

(1999) 02 AHC CK 0017

In the Allahabad High Court

Case No : Government Appeal No. 1580 of 1986

State of U.P.

APPELLANT

Vs

Akshey Kumar and Others

RESPONDENT

Date of Decision : 26-02-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 62

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

Citation : (1999) 1 ACR 720

Hon'ble Judges : K.D. Shahi, J;G.D. Mathur, J

Bench : Division Bench

Advocate : A.G.A, for the Appellant; Brijesh Shahai, for the Respondent

Judgement

K.D. Shahi, J.—This Government appeal has been preferred by State against the acquittal of the accused-Respondents Akshey Kumar, Anil Kumar and Shiv Kumar by order dated 29.1.1986 passed by Shri Ramji Lal, the then learned Sessions Judge, Farrukhabad in S.T. No. 145 of 1982 Under Sections 302 and 302/34, I.P.C. (Akshey Kumar) and u/s 302 read with Section 34, I.P.C. (Anil Kumar and Shiv Kumar).A. Cr.R. 46

2 .Accused-Respondents Akshey Kumar and Shiv Kumar have since died, the appeal against them stands abated. The appeal now remains only against accused-Respondent Anil Kumar.

3. The brief facts of the case are that Goverdhan Lal, son of Guljari Lal lodged first information report (hereinafter referred to as "F.I.R."), on 27.2.1980 at 4.45 p.m. with the allegation that at about 3.00 p.m. on the same date, accused Akshey Kumar, Anil Kumar and Shiv Kumar came towards their house. Accused Shiv Kumar was driving the tractor while Akshey Kumar and Anil Kumar were sitting on the trolley of the tractor with double barrel gun in the hands of each of them. They wanted to take the tractor through the land of the complainant. It is stated in the F.I.R., that in front of the house and the land of the complainant

and his brothers, there is some open land. Gram Pradhan Akshey Kumar wanted to make path (Rasta) over the said land. He (complainant) filed a case before the Munsif about 21-22 years ago for the said purpose. The complainant won the case. The accused persons bore enmity for that reason. Before three years of the present occurrence, accused Anil Kumar and Shiv Kumar went at the plot of the complainant and wanted to assault by fire. The complainant had lodged a report in the police station to this effect.

4. It is further stated in the F.I.R. that on 27.2.1980 at about 3.00 p.m. Kunji Lal brother of the complainant and Kali Charan, nephew of the complainant were keeping potatoes in bags in the west of their house. Kunji Lal and Kali Charan asked the accused persons that as there is no path in front of house of the complainant, why they are taking tractor? They stopped the tractor in front of the house of Kunji Lal. Accused Shiv Kumar exhorted to kill. On this Akshey Kumar and Anil Kumar got down from the tractor and started to abuse. Accused Anil Kumar made a fire which hit Kunji Lal and Akshey Kumar made another fire which hit Kali Charan and both died on the spot as a result of fire-arm injuries. The accused persons sat on their tractor and went towards their house proclaiming that if anybody tried to raise his head, he shall also be killed. The occurrence is said to have been seen by Kalloo. son of Sukha, Ram Beti wife of Gokaran and Rakesh Kumar son of Siya Ram.

5. Rakesh Kumar has since died. Govardhan Lal, the complainant has been examined as P.W. 1 in this case. Kalloo has been examined as P.W. 2 and Ram Beti has been examined as P.W. 3.

6. However, on the basis of F.I.R., a case was registered. A chick report was prepared. Carbon copy of which is Exb. Ka. 4 and Ka. 24. Copy of earlier F.I.R. lodged by Govardhan Lal against Akshey Kumar is Exb. Ka. 3. The Police investigated the case and submitted the charge-sheet in the Court.

7. The post-mortem examination of Kali Charan was conducted by Doctor K.K. Agrawal (P.W. 5). The doctor has found the following ante-mortem injuries on the person of the deceased (Kali Charan):

(1) Circular gunshot wound of entry on left side abdomen 1" away from umbilicus. Intestine loop coming out directing left to right 3 cm. in diameter.

(2) 9 Circular gunshot wound of exit on right side abdomen in mid axillaries line margins everted each measuring 1/2 cm. in diameter.

(3) 5 gunshot wound of entry on front and lower parts of right fore arm each 1/2 cm. above.

(4) 2 gunshot wound of entry on front and lower part of right arm each 1/2 cm. in diameter x bone.

