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AFR

CRIMINAL APPEAL NO.846 of 1982

Munendra and others	Appellants
	Versus	
State of U.P.	Opposite Party

Hon'ble Vinod Prasad, J.
Hon'ble Surendra Kumar, J.

(Delivered BY Hon'ble Vinod Prasad J.)

This appeal has emanated against the judgment and order dated 31.3.1982 passed by 4th Additional Session's Judge, Muzaffarnagar in S.T. No.231 of 1981, State Vs. Munendra and others, by which, the two real sibling brothers Munendra (A-1) and Vijai Singh (A-2), both sons of Bhagirath and Rajpal (A-3) son of Shyam Singh, all resident of village Bhaishwal, police station Shamli, district Muzaffarnagar have been convicted and sentenced under section 302/34 I.P.C. for life imprisonment.

Prosecution has divulged its entire story through the depositions of the informant Ram Kishan, P.W.3, coupled with orally dictated F.I.R. Exhibit Ka-1. From the perusal of both the aforesaid evidences it is discernible that both informant and deceased on the one side and accused on the other had the same lineage. Narrated pedigrees indicate that one Ram Singh, r/o village Bhaishwal, P.S. Shamli, district Muzaffarnagar, had two sons Jagdish and Ram Kishan (informant). Jagdish had three sons Desh Pal (deceased), Jasvir and Ram Autar, whereas informant Ram Kishan had two issues Satbir (who had taken the injured/deceased along with others to hospital on his tractor) and Udaiveer. Collateral and co-villager Shibba and his wife Zikor also resided in the same village. They had only a daughter Atli (deceased in cross case). Bhagirath was the husband of Smt. Atli, whereas Munendra (A-1) and Vijai Singh (A-2) are their sons. Thus what is admitted is that both

prosecution side and accused had common ancestors. Rajpal (A-3) is stated to be the associate of (A-1) & (A-2). Houses of Jagdish and accused were adjoining to each other having a common boundary wall.

Bhagirath and Munendra (A-1), father and son, had affixed a passage door on a pedestal in the premises of Jagdish and for its removal Jagdish had filed a civil suit before the competent Munsif court, which was being looked after by Desh Pal (deceased). Five or seven days prior to present incident, which occurred on 25.12.1979 in the early hours of the morning, the aforesaid civil suit was decreed in favour of Jagdish wherein Munsif Court had ordered judgement debtors, Bhagirath and Munendra (A-1) to remove their passage door within a month, failing which, plaintiff decree holder was authorised to block it. However, on the very next day of the judgement, Jagdish and Desh Pal (deceased), blocked the said passage door-way by erecting a brick wall obstruction.

Prosecution further alleged that because of hostile feelings and malice intent, (A-1) along with his father and four brothers, had shot at informant's mother and had belaboured his father regarding which informant had lodged a FIR through his father at the police station and in the said crime accused had to get themselves bailed out. Criminal trial regarding that incident was pending on the date of the present incident.

On 25.12.1979 at 7/7.15 a.m. deceased and his maternal uncle Brahm Singh were going to attend nature's call. Informant Ram Kishan, P.W.3 along with Ilam Chandra Singh (P.W.1), Hans Raj (P.W.2), and Bijja too were going for the same purpose, when accused appellants surrounded injured/deceased near the house of Baljit Chamar. Both injured/deceased and Brahm Singh raised rescue calls attracting informant and other witnesses. All the accused then uttered that injured/deceased had tormented them enough, and thereafter opened murderous gun fire shots at him from their country made pistols. Sustaining grievous fire arm injuries, deceased fell down on the erected pedestal (*Chabutara*) in front of Baljit's house. In this shooting incident Hans Raj, PW2, had also sustained pellet injury in his ankle. Committing the crime, all the assailants escaped from the incident

scene towards their houses as terror stricken witnesses could not muster any courage to apprehend them.

Informant Ram Kishan transported both the injured to Shamli Hospital at a distance of four miles, in his tractor trolley driven by his son Satbeer, accompanied by Desh Pal, Hardeva and others and got them admitted in the hospital. From the hospital, informant, PW3 proceeded to P.S. Shamli, where he dictated his FIR, which was recorded as crime no. 574 of 1979, u/s 307 I.P.C., by head constable Bhanwar Singh, P.W. 5, same day at 8.45 p.m. by preparing chik FIR Ext. Ka-1. Corresponding GD entry, vide rapat no.17, was prepared by the same witness which is Ext. Ka-5. This GD entry also contains a reference of a memo, which was brought by Ward boy Om Prakash, from the hospital and was handed over to S.I. S.N. Khan. Subsequently, after demise of the deceased, on 25.12.1979 at 1p.m.in the Safdarjang Hospital, New Delhi, crime was converted u/s 302 I.P.C. by SI S.N. Khan on 27.12.1979 at 6.30 p.m. vide rapat no. 40. Conversion GD, prepared by I.O. P.W. 14, is Ext. Ka-24.

SI S.N. Khan, in whose presence the crime was registered at the police station by P.W.5, commenced investigation into the offence, came to the hospital and recorded 161 Cr.P.C. statement of the deceased, which by virtue of the demise of the testator, is now his dying declaration, which is Ext. Ka-19. Statement of injured Hans Raj was recorded thereafter in the hospital, copy of which has been proved as Ext. Ka-20. Thereafter informant Ram Kishan and Dr. S.C. Gupta were interrogated and their statements were recorded. I.O. thereafter came to the incident spot in village Bhaishwal where he recorded statement of witness Ilam Chand, which is Ext. Ka-21. He conducted spot inspection and prepared site plan Ext. Ka-22. Blood stained *joot* bag and soil were recovered vide recovery memo Ext. Ka-23. All the recovered articles were put in the police station cloak room.

Two sibling brothers Munendra (A-1) and Vijai Singh (A-2) surrendered in the Court on 10.1.1980.

Papers from Safdarjang Hospital, New Delhi in respect of medical treatment and demise of the deceased as well as medical treatment of the

injured were got requisitioned by the I.O., through constable Durga Lal and were made a part of the case diary. On 27.1.1980, witness Sukhbir was interrogated, and subsequent thereto statement of all the accused persons were recorded on 1.3.1980 and concluding investigation, on the said date, I.O. charge sheeted them vide Ext. Ka-25.

