

(2005) 05 AHC CK 0245

In the Allahabad High Court

Case No : Capital Appeal No. 28 of 2003, Jail Appeal No's. 1946 and 1947 of 2005, Criminal Reference No. 19 of 2003 connected with Govt. Appeal No. 1181 of 2003 and Criminal Revision No. 140 of 2003

Sudhir and Satendra

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 13-05-2005

Acts Referred:

Arms Act, 1959 — Section 25

Criminal Procedure Code, 1973 (CrPC) — Section 161, 366, 378

Penal Code, 1860 (IPC) — Section 120B, 147, 148, 149, 302

Citation : (2005) 05 AHC CK 0245

Hon'ble Judges : Imtiyaz Murtaza, J; Amar Saran, J

Bench : Division Bench

Advocate : Gopal S. Chaturvedi and Samit Gopal, for the Appellant; R.N. Rai, A.K. Rai and R.K. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Amar Saran, J.—Capital Criminal Appeal No. 28 of 2003 arises out of the judgment and order of the VI Addl. Sessions Judge, Ghaziabad, dated 19.12.2002, convicting the appellants, Sudhir and Satyendra, to one year's R1 u/s 427, 10 years R1 and a fine of Rs. 25,000/- u/s 307 IPC and death sentence, along with a fine of Rs. 25,000.- u/s 302 IPC. In default of payment of fines u/s 307 and 302 IPC the appellants were to undergo further R1 for one year.

2. Two separate jail appeals aforesaid were also filed by the appellants which, due to a lapse on the part of the office, were not assigned any number initially. The same were, however, admitted on 5.5.2005 and the office has given the aforesaid numbers mentioned hereinabove.

3. A Criminal Reference No. 19 of 2003 has also been received u/s 366 Cr.P.C. for confirmation of the sentence of death awarded to the appellants. The appellant Saryendra was also convicted u/s 25 of the Arms Act. All the sentences were to

run concurrently.

4. Govt. Appeal No. 1181 of 2003 was preferred by the State u/s 378 Cr.P.C. for setting aside the order of acquittal which was passed by the same judgment of the aforesaid VIth Addl. Sessions Judge. Ghaziabad, and for convicting and sentencing the respondents Jai Bhagwan, Yogendra Sharma, Dalbir @ Veera, Bijendra, Satveer, Deepak @ Pradeep, Mamraj Singh, Sadho Singh, Naresh Kumar @ Neeru and Raju @ Raj Kumar. Crl. Revision No. 140 of 2003 has been tiled by informant Vijai Pal Singh for setting aside the order of the acquittal passed by the aforesaid sessions court in respect of 10 respondents mentioned hereinabove. The aforesaid Capital Criminal Appeal No. 28 of 2003 Reference No. 19 of 2003, Govt. Appeal No. 1181 of 2003 and Crl. Revision No. 140 of 2003, which were connected together, are being considered and disposed of by us by this common judgment.

5. There are two other accused persons Satyendra Pradhan and Balbir but as they died during the trial, their trial stood abated by the order of the trial judge.

6. Briefly, the prosecution case was that on 19.6.1992 Sensar Pal Singh, another son of the informant Vijai Pal Singh, was murdered. In that case, six persons were implicated, but two accused, Sudhir and Satyendra the appellants of this case, were absconding. At about 12.15 pm on 20.9.1992 the informant's brother, Brahma Pal Singh, his sons Om Pal Singh and Munesh Pal Singh, his daughter Kusum and daughter-in-law Omwati, widow of Sensar Pal Singh, Raju, a son of Sensar Pal Singh and Chunnu son of Om Pal, were returning to their village in a Maruti car after getting Raju and Chunnu treated in Dr. Khan's Nursing Home in Hapur. On their way back, they found that an old red coloured truck parked in front of the house of Udai Ram Master blocking their passage. Om Pal Singh, the driver of the Maruti car blew his horn, whereupon the appellants Sudhir and Satyendra fired from their rifles and guns from the back of the truck (dala) on the occupants of the Maruti car. As a result of the firing. Brahma Pal Singh, Om Pal Singh, Smt. Kusum Raju and Chunnu were killed in the Maruti car itself. Omwati was grievously injured, Munesh Pal came out of the car and ran through the fields for concealing himself; The accused came out of the truck and followed firing at him. A bystander, Smt. Ramwati, resident of village Tumrail, who came in the way was killed as a result of the firing which was directed on Muneshpal. Rishi Pal and others are said to have arrived on hearing the noise and cries. On the information, Vijai Pal reached the spot and thereafter the dead bodies and the injured were taken in the Maruti car which was then driven by Munesh Pal whilst the informant drove his tractor trolley to Dr. Khan's Nursing Home in Hapur. Dr. Khan admitted Omwati in a grievous condition whereas he declared the other persons dead.

