
(2005) 04 AHC CK 0105

In the Allahabad High Court

Case No : Criminal Appeal No. 4950 of 2003 and Criminal reference No. 2 of 2003

Nazim and Bhagwan Das alias Cheeni

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 29-04-2005

Acts Referred:

Arms Act, 1959 — Section 25

Penal Code, 1860 (IPC) — Section 302, 34, 394, 411

Citation : (2005) 04 AHC CK 0105

Hon'ble Judges : M. Chaudhary, J;Imtiyaz Murtaza, J

Bench : Division Bench

Advocate : V.C. Tiwary, Ashwini Kumar Aswathi, Manish Tiwary and Brij Raj Singh, for the Appellant; P.N. Mishra, Apul Mishra, S.S. Yadav and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Imtiyaz Murtaza, J.—The above appeals have been filed against the Judgment and order dated 11.9.2003 passed by Special Judge (Dacoity Affected Area Act) Budaun in Special Sessions Trial No. 31 of 1999 whereby the appellants in Criminal Appeal No. 4950 of 2003 have been convicted and sentenced to death u/s 302/34 I.P.C. 10 years R.I. u/s 394 I.P.C. and one year R.I. u/s 411 I.P.C. Appellant-Aslam alias Neta in Criminal Appeal No. 4905 of 2003 has been convicted and sentenced to undergo life imprisonment u/s 302/34 I.P.C, 10 years R.I. u/s 394 I.P.C. and one year R.I. u/s 411 I.P.C.

2. Criminal Reference No. 2 of 2003 is for the confirmation of death sentence.

3. The brief facts of the case are that on 23.1.1998 at 11.15 a.m. Assistant Station Master of Vitrohi Station informed the informant Madan Lal Sukhaja, Station Master, Budaun that a murder of a passenger took place in 127 Up train. On this information he lodged a report which was registered as a first information report at P.S. G.R.P. u/s 302 I.P.C. Sub-inspector Rakesh Kumar started

investigation. He recorded the statements of the scribe and constable Tekam Singh and also recorded the statement of informant Madan Lal Sukhaja, Station Master. He also recorded the statement of S.P. Kashyap, Assistant Station Master and Sanjay kumar and also prepared the inquest report (Ext. Ka. 18) and the site plan (Ex.Ka. 16). He had also prepared the relevant papers for the post mortem examination of the deceased. (Ext. Ka-19 to Ka-23) He also received an application given by Sanjay Kumar (Ext. Ka-2). He also recovered the plain and blood stained earth, recovery memo (Ext.Ka-4. He recovered one empty cartridge 12 bore and prepared its recovery memo (Ext. Ka-5).

4. The post mortem of the deceased was conducted by Dr. U.C. Gupta and he found following ante-mortem injury:

1. One firearm wound of entry below left lower jaw, below mandible of size 3 cm. x 3.5 cm. x bone deep, margins inverted, blackening and tattooing present surrounding the wound, on dissection muscles, great vessels, nerves trachea and esophagus found lacerated and clotted blood present, one wedding piece and (19) small metallic pellets recovered from below the injury from surrounding structures.

5. In the opinion of the doctor cause of death was due to shock and hemorrhage as a result of ante mortem injuries.

6. Sub-inspector Kailash Chand started investigation of the case. On 26.11.1998 he recorded the statements of Sunil Kumar and Smt. Urmila Devi wife of the deceased. On 28.11.1998 he recorded the statements of Sandeep Kumar and Jitendra Kumar. On 4.12.1998 he recorded the statement of Rakesh Kumar. On 21.12.1998 he alongwith S.I. Rakesh arrested the appellants and kept them baparda. On the basis of recovery memo of country made pistol he prepared the chik report in the hand writing of Head Moharrir Avinash Kumar u/s 25 Arms Act (Ext. Ka-11). The chik was entered in the G.D. and copy of G.D.(Ext. Ka-12). He had taken the arrested accused who got recovered the currency notes and the bag. He stated that the currency notes do not contain the seal of Prayag Narain and these notes are different from the notes recovered from the appellant Nazim. He admitted that currency notes were kept in the same cloth, which bears his signature. He could not explain how the currency notes were changed in the police station. Similarly the currency notes were opened in the court and they did not contain the seal of Prayag Narain, He admitted that he sealed the currency notes in the same cloth. He did not mention the number of currency notes in the memo and he did not know whether the currency notes were the same or not. On 29.1.1999 accused were put up for identification and on 19.2.1999 he submitted charge sheet.

