
(2004) 12 AHC CK 0035
In the Allahabad High Court
Case No : Criminal Appeal No. 1233 of 1980

Virendra Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 07-12-2004

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 302, 304(1), 307, 324, 452

Citation : (2005) 2 ACR 1713

Hon'ble Judges : V.S. Bajpai, J;S.K. Agarwal, J

Bench : Division Bench

Advocate : R.C. Shukla and M.K. Shukla, for the Appellant; A.G.A., for the Respondent

Judgement

S.K. Agarwal and V.S. Bajpai, JJ.—This appeal was preferred by Virendra Singh, Appellant, against his conviction under Sections 302, 452 and 307, I.P.C. and consequent sentences of imprisonment for life, one year R.I. and 7 years R.I. passed by Sri P. C. Jain, Ist Additional Sessions Judge, Shahjahanpur, on 8.4.1980 in S.T. No. 474 of 1979.

2. The prosecution story, as contained in the F.I.R., is as under:

Ghashi Ram son of Ram Dayal, a farmer, has his house in the east of the village. He is a resident of village Baragaon. According to him some 20-25 days ago Appellant Virendra Singh son of Ganga Singh assaulted his nephew Ram Das, who used to ply rickshaw, with a knife. The Appellant was challaned in that case. On 15.7.1979, at about 9.00 a.m., the Appellant, with a single barrel gun in his hand, came inside the chappar of his house, hurling abuses. He shouted at him that he should turn out Ram Chander from his house. He will not leave him alive. He has come after killing his father. Immediately after that he opened fire on him, but the fire, instead of hitting him, hit his grandson aged about 3 years, Ram Naresh. He fell down and died instantaneously. The alarm raised by him and

the females of his family attracted Ram Bharose, etc. from his neighbourhood. The Appellant left his house shouting that any one who will come across him shall also be killed. On the road, near his house, a person from Udna village, Pandit Shyam Behari, was coming from the front, was also fired upon by the Appellant. He fell down after receiving the gunshot injuries and died. The Appellant opened more fires on towards the road, the pellets of which struck some other persons and the passer-by. Later on, on raising of the alarm by villagers the Appellant went towards Bareli village in the west. It is also stated in the F.I.R. that he had heard that on Bareli road in village Baragaon, in the Har, he fired upon Principal Sheo Prakash Agrawal causing injuries to him also. Leaving his grandson in the charge of his family members he went to lodge the report. A case was registered at Crime No. 179 on 15.7.1979 at 9.45 a.m. The distance of the place of occurrence from the police station was 2 miles south.

3. At 9.30 a.m. on the same day, i.e., on 15.7.1979, another report for the murder of Ganga Singh, father of the Appellant, was registered at the same police station. The occurrence in both the cases is alleged to have taken place at about 9.00 a.m. In this F.I.R. Shree Krishna, Ram Chander and Ram Das were arrayed as accused. They killed Ganga Singh by causing knife injuries on his person. In the F.I.R., lodged by Smt. Bitoli, wife of deceased Ganga Singh, it was alleged that they were earlier residing in village Simra. They had started living in Baragaon for the last one year. He had to abandon his original residence on account of some enmity between them, Shree Krishna and his companions. The enmity commenced on the purchase of 3 bigha grove land in village Baragaon from Kayasthas, probably the Zamindars. This land was purchased by him two years ago. The land was in illegal possession of Shree Krishna. Due to purchase of the grove, Shree Krishna and his companions nursed animus against the father of the Appellant. Since then they were trying to turn Ganga Singh out from the village. About a year and a half ago these persons abducted Ganga Singh's daughter, Kamla. They were challaned for that offence. Some months later they set her house afire. They were challaned for this offence also. On account of fear of these persons, they settled in village Baragaon. This did not deter them. Their activities against the deceased Ganga Singh continued unabated. They involved Virendra, the Appellant, in a knifing case. He was challaned for the offence. In that case the victim was Ram Das. She further stated that on the date of occurrence, i.e., on 15.7.1979 she along with her husband was sitting on the platform in front of the shop of Ram Swaroop, a tailor master, waiting for a bus to go to Shahjahanpur to fetch medicines. In the meantime, Shree Krishna, Ram Chander and Ram Das were sighted by them. As soon as they came near deceased Ganga Singh, Ram Das exhorted his companions, "kill him, so that every day quarrel should come to an end." Ram Das caught hold of her husband. Shree Krishan and Ram Chander started belabouring him with knife. They raised alarm. The victim Ganga Singh some how managed his freedom and ran towards south. He fell down at the turn of the lane and died there. Tea vendor Suraj, Tailor master Ram Swaroop and many

passer-by had seen the occurrence. She proceeded to lodge the report after leaving village Chaukidar and some other villagers to keep a vigil on the dead body of her husband. This report was transcribed at 9.30 a.m.