7. A written report of this incident was lodged by Vijai Pal Singh at P.S. Hafizpur/ Ghaziabad, on 20.9.1992 at 1.40 pm under Sections 147, 148, 149, 307, 302 and 427 IPC. Constable Pradeep Kumar prepared the chik FIR and made necessary GD entries of the report. After completing necessary formalities such

as spot inspection, preparation of site-plan, examination of witnesses u/s 161 Cr.P.C. etc. PW 11, Jodh Singh, submitted a charge-sheet against Jai Bhagwan, Balbira @ Bira, Yogendra Sharma and the appellants Sudhir and Satyendra. He also submitted a charge-sheet with the aid of Section 120B IPC against Satyendra, Vijendra, Balbir Singh and Sadho Singh. Charges were framed in this case under Sections 147, 148, 149, 307, 302, 427 and 120B IPC against Sudhir, Satyendra, Jai Bhagwan and Yogendra Sharma on 24.5.1995 and u/s 120B IPC Against Vijendra Singh, Balbir, Sadho Singh, Neeru @ Naresh, Raju @ Raj Kumar, Deepak, Satvir, Mamrej, Sudhir, Satyendra, Jai Bhagwan and Yogendra also on the same day, i.e. 24.5.1995. A charge was also framed on 24.5.1995 against Satyendra u/s 25 of the Arms Act after obtaining sanction from the District Magistrate on 28.7.1993.

8. The prosecution has examined 13 witnesses, namely, PW 1 Vijai Pal, PW 2 Omwati, PW 3 Munesh Pal Singh, PW 4 Satvir Singh, PW 5 Dr. N.K. Sharma, PW 6 Dr. Gyanendra Singh, PW 7 Dr. Harikrishna Agrawal, PW 8 S.P. Gerdey, PW 9 Ram Autar Singh, PW 10 Veerpal Singh, PW 11 Jodh Singh, PW12 Shesh Pratap Singh, PW 13 Mahendra Kumar and FW 14 J.S. Kane.

9. PW 1, Vijai Pal Singh was the informant of the case who was not himself an eye-witness. He reaffirmed the version mentioned in the FIR in his testimony in the court. He was given information of this incident by Munesh Pal Who is said to have received pellet (injuries whilst the occupants of the car, Brahma Pal Singh, Om Pal Singh Smt. Kusum, Raju and Chunnu died in the car itself and Omwati was grievously injured a result of the firing One bystander, Ramwati, wife of Tek Chand, also received injuries at the spot After Munesh Pal and Vijai Pal reached the spot on their tractor trolley, the dead bodies and the injured were carried to the clinic of Dr. Khan's Nursing Home in Hapur, in the Maruti Car which was then driven by Munesh Pal. The doctor pronounced the aforesaid deceased as dead, and, after first aid was given to Omwati, she was referred to Meerut Medical College. The Maruti car was also damaged in the incident Vijai Pal got the report scribed by Devendra Kumar (Ext Ka 1) which was presented at the police station Hafizpur. This incident was a sequel to the earlier murder of Vijai Pal's son Sensar Pal on 19.6.1992, in which case, six accused were in jail. But the two appellants. Sudhir and Satyendra, were absconding. In his fresh re-examination in reply to a leading question, whether there were any persons accused of conspiracy, he replied in the affirmative stating that Satvir resident of Saidpur, Deepak resident of Raghunathpur, Balbir resident of Sikro, Raju resident of Giridharpur, Neeru resident of Harkaran and Vijendra were the conspirators. Sadho, who was a Muzaffarnagar police person and the cousin of Sudhir and Satyendra (tau ka larka) were also conspirators along with one Mamrej, resident of the informant's village Giridharpur.

