

(1996) 04 AHC CK 0046

In the Allahabad High Court

Case No : Criminal Appeal No. 1535 of 1985 and Govt. Appeal No. 2166 of 1985

Madan Rai and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 34, 420, 440

Citation : (1997) CriLJ 1677

Hon'ble Judges : R.N. Ray, J; N.L. Ganguly, J

Bench : Division Bench

Advocate : Krishna Ji Khare, Gajender Pratap, Y.K. Shukla, A.D. Giri and Ravindra Rai, for the Appellant; A.G.A. and P.N. Misra, for the Respondent

Final Decision : Allowed

Judgement

N.L. Ganguly, J.—The appellants Madan Rai and three others tried by the Sessions Judge, Ghazipur in S. T. No. 150 of 1984 were convicted as under:

Accused Madan Rai was convicted u/s 302, I.P.C. and sentenced to imprisonment of life and convicted and sentenced to two years R.I. u/s 440, I.P.C. and a fine of Rs. 5007-. In default of payment of fine, R.I. for three years.

2. Appellants Sachidanand Rai, Ras Behari Rai alias Panda and Janardan Rai were convicted u/s 440, I.P.C. and sentenced to two years R. I. and a fine of Rs. 500/-. In default of payment of fine, three months R.I. All the sentences to run concurrently.

3. Government Appeal No. 2166 of 1985 is directed against the same judgment and order against the acquittal of the appellants Ras Behari Rai alias Panda, Sachidanand Rai and Janardan Rai under Sections 302/34, I.P.C.

4. The occurrence took place on 11th May, 1984 at about 6.30 p.m. in village Lauwadih P. S. Bhanwarkol Distt. Ghazipur when all the accused appellants are said to have fallen the wall by which a door had been closed by Rama Kant,

father of the deceased Jai Ram Rai. It is said that appellant Madan Rai had fired from his licenced gun at Jai Ram Rai, a young boy of 15 years of age which resulted in his death after some time of the incident i.e. on 12-5-1984 at 2 p.m. after he had been taken to the hospital of the B.H.U. Hospital at Varanasi. The F.I.R. of the occurrence was lodged at the police station on 11 -5-1984 at 11.20 p.m. by the informant Siya Ram.

5. The accused appellants Ras Behari Rai alias Panda, Sachidanand and Janardan Rai were charged to have shared the common intention with appellant Mdan Rai for murdering Jai Ram Rai and as such charged under Sections 302/34, I.P.C. was framed. The appellant Madan Rai was charged u/s 302, I.P.C. simpliciter. All the aforesaid appellants were charged u/s 420, I.P.C. for committing the mischief having made preparation to cause hurt. The appellants pleaded not guilty and claimed to be tried.

6. It would be convenient to give the pedigree and family of the complainant informant and the accused persons :-

DUTT NARAIN RAI		-----		
Sudarshan Ram	Auttar			Ram Kant
-----				Siya Ram Rai
Jai Jai Ram Rai	Madan Rai	Tara Chand	(Informant)	(Deceased)
	Ras Behari Ram	Sachdanad Rai	Alias Panda	(accused) (accused)

7. Janardan Rai, accused is a distant co-lateral resident of the same village.

8. According to the F.I.R. and the prosecution case, as revealed in the Court, the informant-complainant and the accused-opposite party except Janardan Rai lived jointly earlier. There had been a private partition between them some few years ago. The room in which the cattle used to be tethered was also partitioned. Accused Madan Rai wanted to usurp the northern room, out of the room in which the cattle used to be tethered which had fallen in the lot of informant Siya Ram. There was a door in the said room which could open towards the north in the angan of the accused appellant lot. The said door had been removed some time before the occurrence. The informant had closed this door by constructing a mud wall.

9. On the date of the incident at 6.30 p.m. at 11-5-1984, appellant Madan Rai came with his licenced gun along with Ras Behari Rai alias Panda, Sachidanand and Janardan Rai, appellants who were armed with lathis. They started felling the mud wall. The informant Siya Ram Rai and his brother and father asked the accused appellant Madan Rai not to fell the wall. Madan Rai thereupon fired one gun shot from his gun. The sound of the gun fire attracted witnesses Vasistha Pandey and Bhimnath Rai and several other people of the village who came to the room of the informant where the cattle were tethered. The informant and the others who had come to the said room where cattle were tethered, saw Madan Rai climbed the roof of the room through the western corner of the house along

with his gun. Jai Ram Rai was at the door of the room which was towards north east of the house. Madan Rai appellant fired one gun shot towards Jai Ram Rai deceased which resulted in the injury on his face, Jai Ram Rai fell down on the spot. The occurrence was witnessed by Vashistha Pandey and Bhimnath Rai and many others. The condition of the injured Jai Ram Rai was serious. The informant of the injured Jai Ram Rai was serious. The informant arranged for a tractor for taking the injured to the hospital at Mohammadabad and he himself reached the police station for lodging the F.I.R. The distance of the police station from the place of occurrence in the village Lauwadih is about 7 miles north and the distance of the primary Health Centre where injured Jai Rai Rai was taken on tractor is stated to be about 7 Kms. from the village of occurrence. The police station is towards north of the village Lauwadih and the Primary Health Centre is towards south of the village Lauwadih, i.e. both were in the opposite direction of the village of the incident.

