companions and two injured on 15.2.1081.
2. This bus was being conducted by PW-1 Shailendr Raizada and driven by PW-2 Sabir Ali. This bus no. U.T.P. 4062 left Manikpur at 6:30 for Karvi. This bus reached Saraiya bus stop at 6:45pm.
3. Both conductor and driver alighted from the bus. Conductor was busy with the passengers and while driver was busy at a Pan shop;.
4. Some assailants, more than one in number armed with fire arm weapons boarded the bus and killed one person after dragging him down on the road and injured two other passengers.

5. Conductor driver as well as other passengers fled from the place of occurrence instantly towards village Saraiya in heat of movement as pandemonium broke out in the wake of discharge of fire arm weapons.

6. On the next day i.e. 16.2.1981, both the Conductor and driver reached the place of occurrence and found the corpse of deceased lying near the bus and by that time police personnel had arrived on the spot.

7. Evidence of PW-1 Shailendra Raizada and PW-2 Sabir Ali has revealed the fact that they were not aware of identities of either deceased or assailants.

8. This evidence suggest that these witnesses have not been tutored and were not prone to speak lies. They have testified only to those facts, they noticed or were aware.

32. We believe that information regarding number of shots fired is not important as witnesses themselves have disclosed that they ran for saving themselves in frightened state even abandoning the Roadway bus and other passengers. We cannot expect, ordinary people to interfere in such a brutal attack.

33. But identities of deceased and assailants were disclosed within 45 minutes of incident. The deceased was accompanied with Ram Raj and his own brother Ram Naresh (informant). PW-4 Ram Naresh has testified that on the day of occurrence when bus stopped at Saraiya bus stop, four assailant armed with fire arm weapons entered into the bus, two from front door and two from back door. Late Bhairav and late Rajender entered the bus from back door while surviving appellants Sagar alias Shiv Sagar and Anurudh Prasad alias Pullu entered into the bus from front door and tried to drag deceased Shiv Naresh. Two persons got up for rescue but late assailant Rajendra and surviving appellant Anurudh Prasad alias Pullu opened fire which injured the deceased Shiv Naresh. Late assailant Bhairav and surviving appellant Sagar alias Shiv Sagar also exhorted and shouted that enemy should not be spared. Deceased Shiv Naresh was dragged down from the bus and then, appellant Sagar alias Shiv Sagar opened a fire upon Shiv Naresh and killed him. Thereafter, all the assailants ran towards north-western side. The deceased Shiv Naresh died instantaneously. Two other persons, later on identified as Ram Asrey and Shanker Lal were also injured. Injured Ram Asrey belongs to village Bharthaul, P.S. Karvi and Shiv Shanker belongs to Hathras a very distant place from Banda.

34. The testimony of PW-4 Ram Naresh (informant) is supported by credible evidence. Ram Raj, too was accompanying deceased and informant. He has also testified that four assailants entered the bus, two from the front door and remaining two from back door of the bus. They were armed with fire arm weapons. Appellants Sagar alias Shiv Sagar and Anurudh Prasad alias Pullu dragged deceased Shiv Naresh and when informant and others got up for his rescue, late appellant Rajendra and appellant Anurudh alias Pullu opened fire inside the bus resulting in causing injuries to two innocent bystanders.

35. We have very carefully examined the evidence of PW-3 Ram Raj and PW-4 Ram Naresh. These testimonies are highly natural, credible and trustworthy. There is absolutely no reason to doubt, their presence on the spot.

36. Learned counsel has suggested that PW-4 Ram Naresh was not present on the spot but that this argument is not sustainable for one reason. The bus was full of strangers. Only PW-4 Ram Naresh and PW-3 Ram Raj were aware of identities of both the deceased and assailants. Police Station Manikpur was 10 kms. away from the place of occurrence with poor communication facilities yet within 45 minutes, FIR was lodged disclosing the identities of deceased as well as assailants. But for the presence of Ram Naresh and Ram Raj, it would not have been possible at all. It is pertinent to point out that both PW-4 Ram Naresh and PW-3 Ram Raj have stated that they took a piece of paper from a nearby shop, then hailed a truck, reached the P.S. Manikpur immediately and lodged the report.