4. In the impugned incident two persons, Ram Naresh and Shyam Behari lost their lives. Some others have also suffered pellet injuries. They are Om Prakash, Ram Nath, Smt. Ram Devi, Noor Ali, Noor Mohammad and Shiv Prakash Agrawal. These injured persons were medically examined by P.W. 1 Dr. U. C. Gaur and P.W. 7 Dr. Sat Pal. X-Ray examination of the injuries of these persons was undertaken by P.W. 12 Dr. P. S. Verma. Their injury reports are Exts. Ka-1 to Ka-5 and Ka-9. X-Ray reports are Exts. Ka-26 to Ka-28.

5. The post-mortem examination on the two dead bodies were conducted by P.W. 2 Dr. M. L. Tandon. The post-mortem examination reports are Exts. Ka-6 and Ka-7.

6. The prosecution in support of its case examined P.W. 3 Ghasi Ram, P.W. 4 Noor Ali, P.W. 5 Smt. Shiv Devi, P.W. 6 Shiv Prakash Agarwal and P.W. 9 Ram Bharosey as eyewitnesses of the incident. The case was investigated by P.W. 11 S.I. Bhim Singh. P.W. 10 S.I. Achaya Prasad Tiwari prepared the inquest memos. This is, in the nutshell, entire prosecution evidence.

7. So far as the Appellant is concerned, he had pleaded in his statement u/s 313, Cr. P.C. in response to question No. 10 that on 15.7.1979, his father was sitting at the shop of Ram Swaroop, tailor master, for going to Shahjahanpur. Per chance he also reached that road. His father asked him to fetch his gun and belt of cartridges. He went back to his house to fetch his gun and cartridges. When he returned with the gun and the belt of cartridges he saw his father running towards south. Ram Chander, Shree Krishna and Ram Das were belabouring him with knives. His father fell down near the shop of Nathu. These persons also tried to take away the dead body. When he saw the incident he opened fire. He did not shoot any one intentionally. Earlier also, in response to question No. 3 the Appellant stated that he had fired four rounds to save his father, but he did not open these fire to kill any one.

8. The trial court, after appreciation of the prosecution evidence including the eye-witness account, came to the conclusion that the Appellant had fired indiscriminately with the intent to kill. Accordingly, the Appellant was convicted by him for the offence of murder.

9. It has been contended by learned Counsel for the Appellant that the Appellant had resorted to firing indiscriminately on a grave and sudden provocation caused by the assault on his father. He is very young and was under 16 years of age when the offence was committed. He possessed a gun and due to his immaturity decided to fire in order to rescue his father. He actually became enraged on seeing the assault on his father in a gruesome manner and lost his balance. Alternatively, it was contented on his behalf that he had already been in jail for 4-1/2 years and the offence does not travel beyond Section 304, Part II, I.P.C.

even if the prosecution version is acknowledged as true. He was taken in custody on 17.7.1979, on his conviction. Bail was granted to him in appeal on 5.6.1980 but he was released on bail on 18.1.1984.

10. We have given our anxious consideration to the submissions made by learned Counsel for the Appellant. It has also been contended by learned Counsel for the Appellant that the F.I.R. in this case was ante-timed and was result of the deliberation and consultation with the police. It was lodged after an F.I.R. was lodged by Smt. Bitoli, wife of deceased Ganga Singh. He was done away with by Shree Krishna, Ram Chander and Ram Das first. Ram Dayal was not an accused in the said case.

11. With regard to shooting upon Sheo Prakash Agrawal, the contention is that he was not present at his field, as alleged by him, but was present at the shop of his brother, who is a medical practitioner, which exists on the same road.

12. In order to appreciate the defence contention, we have decided to examine the evidence of the informant, his daughter Smt. Shiv Devi and four other eye-witnesses, Ghasi Ram, Noor Ali, Sheo Prakash Agrawal and Ram Bharose, P. Ws. 3 to 6 and P.W. 9.

13. Taking up the evidence of P.W. 3 Ghasi Ram we discerned certain very serious anomalies in his evidence. According to him, the Appellant visited his house at about 9.00/9.15/9.30 a.m. He was sitting in his house in the inner courtyard. The incident occurred on the ground floor of his house. Ram Naresh, according to F.I.R., was seated nearby him, but according to his evidence in the trial court, Ram Naresh was playing under the chhappar. The Appellant arrived at his house. His house is encompassed by the brick walls from all the sides. He came to the northern chhappar. He asked him to turn out Ram Chander from his house. He further told him that he had come after killing his father and he will kill him. Ram Chander used to call him Chacha (uncle) on account of village relationship. Ram Chander and Ram Das are brothers. Ram Chander used to reside in the east of his house. Their house is separated from his by a wall alone. Virendra sat down under the chhappar and made a fire towards him. The shot did not hit him. He claimed that he shifted to west. The fire struck Ram Naresh, who fell down. He raised alarm. He was 3-4 steps away in the south from Ram Naresh. Virendra immediately thereafter ran away from his house. He claimed that he chased him. Ram Bharose son of Ram Dayal also went behind the accused. Some other people also followed them but he was unable to name any one. He admitted that the road to Shahjahanpur was about 100 steps from his house. The Appellant ran on the pukka road towards Puwanya. He followed him then stated that he went by another route and reached the milestone. He did not go behind the Appellant. He actually went in the chase of the Appellant on the kharanja which passes in front of Santosh Advocate's house in the south. He further stated that the Appellant threatened them by saying that any one who will come in his way will be shot at. One person from the side of Udna village, viz. Shyam Behari, was coming on his cycle. The Appellant aimed his gun

