

(1998) 07 AHC CK 0099

In the Allahabad High Court

Case No : Criminal Appeal No's. 338 and 342 of 1980

Chandrika and Others (In jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 22-07-1998

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 157, 32(1)
Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302
Police Regulations — Rule 115

Citation : (1999) 1 ACR 202

Hon'ble Judges : Giridhar Malaviya, J; B.K. Rathi, J

Bench : Division Bench

Advocate : R.C. Shukla, Apul Misra and P.N. Misra, for the Appellant; G.A., for the Respondent

Final Decision : Disposed Of

Judgement

Giridhar Malaviya and B.K. Sharma, JJ.—By this judgment and order dated 21.01.1980 in S.T. No. 328 of 1978, Sri G.S.N. Tripathi, the then IIIrd Additional Sessions Judge, Basti, convicted Chandrika, Faujdar, Kanik Ram, Bharat Ram, Vindhayachal, Nehar alias Gay a Prasad and Surat accused of the offence u/s 302/149, I.P.C. and sentenced each one of them to undergo imprisonment for life, convicted each one of them of the offence u/s 307/149, I.P.C. and sentenced them to undergo R.I. for 5 years, convicted Vindhayachal accused of the offence u/s 148, I.P.C. and sentenced him to R.I. for a period of 1 year and convicted the remaining accused persons of the offence u/s 147, I.P.C. and sentenced each one of them to undergo R.I. for a period of 6 months and directed the sentences to run concurrently.

2. Criminal Appeal No. 338 of 1980 has been preferred by Chandrika, Faujdar and Kanik Ram accused while Civil. Appeal No. 342 of 1980 has been preferred by the remaining four accused against their respective conviction and sentences.

3. Since both the appeals have been preferred against the common judgment, the same have been connected with each other and have been heard together and they are being disposed of by this common judgment.

4. The prosecution story as narrated by the deceased Desh Raj Pandey in his verbal F.I.R. dictated to head constable Bans Bahadur Yadav P.S. Paikoliya, Sub-district Haraiya, district Basti on 01.09.1978 at 8.30 a.m. which on his death on 01.09.1978 at 1.40 p.m. in the Civil Hospital became his dying declaration, was that he had gone on 30.08.1978 to Basti along with his brother Parmatma P.W. 1 to give evidence in a criminal case, that when after their evidence, they were returning from Basti, his relations Brij Mohan and Dukhra met him in Haraiya and together they reached Tooti Bhati by bus at about 7.00 p.m.. that on seeing them alighting from the bus, Faujdar accused-Appellant ran towards the grove in the east, that on seeing him running, the deceased got suspicious and, therefore, he and his brother Parmatma P.W. 1 and the relative Brij Mohan and Dukhran went inside the shop of Sukkha, that in the meantime, Faujdar accused-Appellant along with Bharat Ram, Nehar alias Gaya Prasad, Vindhayachal and Chandrika Pandey which were of his own village and with whom there was his old enmity of litigation and their associates Surat and Kanik Ram accused-Appellant came there armed with lathies, that Vindhayachal accused-Appellant exhorted his companions "Khinch lo aur maar dalo saley ko", whereupon all the accused-Appellants started pulling the deceased Desh Raj Pandey and Parmatma P.W. 1 from the shop and beating them with lathies, that Parmatma P.W. 1 managed to run from there, that the accused-Appellant pulled him (the deceased) and took him to the grove situated to the east of village Tooti Bhati and kept on beating him in the way and then in the grove they assaulted him with lathi, knife and bricks, that the deceased kept on crying whereupon, the witnesses came to the spot and saw the occurrence.

5. On the basis of the verbal F.I.R. aforesaid, the chick report was prepared and the case was registered at the police station Under Sections 147, 323, 336, 148 and 324, I.P.C. against all the accused-Appellants at 8.30 a.m. The deceased was dispatched for his medical examination. The investigation of the case was entrusted to S.I. Chandra Bhan Singh and the papers were sent to him through constable as he was not present at the police station. The papers were received by the t.o. while he was on way back to the police station, being barely one furlong away. At that place he met the injured deceased who was being taken for medical examination by constable Lillie and recorded his statement u/s 161, Code of Criminal Procedure Ext. Ka-5 which on his death became his 2nd dying declaration and then took him to the scene of occurrence by the very Jeep in which he was being taken for hospital and made spot inspection with the help of the deceased. The deceased was then taken to the Primary Health Centre, Haraiya where he was medically examined by Dr. Qazi Sayed Zafar Riaz, Medical Officer on 01.09.1978 at 10.30 a.m.

6. The Medical Officer found the following injuries on the body of the deceased

who was alive at that time.

Injuries:

- (1) Lacerated wound 2.5 cm. x 0.5 cm. x bone deep on the Rt. side of fore head 4 cm. above the Rt. eye brow parallel to the margins of the hairs.
- (2) Lacerated wound 3 cm. x 1 cm. x muscle deep on the outer half of left eye brow.
- (3) Abrasion 3.5 cm. x 1 cm. on the left side of face 1/2 cm. below the margins of left lower lid.
- (4) Abrasion 1 cm. x .5 cm. on the middle of the front of nose.
- (5) Abrasion 1.5 cm. x .5 cm. x muscle deep at the left side of upper lip 1.5 cm. lateral to mid line.
- (6) Lacerated .5 cm. x .5 cm. x muscle deep on the prominence of Rt. cheek.
- (7) Punctured wound 1 cm. x .5 cm. x 1.5 cm. on the back upper 1/3 of left forearm, margins Inverted, direction of wound from above down ward 6.0 cm. x below the elbow left.
- (8) Abrasion 1 cm. x 0.5 cm. as on the outer side of left forearm in lower 1/3 10 cm. above the left wrist joint.
- (9) Traumatic swelling on the whole of the back of left hand, fore-arm and left elbow joint, kept under observation and advised X-ray.
- (10) Contusion 5 cm. x 1.5 cm. on the medial side of lower 1 /3 of left thigh.
- (11) Contusion 7 cm. x 2 cm. on the outer side of left hip at the greater orchestra.
- (12) Contusion 3 cm. x 2 cm. on the outer side of left thigh 6 cm. below the injury No. 11.
- (13) Punctured wound 2 cm. x 1 cm. x 5 cm. on the middle of the front of left lower leg margins inverted, direction of wound below upward.
- (14) Abrasion 1 cm. x 0.5 cm. on the medial side of left lower leg in the middle.
- (15) Contusion 2 cm. x 1.5 cm. at the greater orchestra of right hip.
- (16) Contusion 2 cm. x 1 cm. on the outer aspect of the middle of right thigh 10 cm. below the injury No. 15.
- (17) Punctured wound 2.5 cm. x 1 cm. x 5 cm. on the front of the middle of right lower leg, margins inverted direction of wound from front backward.
- (18) Traumatic swelling in an area of 17 cm. x 28 cm. around the injury No. 17. Kept under observation, advised X-ray.

(19) Punctured wound 2 cm. x 0.5 cm. x 6 cm. on the front of the middle of right lower leg 1.5 cm. lateral to injury No. 17 margins of wound inverted, direction from front backward.

(20) Punctured wound 1 cm. x 0.5 cm. x 1.5 cm. on the lower 1/3 of front of right lower leg 8 cm. below the injury No. 17 margins inverted, direction of wound from front backward.

(21) Contusion 3.5 cm. x 1.5 cm. on the right side of chest 16 cm. above the right iliac crest.

(22) Contusion 18 cm. x 2 cm. on the left side of abdomen 1.0 cm. above the left iliac crest.

(23) Contusion 22 cm. x 1.5 cm. on the left side of back in scapular region, obliquely placed lower end at the level of tip 10th vertebrae.

(24) Contusion 10 cm. x 5 cm. on the left side of the back 4 cm. anterior to injury No. 23.

(25) Contusion 17 cm. x 9 cm. on the back of right shoulder joint.

(26) Abrasion 1 cm. x .5 cm. on the upper 1/3 of right forearm 2 cm. below right elbow.

(27) Abrasion .5 cm. x 2 cm. on the back of middle 1/3 of right fore-arm.

(28) Traumatic swelling in whole of right fore-arm, kept under observation advised X-ray.

(29) Lacerated wound 1.5 cm. x 0.5 cm. x .25 cm. on the back of middle of right index finger."

In his opinion, all the injuries were simple caused by blunt object except Nos. 3, 4, 7, 8, 13, 14, 17, 19, 20, 26 and 27 out of which Nos. 3, 4, 8, 14, 26 and 27 are caused due to friction against hard object and Nos. 7, 13, 17, 19, 20 are kept under observation, X-ray advised for any bony injury. The duration of the injuries are about 3/4 day old. After the medical examination by Dr. Riyaz, Medical Officer, the deceased in his injured condition was referred to the District Hospital, Basti where he was admitted the same day at 1.20 p.m. by Dr. K.N. Pandey. He succumbed to his injuries at 1.45 p.m. the same day.

7. Earlier, Parmatma Prasad Pandey, the prosecution injured (P.W. 1) was medically examined by Dr. K.N. Pandey D.M.O., District Hospital, Basti on 01.09.1978 at 9.30 a.m. He found the following injuries on his person.

Injuries:

(1) Lacerated wound 4 cm. x 0.8 cm. x scalp deep on the left side of head 8 cm. above the left ear.

(2) Contusion 7 cm. x 1.5 cm. on the top of left shoulder joint.

- (3) Traumatic swelling 8 cm. x 7 cm. on the left shoulder joint. 2 cm. medial to injury No. 2.
- (4) Abrasion 4 cm. x 2 cm. on the back of left shoulder joint.
- (5) Contusion 10 cm. x 2 cm. on the left arm lateral part 12 cm. below left shoulder joint.
- (6) Contusion 8 cm. x 1.5 cm. on the left arm 17 cm. below shoulder joint.
- (7) Punctured wound 1 cm. x 0.5 cm. x muscle deep on the back of left arm 2.5 cm. above the left elbow joint.
- (8) Lacerated wound 2 cm. x 0.5 cm. x muscle deep on the back of left fore-arm 9 cm. below left elbow joint.
- (9) Abrasion 1 cm. x 1 cm. on the back of Rt. fore-arm 14 cm. below Rt. elbow joint.
- (10) Abraded swelling 7 cm. x 6 cm. on the back of Rt. Palm.
- (11) Abrasion 2 cm. x 0.5 cm. on the front of left leg 20 cm. below left knee joint.
- (12) Traumatic swelling 6 cm. x 6 cm. on the dorsum of left foot laterally.

The injuries are about half day old. The injury Nos. 1, 2, 3, 5, 6, 8, 10 and 12 are caused by hard and blunt object, injury Nos. 4, 9 and 11 caused by friction against hard and blunt object. Injury No. 7 is caused by sharp pointed object. All the injuries are simple in nature except injury Nos. 8 and 1 which are kept under observation. Advised X-ray skull. He was admitted to emergency ward.

8. The dying declaration of Parmesan Prasad Pandey P.W. 1 was recorded by Dr. Madhukar Dwivedi. Executive Magistrate on 01.09.1978 at 10.20 p.m. in the District Hospital, Basti, which are in the following words:

"Main kal Dinank 31.08.1978 ko basti mukadma foundry kittenish par aaya the. Lag hag sham 6 bogeys main as than tutu bite par bus say ultra to Vindhyachal putrid Rqjaram Skin Garza Pandey, Brahmin putrid (Name Nahant Alum). Vindhyachal ka Lark Vajpayee, Gaye Prasad, Barograms, Brahmin Ka lark Lump Marian aura Iowa ka Hair Bar sati Ka lark Surat aura Anaya log jinee main naming penchant, gheelye. Maine baht hath peon jota liken un logon nay mushy lathe say Mara aura Chaka say merely barely bayed Desh Raj ko Mara. Ham donor bayed behest ho Gaye. Ham donor phaeton ko Bus key charley Jamey key bad uprokt bastion nay Mara."