When the injured were brought to the Government Hospital Shamli, Medical Officer Dr. S.C. Gupta, P.W. 4 had examined them. Injured deceased was examined at 8.15 a.m. and his medical examination report Ext. Ka-2 was prepared by the doctor. Thereafter, statement of the injured, Ext. Ka-4, was recorded by the same doctor at 9 a.m., which is his first dying declaration, because of his death. According to P.W. 4, he had recorded the dying declaration in the language of injured deceased Desh Pal and after recording it, he had read out it to him and thereafter had got his thumb impression. At the time of recording of the said dying declaration, doctor had satisfied himself that the deceased was in a fit condition to give the statement. At that time except the doctor and the injured nobody else was present inside the room as everyone else was sent out side. This first dying declaration is transliterated herein below:-

"stated that today in the morning at dawn I from my house along with my maternal uncle Brahma Singh was going to ease, when I reached in front of Baljit Chamar house then co-villager Raj Pal son of Shyam Singh, Munendra and Vijai Singh son of Bhagirath Jat resident of village Bhaiswal rounded me up. I raised shout then all the three shot at me. On my shouts my uncle Ram Kishan, co-villager Ilam Chand , Vijai Singh and Hans Raj Chamar etc. many people collected, who have seen these people shooting at me. I fell down sustaining injury and Hans Raj Chamar also sustained gunshot injury. From these people I have old enmity over land.

Time 9

Date 25.12.1979

LTI

Above statement was given by Sri Desh Pal of his free will in my presence and I certify that the patient was fully conscious. On 25.12.79, Dr.

S.C. Gupta, M.B.B.S, D.M.I.E (seal) note - Sri Desh Pal was being transfused Hemaseal saline and therefore could not sign."

According to the doctor, injured deceased Desh Pal had sustained following injuries on his person:-

"Examined Desh Pal aged about 25 years S/o Jagdish R/o Bhaiswal P.S. Shamli, District Muzaffarnagar on 25.12.1979 at 8.15 am B/B Naipal Singh S/o Raghuveer R/o vill. Bhaiswal P.S. Shamli, District Muzaffarnagar and found following injury.

M.I. :- (i) L.T.I. (ii) A black mole on the front and left side of neck.

Injuries :- (i) *A lacerated wound 14.5cm x 7.0cm x bone deep on left x front extending from back and lower 1/3 of left leg to middle of left foot on the inner side bleeding present.*

(ii) A lacerated wound 2.0cm x 3/4 cm x muscle deep on the front of (Rt.) forearm with lower 1/3 bleeding present.

(iii) A circular gunshot wound of exit 2-1/2cm x 1.0cm x depth cannot measure on the lower part of chest on the front and middle. Margins are inverted.

(iv) A circular gunshot wound of entry 2-1/2 cm x 2 cm on the (Rt.) side of back under lying post. Axillary line 9 cm back to the axillary. The (Anterio) bleeding margins are everted.

G.C. of patient poor pulse feeble 120 /mt. Lumber. Respiration 20/mt. Regular B.P. 100/70 per minute. General condition poor. Pts. fully conscious. Case is referred to Delhi for treatment please.

Duration fresh.

Opinion:- *Injury nos. 3 and 4 are caused by gun shot. Injury nos.*

(i) and (ii) are kept U.O. Advised X-ray of the left part.

AP + Lat. (Rt.) forearm and chest."

General condition of the patient was poor, his pulse was feeble 120 per minute. His respiration was 20 per minute and blood pressure was 110/70. His general condition though was poor but patient was fully conscious. P.W. 4 had referred him to Delhi for treatment. Injuries sustained by the injured were fresh. Injuries 3 and 4 were caused by gunshot whereas

injury nos. 1 and 2 were advised for X-ray. Injuries of this injured were noted by the doctor in private medico legal register. Naipal Singh had brought this injured before the doctor. In the opinion of the doctor, injury could have been sustained by the injured at 7 or 7.30 a.m., the same day.

Hans Raj, injured, PW2 was examined at 9.15 a.m. same day and on his person following injuries were found by the doctor P.W. 4:-

"Examined Hans Raj aged about 30 years S/o Dhanu R/o vill. Bhaiswal P.S. Shamli, Muzaffarnagar on 25.12.79 at 9.15 am B/B Naipal Singh S/o Raghudev R/o vill. Bhaiswal, Shamli District Muzaffarnagar and found following injury.

M.I. :- (i) L.T.I., (ii) A old scar ½ cm x ½ cm on the left side of forehead. 3-1/2 cm above the left eye brow.

***Injury :- (1)** A lacerated wound 4.0 cm x 2.0 cm x bone deep on the front and upper 1/3 of left leg. Bleeding 3-1/2 cm below the left knee.*

Duration : fresh

***Opinion :-** Injury no. 1 is kept U.O. and Advised X-ray of the left leg. AP + Late. About the weapon opinion will be given after X-ray examination."*

The said injury was kept under observation and could have been caused by some firearm discharge. However final opinion was reserved by the doctor in that respect. Medical examination report of Hans Raj is Ext. Ka-3.

Statement of injured Desh Pal, u/s 161 Cr.P.C. recorded by the I.O., which statement by virtue of his death is now his second dying declaration, is as follows:-

" Desh Pal s/o Jagdish Jat r/o Bhaiswal, P.S.Shamli, injured above confirming FIR stated that today at dawn I from my house along with my mama Brahma Singh was going to ease. When I reached in front of Balbir Chamar house on the way then co-villagers Munendra, Vijai Singh, and Raj pal all of a sudden came from side road and surrounded me who were armed with country made pistols. Seeing ourselves surrounded I and my

mama yelled out and hearing our shrieks my village uncle Ram Kishun Imam Chand, Bijja, Hans Raj Harijan came from nearby locality that these three accused uttered that 'this sala had tormented us enough and kill him' that all the three fired upon me with an intention to kill. Munendra and Vijai Singh had gyrating weapons and their shots caused injuries on my body and I fell down on chabutara of Baljit. Meanwhile Hans Raj came to rescue me and then one shot fired by accused hit him also. On challenge by the witnesses all the accused escaped towards their houses. To both of us our family members brought to Shamli hospital on a tractor and then my uncle Ram Kishun had gone to police station to lodge the FIR. Corroborating the incident further stated that in between me and accused a case in respect of a door was going on before Munsif since last year because of which enmity accused Munendra along with four brothers and father had shot at my mother and had assaulted my father regarding which I had lodged a report in police station through father and that trial is pending and accused are on bail. The civil suit was won by us from the court on 18th of this month and on 19th we blocked the door of the accused by erecting a brick wall and since then accused hostile feeling was further aggravated. I am rifle licensee and hence accused felt more danger from me. Because of above enmity these people had fired at me with an intention to murder from their country made pistols. My condition cannot improve and I am proceeding to Delhi for treatment."