10. PW 2 Smt. Omwati is the star witness in this case. She states that she along with Om Pal, Munesh Pal, Veram Pal, Kusum and Raju had gone to Hapur to Madhu Nursing Home for the purpose of showing Chunnu to the doctor. When

they were returning, at the culvert near Tumrail a truck was standing in the middle of the road. As the truck had obstructed the way, Om Pal, the driver of the car, stopped the car at a small distance. At that time, i.e. 12 or 12.15 a.m. the persons who were present in the truck, began firing indiscriminately which resulted into the death, of those who were driving in the car, except Omwati and Munesh Pal. Munesh Pal also received pellet injuries. She knew the names of Satvir and Sudhir amongst the persons, who had fired as they belonged to her village but she did not know the names of 3 or 4 persons, who also fired on the car. Three months prior to this incident her husband Sensar Pal had been murdered by these accused persons who were absconding. There was a Sardar in the truck who was also firing. After the accused ran away on the truck, Munesh Pal arrived with another person at the spot. Munesh Pal took them to the doctor in Hapur where she was referred to Meerut where she was treated.

11. PW 3, Munesh Pal is the other eyewitness in this case. According to him, the incident took place on 20.9.1992 when he along with his brother Om Pal, Chunnu, Raju son of Sensar Pal, his bhabhi Omwati, his sister Kusum and his uncle Veermal Singh were returning in their Maruti car to their village after showing Chunnu to the doctor in Madhu Nursing Home in Hapur. Near the house of Udai Ram Sharma after crossing the culvert he found a red colour truck standing in the middle of the road. Om Pal, who was driving the Maruti car, blew his horn whereupon Sudhir, Satyendra, Yogendra, Jai Bhagwan and Heera fired at their car with rifles and guns. Sudhir and Satyendra belonged to their village Giridharpur Tumrail, whereas he knew Yogendra, Jai Bhagwan and Beera from the "pramukhi" elections. The incident took place at about 12 or 12.15 p.m. Om Pal, Beeram Pal Singh, Chunnu, Raju and Kusum lost their lives at the spot. Omwati was injured. Munesh Pal somehow survived. He saw the entire incident. He also received pellet injuries. Ramwati, wife of Tek Chand Sharma, also received firearm injuries which resulted in her death. The accused ran away on the truck towards Nizampur. After incident he went to his home and narrated the incident to his father Vijai Pal. Thereafter, they returned to the spot on a tractor trolley. He thereafter took all his deceased relatives and injured Omwati to Hapur to Khan Hospital where the five persons abovenamed were declared dead. Omwati was taken to Meerut. He did not care for his own injuries or for getting himself medically examined as many persons of his family had died. Satyendra Pradhan of village Anwarpur, Sadho, son of Satyendra also had a hand in this incident. Beera who used to reside with Satyendra Pradhan was also involved. There was some dispute relating to block pramukh's elections. He had told the names of all the five accused persons to his father. There were one or two other persons whom he could not identify. None else, who was known to him, arrived at the place of the incident.

12. PW 4, Satvir Singh, is a witness of conspiracy. He states that he had gone to Hapur to purchase some parts for his engine. Satyendra, Jai Bhagwan, Sadho, Jogendra, Balbir and Vijendra were sitting in the adjoining shop which belonged to a land-broker. Satyendra and Sudhir, both residents of village Giridharpur,

arrived there, and they started discussing amongst themselves that the Pakistanis had to be murdered. By the Pakistanis they meant Vijai Pal and Munesh. They had arranged for a truck for this purpose, belonging to a Sardar, who was favourable to them and who would support them. Satyendra, resident of Anwarpur, said that in a day or two the car would arrive and they would not spare any of the Pakistanis. This witness had heard this conversation about 2-3 days prior to the incident. Eight or nine days after this incident he could not contain himself and disclosed these facts to the investigating officer. After 8 or 10 days of the incident he heard Satvir accused saying that something more had to be done as Vijai Pal and Munesh had escaped. He disclosed these facts to the Investigating Officer after 5 months.

13. P.W.5 Dr. N.K. Sharma, who was a Medical Officer in the S.R.B. Hospital (Medical College), Meerut at 7.45 p.m. on 20.9.1992 examined Omwati, who was brought by her sister Raj Kumari. He found the following antemortem injuries on her person:-

1. Lacerated wound (Gun shot wound of entry) 8 cm x 8 cm x bone deep on the top of left shoulder, margins were lacerated and inverted. Blackening present. Injury was kept under observation. Advised X-Ray.
2. Lacerated wound (Gun shot wound of entry) 10 cm x 8 cm x bone deep on the back and middle 1/3 of right upper arm, margins were lacerated and inverted. Kept under observation. Advised X Ray. Blackening present.
3. Lacerated wound (Gun shot wound of entry) 10 cm x 5 cm x depth not probed in the interest of patients life. On the right side chest in mid axillary line about 7 cm below the axillary line, margins were lacerated and inverted. Kept under observation. Advised x-ray.
4. Lacerated wound 1 cm x 1 x muscle deep on the top of left shoulder upper part.
5. Abrasion 3 cm x 1 cm on the left thigh, lower part.