7. After the conclusion of the investigation charge sheet was submitted in court. The case was committed to the court of Sessions. The Sessions Judge framed charges under Sections 302/34, 394 and 411 I.P.C.

8. The prosecution examined 13 witnesses in all in order to prove its case.

9. P.W. 1 Madan Lal Sukhaja is the informant of the case. P.W. 2 (7 Sanjay is an eye witness and nephew of the deceased. P.W. 3 Rakesh Kumar is also an eye witness. P.W. 4 Sunil Kumar Maheshwari is son of the deceased. He identified the Bag and the Tiffin recovered from the possession of accused Bhagwan Das @ Cheeni. P.W. 5, Dr. V.C. Gupta conducted the post mortem of the deceased. P.W. 6, constable Man Singh escorted the dead body for the post mortem. P.W. 7, Mahaveer Prasad is witness of recovery of empty cartridges recovered from the spot and blood stained and plain earth. P.W. 8 Ram Autar Sharma, Special Executive Magistrate conducted the identification proceedings of the case. P.W. 9 Satish Chand is witness of recovery of looted currency notes and the bag from the accused. P.W. 10 Sub-inspector, Kailash chand submitted charge sheet. P.W. 11 constable Tikam Singh proved Chik report 22 of 1998. P.W. 12 Rakesh Kumar is the investigating officer of the case and P.W. 13 S.I. A.K. Pandey who was posted as Head Moharrir proved G.D. entries to show that accused were kept baparda.

10. e appellants examined three witnesses in defence. D.W. 1 Nand Kishore stated that police arrested appellant Bhagwan Swaroop but nothing was recovered from his possession. D.W. 2 Babu Ram also stated that nothing was recovered from the possession of Bhagwan Swaroop at the time of his arrest and D.W. 3 Rahat stated that police arrested accused Nazim and money was not recovered from him.

11. Sessions Judge relying upon the prosecution evidence convicted the appellants, as aforesaid, hence these appeals.

12. We have heard the learned counsel for the appellants and the learned A.G.A. for the State and perused the entire record and order of the Sessions Judge.

13. P.W. 1 M.M. Sukheja deposed that on 23.11.1998 he was posted as Station Master. At about 11.15 a.m. Assistant Station Master, Bitrohi informed on phone that one passenger has been murdered in 127 Up Train for the information to G.R P. He immediately sent a memo No. 55/30/11/98 to the G.R.P. outpost. The memo is Ext. Ka-1. On the basis of this memo report was registered at the police out post and after about 10-20 minutes Inspector came to him and recorded his statement. In the cross-examination he stated that he recorded the same message, which he had received. He did not receive the message that some loot also took place. He also did not receive the message that any person witnessed the occurrence which took place in the running train, nor the name of witnesses was mentioned.

14. P.W. 2 Sanjay stated that on 23.11.1998 he boarded the train at Soro, the train was coming from Kasganj to Bareilly. Prayag Narain, his uncle, was also sitting. Rakesh, Sandeep and Jitendra were also sitting in the same compartment. At about 11.15 a.m. when the train reached between Kachchala and Bitrohi three miscreants who were armed with country made pistols came near his uncle who was carrying about Rs.2.5 lacs in a cloth bag. The bag also