9. After the death of the informant, the case was converted into one u/s 302, I.P.C. and the Panchayatnama proceedings were taken and the dead body of the deceased informant was sent for post mortem.

10. The post-mortem of the deceased was conducted by Dr. S.G.T. Tkriwal, Medical Officer on 02.09.1978 at 3.00 p.m. His material observations are as

follows:

Age about 30 years

Time of death 1.45 p.m.

in Civil Hospital, Basti on 1.9.1978.

Ante-mortem injuries:

- (1) Stitched wound (2 stitches) oblique 3 cm. x 0.5 cm. x bone deep, right side forehead, 4 cm. above eye brow.
- (2) Stitched wound (3 stitches) oblique 2 cm. x 0.5 cm. x bone deep, on the right part of left eye brow.
- (3) Incised wound 1 cm. x 0.5 cm. x bone deep, 1 cm. below left eye late part.
- (4) Stitched wound 1.5 cm. x 0.5 cm. x 0.3 cm. on the upper lip left side.
- (5) Abrasion 1 cm. x 1 cm. on the head, 2 cm. behind left ear.
- (6) Multiple abraded contusions (5) in an area of 6 cm. x 3 cm. on the upper arm and elbow medial side, size smallest 1 cm. x 0.5 cm., largest 3 cm. x 2 cm.
- (7) Punctured wound (unstitched) 1 cm. x 0.5 cm. x bone deep left fore arm, 4 cm. below elbow joint, oblique.
- (8) Multiple abraded contusions (nine in number) on the right upper arm, elbow and forearm, all round in an area of 40 cm. x 12 cm. size smallest 3 cm. x 2 cm., largest 9 cm. x 4 cm.
- (9) Stitched wound (3 stitches) 1.5 cm. x 0.5 cm. x bone deep right index finger oblique, back over proximal interphalangeal joint.
- (10) Multiple abraded contusions (12) in an area of 46 cm. x 30 cm. on the back both sides and both buttocks, size smallest 4 cm. x 2 cm. and largest 12 cm. x 3 cm.
- (11) Stitched wound (2 stitches) oblique 2 cm. x 1 cm. x bone deep, front of right leg 10 cm. below knee.
- (12) Stitched wound (1 stitch) oblique 1 cm. x 0.5 cm. x bone deep, 1 cm. below injury No. 11.
- (13) Stitched wound (1 stitch) 1 cm. x 0.5 cm. x bone deep, right leg 6 cm. below injury No. 12.
- (14) Contusion (7) in an area of 20 cm. x 10 cm. right leg 0.6 cm. below right knee joint, front, size smallest 2 cm. x 1 cm., largest 6 cm. x 2 cm.
- (15) Stitched wound (2 stitches) 2.5 cm. x 0.5 cm. x 0.5 cm. x bone deep left leg front 15 cm. below knee joint.

(16) Abrasion 1.5 cm. x 1.5 cm. front of left knee.

Internal Examination:

(2) Membranes slightly Congested. Death is due to shock and hemorrhage due to ante mortem injuries.

11. The investigation of this case was initially done by Chandra Bhang Singh, S.I. (P.W. 8). After recording the statement of Dishrag deceased in his injured condition, making the spot inspection and preparing the site plan, he took blood stained earth from the place in the grove where Dishrag injured deceased was assaulted. He did not find any blood on the road as it had been obliterated due to it being a public "Rasta". He also recorded the statement of Durham (P.W. 3). Then he went to the District Hospital, Basti and recorded the statement of Parham Prasad injured (P.W. 1). Then he came from Basti to the place of occurrence and recorded the statement of some persons of Tooti. Thereafter, further investigation proceedings were taken by 2nd I.O. Vishwanath Ram, S.O (P.W. 10) the same day in the night. He converted the case into one of murder on receipt of information of death of the deceased Deshraj and interrogated the other eye-witnesses and concluded the investigation and then submitted the charge-sheet against the accused-Appellants.

12. At the trial, the ocular testimony has been given by Parham Prasad injured (P.W. 1), Durham (P.W. 3), Brij Mohan (P.W. 4), Ram Gopal (P.W. 6) and Ram Kayak (P.W. 7). Out of them Ram Gopal (P.W. 6) and Ram Nayak (P.W. 7) were declared hostile by the prosecution. The rest of the evidence at the trial was formal in nature.

13. The accused denied their participation in the occurrence and claimed their false implication. They did not lead any evidence in defense.

14. Before proceeding further, it may be placed on record that the presence of the deceased Deshraj and, the presence of Parmatma Prasad (P.W. 1) (who had received as many as 12 injuries on his person) at the time of occurrence cannot be doubted for a moment, nor it is in controversy before us, whatever may have been said about the other eyewitnesses.

15. Now from the post-mortem evidence on record, it is established beyond every shadow of doubt that it was a case of homicide of Deshraj deceased by a plurality of assailants whoever might have been the assailants as he had been inflicted injuries by blunt and sharp edged pointed weapons. The injury report of Parmatma Prasad injured (P.W. 1) similarly showed that he was inflicted various injuries on his person by a plurality of assailants by blunt weapon and pointed weapon, whoever might have been the assailants. The ocular evidence on record is that both of them received their injuries in one and the same transaction and practically at one and the same time. On this point even the defense has not challenged this position. It is clear from the defence suggestion to Parmatma Prasad injured (P.W. 1) itself. The suggestion was that Deshraj deceased and he

(Parmatma Prasad injured, P.W. 1) were assaulted in the night in darkness by unknown assailants.

16. Coming to. the place of occurrence, on this point, the ocular testimony shows that Deshraj deceased and Parmatma Prasad (P.W. 1) were assaulted simultaneously at the tea shop of Sukha and then on the road in front of it and then while Parmatma Prasad was left on the road and then pushed into a Gaddha on the road-side the deceased was carried from there to the grove in the vicinity and was assaulted further and then left there and that Parmatma Prasad came out of the Jeddah and Escaped leaving the deceased in the grove.

17. The first Investigating Officer Chandra Bhan Singh S.I. (P.W. 8} found blood lying in the grove. He did not find blood on the road where the earlier part of the occurrence took place. The statement of this 1st Investigating Officer is that the blood on it had become obliterated as it was a public "Rasta". This statement has not been challenged by the defence. The absence of blood on the Rasta was fully consistent with the place of occurrence as set up by the prosecution. There is no reason to doubt the place of occurrence set up by the prosecution. The defence has also not suggested any other place of occurrence. Further it was not necessary that blood should have fallen in the shop where the assaults had been started.

18. Now we come to the time of occurrence. It has come in the evidence of Parmatma Prasad (P.W. 1) that about an earlier occurrence between the present deceased Deshraj and Bharat Ram present accused-Appellant cross-cases were registered and the same were pending on the date of present occurrence and that on the present date of occurrence both the parties had appeared in Court at Basti and on that date his evidence and the evidence of Deshraj deceased had been recorded on oath. The prosecution has filed certified copies of the statements of Deshraj present deceased and Parmatma Prasad injured (P.W. 1) dated 31.08.1978 recorded in the Court of Judicial Magistrate, Haraiya in the case State v. Bharat Ram, Under Sections 147, 148, 324 and 452, I.P.C. police station Paikoliya, district Basti. These certified copies go to corroborate the statement of Parmatma Prasad injured (P.W. 1) on the point. Otherwise also it is not in dispute that cross-cases were fixed in Court on the present date of occurrence and the statement of Deshraj (present deceased) and Parmatma Prasad injured (P.W. 1) were recorded on the said date. The statement of Parmatma Prasad injured (P.W. 1) was that after the case was over they were returning from there for their house. In his examination-in-chief he did not say as to when he left the Court but from his statement aforesaid it does not necessarily follow that the Court time was over when the work in that case was over. In his cross examination he has made the position clear in reply to question No. 55 about the time when the statement of the deceased was recorded in that criminal case on the date of occurrence. He stated that the statement of the deceased was recorded after lunch, that the statement of only himself and Deshraj deceased were recorded and that both of them had received payment of

diet money from the Court and further that when he (they) proceeded from the Court the Presiding Officer was still on his chair. It means that the Court was still in session when they left the Court after obtaining the diet money. In reply to question No. 53, the witness had testified that they had been relieved from the Court at 4 p.m. and that they got the bus near the Court campus and left. He has also stated that immediately after the conclusion of the evidence of the deceased in that case the Prosecuting Officer conducting the case on behalf of the prosecution had told them that the evidence of other persons would not be taken in the case on that date. There has been no challenge made to this statement of this witness. Consequently, it follows from his evidence that he and Deshraj deceased both boarded a bus from near the Court campus Basti just after 4 p.m. on the date of occurrence.

19. Before the learned Sessions Judge and also before us, it was not in controversy that the distance from district headquarters Basti and village Haraiya was about 25 kms, and that Basti and Haraiya are connected by a road. It has come in the evidence that private buses regularly ply between Basti and Haraiya and between Haraiya and Baumann and that Toot Bhatia falls in the way between Haraiya and Baumann and that after alighting from the bus at Tootibhiti, they go to their village, which is one mile away, A. Cr.R. 14 on foot from there by the public "Rasta". It has also come in the evidence of Parmatma Prasad injured (P.W. 1) that he and the deceased reached Haraiya from Basti at 5 p.m. on the date of occurrence and there from they took another bus and dropped from it at Tooti Bhati Bus Stand and that the occurrence took place immediately thereafter. He also stated that at that time the passengers were sitting. It has to be kept in mind that in the common course the litigants would be returning soon after the Pest in their respective cases was over and would be in a hurry to leave the Court and to reach their house as early as possible and it would be most unlikely that they would delay in returning and let the night fall in the way itself. So, there is no reason to doubt the testimony of Parmatma Prasad injured (P.W. 1) that he and the deceased both reached the place of occurrence, which was near Tooti Bhati Bus Stand, at about the time of sun-set and the occurrence took place immediately thereafter.

20. It has nowhere been suggested by the defense to Parmatma Prasad injured (P.W. 1) in his cross-examination that by boarding a bus at 4 p.m. near the Court campus Basti, they could not reach Haraiya by 5 p.m. or that taking another bus from Haraiya after it, they could not reach Tooti Bhati by about the time of sun-set. So, there is no reason to doubt that the occurrence took place at about 7 p.m. on the date 1.9.1978. Then there is nothing in the medical evidence on record as given by Dr. K.N. Pandey (P.W. 5) who medically examined Parmatma Prasad injured (P.W. 1), Dr. Kazi Syed Zafar Riaz (P.W. 9) who medically examined Desh Raj deceased in his injured and alive condition, and Dr. S.G. Tekriwal P.W. 2 who performed the autopsy on the dead body of the deceased to improbabilise the time of occurrence set up by the prosecution. It may be mentioned here that no suggestion was made by the defense to any of these

medical witnesses in their cross-examination that the injuries on the body of the deceased and the injuries of Parmatma injured P.W. 1 could not have been caused on 1.9.1978 at 7 p.m. as claimed by prosecution. Under these circumstances the bare suggestion by the defense to Parmatma Prasad P.W. 1 in his cross-examination that the occurrence had taken place in the darkness of night cannot be accepted. It may be mentioned here that in the two dying declarations of the deceased, one in the form of F.I.R. dictated to the Head Constable at the police station and the other in the form of statement u/s 161, Code of Criminal Procedure given to the first Investigating Officer, the time of occurrence has been given as 7.00 p.m.