(5) One gunshot wound of exit on back of right arm lower third 3/4 cm. in diameter.

(6)Two gunshot wound of exit on back of right forearm upper and 3/4 cm. in diameter.

The victim is reported to have died due to shock and hemorrhage as a result of aforementioned ante-mortem injuries.

8. The post-mortem examination of Kunji Lal was also conducted by the same doctor (K.K. Agrawal) on 29.2.1980 itself at 2.00 p.m. The doctor has also found the following ante-mortem injuries at the person of the deceased Kunji Lal:

(1)Gunshot wound of entry 1 cm. in diameter, two on right arm three on right shoulder and two on right axial direction right to left.

(2)Abrasion on right side mid axillaries line 1" x 1". One gunshot wound of entry 1/2 cm. in diameter lower third right arm back.

(3)One gunshot wound of entry 1/2 cm. in diameter lower third right is back.

(4)Gunshot wound of exit on left Axial 5 in number each measuring 3/4 cm. in diameter, one on arm, one 3" below left Axilla.

Kunji Lai is also reported to have died due to shock and hemorrhage as a result of aforementioned ante-mortem injuries.

9. On committal of the case, the learned Sessions Judge framed charge u/s 302, I.P.C., against accused Ashley Kumar for committing murder of Kali Charan and also u/s 302/34, J.P.C. for committing murder of Kunji Lal. He charged accused Anil Kumar u/s 302, I.P.C. for committing murder of Kunji Lai and also u/s 302/34, I.P.C. for murder of Kali Charan. He also charged accused Shiv Kumar to be of common intention with Akshey Kumar and Anil Kumar for the murders of Kali Charan and Kunji Lal u/s 302, read with Section 34, I.P.C. The charges were readover and explained to the accused persons in Hindi. They pleaded not guilty to the charges and claimed to be tried.

10. The prosecution examined P.W. 1, P.W. 2 and P.W. 3 respectively as eye-witness. P.W. 4, H.C. Cadet No. 39, Ram Sagar Tiwari has filed affidavit. He had taken the dead bodies of Kunji Lal and Kali Charan in sealed condition for post-mortem and produced it before the doctor in sealed condition. P.W. 5 Dr. K.K. Agrawal has been examined to prove the post-mortem and injury report of the victims. P.W. 6, Hari Singh, Inspector was the Investigating Officer of the case. He has proved the investigation of the case.

11. We will examine the statements of the defence witnesses later on but after the close of prosecution evidence, the learned Sessions Judge recorded the statements of the accused persons u/s 313, Code of Criminal Procedure The accused persons denied the entire prosecution story. In reply to question No. 1 they stated that the land in front of the house of the complainant and his brothers, is not the land of the complainant but the said land is Aam Rasta. They do not take the tractor through that land. The rest of the allegations were denied by the accused persons. However, accused Anil Kumar stated that the occurrence

is of 27.2.1980 at about 2 or 3 p.m. His driver Navin Chandra was going to plough the plots of Virendra son of Onkar. They (Navin Chandra and Virendra) were going to the tractor at the Tera Mallu road and as soon as they reached in front of the house of the complainant, Kali Charan, Munshi Lal, Hari Shanker, Siyaram, etc. emerged with Lathi and country made pistol, stopped the tractor and threatened how dare to take the tractor. Seeing the danger to life, Navin Chandra and Virendra cried and on their cry and alarm, he (Anil Kumar) came along with licensed gun of his father to save their lives. When he reached near the tractor. Kali Charan and Kunji Lai fired at him as well as Navin Chandra. Both of them suffered firearm injuries. Anil Kumar made two fires in his self-defence, he got himself medically examined and the injuries were X-rayed. He had made a telegram to this effect and had filed the said telegram along with papers for bail, which has either been lost or weeded out. The case of the other two accused persons is that of denial.