Translating the above statement it becomes evident that besides facts sketched in the FIR, Desh Pal, had stated that he had fallen down on the erected pedestal of Baljit and that his family members had brought the injured to Shamli hospital on a tractor and got them admitted and thereafter informant, Ram Kishan, had gone to the police station to register the FIR. On inquiry he had disclosed to the I.O. that with the accused he had enmity of civil suit since last many years because of which appellant (A-1) along with his four brothers and father had shot at his mother and had assaulted his father regarding which a report at the police station was lodged by the father of the injured (Desh Pal). Aforesaid criminal trial was also pending in

Court and the accused persons were on bail. The civil suit was decreed in their favour on 18th of the same month and on 19th they had erected a brick wall closing the door opened by the accused and since then the hostility amongst them had aggravated. Injured has also stated that he had a licensed riffle and because of this the accused persons felt terror from him. Because of aforesaid enmity accused had shot at him from their country made pistols and he is going to Delhi for further management of his injuries. This 161 Cr.P.C. statement is the second dying declaration of the deceased recorded only a few minutes apart and is Ext. Ka 19, dated 27.2.1980.

Both the injured were admitted in Safdarjang Hospital, Delhi on 25.12.79 at 12.45 P.M. and police station Vinay Nagar, Delhi was accordingly informed about it through constable Ramesh Chand, which intimation was recorded in the general diary. S.I. Rampal Singh, P.W.6, of P.S. Vinay Nagar had gone to Safdarjang Hospital along with a written report prepared by him to record statement of injured Desh Pal, but at 12.45 P.M., Dr. D.K. Chug, declined the said request in writing as Desh Pal was not in a fit condition to give his statement. The note given by the Doctor is Ext. Ka-7. Desh Pal expired same day at 1 p.m., regarding which an intimation was received at P.S. Vinay Nagar. S.I. Rampal Singh P.W.6 entered the message received from the hospital in GD vide rapat no.9 and then along with constable Tejveer and Kamal Dev came to Safdarjang Hospital where he found the cadaver of the deceased in the hospital mortuary. After seizing the corpse, S.I. conducted inquest proceedings on the cadaver of the deceased and prepared inquest memo Ext. Ka 6. Sealing the dead body, it was handed over to the aforesaid constables to be carried to AIIMS for autopsy purposes. P.W.6 had also written a letter in the name of the doctor for conducting post mortem examination on the corpse of the deceased which is Ext. Ka-8. In the hospital, Satya Vir and Veer Sen had identified the dead body before P.W.6 regarding which their statements were recorded by the said S.I. who had attested them. The attestation signature on these statements are Exts. Ka-9 and Ka- 10. On 21.1.1980 from A.I.I.M.S. in a sealed bottle, blood stained pellet and wads, were collected by P.W.6,

regarding which he had sketched a recovery memo, which is Ext. Ka-11. Both the bottles and material are Exts.1 and 2.

Constable Tejpal, P.W.7 had carried sealed dead body from Safdarjang Hospital to A.I.I.M.S., without getting it tampered, and had identified it before the post mortem doctor.

Satyavir Singh, P.W.8, had identified the dead body before S.I. Ram Pal P.W.6 on 25.12.1979 and post autopsy examination had received it on 26.12.1979. Extract of his statement is Ext. Ka-12.

Ram Lal, record clerk, Safdarjang Hospital, New Delhi had proved medico legal register from 22.12.1979 to 29.12.1979. At page 5330 injuries of injured Hans Raj, who was brought in the said hospital by Jagdish was noted. Casualty number of the said injured was 112765. Original copy attached with the said register, made by Dr. R.C. Chatwal, was taken out from the register and was filed in the court by PW8.

Dr. Y. Singh, Radiologist, Safdarjang Hospital, P.W.10, had X-rayed injured Hans Raj vide X-Ray film no. 4022 on 25.12.1979. The X-ray was performed by technician Ramesh Chand. Many metallic pellets round in shape were found embedded in upper one-third of the leg of the said injured by P.W.10, which resembled pellets. Tibia bone at the site of the injury had fractured. X-Ray of injured Hans Raj is Ext. Ka-13.

Dr. Rakesh Kumar Chatwal, CMO (casualty) Safdarjang Hospital had examined Hans Raj on 25.12.1979 at 12.30 p.m., who was brought to him by Jagdish. X-ray of the aforesaid injury vide Ext. Ka- 13, was done by Dr. Y. Singh. After examining the X-ray report and X-ray plate, Dr. Chatwal P.W.11, had given his finding and his report as Ext. Ka-14, and his signature on the said report is Ext. Ka-15. The aforesaid injuries could have been caused by firearm on 25.12.1979 at 7-7.30 a.m. Medico legal register containing the said examination report is Ext. Ka-14. Another injured deceased Deshraj was examined by another Doctor D.K. Chug P.W.12, at serial number 5329 on the same day. The said doctor had noted following injuries on his person, after examining the said injured Desh Pal at 12.30 p.m.:-

"1. Clear lacerated wound medial side of left foot and ankle extending

- backwards about 6" x 3", irregular margin charring around margin present.*
- 2. Clear lacerated wound right wrist 1" x 1/2" charring around irregular margin present. No wound of exit (probing not done).*
- 3. Clear lacerated wound 2" below right scapula, oval in shape 1" x 3/4" approximately, margins lacerated (probing not done).*
- 4. Clear lacerated wound 2" below **xiphy sternum** 1" x 1" charring around irregular margins (probing not done)."*

Desh Pal had informed the doctor, the manner in which he had sustained the injury, which has also been noted by the doctor P.W.12 in the medical examination report of the said injured. According to the said noting he had sustained the injury in a scuffle with the appellants. He was conscious at the time of making the disclosure statement. His pulse was very feeble and 120 per minute. His body had gone pale and his general condition was poor. At 12.45 p.m. the patient started gasping and therefore, was given artificial respiration, cardiac massage and resuscitation but he could not survive and lost his breath and at 1p.m. was declared dead, as his heart beat and pulse vanished. X-ray report of the deceased injured is Exhibit Ka-16 prepared by this doctor. Jagdish, father of the deceased was present besides him at the time of his examination by P.W.12. Death certificate issued by the doctor was handed over to Jagdish, which is Exhibit Ka-17.