10. The prosecution in support of its case examined eye-witnesses Siya Ram Rai (PW 1), Vashistha Pandey (PW 2) and Bhimnath Rai (PW 5).

11. The F.I.R. was lodged at the police station at 11.20 p.m. on 11 -5-84 by Siya Ram Rai (PW 1) at P. S. Bhanwarkol. The Investigating Officer Sri Ram Prabha Misra (PW 13) was present at the police station at that time. Head Constable Ram Naresh Yadav (PW 6) prepared the check report of F.I.R. Ext. Ka 4 and the case was registered in the General diary which has been proved in the case as Ext. Ka 5. The Investigating Officer Ram Prabha Misra (PW 13) having come to know that the injured has been sent to the hospital Mohammadabad, proceeded to Mohammadabad on a jeep with certain police constables as he thought expedient to record the statement of the injured Jai Ram Rai, who was reported at that time of the lodging of the F.I.R. to be alive. He accordingly proceeded to Primary Health Centre and had asked the informant to reach his village. The Investigating Officer who reached the Primary Health Centre at Mohammadabad found that Dr. Sudhakar Dubey (PW 3) had already examined the injuries of the injured Jai Ram Rai. The following injuries were found by Dr. Sudhakar Dubey on Jai Ram Rai :-

(1) A gun shot wound of entrance 0.5 cm x 0.5 cm round pea shaped with blackening on the right side of fore-head, 3 in number in an area of 5 cm x 2.5 cm with bleeding and swelling 3.5 cm above the right eye brow. Advised X-Ray.

(2) Gun shot wound of entrance 0.5 cm x 0.5 cm round pea shaped with blackening on left side of fore-head. Six in number in an area of 8 cm x 5 cm. Advised X-ray.

(3) Gun shot wound of entrance 0.5 cm x 0.5 cm on the upper eye lid of right eye, 2 in number, one middle of eye lid and second medical side of eye lid with swelling and bulging of right eye ball. Bleeding present. Advised X-ray.

(4) Gun shot wound of entrance 0.5 cm x 0.5 cm, 5 in number on right side of face just below the right eye, blackening and bleeding present.

(5) Gun shot of entrance 0.5 cm x 0.5 cm on left upper eye lid, blackening, swelling and bleeding from the wound. There is bleeding and bulging of left lid. Advised X-ray of left ball.

(6) Gun shot wound of entrance of left side of face 0.5 cm x 0.5 cm, 5 in number 7 cm x 3 cm in area, blackening and bleeding. Advised X-ray.

(7) Gun shot wound of entrance 0.5 cm x 0.5 cm, 2 (in number) one on the right side of cheek and the other on left side of cheek 2 cm -below right and left side of angle of mouth.

(8) Gun shot of entrance 0.5 cm x 0.5 cm, two in number on right side of chest 3.5 cm below the right clavicle. Bleeding was present.

(9) Gun shot wound of entrance 0.5 cm 0.5 cm on top and front of right Upper arm, 4 cm below right shoulder joint. Blackening present. Advised X-ray.

12. The Medical Officer had noted the general condition. The pulse was noted at 100 per minute. Blood pressure was 100/60. The injured was found in a state of unconsciousness. The injured was referred by the Medical Officer to the District Hospital, Ghazipur.

13. The injuries were found to be fresh and about 6 (sic) at the time of explanation.

14. The Investigating Officer could not record the statement of the injured Jai Ram Rai as there was no electric light available at the Primary Health" Centre. The Investigating Officer left a constable near the unconscious injured Jai Ram Rai and himself went to the village of occurrence with his officials.

15. The injured Jai Ram Rai was shifted to B.H.U. Hospital, Varanasi as his injuries were serious. He died at B.H.U. Hospital on 12-5-84 at 2 p.m. The Sub-Inspector of Police Sri Uma Shanker Singh (PW 7) of P. S. Kanka, Varanasi was informed by the B.H.U. Hospital about the death of Jai Ram Rai. He proceeded there, prepared the panchayatnama after appointing punches. The panchayatnama has been proved by him as Ext. Ka7. The sketch of the dead body with injuries and the challan of the dead body were" prepared by him, proved and marked as Ext. Ka 8 and Ka 9. The report was also prepared for postmortem examination of the dead body which had been sealed by him in cloth. The dead body was sent to the mortuary through constable Ashok Kumar (PW 8) and another constable.

16. The post-mortem examination was performed by Dr. C. B. Tripathi (PW 4) Medical Officer of B.H.U. Hospital on 13-5-1984 at 2 p.m. He noted the age of the deceased to be 15 years at the time of death and the following ante-mortem injuries were found by him :

(1) Multiple gun shot (pellets) entry wound 22 cm X 22 cm in an area over forehead, frontal region of head both sides face, front and right side neck and front of upper part of right side chest. Distorted (flattened) pellets were found lodged

in the scalp and fore-head deeper tissue (muscle) and facial muscles, one pellet perforated and fractured left side frontal bone near orbit (superior surface) which perforated brain membranes and perforated left hemisphere Of brain, front to back (frontal lobe, parietal lobe, occipital lobe) and found lodged in posterior cranial fossa. Another pellet had fractured outer table of left frontal bone.

(2) Multiple abraded contusion 4 cm x 3 cm over back of right elbow joint.