contained his Aungaucha and Tiffin. The miscreants demanded the bag, which his uncle refused to give. One of the miscreants put the country made pistol on the neck and shot him dead. In the meantime train slowed near Bitrohi station and the miscreants got down from the train and ran away. The occurrence was witnessed by him, Sandeep, Jitendra, Rakesh and other passengers who recognised the miscreants. The occurrence took place in the last compartment of the train, Half of the compartment was for the passenger and the other half for the Guard. The compartment was disconnected from the train at Bitrohi station 7. He prepared a report (Ext. Ka-2) and handed over to the police. He recognized the miscreants in the train and thereafter he went to Jail for their identification and in between this period he did not see them. He recognised Nazim, Aslam and Bhagwan Swaroop and also pointed out that Nazim is the person who had fired at his uncle Prayag Narain which resulted in his death. In the cross-examination he stated that the face of Nazim had some small pox marks and hair were black and white. He also stated that Bhagwan Swaroop had also some black and white hair. He stated that they were shown alongwith five other persons but he recognised them because he had seen them in the occurrence. He stated that he had given the statement to the investigating officer that accused had small pox marks and the hair were black and white. He did not know why this has not been mentioned in the written statement as well as in the statement given to the investigating officer. He stated that his uncle was coming from Kasganj and he boarded the train at Soro. Their programme was already fixed. He used to go on every Monday. On the date of occurrence his uncle called him because he did not know the number of compartment. He did not mention it either in his written statement or in the statement to the investigating officer. When the train stopped he informed the Guard about the occurrence. He stated that he disclosed the name of his Uncle to the Guard but he did not disclose his name and the names of witnesses. He stated that miscreants had covered their faces but a part of face was visible while they were jumping from the train.

15. P.W. 3 Rakesh Kumar stated that on the date of occurrence he was going from Kasganj to Budaun. In his compartment Prayag Narain was also sitting and he was sitting in front of him. Some other passengers were also sitting. At Soro some persons who were known to the deceased boarded the train and they also sat near him. Prayag Narain introduced his name to Sanjay. As the train left Kachchala station three persons armed with country made pistol entered in the compartment and they came near Prayag Narain and tried to snatch the bag of Prayag Narain. One of them fired on the neck of Prayag Narain and snatched the bag. As the train reached near Bitrohi they jumped from the train. They opened their faces and earlier they had covered their faces with Muffler. He recognised the faces of miscreants. One of the miscreants had small pox marks on his face. They had informed the Guard about the occurrence. He also went to the jail for the identification of the accused. Nazim fired at Prayag Narain by fire arm. In the cross examination he stated that he is resident of chharra. He stated that he was going to the house of his sister in Budaun. He had no work in Kasganj. The

occurrence took place after one and half hours when the train left Kasganj station. The statement was recorded by the investigating officer after 7-8 days of the occurrence. He did not know that the bag which was taken by the miscreants contained any Tiffin or the Notes bearing the seal of Prayag Narain, He stated that he had gone for the identification of the accused. He denied to have seen the photograph of the. accused. He also denied that he was called from Chharra and the accused were shown to him. In the identification proceedings the small pox marks were covered with paper. The face of Nazim had some spots but he did not know whether they are small pox marks or not.

16. P.W. 4 Sunil Kumar Maheshwari is the son of the deceased Prayag Narain. He stated that on 23.11.1998 his father was going to Bareilly by a train carrying money with him. lie had one Tiffin box which was kept in a cloth bag having chain; letter "P" was inscribed on the bag. In the Tiffin box name of his father was also inscribed. The money which he had carried alongwith him had seal of his father on the top and bottom of notes. His father had left the house at 9.15 a.m. He received the telephone from Kasganj Railway Station about the occurrence. At 11.45 p.m. he reached Bitrohi station. He told Sanjay that the bag contained Rs. 2.5 lacs. He recognised the bag which his father had carried along with him and Tiffin Box (Ext. Ka-2). In the cross-examination he stated that his father used to go Bare illy on every Monday. He used to purchase Ghee and Rice and return in a Matador or Thela (Truck) or he used to return by Train. The distance of railway station from his house is one km.

17. P.W. 5 Dr. U.C. Gupta had conducted the post mortem of the deceased and the ante mortem injuries have already been mentioned in the earlier part of this judgment.

18. P.W. 6 is constable Man Singh. He stated that on 23.11.1998 he was posted at G.R.P. out post, Budaun. Investigating officer handed over the sealed dead body for the post mortem examination. He stated that he handed over the papers to the doctor. After conducting the post mortem the doctor had handed over to him a box containing 19 pellets and one tikli, dead body and 10 police papers along with the clothes of the deceased. He deposited the same at the police station except dead body of the deceased. In the cross-examination he stated that dead body of Prayag narain was in the compartment.

19. P.W. 7 Mahaveer Prasad was posted as Quote Wala at Bitrohi station. He was declared hostile. He stated that he did not know whether the investigating officer collected empty cartridges in his presence or not. He signed the recovery memo (Ext. Ka-4 and Ka-5). He did not know whether plain and blood stained earth was collected or not. He did not know whether any empty cartridge was collected from the compartment or not.