Doctor B.L. Meel, M.O. AIIMS, Delhi had performed autopsy on the cadaver of the deceased on 16.12.1979 between 2.30 to 4.30 p.m. which was brought to him by Constable Tejpal Singh and Kamal Dev of P.S. Vinay Nagar, New Delhi. Body was received on 26.12.1979 at 11 a.m. along with inquest papers. Deceased was 28 years of age and had an average physique. Rigor mortis was present on both upper & lower limbs and post mortem staining on the back side of chest & abdomen were present. No sign of putrefaction was present on the body. Eyes and mouth were closed and pupil dilated. According to the noting in the post-mortem examination report, deceased was alleged to have sustained gunshot injury on 25.12.1979 at 7.30 a.m. and was admitted in S.J. Hospital same day at

12.30 p.m. and had expired the same day at 1p.m. In doctor's estimation, he had died due to shock as a result of laceration of the lungs and liver. Injuries sustained by the deceased were ante-mortem in nature and injuries numbers 1 and 2 were sufficient to cause death in ordinary course of nature and likely to be produced by firearm weapon. In the post-mortem examination report doctor had noted following ante-mortem injuries sustained by the deceased:-

"1. Entrance gunshot wound on right side back of the chest, 4.5 cm medial to post axillary line, 10.5 cm from mid line (...paper torn) 15 cm above the iliac crest & 25 cm below the acromion, measuring in size 2.7 x 2.5 cm with abraded collar & 2.3 x 2 cm. Without abraded collar, rounded shaped, the edges of the wound are inverted & ecchymosed, one wad discovered from the wound subcutaneously, No scorching, No tattooing, No blackening & no singeing of hair seen. There is lacerated wound, underneath tissue, the wound tract going towards right lung, via perforating diaphragm, right lower lobe of the lung get lacerated, at lateral & under surfaces, measuring 5 x 3 x 2.5 cm in size. About 500 cc of semi clotted blood has found collected inside right pleural cavity, then coming out after laceration of right lobe of the liver 11 x 8 x 6 cm in size. There is about 900 cc of blood, semi clotted in nature present in peritoneal cavity then tract going towards.

2. Exit wound at epigastric region 5 cm below the Xiphi sternum in mid line, measuring in size 2.8 cm x 2.6 cm with abraded collar & 1.9 x 1.6 cm without abraded collar. The edge of the wound are everted & ecchymosed, one wad below the subcutaneous tissue & abdominal muscle discovered in the line of the tract.

3. Lacerated wound on anterior aspect of right forearm at the region of wrist 3.5 x 2.5 x muscle deep in size present, lodging one waded bullet, impacted in tendon, with one & a piece of wad recovered from the wound separately near the bullet.

4. Lacerated wound on medio lateral & posterior aspect of left heel 12 x 6 x 7 cm in size present. There is fracture of calcaneus and talus bones present.

Cut on Baniyan & Bandi but there is no cut on the shirt present. Size

on banyan cut No. (B1)- 5 x 2.6 cm. At injury No.(1) & No. (B2) cut 2 x 1 cm in size at injury (2) size on Bandi cut No. (A1) 3 x 2.5 cm in size at injury No. (1) & cut (A2) 2.4 cm linear in nature vertical, parallel to button hole No.(1) from above.

The Direction of the tract was forwards, downwards and medially. The case was consulted with Dr. G.R. Prasad Assistant Director Ballistic C.F.S.L. Delhi."

The post-mortem examination report of the deceased is Exhibit Ka-18. The injuries, which are mentioned in Exhibit Ka-18 corresponds to the injuries noted in the medical examination report of the deceased conducted at Safdarjang Hospital vide Exhibit Ka-16.

On the basis of the charge-sheet submitted by the I.O. P.W.14 case number 886/9 of 1981, State Vs. Munendra and others, was registered in the committal court of C.J.M., Muzaffarnagar on 2.3.1981. Learned C.J.M. found charge-sheeted offences triable by Court of Sessions and therefore, on 23.6.1981, had committed the case of the appellants to the Session's Court for trial where it was registered as S.T. No.231 of 1981, State Vs. Munendra and others, and was transferred to the 4th Additional Sessions Judge, Muzaffarnagar for trial.

Learned trial Judge charged all the appellants on 30.9.1981 with offences under Section 302/34 and 307 I.P.C. Both the charges were read out and explain to the accused in Hindi, who refuted the same, by pleading not guilty, and claimed to be tried and resultantly, to bring home their guilt, their trial commenced by observing Session's trial procedure.

Prosecution relied upon oral testimonies of fourteen of it's witnesses including three fact witnesses Ilam Chand P.W.1, injured Hans Raj P.W.2 and informant Ram Kishan P.W.3. The doctors, who had examined the injured and the deceased at various stages were examined as doctor S.C. Gupta P.W.4, Radiologist doctor Y. Singh P.W.10, Dr. Rakesh Kumar Chatwal, C.M.O. Safdarjang, who had examined injuries of Hansraj P.W.11, Dr. D.K. Chug, who had examined injuries of injured Desh Pal in Safdarjang Hospital P.W.12 and Post-mortem doctor B.L. Meel P.W.13. The police personnels, who were examined where the Head Constable Bhanwar Singh P.W.5, who had

prepared the Chik FIR and GD entry, S.I. Ram Pal Singh P.W.6 who had deposed regarding admission, demise and inquest proceedings conducted on the cadaver of the deceased in Safdarjang Hospital, Constable Tejpal, who had taken the body for post-mortem examination P.W.7, Record Clerk of Safdarjang Hospital P.W.9 and I.O. S.N. Khan P.W.14. Satyaveer Singh P.W.8 had identified and received the dead body of the deceased. No other witness was examined during trial by the prosecution, but it also relied upon various documentary evidences marked as exhibits and some of the material exhibits, which have already been detailed herein above and hence are eschewed from being repeated.

In their statements u/s 313 Cr.P.C., a common defence of false implication was taken by all the accused, who also set up a cross version, which they had already put to the informant P.W.3 as well as Head Constable Bhanwar Singh P.W.5. It was from PW5, that the accused had got proved the GD entry of the cross case, which was recorded on the same day 25.12.1979 at 2.30 p.m. vide rapat no.27 as Exhibit Kha-2. From the Investigating Officer also it has been got elicited, by the defence counsel, that he had also investigated the cross case vide crime no. 574-A and in that case had charge sheeted Jasvir, Udaivir, Ram Kishan and Jagdish. In the cross FIR Desh Pal (deceased) was also one of the named accused. In that cross version, it was alleged that Smt. Atli, mother of appellants (A-1) and (A-2) Munendra and Vijai Singh, was shot dead. Site plan prepared in the said case was also got proved. It was also got elicited, that on the front door of the house of appellant Munendra (A-1) I.O. had found gun fire shot signs, which were fired from the rifle of Jasvir. Portion of the rifle bullet was also recovered from a tin box from inside house of appellants in which, bullet had pierced. In the cross FIR, it was alleged that Desh Pal had caught hold of Smt. Atli, when she was shot dead. Site plan of the cross case was got proved as Ext. Kha-2. Thus according to the defence case, at the date and time of the incident, Ram Kishan, Jagdish, Udaivir entered into the house of the appellants, armed with gun, rifle and *lathi* and had assaulted his mother Smt. Atli inside the house and had shot her dead and in that

melee Desh Pal had sustained injuries because he had caught hold of the deceased Smt. Atli. From the house of the appellants, injured Desh Pal was taken with the help of *lathi* whereas cadaver of deceased Atli was dragged and was thrown in front of the house of Mange. To save their persons prosecution had cooked up a false case in connivance with the doctor and the police in which they had falsely implicated the appellants. In nut shell, therefore, the appellants had narrated a cross version about the incident.