17. Upon internal examination, it was found that the frontal region of scalp was contused. Brain membrane was found perforated. Perforation was on the left side. There was subdural haematoma all round the brain. On the skull base fracture of anterior fossa was found.

18. The small intestine contained digested food and large intestine contained faecal matter. Stomach contained watery fluid 200 ml. Liver and two kidney were found pale.

19. In the opinion of the Medical Officer, death was caused due to coma as a result of gun shot injuries to brain and intracranial haemorrhage. The injuries were found sufficient in the ordinary course of nature to cause death.

20. The post-mortem reports have been proved by Dr. C. B. Tripathi (PW 4) and marked as Ext. ka3.

21. The Investigating Officer Sri Ram Prabha Misra (PW 13) had reached the village of occurrence at about 1 p.m. in the night after visiting the Primary Health Centre at Mohammadabad. The Investigating Officer recorded the statement of Siya Ram (PW I) u/s 161, Cr. P. C. Sri Ram Prabha Misra (PW 13), I. O. stayed in the village of occurrence in the night. The next morning i.e. 12-5-1984, he prepared a site plan, after inspection recovered blood stained soil and plain soil and also recovered empty cartridge, sealed them separately, prepared the memo in respect of those articles and took in possession in presence of the witnesses. The site plan was prepared and index thereto which have been proved and marked as Ext. ka 16. The Investigating Officer had also inspected the door in dispute which is shown by letter "K" in the site plan. He was of the view that the door was recently open, some soil was also found lying near the door, He also found some sign to show the existence of the old wall from before which had been fallen. The Investigating Officer also pointedly indicated in the site plan by letter "B" which according to him was the point of the khaprail. The roof of the room from where appellant Madan Rai had fired from his gun on the deceased Jai Ram Rai, the I.O. had given the distance of the place where the deceased was standing and received injuries from the point just below the point on the roof at the floor level. The fire had been given from the roof of the room which was stated to be 10-11 ft. high from the ground level. The Investigating Officer had not measured the distance of the place where the accused -appellant Madan Rai was actually standing at the roof at the time of firing. He conveniently had measured the distance from the ground level to measure the point where the deceased was standing. The Investigating Officer had adopted an unusual course

of measuring the distance from the point on the ground which fell perpendicular to the point "B" of the tiled roof; The distance of the place where the deceased Jai Ram Rai was standing and hit and the place where the appellant Madan Rai was standing and fired was-stated by the Investigating Officer to be about 6 feet.

22. The Investigating Officer had also found sign of broken tiles on the tiled roof and enroute the return of appellant Madan Rai.

23. The Investigating Officer had sealed in presence of the witnesses, the blood stained and simple soil and cartridges on the spot which was sent to the P. S. Bhanwarkol in sealed condition through constable Ram Parvesh Singh (PW 9). Sita Ram (PW 10) which proved the general diary entries in respect of the deposit of those articles at the police station. The blood stained articles were sent to the Sadar Malkhana through PW 10 Sita Ram on 12-6-1984, after recording in the general diary of the police station. Sri Nag Narain Singh (PW 12) had received the blood stained articles etc. in sealed condition. There he made entries in the Malkhana register which were sent through PW 10 Sita Ram to the C.M.O.'s office on the same day after making entries in Malkhana register. The C.M.O.'s office received those blood stained articles in sealed condition and was placed in wooden box and sent to (for) the Chemical examination report, on the same day i.e. 12-6-84 with sample and seal. P.W. 11 Surya Nath of C.M.O. office has proved this.

24. The Chemical Examination report has been proved and marked as Ext. ka 20 which shows that in the articles human blood stains were found in the earth while blood stains on the pellet were found to have been disintegrated the articles after chemical examination were received back on 18-3-85 and deposited back in the sadar malkhana.

25. The Head Constable Nag Narain Singh (PW 12) slated to have sent the counter and discharge cartridge to the Ballistic Expert of Lucknow but the prosecution failed to bring on record any report of the Ballistic Expert.

26. Before the Court below, the three eyewitnesses of the occurrence namely Siya Ram Rai (PW I), Vashistha Pandey (PW 2), and Bhimnath Rai (PW 5) were examined as witnesses of fact. PW 2 Vashistha Pandey and Bhimnath Rai (PW 5) are not residents of the same house nor shown to be closely related to the parties.

27. The informant Siya Ram Rai (PW I) deposed in the Court and gave the pedigree and the family of the parties. The fact that Janardan Rai is a distant co-lateral and the accused Madan Rai. Ras Bihari alias Panda and Sachidanand Rai belongs to the same family is not disputed. Tara Rai. brother of the accused appellant Madan Rai is in service in P.A.C. at Gorakhpur. He lives there. P.W. 1 stated that Madan Rai accused-appellant is a teacher in Birpur. Rama Kant, father of the informant PW 1 is also a teacher at Balapur. There used to be a joint baithaka and ladies apartment (JANANABAKHRI) separately. The parties were joint earlier but some 10-12 years back, there had been partitioned after

consolidation. The baithakas were partitioned about two years before the date of occurrence. The southern side of the baithaka had fallen in the share of the informant and northern portion of the baithaka had fallen in the share of Madan Rai, appellant. The northern portion in the share of Madan Rai, appellant was pucca but the roof was of khaprail (of tiles). The major part of the southern portion of the informant was kutcha (mud). The roof was of tiles (khaprail). In between the baithaka, there was a wall for demarcation. The wall in dispute is in the share of the informant Siya Ram Rai (PW I).