21. It was testified by Parmatma Prasad (P.W. 1) that at the time when he and the deceased got down at Tooti Bhati, there was ample light and there was sufficient visibility and there is no reason to doubt him. As observed by the learned Sessions Judge in his judgment, the sun-set at about 6.40 p.m. on the date of occurrence and it is well known that the sun-light does not come to an end as soon as sun-sets and that even after sun-set sufficient light remains for thirty to forty minutes, in which the assailants could be recognized and if the assailants used lathes, knife in inflicting injuries on the bodies of the deceased and Parmatma Prasad (P.W. 1) and were known from before as testified by Parmatma Prasad (P.W. 1) and as disclosed in the dying declarations of the deceased identification would be all the more easy.

22. Before we proceed further, it will be in the fitness of things that we take up the point of motive. It has come in the testimony of Parmatma Prasad injured P.W. 1 that Chandrika and Vindhyachal accused-Appellants were real brothers inter se, while Bharat Ram and Nehar alias Gay a Prasad accused-Appellants were real brothers inter se. This relationship has not been challenged at any stage. Parmatma Prasad (P.W. 1) has testified that the accused-Appellants belong to one gang. He has further testified that Vindhyachal accused-Appellant had forcibly kept Smt. Sawari wife of his (Parmatma Prasad's) brother about 20 to 22 years prior to the date of his evidence in Court. The evidence of this witness was recorded in Court about ten and a half months after the occurrence. It has also come in his evidence that Vindhyachal accused-Appellant had even obtained a deed of transfer of all her lands in his favour. In respect of this, no challenge has been made in his cross-examination. The further testimony of Parmatma Prasad (P.W. 1) is that litigation had taken place between the deceased and himself (Parmatma Prasad) (P.W. 1) on the one hand and Vindhyachal accused-Appellant on the other in the consolidation Courts and that in that litigation, he and the deceased had succeeded from the Court of Settlement Officer (Consolidation) and that a revision was preferred by Vindhyachal accused-Appellant against the said judgment of the Settlement Officer (Consolidation) before the Deputy Director of Consolidation which was pending at the time of occurrence.

23. The prosecution has filed a certified copy of a Review Application No. 800,

dated 08.02.1979 on the misc. side moved by Vindhyachal accused-Appellant before the Joint Director of Consolidation, Basti for recall of an Order dated 06.10.1978, whereby the substitution application moved by Vindhyachal accused-Appellant had been rejected for want of proper presentation. This document also states that in the original case the date of Pes hi was 20.08.1979. This document thus shows that consolidation litigation between Vindhyachal accused-Appellant and Deshraj deceased was pending before the Joint Director of Consolidation, Basti even after the date of occurrence. This enmity was going on between Vindhyachal accused-Appellant and the deceased.

24. It has been claimed by the prosecution that Vindhyachal accused-Appellant was found in possession of a country made Bhujali on 12.11.1976, i.e. Prior to the date of present occurrence, for which challan was submitted against him by the police on 09.12.1976. This document goes to show three convictions to the discredit of this accused, one u/s 451, I.P.C., in the year 1958, one for the offence of robbery in the year 1963 and one u/s 25 of the Arms Act in November, 1967. It also shows that in December, 1974 he had been extended u/s 3 of the Goodness Act. It was argued on behalf of the prosecution and not without substance that it was not surprising that he took law in his own hands along with others for private vengeance in view of the enmity.

25. Further the testimony of Parmatma Prasad (P.W. 1) was that cross-cases were pending between Bharat Ram accused-Appellant and Deshraj deceased and himself in the Court of Basti in respect of a rioting that had taken place between them about three and a half years ago (i.e., 3 and half years prior to 12.07.1979 the date of his testimony in Court) and that these cases were fixed for hearing on the date of the present occurrence. It has also come in the evidence of Parmatma Prasad (P.W. 1) in his cross-examination in reply to question No. 37 at the instance of defense itself that in that case Bharat Ram and Gaya Prasad accused-Appellants and Reedmen, father of Bharat Ram accused-Appellant, one Gugri and Ram Lolita, brother of Bharat Ram accused-Appellant, were the accused. Obviously, there was enmity which was very much alive on the date of occurrence. The prosecution has rightly claimed that since the cross-cases aforesaid were fixed in the Court of Basti on the date of occurrence, both sides would have come in the Court at Basti, though of course, it does not necessarily follow that all the accused in that case were present in the Court on the date of occurrence it is obvious that at least some of them must have attended the Court and were quite likely to have committed the present occurrence. It is legitimate to presume regard being had to the common course of human conduct that the accused party in that case must be knowing fully well that the present deceased Deshraj and Parmatma Prasad (P.W. 1) both would be returning from the Court at Basti to their house, via the usual route. The prosecution claim, is that the route was as mentioned by Parmatma Prasad (P.W. 1) namely from Basti to Haraiya by bus. from Haraiya to Tooti Bhati by bus and from Tooti Bhati to their village Garha, police station Palkoliya on foot. The prosecution claims that this provided them with an opportunity to way-lay the present deceased Deshraj and Parmatma

Prasad (P.W. 1).

26. From the side of defence, cross-examination of Parmatma Prasad (P.W. 1) has been made on two lines, one was that there were numerous enemies of the present deceased and Parmatma Prasad (P.W. 1) and so each one of them was a potential assailant, and the other line was that there was other alternative routes from Basti to the village of Parmatma Prasad (P.W. 1) and the present deceased. About the first plea, it is sufficient to say that if the victims were in a position to see and identify the culprits, they would not leave out these assailants and would not falsely implicate an entirely different set of persons with whom there was enmity going on and that it would be a question of fact in each case whether the ocular evidence adduced at the trial against the accused persons was intrinsically good and acceptable. About the second plea, it was elicited from Parmatma Prasad (P.W. 1) in his cross-examination that the direct distance between Basti (District Head Quarter) and the village of the present deceased was only 14 to 15 miles as the crow flies. It does not help the defense. He stated that the said other route from Basti (District Head Quarter) to his village is circuitous and that the train timings do not suit and that the route by which they were going on the date of occurrence was the only route by bus. It is well known that the time of the coming of the trains is never fixed in the sense that the trains are always irregular. It appears from the evidence of this witness that the bus services were regular, while the train services by their very nature would be few and far between on an unimportant route which must be the case in the district of Basti. It seems that Maharajganj was the nearest railway station for his village. He was suggested that Maharajganj was only 3 miles from his village. He testified that the distance was as much as six miles. He was suggested that he could walk on foot from Maharajganj and it could save money also. The witness has replied that nobody of his village goes by the route from Maharajganj which is six miles away as no vehicles ply on the route. A consideration of the testimony of Parmatma Prasad makes it obvious that the route adopted in the usual course from Basti to his village was that which they had adopted on the date of occurrence. It may be presumed regard being had to the common cause of human conduct that the accused persons must have been aware that this usual route would be adopted in the ordinary course by the deceased and Parmatma Prasad (P.W. 1) after being relieved from the Court work on the date of occurrence for going to their village. So, the background of all these circumstances afforded an opportunity to the accused party to commit the occurrence on the date, time and place to as set out by the prosecution.

27. The presence of the injured witness Parmatma Prasad (P.W. 1) at the scene of occurrence, as noted earlier, cannot be doubted and it is also not in dispute. So, his testimony is of great evidentiary value and a conviction can be founded on the same itself in view of the medical evidence even without other material, but in this case his testimony finds corroboration in material particulars from the F.I.R. lodged by Deshraj deceased at the police station in his injured condition on 01.09.1978 at 8.30 a.m. which became a dying declaration u/s 32(1) of the

Indian Evidence Act and as such a substantive piece of evidence in its own right. Furthermore, there is the statement of the deceased u/s 161, Code of Criminal Procedure recorded by the 1st Investigating Officer soon after the lodging of the F.I.R. This statement of the deceased also became the dying declaration of the deceased on his death. This also is now a substantive piece of evidence. So, the prosecution case rests on the testimony of Parmatma Prasad (P.W. 1) and the two dying declarations of the deceased.

28. The learned Counsel for the accused-Appellants has assailed both the dying declarations. The claim of the defence as suggested to Vishwanath Ram (P.W. 10), the second I.O. of the case is his cross-examination was that Deshraj deceased was brought to the police station by un-known person in an unconscious condition and so he was sent to P.H.C., Haraiya straightaway and the thumb impression of some other person was taken on the F.I.R. at the police station in place of Deshraj deceased. The same plea has been taken by the learned Counsel for the accused-Appellants before this Court. It has also been argued that the deceased was unconscious and so could not have been in a position to dictate any F.I.R. at the police station and at any rate he was not at all in a position to dictate a coherent and detailed F.I.R., as the prosecution claims he had declared at the police station and further that before first I.O. also he could not have been in a position to make any statement and at any rate a coherent statement as has been recorded by the first I.O. in the case diary. It has been pointed out by the learned Counsel that the thumb impression taken on the F.I.R. was stated to be the right thumb impression of the deceased while always it is the left thumb impression of the first informant which is taken at the F.I.R. dictated by him. It has also been pointed out that the medical examination of the deceased has been made at 10.30 a.m. at the Primary Health Centre, Haraiya while the scene of occurrence was in village Tooti Bhati. His contention is that sufficient time must have been taken in carrying the deceased to the Primary Health Centre, Haraiya and so that the medical examination was made at P.H.C., Haraiya at 10.30 a.m. on the date and so in the intervening time the first I.O. could not have recorded the statement of the Deceased, visited the spot and made the spot inspection at his pointing out and also prepared the site plan of the scene of occurrence on his pointing out. He placed reliance on certain observations made by Dr. K.N. Pandey (P.W. 5) in his cross-examination. He also placed reliance on the summary of the case of Mohar Singh v. State of Punjab. 1981 ACC 53 . Summary Bhagwandas Vs. The State of Rajasthan, . In these cases the dying declaration was rejected on fact. The cases of Mohan Singh and Bhagwan Das could not have precedential value in this case. It is a question of fact to be determined in each case on an assessment of the evidence and circumstances on record whether the victim was in a position to dictate his F.I.R. at the police station and to give his statement before the I.O. and actually did so. Precedents could hardly help in this regard. So, we proceed to make our own assessment in this regard. There is the evidence of Banish Bahadur Yadav (P.W. 13) who was Head Constable at P.S. Paikoria at the relevant time. He testified

that on that date Deshraj informant was brought at the police station (on 01.09.1978) at 8.30 a.m. in his injured condition, that the deceased had dictated the F.I.R. to him, that whatever the deceased dictated to him, he recorded in the chick F.I.R. Ext. Ka-9 and read it over to him and then obtained his thumb impression at the same. He also testified that he had obtained the right thumb impression of the deceased on the chick F.I.R. His explanation for it as given by him was that there was injury in his left hand. The learned Counsel for the accused-Appellants claimed that the testimony of Bansh Bahadur Yadav was falsified by the testimony of Dr. Quazi Syed Zafar Riaz, Medical Officer (P.W. 9) who recorded the injury report of the same injured deceased at the Primary Health Centre, Haraiya, the same day, that there was no injury on the left thumb of the deceased. We have considered the statement of the doctor. It is true that the doctor did testify as above and even obtained the impression of left thumb of the deceased on the medical report prepared by him at 10.30 a.m. but the statement of the Head Constable was not thereby falsified. The Head Constable did not say that there was injury on his left thumb. What he said was, "Us sarrtai uskey banyen hanth men chot thi". This statement is corroborated by the medical report of the deceased recorded by the same doctor. Injury No. 7 was a punctured wound 1 cm. x .5 cm. x 1.5 cm. on the back of upper 1/3rd of the left forearm, 6 cm. below the elbow left. Injury No. 8 was abrasion 1 cm. x .5 cm. on the outer side of left fore-arm in lower 1/3rd, 10 cm. above the left wrist joint. Injury No. 9 was traumatic swelling on the whole of the back of left hand, forearm and left elbow joint. It will be seen that these injuries not only cover the different parts of the left fore-arm of the deceased but even include swelling on the whole of the back of the left hand and left fore-arm. So there was nothing strange if the head constable obtained the right thumb impression of the deceased on the chick F.I.R. instead of his left thumb impression. He has recorded in the G.D. also the presence of injury from the elbow till the palm and also abrasion and blood stain. It may be that he also stated in his cross-examination that there was blood stained injury in the thumb also, but this was obviously based on his recollection made more than one year and a quarter after the date when he recorded the chick report aforesaid. So nothing revolves on this claim by the witness. It may be either a lapse of memory or unexaggeration. In view of the fact that there were injuries on his left arm including the left hand, though literally there was no particular injury recorded on the left thumb of the deceased, we see no reason to doubt the explanation advanced in the testimony of the head constable. He has refuted the defense suggestion to him that the deceased had never come to the police station and that the chick report does not contain his thumb impression and that the right thumb impression of same 3rd person has been taken by him so that in future its identification could not be made and there is no reason to discard the refutation.

