

(2005) 05 AHC CK 0302

In the Allahabad High Court

Case No : Capital Criminal Appeal No's. 5871 and Criminal Appeal No. 1836 of 2005, Reference No. 6 of 1998 and Capital Criminal Appeal No. 5872 of 2004

Yasin alias Baba

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 20-05-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 366

Evidence Act, 1872 — Section 114

Penal Code, 1860 (IPC) — Section 307, 396

Citation : (2005) 2 ACR 2243

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

Bench : Division Bench

Advocate : Samit Gopal, A.K. Singh and P.K. Singh, for the Appellant; A.K. Dwivedi, A.G.A. and A.G.A., for the Respondent

Judgement

1. This case has a chequered history. Two appeals were preferred by the Appellants Manni Lal alias Thakur and Yasin alias Baba from jail which were numbered as Capital Criminal Appeal Nos. 907 of 1998 (now renumbered as 5872 of 2004 after removal of defects) and 908 of 1998 (now 5871 of 2004) respectively, against the judgment and order dated 2.5.1998 passed by the Special Judge (Dacoity Affected Areas) Act, Kanpur Dehat, whereby the learned Judge convicted the Appellants to death sentence u/s 396, I.P.C. after consolidating Sessions Trials No. 47A of 1995 and 47B of 1995. Thereafter, it appears that a represented criminal appeal was also filed on behalf of one of the Appellants, Yasin alias Baba through Anil Kumar Singh, Advocate, which was numbered as Criminal Appeal No. 110 of 1998. As there was some defect in the appeal, it was removed and thereafter the appeal was renumbered as Criminal Appeal No. 1836 of 2005. As the learned Judge had awarded death sentence to the Appellants u/s 396, I.P.C., he has also referred the matter to the High Court u/s 366 of Code of Criminal Procedure for confirmation of the death sentence.

2. One other accused person Chandra Pal alias Makkoo, who was also involved in this incident at Case Crime No. 238 of 1994, u/s 396, I.P.C., was also sentenced to death by the same Special Judge by a separate judgment dated 2.5.1998 in S.T. No. 47 of 1995. He also filed Capital Criminal Appeal No. 906 of 1998 (now 5870 of 2004) from jail, which was tied up with these Criminal Appeals, but which will be dealt with separately.

3. A charge-sheet had been submitted against Chandrapal whilst he was in custody and on committal his sessions trial was registered as S.T. No. 47 of 1995, whereas the present Appellants Mani Lal and Yasin were absconding, hence the charge-sheet had been submitted against them as absconders. After the arrest of Manni and Yasin and on committal, their sessions trial were registered as S.T. Nos. 47A and 47B of 1995. Evidence in S.T. Nos. 47A and 47B was consolidated and the evidence was recorded separately from the evidence in S.T. No. 47 of 1995 of Chandra Pal and was decided by a common judgment against which the present appeals and criminal references were filed, which are being disposed of by this common judgment.

4. The appeal preferred by Chandra Pal alias Makkoo will be decided by a separate judgment, as the evidence and judgment in that case were distinct.

5. Prior to this, it may be mentioned that these appeals and criminal references were heard by Hon''ble J. C. Mishra and Hon''ble S. K. Phaujdar, JJ. However, there was a difference of opinion between the two Hon''ble Judges. Hon''ble J. C. Mishra, J., passed an order on 4.10.1999 upholding the conviction, but converting the sentence of death to imprisonment for life u/s 396, I.P.C. and rejecting the reference of the learned Sessions Judge. Hon''ble S. K. Phaujdar, J., on the other hand directed that the case may be remanded back to the trial Judge for recording additional evidence by examining a competent police officer or other witness to bring on record the F.I.R. for the dacoity and abduction in the house of Dharmendra and to examine a competent police officer or other witness to bring on record the F.I.R./G.D. entry on the point of arrest of Chandra Pal and rescue of the witness Dharmendra.