12. The accused persons were called upon to produce their defence. They examined D.W. 1, Prabhu Dayal. compounder of Civil Hospital. Fatehgarh. Prabhu Dayal stated that he had been posted with Doctor Vijay Sarin and he recognised the writing and signature of the doctor. He produced the medico legal register to Civil Hospital, Farrukhabad and stated that on 29.2.1980, Anil Kumar and Navin Chandra were medically examined by the said doctor. He, however, did not state whether Dr. Vijay Sarin was in service, alive or dead and that he himself could not have been produced as defence witness. The defence also examined D.W. 2 Narendra Singh, X-ray technician, who was posted in district hospital, Fatehgarh as technician from October 1980. He stated that X-ray of accused Anil Kumar and Navin Chandra was done by Dr. K.K. Agrawal. He has identified the writing and signature of Dr. K.K. Agrawal on the X-ray report. D.W. 2 was examined on 25.1.1986 to prove the writing and signature of Dr. K.K. Agrawal, it is surprising that this Dr. K.K. Agarwal himself had conducted the post-mortem examination of both the victims but he was not asked even a single line regarding the X-ray of accused Anil Kumar and his driver Navin Chandra, when the doctor was examined as a prosecution witness.

13. After hearing learned Counsel for the parties, the learned Sessions Judge came to the conclusion that it is amply proved that the present occurrence took place on the aforesaid date, time and place. The learned Sessions Judge held that both the accused Akshey Kumar and Shiv Kumar were too old to commit the crime. Their presence at the spot appeared to be doubtful in view of their age and he further held that the injuries of the accused side have not been explained, therefore, the prosecution did not come up before the Court with a true case. The learned Sessions Judge further held that the F.I.R. is ante-timed. There was no immediate motive and accused Akshey Kumar and Shiv Kumar did not play any active role in the commission of crime. Accused Anil Kumar had played active role but he is entitled to the benefit of private defence and the learned Sessions Judge, therefore, acquitted all the aforesaid three accused persons.

14. Being aggrieved by the abovesaid judgment and order of acquittal, the State preferred this appeal. We have heard learned Counsel for the parties and have gone through the record of the case. As held by the learned Sessions Judge also, following certain facts are admitted.

(i) The occurrence took place on 27.2.1980 at 3.00 p.m.

(ii) The presence of Anil Kumar on the spot is admitted.

(iii) Two fires have been made by accused Anil Kumar. But he did not say even a single word in his statement that these two fires hit anybody.

Accused Anil Kumar did not say that he killed Kali Charan and Kunji Lai in his defence. However, in the cross-examination, the factum of death of Kali Charan and Kunji Lai is admitted. Their identity has also not been disputed.

15. The presence of deceased Kali Charan and Kunji Lal is admitted. In the statement of accused Anil Kumar recorded u/s 313, Code of Criminal Procedure He stated that Kali Charan and Kunji Lai fired at them, which hit him and Navin Chandra. Thus, it is admitted fact that Kali Charan and Kunji Lai died during the course of this incident at the place of occurrence. As alleged, although not specifically admitted, that the fires made by accused Anil Kumar hit the victims but this fact is admitted that Anil Kumar made two fires from the standard gun of his father.

16. The prosecution has alleged certain litigation regarding the land in front of the complainant side's houses, the litigation is admitted. According to the accused persons, this land situated in front of the house of the complainant and his brothers, is not that of complainant side but is Aam Rasta. The motive of fire is also said to be that the accused persons wanted to take their tractor through this land, which is said by the complainant side as their own and the same is said by the accused persons as Aam Rasta in their statements u/s 313, code of criminal Procedure.

17. It is also admitted that in the west of the main house of the complainant, there is Tera Mallu Road/Rasta as shown in the site plan. According to the accused persons, their tractor was at this Tera Mallu Rasta while according to the complainant side, it has come up to point C in the site plan, towards the east of the Rasta. The accused persons told to remove the cattle from the Charhi so that they may take the tractor and on refusal that this is not Aam Rasta. the fires were made.

18. Thus, the main facts are admitted and atleast not denied. Still the prosecution has to stand at its own leg and to prove the case to the hilt. We shall now examine the eyewitness P.W. 1, Goverdhan Lai is the brother of deceased Kunji Lal. The following pedigree is relevant in the instant case: Guljari Lal. I Goverdhan Lai (P.W. 1) (Complainant) Shlv Dayal Kali Charan (Deceased) Siya Ram Gokaran Ram Beti (Wife) (P.W. 3) Kunji Lai (Deceased)