29. It may be mentioned here that before his testimony was recorded in the Court on 20.12.1979, the statement of Vishwanath Ram S.O. P.W. 10 had been recorded on 04.08.1979, i.e., about 4 and half months prior to it and the

suggestion made to him was a discrepant one, namely, that the deceased had been brought to the police station in an unconscious condition and he was sent to Haraiya because his condition was bad and (for that reason) the thumb impression of some third person was taken on the chick F.I.R. it will be seen that the defence travelled a long distance from 04.08.1979 when the I.O. Vishwanath Ram S.O. was examined in that Court and the date 20.12.1979 when Bans Bahadur Yadav head constable (S.I. on the date of his evidence in Court) was examined. At the trial, its earlier plea was that the deceased was brought to the police station but since his condition was bad, the police sent him to the Primary Health Centre, Haraiya without waiting for the first information report to be scribed and so on the chick report, the right thumb impression of a 3rd person was taken and the subsequent development was that the deceased had never been brought to the police station.

30. There is the evidence of Vishwanath Ram S.O.P.W. 10 that the F.I.R. of this case was dictated by the deceased at the police station to the head constable in his presence on the date and that whatever the deceased had dictated to the head constable, the same was actually recorded and further that the deceased was in a fit condition, that his mental condition was all right and that he was all along speaking properly. He has also stated on oath that the deceased had put his thumb impression on the chick report in his presence. He no doubt stated that he could not tell whether his left thumb impression was taken or the right thumb impression was taken but it was quite a natural statement given by him. It was the function of the head constable who was preparing the chick report to obtain the thumb impression of the first informant (who in this case became the deceased after his death in the hospital) and the S.O. could hardly be expected to observe which thumb impression of the first informant (the deceased) was being taken on the chick report and to recollect and narrate it at the trial.

31. Lillie Mishap constable who had taken the first informant Desh Raj deceased in his injured condition from the police station Paikoria to Primary Health Centre, Haraiya and from there to the District Hospital; Basti after being referred by the medical officer has been examined at the trial as P.W. 12. He has testified that he started from the police station at 9 a.m. that at that time the condition of the deceased about speech was all right, that after it Chandra Bhan Singh S.I. met him at some distance from the police station and took the statement of the deceased. He further stated on oath that Tooti Bhati village (where the occurrence had taken place) was falling in the way to the Primary Health Centre, Haraiya, that Chandra Bhan Singh S.I. boarded the same jeep and by that jeep, he came to the scene of occurrence, that at the scene of occurrence, Chandra Bhan Singh S.I. detained the deceased for about an hour and in this duration made investigation and then sent to him to Haraiya with him (the deceased), that the deceased was medically examined at Haraiya and from there, he was referred to the District Hospital after medical examination and that he took him to the hospital Narhi (District Hospital) where he was hospitalised. He further testified that after some times the deceased died. Cross-examined, he stated that he

reached with the deceased at Harraya only after 10 a.m., then the doctor gave him medicines and made his medical examination and then instructed him to take the deceased to the headquarter, that he reached at the District Hospital at 1.00 p.m. or 1.30 p.m. He further stated that the Jeep in which they had started has been arranged by the house holders of the deceased on hire and then at Haraiya another Jeep was also arranged by those relatives of the deceased. Asked further, he stated that the arrangement of Jeep was made at the police station by some sympathizer of the deceased and at Haraiya by some relations of the deceased. He has been cross-examined. It has not been suggested to him that no Jeep was arranged by anybody and that the deceased was taken to the primary health centre, Haraiya and then to the District Hospital by some other mode of transport. It is on record that Tooti Bhiti (the place of occurrence) was only 3 miles away from the police station and as it is obvious that Haraiya is not far away from Tooti Bhiti, the place of occurrence and undisputed that the distance of the head quarter, Basti from village Haraiya where the Primary Health Centre was situated was only about 25 Kms. In the ordinary course, when the F.I.R. was scribed at 8.30 a.m. at the police station, the constable would have departed from the police station within half an hour and if the first I.O. met him and the deceased in the way to Haraiya and took the statement of the deceased and went in the same Jeep to village Tooti Bhiti where the occurrence had taken place and made the spot inspection with the help of the deceased, the deceased could have been taken from there in another private Jeep to the Primary Health Centre, Haraiya, so as to reach there and be medically examined in that District Hospital the same day at about 10.30 a.m.

32. At this juncture, it will be useful to refer to the statement of Chandra Bhan Singh S.I., P.W. 8 who was the first Investigating Officer in this case. He testified that the F.I.R. of this case was recorded at the police station on 01.09.1978 in his absence, that the orders entrusting the investigation to him were received by him the same day at a distance of about one furlong from the police station when he was returning from Dehat (i.e., the circle) to the police station. He testified that he had been given the copy of the chick report and the G.D. entry about the registration of the case by constable Baldev who had brought the same. He further stated on oath that at that very place, he met the injured deceased who was being carried by Lillie constable for medical examination and that at that very place, he recorded his statement in the case diary. He has filed a copy of that statement on record which was Exb. Ka-5. He further testified that when he took the statement of Desh Raj injured deceased, he was in a fit condition and was in a position to give statement and had given a proper, i.e., coherent statement to him. He further stated in oath that he had gone to the scene of occurrence by the same Jeep in which the injured deceased Desh Raj was being carried and had prepared the site plan of the spot with the help of the injured deceased who was in a fit and conscious condition at that time. In his cross-examination, he testified that when he has met the injured deceased Desh Raj, his condition was all right and remained so as long as he (the injured deceased)

was with him (the witness). He further stated that at that time, the injured deceased was not in a position to walk but otherwise his condition was all right and he was in a position to speak and also moved his hands and feet. The defense suggestion to him was that he made fictitious investigation. He stated in his examination-in-chief that he had taken the statement of the injured deceased on that date at 9.30 a.m. and in his cross-examination it was elicited from him that he had met the injured deceased at 9.30 a.m. and further that the deceased remained with him up to 11.30 a.m. The defense has tried to make capital out of this statement about the time 11.30 a.m. pointing out that if from Tooti Bhati, the injured deceased had started at 11.30 a.m., he would have taken at least some time in traveling even by the Jeep from Tooti Bhati to Haraiya and so his medical examination could never have been made by Dr. Zafar Rivas P.W. 9 at the Primary Health Centre, Haraiya at 10.30 a.m. The defence has accepted the time of the medical examination of the injured deceased by Dr. Riaz (10.30) as the correct time and taking this as the touch stone the learned defence counsel argued that the evidence of the constable Lillie Mishap (P.W. 12) and the evidence of the first I.O. Chandra Bhan Singh (P.W. 8) false. The argument in other words, is that actually neither any statement of the deceased was recorded by the first I.O. nor was any investigation made by him at the spot as claimed by them. In our view, it is a hyper-technical approach. The first point to be noted is that it cannot be said that the time 10.30 a.m. recorded in the medical report by Dr. Riaz was accurate. It is well known saying that no two watches agree but every one believes his own. The time at the police station cannot also be taken to be accurate. If the constable had started from the police station at 9.00 a.m., in a Jeep and the first I.O. had met just after a furlong and taken the statement of the injured deceased and had taken him to the nearby village Tooti Bhati which was just 3 Kms. away from the police station, the time taken in spot inspection would not be much and the injured would have been taken from Tooti Bhati to Haraiya which appears to be near by, by Jeep so as to reach there round about 10.30 a.m. If the first I.O. has stated in his testimony on 04.08.1979 (which was almost 11 months after the date of occurrence) the time of 11.30 a.m. as the time upto which the injured deceased remained with him he may not be taken too literally. He was not giving this time on the basis of any entry in the general diary about which it may be said that it was recorded by him at the time when the injured deceased left him. It could have been just a lapse of observation and/or recollection on this part. It will be useful to refer here to an Apex Court authority *Somappa Vamanappa Madar and Shankarappa Ravanappa Kaddi Vs. State of Mysore*, in which the question of discrepancy about the timing regarding receipt of message in police station and the admission i.e., entry of the deceased in the hospital arose. In that case, the trial court had found that according to the evidence of P.S.I. P.W. 38 of the police station, he got the telephonic message at 8.10 p.m. from the P.W. 5 about the occurrence and made an entry in the police station diary and reached the spot at 8.15 p.m. but on Yadi (memorandum) sent to him at 8.00 p.m. the injured reached the hospital and was medically examined at 8.00 p.m. (by P.W. 32) and the trial court concluded

that the telephonic message was received at the police station at 8.10 p.m. and that the police officer reached the spot at 8.15 p.m. was not acceptable. The High Court came to the conclusion that the time element should not be taken literally observing that it is idle to expect that the two watches worn by P.W. 32 and P.W. 38 would have shown an identical time and that variation was not sufficient ground for rejecting the testimony of the eyewitnesses. The Apex Court agreed with the view of the High Court observing that the evidence of the eyewitnesses cannot be rejected on the sole ground of discrepancy in the timing noted at various places. In the present case, there is no discrepancy between the timing of the F.I.R. (8.30 a.m.) and the timing of the medical examination at the Primary Health Centre, Haraiya at 1.30 a.m. The real question is whether the first I.O. met the constable carrying the injured deceased in the Primary Health Centre, Haraiya in the way after one furlong and the first I.O. took the statement of the injured deceased and then went to the spot and made the spot inspection at the pointing out of the injured deceased and then the deceased was taken to the Primary Health Centre, Haraiya in Jeep after it and brought there well in time so as to be medically examined there at 10.30 a.m. We attach no importance to the statement of the first I.O. that the injured deceased was with him till 11.30 a.m.