Omwati was conscious when she came for the medical examination in the hospital, but the doctor was unable to say whether she would have been continuously conscious after receiving the injuries. Her injury report is Ext. Ka-2.

14. P.W.6 Dr. Gyanendra Singh was the Medical Superintendent, C.H.C. Hapur. He examined Munesh at 1.45 p.m. on 27.9.1992. Munesh had been brought for medical examination by S.O. P.S. Hafizpur, Sri J.S. Adhikari. He found the following injuries on his person:-

Six crusted abrasions, each about .3 cm x .2 cm on right side back on posterior axillary line, in an area of 14 cm x 14 cm.

15. There is no supplementary-injury report on record, even though, X-ray had been advised. He admitted that injuries of Munesh could have been received two days prior to the medical examination. There was no prior to the medical

examination. There was no confirmation that the injured had received any injury by the pellets of a bullet. The injury report of Munesh is Ext. Ka-3.

16. P.W.7, Dr. Hari Kishan Agarwal, conducted the postmortem examination on the deceased Ompal at 1 p.m. on 21.9.1992 (vide Ext. Ka-6). There was a single firearm wound of injury 1.5 cm x 1.5 cm abdomen cavity deep over epigastric region. Blackening, tattooing and scorching absent from the wound of exit which was 4.7 cm x 2.5 cm over back of abdomen. The cause of death was shock and haemorrhage as a result of the ante-mortem injuries.

17. P.W.8, Dr. S.B. Girde conducted the postmortem on Kusum daughter of Vijai Pal on 21.9.1992 at 12.45 p.m. (vide Ext. Ka-7). She had the following ante-mortem injuries.

1. Gun shot wound of entry 0.5 cm x 0.5 cm on top of right shoulder, skin deep. No blackening tattooing present.

2. Gun shot wound of entry 1 x 1 cm x on top and outer aspect of right shoulder 2 cms. Away from above injury, muscle deep. One metallic piece of pellet recovered from tissue. No tattooing and blackening present.

3. Gun shot wound of entry 0.5 cm x 0.5 cm on outer aspect of right upper arm 5 cms. Below injury No. 2. The wound was skin deep. No tattooing and blackening present.

4. Gun shot wound of entry 0.25 cm x 0.25 cm on outer aspect of right upper arm, 3 cms below inj. No. 3. The wound is skin deep. No blackening and tattooing around wound present.

5. Gun shout wound of entry 2 x 2 cms on right breast 2 cms below and lateral to right nipple, muscle deep, direction downward with gun shot wound of exit 2.5 x 2.5 cms. In size muscle deep, 3 cms below the entry wound.

6. Gun shot wound of entry 3 x 2.5 cms on side of right chest, 5 cms. Away from midline and 4 cms below Inj. No. 5. The wound is abdominal cavity deep. One metallic piece of pellet recovered form liver. Liver lacerated. No blackening tattooing present; directing downwards.

7. Gun shot wound of entry 3 x 2.5 cms on left shoulder top & front x muscle deep; wound is communicating with the gun shot wound of exit 4 x 3.5 cms. In size, over top and lateral aspect of left shoulder. Direction backward.

Cause of death was shock and haemorrhage as a result of ante-mortem injuries.

18. He also conducted postmortem on Brahma Pal Singh at 1.15 p.m. on 21.9.1992. He found the following ante-mortem injuries on his person:-

Gun shot wound of entry 3 x 2.5 cms x bone deep, 3 cms above middle of left clavicle communicating with wound of exit 6 x 4 cms x muscle deep on left side chest. No blackening and tattooing seen. Direction downward.

Gun shot wound of entry with ext. through and through, size 17 x 9 cms x bone deep extending from left eyebrow to left side of chin, over left side of face. Left mandible, left maxilla, left nasal bone, left eye missing and left upper face missing.