19. P.W. 1, Goverdhan Lal stated that the date and time of occurrence was 27.2.1980 at 3.00 p.m. He was cutting fodder for the cattle. There is some open land in front of his brother's house. There is no Rasta on this land. Accused Akshey Kumar had filed a civil suit in which the complainant succeeded and accused persons lost the case. The complainant had filed the copies of the judgment and decree of the said case as Ext. Ka. 1 and Ka. 2. From the perusal of Ext. Ka. 1 and Ka. 2, it is clear that the Gram Samaj had filed a suit through accused Akshey Kumar against Govardhan, Kunji Lal, Onkar and others to remove the construction made over the land MNOP. There is also a site plan with the decree. If this site plan of the decree is tallied with the site plan of this case, it is clear that there is house of the complainant side (Defendant in suit) along with their Sahan on the disputed land MNOP. The disputed construction sought to be demolished in the suit appears to be the same land through which the complainant side says that the tractor was being driven by the accused side. However, the Gram Samaj on behalf of accused Akshey Kumar lost the case and the land was held to be that of the Defendants, Le., present complainant. There was no finding that the land belongs to Gram Samaj or there was any Rasta on the disputed land.

20. P.W. 1, Govardhan Lal further proved that before this occurrence, accused Akshey Kumar along with his two sons tried to assault him by gun and he had lodged a report in this regard, which is Exb. Ka. 3. From the perusal of Exb. Ka. 3, it is abundantly clear that on 28.10.1979 at 8.00 a.m., accused Akshey Kumar had threatened to kill complainant Govardhan Lal by fire.

21. Besides the above motive, the immediate motive is said to be that on the date of occurrence at 3.00 p.m., the three accused persons wanted to take tractor through Sahan land of the complainant. Ram Beti, who was mudding the walls, asked that this was not Rasta, on which the accused persons started to abuse. When Kunji Lai and Kali Charan asked not to abuse, both Akshey Kumar "and Anil Kumar came down from the tractor and fired at the victims. This immediate motive although not in express words but has been admitted by the accused side as well. At least, it is admitted that Navin Chandra was going to cultivate the plot of Virendra by the tractor. The tractor was stopped by the complainant side and on hue and cry, the accused persons came along with gun. Thus, according to the complainant side, the accused attacked on them because their tractor was stopped and was not permitted to be taken in the Sahan land of the complainant and according to the accused side, they were taking the tractor through Rasta. The complainant side asked not to do so, Kunji Lal and Kali Charan fired and In self-defence, accused Anil Kumar made two fires. Thus, the motive of taking the tractor is also admitted.

22. P.W. 1, Goverdhan further stated that when Kunji Lal and Kali Charan died, he lodged the F.I.R. at the police station. The original pencil copy of the chick report had been misplaced and a carbon copy was issued to the complainant, which he has filed as Exb. Ka. 4. The third carbon copy was preserved at the

police station and the prosecution has filed it as Exb. Ka. 24. The original appears to have been lost from the Court but the two carbon copies of the pencil copy had already been produced. These carbon copies have been prepared from the same process in which the pencil copy had been prepared each of the copy is original and is admissible u/s 62 of the Indian Evidence Act, it cannot be said to be a secondary copy to be proved by secondary evidence.

23. In the cross-examination. Govardhan Lal (P.W. 1) admitted that there was no Rasta in the southeast of the house of Gokaran. There was Rasta Tera Mallu Road in the west of the house of Gokaran but according to the prosecution side, there was no Rasta in front of the house of Gokaran. He further stated that the land of Virendra is situated in the east of the Sahan land of the complainant. This is the land to which the accused side is said to be going to plough. There is Talab in the south of the house of the complainant and his brothers. In the cross-examination he stated that nobody fired from his side. In the cross-examination, it was further suggested that the land situated in front of their house is not the Rasta and the vehicle of Virendra never used to pass through this land. The exact words are:

Yah Bhi kahna galat hai ki ham logon me makan ke samne khulijamin raste kijamin ho idhar se Virendra ke Gadi Wagairah gujarti rahi ho.

Through this suggestion it appears that the accused side wanted to show that Virendra has land near that land which is situated in front of the house of the complainant and, therefore, the tractor was being taken to plough the plot of Virendra. In the cross-examination, he further denied that the tractor was at the Tera Mallu Road itself.

24. P.W. 2, Kalloo gave the same statement. He, however, stated that witness Rakesh is now dead. He corroborated the entire prosecution story. He, however, denied in the cross-examination that two country-made pistols were recovered by the Investigating Officer near the dead bodies of Kunji Lal and Kali Charan. It was only suggested that he did not see the occurrence. No other suggestion was made to this witness regarding the mode and manner of assault and other facets of the prosecution case.

