

(2005) 04 AHC CK 0167

In the Allahabad High Court

Case No : Government Appeal No. 1270 of 1981

The State of U.P.

APPELLANT

Vs

Sarvjeet Gupta and Others

RESPONDENT

Date of Decision : 04-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 117, 133
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2005) 04 AHC CK 0167

Hon'ble Judges : M.C. Jain, J;M. Chaudhary, J

Bench : Division Bench

Advocate : H.S.N. Tripathi and K.P. Shukla, A.G.A, for the Appellant; K.N. Sahai, G.S. Chaturvedi, R.B. Sahai, Amrish Sahai, R.L. Sinha and N.P. Singh, for the Respondent

Final Decision : Partly Allowed

Judgement

M.C. Jain, J.—The State has come up in appeal against the judgment and order of acquittal dated 21.2.1981 passed by Sri B.P. Srivastava, the then III Additional Sessions Judge, Deoria in Sessions Trial No. 347 of 1978 under Sections 147, 148, 307 read with Section 149 I.P.C., 436 read with Section 149 I.P.C. and 302 read with Section 149 I.P.C. Nine accused respondents, namely, (1) Sarvjeet (2) Om Prakash (3) Jagdish (4) Ram Narain (5) Raj Kishore (6) Durga Prasad (7) Indrajeet (8) Awadh Narain and (9) Raj Banshi Tiwari were tried in the said trial. All of them were charged under Sections 307 read with Section 149, 436 read with Section 149 and 302 read with Section 149 I.P.C. Indra Jeet, Awadh Narain and Raj Banshi Tiwari were charged for rioting u/s 147 I.P.C. whereas the rest u/s 148 I.P.C. The incident occurred on 7.7.1978 at about 7.30 P.M. at three places within Police Station Kotwali, District Deoria. The F.I.R. was lodged the same night at 8.20 P.M. by Brij Raj Tiwari PW 1. One Guru Prasad Tiwari was murdered in the incident whereas Subhash PW 2, Devi Prasad Pandey PW 5 and Virendra Kumar sustained injuries.

2. The case of the prosecution as unfolded during trial through F.I.R. and the evidence may be related thus. Brij Raj Tiwari PW 1 resided in village Deoria Ram Nath, Police Station Kotwali, District Deoria. The accused respondents were also the residents of the same place. Sarvajeet, Indrajeet and Jagdish accused were real brothers. Om Prakash was the nephew of Sarvjeet and others. Durga Prasad was the son of accused Awadh Narain. The accused Rajbanshi Tiwari and Raj Kishore were Pattidars of accused Awadh Narain and the accused Rani Narain belonged to the group of the remaining accused. Enmity on account of litigation was going on between the family of the informant Brij Raj Tiwari PW 1 on the one hand and the accused Sarvjeet and Raj Kishore on the other. Earlier to the present incident, on the eve of Holi some had inflicted a knife blow on the accused Sarvjeet in which Subhash Tiwari PW 2 (brother of the informant) was implicated as accused. Sometime thereafter, Hari Ram -first cousin of accused Durga was also inflicted knife blow by someone in which the informant, his father Guru Prasad (deceased of the present incident), Mahasarey, Subhash Tiwari PW 2 and Jai, Shankar were implicated as accused. Proceedings under Sections 107/117 Cr.P.C. had also been drawn between the informant and others on one side and the accused Durga and Hari Ram on the other.

3. In front of the door of the house of the informant, there was a flour mill adjacent to which on the northern side the house of the accused Durga Prasad and Hari Ram was situated and on the eastern side thereof the house of the accused Sarvjeet was situated at a distance of about 10 paces from the flour mill. During the thrashing season, dust and sound came to be produced by the flour mill to the disliking of the accused. The accused Sarvjeet, Durga Prasad and Hari Ram had applied for electric disconnection of the informant before the Electricity Department prior to the present incident in which the accused Raj Kishore was cited as a witness. A case u/s 133 Cr.P.C. was instituted against the informant by the police which came to be decided in favour of the informant. So, there was a long string of enmity between the two sides. 4