20. P.W. 8 Ram Autar Sharma is a retired Tehsildar/Special Magistrate. He conducted the identification proceedings of Aslam, Nazim and Bhagwan Swaroop inside Budaun Jail. He stated that he affixed chips on the marks on the face and

mixed ten persons of similar physique and their faces were covered by chips. There were three accused and he had mixed 10 persons of similar physique. The identification parade was held separately for all the three accused persons. He mentioned the entries in the identification memo on the basis of entries in the register. He also mentioned the name of accused, parentage and address. He called Sanjay Kumar in all the parades, his parentage and address was mentioned in the identification memo and he told him that he came to identify the accused in the case of loot and murder. He identified all the accused persons correctly. He affixed ink mark on the palm of each of the accused and then it was clarified that accused was correctly identified by Sanjay Kumar. Sanjay Kumar correctly identified the accused persons and he did not commit any mistake. Sandeep Kumar had correctly identified Nazim and Bhagwan Swaroop and wrongly identified Aslam. Jitendra identified Nazim, Bhagwan Swaroop and Aslam and he did not commit any mistake. Rakesh Kumar had also correctly identified Nazim, Bhagwan Swaroop and Aslam and he did not commit any mistake. Identifying witness signed the identification memo. In the cross examination he stated that he mentioned the distinctive features of accused in the identification memo. The main distinctive marks were covered with chips and entries were made in the identification memo. He did not specify about the height, width, complexion etc. in the memo. He also did not mention about the colour of hair of the accused persons. He also stated that accused were not covered with any bed sheet, blanket or other cloth. Bhagwan Swaroop and Aslam are shorter than Nazim, complexion of Aslam is fair than the other accused. Colour of hair of Bhagwan Swaroop is black and white. Bhagwan Swaroop admitted that he use hair dye. There was no mark of small pox on the face of Nazim. Very few marks of small pox were on his face.

21. P.W. 9 Satish Chandra stated that on 21.1.1998 investigating officer met him when he was going to temple. There were other police, personnel also. The police accompanied him and Ram Pal. Accused Nazim, Aslam and Bhagwan Swaroop were kept baparda. The police had gone to the house of Nazim in Ashok Nagar, Kasganj. In the house they opened a tin box and recovered a packet of Rs. 1000/- of ten rupee note and 50 notes of Rs.50/- amounting to Rs. 2,500/-. Total Rs. 3,500/- was recovered. Nazim confessed that he looted the money in the train after committing murder of Prayag Narain. The police sealed the currency notes and prepared recovery memo. The recovery memo was prepared by Rakesh Kumar on the dictation of S.O. K.C. Verma and he signed the recovery memo (Ext. Ka-7). The packet was opened in the court and the notes of Rs. 10 and Rs.50 were shown. He stated that these currency notes were recovered from the house of Nazim. On 21.1.1998 the police had taken him to the house of Aslam in Kasganj. Aslam also got recovered a packet of Rs. 10/- notes and 20 notes of Rs.50/- recovery memo was prepared and he signed the said recovery memo(Ext. Ka-8). Sealed packet was opened in the court and the said notes were recovered in the packet. He stated that the currency notes bear the seal of Prayag Narain but the currency notes which were opened in the court did not

bear any seal of Prayag Narain. He further stated that the currency notes which were recovered from the house of Nazim had no seal of Prayag Narain. Thereafter they had gone to the house of Bhagwan Swaroop in Malgodam, Kasganj and he got recovered a bag and a Tiffin box. Letter "P" was inscribed on the bag and the name of Prayag Narain was engraved on the Tiffin box. Both the articles were sealed and recovery memo was prepared. The packet was opened in the court and Tiffin box on which name of Prayag Narain was engraved and in the bag letter "P" was mentioned. He identified both the recovered articles. In the cross examination he stated that currency notes which were recovered from the house of Nazim and Aslam are not the same currency notes. He further stated that all the recoveries were made within 2-1/2 to 3 hours.