25. P.W. 3, Ram Bed is the wife of Gokaran. She also stated about the entire prosecution story. She was suggested in regard to the F.I.R., which we shall discuss later on.

26. We have discussed the broad aspect of the case. The case of the prosecution is almost admitted. At least the case of defence is parallel to the case of the prosecution side. The date, time, place of occurrence, weapon of assault and death of the two victims etc., are admitted and proved. The witnesses of the prosecution had stated that these are the accused persons who made fires and killed the victims. The fire by accused Anil Kumar is admitted but, as stated above, it is not said by the accused that by these fires of Anil Kumar, victims Kunji Lal and Kali Charan, died.

27. The F.I.R. is challenged on the ground that it is ante-timed. It was lodged at 16.45 p.m. on 27.2.1980 while the occurrence took place at 15.00 p.m., i.e., after one hour and 45 minutes. The place of occurrence is at a distance of six miles from the police station. There is no delay in lodging the F.I.R.

28. Our attention was drawn on the statement of Govardhan Lal, the complainant. He is the maker of the F.I.R. He was cross-examined in para 8 of his statement with regard to the F.I.R. He stated that he reached the police station at about 5.00 p.m. There is some difference between 4 p.m. and 5.15 p.m. but for village side people, it is excusable. No other witness was examined regarding F.I.R. P.W. 2, Kalloo was not asked even a single line regarding the F.I.R. P.W. 3, Ram Beti was rather cross-examined regarding the F.I.R. She did not go to the police station to lodge the F.I.R. She is a lady and is educated upto 5th standard. In the cross-examination, she stated that the F.I.R. was lodged at police station in the evening; the month is that of February, 5.00 p.m. is necessarily evening. The Investigating Officer stated that after recording the F.I.R. and taking the statement of the complainant, he proceeded to the spot and prepared the inquest report.

29. P.W. 3, Ram Beti was suggested a question which appears to be very vague question which was "the Daroga came to the place of occurrence at 6.30 p.m. and went back at 10.00 p.m." Whether the F.I.R. was lodged in the meantime, she stated yes. This was not fair in the eyes of law. She did not go to the police station to lodge the F.I.R. The Investigating Officer came to the spot after the F.I.R. had been lodged. The Investigating Officer prepared several papers on the spot. She may not be knowing what is the F.I.R., which was being written, therefore, this vague statement is of no value.

30. P.W. 6, Hari Singh the Investigating Officer, specifically stated that the case was registered in his presence and after recording the statement of the complainant, he along with other officials proceeded to the spot. The statement of Ram Beti cannot be read to say that the F.I.R. is ante-timed. The Investigating Officer was cross-examined regarding the inquest report and our attention was drawn that in the F.I.R., the distance of police station has been shown as six miles while in the inquest report it has been shown as eight miles. The Investigating Officer was asked with regard to this factual aspect but he was not asked why he had written six miles in the F.I.R. and eight miles in the inquest report. It may be that in the papers of the police station, it is six miles and while going to the place of occurrence through different route, it may be eight miles. However, explanation could have been given by the Investigating Officer and without any cross-examination, merely because of difference between the F.I.R. and the inquest report regarding the distance; it cannot be held that the F.I.R. is ante-timed. If the dead bodies were not sent in time, that is no ground to hold that the F.I.R. is ante-timed. The learned Sessions Judge held on the strength of the ruling reported in the case of Shyama Charan. 1985 ACR 8, that these interpolations in the inquest report will lead to a conclusion that the F.I.R. is ante-

timed but the present law is that inquest report is to be read only to ascertain the factum of death and is not a reproduction of the F.I.R. The mistakes and mischief of the Investigating Officer in the preparation of the inquest report will not make the F.I.R. as ante-timed and unbelievable vide *Podda Narayana and Ors. v. State of Andhra Pradesh* AIR 1975 SC 1253.