towards him. Seeing this Shyam Behari came down from his cycle. The Appellant in the meantime opened fire on him. Receiving the shot he fell down and died. Thereafter the Appellant went on the road towards north. He remained stationed at the milestone due to fear. The Appellant opened another fire from near the chhappar of Data Ram. The fire caused injuries but to whom he did not know. He had heard people raising alarm. Data Ram's chhappar is 50-60 steps northward from the milestone. The Appellant thereafter went towards the market in the west. After the Appellant moved towards the market this witness proceeded towards the dead body of Shyam Behari. In the meantime, his son Bhagwantu also came there. He and Bhagwantu went to P. S. Puwanya, which is about 3 kms. from his village. It is stated by him that at the time of his going to the police station he heard that the Appellant fired on the Principal also. He got his report scribed at the police station. It was read over to him. Thereafter he fixed the thumb mark upon the same. He proved it as Ext. Ka-8. He disclosed that about a month ago the Appellant knifed Ram Das. He was not an eye-witness of that incident. Ram Das lodged this report at the police station. The Appellant was challaned and is facing trial. He claimed that since he accompanied Ram Das to Shahjahanpur for medical examination, the Appellant felt angry. Accused has a younger brother. Admittedly, according to this witness, the Appellant was aged about 12 years at the time of occurrence. The Addl. Sessions Judge, at this juncture, put a note in the following words: "The accused appears to be a grown up boy. He has moustache. He appears to be 17-18 years of age." But unfortunately, as required by the Apex Court, the boy was never subjected to medical examination to ascertain his approximate age. According to the witness, Ganga Singh was a licensee of a single barrel gun. He further admitted that Baragaon is situated on both sides of Puwanya-Shahjahanpur road. The road passes in the middle of the village. The population of the village is spread in 3-3-1/2 furlongs east-west. According to him, he went through the brick laid road which passes in front of the house of Santosh Advocate in the south. In order to reach this kharanja road, he had to go to another kachcha lane. He claimed that he had agricultural land but since there was no rain no ploughing or sowing could be on. He denied that he was at his field and not at his house at the time of occurrence. He also denied that Ram Naresh was sitting by his side and was not playing near the flour mill. He admitted that he has not written in his report that at the time of occurrence Ram Naresh was sitting nearby him. He feigned ignorance how it was transcribed in his report. According to him, Sheo Devi, mother of deceased Ram Naresh, was sitting underneath the chhappar. She was some 5-6 steps in the north from him. Sheo Devi was just two steps from deceased Ram Naresh at the time of occurrence. Ram Naresh was playing. When Virendra, Appellant, fired on him, Ram Naresh was 5-6 steps in the north. He was unable to tell that the gun used by the Appellant was the licenced gun of Ganga Singh or not. He further admitted that Appellant-Virendra did not enter his house. He was at the door of his chhappar and from that place he opened fire. He further stated that the Appellant was underneath the outer chhappar and Ram Naresh was playing near the flour mill in the inner chhappar. The inner door

was about 4 steps from the outer door. He admitted that it is not written in his F.I.R. that Appellant Virendra sat down at the time of opening fire. This fact was not stated by him to the Investigating Officer as well. He denied that he is stating this fact on the tutoring by the police or D.G.C. According to him, the Appellant first went towards north and here it merges into the southern road passing from in front of the house of Santosh Advocate and came on the Puwanya-Shahjahanpur road. He did not see Ram Naresh. Instead he went behind the accused. He had a lathi when he chased him. He started the chase when the Appellant had already covered 40-50 steps. He claimed that the fact of his going behind the Appellant was scribed by him in his report, but failed to explain its omission. He further stated that when his grandson was killed he lost all fear for his life. When he was following the Appellant he did not open any fire on him. He denied that he did not follow the Appellant and had not come on Puwanya-Shahjahanpur road. He saw the dead body of Ganga Singh, father of this Appellant, at that very time when the Appellant moved away after killing Shyam Behari. When the Appellant went towards the market then he came to know that Ram Nath, his wife, Om Prakash and two Muslims had also suffered pellet injuries and they ran away for fear. He admitted that the age of his son Ram Gulam is about 11-11-1/2 years. He denied that Ram Naresh was on the pukka road with Ram Gulam and he suffered the injury there. He also denied this fact that he had shifted the place of Ram Naresh's occurrence under police pressure and advice. He further admitted very clearly that when the Investigating Officer arrived at the scene of occurrence the dead body of Ram Naresh was lying near the shop of Nathu. The shop of Nathu is about 10-12 steps in the north of the milestone. The Investigating Officer prepared the inquest memo of his grandson at that very place. His wife, mother of Ram Naresh and other family members were crying there. In response to the question that how the dead body of Ram Naresh reached the shop of Nathu, he told that he did not know because he had already gone for lodging the report. He further stated that mother of Ram Naresh told him that his son was alive and, therefore, she brought him there. When he was questioned as to how the dead body of Ram Naresh was kept near the shop of Nathu, he said, his daughter-in-law told him that when the police arrived at the scene of occurrence the shop of Dr. Pushpendra was not open and, therefore, she left the dead body there. He further stated that blood had fallen near his flour mill. The Investigating Officer collected that from there. He further stated that there were pellet marks on the wall near the flour mill. He denied that this is false and no pellet marks were there on the wall of his house. He denied that Ram Naresh suffered injuries on the road and was thereafter left on the road near the shop of Nathu. When Appellant Virendra fired on Shyam Behari, deceased, he was 4-5 steps in the south from the deceased. No movement was there on the road. There was complete silence. Market did not open till then. He denied that when Shyam Behari suffered firearm injury he was not on the road and he had not seen this occurrence. He also denied that he was called to the police station long after that and his report was transcribed in consultation with the police. He claimed that in