37. It would not be out of place to mention that rival parties had been feuding and litigating for pretty long time, therefore, importance of lodging the report, perhaps was known to informant. The families, which face or institute criminal cases or keep feuding for a long time do acquired knowledge of legal procedures. We are not surprised by prompt lodging of the FIR. The distance between Police Station and place of occurrence was merely 10 kms. and they managed to board a truck and reached the Police Station quickly. It is pertinent to point out that prompt lodging of FIR has been supported by PW-10 Bare Lal Misra, the then Head Constable at P.S. Manikpur. He had recorded the FIR, entered into the G.D. of Police Station as Sub-Inspector was absent. This Head Constable actually reached place of occurrence along with Constable Ranjit Singh Yadav (PW-9), Constable Maharani Deen Shukla (PW-8), Constable Gaya Dutt Pathak, informant PW-4 Ram Naresh and PW-3 Ram Raj. It is not unknown in the small rural areas to use trucks for carrying passengers also especially in emergencies.

38. Sub Inspector Maha Deo Prasad (PW-7) also reached the place of occurrence at 8:30pm after getting information. The relevant information and relevant papers of Constable Anand Swaroop also establish truthfulness of recording of the FIR. There was no occasion for Sub Inspector to reach the place of occurrence at the same evening at 8:30pm if the FIR was not in existant. The incident occurred at 6:45pm and FIR was lodged at 7:30pm in the same evening. This obviates any possibility of manipulation. It is pertinent to point out that inquest report (Ex.K-9) contains crime number and sections under which the case was registered. But for the registration of actual case at Police Station, it would not have been possible. We believe that there was no possibility or any opportunity either to concoct or manipulate the prosecution story. We also believe the presence of PW-4 Ram Naresh and PW-3 Ram Raj on the spot is established from the fact that names of assailants as well as deceased were disclosed in the FIR lodged within 45 minutes of incident. We believe that informant would not spare real culprits of murder of his brother and implicate falsely the assailants merely on account of prior enmity. On the contrary we

believe that on account of previous enmity and continuous, feuds lasting several decades the assailants used the opportunity to kill the deceased Shiv Naresh in the presence of his brother PW-4 Ram Naresh and PW-3 Ram Raj.

39. Learned Senior counsel for the appellants has also raised the argument that it is surprising that assailants despite being four in number and armed with deadly weapons, did not kill PW-4 Ram Naresh. Learned counsel has claimed that enmity with Ram Naresh was same as was with deceased Shiv Naresh still informant Ram Naresh was spared and only Shiv Naresh was assassinated. First of all, we would like to say that it is not always possible to figure out the full intent of assailants in this kind of episode. We can only speculate about their reasons. Probably they did not notice the presence of PW-4 Ram Naresh in the heat of moment. The evidence reveals that deceased was sitting ahead near the seat of Conductor of bus. The seat obviously was in the front row while others were sitting on the back seats. As soon as assailants entered from the front door, they identified Shiv Naresh instantantly and their attention naturally was drawn towards him. It is true that PW-4 Ram Naresh has given the impression that he tried to save the deceased but apparently he was frightened and perhaps did not venture out to rescue his brother in the light of four armed assailants. This is not difficult to visualise the scene in the bust. Several passengers were inside the bus. Some were boarding and others alighting the bus. This armed attack naturally created a pandemonium inside the bus. Passengers were running helter and skelter. Two innocent passengers were already injured in the incident. The assailants did not have intention to harm those passengers. Yet two of them Ram Ashrey and Shankar Lal were seriously wounded. In this melee assailants perhaps only noticed the presence of deceased Shiv Naresh and missed Ram Naresh (PW-4) in the heat of moment, excitement and haste. We believe that it is very difficult to predict human nature or defined their conduct in perceived manner. The assailants wanted to kill somebody from his family and they did it. We believed that they perhaps did not notice the presence of other persons and that by itself would not create doubt regarding the prosecution story.

40. Learned Senior counsel for the appellants has also argued that fire arm shots were discharged from a close range therefore dispersal of pellets was not feasible, therefore, injuries to two other persons namely, Ram Asrey and Shanker Lal were not possible. We think that this argument is nothing but pure speculation as the evidence of PW-5 Dr. Mahesh Kumar Joshi and PW-6 Dr. Umesh Chandra Joshi have clearly established injuries sustained by them. Why they got gunshot injuries in the bus is difficult to explain and it is not even required. Ram Ashrey received seriously injuries. He was in fact under expectation of death and therefore, his dying declaration was recorded. Luckily, Ram Asrey survived but injuries to these two innocent persons Ram Asrey and Shanker Lal themselves indicate brutal attack by the assailants. There is nothing on record to show that any fire arm weapon was recovered. Certainly, there is no forensic report on record that weapons were either recovered or tested, therefore, to claim that injuries to two other passengers were not possible is

purely a guess work. The area inside the bus was small and bus was full with 44 passengers. It is always not amongst possible, in anger and passion to make surgical strike only amongst intended victim. We have no doubt that Ram Asrey and Shanker Lal received injuries in the same episode.