As noted in the opening paragraph of this judgment, learned Trial Judge after analysing prosecution and defence case had held the appellants were guilty only under section 302/34 I.P.C. and, therefore, had sentenced them with life imprisonment, which conviction and sentence is under challenge in the instant appeal. However, the Trial Judge opined that the appellants were not guilty of the charge under section 307/34 I.P.C. because the injury to Hans Raj was not caused voluntarily but he had sustained injury when shot was fired on Desh Pal and, therefore, acquitted accused appellants of that crime under section 307/34 I.P.C.

The appeal was filed in the year 1982 and was got passed over time and again. At last when nobody appeared to argue the appeal, we appoint Sri Arun Kumar Srivastava as *amicus curiae* to argue the appeal. Later on, he was joined by Sri G.P. Dixit, learned advocate. We have heard both of them in support of the appeal. Sri Akhilesh Singh, learned Government Advocate has been heard in opposition. We had reserved the judgment, which is now being delivered.

Castigating the impugned judgment, appellants' counsel submitted that the entire prosecution case is a bundle of lies and full of fabrication and, therefore, cannot be considered to be credible and truthful. FIR is ante timed and was later on cooked up. Dying declarations were fabricated and are sham documents. Incident had not occurred as alleged by the prosecution but happening of the incident was in a totally different manner, which has been spelt out by the accused in their defence version. Deceased was a named accused in the murder case of Smt. Atli, which was registered same day at the same police station at 2.30 p.m. Perusal of autopsy report

of Smt. Atli, which was filed as defence paper/Exhibit clearly indicate that the said deceased had sustained firearm injuries and had died because of that. None of the dying declarations narrated correct version about the incident and is the outcome of fabrication and manipulation by the doctor and the police in conspiracy with the informant and hence does not inspire any confidence. The first two witnesses examined by the prosecution P.W.1 and P.W.2 turned hostile and did not support the prosecution case at all. P.W.2 was an injured witness, but he too had not supported the prosecution case, which makes a deep inroad in the truthfulness of the prosecution allegations, incisively harangued both the counsel. Conduct of Dr. S.C. Gupta is condemnable as he had tried to bolster up the prosecution case by charging money for medical examination in a government hospital, which fact he had admitted in his cross examination. Although the police station was adjacent to the hospital but the doctor had not cared to call the police for recording of the dying declaration nor had summoned the Magistrate for such a purpose. He fabricated the first dying declaration and kept it with him for two weeks without any valid reason and when pushed against the wall, furnished a totally bogus and false explanation for withholding such a vital and important piece of material evidence with him and hence first D/D is unworthy of any credence. Subsequent to the recording of that first D/D, when I.O. had arrived in the hospital to record the statement of the injured u/s 161 Cr.P.C., even then neither injured informed him that he had already given a statement to the doctor nor the doctor had produced his recorded D/D before the I.O. All this indicate that D/D was not in existence at all and the same is a sham document, which was fabricated later on, just to lend credence to the prosecution story. P.W.4 had not informed the I.O. that he had recorded statement of injured. It was further submitted that no certificate was appended by the doctor prior to recording of the dying declaration that the deceased was in a fit state of mind to give the statement. His condition was stated to be serious and he was advised to be carried to Delhi, which fact also indicates that deceased was not in a fit mental condition to give statement to the doctor. The entire dying

declaration is on a plain sheet of paper and it is evident from the necked eye that signature on it was put much below after a long gap which indicates that it was manufactured as the doctor had signed on it after slashing a line. Time of starting of recording and when it was finished is not mentioned but only 9 is written. Doctor had also not noted as to whether family relatives of the deceased injured were present or not when he was recording the dying declaration. It was, therefore, submitted that dying declaration Ext. Ka-4 is fabricated and accused had challenged it as a sham piece of evidence. Doctor P.W. 4 was so much interested in taking the sides with the prosecution that although memo sent by him to the police station existed on the record, he never cared to prove it nor the prosecution got it elicited from him as to when and in what manner, he had sent it and not waited for the police next door to arrive. Doctor had noted the injuries of the deceased and injured in a private medico legal register after charging fees. It was next submitted that 161 Cr.P.C. statements alleged to have been recorded by the I.O. is also a fabrication and in fact I.O. never recorded the same. Injured and the deceased were brought to the hospital by Naipal Singh but none of the prosecution witnesses had stated that the said person had accompanied the injured and the deceased to the hospital in the tractor and hence presence of Naipal Singh in the hospital is suspect. Testimony of P.W.3 on the said aspect of the matter is completely silent. The statement of P.W. 2 that he was carried to the hospital by his brother Hardeva has been proved by the informant P.W.3 also, as during his cross examination he had admitted that Hardeva had also accompanied injured Hans Raj to the hospital. It is further submitted that no explanation has been offered by the prosecution witnesses nor any of the dying declaration gives an explanation as to how and in what manner Smt. Atli was shot dead at the same time and date and, therefore, none of the prosecution witnesses nor the dying declarations are reliable and convincing as it all suppressed the real genesis of the incident and the actual manner in which it had occurred. For this submission, learned counsels had relied upon some of the Apex Court decisions to which we will refer to in the later part of this judgment. Since