4. The present incident occurred in three parts. At about 7.30 P.M. on 7th July 1978, Subhash--younger brother of the informant was sitting at his grocer's shop on the crossing in front of the house of Sri Vishwa Nath Pandey, Vakil. All the accused respondents with 2 or 3 other companions reached there. Sarvjeet and Om Prakash had bombs in their hands; Jagdish had a gun; Ram Narain had country made pistol; Raj Kishore had a spear; Durga Prasad had a Pharsa and the remaining accused had lathis. As soon as they reached the shop of Subhash, accused Sarvjeet and Om Prakash attacked Subhash by means of bombs, Ram Narain by means of country made pistol and Jagdish by means of gun. Subhash ran for his life and anyhow saved himself but was hurt in his leg in this process. This occurrence was witnessed by Jagdish Mani, Chandbali Pasi, Brijesh Tiwari and others.

5. The second part of the incident was that the accused came running to the grocer's shop of the informant at Bhatwalia Crossing in search of Subhash and

not finding him there, threw bombs and also fired. The accused Indrajeet set fire to the shop of the informant which was reduced to ashes. Mahasarey--brother of the informant, Devi Prasad Pandey, Surendra Prasad, Rajesh Singh and others witnessed this incident.

6. Then the accused came running to the door of the house of the informant where Guru Prasad (deceased)--father of the informant was present. They inquired from him about Subhash, saying that he would not be left alive that day. Guru Prasad wanted to know as to what the matter was. But the accused Sarvjeet instigated the remaining accused saying that if Subhash was not available, he (Guru Prasad) be killed. Instantaneously, Sarvjeet attacked Guru Prasad Tiwari throwing a bomb and Ram Narain by means of the country made pistol. Guru Prasad died on the spot. The incident was witnessed by the informant, Ram Darash Tiwari, Bhagirath Yadav, Nand Kishore, Hari Prasad and Munni--sister of the informant. The accused persons (hen ran away. At the time of the incident, electric light was available at the door of the informant. This was the third part of the incident.

7. Leaving the dead body of the his father at the door, the informant went to the Police Station and lodged the F.I.R. resulting in registering of the case. Investigation was taken up by Tota Ram Gupta PW 13. It may also be related here that the injuries of Subhash Tiwari PW 2, Virendra and Devi Pandey PW 5, were examined on 7.7.1978 at 10.45 P.M., 10.55 P.M. and 11.05 P.M. respectively by Dr. J.N. Thakur PW 8. The details of their injuries are as follows:

Subhash

1. Multiple abrasions in an area of 4" x 4", right thigh, lower 3rd outer part. No tattooing or blackening present.

The injury was simple and caused by friction. It was fresh.

Virendra Prasad

1. Lacerated wound 1/6" x 1/8" x skin deep oval in shape, left side forehead, bleeding present.

The injury was simple, caused by blunt object and about six hours old.

Devi Prasad Pandey

1. Abrasion 3 1/2" x 2" with oozing of blood on left knee.

The injury was simple, caused by friction and was fresh.

8. Post mortem over the dead body of Guru Prasad was conducted on 8.7.1978 at 2 P.M. by Dr. Dr. J.N.L. Srivastava PW 7. The deceased was aged about 65 years and 3/4 day had passed since he died. The following ante mortem injuries were found on his person:

1. Badly lacerated wound (caused by blast injury) in an area of 25 cm x 12 cm

over the back of the head and neck. Comminuted fractures of the whole of the skull. Occipital, parietal and bones of base of skull converted into small bits. Brain and membranes badly lacerated and torn into bits. Half of the brain missing along with bones and membranes.

2. Gunshot wounds: 6 (Six) in number situated in an area of 8 cm x 8 cm. Each measuring 1 cm x 1 cm situated over the left side of chest, 12 cm below left nipple and 10 cm above umbilicus at 2"O Clock position. Blackening and tattooing present.

Margins inverted and ragged. Wound directed towards mid axillary line.

3. Contusion--10 cm x 8 cm over the mid axillary line on the left side of chest in the middle. 6 big shots recovered from the wound. The wound No. 2 connected to No. 3.