41. Learned Senior counsel has submitted that both the injured Ram Asrey and Shanker Lal have not been produced by the prosecution, therefore, prosecution case should be thrown out. We are not in agreement with this argument as well. Indian Evidence Act does not provide any specific number of witnesses. There is old legal cliché that legal evidence is weighed not counted. Two injured Ram Asrey and Shanker Lal have not been produced by the prosecution. It is pertinent to point out that Ram Asrey and Shanker Lal were unknown passengers who were naturally not aware of identities of assailants. The dying declaration of Ram Asrey recorded by Sri Yogesh Srivastava, Tehsildar/Magistrate is testimony of this fact. He supported the incident but could not identify the deceased or assailants. Obviously no other passenger except Ram Naresh and Ram Raj knew the deceased and assailants. There kind of evidence has already been given by PW-1 Shailendra Raizada and PW-2 Sabir Ali. There was no need for these two witnesses to give identical evidence. Shanker Lal, in fact, belongs to Hathras a long way from Banda i.e. more than 800-1000 kms. away from the place of occurrence. Both these witnesses were not aware of identities of assailants, therefore, they could have merely established the incident and their own injuries but the trial court had framed charge only under section 302 IPC and not in any other section. Therefore, we believe that non-production of Ram Asrey and Shanker Lal would not vitiate the prosecution case. It is pertinent to point out that dying declaration of Ram Asrey was not used by prosecution or by the trial court for the reason that Ram Asrey luckily survived. In any case as he was not produced in the trial. His earlier statement under expectation of death could have been used for limited purposes under section 145 and 157 of Indian Evidence Act for contradiction or corroboration only.

42. Learned counsel for appellants has also argued that no test identification parade was held. He has argued that an application was for moved on behalf of appellants claiming identification but this application was rejected by trial court.

43. Test identification is a device to establish the identities of perpetrators of crime. But in this case, we find that the identities of the assailants were not disputed and the assailants were named in the FIR itself, and as such, holding of test identification parade was not required. In the present case, FIR was lodged within 45 minutes of incident disclosing identities of all the four assailants. At least two witnesses emphatically claimed from the very beginning that they had recognised the assailants. These witnesses have described them. In this scenario, holding of test identification parade was not necessary. If identities of assailants are established or prosecution is satisfied with the available evidence regarding the identity of assailants, then there is no necessity or requirement of holding of test identification parade. We believe that even in this case, there was

no necessity of holding the test identification parade as there was no dispute about identity of assailants. Trial court rightly rejected the application for test identification.

44. Learned counsel for the appellants has also claimed that cadaver of deceased Shiv Naresh reached mortuary after 24 hours which creates doubt about the genesis of case. We are afraid, even this argument of learned Senior Advocate is not sustainable. We have already discussed the prevailing circumstances of Bundelkhand region in the year 1981 i.e. 35 years back. PW-9 Constable Ranjit Singh and Constable Anand Swaroop were given cadaver for post-mortem. PW-9 Constable Ranjit Singh has testified that cadaver was given to them on 16.2.1981 at 10:30am subsequent to inquest proceedings and Constable Anand Swaroop was also sent along with him. After arranging a bullock cart at about 11:30am they left the place of occurrence and reached the Police lockup on next day i.e. on 17.2.1981 and made their entry at about 10:00am. They have testified that bullocks were old and weak and distance was more than 20 kms. therefore, they took considerable time for reaching mortuary. PW-9 has clearly testified that he did not allow any person to meddle with the cadaver. We also believe that constables and bullock cart driver must have eaten food and taken rest on their way to mortuary. In this scenario to reach mortuary in the morning at 17.2.1981 is hardly surprising. There is no evidence on record to suggest that this delay gives any benefit to prosecution or gave any opportunity for manipulation. PW-5 Dr. Mahesh Kumar Joshi has testified that he started post-mortem at about 10:40am on 17.2.1981. We believe that delay of few hours had not created any problem or any affect on the post-mortem or tainted investigation in any manner. In fact, PW-5 Dr. Mahesh Kumar Joshi has not been questioned on this score at all.