28. Siya Ram Rai (PW I) in his statement stated that on the date of the incident i.e. 11th May, 1994 at about 6.30 p.m. he was at the cattle turf. His cattle turf is towards the west of his baitakha. His father Sri Rama Kant and brother Jai Ram Rai deceased were there. They heard from the southern side the talks and sensed from the sound that the wall was being demolished. There is a door near the cattle turf in the east through which Siya Ram PW I stated to have seen that appellant Madan Rai armed with a gun was standing there. The appellant Ras Behari, Sachidanand and Janardan Rai were also present armed with Iron rod (Rambha), who were demolishing the wall. The door affixed in the wall on the northern side of the room had already been removed which the informant had closed by mud wall. The accused Janardan Rai, Sachidanand Rai and Ras Behari Rai alias Panda were demolishing the wall with their rambhas. Their lathis were lying on the floor. The witness Siya Ram Rai asked them not to demolish the wall. On hearing such request, appellant Madan Rai fired from his gun. On the Court question, the witness replied that appellant Madan Rai had fired from his gun towards them.

29. On the firing by Madan Rai, the informant, his father and deceased brother retrenched back towards the southern side. The door from which Siya Ram and his father and the deceased were looking, had been closed by them. They ran and reached the baithaka. While running to the baithaka, the informant, his father and deceased have also raised alarm. After reaching the baithaka Jai Ram Rai went to the eastern room to the northern side and the informant Siya Ram said to be standing at the khamia, in the west of the angan. Khamia is a thatched structure on temporary pillar. On the alarm raised by the informant, witnesses Vasistha Pandey and Bhimnath Rai had arrived. In the mean time, appellant Madan Rai climbed on the khaprail of the room with his gun which is towards the northern side of the angan. At that time Jai Ram had come to the door of the room in the north eastern side of the angan. Madan Rai, appellant fired from his gun from the khaprail standing there. The fire shot given by Madan Rai hit Jai Ram on the face. He fell down there. Thereafter, Madan Rai came down of the khaprail and went outside. On the Court question stated to have gone to their own portion.

30. The blood was seen coming out of the injuries received by Jai Ram Rai on the ground. Ras Behari, Sachidanand Rai and Janardan Rai who were demolishing the wall by rambha had completely demolished the wall. They also

removed the mud and tiles of the demolished wall and left the place. The father of the informant Siya Ram took Jai Ram Rai injured on a tractor to the hospital at Mohammadabad along with the other villagers. When the injured was carrying to the hospital by the father of P.W. I Siya Ram, he wrote the report and look it to P. S. Bhanwarkol and handed over it to the police of the police station. The Head Constable recorded the FIR and gave a copy.

31. PW 2 Vashistha Pandey and PW 5 Bhim Nath Rai substantially reiterated the facts stated in the examination Chief by PW 1 Siya Ram Rai.

32. Learned counsel for the appellant Sri A. D. Giri placed the evidence on record and formulated the following questions for consideration: firstly he submitted that the FIR said to have been lodged by PW 1 Siya Ram Rai which is said to have been registered at the police station at 11.20 p.m. on 11-5-1984 in which it was firstly mentioned that the occurrence took place at about 7.30 p.m. which was later interpolated and made to look as an occurrence took place at 6.30 p.m. The learned counsel for the appellants pointed out from the original FIR Fxt. ka. I on record which clearly shows that figure "7" in Hindi was changed to "6". The informant Siya Ram was asked in the cross-examination about the over writing in the figure 7.30 and made as 6.30 p.m. The witness Siya Ram stated that it was not over writing. He stated that his hand had shaken out of anxiety and worries at the time of writing. It was not 7.30 p.m. but originally writing 6.30 p.m. which looked like that only because of shaking of his hand. We have seen the original FIR. The manner of writing and the letters do not show that it was written with a shaky hand. It is clear on apparent that "7" was written originally which was later changed as "6" in Hindi. Sri. A. D. Giri submitted that this was purposely done by the prosecution so that there may be sufficient daylight available for the witnesses to see the incident. It was first half of the month of May. At 7.30 p.m., there be no sufficient light available. Sri Giri submitted that the fact that after the occurrence, the informant Siya Ram Rai (PW I) when the injured was taken by his father for medical aid on a tractor, thereafter he wrote the report and then proceeded to lodge the FIR at the police station Bhanwarkol which is at a distance of 7 miles from the village Lauwadih. He submitted that Siya Ram Rai PW 1 stated to have went to the police station on foot and the FIR was actually handed over to the constable moharrir at the police station at 11.20 p.m., on 11-5-1984. The distance of the PHC at Mohammadabad where Jai Ram Rai victim was taken for medical aid, was examined at the P.H.C. at 11 p.m. by P.W. 3 Dr. Sudhakar Dubey. The injuries received and found by Dr. Sudhakar Dubey PW 3 have already been quoted above which shows 9 gun shot wounds of entries of the size of 0.5 cm x 0.5 cm round "P" shaped with blackening around it. The injuries by gun shot are all of round shaped. Sri Giri submitted that a perusal of the injuries of the victim Jai Ram Rai shows that those injuries were not caused from higher level to a lower direction. The nature of injuries do not depict that the injuries were from upward to down ward. The submission of the learned counsel for the appellants is that the blackenning around the injuries caused by fire arm are clear indications of the fact that the fire was given from a very close