6. In view of the difference of opinion of the two Hon''ble Judges, the matter was directed to be placed before the Hon''ble Chief Justice for nominating a third Hon''ble Judge. Thereafter by order dated 4.11.1999, the Hon''ble Chief Justice directed that the matter to be placed before Hon''ble G. P. Mathur, J. The case was listed before Hon''ble G. P. Mathur, J., on several occasions, but as the Appellant's counsel did not turn up, Justice Mathur appointed Sri Samit Gopal as amicus curiae on 18.1.2002 to represent the Appellants in these criminal appeals. As the case could not be heard by Hon''ble G. P. Mathur, J., who was elevated to the Supreme Court, another order was passed by the Chief Justice on 19.5.2003 for placing the case before Hon''ble S. K. Agarwal, J. However, Hon''ble S. K. Agarwal, J., passed an order on 14.7.2003 in Capital Criminal Appeal Nos. 906 of 1998, 907 of 1998, 908 of 1998 and 110 of 1998, that a most fluid situation had arisen in this case because if he did not agree with the

judgments of both Hon''ble J. C. Mishra, J., maintaining the conviction of the Appellant, nor with the view of Hon''ble S. K. Phaujdar, J., remanding the case for additional evidence, but if he was of the view that the Appellants should be acquitted, in that case the division between the Members of the Bench would remain intact. He therefore, expressed an opinion that the whole matter be heard by another Division Bench or even by a Bench comprising three Hon''ble Judges. The case was, therefore, placed before Hon''ble the Chief Justice, who passed an order on 28.7.2003 that the case be listed before a Division Bench presided over by Hon''ble S. K. Agarwal, J., for fresh hearing. The appeal was, thereafter heard by a Bench presided over by Hon''ble S. K. Agarwal, J., but unfortunately as Hon''ble S. K. Agarwal, J., resigned, an order was passed by Hon''ble Senior Judge on 10.3.2005 for placing this case before the Bench presided over by Hon''ble Imtiyaz Murtaza, J. It is in the circumstances that these appeals and criminal references have been heard by us.

7. We have heard Shri Samit Gopal, Amicus Curiae for the Appellants and learned Additional Government Advocate representing the State.

8. In a short compass, the case of the prosecution was that on 26.11.1994 at about 7.00 p.m. a gang of 14-15 miscreants armed with rifles and guns arrived at the crossing in village Hathai, and started taking sweets and pan at the sweets and pan shops. At that time constable Ram Asray and home guard Shiv Balak, arrived there and were questioned by those miscreants. When the aforesaid police personnel replied that they were police personnel and challenged the miscreants flashing their torches at them, the miscreants started firing indiscriminately causing the death of a constable and a home guard. Thereafter the miscreants ran away, with the rifles, cartridges and torches of the two deceased, towards Daulatpur road. On hearing the sound of firing, the villagers arrived there, who identified the miscreants in the light of torches and in the lamp lights, which were burning in the shops and who found the miscreants to be between the ages of 25-30 years. Some of the miscreants were speaking the language of the vicinity whereas others were speaking the dialect of Jamunapar. An oral report about this incident as above was lodged by Uma Shanker, Chaukidar at police station Gajner u/s 396, I.P.C. at Case Crime No. 238 of 1994 against 14-15 unknown persons on 26.11.1994 at 8.05 p.m. in the presence of P.W. 3 S.I. Gajendra Singh. Constable Muharrir Kailash Nath Mishra prepared chik F.I.R. (Ext. Ka-13), and made necessary entries in GD No. 29, vide Ext. Ka 14, at 8.05 p.m.

9. S.I. Gajendra Singh, P.W. 3 immediately left for the place of incident, where he recorded the statement of informant Uma Shanker, Chaukidar, P.W. 1 and prepared the site plan on the pointing out of Uma Shanker (Ext. Ka-15). He also took the plain and blood stained earth from the spot, got the recovery memo prepared through S.I. J. P. Rawat. The plain and blood stained earth in respect of the two deceased, Constable Ram Asray and Home Guard Shiv Balak are Exts. Ka 16 and 17. He also recorded the Section 161, Cr. P.C. statement of witness Vinay

Kumar on 28.11.1994 near whose shop the incident had taken place. He also recorded the statement of Ram Shanker Mishra u/s 161, Cr. P.C. and after making the last entries in the case diary on 1.12.1994, the case was transferred from him. Thereafter the investigation of this case was carried on by S.I. Girish Chandra Yadav, P.W. 7 from 5.12.1994.