Gun shot wound of entry 2.5 cm x 2 cms x chest cavity deep left side of chest, 7 cms. Down and inward to left nipple. Direction backward & outward. Heart lacerated, left lung lacerated. Three metallic pieces recovered from left lung.

Abrasion 2.5 x 2 cms in area over right back & base of index finger.

Cause of death was shock and haemorrhage due to ante-mortem injuries.

19. At 2.30 p.m. on 21.9.1992 he conducted postmortem on Ramwati, wife of Tek Chand Sharma. He found the following ante-mortem injuries on her person vide Ext. Ka-9:-

1. Gun shot wound of entry 2.5 x 2 cms over right back of middle of abdomen. The wound is abdominal cavity deep. No blackening and tattooing present. Direction backward.

2. Gun shot wound of exit of wound (1) 4 x 3.5 cms. Left side of abdomen. 16 cms blow left nipple Liver, stomach and omentum lacerated.

3. Lacerated wound 6 x 4 cms in area over left breast.

20. Cause of death was shock and haemorrhage due to ante-mortem injuries. He opined that all the three deceased could have died as a result of shock and haemorrhage due to ante-mortem injuries. All these injuries were due to firearms and they could have been caused at 12.15 p.m. on 20.9.1992. The injuries received by the deceased were sufficient to cause their deaths in the ordinary course.

21. P.W.9 S.I. Ram Autar Singh Yadav, deposed that on 20.9.1992 he took steps for getting the postmortem conducted on the body of Ramwati wife of Tek Chand resident of village Tamrail, P.S. Hafizpur, at 2.55 p.m. (vide Ext. Ka-10). After the inquest was done, he sealed the body and handed over the same to constables Madan Pal and Jagveer Singh for the purpose of postmortem examination. He also prepared other papers such as sample of the seal, Challan Nash, letter to C.M.O. and photo lash. The said documents are Ext. Ka-10 to Ka- 14.

22. P.W. 10 S.I. Veerpal Singh obtained a police remand on 12.6.93 of the appellants Sudhir and Satyendra, who were in custody for recovering the weapons said to have been used in the earlier incident in case crime No. 65 of 1992 under Sections 147, 148, 149, 307 and 302 IPC and the present case crime No. 121 of 1992 under Sections 147, 148, 149, 307 and 302 IPC. On the pointing out of the appellant Satyendra near the culvert of a canal from his sugarcane field he got recovered the rifle and cartridge, which was alleged to have been used in the earlier murder of Sensar Pal (Crime No. 65 of 1992). After that this appellant got a 315 bore rifle, which was wrapped in a wax paper and was buried

one feet under this field, in its South Western Corner, and got it discovered after digging it out from the field. The appellant was also thereafter implicated under Sections 25 of Arms Act.

23. P.W.11 Jodh Singh is the Investigating Officer of this case. The F.I.R. was lodged in his absence on the report of Vijai Pal Singh by Constable Pradeep Kumar. Constable Pradeep Kumar also made entries in the G.D. at 1.40 p.m. on 20.9.1992 in respect of the report. Constable Pradeep Kumar's entries have been proved by P.W.11 Jodh Singh. After interrogation of Jai Bhagwan, respondent accused in the Government Appeal, P.W. 11 Jodh Singh obtained his remand on 18.10.92 and got a countrymade pistol and empty cartridges which he claimed to have used in this incident, recovered from a stack of grain in the house. On 20.12.1992 he recorded the statements of the injured Omwati and submitted the charge sheet against Jai Bhagwan, Dalbir, Beeru, Yogendra Sharma, Sudhir and Satyendra under Sections 147, 148, 149, 307, 302 and 427 IPC and against Satyendra Pradhan, Vijendra Singh, Balbir Singh and Sadho Singh u/s 120B IPC. On 9.3.1993 he submitted the charge sheet u/s 120B against Neeru @ Naresh, Raju @ Raj Kumar and Deepak. On 3.4.1993 he submitted charge-sheet against the accused Mamrej. On 6.4.1993 he submitted charge-sheet against Satvir u/s 120B IPC. After 4.6.1993 he was transferred and subsequent investigation was conducted by S.I. Veerpal Singh, who submitted the charge-sheet against the appellants Sudhir and Satyendra.