22. P.W. 10 S.I. K.C. Verma is the investigating officer of the case. On 25.11.1998 he started investigation of this case. Prior to 16A 1.1998 In charge G.R.P. Budaun S.I. Rakesh Kumar investigated the case. On 26.11.1998 he recorded the statements of Sunil son of Prayag Narain, deceased and Smt. Urmila Devi wife of the deceased. On 28.11.1998 he recorded the statements of Sandeep Kumar and Jitendra Kumar. On 4.12.1998 he recorded the statement of witness Rakesh Kumar at Kasganj. On 21.12.1998 he arrested the accused persons from the railway platform. They confessed their guilt and country made pistols were recovered from their possession. All the three accused were kept "baparda". He prepared recovery memo of country made pistol (Ext. Ka-10). On the basis of recovery memo case u/s 25 Arms Act was registered against the accused persons on 21.12.1998. Chik report is Ext. Ka-11 and copy of general diary entries is Ext. Ka-12. Accused Nazim got recovered Rs. 3500/-from a box. The recovery memo was prepared which is Ext. Ka-7. In court he stated that the currency notes did not bear the seal of Prayag Narain and these are not the notes, which were recovered from the house of Nazim. He admitted that the cloth is the same in which the notes were kept and his signature is also on the cloth. He could not explain how the currency notes were changed. After the recovery of currency notes from the house of Nazim, Aslam had got recovered currency notes from his house and he admitted that he looted the said currency notes. Recovery memo (Ext. Ka-8) was prepared. He stated that currency notes recovered from the Aslam do not bear the seal of Prayag Narain but the cloth is the same in which the notes were kept. He did not know whether the currency notes are the same which were recovered from the house of Aslam. Lastly, Bhagwan Swaroop got recovered one Tiffin box and a cloth from his house and recovery memo Ext.Ka-9 was prepared. On 29.11.1998 identification of the accused was held in district jail. He submitted charge sheet against the accused on 19.2.1999(Ext. Ka-13). He stated that he recorded the statement of Sunder. On 26.11.1998 Rakesh Kumar disclosed that one of the accused was tall and there were small pox marks on his face. His statement was recorded on 4.12.1998.

23. P.W. 11 is constable Tikam Singh. He stated that on 23.11.1998 he was posted at G.R.P. police out post at Budaun. On the basis of memo sent by M.M.

Sukheja he prepared chik No. 28/98 crime No. Nil of 1998 finder Section 302,1.P.C, Ext. Ka-14, G.D. entry of the Chik is Ext, Ka-15.

24. P.W. 12 is S.I. Rakesh Kumar. He is the investigating officer of the case. He recorded the statements of scribe constable Tikam singh, M.M. Sukheja and Station Master, Bitrohi Station S.P. Kashyap. He prepared the inquest report. He recorded the statement of Sanjay Kumar and on his pointing out he prepared the site plan (Ext. Ka-16). He collected plain and blood stained earth from the place of occurrence (Ext. Ka-4). He also recovered one empty cartridge of 12 bore and prepared recovery memo Ext. Ka-5. He also recorded the statements of Mahaveer Prasad and Het Ram, witnesses of recovery. Thereafter he recorded the statements of inquest witnesses Arun Maheshwary, Sanjay, Atul Kumar, and Naresh chandra. He forwarded the chik to Bareilly City police station where the case crime number was entered and he received the report on 24.1 1.1998(Ext. Ka-17). Thereafter investigation was transferred to S.O. Shri K.C. Verma. On 21.12.1998 S.O. K.C. Verma and S.I. Ram Pal arrested three persons. One of three accused disclosed his name as Nazim from whose possession a country made pistol and three live cartridges were recovered. The second accused disclosed his name as Bhagwan Swaroop from whose possession a country made pistol alongwith two live cartridges of 12 bore were recovered and the third accused disclosed his name as Aslam from whose possession at country made pistol alongwith four live cartridges were recovered. Recovery memo Ext. Ka-10 was prepared. They confessed their guilt and they were arrested in case crime60 of 1998 under Sections 302, 394 I.P.C. Their faces were immediately covered and they were instructed to keep their faces covered because they were to be put up for identification. On 21.12.1998 they were taken baparda for the recovery and from their possession currency notes, Tiffin box and a bag were recovered and recovery memos Ext Ka-,7, Ka-8 and Ka-9 were prepared. They were again kept at the police out post baparda. Next day they were sent to district jail Budaun. In the cross examination he stated that he prepared inquest report u/s 302 I.P.C. At the time of preparation of inquest report he received the report Ext. Ka-2 by Sanjay Kumar. He stated that dead body was found between the two seats of the compartment. He prepared the site plan on the pointing out of Sanjay. Sanjay did not disclose any identifying marks on the currency notes or the bag.