33. It may be mentioned here that a reference to the statement u/s 161, Code of Criminal Procedure of the injured deceased will show that it is not a verbatim reproduction of the F.I.R. or a paraphrasing of the same. It appears to contain a narration of facts given by a victim on an interrogation by the Investigating Officer. It has given the details which would have been elicited from a victim in investigation. It says that Inker alias Ram Shaker brought him from the spot to the road and boarded him on the transport bus of Radar Raman conductor and then brought him to the place of Dr. Dwivedi in Haraiya and asked him to give treatment, that the doctor declined to do so but was persuaded to give injection and to bandage his wounds and then Kinkier brought him back to Tooti Bhati and lay him on a cot in the verandah of one Kiap Shaker. There is also mention in it that in the night out of fear of accused persons and due to it, being night time, he could not come to the police station and in the morning on getting a Jeep, he came to the police station with the son of his relation, Paris Nathan. The I.O. could hardly have put all these details in the statement of the injured deceased in the case diary if he (the deceased) had not provided him with the same. It has not been said anywhere by the defence that there is no Dr. Dwivedi in Haraiya or that the deceased was not given medical assistance by Dr. Dwivedi or that he was not taken to the Verandah of Kripa Shanker or had not been brought to the police station by a son of Paras Nath. It may be that Kripa Shankar and Paras Nath were not examined by the prosecution at the trial but it is difficult to draw an adverse inference from this.

34. The learned Counsel for the accused-Appellants has placed great reliance on the opinion of Dr. K.N. Pandey (P.W. 5) given on the basis of the injuries of the deceased recorded in the injury report by Dr. Riaz, P.W. 9, in reply to a Court

question that the deceased would have become unconscious immediately on receiving the injuries and that it is probable that the victim may have remained conscious for 10-15 minutes after receiving the injuries and then become unconscious but once he became unconscious, the possibility of his becoming conscious again was In the negative to the extent of 75% and that there was only 20-25% likelihood of his regaining consciousness, that, if he regains consciousness, he may remain conscious for 15-20 minutes but could not remain in full consciousness and in that condition, he would not have been in a position to give a coherent statement, that the possibility of his dictating the F.I.R. at the police station in a regular manner 12 to 13 hours after receiving the injuries was very little. We have given our anxious consideration to the above testimony of Dr. Pandey. He testified that normally such a person cannot dictate his F.I.R. in a normal manner though he added that about an exceptional case, nothing can be said. In reply to a further Court question it became clear that Dr. Pandey had given his above statements on the basis of the external injuries of the deceased as recorded by Dr. Riaz of Primary Health Centre, Haraiya in the injury report. It was at this stage that the attention of the learned Sessions Judge turned to the nature of the injuries and on a Court question Dr. Pandey had to admit that he could not say what was the depth of each injury and which internal organs were fractured. The learned Sessions Judge then asked him to take help from the post-mortem report. That was then shown to him. He stated that it did not show which internal parts had been fractured and further stated that he was not able to get any additional help from the post-mortem report. He did not say as he should have said that there was no damage to any vital organ and no bone was fractured anywhere and that on these facts he would revise his opinion. However, even then he had to say that on seeing the injury report and the postmortem report of the injured deceased, he could not say as to how long the (the deceased) could remain conscious after receiving the injuries and for how long he could have remained conscious and for how long he would have been in a position to speak and for how long he would not have been in a position to speak. Further he had to state that he could not tell whether such a person could speak or not even if he had not received any medical aid after receiving lea injuries. However, in reply to a question by the defence counsel, he seared and stated that ignoring the post-mortem report and taking only the report of the medical officer of Primary Health Centre, Haraiya, his earlier opinion was correct and he stood by the same. In reply to a Court question, he, however, had to state that the opinion he had given on seeing the postmortem report was correct.

35. In fact, taking the statement of Dr. Pandey as a whole, the prosecution evidence aforesaid about the injured deceased having dictated the whole F.I.R. to the Head Constable in full consciousness and in a coherent manner cannot be discarded in any case. As a matter of fact, it is improper to attach undue weight to the earlier part of the testimony of Dr. Pandey that has been relied upon by the learned Counsel for the accused-Appellants.

36. As noted earlier, the initial opinion of Dr. Pandey was based on mere reading

of the injury report of the injured-deceased as recorded by Dr. Riaz and while giving his opinion, he deliberately abstained from taking into account the post-mortem report about the deceased though while giving his opinion, he was bound to refer to the post-mortem report as well when it was in his personal knowledge that the deceased had died in the District Hospital as a result of injuries received by him. It may be mentioned here that it was Dr. Pandey who had admitted the deceased in the District Hospital at 1.20 p.m. on 01.09.1978 and who himself had testified that the deceased had died in the Hospital at 1.45 p.m. and also proved the bed head ticket. It was the internal damage to the vital organs and to the bony parts of the body which would have largely determined whether the deceased would have remained conscious and whether he could remain in a position to speak and to make a coherent statement about the transaction in which he had received his injuries including its background and the names of the assailants. So, he must have requested the learned Sessions Judge to allow him to go through the post-mortem report before giving his opinion instead of giving his opinion recklessly as he had initially done before him.

37. It is important to note that Dr. Pandey had not medically examined the deceased at the time of his admission in the District Hospital at 1.20 p.m. in view of the noting made by the constable who had brought the injured deceased to the District Hospital after his medical examination had been done by the said Dr. Riaz at the Primary Health Centre, Haraiya. Thus, what was in his personal observation was only the very serious condition of the deceased visible at 1.20 p.m. on the date which was his condition just 25 minutes before his death. He has stated at the trial that at the time of his admission in the District Hospital, he was unconscious and nobody would doubt the same. But the question was different. It was whether the deceased would have been in a conscious condition earlier at 8.30 a.m. when he purported to have dictated the oral F.I.R. to the Head Constable Banish Bahadur Yadav (P.W. 13), on the basis of which the case was registered at the police station by G.D. Entry No. 8 at 8.40 a.m. against the accused-Appellants. The initial statement of Dr. Pandey as given by him on the basis of the medical report was in any way a reckless statement based on mere surmise and guesses and not based on scientific data. If he had considered the injury report and the copy of the postmortem report together before giving his first opinion, something could be said in his favor. So, it is difficult to place reliance on the said opinion of Dr. Pandey. If there had been no other opinion on record even then this Court would have been reluctant to throw overboard the entire prosecution evidence about the recording of the F.I.R. at the dictation of the deceased. The best evidence here was of Dr. Riaz, the then Medical Officer, Primary Health Centre, Haraiya (P.W. 9) who had medically examined the injured deceased on 01.09.1978 at 10.30 a.m. in his injured and alive condition. He has recorded that except for certain injuries specially mentioned by him, all other injuries were simple and the specified injuries were kept under observation and there is his categorical evidence that so long as injured deceased was with him at the time of his medical examination, he was speaking and his mental condition

was O.K., that he had asked from the injured deceased himself his name and address. He has also categorically stated in cross-examination that when he had examined the injured deceased in his injured condition, he was not in a state of shock. He also stated that before his medical examination or after it, it was possible that this injured may remain conscious for some times and then become unconscious. It may be mentioned here even at the cost of repetition that it was Dr. Riaz who had seen the physical and mental condition of the injured deceased in his injured condition at 10.30 a.m. not long after the recording of the F.I.R., by Constable Bansh Bahadur Yadav (P.W. 13) at the police station (the first dying declaration) and the recording of the statement of the deceased u/s 161, Code of Criminal Procedure by the 1st Investigating Officer soon after the recording of the said F.I.R. (IInd dying declaration). As noted earlier, the medical report recorded by Dr. Riaz and his testimony make it clear that at 10.30 a.m. on 01.09.1978 he (the deceased) was not only alive but also was fully conscious and mentally awake and also speaking normally and was also not in a state of shock even until then. It was not suggested to Dr. Riaz (P.W. 9) in his cross-examination that actually the deceased was not conscious and was in a state of shock and was also not in a position to speak and that the doctor had made a false statement for the sake of prosecution. There cannot be any doubt on all canons of appreciation of evidence that the testimony of the doctor who medically examined the injured deceased in his injured condition soon after the making of the two dying declarations would be worthy of reliance and not the testimony of a doctor who had seen him after about 5 hours of the first dying declaration and had not examined the injuries of the deceased even at that stage. There was not a single circumstance casting a shadow of doubt over the testimony of Dr. Riaz (P.W. 9).

38. Then there is the testimony of autopsy surgeon Dr. G. Tekriwal (P.W. 2) who performed the autopsy on the body of the deceased. Dr. Tekriwal testified that he could not tell if this injured would have become unconscious immediately on receiving the ante mortem injuries found by him on his body. He further stated that he could not tell whether there was possibility of his becoming unconscious on receiving the injuries or not. He categorically stated that there is only a remote possibility that the injured-deceased may have become unconscious also on receiving the said injuries. The autopsy surgeon Dr. Tekriwal had the privilege of not only examining all the ante mortem injuries on the body of the deceased but also making the internal examination of the different parts of the body of the deceased and also dissecting and probing into the damage to the vital and other internal organs. So, his opinion also must carry much greater weight than the testimony of Dr. Pandey who only gave admission to the deceased in the District Hospital 25 minutes before his death and thus did not even examine his injuries.

39. So, we are of the view that if the injured deceased was in a perfectly conscious and speaking condition free from shock even at 10.30 a.m. on 1.9.1978 when he was medically examined by Dr. Riaz, we could safely believe the prosecution evidence that he was fully conscious with perfect speech and free

from shock at 8.30 a.m. prior to it on that date at the police station and could have dictated the F.I.R. to Banish Bahadur Yadav, Head Constable, as testified to by him and Vishwanath Ram S.O. (P.W. 10) and could have given his statement u/s 161, Code of Criminal Procedure as testified to by Chandra Bhan Singh (P.W. 5), the 1st I.O., and Lai Ji Mishap, Constable (P.W. 12).

40. Considering all the evidence and the surrounding circumstances, we hold that the deceased in his injured condition dictated his F.I.R. to the Head Constable Bansh Bahadur Yadav (P.W. 13) and that he gave his statement to the 1st I.O. Chandra Bhan Singh (P.W. 8) u/s 161, Code of Criminal Procedure as soon as when he met him at one furlong from the police station while he (the 1st I.O.) was returning to it from the Circle.

41. Here a reference may be made to Balak Ram and Anr. v. State of U.P. 1974 Cr U 1486, an authority relied upon by the learned Counsel for the accused-Appellants in which the statement u/s 161, Code of Criminal Procedure recorded by the Investigating Officer in that case was relied by the prosecution as the dying declaration and the Apex Court had discarded/ignored it. The Apex Court observed that it is not prudent to base the conviction on a dying declaration made to the Investigating Officer. Thus, only a Rule of Prudence was laid down. Referring to the circumstances of that case the Apex Court took note of the fact that the Investigating Officer did not obtain the signatures of the deceased or at least the signature of any of the large number of persons who were surrounding the car in which the deceased was lying while Under Rule 115 of the Police Regulations the Investigating Officer was required to record a dying declaration at least in the presence of two respectable witnesses and to have obtained their signatures at the foot of the dying declaration. In that case, there was one more circumstance to discard his evidence. It was that the Investigating Officer was at the police station but he did not even wait at the police station until the various columns at the 1st page of the F.I.R. were duly filled in and he claimed to have taken the case diary with him and it was found difficult to believe that seized by such a pressing sense of emergency he would take the case diary with him on the off chance that a dying declaration may be in the offing. In the present case, the 1st Investigating Officer was not at the police station when the case was registered and a copy of the chick report and the G.D. entry about the registration of the case was given to him in the way while he was returning from the circle to the police station and at that time and place he met the deceased who was being taken to the Primary Health Centre, Haraiya by another constable for his medical examination. The infirmity of noncompliance of Rule 115 of the Police Regulations no doubt stands which in the present case may affect to some extent the value to be attached to the statement of the deceased as recorded by him in the case diary u/s 161, Code of Criminal Procedure which became his dying declaration on his death.