24. The defence of the appellant Sudhir was of denial and false implication. Likewise, the defence of the appellant Satyendra was also of denial. However, he claimed to have been falsely implicated for the murder of Sensar Pal along with Sudhir and his brother Om Prakash on the basis of partibandi. He denied to have absconded after the incident. He claims that serious cases were pending against P.Ws. 1, 2 and 4 about which he would give evidence. No evidence, was however, led in defence.

25. The learned Sessions Judge has dealt with this case in three parts. It would also be appropriate to deal with the present criminal appeal, death reference, government appeal and criminal revision likewise in three parts. So far as the appellants Sudhir, and Satyendra are concerned, they had been awarded death sentence and a fine of Rs. 25,000/- under Sections 302 IPC and other substantial sentences under Sections 407 and 307 IPC.

26. It was conceded by Sri G.S. Chaturvedi, learned Senior Counsel that place any time of death could not be challenged in this case. However, he seriously challenged the presence of the witness Mukesh P.W.3. So far as the other injured witness Omwati was concerned, it was contended by the- learned Counsel that she would not have been in a position to identify the two appellants.

27. The reasons for questioning the presence of Munesh was that although Munesh is said to have received firearm injuries, yet at the time of incident when he is said to be travelling at 12,15 p.m. on 20.9.1992, yet in the F.I.R. there is

no mention that Munesh has received any injury. Furthermore, Munesh's injuries were medically examined on 27.9.1992 and the opinion of the Doctor; P.W.6, Dr. Gyanendra Singh was that the injuries were by blunt; weapon injuries and no X-ray was done, and if Munesh was present at the spot, he would have been grievously injured and would not have escaped with such light, injuries. It is true that Munesh was medically examine belatedly on 27.9.1992. However Munesh has deposed in this evidence that he was so upset with all the murders that had been committed of his family members, that he even neglected to get his own comparatively minor injuries examined immediately after the incident; Admittedly Munesh has been taken by the S.O., P.S. Hafizpur. Sri J.S. Adhikari for his medical examination on 27.9.92, and there was no need for the S.O. multiply the injured, as Stint. Omwati, a grievously injured person was definitely present in the car, who was there to give evidence for the prosecution. It was not impossible that Munesh, who was sitting on the side away from the driver may have dated out of the car and run for his life through fields, and received only some stray pellets. One factor which seems to indicate the presence of Munesh in the car, was that after Munesh came out and ran to save his life, he was fired upon, as per his case, and indeed one outsider, Smt. Ramwati who had no concern with the other deceased and injured of this case, was caught in the fire. There was no likelihood otherwise of Smt. Ramwati who was not travelling in the car, meeting her end, in the firing that was directed at the Maruti car. Smt. Ramwati would only nave been injured in the firing in the circumstances that Munesh, who was earlier sitting in the car, rushed out of it and was fired upon when he was escaping from the car and Smt. Ramwati, who was a bystander and who unfortunately intercepted the firing, received the firearm injuries resulting in her death. This is also a circumstance corroborating the version of Munesh that he was sitting in the car when he received some pellet injuries and saved himself by rushing out of the car and hiding in a nearby field and as Smt. Ramwati came in the way of the firing on him, which also saved his life.

28. However, even without taking into account the testimony of Munesh, we think that the conviction of the appellants Sudhir and Satyendra could be recorded on the basis of the testimony of the injured witness P.W.2 Smt. Omwati, as she was certainly present in the vehicle and had received grievous injuries. The incident had taken place in broad-day light. The motive of this incident also stood proved against the appellants, who were absconders and involved in the earlier murder of the son of the informant Vijaipal, namely, Sensar Pal, which took place hardly three months prior to this incident on 19.6.1992. Smt. Omwati has categorically named these two appellants Sudhir and Satyendra as the persons who fired at her from the Dala of the truck and claimed that she could not know the names of the remaining two or three persons, who were present at the time of firing. Sri Gopal Chaturvedi, however, contends that as Smt. Owmati was sitting on the back seat and she was a pardanashin lady, hence she could not have been in a position to identify the appellants and, in any case, she would have ducked for cover when such indiscriminate firing was resorted to. In this

connection, it may be mentioned that Smt. Omwati has been extremely cautious and circumspect in giving her testimony and apart from the two appellants i.e. Sudhir and Satyendra, she candidly said that she did not know the other two-three persons who were firing from the truck.