25. The case of the appellants is of denial and false implication. Accused Nazim stated that he was shown to the witnesses at Kasganj and Badayun out post and his photograph was also taken. Accused Bhagwan Das stated that he was shown to the witnesses at Kasganj and Badayun out post and his photograph was also taken. Accused Aslam stated that nothing was recovered from his possession, and he was also shown to the witnesses at Kasganj and Badayun outpost and his photograph was also taken.

26. Learned counsel for the appellants has challenged the findings of the Sessions Judge, It is submitted that the presence of P.W. 2 Sanjay Kumar at the

alleged time of occurrence is doubtful. It is submitted that in the F.I.R. presence of Sanjay is not mentioned. Similarly in the inquest report nothing was mentioned by P.W. 2 Sanjay Kumar about the loot of money and he has not stated about the alleged occurrence at the time of inquest proceedings. We have considered this submission of learned counsel for the appellants. The report of the occurrence has been lodged by P.W. Madan Lal Sukhya who is the Station Master. He lodged the report on the basis of information that one passenger has been murdered in the train. No details of the occurrence were mentioned and on this information the investigating officer reached at the place of occurrence. This has come in the evidence that when the investigating officer reached at the place of occurrence, P.W. 2 Sanjay Kumar had given an application to the investigating officer. According to the statement of the investigating officer he prepared the site plan on the pointing out of P.W. 2 Sanjay Kumar, The presence of P.W. 2 is also mentioned in the inquest proceedings. The counsel for the appellants submits that if P.W. 2 Sanjay Kumar was present at the time occurrence he should have disclosed to the investigating officer about the occurrence when he had recorded his statement as a witness of inquest. The inquest was prepared on the basis of the report lodged by P.W. 1 and not on the basis of information given by P.W. 2 Sanjay, therefore, there was no necessity to mention the other facts in the inquest report. The purpose of the inquest proceedings is to record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted. It does not contemplate that the manner in which incident took place should be mentioned. We have also carefully examined the testimony of this witness which fully inspires confidence and there is nothing on the record to hold that at the time of occurrence he was not present. He had described his presence and the eye witness account furnished. : by him fully inspires confidence. His testimony is corroborated by the investigation and also from the identification proceedings held by P.W. 8 Ram Adhar Sharma and the recovery of the looted articles. He had correctly identified all the accused persons. This submission of learned counsel for the appellant that P.W. 2 Sanjay Kumar was not present at the alleged time of occurrence has no force and is rejected.

27. It would become manifest from the above that the conviction of the appellants are based on evidence of identification and recovery of looted articles from the possession of appellants. So far as the evidence of identification of the appellants is concerned P.W.8 Ram Autar Sharma had conducted identification proceedings on 29.1.1999. He had taken all the precautions for identification. He had affixed paper slips on the distinctive marks of the faces and marked similar persons. He stated that Sanjay Kumar P.W. 2 had correctly identified all the three accused appellants, namely, Nazim, Bhagwan Swaroop and Aslam. Sandipu Kumar had correctly identified Nazim and Bhagwan Swaroop and Jitendra Kumar had correctly identified Nazim, Bhagwan Swaroop and Aslam. Rakesh had correctly identified Nazim, Bhagwan Swaroop and Aslam. Thus there is evidence of good identification against the appellants. Learned counsel for the appellants

submitted that no precaution was taken about the hair of the accused and no precaution was taken about the covering small pox marks on the face of Nazim. There is nothing on the record to suggest that any of the accused had full gray hair. It is important to mention here that the evidence in this case is recorded after about three years and there can be some change in the colour of the hair. It is also pointed out that there are small pox marks on the face of Nazim. The observation of the Sessions Judge is very relevant. He observed that he could not notice small pox marks on the face of any accused. Therefore, there was no necessity for P.W. 8 Ram Adhar Sharma to cover all the marks which are not distinctive.