range. The distance for causing blackening and tattooing could be possible only when the shot is fired from a distance of 3 to 6 ft. maximum. PW 3 Dr. Sudhakar Dubey stated in his examination-in-chief itself that he had found blackening in some of the injuries and in some there was no blackening. There was no tattooing in the injuries on the person of the victim. He also stated that it is necessary for blackening, there should be tattooing necessarily. He submitted that when tattooing there can be no blackening. Dr. Sudhakar Dubey stated that at the time he had examined the injured victim in the hospital, there was no electric light in the hospital. He had examined the victim in the light of lantern which he had brought from his house. He also stated that some time blood clot or ecchymosis look like blackening or black in dim light. Such impression is created on account of dim light volunteered that in this case also it is possible that the blackening may have been written on account of the dim light of the lantern at the time of the medical examination. Dr. Sudhakar Dubey said in his cross-examination that he could not said as to whether the injuries on the victim was caused by a single shot or more than that as he was not Ballistic Expert but again said that as a Doctor in his opinion the injuries were caused by a single shot. The dimensions of the injuries mentioned in the report show that each injury was caused by separate pellet. In all 27 pellets had caused injuries on the victim. He also opined that if a single shot was fired then there should be 27 pellet injuries (sic) in the cartridge. He had no scientific data on the basis of which he could say that all the injuries on the victim were caused by single shot. He also stated that none of the injuries were oval in shape.

33. The learned counsel for the appellants drew the attention of the Court to the post-mortem report Ext. ka 1 proved by PW 4 Dr. Chandra Bhal Tripathi. The ante-mortem injuries on the persons of the victim have been noted above. In the postmortem report PW 4 Dr. Chandra Bhal Tripathi in injury No. I mentioned multiple gun shot pellets entry wounds 22 cm x 22 cm in an area over fore head, frontal region of head, both side face; front and right side neck and front of upper part of right side chest distorted (flattened), pellets were found lodged in the scalp and fore head deeper tissues (muscle) and facial muscle. He had not mentioned anything about the nature of the injuries and presence of the blackening near the injuries caused by the gun shot. He in his statement stated that if a fire arm injury is caused in post-mortem there would be blackening and if there is blackening in the wounds, it would be necessary there should be tattooing also. If the injuries were caused by gun shot from a distance of 3 feet, tattooing is generally caused from shot at a distance from 4 ft. and in some cases it may range up to 6 ft. He stated for running of pellet, the disposal as under :-

Range in yards equal to diameter in inches of perpendicular cross-sectional area on a fault minus one.

The actual cross-sectional area diameter on calculation was said to be 5 or 6 inches.

According to the formula given by the witness, the firing range in the present case may range between 4 to 5 yards. He had not found tattooing in any of the injuries in the ante-mortem injuries of the deceased. PW 4 Dr. Chandra Bhal Tripathi stated that at the time the dead body was brought before him and the wounds for treatment if washed, in such circumstances there may be blackening found.

34. Sri A. D. Giri submitted that the ante-mortem injuries found on the person of the deceased and in the medical report by PW 3, Dr. Sudhakar Dubey and evidence of PW 4 Dr. Chandra Bhal Tripathi are at variance.

35. Sri A. D. Giri placed reliance on Lyon's Medical Jurisprudence for India 10th Edition page 276 and placed the following paragraph :

Great heat is evolved by the chemical changes which result in the conversion of the small volume of solids constituting the charge into a large volume of gas. At this high temperature the gases resulting from the explosion, on coming into contact with the oxygen of the air, enter into active combustion. If this flame impinges on the skin as it must do if the shot is fired within a few inches of the surface, a burn is produced round the wound. If the gun is fired at a right angle to the body the burn covers an area circular in shape and about 6 inches in diameter. If the burnt area be oval in shape the indication is that the barrel of the gun was inclined to the surface; the direction of the inclination being indicated by the proximity of the wound to one or other end of the burnt area. The end nearer the wound is the direction towards which the shot travelled. Thus if the wound is nearer the upper end of an oval patch of burning, its position suggests that the shot travelled from above downwards.

36. He also placed reliance from Jhala & Raju Medical Jurisprudence Vth Edition page 345 and placed the following paragraph :

As discussed above, there is always discharge of flame, gas and smoke to a varying degree with all firearms when trigger is pulled. Hence in close proximity of all fire-arms, effects of flame are invariably encountered. This distance does not extend beyond few inches. This is so, because of the special type of powder usually employed in the fire-arm. Even with evidence of burning or scorching (effect of flame) the wound also shows blackening or charring because of shot or carbon particles. These are results of incomplete combustion. These soot particles are inherently light and hence are subject to counteracting forces of air resistance and gravity which over-power the projectile force due to pressure in the barrel. This leads to another positive sign of forensic importance. As long as the carbon particles retain the force, they are capable of penetrating the skin. This leads to carbonaceous tattooing. Such tattooing has its limitations. Firstly, because of the circumstances discussed they are not armed with force beyond 18" or 1 1/2". This offers a very important clue in firearm injuries. Absence of such carbonaceous tattooing proves that the firearm responsible was at a distance of more than 18.