his report he had stated that he had gone with Ram Das for his medical examination and that is why the Appellant was nursing grouse against him. He feigned ignorance as to why it was not so written in his report.

14. Thus, from his statement it is apparent to us that the claim of this witness that he chased the Appellant is not corroborated either from the F.I.R. or from his Section 161, Cr. P.C. statement. It is a material improvement introduced in his testimony at the stage of trial. How the dead body of Ram Naresh came to the shop of Nathu is also a mystery, though his daughter-in-law, Shiv Devi, in her statement claimed that she brought her son to the shop of Dr. Pushpendra in the hope that he may be saved, but the shop did not till then open and so she abandoned the dead body near the dead body of Shyam Behari and Ganga Singh near the shop of Nathu. It does not stand our scrutiny nor the conduct of the mother appeals to our conscience. The suggestion of the defence to this witness, P.W. 3, that Ram Naresh came on the road with his son Ram Ghulam aged about 11-11-1/2 years and suffered injury there. In our opinion, it is borne out from the circumstances available in the case. No such incident, as alleged, at the house occurred. His claim that he had left by the time the dead body of Ram Naresh was brought to the road for lodging the report to P. S. Puwanya is not true. Therefore, he did not learn this fact and it was not mentioned in the report. Admittedly, the Investigating Officer prepared the inquest memo of this deceased Ram Naresh near the shop of Nathu where it was lying on the road. The prosecution seems to have introduced this ingenious story about the Appellant going to his house and making an attempt to fire on this witness. The fact that had he not taken a tilt towards west to avoid the shot fired on him, it would not have hit his nephew. According to F.I.R. he was sitting near him. Why the story was changed and the boy was claimed to be playing at some distance in the north, near the flourmill, is beyond our comprehension. Probably the Investigating Officer had realised that the shot fired on him could not strike the victim if he was nearby him, if the aim was this witness himself. He had claimed that he was sitting in the inner courtyard. The deceased, therefore, must be nearby him. Had he been nearby him the shot would not have struck him but must have passed him by a whisker. A perusal of the site plan will also show that the inner courtyard is deep inside the house of this witness and inner dehra and the chhappar is before the inner courtyard. The hand operated mill was fixed on the ground near this inner dehra. The Appellant was shown to have come inside the house near the inner dehra at spot "Ka". This is contrary to the statement made by this witness in the Court. According to him the Appellant stood in the outer verandah and fired from the door. Therefore, what is mentioned in the site plan is wholly incompatible with the story set up by this witness in the trial court. The presence of three dead bodies nearby each other further lends corroboration to the defence of the Appellant that his father Ganga Singh was running towards south. His dead body was found in the south, some 15-20 steps away from the shop of Ram Swaroop, tailor master.

15. We have examined the inquest memo also very carefully. We have found

cuttings in the time in this memo. The crime number is also changed by making overwriting. Section 452, I.P.C. was added after placing a line beneath Section 307/302, I.P.C. No crime number was mentioned at the top. It had been mentioned in the middle at the first page. It had been introduced subsequently in the vacant space between the columns. No such crime number was mentioned on the second page where the facts of receiving the information were noted. These facts were put to the Investigating Officer as well and the explanation offered by him does not inspire our confidence. From these facts and interpolations made in the inquest memo in the time and other facts, it is apparent that the F.I.R. of this case was not ready when the inquest memo was prepared. In other papers prepared in connection with the inquest no crime number was mentioned. These cuttings and interpolations are apparent even in the inquest memo of Shyam Behari also. The police came to the spot of occurrence possibly on the report of Smt. Bitoli, mother of the Appellant. The case was registered on this report at the police station (Ext. Kha-5) at 9.30 a.m. It is admitted to the Investigating Officer that the papers of this case (Crime No. 179) were received by him later on. So far as the report of Smt. Bitoli Devi is concerned, it was allotted Crime No. 179A. It was also an oral report. The inquest memo of the two deceased clearly shows that the crime number allotted to this case initially was 179. "A" was added at the foot of digit "9". This is a clear interpolation to make it a cross case. Initially he did not speak about the murder of the father of this Appellant at any stage from F.I.R. till his evidence in Court that this Appellant came to his house after the murder of his father. He had set up an absolutely a different motive for the firing by the Appellant on him shorn completely from the murder of Ganga Singh.