45. Learned Senior Advocate appearing for appellants has also drawn attention of this Court towards the testimonies of both PW-7 Mahadeo Prasad, I.O. and PW-8 Constable Maharani Deen Shukla. The I.O. has testified that he completed inquest proceedings by 19:30am on 16.2.1981 as he could not conclude it on 15.2.1981 because of paucity of light. After dispatch of cadaver for post-mortem on 16.2.1981 at 10:30am in the morning, he prepared site-plan, recorded statements of some of the witnesses and reached Karvi and recorded statement of injured Ram Asrey and then initiated search for accused persons. He spent whole night in Karvi and again searched for accused persons on 17.2.1981. He also came back to place of occurrence at village Saraiya for search of accused persons but failed to do so. He came back to Police Station and deposited materials at Police Station on 17.2.1981 vide G.D. No.17, an extract of which is available on record at Ex.Ka.-5.

46. Learned counsel has submitted that this statement is contrary to the testimony of PW-8 Constable Maharani Deen Shukla as he has testified that Sub Inspector met him in Karvi market on 16.2.1981 in the morning at 8:00-9:00am. He stated that he joined I.O. and started search for accused persons. Learned

counsel for the appellants has submitted that even if the statement of PW-8 Constable Maharani Deen Shukla is accepted, then entire stated investigation conducted by PW-7 Mahadeo Prasad, I.O. becomes suspicious as according to PW-7 Mahadeo Prasad, I.O. he spent morning of 16.2.1981 at the place of occurrence conducting inquest proceedings, recorded statements of witnesses and preparation of site-plan etc.

47. This is a minor discrepancy which has been explained by PW-8 Constable Maharani Deen Shukla in later part of his testimony. He has conceded that there was no recording in G.D. of Police station indicating the fact that he met I.O. at 8:00-9:00am on 16.2.1981 at Karvi. He admitted that this part of statement was based on mere memory. This statement was given by PW-8 Constable Maharani Deen Shukla after more than 15 months of incident. He later on conceded that he mistakenly gave this information that he had met I.O. on 8:00- 9:00am on 16.2.1981 at Karvi because he could not understand the question of counsel. He again reiterated that at 11:00pm in the night of 15.2.1981, he admitted injured at hospital and thereafter, slept at bus station, Karvi in the night. He met I.O. in the afternoon instead of morning. This mistake was admitted and rectified by PW-8 Maharani Deen Shukla. In any case, evidence of PW-7 Mahadeo Prasad is highly trustworthy and credible for several reasons. Inquest proceeding and site-plan all contain date of 16.2.1981. If we consider the sequence of events, it is apparent that it would have been impossible to prepare site-plan in the dead of night. Therefore, we believe that inquest proceedings were concluded in the morning of 16.2.1981 by I.O. and thereafter, the site-plan was prepared. A minor mistake of memory of PW-8 Constable Maharani Deen Shukla would not vitiate the entire investigating procedure.

48. We have scanned all the materials available on record. We find that prosecution has been successful in establishing the guilty of assailant with trustworthy evidence. We are convinced that PW-4 Ram Naresh, informant, was present on the spot and but for this presence, the details of names and identities of deceased and assailant would not have been possible in the FIR (Ex. Ka.-1) lodged within 45 minutes of incident. The testimony of PW-7 Mahadeo Prasad, I.O. has also disclosed that investigation was done properly. He has testified that date on Chitthi Majrovi was sent on 15.2.1981 but date of 16.2.1981 was wrongly mentioned. We have carefully examined entire testimony of PW-7 Mahadeo Prasad, I.O. We do find that this minor mistake indeed was committed by him but has not tainted the investigation in any manner.

49. In view of the aforesaid discussion, the appeal fails and is accordingly dismissed. The judgment and order dated 27.7.1982 passed by the then IIIrd Additional Sessions Judge, Banda in Sessions Trial No. 143 of 1981 (State of U.P. v. Sagar alias Shiv Sagar and other arising out of Case crime no. 14 of 1981 , under section 302 read with Section 34 IPC, P.S. Manikpur, District Banda is affirmed.

50. Office is directed to certify this judgment to the concerned court through the

Sessions Judge concerned within 15 days. The concerned court shall report the compliance within one month thereafter.