29. It was also urged by Sri Chaturvedi that Smt. Omwati's testimony should not be relied upon, as her statement u/s 161 was recorded by the I.O. P.W.11 three months after the incident on 20.12.1992. There is no satisfactory explanation for this delay. In this connection, it may be pointed out that if the Investigating Officer commits a default in recording the statement of a witness, the prosecution case cannot be thrown over board on this score. Moreover, no question has been put to the Investigating Officer, nor his explanation has been sought as to why this delay occurred in examining Smt. Omwati u/s 161 Cr. P. C. furthermore, Smt. Omwati has stated that she had gone to Begamabad after she was treated in the Medical College in Meerut and she did not go to her Sasural in village Giridharpur, where the incident took place. She stayed in Begamabad for there months before returning to her Sasural in Giridharpur. Also, as these two Appellants belonged to her village and were well known to her, hence the learned Sessions Judge was correct in recording a finding that she would have no difficulty in recognizing these two appellants and recording a conviction- of the appellants Sudhir and Satyendra as above. We have no reason to differ from this conclusion arrived at by the learned Sessions Judge and we can safely conclude that even if the testimony of Munesh Pal is not given undue weight, the prompt report nominates Sudhir and Satyendra. In these circumstances, in view of the unassailable testimony of the injured eyewitness Smt. Omwati, we have no option but to affirm the conviction of the appellants Sudhir and Satyendra. However, one question which needs serious consideration is whether the sentence of death and the fine of Rs. 25,000/- awarded to the appellants Sudhir and Satyendra deserves to be maintained in the facts and circumstances of the case. 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 cases and that too after advancing special reasons for making a 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 the rarest of rare cases when the alternative option of lesser sentence is unquestionably foreclosed.

30. 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 cannot be said that imposition of lesser sentence of life term is altogether foreclosed.

31. In this regard it may be noted, that there is no specification in the F.I.R. or in the evidence as to who caused the fatal injuries to the deceased and there is only an omnibus role of firing assigned to the appellants and other assailants.

32. Another (sic) for not awarding the death penalty is that the incident took place almost 13 years ago on 20.9.1992 and the appellants Satyendra was studying in High School at the time of incident. In this view of the matter, whilst the sentence of death awarded to the appellants u/s 302 IPC is substituted with a sentence of imprisonment for life. However, the fine of Rs. 25,000/- u/s 302 IPC is maintained. The other sentence awarded to the appellants Satyendra and Sudhir under the other provisions for which they have been convicted are maintained. The sentences are to run concurrently.

33. Coming to the second part of the case, namely, the case of the respondents Jai Bhagwan, Yogendra Sharma and Balbir alias Veeru. It was contended by Sri R.K. Singh, learned AGA, that so far as these three accused persons were concerned, Munesh Pal should be believed as he had named these persons in his examination-in-chief and if his testimony has shown some variations it is in view of the complex nature of the incident where it is not possible for a witness to come forward with a straight, accurate and unchanging account. These persons have only been nominated by Munesh Pal. We do not think it would be safe to set aside the order of acquittal of these accused persons passed by the learned Sessions Judge on the basis of the testimony of Munesh Pal, because if these three persons were indeed present and their names had been disclosed to his father, the informant P.W.1 Vijaipal, as Munesh claims to have done in his examination-in-chief, which version is also supported in the examination-in-chief of his father Vijaipal, P.W.1, there was no earthly reason why the names of these three respondents and Jai Bhagwan, Yogendra Sharma and Balbir alias Veeru would not have found place in the F.I.R. Even there was no explanation in the 161 Cr.P.C. statements that the names of Yogendra, Jai Bhagwan and Veeru were not disclosed by Munesh to his father Vijaipal when the F.I.R. was lodged. However, it was further pointed out that Vijaipal in his statement-in-chief, which was recorded in 1995, had stated that apart from Sudhir and Satendra, Munesh Pal had not disclosed the name of any other accused. The learned Sessions Judge also rightly points out that so far as Omwati P.W.2, who is the star witness, was concerned, she clearly says that she only knew the names of Satyendra and Sudhir as the persons, who fired and they belonged to her village, but she did not know the names of other three or four persons, who resorted to firing. In S.T. No. 318 of 1999: State v. Balbira alias Beera, P.W.2 Smt. Omwati had nominated Sardar Beera also along with Sudhir and Satyendra and four or five persons who were present were firing. This statement was recorded on 5.7.2001. However, in the examination in chief in the present case on 5.8.1996, she had only named Sudhir and Satyendra and in cross examination she had specifically admitted that she had not named any Sardar driver as one of the persons, who resorted to the firing at the time of incident. Also, as Smt. Omwati claims not to recognize any other persons other than Sudhir and Satyendra, hence not putting