42. The question of Appreciation of evidence of police officials again came up before the Apex Court in the case of Tahir v. State, (Delhi) 1996 SCC 515, which

was an appeal against the conviction of an accused in the T.A.D.A. Act, 1987. In that case, the conviction had been recorded on the testimony of only police officials in the absence of any independent witness to corroborate them. It was argued before the Apex Court by the learned Senior Counsel appearing for the accused-Appellant that in the absence of any independent witness to corroborate the police officials it was not safe to rely upon their testimony to sustain the conviction of the Appellant. The Apex Court said; "We cannot agree". In our opinion, no infirmity attaches to the testimony of police officials merely because they belong to the police force and there is no rule of law of evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case. In the present case also, apart from the non-compliance of Rule 115 of the Police Regulation, there is no other infirmity in the testimony of the first I.O. aforesaid and so in the circumstances of this case, his testimony about the dying declaration given by the injured deceased to him can be safely accepted.

43. Furthermore, even if, we leave out of account, this second dying declaration of the deceased, there still remains the first dying declaration of the deceased in the Form of the F.I.R. dictated by him to the head constable Bansh Bahadur Yadav, P.W. 13 which does not suffer from any infirmity whatsoever. Rule 115 of the Police Regulation does not apply to it because at the time of recording of the F.I.R. of the injured deceased (the first dying declaration) at the police station, there was no investigation pending and the Head Constable who recorded it was not the Investigating Officer and, therefore, there is no reason to reject or doubt the first dying declaration of the deceased recorded by the Head Constable particularly when no enmity has been alleged between the Head Constable or the S.O. of the police station and no link has been shown between the injured deceased and the police.

44. Much argument has been advanced by the learned Counsel for the accused-Appellant that the F.I.R. lodged by the injured deceased in this case at the police station was a highly delayed one as the occurrence had taken place at 7.00 p.m. at village Tooti Bhati which was only 3 miles away from the place of occurrence and the F.I.R. was lodged at 8.30 a.m. the next day and reliance was also placed on the authority Thulia Kali Vs. The State of Tamil Nadu, , in which the necessity of prompt lodging of the F.I.R. at the police station was emphasized. There can be no quarrel with the proposition laid down. The F.I.R. ought to be lodged with reasonable promptness. But no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of

reasonable time being a matter for determination by the Court in each case on its own facts. Furthermore, if a reasonable explanation has been advanced for the delay, it is enough.

45. The occurrence had not taken place at the house or even at the village of deceased or of Parmatma Prasad (P.W. 1). The place of occurrence was another village even though not far away from their village. Both the victims had got down from the bus and were on foot when the occurrence took place. Parmatma Prasad (P.W. 1) who was the other victim who received a lesser number of injuries could escape earlier while the injured deceased was left lying on the spot by the assailants. In his second dying declaration given to the first I.O., he has given more details about his being taken to a doctor and given some first aid and then left at the house of a 3rd person in the night and then about his being taken in a Jeep to the police station in the morning. If we leave out of account this second dying declaration, we may leave out this explanation also but the explanation given in the F.I.R. itself appears to be truthful and reasonable. The deceased had been assaulted and whisked away to the grove in the vicinity in the sight of Parmatma Prasad (P.W. 1) and the villagers and given blows after blows and then left lying with as many as twenty-nine injuries on his body covering almost the whole of his body including his both legs. It cannot be doubted that the deceased must not only be terror-stricken besides being in severe bodily pain. It would be idle to expect him to rush to the police station in the night from village Tooti Bhati to lodge the F.I.R. In his F.I.R. dictated at the police station, he has stated that he could not come to the police station in the night due to the large number of injuries and for want of means of transport and further due to fear of the accused persons. While expecting the victim to lodge the F.I.R. promptly at the police station, the Courts have to be realistic. It was also not surprising that in the injured condition Parmatma Prasad did not go to the police station. Under the circumstances Parmatma Prasad (P.W. 1) must have been so much terror-stricken that he could not be expected to muster courage to go to the police station for lodging the F.I.R. He could not have even thought of going to the scene of occurrence again for fear of confrontation with the assailants. So it is not surprising that the deceased and Parmatma Prasad remained incommunicable from each other.

46. The cross-examination of Parmatma Prasad (P.W. 1) may be usefully referred to at this stage. In reply to question No. 5 as to why he did not know about the whereabouts and condition of the deceased in the night his reply was that he was unable to move and out of fear he could not send any one and in his knowledge nobody went there (to the spot to find out as to what had happened to the deceased). It was elicited from him that he passed the night at the house of one Hula. He testified that he did tell somebody at the house of Hula that he had seen his brother to being assaulted and did not know what would be his condition and asked them to do something about it. But Hula did not take any step. He had further testified that in that night persons from his Aural did not come to him, that in the morning the house-holders of Bhulai made him to board a bus and by

it he came to Haraiya and in Haraiya his in-laws met him and took him to the District Hospital. Basti. His injury report shows that he was brought to the District Hospital, Basti by one Radhey Shyam, r/o village Dubhara Bodhi lying with the circle of the same police station and his medical examination was made there at 9.30 a.m. on 01.09.1978. There is nothing suspicious or unusual about his conduct. It is common that people are generally insensitive when a crime is committed in their presence and they withdraw from both the victim and the vigilantes (the police). This apathy of the general public cannot be lost sight of while insisting upon the victim or those who see the occurrence to go to the police station in the night itself if the occurrence had taken place in the evening and risk their whole lives in the process.

47. In the circumstances of this case, we are of the view that there has not been any unreasonable delay in lodging of the F.I.R. of this case and we are also satisfied that the time gap between the occurrence and the dictation of the F.I.R. concocting a story or embellishing it.

48. Now the 1st F.I.R. lodged by the injured deceased at the police station has become his dying declaration on his death and hence a substantive piece of evidence. Lot of case law has developed during the course of years regarding the appreciation of dying declaration of the deceased, i.e., his statement about the cause of his death or the circumstances of the transaction which ultimately resulted in it. It is to be seen whether the victim was in a position to see and identify the assailants, whether there was sufficient light, natural or artificial, at the spot, whether the victim was in such a situation in reference to the assailants to be in a position to identify, whether he was in a fit physical and mental condition to narrate the facts at the time of making the dying declaration, whether he has made the statement voluntarily or it was the result of tutoring or prompting by interested parties, whether it has been faithfully and accurately recorded in his own words ; whether his statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it, whether his dying declaration was consistent with the ocular testimony on the record and also whether it was consistent with the medical evidence in the case. It was observed by the Apex Court in a recent decision in the case of Padmaben Shamalbhai Patel Vs. State of Gujarat, at page 750, "If in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the Court on strict scrutiny finds it reliable there is no rule of law or even of prudence that such a reliable piece of evidence cannot be accepted (acted upon) unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence neither extra strong, nor weak and can be acted upon without corroboration if it is found to be otherwise true and reliable." In the authority Kundula Bala Subramanian and another v. State of Andhra Pradesh 1993 SCC 655, it was observed that once the statement of the dying person and the evidence of the witnesses testifying to the same passes the test of careful

scrutiny of the Courts, it becomes a very important and a reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment, such a dying declaration, by itself, can be sufficient for recording conviction even without looking for any corroboration.

49. In the case of Jose v. State of Kerala 1994 SCC 1659, the Apex Court said that it is well-settled that the conviction can be based on the dying declaration itself provided it is satisfactory and reliable and if there are any infirmities of such nature warranting further assurance, then the Courts have to look for corroboration. Yet another case is State of Rajasthan v. Kishore, 1996 SCC 646, in which the Apex Court observed as follows:

"It is settled law by series of judgments of this Court that the dying declaration, if after careful scrutiny the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent (there) is no legal impediment to form such dying declaration the basis of conviction, even if, there is no corroboration."

50. In the present case, we have already noticed that at the time of occurrence (7.00 p.m.) both the victims, namely, Desh Raj deceased and Parmatma Prasad (P.W. 1) were in a position to see and identify the assailants who were near at hand while making the assaults vis-a-vis the victim though in the second part of the transaction Parmatma Prasad (P.W. 1) will be a little away from the grove where the deceased Desh Raj was assaulted by the assailants. It is also established from the evidence that at the time of dictating his F.I.R. to the head constable at the police station (now his first dying declaration) the deceased was in a fit physical and mental condition to narrate the facts and to narrate the same coherently and that he had voluntarily dictated his F.I.R. to the head constable and further that the F.I.R. dictated by him has been recorded by the head constable faithfully and accurately. From the second dying declaration of the deceased, it comes out that the persons named there in, namely, Kinker, Kripa Shanker, and the sons of Paras Nath who came in touch with him prior to the dictation of the F.I.R. by him but there is absolutely nothing in the evidence on record to show that any of the said persons had any animus against any of the accused persons so as to have become instrumental in the false implication of any of them and considering the circumstances of the case, we are satisfied that the F.I.R. dictated by the deceased to the head constable was not the result of the tutoring or prompting by any interested party. It may be noted here that Parmatma Prasad (P.W. 1) did not come in contact with him after the occurrence even up to the time of dictation of the F.I.R. by him (the deceased).

51. The second I.O. of this case, namely, Vishwanath Ram (P.W. 10) has testified that at the time of the dictation of the F.I.R., the deceased was alone in the office of the police station and there was nobody with him. Neither he nor Bans Bahadur Yadav, head constable (P.W. 13) was suggested in cross-examination that the persons who had brought the deceased to the police station from the Jeep by which he had been brought there, were present in his immediate vicinity

inside the office of the police station and were helping him in dictating his F.I.R. or were in any manner instrumental in it (apart from the help extended in bringing him to the police station and to the inside of the office of the police station). There was also no suggestion made to any of the two witnesses that any of those persons had any enmity with any of the accused-Appellant.

52. It may be that the second I.O. stated in his cross-examination that on an inquiry (i.e., a query) being made, he learnt that those persons who were accompanying the deceased in the Jeep and had helped him in reaching the office of the police station were mere fellow passengers unconnected with him (the deceased Desh Raj). This statement of the second I.O. could not be taken literally. He seems to have made it casually and it cannot be said that the statement contradicts the second dying declaration of the deceased. The second I.O. has himself admitted that he do not ask for the name and addresses of those persons who were accompanying the deceased at the time and had also not recorded their statements. At that time, he was not the Investigating Officer of the case.

53. In this case, as noted above, there were two successive dying declarations made by the deceased and a reference to the same will show that these two dying declarations were consistent with each other in all material particulars.

54. We now come to the question whether the dying declarations of the deceased were consistent with the ocular evidence on record. However, before we take up the two dying declarations vis-?-vis the testimony of Parmatma Prasad (P.W. 1), a brief reference may be made to the remaining ocular evidence given by Durham (P.W. 3), Brij Mohan (P.W. 4), Ram Gopal (P.W. 6) and Ram Naik (P.W. 7). Out of them, Ram Gopal and Ram Naik P. Ws. were totally hostile to the prosecution in the sense that Ram Gopal P.W. 6 stated that he did not see the occurrence and Ram Naik, P.W. 7 stated that he saw that some persons were beating Desh Raj deceased and Parmatma Prasad (P.W. 1), at the shop of Sukha but claimed that he could not see any further. The learned A.G.A. has pointed out that when the learned D.G.C. cross-examined the witness Ram Gopal (P.W. 6) before the trial court even though, the witness kept on resiling from his statement before the I.O. and kept on denying having seen the occurrence, he admitted that on 31.8.1978, he had come to Haraiya and had gone up to village Tooti Bhati by bus and that the deceased and Parmatma Prasad injured had also gone by the same bus. He further stated that at the time when they reached the village Tooti Bhati, it was 15 minutes after the sun-set, though he said that there was some darkness and visibility was up to 1 yard. It is not surprising that this witness made this statement about the visibility, after all he had gone hostile. Much significant is that when asked the question whether he had colluded with the accused persons and had become afraid, his reply was, "Mila Nahant Hun Magyar Data Hun. Muljuman Sarcasm Ham". This is an unusual reply coming from a hostile witness. From the reference to the above testimony of Ram Gopal P.W. 6, it is obvious that no adverse inference can be drawn against the

prosecution from the fact that this witness has turned hostile having regard to the stark realities in villages and even in cities.