10. S.I. Girish Chandra Yadav, P.W. 7, recorded the Section 161, Cr. P.C statement of the main witness of this case Dharmendra on 31.12.1994 after he was rescued. Dharmendra stated that Kalla alias Sardar alias Pahalwan, Yasin, Surendra Kachi, Kamlesh Kahar, Ram Babu Yadav, Raj Bahadur, Munna alias Munua, Manni Lal etc. were involved in his abduction. He had gone to Dharmendra's village Ram Sari for recording his statement. He could not however recall if Dharmendra had any injuries. He also recorded the statement u/s 161, Cr. P.C of Arvind Kumar alias Phailu, P.W. 4.

11. The third Investigating Officer Inspector CBCID Sri Karan Singh, P.W. 5 took up the investigation of this case on 11.1.1995. He recorded the statements u/s 161, Cr. P.C. of the inquest witnesses such as Babu Lal etc. and the witnesses of recovery and also the statement of the writer of the F.I.R. on 25.2.1995. He submitted charge-sheet against co-accused Chandrapal alias Makkoo and the Appellants Manni Lal and others. Apart from Chandrapal, the charge-sheet was also submitted against other accused including the Appellants showing them as absconders (Ext. Ka-19). He, however, did not conduct any investigating in this case and merely submitted the charge-sheet on the basis of the investigation conducted by the earlier Investigating Officers.

12. Apart from P.W. 3, Gajendra Singh, the first Investigating Officer, P.W. 7, S.I. Girish Chandra Yadav, the second Investigating Officer and P.W. 5 Inspector CBCID Sri Karan Singh, the third Investigating Officer, who submitted the charge-sheet and whose depositions are mentioned above, the other four witnesses examined in this case were P.W. 1 Uma Shanker, P.W. 2 A.C.M. Bhola Nath Mishra, P.W. 4 Arvind Kumar alias Phailu, P.W. 6 Dharmendra Singh.

13. P.W. 1, Uma Shankar, Chaukidar, the informant, stated that as soon as he reached near the gomti (shop) he saw the miscreants consuming pan etc. at the shop. The milk man Phailu had also arrived from whom these persons took milk. At that time two constables arrived there flashing their torches and on their objections, the miscreants started firing on them. As a result of the firing two constables, one of whom was a home guard, died. The miscreants snatched the rifles and cartridges of the two deceased and proceeded in the direction of Daulatpur road. Vinay, Ram Avtar, Arun and others who had arrived at the spot also saw the miscreants in the light of lamps and torches. The deceased were Constable Ram Asray and Home guard Shiv Balak. On his cross-examination, he however, disclaimed knowing as to who were the miscreants who had fired at the deceased. As he was hiding behind the gomti hence he could not identify the miscreants. He went to jail for identification of the accused, but failed to identify any of the miscreants.

14. P.W. 2, Bhola Nath Mishra, S.D.M., Bhognipur, conducted the inquest on the dead bodies of the two deceased constable Ram Asray and home guard Shiv Balak at village Hathai where the bodies were lying and after getting the bodies sealed, sent the same for post-mortem after preparing the necessary papers (Exts. Ka-1 to 12) for that purpose.