16. From all these facts and circumstances, we do not have any hesitation in arriving to a conclusion that the F.I.R. of this case was transcribed much later than the time claimed by the prosecution. Once we come to this conclusion, the spontaneity and the promptness in making this F.I.R. loose all its evidentiary value. A serious doubt in the authenticity of this F.I.R. is created. The presence of three dead bodies nearby each other further provides sufficient corroboration to us that the defence version fostered by this Appellant has some grains of truth and the trial Judge had committed gross error in discarding it in its totality. The trial Judge has also committed a serious mistake in not determining the age of this Appellant. P.W. 3 Ghasi Ram has admitted the age of the Appellant to be about 12 years. The Appellant himself, during his deposition in the trial court on 21.3.1980, claimed himself to be about 17 years. The occurrence had taken place on 17.7.1979. So, about 8 months, before the statement made by this witness, had elapsed. Thus, it was necessary for the trial court to determine his age properly. The only method possible was to afford the Appellant an opportunity to prove his age and otherwise also to get it settled by his medical examination. This exercise having not been undertaken by the trial court in view of the statement of P.W. 3, we are of the opinion that this Appellant was a minor at the time of occurrence below 16 years of age.

17. In view of the above said facts we are not prepared to place any implicit reliance on the testimony of this witness. We have serious doubts about his having seen the occurrence of shooting by the Appellant at Shyam Behari and other injured persons. His coming to the road is also, in our opinion, highly doubtful at the time of the occurrence. When, the Appellant challenged the first place of occurrence, i.e. the house of this witness, it was the duty of the prosecution to have sent the blood, allegedly recovered from the house from near the flourmill fixed in the ground inside the house of this witness for determination of its blood group to the Serologist that it was human blood and had the blood group of Ram Naresh. This having not been done, in our opinion, the place of first incident of killing of Ram Naresh, a young kid of 3 years is not established from the evidence of this witness and the evidence of P.W. 5 Smt. Shiv Devi, daughter-in-law of this witness.

18. On examination of evidence of Smt. Shiv Devi we find that there is controversy on her presence on the ground floor as asserted by P.W. 3. She claimed that she was standing near the door behind it. She then stated that she was standing on the first floor at the door just above the door at the ground floor. She denied that she was sitting near the main door. She claimed that she did not know what is meant by sadri darwaja. She denied making any statement to the Investigating Officer that she was sitting in the west near the sadari darwaja (main door). When the said statement was read over as Ext. Kha-3, she stated that this statement was not made by her. She admitted that inner dehri is in the east of the fixed hand worked mill. She came to the door at that very time. She also admitted that she did not disclose to the Investigating Officer that the Appellant fired upon his son by sitting on the ground. She also admitted that she did not disclose to the Investigating Officer that she took his son to the shop of the Doctor on the main road going from Puwayan to Shahjahanpur. She abandoned the dead body near the tailor master's shop. She sat on the advice of the ladies collected there with his son at the shop of tailor master, though she denied that her son was injured on the road and she came there later on, on coming to know of it. We are of the opinion that Ram Naresh did not suffer any injury in his house. He suffered the injuries on the road itself in the firing resorted to by the Appellant to save the life of his father. The presence of 3 bodies close to each other can be explained in this manner alone.

19. Coming to the statement of P.W. 4 Noor Ali, we find that he was waiting at the tea shop of Suraj for going to Kunwa for obtaining some work on daily-wage. With him his first cousin Noor Mohammad was also present. According to him, Ram Nath, his wife Ram Devi and a young boy was also present there. In the meantime Shyam Behari was seen returning after selling milk. Shyam Behari reached the shop of Bhagwantu. Shop of Bhagwantu is about 60 steps from the shop of tea vendor Suraj. In the meantime, according to him, Appellant, Virendra, with a gun in his hand, came from south. He asked Shyam Behari to come down from the cycle so that he may shoot him. Shyam Behari came down from his cycle. The Appellant fired on him. Consequently he died. He had