9. Six metallic pellets and two waddings were recovered from the wound.

10. The cause of death was coma as a result of ante mortem head injury.

11. The defence was of denial.

12. The prosecution in all examined 13 witnesses. PW 1 to PW 6 were examined as eyewitnesses. Subhash Tiwari PW 2 is the eyewitness of the first part of the incident, Mahasrey Tiwari PW 3 and Devi Prasad Pandey PW 5 are the eyewitnesses of the second part of the incident and the remaining three, namely, Brij Raj Tiwari PW 1, Km. Munni PW 4 and Nand Kishore PW 6 are the eyewitnesses of the third part of the incident. The evidence adduced by the prosecution did not commend itself to the trial Judge who recorded acquittal which is under challenge from the side of the State.

13. We have heard Sri K.P. Shukla, learned A.G.A. and Sri G.S. Chaturvedi learned counsel from the side of the accused respondents.

14. We should point out before proceeding further that the accused respondents Sarvjeet, Om Prakash, Raj Kishore and Awadh Narain died during the pendency of the present appeal and the same abated respecting them under order dated 11.12.2003. It has to be decided on merits in respect of the remaining accused respondents.

15. The learned A.G.A. has urged that discarding the trustworthy evidence and finding fault therewith without any basis, the trial Judge has erred in recording acquittal. On the other hand, learned counsel for the accused respondents has tried to justify the impugned judgment.

16. We have carefully gone through the evidence on record as also the reasoning adopted by the trial Judge in the impugned judgment. It has to be kept in mind that the incident took place in three parts as we have related earlier. Admittedly, there was a long drawn enmity between the prosecution side and the accused respondents and they allegedly formed a well knit clique. Sarvjeet, Indrajeet,

Jagdish and Om Prakash were closely related; Durga Prasad was the son of accused Awadh Narain; Rajbanshi Tiwari and Raj Kishore were allegedly the Pattidars of accused Awadh Narain and accused Ram Narain allegedly belonged to the faction of the remaining accused. We should remind ourselves that when two parties are at daggers drawn and there have been various incidents between them, it is not possible to reach any conclusion on the basis of enmity. In the case of persons seized of anger due to various incidents and litigations, the state of their mind becomes unpredictable. We note that essential proof is wanting as to the first two parts of the incident and participants thereof. In the first part of the incident, Subhash Tiwari PW 2 was allegedly targeted by the accused respondents at his grocer's shop on the crossing in front of the house of Sri Vishwanath Pandey Vakil. This incident was allegedly witnessed by Jagdish Mani, Chandbali Pasi, Brijesh Tiwari and others. However, only Subhash Tiwari PW 2 was examined with regard to this part of the incident. None of the other witnesses who allegedly saw this incident was examined by the prosecution. He claimed that he had been hurt by the bomb blast. Bombs had allegedly been hurled by Sarvjee and Om Prakash when he (this witness) was at his shop. His injury report shows that he sustained multiple abrasions in an area of 4" x 4" over right thigh lower third outer part. Dr. J.N. Thakur PW 8 who medically examined him, stated that the said injury had been caused by friction. To a pointed question as to whether his injury could be caused by a bomb blast, he gave reply in the negative. True, he sustained the above injury, but it was caused by friction and not by bomb blast. So, the point is that the manner of happening of the first part of the incident as spoken of by him does not find support from his medical examination report either.

17. So far as the second part of the incident is concerned, it allegedly happened at Bhatwalia Crossing at the shop of the informant and Mahasrey Tiwari PW 3 (brother of informant and Subhash and son of the Guru Prasad Tiwari). It was allegedly witnessed by Mahasrey Tiwari PW 3, Devi Pandey PW 5, Surendra Pratap Singh, Rajendra Singh and others. With regard to this part of the incident, Mahasrey Tiwari PW 3 and Devi Pandey PW 5 have been examined. Mahasrey Tiwari PW 3 is not an injured. When the second part of the incident occurred, Mahasrey was allegedly chewing betel at the betel shop adjacent to his own shop where Devi Pandey PW 5 was also allegedly present. Sarvjeet and Om Prakash accused had allegedly thrown bombs and Indrajeet had set fire to the shop with a match stick after pouring kerosene. Jagdish and Ram Narain had allegedly opened shots on his shop. None was present at the shop at that time. Devi Prasad Pandey PW 5 tried to support this part of the incident claiming himself to be present at the betel shop and conversing with his friends. But it is difficult to place reliance on his testimony on holistic consideration of his deposition. As per his injury report, an abrasion 3 1/2" x 2" with oozing of blood on left knee was found on his person which was simple in nature and had been caused by friction. He did not actually sustain this injury in this incident because his version is that he had taken to his heels from the spot and out of fear had