15. P.W. 4, Arvind Kumar alias Phailu deposed that on the fateful evening at about 6.30 p.m. he was returning from Mughalpur to his village and when he reached near village Hathai near the pan shop he saw 4-5 miscreants who were carrying guns and cycles in their hands, The miscreants stopped him and opened the top of the milk can and started drinking milk. At that time two constables arrived on cycles from the direction of Gajner. When the constables flashed their torches, the miscreants recognized them to be constables and fired at them resulting in the deaths of the two constables at the spot. After that, the miscreants ran away with the torches and rifles of the constables. This witness recognized the miscreants in the light of lamps, which were burning at the shops. He had gone to Akbarpur police station after the miscreants were arrested and was made to recognize the miscreants there. He did not know the miscreants before the incident. At that stage this witness was declared hostile and allowed to be cross-examined by the learned ADGC. However, in his cross-examination, he stated that he had told the Investigating Officer that he was unable to recognize any of the miscreants. He denied having told the Investigating Officer that he could identify the Appellants Yasin alias Baba and he could not explain why the Investigating Officer had written such a statement. He denied having colluded with the accused.

16. The star witness of this case is P.W. 6, Dharmendra Singh. He deposed that on 25.11.1994, a dacoity took place in his house in village Ram Sari, police station Ghatampur, district Kanpur Nagar. In that dacoity, the dacoits had taken away the licensed gun of his father and household items and also kidnapped him. The police got him released from the clutches of the dacoits on 10.12.1994. On 26.11.1994 at about 6.30 p.m. these miscreants who were Pravesh Ali alias Palla, Yasin Baba, Manni Lal, Chandra Pal, Aziz, Surendra Kachi, Ram Bahadur, Kamlesh Kahar, Ram Babu Yadav and Bhunwar Pal etc resorted to firing, which resulted in the deaths of one constable and one home guard. He was also present at the time of incident in the custody of the miscreants. The constables had come on cycles carrying rifles and when they flashed their torches on the miscreants they were fired upon. He learnt the names of the miscreants after he was abducted. The Appellants Yasin alias Baba and Manni Lal are present in Court. The rifles and cartridges of the constables had been looted by these miscreants who had kept this witness in village Tigai for 4-5 days. The food used to come from the house of Yasin. The miscreants kept him in custody for 14-15 days. The rifles, which were looted by the miscreants, were recovered in an encounter with the Palla gang. In that encounter one dacoit Palla was murdered. He was not present in that encounter, but after the encounter, he went to see the deceased miscreant. He was not made a witness of that encounter by the police.

He thereafter admits that he himself had participated in two encounters. In one of those encounters, he accompanied the police. He even participated in one encounter without the involvement of the police. In the first encounter in which he was involved along with the police one miscreant Aziz was killed and in the other encounter in which he participated without the police, two miscreants were killed, whose names were Raj Bahadur and Punni Lal. He did not have any permission of the senior police officers for engaging in the latter encounter but only had the verbal consent of the Station Officer for that purpose. Yasin alias Baba and Manni Lal were the members of Palla gang. The two Appellants, Yasin and Manni Lal, were not involved in either of the two encounters in which this witness participated. He had not gone to the jail to identify the Appellants because the police had not asked him to identify the Appellants. The miscreants had killed the constables at 7.00 p.m when it was dark. The miscreants used to move him in the night. He denied having been kept in the house of Yasin, but he was confined by the miscreants in a sugarcane field. He did not say how far from village Tigai, he was kept in captivity. He stayed for 3-4 days with the miscreants. At that time Yasin, Aziz, Kamlesh Kahar and Manni Lal were present, but Raj Bahadur and Palla were not present. In those 4-5 days, he did not meet any villagers and he along with his custodians, did not even leave the sugarcane field for 4-5 days. He was not taken to the police station to identify the miscreants. When he was got released in the police encounter, then one miscreant was caught hold of whose name was Chandra Pal. At the time of his release firing had taken place and 10-12 fires were made from the side of the police and 5-6 fires from the side of the miscreants. In that firing no police person was injured. He had gone over to the side of the police at the time of cross-firing between the police and the miscreants. The miscreant, who was running away was caught hold of by the police. He confirmed that he had actually been kidnapped and had not gone to his relations. He denied that he was colluding with the police and giving false testimony at their instance. For two years after the incident, there was a police guard at his place. When the miscreants were kidnapping him, some had covered their faces, while the faces of other miscreants were uncovered. The miscreants did not keep him tied all the time, but would sometimes release him. Before this incident he had not heard the names of the Appellants, who were present in Court nor did he know them. He learnt their names after the incident. At the time of dacoity in his house, he could not recognize any miscreant and could not say as to which miscreant was standing where, but he could only say that Manni Lal was standing in the courtyard, Ram Babu was with him in the room and Yasin was standing outside. He could not say where Chandra Pal was present at that time.