these accused persons for test identification before her was another reason given by the learned Sessions Judge for holding that there was no adequate material for recording the conviction of these respondents, Yogendra, Jai Bhagwan and Beera. Also, Omwati did not recognize Yogendra Sharma and Jai Bhagwan even in court when her examination-in-chief was recorded in 1996. So far as Dalbira alias Beera was concerned, although in her examination-in-chief she had stated that Dalbira belonged to her village, but in her cross-examination, she admitted that Dalbira alias Beera did not belong to her village and she did not know Dalbira alias Beera from before. In this view of the matter, the learned Sessions Judge was perfectly justified in acquitting the respondents Jai Bhagwan, Dalbira alias Beera and Yogendra and there is no ground whatsoever to interfere with the order acquitting these persons.

34. So far as the third part i.e. the part relating to the remaining respondents in Government Appeal No. 118 of 2003 and in Criminal Revision No. 140 of 2003, namely Satvir, Deepak alias Pradeep, Mamrej Singh, Sudhir Singh, Naresh Kumar alias Neeru and Raju alias Raj Kumar are concerned no serious attempt was made by the learned AGA to challenge the order of the learned Sessions Judge acquitting these persons. We also find no error in the finding of the learned Sessions Judge for acquitting these respondents. Learned Sessions Judge in this connection has rightly observed that P.W.1 in his cross examination has admitted in paragraph 12 that Satvir, Nain Singh, Chacheru and Jagbir told him about the names of the conspirators, who were, Mamrej, Raju alias Raj Kumar, Sadho Singh, Satendra Pradhan, and Vijendra. However, none of these witnesses have admittedly been examined in this case, but only Satvir son of Hansh Raj, who was 86 years in age, was produced and P. W. 1 Vijai Pal had clearly stated that apart from Jagbir he even did not know the parentage of any of these witnesses, Satvir, Nain Singh or Chacheru. Hence, there was complete lack of evidence for showing the complicity of these respondents in this case. Even, the learned Sessions Judge had rightly discarded the testimony of P.W.4 Satvir Singh who stated in his examination-in-chief that he had gone to Hapur to purchase some parts for his engine. Adjoining which shop there was a shop of a land-broker where Satyendra, Jai Bhagwan, Sadho Singh, Yogendra, Balbir and Vijendra were sitting and where Satyendra and Sudhir residents of village Giridharpur arrived and who stated that they had to exterminate the Pakistanis by which they meant Vijai Pal and Munesh. However, he admitted that his village was forty miles away from Giridharpur and four to five miles from Hapur. He does not even remember the name of the person who was selling engine parts in village Anwarpur, which was forty-five miles from his village and at the time of his examination he could not even identify as to who were the persons who were engaged in the conspiracy as his eyesight had deteriorated to that extent. Therefore, the learned Sessions Judge has rightly recorded a finding that in view of these circumstances, and the delayed disclosure about the incident to the investigating officer by this witness, P.W.4 Satvir cannot be relied upon for recording the conviction of these respondents. There is also no support to the testimony of this

witness from P.W.1 Vijai Pal, who does not name these accused persons in the F.I.R. In this view of the matter we affirm the order of acquittal, and there is no reliable evidence for recording the conviction of respondents Mamrej, Satyendra, Balbir, Raju alias Raj Kumar, Sadho Singh, Vijendra, Deepak, Naresh alias Neeru and Satvir with the aid of Section 120B IPC in this case.

35. In view of the aforesaid, Criminal Appeal No. 28 of 2003 preferred by appellants Sudhir and Satyendra and their separate Jail Appeal Nos. 1946 and 1947, both of 2005, respectively, are dismissed, subject to the modification that their sentence of death is substituted by a sentence of imprisonment for life u/s 302 IPC, whilst the fine of Rs. 25,000/- awarded by the learned Sessions Judge u/s 302 IPC is maintained and the convictions and sentences awarded to these two appellants under the other provisions by the learned Sessions Judge are also affirmed.

36. Government Appeal No. 118 of 2003 and Criminal Revision No. 140 of 2003 are also dismissed. The Reference No. 19 for confirming the death sentence awarded to the appellants Sudhir and Satyendra is also rejected.