witnessed the incident from the shop of tea vendor Suraj. Thereafter the Appellant ran away towards the north. He stopped at the chhappar (thatch) of Dataram and opened fire upon them from that place. Pellet injuries were suffered by him, Noor Mohammad, Ram Nath, his wife and Om Prakash in this firing. According to him, tea stall of Suraj was open but neither Suraj was there nor any one else. This part of his evidence we are not prepared to believe. They withdrew to their house. He was called by S.I. later on to the road and was sent from there for his medical examination. According to him the Appellant was having a single barrel gun. He admitted that on that very day father of this Appellant was also murdered. He did not see that incident. According to him, after 4-5 minutes of his arrival at the shop of tea vendor Suraj, he suffered firearm injuries. The Appellant only fired once and 5 persons present at the shop of tea vendor Suraj suffered injuries from that fire. He claimed that he had seen the Appellant before the fire was opened by him. The Appellant was not saying anything when he opened fire upon Shyam Behari and he and other injured persons. He claimed that he did not notice that Appellant was in anger. When the Appellant fired upon them, he was at a distance of 30-40 steps. But the fire upon Shyam Behari was made only from 4-5 steps. The place where Shyam Behari fell down was about 15 steps from the milestone towards south. He was called by the Investigating Officer at about 2.30 p.m. He and Noor Mohammad met the S.I. on the road. He denied that he had come to the place of occurrence on hearing the news of murder of Ganga Singh. He denied that any statement that he, Noor Mohammad, Om Prakash and many other persons of his village came to the market in front of the shop of Suraj in the south and were standing there on hearing the news of killing of Ganga Singh. His statement recorded u/s 161, Cr. P.C. was read over to him. He told that he cannot say how it was transcribed. It was marked as Ext. Kha-1. He admitted that when he was coming from his house he got the information that Ganga Singh was murdered. He further stated that he himself did not see the dead body of Ganga Singh nor noticed the place where it was lying. He denied that he did not go to that spot because firing was going on there. He also denied that since killers of Ganga Singh were trying to remove his dead body the firing was resorted to and in the firing he also suffered injuries. He further stated that he did not remember whether he had disclosed the fact that the Appellant opened fire on them from near the thatch of Data Ram to any one or not. He also claimed that he did not remember whether the incident occurred at 9.00 a.m. He pleaded lapse of memory when the statement recorded by the Investigating Officer was put to him regarding the time of occurrence. In his statement before the Investigating Officer 9.00 a.m. is written. It is marked as Ext. Kha-2. Thus, even this witness apparently has made serious modulation in his evidence from his Section 161, Cr. P.C. statement. According to his Section 161, Cr. P.C. statement he came to the spot of the occurrence on learning about the murder of Ganga Singh and suffered injuries at that place. Now, he is changing the place of sufferance of his injuries to the shop of tea vendor Suraj claiming that the fire was made from the thatch of Data Ram. He is clearly towing the line suggested to him by the investigating agency. From his statement

recorded u/s 161, Cr. P.C. it becomes very clear that until that time the prosecution story was very near the case of this Appellant.

20. So far as the testimony of Sheo Prakash Agrawal is concerned, we have serious doubt that this witness had suffered injuries on his field. He has admitted in his cross-examination that Harsaran Singh Chaudhary was Agriculture Teacher in his college and it was he who was looking after the agriculture work of the college. He denied that it was 9.00 a.m. when the occurrence took place. He denied making a similar statement to the Dy. S.P. When his statement was read over, he stated that he cannot say whether he made this statement or not. His statement was a signed statement. It was marked as Ext. Kha-4. According to him, when he suffered firearm injury, he was 2-3 steps in the south near the northern end. Kachcha road was about 20-25 steps in the mud from this end. This field was about 100-125 steps in length and about 175 steps on the east. He feigned lapse of memory as to whether he disclosed this fact that Appellant Virendra fired on him while stating to the Investigating Officer and the Dy. S.P. He had stated that since his condition was serious at that time, therefore, he did not remember these facts. He admitted that in the deposition made to the Dy. S.P., which was read by him this fact is not there. He admitted that his brother Ram Pratap's medical shop is on the outskirts of the village Baragaon on the main road and the milestone is near it. He pleaded ignorance to the fact that Virendra's father Ganga Singh was murdered at 9.00 a.m. on the same road. He also feigned ignorance to the fact that his dead body was lying near the shop of his brother at a distance of 18 steps in the north. He also denied the suggestion that at the time of occurrence he was coming down from the shop of his brother and when the assailants of Ganga Singh were trying to remove his dead body the fires were made then and he sustained injuries in the same firing. In our opinion, from the omissions discussed by us, a serious doubt is created in the authenticity of the statement of this witness. No benefit could be granted to him because of he being a Principal of a college, as was observed by the trial Judge. He stands on the same footing as any other witness and since he has modulated his statement materially to corroborate the story set up during the trial by the prosecution against the Appellant we are not ready to rely on his evidence. He having been convinced by the fact that the Appellant had caused these deaths and also caused injuries to a number of other persons including he himself in a reckless manner, therefore, he agreed to adhere to the modulations made in the trial court in the prosecution story and supported it to deny the Appellant any benefit of either grave and sudden provocation or right of defence of the person of his father. The story brought forth in the trial was materially altered from the version contained in the F.I.R. as also disclosed during the investigation by these witnesses.