17. Copies of the post-mortem reports are Exts. Ka-20 and 21. They have also been brought on record. Their formal proof was dispensed with by the defence. The post-mortem on the body of Shiv Balak Pandey was conducted on 27.11.94 at 1.10 p.m. by Dr. Ashok Kumar, MO I/C IPP 6, Kanpur Nagar, who found the following ante-mortem injuries:

(1) Fire arm wound of entry 1 cm. x 1.5 cm. x chest cavity deep over the right side of chest. Just lateral to the sternum and 2.5 cm. below the right clavicle. Scorching present all around the wounds margins inverted.

(2) Fire arm wound of exit 3 cm. x 3 cm. x chest cavity deep over to left side of chest 6 cm. below the left nipple margins everted. Lacerated pleura coming out from the wound.

(3) Fire arm wound of entry 0.5 cm. x 0.5 cm. x abd. cavity deep just below the 10th rib x 9 cm. Away from mid line charring present, all around the wound.

(4) Fire arm wound of exit 2 cm. x 2 cm. over the left side of back 10 cm. below the lower angle of left scapula.

(5) Lacerated wound 11 cm. x 4 cm. x bone deep of inner side of left arm 1 cm. above the left elbow under injury fracture of bone.

Direction of fire arm:

(a) Obliquely downward and left side in injury Nos. 1 and 2 (Rt. Leg-stomach-spleen-out).

(b) Transverse on 3rd and 4th injury.

18. Post-mortem examination report of Rama Asrey, which was also conducted on 28.11.1994 at 12.05 noon by Dr. Ashok Kumar disclosed the following ante-mortem injuries:

(1) Lacerated wound 1 cm. x 0.5 cm. over the right side of skull above the right ear.

(2) Fire arm wound of entry 3 cm. x 3 cm. x bone deep over the right side of neck. Just below the right angle of mandible. Color (margin) of wound are blackish and inverted.

(3) Fire arm wound of exit 9 cm. x 8 cm. x bone deep over the left side of face lower jaw, left maxilla and nasal bones are found fractured, margins of wounds are everted.

(4) Fire arm wound of entry 2 cm. x chest cavity deep over the right side of chest. Blackening and charring present all around the wound margins inverted.

(5) Fire arm wound of exit 4 cm. x 5 cm. over the lat. side of chest on right side. 11 cm. below the right axilla area wadding piece recovered from the underneath the wound. Margins of wound everted and two small pellets from skin.

(6) Lacerated wound 5 cm. x 2 cm. x muscular deep over the left side of scrotum.

Direction of fire arm:

(a) Injury No. 2 to 3 obliquely upward and laterally to left side.

(b) Injury Nos. 4 and 5 downward and laterally.

19. The Appellants had only stated in their Section 313, Cr. P.C statements that they were falsely implicated on account of enmity and have denied participation in the incident. However, the Appellants have not examined any defence witness, but have filed three documents in their defence. These are: statement of Manoj Kumar in State v. Chandrapal alias Makkoo S.T. No.125 and 205 of 1995, pending before VII Ith Additional District and Sessions Judge, Kanpur Nagar (Ext. Kha-1), decision in S.T. No. 125 of 1995 (Ext. Kha 2) and decision in S.T. No. 209 of 1995, State v. Chandra Pal, u/s 307, I.P.C., Police Station Akbarpur, district Kanpur Dehat.