55. The position of Ram Naik (P.W. 7) was not much different. He too was declared hostile by the prosecution at the trial. In his cross-examination by the learned D.G.C. (Cri). he denied his statement u/s 161, Code of Criminal Procedure as recorded by the I.O. in the case diary in affirmation of the prosecution case. But when asked the question, "Kay Mulligan Baht Sarcasm Admit Hat Isis Clayey asp dar rahey hain aur sahi bat nahin kahna chahtey". His reply was, "Jihan. Yah Baat sahi hai". It is obvious that this witness too has become hostile out of fear of the accused-persons. Asked further, he admitted having boarded the bus at Haraiya on 31.8.1978 and also stated that he went upto Tooti Bhati and that by the same bus the deceased and Parmatma Prasad (P.W. 1) were also travelling. He claimed that he had gone beyond by the bus. He stated further that when the bus reached Tooti Bhati, the sun was about to set and that the visibility was up till 2 to 4 big has. So it is not possible to draw an adverse inference against the prosecution even from the fact that this witness Ram Naik P.W. 7 had turned hostile. In fact, evidence of these two witnesses goes to corroborate the prosecution case about its substratum, that the deceased and Parmatma Prasad (P.W. 1) both had come up to Haraiya on 31.08.1978 and had boarded the bus from Haraiya and travelled in it. upto Tooti Bhati and got down there at about sun-set. The evidence of Ram Nayak P.W. 7 even fixed the place of occurrence. Then comes the testimony of Dukhran (P.W, 3) and Brij Mohan (P.W. 4). The testimony of both of them is practically on the same lines as the testimony of Parmatma Prasad (P.W. 1).

56. The learned Sessions Judge has held that none of the said four eye-witnesses, namely, Durham (P.W. 3), Brij Mohan (P.W. 4), Ram Gopal (P.W. 6) and Ram Nayak (P.W. 7) were present at the time of occurrence. Parmatma Prasad injured (P.W. 1) was son-in-law of Devi Prasad and Devi Prasad was son of daughter of Durham (P.W. 3). Ram Gopal (P.W. 4) was Sarah of Deshraj deceased, i.e., out of two real sisters, one was married to Deshraj deceased and another was married to this witness. With regard to Durham (P.W. 3) and Brij Mohan (P.W. 4) the grounds of rejection of their evidence were ; (1) that they were closely related to the victim and it was improbable that if they were present they would leave Deshraj deceased and Parmatma Prasad injured (P.W. 1) uncared in the night and would not inform the police also, (2) that they did not tell a word to the person at whose house they took shelter in night and also kept mum at their own houses and lastly, (3) that they were interrogated after more than 10 to 15 days of the occurrence according to their own admissions.

57. The remaining two eye witnesses, namely, Ram Gopal (P.W. 6) and Ram Nayak (P.W. 7), noted earlier, had turned hostile. No reasons were given for rejection of their evidence except that they had turned hostile. Both these witnesses had turned hostile apparently out of fear of the accused party and as such no adverse inference can be drawn against the prosecution merely for the

reason that they had become hostile. As noted earlier, both these witnesses corroborated the substratum of the prosecution case and they have not been suggested that they were not returning from the route at the relevant time. So, it cannot be said that the learned Sessions Judge was right in holding that these two witnesses were not present at the time of occurrence. It is a common occurrence to find one or other witnesses turning hostile at the trial even in the most genuine cases due to various reasons. It cannot be said that the names of these two witnesses have been falsely introduced in this case.

58. The 1st dying declaration of the deceased (F.I.R.) does not name these two witnesses, namely Ram Gopal (P.W. 6) and Ram Nayak (P.W. 7) but it does not rule out their presence. Their names have come in his (deceased's) statement u/s 161, Code of Criminal Procedure (the 2nd dying declaration) taken soon after the dictation of the F.I.R. by him at the police station. Both these witnesses were fellow passengers and were not said to be related to the deceased or to Parmatma Prasad injured (P.W. 1) and, therefore, there could be no purpose in introducing them in the prosecution, story during the investigation of the case falsely. Both these witnesses, namely, Ram Gopal and Brij Mohan, have been interrogated u/s 161, Code of Criminal Procedure by the 2nd Investigating Officer Vishwanath Rai (P.W. 10) on 02.09.1978. So, it cannot be called a delayed interrogation under the circumstances of this case.

59. Coming to Durham (P.W. 3) and Brij Mohan (P.W. 4), their presence finds place in the F.I.R. dictated by the deceased at the police station (1st dying declaration) itself and their names also find place in his statement u/s 161, Code of Criminal Procedure (1st dying declaration) given before the 1st I.O. The grounds for rejecting their evidence as given by the learned Sessions Judge in his judgment have been considered by us.

60. There is the conduct of these witnesses in keeping mum and avoiding going to the police station, though they were closely related to the deceased and Parmatma Prasad injured (P.W. 1). But what blame can be attached to them when Parmatma Prasad injured (P.W. 1) himself being the real brother of the deceased left the spot leaving the deceased to his fate and at the mercy of the assailants. The escapist attitude was common with both these two witnesses and him. It is obvious that Parmatma Prasad injured (P.W. 1) left the deceased to his fate at the spot being afraid of the accused party and even did not try later on to come at the spot and to trace him out or to go to the police station to lodge the F.I.R. and to seek the help of the police. But it could not be said that he was not present at the spot because if he had been present, he would have gone to the police station and lodge the F.I.R. about it and would have narrated the event to others and would have gone to the spot again. Though Durham (P.W. 3) and Brij Mohan (P.W. 4) were not injured in the occurrence, it does not necessarily follow from the absence of injuries on their person and their aforesaid conduct after the occurrence that they were not actually present at the spot. It appears that both these witnesses were in the grip of fear at the time of occurrence and so they

acted and omitted to act after the occurrence as they have done and further that the twisted testimony which they had given in the witness box in their cross-examination had been given by them due to the fear of the accused party.

61. It may be that Durham (P.W. 3) claimed in his cross-examination that the Investigating Officer had met him 7 to 8 days after the occurrence and he had narrated the story to him and Brij Mohan (P.W. 4) claimed that the Investigating Officer met him to 10 to 20 days after the occurrence and he had narrated the occurrence to him at that time.

62. However, Chandra Bhan Singh, 1st I.O. of the case (P.W. 8) testified to having recorded the statement of Durham (P.W. 3) on 01.09.1978 itself immediately after preparing the site plan with the help of Deshraj deceased. He was not suggested that he had not interrogated this witness Durham (P.W. 3) on 01.09.1978, but he had interrogated this witness Dukhran (P.W. 3) 7 to 8 days after the occurrence and that he had recorded in the case diary a fictitious statement of this witness on 01.09.1978. Then Vishwanath Ram, 2nd I.O. (P.W. 10) has testified that he had recorded the statement of Brij Mohan (P.W. 4) on 02.09.1978 along with the witnesses Ram Gopal and Ram Nayak, P. Ws. 6 and 7. He was not suggested by the defense in cross-examination that he had not interrogated Brij Mohan (P.W. 4) on 02.09.1978 but had recorded a fictitious statement of this witness in the case diary on the date and that actually it was only 10 to 20 days after the occurrence that he had interrogated this witness. There was no reason for these Investigating Officers in not actually interrogating these witnesses and showing their interrogation in the case diary even while they were related to the deceased and Parmatma Prasad injured (P.W. 1). If they were not available or traceable the Investigating Officer could have recorded their statement in the case diary at a belated stage. The statement of these two eye-witnesses, therefore, would have been made either recklessly or with a purpose of silently helping the defense. Such type of semi-hostile witnesses are often found who support the prosecution story in the examination-in-chief in the main and during the cross-examination make one reckless statement here and another reckless statement there with a view to give enough scope to the defense to assail the prosecution evidence and case. In our view, the testimony of such semi-hostile witnesses cannot be allowed to erode the prosecution case by upholding the argument that these witnesses were not present at the spot at the time of the occurrence and had been falsely introduced in the prosecution story as eye-witnesses of the occurrence. In the circumstances of the present case the testimony of these two semi-hostile witnesses and that of the earlier mentioned hostile witnesses Ram Gopal (P.W. 6) and Ram Nayak (P.W. 7) cannot be used to cast a shadow of doubt over the other prosecution evidence on record in the present case. The only reasonable effect of such earlier mentioned material coming in the testimony of these witnesses was only this much that the prosecution was left to prove its case on the strength of the other evidence on record. To take any other view about such hostile/semi hostile witnesses would be only encouraging the unhealthy practice of tampering with the prosecution

witnesses by all possible means to destroy and damage the prosecution case even though it may be otherwise true and strong.

63. In view of the above observations made by us, it is difficult to give any benefit to the accused-Appellants on the strength of a Division Bench authority Basra and another u. State 1986 ACR 227, in which the contention of the defense in the case before the Court was that where a witness states that he and other person, both of them, were present at a place of occurrence and had witnessed the incident but the Court comes to a conclusion that he was not present at the place of occurrence, then no reliance can be placed also on the other witness as well if he deposes about the presence of the witness whose testimony has not been accepted regarding his presence or the place of occurrence. These observations were made on the facts of that case. The facts of two different cases are never identical and it will have to be seen in the background of the circumstances of the case at hand before the Court whether the evidence of the other witnesses also becomes unreliable or not in the case if the presence of other witnesses in the prosecution story gets belied or becomes doubtful.

64. The learned Counsel for the accused-Appellants has assailed the testimony of Parmatma Prasad injured (P.W. 1) and the two dying declarations of the deceased on the ground that in the dying declaration of Parmatma Prasad injured (P.W. 1) recorded by the Deputy Collector on 01.09.1998 in the Hospital the names of Chandrika, Faujdar and Kanaka Ram accused-Appellants, who had preferred Criminal Appeal No. 338 of 1980, are conspicuous by their absence and further that there were names of Brahma din (Kansan of Nehar alias Gaya Prasad) Laxmi Marian (son of Brahma din), and Vijay, (Grand-son of Vindhychal, i.e., accused-Appellant), stated as assailants and it is also said that there were other persons also amongst the assailants whom he did not know from before, while in the testimony of Parmatma Prasad injured (P.W. 1) the names of Brahma din, Laxmi Marian and Vijay were not stated amongst the assailants and it was also not said that there were unknown persons also amongst the assailants and the two dying declarations of the deceased aforesaid, the names of Chandrika, Faujdar and Kanaka Ram accused-Appellants as assailants were not stated by the deceased. The contentions of the learned Counsel for the accused-Appellants are two folds ; one that the entire testimony of Parmatma Prasad injured (P.W. 1) and the two dying declarations of the deceased should be discarded altogether and that all the accused-Appellants in both the present appeals should be acquitted as a shadow of doubt is created about the authenticity of the names of the assailants in the two dying declarations of the deceased and the testimony of Parmatma Prasad injured (P.W. 1), and the second is that in any case Chandrika, Faujdar and Kanaka Ram accused-Appellants in Criminal Appeal No. 338 of 1980 at any rate are entitled to be given the benefit of doubt and to be acquitted.