31. It was argued by the learned Counsel for defence that the prosecution cannot stand on the infirmities of the defense case but it has to prove its case on its own evidence. The argument is correct. The prosecution has established that accused persons were not going on the Rasta but were going on the Sahan land of the complainant. It is said that there was no Rasta. As discussed above, the earlier suit, judgment and decree does not show any Rasta over the disputed land, ratter shows that this was the land of the complainant side. It is to be seen that the case of the accused persons is that they were going to cultivate the land of Virendra. Just in the south of the house of the complainant side, there is Talab and through that way, one cannot go to the land of Virendra. The land of Virendra has not been shown in the site plan but it is definitely said to be the land in the east of the house of the complainant. In para 1 of his statement, complainant Govardhan stated that in front of his land, there is a Sahan land and there is no Rasta. When the accused persons were re-examined u/s 313, Code of criminal Procedure they stated that this land did not belong to the complainant and is Aam Rasta. In the north of the disputed land (we say it disputed because it is said on this land the tractor was desired to be dragged), there is house of Goverdhan. In para 6 of his cross-examination, the complainant was asked that in the south-west of the house of Gokaran there is any path or not. He stated that there is no Rasta. This disputed land is said to be surplus land of Gram Samaj. In para 6, the complainant also stated that the land of Virendra, son of Onkar is in the east of the surplus land. If the accused persons were going to the land of Virendra, they had to go at this disputed land. In para 3, he stated that the accused persons wanted to take the tractor through this land. The Investigating Officer has also stated that the tractor had come up to point C in the site plan, just in the east of the "admitted Rasta. In the cross-examination also, this witness was suggested that the house of the complainant side is on the land of Virendra and was further suggested that the vehicles of Virendra used to pass through this land. The exact words are as follows:

Yah kahna galat hai ki ham logon ke makanat Virendra ke jamin par bane hue hain. Yah bhi Kahna galat hai ki ham logon fee makan ke samne khulijamin raste ki jamin ho Idhar se bhi Virendra ki gadi wagairah gujarti rahi ho.

32. In the cross-examination by accused Shiv Kumar, the witness stated that it is not correct to say that the tractor was at the Tera Malloo Road itself. P.W. 2, Kalloo also stated that the tractor had come on the Sahan land of the complainant side. He stated that the face of the tractor was towards the east. Admittedly it was going to the land of Virendra. If it was going only at the Tera Malloo Road, its face would be either in the north or south. He was specifically

asked that Ram Beti was asked to remove their cattle. Similar is the statement of Ram Beti. She stated that Kali Charan was there and she was also suggested that they went to take possession over the land of Virendra. Thus, it is abundantly proved that the accused persons wanted to take the tractor through the Sahan land of the complainant. The accused side was definitely trespassers because they tried to take the tractor over the Sahan land of the complainant and even if the entire case of the accused is believed, then also, as held in the ruling in Hukum Singh and Others Vs. The State of Uttar Pradesh, and Mizaji and Another Vs. The State of U.P., , they are not entitled to the right of self-defence.

33. Coming to the actual mode and manner of assault, it is said that accused Anil Kumar fired which hit Kunji Lai and Akshey Kumar fired which hit Kali Charan. This is a case of two fires. The learned Counsel for the defense on the basis of the statement of doctor wanted to argue that this is a case of three or four fires. If there are six injuries on a person and if a suggestion is made that each injury may be caused by each separate fire, the doctor has got no option but to say yes. Now coming to the injuries of Kali Charan, there is single gunshot entry at the abdomen. Injury No. 2 is exit and injury No. 3 is on the front and lower parts of right forearm. Injury No. 4 is entry wound on the front and lower part of the right arm. All these three injuries of entry are possible to be caused by one fire. Injury Nos. 3, 5 and 6 are exit injuries. Thus, the injuries of Kali Charan are possible to have been caused by one fire. Likewise the injuries of Kunji Lal on the right shoulder has got exit wound as injury No. 4. Injury No. 2 is only abrasion. Injury No. 3 is on the right arm back. The arm can be moved in any direction and abrasion can come by any friction then the injuries of Kunji Lal are also possible by one shot. The Injuries of both the victims are as a result of two fires. The case of prosecution is also of two fires. Thus, in no way, there is contradiction between ocular statement of the witnesses and the medical evidence.

34. The learned Sessions Judge has given a totally incorrect finding that the injuries of the victims are as a result of three or four shots. According to prosecution case, there were two shots and according to the accused side, there were two shots. The injuries are also possible to have been caused by two shots. Where from the learned Sessions Judge got a case of three or four shots, is not known to anybody.