20. So far as the place, time and manner of the incident are concerned, no challenge has been made by the learned Counsel for the Appellants and this Court has no reason to hold that the incident did not take place at 7.00 p.m. at the crossing of village Hathai near the gomti (shop) on 26.11.1994 or that in that incident constable Ram Asray and home guard Shiv Balak were not shot at by the miscreants and their rifles looted. These facts are amply borne out from the testimonies of the witnesses, who have been examined in the case and also corroborated by the inquest report and post-mortem reports of the deceased, and other police papers. The prosecution can also not derive any advantage from shifting the place of incident to another place as in this case no one was named in the F.I.R. and in a very natural manner the incident has been described as it occurred. The question, which still remains is whether the evidence in this case was sufficient for implicating the Appellants and specially whether the testimonies of the three witnesses of fact, who have been examined, namely P.W. 1 Uma Shankar, Chowkidar, and informant of this case, P.W. 4 Arvind Kumar alias Phailu and Dharmendra Singh, P.W. 6 is sufficient for showing the complicity of the Appellants in this incident.

21. So far as P.W. 1 Uma Shankar Chowkidar, the informant of this case is concerned, admittedly he did not know the accused from before. He did not name anyone in the F.I.R. He also claims to have hidden behind the gumtis when the firing took place and hence he could not identify the miscreants. He failed to identify any miscreant in the Test Identification proceedings held in the jail.

22. P.W. 4 Arvind Kumar alias Phailu also claims to have been made to identify the miscreants and disclaims knowing the miscreants from before. He was even declared hostile by the prosecution and allowed to be cross-examined. Whereupon, he claimed that he did not recognize any of the miscreants and he even repudiated his Section 161, Cr. P.C. statement where he is said to have stated that he could identify Manni Lal and Yasin. In this view of the matter these two witnesses can be of no assistance for the prosecution for showing the complicity of the Appellants in this incident.

23. So far as the star witness P.W. 6, Dharmendra Singh is concerned, it has been vehemently argued that apart from the mere statement of this witness that he was abducted from his house on 25.11.1994 when the dacoity took place there and he was thereafter rescued in a police encounter on 10.12.1994 when

another accused Chandra Pal was arrested, there is absolutely no corroboration for his abduction on 25.11.1994 and rescue on 10.12.1994. It was in those circumstances that Hon"ble S. K. Phaujdar, J. had observed in his order dated 4.10.1999 that some additional evidence was needed for examining the competent police officer or other witness to bring on record the F.I.R. for the dacoity and abduction in the house of Dharmendra and also for examining a competent police officer or other witness to bring on record the F.I.R./G.D. entry on the point of arrest of Chandra Pal and rescue of Dharmendra. However, as the third Judge, Hon"ble S. K. Agarwal, J., in his order dated 14.7.2003, and Hon"ble J. C. Mishra, J., in his separate opinion dated 4.10.1999 observed that after lapse of four years, the said materials would in all likelihood have been weeded out, as the normal practice in U. P. was weeding out of such material from the police stations in three years, hence no purpose would be served in calling for additional evidence on the lines suggested by Hon"ble S. K. Phaujdar, J.

24. We are inclined to accept the observations in this regard made in the judgments of Hon"ble J. C. Mishra, J., the third Judge Hon"ble S. K. Agarwal, and also feel that now in 2005 certainly no purpose would be served in calling for the additional evidence on the lines suggested by Hon"ble S. K. Phaujdar, J.

25. This Court is therefore left with no option but to draw an adverse inference against the prosecution u/s 114(g) of the Evidence Act that this material for corroborating the abduction of this witness Dharmendra from his house on 25.11.94 and his rescue on 10.12.1994 has deliberately been withheld by the prosecution as it felt that this material, if produced would be unfavourable to it.

26. Even intrinsically there are certain circumstances, which cast a grave doubt on the independence and reliability of P.W. 6 Dharmendra as to whether actually he was abducted when the so-called dacoity took place at his residence on 25.11.1994 as he claimed, and whether he was present in the present incident dated 26.11.94 when the two constables were murdered.