21. P.W. 9 Ram Bharose, is a servant of Sheo Prakash Agarwal. Once we are not believing the evidence of this witness, it is neither plausible nor justifiable for us to accept the testimony of this witness. This witness has clearly admitted that in the paddy field, during walk, the foot used to dig deep in the ground because the

ground was very soft due to watering. The foot used to smudge deep in the soil. The paddy was sown just 15 days ago. Good amount of water is always required for rice crop. He claimed that he had shown both the places to the Investigating Officer where he was and injured Sheo Prakash Agrawal, Principal, was. He was not able to tell the length of the field (east-west). According to him, when fire was opened by Virendra, Appellant, on them, he was some 50 steps away from the Principal. When Virendra fired upon the Principal, he was some 25-26 steps away from him. This was a clear modulation made by him. He further modulated his previous statement regarding softness of the ground with regard to the Principal that where the Principal fell down during the firing made by the Appellant the ground was only wet but it was not muddy. No sowing was going on in any other fields, admittedly. He claimed that when he reached his house at about 11-00-12.00 in the noon hour, he came to know of the murder of Ganga Singh. In our opinion, the news of all the murders including Ganga Singh must have spread like a wild fire yet he made the said statement. He also denied that he did not witness the occurrence since he was not in the village. He is deposing falsely on account of the influence of the Principal and the police. Enormity of the incident might have persuaded him to side with the prosecution. He was not injured.

22. Our conclusions in this respect find some corroboration from the testimony of Investigating Officer, P.W. 10 Achaya Prasad Tiwari. According to him the report lodged by Smt. Bitoli, mother of the accused, was registered in his presence. He came to the spot of occurrence for investigation of that case. He received the papers of the present case through constable Ram Chandra at the site of occurrence of Ganga Singh. According to him, S.O., Baragaon, was also with him when he was investigating the murder of Ganga Singh, but he was not participating because he was ailing. He reached the place of occurrence by a jeep at about 10.00 a.m. and they started from the police station 20 minutes to 10.00 a.m. The place of occurrence is 3-4 kms. from the police station. According to him, Ram Naresh, deceased, was in the laps of his mother underneath the verandah in front of the shop of Nathu. Milestone was about 1-2 steps from that place. It is contrary to the statements of the eye-witnesses. He prepared the inquest memo on the body of Ram Naresh first. Then stated in the next paragraph that Shyam Behari's inquest memo was prepared first before preparation of Ram Naresh's inquest. According to him, Shyam Behari's body was lying on the main road in the east, in front of the house of Nathu Lal. It was lying 1-2 steps away from Ram Naresh in the north towards Kunwan. He prepared his inquest. It is Ext. Ka-14. Thereafter, he had taken the blood-stained earth and simple earth from these places. According to him, a cycle was lying near the dead body of Shyam Behari. He further stated that about 35 steps in the north from Shyam Behari's dead body near the hut of Data Ram he found a spent cartridge. He also found pellet at spot "Ga" about 30 steps from spot "Ka". A fard was prepared. It is Ext. Ka-9. These material exhibits were not identified by him since they were not produced at that time. He did not prepare any site

map of the place where the dead body of Shyam Behari was lying. After all these formalities he recorded the statement of Ghashi Ram and other injured persons. Before recording this statement he had visited the house of Ghashi Ram also. He prepared the site map after recording the statement of this witness. He thereafter had despatched Noor Mohammad and other injured persons after calling them on the road for their medical examination. In the meantime, he learnt about injuries of Sheo Prakash Agrawal and the fact that he had already gone for his medical examination. He recorded the statement of Bhaju Lal, a witness of the incident of shooting of Sheo Prakash Agrawal and prepared the site map on his pointing out. It is Ext. Ka-23. This witness was not examined. Instead, Ram Bharose was examined as witness of this incident in the trial. He claimed that he had taken into possession bloodstained earth and plain earth. He prepared its recovery memo. It is Ext. Ka-24. He admitted in cross-examination that crime number of Ganga Singh's murder was 179 of 1979. This case was also investigated by him. He had also prepared the inquest memo and site map of this deceased. It was available in the other trial, which was pending in the same Court. He admitted that Ganga Singh's dead body was just 3-4 steps away in the north from the body of Shyam Behari. He also proved the statement made by Noor Ali and Smt. Sheo Devi as Exts. Kha-1 to Kha-3. He admitted that initially he started preparing inquest of Ganga Singh, thereafter Shyam Behari and then Ram Naresh. When he was preparing the inquest of Ganga Singh, he came to know of the second incident and received its papers, check report and copy of the G.D. etc. He denied that till preparation of the inquest memo of Ram Naresh and Shyam Behari no report was registered. He admitted in further cross-examination that in Exts. Ka-11 and Ka-14 panchayatnamas of Ram Naresh and Shyam Behari crime number was not mentioned because it was mentioned on first page. He denied that it was scribed on the first page by a different ink. He admitted that on Exts. Ka-12 to Ka-16 no crime number is mentioned because they were in connection with the inquest of Shyam Behari and Ram Naresh. He claimed that interpolation in the time of the F.I.R. in these inquest memos were made by him. Initially they were shown as 9.30 a.m. He denied that F.I.R. of Ghashi Ram was prepared long after the preparation of these memos on due consultation and deliberation. He also denied the statement of Ram Bharose that when the site of assault of Sheo Prakash Agrawal was inspected Ram Bharose was there. He also denied that he told him the position of the witness and the Appellant from where the fire was opened. He also admitted in the site map of this place Ext. Ka-23 he had only shown one field in the east. He admitted that some more fields were there but he did not show them in the site map. Therefore, non-examination of Bhajan Lal, on whose pointing out the site map was prepared by this witness, leaves enough room to doubt that all this was a concoction on the part of investigating agency. The entire incident occurred on the road near the house of Nathu, where the three dead bodies were found lying. Six persons also suffered injuries at that very place. He was suggested that from the alleged places from where he claimed to have recovered the spent cartridges and blood nothing was found by him and these recovery memos were prepared

ingeniously by him. He also denied that the single barrel gun was recovered from the house of Ganga Singh. It was not recovered from the Appellant. He denied that the site map, Ext. Ka-20, is also an ingenious document. No incident occurred there.