37. Sri Giri also cited from Jhala & Raju's jurisprudence page 355 which is quoted as under:

If the bullet has a perpendicular impact, the aperture is round. This has already been discussed earlier, while describing the abrasion collar. If the impact is slanting or inclined, the injury would be oval or valvular.

38. Sri Giri placed the passage from page 219 of Modi's Text Book of Medical Jurisprudence & Toxicology 18th Ed. 1972 as under :

No blackening or scorching is found if the firearm is discharged from a distance of more than four feet.

39. Sri Giri also placed Mohd. Islam Vs. State of U.P., in which it has been held that:

The author has also described the results of an experimental study undertaken with a view to compare the result by a 12 bore shot gun with 12 bore country made pistols from varying distance which are as follows :

Scorching was found up to a distance of 1 feet with the standard shot gun and up to 6 inches with the country made pistol.

Tattooing was obtained up to a distance of 2 feet with the standard 12 bore shot gun and up to 1 feet with the country made pistol.

Blackening was obtained up to a distance of 3 feet with the standard gun and 1 feet with the country made pistol.

40. Sri A. D. Giri submitted that the occurrence is said to have taken place at 6.30 p.m. and the injured was soon after taken on a tractor for medical examination to the Primary Health Centre at Mohammadabad. The distance of PHC Mohaminabad is 7 kms. from the place of occurrence. He submitted that the prosecution case appears to be doubtful on the count that it would not take four of 4 1/2 hours to cover a distance of 7 kms. as the injuries were examined by Dr. P.W. 3 Sudhakar Dubey at 11 O'clock on 11-5-1984. He submitted that it would hardly take half an hour maximum to reach the distance of 7 kms by tractor. The distance of 7 miles could be covered by the informant PW 1 Siya Ram to reach distance is said to have been covered on a tractor in 4 1/2 hours. The learned counsel for the appellants submitted that the FIR was not prepared as said in evidence. It is ante-timed. He further submitted that the origin of the marpit is doubtful. He also submitted that it is highly improbable that the accused appellant Madan Rai would climb on the roof of the room for firing. It is also evident from the record that PW 1 Siya Ram Rai stated that accused Ras Bihari alias Panda, Sachidanand Rai and Janardan Rai were demolishing the wall in the northern wall of the room when the accused appellant Madan Rai climbed on the roof for firing. PW 2 Vashistha Pandey and PW 5 Bhimnath Rai have not stated in their statement in the Court that the accused appellant Ras Behari Rai, Sachidanand Rai and Janardan Rai were demolishing the wall by Rambha, in their

examination-in-chief. Although in the cross-examination, para 8 of the statement of PW 5 Bhim Nath Rai said that when he saw accused Madan Rai firing towards Jai Ram Rai, he had seen Janardan Rai, Sachidanand Rai and Ras Behari alias Panda demolishing the wall by rambha.

41. PW 2 Vashistha Pandey slated that he was sitting at his door which is at a distance of 10-15 lathis from the house of Ramakant, the father of the deceased. He heard the sound of gun shot from the side of Bardwan of the house of Rama Kant. He reached Bardwan of Rama Kant and saw Madan Rai appellant on khaprail roof of the northern room from where he shot his fire arm towards the north eastern room and hit Jai Ram Rai where he was standing on the door. This witness in his statement u/s 161, Cr. P. C. had not stated anything about the demolition of the wall by three accused persons, namely Ras Behari Rai alias Panda, Sachidanand Rai and Janardan Rai. Sri Giri submitted that the licenced gun of appellant Madan Rai was ceased and sent to the Ballistic Expert. The prosecution has led to evidence to show that the gun of the appellant Madan Ram was used in the commission of the offence. Sri Giri submitted that in this case, the investigation is faulty, partial and defective.

42. He submitted that the Investigating Officer had not fairly investigated the case and the case diary written by the Investigating Officer which is the basis of the prosecution is wholly unreliable and partisan.

43. It is well settled that the moment the FIR is lodged by the complainant, informant and a cognizable case is registered at the police station, the investigation starts. It is the first duty of the Investigating Officer to interrogate the informant and record his statement u/s 161, Cr. P. C. In the present case Sri Ram Prabha Misra PW 13 Investigating Officer after the FIR was registered did not interrogate the informant. He stated to have proceeded to record the statement of the injured as he was of the view that the victim had received serious injuries. The I. O stated that he immediately proceeded towards the Primary Health Centre at Mohammadabad and saw the victim in the hospital. He could not record the statement of the victim. He thereafter tried to contact the eye-witnesses there or at Mohammadabad. No eye-witness was available there. He then proceeded to the place of occurrence. There also he could not meet any witness. The Investigating Officer made no entry in the case diary and general diary that* he had visited to Mahammadabad after the FIR was registered. He had to admit that although he proceeded to Mohammadabad for investigation on 11 -5-84, but he had not actually written a single word in the case diary on the said dale. He stated that it was not necessary to mention the date and when he started investigation in the case diary, the date and time written in the case diary showing the beginning of the investigation. A perusal of the case diary shows that no dale and time was mentioned in the case diary. However he staled in the case diary that he had started the investigation at 11.20 p.m. on I 1-5-84. He admitted that the case diary was prepared in a fresh diary and it begins from page 1. This case diary was got issued in the name of the Investigating Officer

on the same day i.e. 11-5-1984. All these he has slated by his memory.