fallen down whereby he sustained the injury. It also came down from his cross-examination that he was resident of Basti and was allegedly residing in Deoria in connection with pursuing his studies in B.R.D. Degree College. At the time of the incident, he was allegedly talking with his friends but he could not name any of them. It is wholly doubtful that despite being unable to name the friends with whom he was allegedly talking at the relevant time, he could name the accused persons who were as many as nine accompanied by 2-3 others. Seemingly, he did not have the occasion of any interaction with them earlier to the incident. On careful consideration we are of the opinion that on the basis of the testimony of Mahasrey Tiwari PW 3 and Devi Prasad Pandey PW 5, the second part of the incident could not be deemed to be proved according to legal standard.

18. We are, however, of the firm opinion that "the trial Judge disbelieved the third part of the incident (in which Guru Prasad Tiwari was murdered) on specious grounds and threw away the entire prosecution case over board, faulting each and every aspect of the prosecution evidence. He doubted the genuineness of the F.I.R. lodged by Brij Raj Tiwari PW 1, turning it to be too prompt. The incident took place on 7.7.1978 at about 7.30 P.M. and the F.I.R. was lodged at 8.20 P.M. The distance of the Police Station was only 1 1/2 Km. The informant Brij Raj Tiwari PW 1 explained that after the accused respondents had run away accomplishing the third part of the incident, his brothers Subhash and Mahasrey had also reached and had told him about the first two parts of the incident, related to earlier. He then sat down with these two brothers and wrote down the F.I.R. Ex. Ka-2 which was lodged at the Police Station. We do not think that the trial Judge had any justification to criticize the F.I.R. as being too prompt. It was lodged within reasonable time after the incident. We are afraid if an F.I.R. lodged at proper time is to be carped at as too prompt and the delayed one on the ground of delay, there would hardly be any F.I.R. which could be deemed to have been lodged within reasonable time of the incident. Such a biased approach would be a device to hit the prosecution case right from the threshold. The trial Judge also held the F.I.R. to be the outcome of deliberations and concoction because it contained full particulars of the first two parts of the incident also including the names of the witnesses of those two parts giving an impression that the informant himself had seen the first two parts as well. The F.I.R. having been lodged by the informant on getting information of the first two parts of the incident also from his brothers Subhash and Mahasrey there was nothing wrong if full particulars of those two parts of the incident including the names of the witnesses came to be narrated by him in the F.I.R. Rather by giving the details of earlier parts of the incident in the F.I.R., it appeared to be a genuine document having ring of spontaneity. Therefore, there was no justification whatsoever in importing cloud on third part of the incident, involving the murder of Guru Prasad and throwing away the entire prosecution case.

19. On carefully examining the evidence on record, we find that the third part of the incident and the actual and overt participation therein of the accused respondents Sarvjeet (now dead) and Ram Narain was proved to the hilt beyond