injured/deceased was conscious and was at all times in the company of his family relatives and, therefore, all his statements(dying declarations) are tutored and fabricated in connivance with the police and the doctor just to save punishment from murdering Smt. Atli. Non explanation of injuries sustained by Smt. Atli, who died in the same incident, is enough to discard the entire prosecution story as being false and fabricated. The statement given by the injured to the doctor in Delhi is the outcome of tutoring and cannot be relied upon as the deceased/injured was conscious at all times and could have been tutored, midway, while he was being transported to the hospital and to Delhi. Injury sustained by the deceased/injured do not support ocular version as situs of those injuries is incongruent vis-a- vis medical evidences. Out of three, two of those injuries were caused from point blank range on non-vital parts of the body- one on the wrist and other on the ankle, and none of those injuries cumulatively or singularly were sufficient to cause death and if vetted pragmatically it rules out any assault with an intention to commit murder by three assailants. It is difficult to perceive that three miscreants, armed with pistols will surround the deceased to annihilate him and then two of them will cause injuries on right wrist and left ankle with charring and blackening present. If, these injuries are analysed in the proper prospective, at least two of the accused, who had caused those injuries to the deceased on such non vital parts with the body from closest possible range, they cannot be said to carry an intention to commit murder. It was further submitted that first informant is not a truthful witness and no credence can be attached to his depositions. He is related, partisan, inimical and therefore, on his solitary testimony appellant should not be held guilty, especially when prosecution has failed to offer any explanation regarding shooting down of appellant's mother in the same incident. It was further argued that Munsif had permitted one month time to the accused persons to remove the passage door fixed by them and therefore, there was no occasion for the prosecution side to block it by erecting a brick wall very next day of the judgement and hence it was the prosecution side who had motive to start the assault and it was the

prosecution side, who had created the mischief. Neither informant nor his brother Jagdish were innocent and simple persons but they had criminal proclivities and background and were involved in many criminal cases, which fact is clear from the cross examination of the informant P.W.3, wherein he has admitted that Jasvir, real brother of deceased, was incarcerated in jail and that police had searched his house twice for the reason that he had concealed a stolen gun. He also admitted that along with Raja Singh, he was booked u/s 107/117 Cr.P.C. and was incarcerated in jail for a month. He had also admitted that his brother Jagdish had remained in penitentiary for one and quarter months. He has also admitted that his son Udaiveer was also jailed along with him under section 107/117 Cr.P.C. Thus, the argument, which has been raised is that the prosecution side was prone to commit crime and therefore, the defence theory that they shot dead Smt. Atli inside her house is quite probable when analysed on the anvil of preponderance of probabilities. Learned counsel had referred to the post mortem examination report of Smt. Atli arguendo their submissions to which we refer herein below:-

- " 1. Gunshot wound of entry an interior lateral side of left shoulder region midline 1/4" x 1/4" x connecting to the injury no. 2, the margins were lacerated*
- 2. Wound of gunshot of exit lower end of angle of part on left axilla lacerated 1/2" x 1/2" x connecting with injury no. 1.*
- 3. Lacerated wound gunshot of exit on the middle of scapula, left side 2" x 3/4" x muscle deep, the margins of the wound lacerated marrow.*
- 4. Gunshot wound of entrance 1" below of the sternum epigastric region 1/2" x 1/2" x abdomen cavity deep, the margins inverted.*
- 5. Gunshot wound of exit below the middle right rib*
- 6. Deep abrasion at 5 'O'clock position right nipple 1/2" x 1/2" left nipple."*

Primarily on the above submissions, it was contended that the solitary

prosecution witness is not reliable and learned trial Judge committed a manifest error of law in accepting prosecution case. He has totally misguided himself in relying upon oral testimonies as well as dying declarations. Appellant's appeal be allowed and they be set at liberty conclusively submitted learned *amicus curiae* as well as Sri Dixit, learned counsel.

Arguing conversely, Sri Akhilesh Singh, learned Government Advocate submitted that prosecution case is consistent right from the very beginning that it were the appellants, who had caused injuries to the deceased as well as injured Hans Raj and therefore, they cannot escape from their offence liability. Admittedly, the incident had occurred during the day time and presence of the informant and the deceased during the incident is not in doubt as even according to the defence version they had participated in the incident. It was further submitted that the date and time of the incident from the both the versions is also proved as none of the two sides are at discord on the said issues. During the incident gun shots were fired is also established. It was also established that the deceased Desh Pal and injured Hans Raj had sustained injuries in the same incident and therefore, prosecution has established his case beyond all reasonable doubt. Presence of appellants (A-1) and (A-2) during the incident is also proved by reliable evidences. Since the prosecution story is consistent and corroborated by medical evidence, it cannot be discarded and resultantly the appellant's appeal is devoid merits and deserves to be dismissed submitted learned government advocate.

We have considered the arguments raised by both the sides and have pondered over the rival submissions in the light of tendered evidences. A critical examination of the entire evidences and attending the circumstances indicates that on some vital issues about the incident both the parties are not at variance with each other and therefore, those aspects are established beyond any reasonable manner of doubt and ab- initio we register them. Firstly, presence of informant and the deceased during the incident is admitted. Secondly, in the incident fire arm weapons were used. Thirdly that

during the incident firearms injuries were sustained by Desh Pal and Hans Raj. Fourthly, that there is a cross version lodged from the appellant's side against informant, deceased and others regarding murder of Smt. Atli, which trial was also pending in the same court as a cross case. Fifthly date, time and place of the incident in the cross version is the same as alleged by the prosecution. Sixthly, murder of Smt. Atli same day has not been disputed by the prosecution side and hence is an admitted fact. In the back drop of above non disputed facts it is evident that happening of the incident is admitted to both the sides, who have got their own versions regarding the manner in which incident had occurred. Thus what remains to be adjudicated firstly is, as to whether story of prosecution side is correct or the defence version is probalised, when tested on the anvil of preponderance of probabilities, and secondly that if the prosecution does not offer any explanation regarding shooting down Smt. Atli dead, what will be it's effect? The supplementary question which automatically arises for determination is, because of non-explanation of injuries from the side of the accused, whether prosecution witnesses are reliable or not or whether they had suppressed the real genesis of the incident and actual manner of assault.

Law relating to none explanation of the injuries from the side of the accused has always attracted attention of the courts, since decades, and has been subjected to many judicial decisions. It no longer remains res Integra and has achieved a certain degree of trite law. To recapitulate them briefly we aptly and benefittigly refer to some of the apex court decisions on the said aspect. In **Lakshmi Singh and others v. State of Bihar: AIR 1976 SC 2263** it has been held by the apex court as under:-

"11. PW. 8Dr. S. P. Jaiswal who had examined Brahmdeo deceased and had conducted the post-mortem of the deceased had also examined the accused Dasrath Singh, whom he identified in the Court, on April 22, 1966 and found the following injuries on his person :

"1. Bruise 3" x 1/2" on the dorsal part of the right forearm about in the middle and there was compound fracture of the fibula bone about in the

middle.