27. In this regard, this witness has stated that he has twice been an active participant in encounters. He joined one police encounter in which one miscreant Aziz was killed. He claims to have participated in another encounter even without police aid and without orders of senior police officers simply on some verbal sanction given by the Station Officer. In that encounter two persons Raj Bahadur and Panna were killed. Such a witness is not likely to be meekly abducted when a dacoity took place in his house. He would also appear to be closely connected with the police as no ordinary or common person is likely to participate in such encounters. Looking at the proximity of this witness with the police, it is quite possible that this witness could be more than willing to give any testimony as desired by the police. We notice how willingly this witness has nominated as many as 10 persons, Pravesh Ali alias Palla, Yasin Baba, Manni Lal, Chandra Pal, Aziz, Surendra Kachi, Ram Bahadur, Kamlesh Kahar, Ram Babu Yadav and Bhunwar Pal etc. in his examination-in-chief as the persons who participated in the incident dated 26.11.1994. How would he learn the names of all these

accused persons simply by being kept in the sugarcane field for some days by some of the miscreants. He specifically mentions in his cross-examination that Yasin, Aziz, Kamlesh Kahar and Manni Lal were present in the field where he was held captive, but Raj Bahadur and Palla were not there. In this connection it does appear that such a witness would have no qualms in dittoing the names of as many persons whom the police desires to implicate, in view of his closeness to the police.

28. One other reason for casting grave doubt on the veracity of this witness is that although this witness is claimed to have been rescued by the police on 10.12.1994, yet his statement u/s 161, Cr. P.C. was recorded by P.W. S.I. Girish Chandra after 21 days on 31.12.1994 and there is absolutely no adequate explanation for this delay other than the fact that the police wanted to put the names of certain accused persons, such as Appellants and Chandra Pal into the mouth of this witness.

29. It may also be noted that although the Appellants Manni Lal and Yasin alias Baba are not said to have been arrested when this witness was said to have been rescued on 10.12.1994 and admittedly this witness did not know these persons from before, yet they have not even been put for test identification by this witness.

30. It is also not likely that one day after his abduction from his house, the miscreants, who had abducted him, would take this witness to different places and shops, such as the place where the incident took place as there would always be the risk that this witness could reveal to any person present at such a public place that he was an abductee in the clutches of his captors and that they should arrange his rescue or actually try to go over to the other side. In this respect it is noteworthy that this witness claimed that when the police encounter with firing from both sides took place on 10.12.1994, he managed to cross over to the side of the police facilitating his rescue. That the witness was not present when the incident took place on 26.11.1994 at the crossing of village Hathai is also suggested by the fact that this witness admits in his cross-examination that he was kept confined in the sugar cane field for four or five days by his captors with no opportunity to meet any outsiders, whilst this incident took place on 26.11.1994, the very next day after his alleged abduction from his house on 25.11.1994.

31. Furthermore the judgment, Ext. Kha-3, in S.T. No. 209 of 1994, u/s 307, I.P.C., only shows that an injuryless encounter with the police took place on 11.12.1999 at 3.15 a.m. in village Harhi, police station Akbarpur in which Chandra Pal alias Makkoo was apprehended. This witness Dharmendra is not even said to be present at the time of that encounter. His rescue dated 10.12.1994 is rendered doubtful by another circumstance that no one from either side received any injury in that encounter, although cross firing was alleged.

32. It would therefore be highly unsafe to place implicit reliance on the solitary testimony of this witness for establishing the complicity of the Appellants in this incident.

33. In this state of evidence, we do not feel that there is adequate material for sustaining the conviction of the Appellants.

34. In view of what has been indicated above, the appeals succeed and are allowed. The reference made by the learned Sessions Judge is rejected. The conviction and sentence awarded to the Appellants as aforesaid are set aside. They are in custody, they will be released forthwith unless wanted in any other case.

35. Shri Samit Gopal, amicus curiae shall be paid Rs. 1,500 each for both the appeals for the able assistance rendered to this Court.