44. Sri Gin also submitted that there was no motive or immediate cause for the appellants to have murdered the deceased Jai Ram Rai. He was a boy of 15 years of age at the time of occurrence. The family partition had taken place long back. The partition of the dwelling accommodation had also be effected quite early and the parties had not resented or complained about the partition between the parties. He also submitted that the door in the wall in question had been removed by the informant and there is no allegation that the police object to it or had raised any complaint about the closure of the space of door by mud wall. He submits that the prosecution case as put before the Court is doubtful and the prosecution have come "with a" false case and the mariner of occurrence* have been falsely stated. The two alleged eyewitnesses PW 2 Vashistha Pandey and PW 5 Bhimnalh Rai are unreliable witnesses who could not have reached and seen the occurrence. PW I Siya Ram Rai is highly interested. His testimony alone which do not support, rather his version is contradicted by the medical evidence.

45. Sri P. N. Misra, Senior Advocate Appeared for the complainant-informant in the appeal besides Sri K. C. Saxena, A.G.A. Sri P. N. Misra submitted that there was no motive for false implication of the appellants. He submitted that the evidence of the prosecution is reliable and there are two independent witnesses namely Vashistha Pandey PW 2 and Bhimnath Rai PW 5. It has not been shown that they are in any manner partisan witnesses or interested witnesses. The defence in the cross-examination had not suggested any such fact which may explain and give the version about the the occurrence. No alternative suggestion was also given by the defence to the prosecution case. He submitted that the postmortem report proved by Dr. Chandra Bhal Tripathi PW 4 fully corroborated the ante-mortem injuries of deceased Jai Ram Rai. In fact the alleged variance and contradiction in the nature of injury as found by Dr. Sudhakar Dubey PW 3 has been fully explained by PW 3 Dr. Sudhakar Dubey in his evidence. The learned counsel submitted that when there is variance in the injury report and the post-mortem report, the report of the post-mortem examination is to be preferred and there is no justifiable legal ground to discard the post-mortem report, and the ocular evidence of the eye-witnesses. He cited Piara Singh and Others Vs. State of Punjab, . He submitted from para 5 of the said judgment:

It is well settled that the positive evidence in the case is that all the eye-witnesses who had seen and narrated the entire occurrence. The evidence of a medical man or an Expert is merely an opinion which lands corroboration to the direct evidence in the case where there is a glaring inconsistency between the direct evidence and the medical in respect of the entire prosecution story, i.e. undoubtedly a manifest defect in the present case.

The learned counsel for the complainant informant submitted that there had been sufficient corroboration of the evidence, of eye-witnesses Siya Ram PW 1, Vashistha Pandey PW 2 and Bhimnath Rai PW 5 by the report of the postmortem and the evidence of PW 4 Dr. Chandra Bhal Tripathi. He further submitted that in

view of clear statement of PW 3 Dr. Sudhakar Dubey that at the time of examination of the injuries of Jai Ram Rai, there was no electric light in the Primary Health Centre and he had examined the injuries in the light of lantern. In dim light of lantern, the blood clot and ecchymosis would also look black and it was in such circumstances he had mentioned the blackening around the fire arm wound of the injured Jai Ram Rai.

46. Sri K. C. Saxena. A.G.A. adopted the arguments advanced by Sri. P. N. Misra. He in addition submitted a decision from Pradumansinh Kalubha Vs. State of Gujarat, . He placed para 19 of the said judgment from 286 and submitted that the Hon"ble Supreme Court repelled the submission advanced in said case that absence of blood on the spot, absence of blood in the weapon seized throws doubt on the credibility of the investigation. The failure to examine non Harijan witness was also commented upon amounting suppression of material medical evidence. The apex Court was pleased to repel the submission. The apex Court was further pleased to observe that in a case where there is direct evidence, even the seizure of the weapon is not essential.

47. We have perused the record and considered the submissions advanced by the learned counsel for the parties. The appellants and the informant and the deceased are the same family and had been living jointly till few years before the occurrence. It is also clear from the evidence that the parties had partitioned the residential house themselves without going, to Court of law. The parties were living in their respective portions allotted in the partition amicably made. A perusal of the site plan shows that the door to the north of the complainant's house in the room, which was being open by the accused persons at the time of occurrence, would show that had they intended and succeeded in doing so, the accused appellants would have encroached the room abutting the courtyard of the complainant, in the west and east of the said room admittedly the rooms of the informant are there . The demarcation of the-partition was, thus, attempted to be disturbed. We do not consider it very reliable, as to why the appellants would have dissatisfied with the accommodation allotted in their share on partition. The portion allotted in the share of the appellants is pucca construction mostly whereas the room allotted to the complainant is not pucca. It has not come in evidence that before the date of occurrence, the accused appellants had shown any inclination or dissatisfaction to the partition already made. It is also not said that they had demanded and asked from the complainant to give the room " A". It has come in evidence that the door affixed at "A" had been removed by the appellants and the space after removal of the door had been closed by the complainant by mud wall.

The complainant PW 1 Siya Ram Rai has not said a word that when the mud wall was erected by them, the appellants raised any objection. Thus, the arguments of learned counsel for the appellants appears to have force that there was no just cause or notice for commission of the offence and murder of Jai Ram Rai who was a boy aged about 15 years only. The motive part, thus, as suggested by the

prosecution, appears to be not reliable and believable.