23. So far as the second Investigating Officer, P.W. 11 Bhim Singh, is concerned, his testimony is of little consequence, inasmuch as according to him he had sent the spent cartridge and the gun to the ballistic expert but there is no report on the record. Therefore, it is not established that the recovered spent cartridge and pellets were fired from this very gun. He did not make any report for sending the blood recovered from the spot of occurrence to the chemical examiner for determination of the fact that it was human blood and was of the group of Ram Naresh. He also did not know whether any case for the recovery of the gun u/s 25 of the Arms Act was prosecuted against the Appellant or not.

24. Scrutinising the entire incident in the light of the statement made by the Appellant, we find, as earlier discussed, grains of truth in his evidence. He is a young lad, aged about 16 years. If we deduct 8 months and 5 days from the age given by this witness in his statement u/s 313, Cr. P.C., he was 15 years 3 months and 25 days at the time of incident and if we take into consideration the statement made by P.W. 3, he was about 12 years of age. Giving the benefit of two years either way, in our opinion, this Appellant might be between 14 and 16 years at the time of occurrence. This we are discussing to assess the maturity of the mind of the Appellant. He claimed that he had seen the assault on his father and had fired only to save him from the assault by three assailants. We do not have the advantage to peruse the post-mortem examination report of deceased Ganga Singh, his father, because neither the prosecution brought it on record nor the trial Judge found it necessary to place a certified copy of the same on the record. Despite being handicapped, the fact that Ganga Singh lost his life in the assault made by Shree Krishna and Ram Chander with knives and, as alleged by the Appellant, and it was witnessed by him. He being in possession of the gun it would not be improbable for this young lad to use the same to save the life of his father. It caused the death of a young kid, Ram Naresh and Shyam Behari and injuries to 5 or 6 persons of stray pellets. All the injured had suffered simple injuries. He had opened fire, in our opinion, in the defence of the person of his father. Though, as the law enjoins, the force used by the Appellant apparently was more than what was required. He opened fire to desist the assailants of his father as he was not an expert shooter. Since there is no such evidence brought by the prosecution or the defence we have to presume that the fires made by him went astray and struck those innocent person who had nothing to do with the murder of his father. There is absolutely no evidence available to us that Appellant was versed in the use of a gun. Taking these facts and circumstances into consideration and the fact that provocation received by him from the murder of his father, he completely lost his mental balance for the time being and was not in a position to realise or know the consequences of his act, went on firing, admittedly four rounds. Ram Naresh had suffered few stray pellet injuries (four

in all). In two of his injuries, viz. injuries No. 1 and 5, presence of blackening was noted by the Medical Officer. In other injuries it is not so noted. In the injury of other deceased, viz. Shyam Behari, there is blackening. These facts established that the shooting was made from close quarter. All the dead bodies were lying in close proximity to each other is a very material circumstance.

25. In the circumstances, it is borne out and also admitted by the Appellant that he had opened four rounds of fire with no intention to cause death of any one. We are, therefore, of the opinion that the ends of justice would be met sufficiently if the conviction of this Appellant u/s 302, I.P.C. is set aside and alternatively he is convicted u/s 304, Part I, I.P.C. Giving him advantage of his immaturity and young age, we are of the opinion that he deserves the benefit of the incarceration that he had already undergone. As was informed by learned Counsel for the Appellant, he had already undergone 4-1/2 years, though he was granted bail on 5.6.1980 but had come out of the jail only on 18.1.1984. We believe the statement of learned Counsel for the Appellant and accordingly award the Appellant a sentence of 5 years R.I. We also impose a fine of Rs. 25,000 upon this Appellant. This fine shall be deposited by the Appellant within three months from the date the judgment is delivered. His incarceration shall be ascertained and if he has already underwent 4-1/2 years, adding the benefit of remissions if 5 years are completed, he shall not be sent to jail. But on ascertainment if it is found that 5 years have not been completed by him, he shall be taken into custody forthwith to serve out the remaining sentence. The fine shall be realised from the Appellant, as directed above, and if he fails to deposit the fine awarded to him, it shall be realised as land revenue. In default of payment of fine he shall undergo one year R.I. further.

26. The appeal, therefore, is partly allowed. His conviction under Sections 302, 452 and 307, I.P.C. are hereby set aside. He is convicted u/s 304, Part I, I.P.C. and sentenced to 5 years" R.I. He is also convicted u/s 324, I.P.C. and sentenced to 2 years" R.I. These sentences shall run concurrently.