2. Incised wound 1" x 2 m. m. x skin subcutaneous deep on the lateral part of the left upper arm, near the shoulder joint.

3. Punctured wound 1/2" x 2 m. m. x 4 m. m on the lateral side of the left thigh about 5 inches below the hip joint."

According to the Doctor injury No.1 was grievous in nature as it resulted in compound fracture of the fibula bone. The other two injuries were also serious injuries which had been inflicted by a sharp-cutting weapon. Having regard to the circumstances of the case there can be no doubt that Dasrath Singh must have received these injuries in the course of the assault, because it has not been suggested or contended that the injuries could be self-inflicted nor it is believable. In these circumstances, therefore, it was the bounded duty of the prosecution to give a reasonable explanation for the injuries sustained by the accused Dasrath Singh in the course of the occurrence. Not only the prosecution has given no explanation, but some of the witnesses have made a clear statement that they did not see any injuries on the person of the accused. Indeed if the eye-witnesses could have given such graphic details regarding the assault on the two deceased and Dasain Singh and yet they deliberately suppressed the injuries on the person of the accused, this is a most importance circumstance to discredit the entire prosecution case. It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence. This matter was argued before the High Court and we are constrained to observe that the learned Judges without appreciating the ratio of this Court in Mohar Rai v. State of Bihar, (1968) 3 SCR 525 = (AIR 1968 SC 1281) tried to brush it aside on most untenable grounds. The question whether the Investigating Officer was informed about the injuries

is wholly irrelevant to the issue, particularly when the very Doctor who examined one of the deceased and the prosecution witnesses is the person who examined the appellant Dasarath Singh also. In the case referred to above, this Court clearly observed as follows :

"The trial Court as well as the High Court wholly ignored the significance of the injuries found on the appellants. Mohar Rai had sustained as many as 13 injuries and Bharath Rai 14. We get it from the evidence of P.W.15 that he noticed injuries on the person of Mohar Rai when he was produced before him immediately after the occurrence. Therefore the version of the appellants that they sustained injuries at the time of the occurrence is highly probalised. Under these circumstances the prosecution had a duty to explain those injuries In our judgement the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilities the plea taken by the appellants."

This Court clearly pointed out that where the prosecution fails to explain the injuries on the accused, two results follow : (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probalise the plea taken by the present case has not correctly applied the principles laid down by this Court in the decision referred to above. In some of the recent cases, the same principle was laid down. In Puran Singh v. The State of Punjab, Criminal Appeal No. 266 of 1971 decided on April 25, 1975 = (reported in AIR 1975 SC 1674) which was also a murder case, this Court, while following an earlier case, observed as follows :

"In State of Gujarat v. Bai Fatima (Criminal Appeal No. 67 of 1971 decided on March 19, 1975) = (reported in AIR 1975 SC 1478) one of us (Untwalia, J.,) speaking for the Court, observed as follows :

"In a situation like this when the prosecution fails to explain the injuries on the person of an accused depending on the facts of each case, any of the three results may follow :

(1) That the accused had inflicted the injuries on the members of the

prosecution party in exercise of the right of self defence.

(2) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

(3) It does not affect the prosecution case at all.

The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgement. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case." It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the Court to rely on the evidence of PWs. 1 to 4 and 6 more particularly, when some of these witnesses have

lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima, Criminal Appeal No. 67 of 1971 decided on March 19, 1975 : (Reported in AIR 1975 SC 1478) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

The above view has been affirmed by the apex court since then in innumerable judgements. In Surendra and Anr. v. State of Maharashtra: AIR 2006 SC 3063 it has been held by the apex court as under :-

"26. We are not unmindful of the fact that in all circumstances injuries on the person of the accused need not be explained but a different standard would be applied in a case where a specific plea of right of private defence has been raised. It may be true that in the event prosecution discharges its primary burden of proof, the onus would shift on the accused but the same would not mean that the burden can be discharged only by examining defence witnesses.

27. The learned courts below committed a manifest error of law in opining that the Appellants had not discharged the initial burden which is cast on them. Even such a plea need not be specifically raised. The Courts may only see as to whether the plea of exercise of private defence was probable in the facts and circumstances of the case.

In State of Rajasthan versus Rajendra Singh: 1998 CR.L.J

3628, under somewhat identical facts, it has been held by the apex court as under:-

"8. All the witnesses had categorically stated that they had not beaten the respondent and seen any injury on the accused. But the evidence establishes that the respondent had two contused lacerated wounds : one on his face and one on his head. The injuries were bleeding injuries and visible and yet the witnesses stated that they had not seen any injury on the person of the respondent. That would mean that neither the family members of Harveer nor the two independent witnesses were willing to give a true version and had tried to suppress the part played by some of them which had resulted in causing injuries to the respondent. The High Court was, therefore, justified in not placing reliance on their evidence."

Thus from the above exposition of law, which has been reiterated time and again by the apex court it is discernible that where prosecution suppresses genesis of the incident or it fails to offer any explanation of the injuries sustained by the accused side, which were neither insignificant nor minor nor could have been self-suffered, then, in that eventuality, the only inescapable conclusion which can be drawn is that prosecution has failed to discharge it's initial burden of proof and was un-successful in bringing accused guilt home. The golden rule of criminal jurisprudence is that it is for the prosecution to establish accused guilt beyond all reasonable doubts by tendering admissible, reliable and confidence inspiring evidences which should be compatible only with one hypothesis of accused being guilty of the crime and no other. In cases where any reasonable doubt creeps in, it is better to err in favour of accused than to adhere pedantically to the prosecution story. Here we would hasten to add that every doubt, howsoever fanciful or insignificant it may be, will not come to the rescue of the accused but the doubt has to be reasonable and pragmatic view of a prudent man, which should be capable of shaking the veracity of the prosecution edifice. Here we would like to recollect the words of the apex court in **Sucha Singh versus State of Punjab: AIR 2003 SC 3617** wherein apex court has observed as under:-

"20.Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. (See Gurbachan Singh v. Satpal Singh and others (AIR 1990 SC 209). Prosecution is not required to meet any and every hypothesis put forward by the accused (See State of U.P. v. Ashok Kumar Srivastava (AIR 1992 SC 840). A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. (See Inder Singh and another v. State (Delhi Admn.) (AIR 1978 SC 1091). Vague hunches cannot take place of judicial evaluation. "A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man, does not escape. Both are public duties." (Per Viscount Simen in Stirland v. Director of Public Prosecutor (1944 AC (PC) 315) quoted in State of U.P. v. Anil Singh (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth."