any shadow of doubt. The witnesses of this third part of the incident were the informant Brij Raj Tiwari PW 1, Km. Munni PW 4--daughter of Guru Prasad and Nand Kishore PW 6. They were natural witnesses of the incident. No doubt, Brij Raj Tiwari PW 1 and Km. Munni PW 4 were the son and daughter respectively of the deceased Guru Prasad Tiwari but their mere relationship or interestedness was not sufficient to discard their testimony as their presence on the spot was beyond doubt. The incident took place at about 7.30 P.M. Brij Raj Tiwari PW 1 had just returned from the market and reached the Osara of his house. It being the time of about 7.30 P.M., it was believable that he had returned from the market, lie was putting off his clothes and was handing over the same to his sister Km. Munni PW 4 when the accused respondents reached there. It has specifically been stated by all these three eyewitnesses that it was Sarvjeet who had thrown a bomb on Guru Prasad and Ram Narain who had fired shot from his countrymade pistol on him (Guru Prasad) hitting him thereby. Guru Prasad was sitting at his door at that time. As stated by Km. Munni PW 4, she was inside the house and had come out in the Osara on the call of his brother to take away his clothes. Nand Kishore PW 6, too, is named as an eyewitness of the third part of the incident in the P.I.R. He was the neighbour of Guru Prasad and had reached the spot on hearing commotion emanating therefrom. He, too, was categorical that Sarvjeet had thrown bomb on Guru Prasad and Ram Narain had opened shot on him. He was subjected to searching cross-examination but the defence could not show any animus on his part which could have tempted him to depose falsely against them. Rather, the truth of the matter was that after the death of the lather of this witness, Guru Prasad had got transferred all the land left by his father in his name from his mother (this witness's mother). Therefore, he would have been the last person to depose in favour of the prosecution because Guru Prasad had denuded his mother of her entire property after the death of her husband (father of this witness). It was specifically stated by this witness that the house of Guru Prasad, i.e., spot was at a distance of only 100 yards from the house in which he (this witness) used to live. The testimony of this witness definitely has the ring of truth and his deposition as to the part played by Sarvjeet and Ram Narain in the commission of the crime could not at all be doubted. There was no justification whatsoever for the trial Judge to be proceeding with a negative and imaginary approach, doubting every piece of the evidence of the prosecution.

20. For no good reason, the trial Judge doubted the presence of light at the spot where the third part of the incident of the murder of Guru Prasad took place. It was stated in the F.I.R. itself that a bulb was glowing outside the house of the informant. It was the month of July and the time was about 7.30 P.M. The accused respondents Sarvjeet and Ram Narain about whose actual and positive role the three witnesses spoke, were known to them from before and there could be no question of any mistaken identity. The Investigating Officer had even inspected the bulb and had found it in working order. After inspection, it was given in the custody of the informant through Phard Ex. Ka-3. The place where

the bulb was glowing was shown in the site plan by letter "F". Ignoring all this, the trial Judge disbelieved the source of light at the spot of the third part of the incident on the ground that the bulb was not produced at the trial. In view of the overwhelming evidence on the point of light on the spot through the bulb glowing at point "F" shown in the site plan by the Investigating Officer, it hardly affected the prosecution case that the bulb was not produced by the prosecution at the trial. Seemingly, the trial Judge was out to make a mountain of a mole to hit and disbelieve the prosecution case.

21. We do not agree with the trial Judge that the time of the incident was rendered doubtful because of the stomach contents of the deceased. It should be recapitulated that as per the post mortem report of the deceased about 400 gms half digested food had been found in the stomach of the deceased. The trial Judge commented that it suggested that the deceased must have taken meals 2-2 1/2 hours prior to his death. He reasoned that if the occurrence had taken place at 7.30 P.M., the deceased must have dined at about 5.30 P.M. which was nobody's case. Km. Munni PW 4 had stated that Guru Prasad was in the habit of dining only once a day and that, too, at about 3.30 P.M. every day. In that eventuality, the trial Judge observed, he would have died at about 5 or 5.30 P.M. According to him, 3 or 3.30 P.M. was hardly a time to take meals. We should point out that the deceased was aged about 65 years (an old man). There was nothing unusual that he, at this age, was in the habit of taking meals only once a day at about 3-3.30 P.M. Moreover, the stomach contents cannot be determinative of the time of death. The Supreme Court has held in the case of *Ram Bali v. State of U.P.* IXL 2004 ACC 453 that medical science is not so perfect so as to tell the precise time of the death of the deceased in a computerised mathematical manner on the basis of the contents of stomach found at the time of the post mortem. In the said case reference was made of earlier decisions too, i.e. *Pattipati Venkaiah Vs. State of Andhra Pradesh*, and *Nihal Singh and Others Vs. State of Punjab*, The gist is that the state of contents of stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation. Further, the process of digestion is not uniform and varies from individual to individual as also the health of a person at a particular time and so many other varying factors. Therefore, the trial court was not justified in doubting the time of incident on the basis of stomach contents of the deceased.