28. Learned counsel for the appellants submitted that there is inordinate delay in the identification proceeding. The accused were arrested on 21.12.98 and they were put up for identification on 29.1.99. There is delay of about 38 days. It is also submitted that the appellants were not kept baparda and they were shown at the police stations Kasganj and Budaun.

29. So far as the delay in identification proceeding is concerned, learned counsel for the appellants placed reliance in the case law reported in *Hindu Singh v. State of Uttar Pradesh*, (1982) 3 SCC 368 . wherein it is held "that the delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witnesses would be remembering the facial expression of the appellant. If this evidence cannot be relied upon there is no other evidence, which can sustain the conviction of the appellant. We therefore allow the appeal and acquit the appellant."

30. In 1994 SCC 1424 *Satrughana @ Satrughana Parida and Ors. v. State of U.P.* it is held that "it is the duty of the prosecution to state why the identification parade could not be arranged immediately after the arrest of the accused and without loss of time. Unless there is good reason for the delay, the value regarding the evidence of identification gets adversely affected.

31. Another decision relied by the learned counsel is reported in *State of Andhra Pradesh Vs. Dr. M.V. Ramana Reddy and others*, . where in it is held that "there is no valid explanation tendered by the prosecution for delay in holding the identifications parade."

31. Learned counsel for the appellants also placed reliance on the observations made in a case reported in 1987 SCC 573 *Subash and Shiv Shankar v. State of U.P.*

32. In the present case there was a long interval of nearly four months before the test identification parade was held and it is difficult to accept that inspite of this interval of time the witnesses were able to have a clear, image of the accused in their minds and identify him correctly at the identification parade.

33. We have considered the submission of learned counsel for the appellants and the decisions of Apex Court. In our view there is an evidence of good

identification against the appellants. The statements of the witnesses namely P.W.2 Sanjay, who is nephew of the deceased and P.W.3 Rakesh Kuamr clearly indicate that they had sufficient opportunity to recognize the assailants. The place of occurrence is a compartment of the train and both of them were sitting very close to the deceased and occurrence took place in broad day light. The only precaution which the accused had taken at the time of occurrence was that they had covered their faces with muffler which was opened at the time of coming down from the train. So the witnesses had ample opportunity for examining distinctive features of the assailants. They had also recognized some small pox on the faces of assailant. Both the witnesses have rightly identified Nazim as main assailant, who had fired at Prayag Narain.

34. As regard the submission of the counsel for the appellants that 7 there is inordinate delay in the identification parade and the decisions relied upon the counsel we have carefully examined the evidence on record.

35. The Apex Court after considering all the case laws has observed in the case of Lal Singh and Ors. v. State of U.P. 2004(1) JIC 1 (SC) held that "it will thus be seen that the evidence of identification has to be considered in the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest possible opportunity, no hard and fast rule can be laid down in this regard. If the delay is inordinate and there is evidence probablising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in Court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the Court has to consider the evidence in its entirety."

36. In the present case the occurrence took place in a running train and the witnesses are resident of far off places. One is a resident of Kasganj, one is of Aligarh and two witnesses are resident of Etah. In holding the identification parade their presence is required on a particular date and in that process if any delay is caused, no adverse inference can be drawn against the prosecution.

37. In the present case the prosecution also produced evidence, which satisfactorily proves that right from the day of the arrest of the accused persons they were kept baparda so as to rule out the possibility of their faces being seen while in police custody.

38. The appellants were arrested by P.W.10, Sub-Inspector Kailash Chand Verma on 21.12.98 and he kept them baparda. P.W.I3, Sub-inspector A.R. Fandey also stated that accused were kept baparda at the police station and while they were sent to jail they were kept baparda.

39. The Sessions Judge also considered this aspect and has rightly held that accused were brought to the Court baparda and this fact is also mentioned in the order sheet of lower court.

40. The accused appellants had not challenged that they were shown to the witnesses while they were brought to the court. They had stated that they were shown to witnesses at Kasganj and Badayun out post.

41. Thus considering the evidence on record we are of the opinion that appellants are correctly identified by the witnesses and there is evidence of good identification. The Sessions Judge also rightly relied upon the evidence of identification.