35. The learned Sessions Judge has also himself become a witness in the case than to be a Judge. The occurrence is said to have taken place in February, 1980. The charges were framed in the year, 1982 and the statement of P.W. 1 was recorded on 30.4.1984. There is no suggestion to this witness that accused Shiv Kumar and Akshey Kumar were too old to fire. Nothing was asked about the age of the accused-Respondents or their physical capacity to the witness. The statement of P.W. 2, Kalloo was recorded on what date is not clear. Similar is the statement of P.W. 3, Ram Beti but for the first time, Ram Beti was suggested that Akshey Kumar is unable to hold the gun. She stated that today he is so unable to hold the gun but on that day, he was holding the gun. Accused Akshey Kumar

stated his age in the year 1985 as 80 years. Before 15 years, he must have been strong enough to hold the gun and to fire it. The statement of the accused u/s 313, Code of Criminal Procedure was recorded on 10.1.1986. The learned Sessions Judge observed that accused Akshey Kumar is so old that he is unable to stand and reply. He did not record the finding what his position was before six years? The doctor has been examined in this case in the presence of the accused persons. But no suggestion was advanced to the doctor that the accused persons were unable to hold the gun and to fire it. The learned Sessions Judge was not authorised to substitute his own finding on the physical condition of the accused without any evidence to that effect. Even the accused did not state that he was not able to stand and to fire. The observation of the learned Sessions Judge, merely because Akshey Kumar was aged about 80 years on the date of statement u/s 313, code of criminal Procedure is of no value. If the witnesses stated Akshey Kumar to be of 70 years on the date of his statement, the age of Akshey Kumar should have been about 65 years on the date of occurrence and a man of 65 years is not old in the present days. The main trump card of the defense as well as the learned Court was that of self-defence.

36. The theory of self-defense of property is not claimed in this particular case and even it is claimed that it was not available. Accused Anil Kumar stated that Kunji Lal and Kali Charan fired at them and they received injuries and then Anil Kumar made two fires, although not said but these are two fires which hit Kali Charan and Kunji Lal who died. Thus, the right of private defence is claimed on the basis of alleged two fires of Kali Charan and Kunji Lal. P.W. 2, Kalloo was suggested that on the spot, two country made pistols belonging to Kali Charan and Kunji Lal were recovered. No such suggestion was made to the complainant and the Investigating Officer. It was not said to Investigating Officer that he had received two country made pistols and he himself disappeared these country made pistols to support the prosecution story. It is not proved that two persons have got two country made pistols. Even a doubt is not created for that purpose. It is stated that there were injuries to Anil Kumar and Navin Chandra. The injuries of accused Anil Kumar are as under:

(1) Firearm wound $1\frac{1}{8}$ " x $1\frac{1}{8}$ " not probed and over left side chest $2\frac{3}{4}$ " above the left nipple.

(2) Firearm wound $1\frac{1}{8}$ " x $1\frac{1}{8}$ " x skin deep front and left arm below the left shoulder.

(3) Firearm wound $1\frac{1}{8}$ " x $1\frac{1}{8}$ " skin over front of left forearm 2" above the injury No. 2.

37. All these injuries are superficial injuries. These are skin deep and it can be manufactured at any time. Besides the injuries are said to have been caused on 27.2.1980 but after two days on 29.2.1980 at 10.30 a.m., these injuries were examined by the doctor. Similar is the position with the injuries of Navin Chandra, which are skin to muscle deep. All these five injuries are $1\frac{1}{8}$ " length

and breadth and these could be created at any time. Not only this, these injuries have not at all been proved. It is stated by D.W. 1, Prabhu Dayal that the injuries were examined by Dr. Vijay Sarin. It is not stated anywhere whether Dr. Vijay Sarin is dead or alive and why he had not been produced. The best witness to explain these injuries was Dr. Vijay Sarin who could have proved the injuries and could have stated that the injuries were genuine injuries and could not have been manufactured. In the case of non-examination of Dr. Vijay Sarin, the injuries could not be proved. The injuries are said to have been X-rayed by Dr. K.K. Agrawal in district hospital, Fatehgarh. It is to be noted that this is Dr. K.K. Agrawal of district hospital Fatehgarh who has been examined as P.W. 5 on 29.1.1985 but he was not asked even a single word regarding the X-ray examination of the injuries of Anil Kumar and Navin Chandra. It is also not said that two Dr. K.K. Agrawals were posted at district hospital, Fatehgarh on that particular date and if this Dr. K.K. Agrawal who X-rayed the injuries of these two victims, why the doctor had not been cross-examined on this point. Whether he has died or was alive has not been said by the defence. The best witness to prove the X-ray examination was Dr. K.K. Agrawal but when he was examined by the prosecution, he was not at all queried by the accused side and when the defence entered into evidence, it did not dare to call for Dr. K.K. Agrawal. Thus, neither the injuries nor the defence of accused persons are proved. Even if these are taken to have been proved, these are very superficial injuries. The medical examination has been done after great delay and these could have been manufactured by the defence to get rid of punishment of life imprisonment in case of their conviction. To their satisfaction, they had really got it when the learned Sessions Judge held that the injuries of the accused are proved and the prosecution could not be able to explain the injuries of the accused side.