65. On the other hand, the learned Additional Government Advocate appearing for the prosecution has contended that there were two victims in this case who

have been simultaneously assaulted by number of assailants inside the shop/ Joplin of Sukkha and then on the road in front of the shop and further that Deshraj deceased was then taken to the grove by the assailants and assaulted there and that the discrepancy in the names of the culprits by the two victims does not show the false implication of any one but that this shows that some of the assailants were common in respect of both the victims and there were other persons who participated in the second part of the occurrence in which Deshraj deceased was assaulted in the grove where he was whisked away by the assailants.

66. The first point to be noted here is that since Parmatma Prasad injured (P.W. 1) has survived the assault on him, his dying declaration would not be admissible as a substantive piece of evidence and would be treated only as previous statement which can be used for contradicting him or corroborating him at the trial, for contradicting him, a recourse ought to have been taken to Section 157 of the Indian Evidence Act but no where Parmatma Prasad injured (P.W. 1) was contradicted with reference to his aforesaid dying declaration. Therefore, the nomination of the persons Brahma din, Laxmi Narrating and Vijay in his dying declaration cannot be used to discard his testimony, nor can his testimony be discarded on the ground that he had said in his dying declaration about the presence of unknown persons. All that had been done by the defense in the cross-examination of Parmatma Prasad injured (P.W. 1) is that in question No. 28 he was asked if he had stated so as given in the dying declaration before the Deputy Collector and he replied in the affirmative. It was elicited from him that the statement given by him was correct and then he was read over his dying declaration and it was elicited from him, " WTR From this reply at the most this much can be said that while it goes to corroborate the presence of Bharat Ram, Vindhyachal, Nehar alias Gaya Prasad and Surat accused-Appellants of Criminal Appeal No. 342 of 1980, the narration does not prove the presence of the accused-Appellants Chandrika, Faujdar and Kanak Ram of Criminal Appeal No. 338 of 1980. The argument of the learned Additional Government Advocate is not without substance and there is possibility of same different persons also participating in the second part of the transaction. However, by way of abundant precaution this Court may give the benefit of doubt to Chandrika, Faujdar and Kanak Ram accused-Appellants though they have been named in the two dying declarations of the deceased and in the testimony of Parmatma Prasad injured (P.W. 1). But it does not mean that this Court has come to the conclusion that Chandrika, Faujdar and Kanak Ram accused-Appellants have been falsely implicated by the deceased and Parmatma Prasad injured (P.W. 1) we propose to give them the benefit of doubt only by way of abundant precaution. But there is no warrant of justification for discarding the prosecution evidence against Bharat Ram, Vindhyachal, Nehar alias Gaya Prasad and Surat accused-Appellants. In view of these observations, the first contentions raised by the learned Counsel for the accused-Appellants that the prosecution story becomes doubtful and that these accused-Appellants had been falsely implicated cannot be sustained.

67. Here it may be mentioned that the maxim, falsus in undo, falsus in omnibus, is not a sound rule of law and practice and the Court has to scrutinize the evidence in each case carefully. There are several authorities. In the authority, Hair Chad v. State of Delhi, 1996 SCC 950 at page 962, it was said:

".... It must be kept in view that while appreciating, the evidence of witnesses in a criminal trial apacially in a case of eye-witnesses the maxim falsus in uno, falsus in omnibus cannot apply and the Court has to make efforts to sift the grain from the chaff. It is of course true that when a witness is said to have exaggerated in his evidence at the stage of trial and has tried to Involve any more accused and if that part of the evidence is not round acceptable the remaining part of evidence has to be scrutinized with care and the Court must try to see whether the acceptable part of the evidence gets corroborated from other evidence on record so that the acceptable part can be safely relied upon"

68. In the authority. State of Haryana v. Chandvir and Ors. 1996 SCC 728, it was said that the maxim has no application in criminal trial and that the Court has to endeavour to separate the grain from the chaff and accept that parts of the evidence which is found to be truthful and consistent.

69. In the authority, Arjun and Ors. v. State of Rqjasthan. 1994 SCC 1685:

" It is well-settled that maxim falsus inane, falsus in ominibus, that is to say, false in one thing, false in everything, is neither a sound rule of law, nor a rule of practice. In such a circumstance the Court has to analyze the prosecution evidence carefully and on such analysis of the evidence is found to be consistent and reliable the Court can accept the same with regard to the other accused persons and held them guilty, even though the Court is unable to rely fully on the prosecution evidence with regard to some of the accused persons "

70. There is yet another authority, State of U.P. v. Anil Singh AIR 1988 SC 1988, in which it was observed by the Apex Court:

" It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies of falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to destroy remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

71. The learned Counsel for the accused-Appellants has relied on the authority, Vadivelu Thevar v. steate of 1957 SC 614, where it was said:

" Generally speaking oral Testimony in this context may be classified into three categories namely (1) Wholly reliable (2) Wholly unreliable (3) Neither wholly reliable for wholly unreliable.

In the first category of proof the Court should have no difficulty in coming to its

conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial."

72. There is a subsequent authority of the Apex Court dealing with the question of appreciation of the testimony of a single eye-witness. In that authority *Anil Phukan v. State of Assam* 1993 CAR 145, it was said:

Indeed, conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability so long as the single eye-witness is a wholly reliable witness, the Courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the Courts generally insist upon independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the Courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.

73. These authorities do not render any help to the defense in this case. Firstly, because it is not a case hanging on the evidence of a single eye-witness. Apart from the testimony of Parmatma Prasad injured (P.W. 1), there are two dying declarations of the deceased. Furthermore, his testimony finds ample corroboration from the two dying declarations of the deceased at least to the extent of accused-appellants Bharat Ram, Vindhyachal, Nehar alias Gay a Prasad and Surat. It cannot be said even for a moment that Parmatma Prasad injured (P.W. 1) was an unreliable witness. In this case we find his evidence reliable and it is safe and beyond every shadow of doubt to act upon his (Parmatma Prasad's) testimony and the two dying declarations of the deceased against these four accused-appellants.

74. Now comes the question as to what offence has been made out by Bharat Ram, Vindhyachal. Nehar alias Gaya Prasad and Surat accused-appellants. The learned counsel for the accused-appellants argued that in any case, the offences of murder and attempt to murder have not been made out in this case.

75. Before we proceed further, it may be stated that in view of the fact that conviction of only four accused is being sustained, conviction for the offence under Sections 147 and 148, I.P.C. would have to be set aside and Section 149, I.P.C. would certainly be not applicable but Section 34, I.P.C. would certainly be applicable.

76. It is noticeable that though Desh Raj deceased has received as many as 29 injuries on his body as recorded in the injury report, all the injuries were

recorded by the doctor as simple in nature except injury Nos. 9, 10 and 28 which were kept under observation and in respect of which X-ray was advised for any body injury. Injury No. 9 was traumatic swelling on the back left hand, left forearm and left elbow joint. Injury No. 18 was traumatic swelling around the injury No. 17 (punctured wound) on the front and the middle of right lower leg. Injury No. 28 was traumatic swelling on the whole of right forearm. There were no X-ray reports on record and in the post-mortem report, no fracture of any bone was recorded in any part of the body and no damage to any vital organ like brain, spinal cord, pleura, lungs, heart or elementary canal, liver, spleen, etc. were found. Only membranes were found slightly congested in the head region. Considering all these facts, it is difficult to hold that the intention of the accused persons was to cause the death of the deceased. It cannot also be safely held that the case will fall under clause thirdly of Section 300, I.P.C. though the autopsy surgeon has stated in his testimony at the trial that the injuries of the deceased were sufficient to cause death in the ordinary course of nature. However, at any rate it cannot be doubted that all these four accused had caused the death of the deceased with the common intention of causing such bodily injury as is likely to cause death which is punishable u/s 304, Part I, I.P.C. read with Section 34, I.P.C. Similarly having regard to the injuries received by Parmatma Prasad (P.W. 1) it cannot be said with regard to the assaults on him that the offence u/s 307, I.P.C. read with Section 34, I.P.C. is made out. However, it cannot be doubted that the assaults on him were made with such an intention or knowledge and under such circumstances that if these accused witness, the Courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the Courts generally insist upon independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the Courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect." These authorities do not render any help to the defense in this case. Firstly, because it is not a case hanging on the evidence of a single eye-witness. Apart from the testimony of Parmatma Prasad injured (P.W. 1), there are two dying declarations of the deceased. Furthermore, his testimony finds ample corroboration from the two dying declarations of the deceased at least to the extent of accused-Appellants Bharat Ram, Vindhyachal, Nehar alias Gay a Prasad and Surat. It cannot be said even for a moment that Parmatma Prasad injured (P.W. 1) was an unreliable witness. In this case we find his evidence reliable and it is safe and beyond every shadow of doubt to act upon his (Parmatma Prasad's) testimony and the two dying declarations of the deceased against these four accused-Appellants. Now comes the question as to what offence has been made out by Bharat Ram, Vindhyachal. Nehar alias Gaya Prasad and Surat accused-Appellants. The learned Counsel for the accused-Appellants argued that in any case, the offences of murder and attempt to murder have not been made out in this case. Before we proceed further, it may

be stated that in view of the fact that conviction of only four accused is being sustained, conviction for the offence Under Sections 147 and 148, I.P.C. would persons by that act caused death, they would be guilty of capable homicide not amounting to murder and so the offence u/s 308, I.P.C. read with Section 34, I.P.C. is certainly made out in this regard against all these four accused-Appellants.

77. In our view, rigorous imprisonment for a period of 10 years would be adequate for the offence u/s 304, Part I. I.P.C. read with Section 34. I.P.C. and that rigorous imprisonment for a period of 4 years would meet the ends of justice for the offence u/s 308, I.P.C. read with Section 34, I.P.C. in the case of each of these accused persons, both the sentences ought to run concurrently.

78. For the reasons aforesaid, Criminal Appeal No. 338 of 1980 is allowed. The conviction and sentence of the accused-Appellants Chandra. Faujdar and Nanak Ram for the offences u/s 302/149. I.P.C. 307/149, I.P.C. and 147, I.P.C. are set aside. They are acquitted of the offences. They are on bail from this Court. They need not surrender to it. Their bail bonds are cancelled and sureties discharged.

79. Criminal Appeal No. 342 of 1980 is partly allowed. The conviction and sentence of the accused-x Appellant Vindhyachal for the offence u/s 148, I.P.C. is set aside and he is acquitted of the same.

80. The conviction and sentence of Bharat Ram, Nehar alias Gaya Prasad and Surat for the offence u/s 147, I.P.C. is set aside and each one of them is acquitted of the same.

81. The conviction and sentence of Bharat Ram, Vindhyachal, Nehar alias Gaya Prasad and Surat for the offence u/s 302/149, I.P.C. is set aside and they are acquitted of the same but are convicted of the minor offence u/s 304, Part I, I.P.C. read with Section 34, I.P.C. and each one of them is sentenced to undergo R.I. for a period of 10 years. Their conviction and sentence for the offence u/s 307/149, I.P.C. is set aside. They are acquitted of the same. They are however convicted of the minor offence u/s 308/34, I.P.C. and each one of them is sentenced to undergo rigorous imprisonment for a period of 4 years for the said offence in the case of each of these accused-Appellants both the sentences shall run concurrently.

82. Bharat Ram, Vindhyachal, Nehar alias Gaya Prasad and Surat accused-Appellants are on bail from this Court. Their bail is cancelled. Let them be arrested and sent to the District Jail concerned to serve out their sentences in accordance with law.

83. Let a copy of this judgment be certified to the Sessions Judge, Basti, at once for immediate information and compliance. The compliance report shall be submitted by the Sessions Judge to this Court within 15 days from today and the record of this appeal shall be listed before this Court for orders on 7th August along with the compliance report of the Sessions Judge.