48. No doubt the deceased Jai Ram Rai had died of gun shot injuries. Merely because a person died of gun-shot injuries, it cannot be assumed that the present appellants are the only persons and persons who committed the offence of murdering him. The prosecution case is to be examined carefully to find out whether the version of the prosecution about the start of the occurrence, manner of incident, time and place, as brought before the Court whether is correct. The submission of the learned counsel for the appellants that there was interpretation in the First Information Report in the time of the occurrence. It is argued that from 7,30 p.m." it has been interpreted to 6..10 p.m. As observed earlier in this judgment, the explanation of Siya Ram Rai PW 1 that his hand had shaken at the time of writing, the figure 6.30 p.m. is not correct. We have perused the original FIR which shows that the figure "7" was written initially which was altered to 6.30 p.m. The alteration is patent. It is not the shaking of the hand of Siya Ram Rai PW 1, which creates doubt in the mind of the Court about the correctness and genuineness of the time of occurrence. The argument of the learned counsel for the appellants is that this interpretation was made so that there may be sufficient natural light available for the witnesses to see the occurrence. The argument of the learned counsel for the appellants is that the occurrence had not taken place in the manner the prosecution stated. The case that Madan Rai had climbed on the roof of a room on the north of the court-yard and the door of the room where deceased Jai Ram Rai had received gun shot injuries. The argument has sufficient force in view of the evidence of Dr. Chandra Bhal Tripathi PW 4 who conducted the post-mortem examination and Dr. Sudhakar Dubey PW 3. Both the reports i.e. the injury report prepared by Dr. Sudhakar Dubey PW 3 and Dr. Chandrabhal Tripathi PW 4 gave different nature of injuries. evidence of Dr. Sudhakar Dubey that since he had examined the injured Jai Ram Rai in lantern light, he may have committed mistake in noting the blood clotting on the injuries as blackening. Dr. Sudhakar Dubey admitted and have to state that he had not made any notice in the injury report prepared by him that the medical examination was done in the lantern light. Further one more aspect is apparent from the statement of PW 4 Dr. Chandra Bhal Tripathi PW 4 who stated that if there is a double barrel gun, both the cartridges are fired by pressing the trigger at one time the injuries which would be caused would be like single shot injury. This argument has been advanced looking to the nature of the multiple gun shot injuries in an area 22 cm x 22 cm in an area over forehead, frontal region of head, both sides face, front and right side neck and front upper part of right side chest distorted. The injuries would show to have been caused from a distance. 27 pellets were there in the shots as found by the Doctor. The contradiction from the post-mortem report and the injury report by PW 3 Sudhakar Dubey cannot be reconciled, either the report of PW 3 Sudhakar Dubey is wrong and false or the post-mortem report is wrong and incorrect. We do not agree to the submission of Sri K. C. Saxena that the injuries as found in the post-mortem report is to be preferred and the injuries as shown in the injury

report prepared by PW 3 Sri Sudhakar Dubey is to be ignored. We take this view on account of the nature of the gun shot found on the body of the deceased. The gun shots are all round in shape. According to the Medical Jurisprudence and the relevant paragraph, quoted above, if the gun shot wounds are all round shaped, it would show that the shot was fired from ground but if the shots are fired from upper side to lower side, the injury would be of oval shape. In the present case, the injuries are not oval nor directed from upward to downward direction. The Investigating Officer in the case had adopted a peculiar method of measuring the distance of the point from where the gun shot was fired at the deceased victim and he said to have measured the distance by drawing a perpendicular line from the roof. Apparently this was stated by him to explain the blackening and tattooing in the injuries of the deceased as shown by PW 3 Dr. Sudhakar Dubey.

49. We are not inclined to place the implicit reliance on the statement of PW 1 Siya Ram Rai who stated that the distance from where Madan Rai, accused appellant had fired from 6 feet. The nature of injuries are not oval nor it is the case that two shots were fired by the appellant Madan Rai. The evidence of PW 2 Vashistha Pandey and PW 5 Bhimnath Rai also do not inspire confidence. The presence of these two witnesses who are at their own house at the time of incident who had come and seen the occurrence, appears to be doubtful. They are said to have reached the place of occurrence on hearing the sound of gun and there is only one injury. These witnesses were at a distance from the place of occurrence and unless they entered court-yard and baithaka of the complainant, it would not be possible for them to see the occurrence and the manner in which the shot was given. PW 5 Bhimnath Rai stated that the accused persons had demolished the wall and removed the earth and clay from the place and the trace was found by the Investigating Officer, as stated by him which does not show the normal conduct of the accused persons after committing such an offence that they would continue cleaning the earth. The overall appreciation of evidence, contradictory state of affairs about the injuries and ocular testimonies, time of lodging of F.I.R., throw grave doubt in the prosecution case. The occurrence as said to have been taken place and stated in the Court is not true and correct version of the incident and the prosecution has not come with the clean and correct case before the Court. We are of the view that on the basis of such evidence, the appellant's conviction and sentence could not be maintained. The appellants are entitled for the benefit of doubt.

50. Criminal Appeal No. 1535 of 1985 Madan Rai v. State is allowed. The conviction and sentence passed by the Court below is set aside. The appellants are on bail. They need not surrender. Their bail bonds stand discharged. Material exhibits shall be disposed of, according to law.

51. Government Appeal No. 2166 of 1985, State v. Ras Bihari is hereby dismissed.