38. According to the defence case, Navin Chandra driver and Virendra Singh were going to plough the plot of Virendra and that there was attack by the prosecution side. Thereafter, Anil Kumar came and fired. Thus, Anil Kumar had arrived at the place of occurrence late but Navin Chandra and Virendra were there on the spot from the very beginning. They are not accused in the case. There was no reason to the accused side to have examined them as defence witnesses, rather they were best witness in the case but none of them have been examined to prove the defence theory. The case of the defence is totally false, baseless and without any leg and has been incorrectly appreciated by the learned Sessions Judge.

39. The prosecution has proved its case to the hilt against the accused persons. We have already said that accused Akshey Kumar and Shiv Kumar are already dead. Accused Anil Kumar admitted to have made two fires. Although he did not say that he killed both Kunji Lal and Kali Charan by his fires but the case of the prosecution is that he has killed Kunji Lal by his fire. The case against accused Akshey Kumar and Shiv Kumar is merely of academic interest and has been discussed only to see whether the case of the prosecution is correct or incorrect but on facts and evidence and also by admissions, the case against Anil Kumar is

fully proved and established. He was liable to be convicted u/s 302, I.P.C., for the murder of Kunji Lai and also u/s 302/34, I.P.C. for the murder of Kali Charan.

40. It was argued by the learned Counsel for the accused Respondents on the strength of the ruling in Ramesh Babu Lai Dosi v. State of Gujarat 33 1996 ACC 585, that this appellate court is entitled to set aside the order of acquittal only when the reasons given by the learned Sessions Judge are entirely incorrect and its conclusions are wholly untenable. We have discussed above the findings recorded by the learned Sessions Judge who had gone to the extent of perversity. In para 9 of this judgment, the learned Sessions Judge observed that in this way, it has been amply proved that the present occurrence took place on the aforesaid date, time and place of occurrence. In concluding para of this judgment, the learned Sessions Judge has held that accused Akshey Kumar and Shiv Kumar did not play any active role in commission of crime. It was only accused Anil Kumar who might have committed the present crime in exercise of right of private defence. If it was so, we have also held that there was no right of private defence of property or right of self-defence of person. Regarding the participation of accused Akshey Kumar, the learned Sessions Judge himself stood as a witness. Regarding the shots in the case, the learned Sessions Judge unnecessarily and without any reason held that the injuries are as a result of three or four fires. As stated above, nobody said that there were three or four fires. Regarding the inquest report we have already said above that this is a paper which is relevant for limited purpose. The mischief or mistake of the Investigating Officer will not discredit the statement of the eyewitnesses. We have also stated that the medical evidence has fully corroborated the oral evidence.

41. The appeal is fit to be allowed and is accordingly allowed the judgment and order of acquittal passed by the learned Sessions Judge is fit to be set aside and is accordingly set aside.

42. The appeal is hereby abated against accused Akshey Kumar and Shiv Kumar. Accused Anil Kumar is found guilty of charge u/s 302, I.P.C., for the murder of Kunji Lal. He is found also guilty of the charge u/s 302 read with Section 34, I.P.C. to be of common intention of murder of Kali Charan. He is accordingly convicted in both the charges. He is sentenced to undergo life imprisonment on both the charges. However, both the sentences shall run concurrently. Accused Anil Kumar is on bail. He shall be taken into custody forthwith to serve out the sentence.

43. Registry of this Court is directed to send a copy of this order to the concerned Chief Judicial Magistrate to take accused Anil Kumar into custody and to send him in jail to serve out the sentence of life imprisonment as awarded to him. After he is taken into custody, his bail bonds shall stand cancelled. The learned Chief Judicial Magistrate, Farrukhabad shall report compliance of this order to this Court within three months from the date of communication of this order and sentence.