42. So far as the participation of the appellants in the alleged crime is concerned in Our opinion the Sessions Judge has rightly held that these appellants had participated in the occurrence. The evidence of identification is fully proved in this case. The witnesses have identified the accused in court and specified overt act to Nazim. So far as the recovery of looted article is concerned, P.W. 9 Satish Chandra stated that in his presence investigating officer had recovered Rs. 1000/- from the house of Nazim and recovery memo was also prepared. In the court he stated that the looted currency notes were recovered from the house of Nazim. He further stated that Aslam also got recovered currency notes and he is also witness of the recovery of bag and Tiffin box from the house of Nazim. P.W, 10 S.I. K.C. Verma is also a witness of recovery of the currency notes, bag and Tiffin box. "This has come in evidence that the currency notes which were looted bearing a seal of Prayag Narain but in the court P.W. 12 S.I. Rakesh Kumar admitted that the currency notes which are produced in the court are not the same currency notes. It is admitted by the investigating officer that the packet which was opened in the court does not contain the same currency notes.

43. It is clear from the statement of P.W. 4 S.K. Maheshwari that on the date of the occurrence deceased had taken money, tiffin box and bag alongwith him. He had identified tiffin and bag (Ext.Ka. 1 and 2), The recovery of Rs. 3,500 from the house of Nazim and Rs. 2000/- from the house of Aslam and recovery of tiffin and bag from the house of Bhagwan Swaroop, on the pointing out, is proved from the testimony of P.W. 9 Satish Chandra and P.W. 12 S.I. Rakesh Kumar. P.W. 12 S.I. Rakesh Kumar identified the packet in which currency notes were packed but he stated that the currency notes which he had sealed are not recovered from the packet. The evidence on record fully proves that currency notes of the deceased were recovered from the possession of Nazim and Aslam. If currency notes are changed at any time prior to recording of the evidence it cannot be said that looted articles were not recovered from their possession when evidence of the witnesses is reliable and credible.

44. In view of the discussion made above, the prosecution fully proved its case beyond reasonable doubt and the Sessions Judge has rightly recorded the findings of conviction.

45. Lastly, the question, that arises for serious consideration, is whether imposition of death penalty to appellants Nazim and Bhagwan Das alias Cheeni of criminal appeal No. 4950 of 2003 in the facts and circumstances of case is

justified"?

46. Under the old Code of Criminal Procedure ample discretion was given to courts to pass death sentence as a general proposition and the alternative sentence of life term could be awarded in exceptional case and that too after advancing special reasons for making departure from the general rule. The new Code of 1973 has entirely reversed the approach. A sentence for imprisonment for life is now the rule and capital sentence is an exception. It has also been made obligatory on the courts to record special reasons if ultimately death sentence is awarded. A Constitutional Bench of the Supreme Court in the case of Bachan Singh Vs. State of Punjab, while upholding the constitutional validity of the death sentence voiced that as a legal principle death sentence is still awardable but only in rarest of rare cases when the alternative option of lesser sentence is unquestionably foreclosed.

47. Considering the aggravating and mitigating circumstances we are of the opinion that in the facts and circumstances of the case, this case does not fall within the category of "rarest of rare case" and it can not be said that imposition of lesser sentence of life term altogether foreclosed.

48. We therefore, reduce the death sentence to imprisonment for life of the appellants Nazim and Bhagwan Das alias Cheeni.

49. The appeals are decided as under:

Criminal Appeal No. 4950 of 2003

(Nazim and Bhagwan Swaroop alias Cheeni v. State)

50. The appeal is dismissed with the modification that while affirming the conviction of the appellants Nazim and Bhagwan Das alias Cheeni u/s 302 read with 34 I.P.C. we set aside the sentence of death imposed by the trial court and alter the same to imprisonment for life. The conviction and sentences of the appellants, awarded by the trial court u/s ion 394 and 411 I.P.C. are upheld.

Criminal Appeal No. 4905 of 2003

(Aslam @ Neta v. State of U.P.)

51. The appeal is dismissed. The conviction and sentences of appellant Aslam alias Neta u/s ion 302/34, 394 and 411 I.P.C, awarded by the Sessions Judge, are upheld.

52. Appellants are in jail. They shall be kept there to serve out the sentences as modified by this court.

53. Reference made by learned Sessions Judge for confirmation of death sentence of appellants Nazim and Bhagwan das alias Cheeni is rejected.