22. For the discussion made hereinabove, we "also overrule the finding of the trial Judge that there was conflict between the ocular testimony and medical evidence concerning the death of Guru Prasad. The consistent testimony of the three eyewitnesses of the third part of the incident relating to the murder of Guru Prasad was that the accused Sarvjeet had thrown a bomb on him and Ram Narain had fired on him. the trial Judge wrongly held that the ante mortem injury No. 1 of the deceased was not caused by a bomb. Instead, it was caused by gunshot. He tried to support this finding by the fact that the skin around ante mortem injury No. 1 showed blackening and tattooing which could not be

possible in case it was caused by bomb and further that two wadding pieces were also recovered by the Doctor from the lacerated brain tissues. According to his finding, waddings are not used in bomb at all. We are of definite opinion that the ante mortem injury No. 1 was of bomb blast. Even half of the brain was missing along with bones and membranes. Blackening and tattooing around the skin did not mean that it was not a blast injury. Nor did the recovery of two wadding pieces from the lacerated brain tissues negate it to be a bomb blast injury. Dr. J.N.L. Srivastava PW 7 who had conducted post mortem over the dead body of the deceased, definitely opined that the ante mortem injury No. 1 was of bomb blast. However, under the stress of cross-examination, he stated that he had not taken the opinion of Ballistic Expert and could not definitely say whether ante mortem injury No. 1 was caused by bomb blast or gunshot. He, however, insisted that greater possibility was of its being bomb blast injury. We are of the view that ante mortem injury No. 1 of Guru Prasad was of bomb blast. We should point out that explosive means gun powder or any other substance whether a single chemical compound or a mixture of substances. It may be solid or liquid or gaseous used or manufactured with a view to produce a practical effect by explosion. It includes fireworks, fuses, rockets, percussion caps, detonators, cartridges and ammunition of all descriptions. In bombs used by criminals, the device is usually home made. As a direct effect of hot expanding gases, the body may suffer burn due to Hash burn from the primary explosion of the bomb. The metallic or sometimes wooden or plastic fragments can penetrate deeply through the skin and cause a "peppering" effect around the skin. Therefore, the presence of blackening and tattooing around the skin in ante mortem injury No. 1 of the deceased did not mean that it was a gunshot injury. It is not possible to know the exact composition of the bomb thrown by Sarvjeet on Guru Prasad and it could contain waddings. Far from being in conflict, the medical evidence and ocular testimony were in complete harmony. The deceased Guru Prasad sustained two fatal injuries on his person, one by bomb blast and the other of gunshot. Bomb had been thrown on him by the accused respondent Sarvjeet and the shot had been fired by Ram Narain. There was nothing to disbelieve the categorical and emphatic testimony of three eyewitnesses in this behalf, the same being in complete conformity of the medical evidence too.

23. The learned counsel for the accused respondents argued that the incident occurred in continuation in three parts and if two of them were disbelieved, the entire prosecution case was liable to be rejected and no conviction could be based on the proof of a part of the incident. It is not possible to uphold this argument. Quite often, there is a tendency of falsely roping in innocent persons. It; doing so, the story is improved and modified to achieve the purpose. Exaggeration of the part played by the other side in the course of the incident is also quite common. Therefore, the court has to be circumspect in the appreciation of the evidence to guard against conviction of innocent persons and against wrongful acquittal of the guilty. The principle *falsus in uno falsus in omnibus* is not applicable in India. In each case, the court has to appreciate-the

evidence to see as to what extent it is worthy of credence and merely because in one respect the court considers it insufficient to rely on the testimony of a witness, it does not necessarily follow as a matter of law that it must be discarded in all respects. The experience shows that there is a tendency on the part of the witnesses to exaggerate the guilt of the opposite party and then the imperfection of human memory and of observation also shows that the broad rule that the witnesses who have been disbelieved in respect of the acts imputed to some accused cannot be relied upon for convicting the other accused cannot be laid down as a sufficient guide for all the cases. The court has to sift the evidence with care in each case and on full consideration of all relevant material circumstances to come to a decision, which part of the testimony of the witnesses is to be accepted and which is to be rejected. In other words, the witnesses cannot be branded as liars in toto and their testimony rejected outright even if parts of their statements are demonstrably incorrect or doubtful. The court has to separate the grain of acceptable truth from the chaff of exaggeration and improbabilities, which cannot be safely or prudently accepted and acted upon. The dictum "falsus in uno falsus in omnibus" is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments.

24. To say the least, the judgment rendered by the trial Judge is perverse. It appears as if he was fumbling for excuses to throw away the prosecution case and to record acquittal come what way.

25. On threadbare scrutiny of the evidence, the participation of the accused respondents Sarvjeet and Ram Narain with their specific role is proved to the hilt by the testimony of three eyewitnesses, namely, Brij Raj Tiwari PW I, Km. Munni PW 4 and Nand Kishore PW 6 coupled with medical evidence and other speaking circumstances on record. With regard to the remaining accused, the possibility of false implication of some of them cannot be ruled out. Chaff and grain are inexplicably mixed so far as the remaining accused respondents are concerned. Therefore, the benefit of doubt should be afforded to them.

26. No doubt Sarvjeet and Ram Narain were definitely accompanied by few others but it cannot be pronounced with certainty as to what was their number and who they were. In any case, these two, namely, Sarvjeet and Ram Narain were there who actually participated in the incident. One of them, namely, Sarvjeet threw a bomb and Ram Narain opened shot on the deceased. They were acting in concert with previous meeting of minds. They had come at the spot dangerously armed with bomb and countrymade pistol which they made use of in the commission of murder of Guru Prasad. Doubtless it is there that they were accompanied by a few others but it cannot be ascertained as to how many and who of the remaining accused accompanied these two accused respondents Sarvjeet and Ram Narain. So, the benefit of doubt will be afforded to the remaining accused respondents. The evidence being not firm enough against the remaining accused the benefit would go to them, but not to the present two

accused respondents.

27. Unmerited acquittals should be guarded against because they strike at the root of the judicial edifice and shake the confidence of the people in the efficacy of justice delivery system. Substantial justice based on dispassionate scrutiny of evidence brought on record should always be imparted. We should make it clear that the two accused respondents committed the murder of Guru Prasad in furtherance of their common intention and it makes no difference that the accused respondents were charged u/s 302 read with Section 149 I.P.C. Since the names and number of the remaining accused respondents cannot be ascertained, the offence committed by Sarvjeet and Ram Narain falls within the ambit of Section 302 read with Section 34 I.P.C. we may refer to the decision of the Supreme Court in the case of Amar Singh Vs. State of Haryana, wherein it has been held that conviction u/s 302 read with Section 34 I.P.C. is possible even though the charge is u/s 302 read with Section 149 I.P.C. when the facts proved and the evidence adduced would have been the same if the accused had been charged u/s 302 read with Section 34 I.P.C. In such a case, failure to charge the accused with the aid of Section 34 I.P.C. does not result in any prejudice. As a matter of fact, Sarvjeet having died during pendency of the appeal, the appeal has abated respecting him and it is only of theoretical importance that he committed the murder of Guru Prasad in furtherance of the common intention with the other accused respondent Ram Narain who alone is now liable to be punished u/s 302 read with Section 34 I.P.C.

28. To come to a close, in view of the discussion made hereinabove, we partly allow this appeal and set aside the acquittal recorded in respect of the accused respondent Ram Narain, He is convicted u/s 302 read with Section 34 I.P.C. and is sentenced to undergo life imprisonment which is lesser of the two alternative punishments provided for the offence of murder.

29. The appeal has already abated in respect of accused respondent Sarvjeet, Om Prakash, Raj Kishore and Awadh Narain who died during pendency of the appeal. The acquittal recorded for the remaining accused respondents, namely, Indrajeet, Jagdish, Durga Prasad and Raj Banshi Tewari is maintained.

30. Ram Narain is on bail, Chief Judicial Magistrate, Deoria shall cause him to be arrested and lodged in jail to serve out the sentence of life imprisonment and shall report compliance within two months.

31. Let the judgment be certified to the court below.