Analysing facts of the present appeal on the anvil of above exposition of law with all supplementary submissions, in the very beginning, we find that FIR, Ext. Ka-1, seems to be ante timed and cooked up. This conclusion can be arrived at by scanning prosecution documents itself and we take stock of those facts. It is admitted case of prosecution that injured Hans Raj was examined in the hospital at 9.15 a.m. by doctor PW4. After examination doctor had referred to him to Delhi for management of his injuries. After this doctor had dispatched a note to the police station about it which exist on

the trial court record and reads as under-

"Mr. Station Officer

Shamli, Mu. Nagar.

Mr.

One patient whose name Sri Desh pal s/o Sri Jagdish resident of village Bhaishwal Police station Shamli district Mu. Nagar who has been brought by Sri Naipal Singh he has gunshot wound on chest. Case has been referred.

- *One another patient whose name Hansraj s/o Dharmi resident of Bhaishwal also had injury in ankle left leg. He has been sent to Delhi.*
- *For information sent*

(S.C.Gupta)

Medical Officer

Govt. Hospital Shamli.

District Muzzafarnagar, U.P."

A reference of this note is found in the FIR registration GD entry. How come then that the FIR was registered at 8.45 a.m., half an hour before examination of Hans Raj. This is possible only in two circumstances. Firstly that either FIR is ante timed or doctors had fabricated medical examination report of injured Hans Raj. This casts a serious doubt on the veracity of the prosecution version. Learned trial Judge while conducting the trial and while examining prosecution case completely ignored this aspect and had not dealt with it all. Assailing of FIR as a sham document by the accused appellant is therefore not without force and has some substance in it. Consequently the earliest and very first prosecution version is hazy and doubtful.

Next we find that the testimonies of three fact witnesses suffer from serious infirmities and do not inspire any confidence. So far as Ilam P.W.1 is concerned he had turned hostile and did not support prosecution case at all. Prosecutor also failed to elicit any corroborative evidence from him. He had completely denied witnessing any incident, as alleged by the prosecution, in his examination-in-chief. The only fact-in- issue admitted by him is the

relationship between Desh Pal, Jagdish and Ram Kishan. He deposed that he very well knew the accused, who were his co-villagers and he had heard that Desh Pal was murdered but does not know where he was done to death. When cross examined by the prosecution he had deposed that he does not know whether the I.O. had recorded his statement or not. He has entirely denied his 161 Cr.P.C. statement and also negated public prosecutor's suggestion that he had colluded with the accused and therefore, had given false evidence.

Injured witness Hans Raj P.W.2, too, turned hostile, but on some aspects had supported the prosecution case, as he had deposed that at 7 a.m., on the date of the incident, he had received gunshot injury when it was fog and while he was going to attend nature's call. Probably the fire was made from village *abadi* side. Thus he had admitted time and date of the incident and factum of his sustaining gun-shot injury. Besides above he had completely resiled from his earlier statement u/s 161 of the Code and had testified that in his witnessing nobody had murdered Desh Pal and when he had sustained the injury, he was all alone, one furlong away from down town village and could not spot the shooter. He thus denied presence of the informant and other witnesses at the spot. When cross examined by the public prosecutor regarding his 161 Cr.P.C. statement he denied having made any such statement to the I.O, but also failed to offer any reason how his such a statement was recorded. He too denied public prosecutor's suggestion that he had sided with the accused and therefore was deposing falsely. He, further refuted prosecutor's suggestion that he had sustained injury during the incident in front of house of Baljit Chamar from the fires made by an appellant from his pistol, when they had shot at Desh Pal. PW2 further stated that his brother Hardeva had brought him to Shamli Hospital for his medical treatment and it was his another brother Mora, who had brought him from the place where he had sustained the injury. Thus he denied having gone to the hospital on the tractor of the informant. He had also deposed that it was Hardeva who had taken him to Delhi for his medical treatment. He admitted that he himself had not lodged any FIR

regarding sustaining of gunshot injury and did not know whether Hardeva had lodged any such report or not. His further evidence is that he had informed the doctors, at both the places, that when he was returning after attending nature's call then he had received injury in his leg. He expressed his ignorance about filing of an affidavit in favour of the accused. Thus regarding factum of actual assault he had not supported the prosecution case at all. From the supportive evidence of informant P.W.3, there remains little doubt that Hardeva had accompanied this injured to the hospital. Prosecutor had not specifically asked 161 Cr.P.C. statement from him so as to contradict him in tune with proviso to section 162 of the Code read with section 145 of the Evidence Act and therefore, his testimony does not lend any credence to the prosecution case regarding murder of the deceased by the appellants. It is cardinal rule of evidence that if a witness is to be contradicted from his previous statement, his attention has to be drawn to the said previous statement, if already reduced in writing, and he has to be asked specifically about it. Since that having not been done by the public prosecutor, we cannot give any latitude to the prosecution in that respect and confer any benefit to it.

What is strikingly significant to note is that neither of the two witnesses PW1& PW2, stated anything regarding death of Smt. Atli and thus her murder remained to be a mystery from their testimonies, which is of no help to us in deciphering the truth and separating grain from the chaff.

Now turning towards the evidence of star solitary witness of the prosecution, informant P.W.3. From his depositions it is evident that he is related, partisan, and inimical witness but for those reasons alone his evidence cannot be discarded nor can he be treated to be a untruthful witness. However his evidence has to be scanned with caution and circumspection as had been mandated by the apex court in innumerable decisions and therefore we have vetted his evidence with myopic scrutiny.

At the outset it comes to the light that he is a resident of different place than his brother Jagdish and deceased Desh Pal and he also seems to be chance witness. It is his categorical deposition that-

“Jagdish has 50 bighas of land. I live separately from Jagdish. My house is opposite side of water channel towards west of village plateau in a corner. From the house of Baljit Chamar towards west of the plateau are the houses of Chamar and Gararias. In front of their houses there is a vacant land and then there is a water channel. After leaving some open land there is a johad. After johad there are three other premises and thereafter I have my house. In between johad and first premises is also some vacant land. In front of my house is plateau and towards west is jungle. My house is far away from Jagdish house at a distance of 150 yards.”

Thus what is clear is that this witness is not a resident of same locality. His presence at the spot was denied by injured witness Hans Raj, who had deposed that he was all alone when he sustained injury in his leg as has already been mentioned herein above. PW 3 also admits that he had seen the incident while he was proceeding to attend nature's call and thus he is also a chance witness. Regarding civil suit and blocking of the passage door he had reiterated same facts which have already been described herein above, while unfolding the prosecution story. He had admitted that house of Manga is three houses away from house of Baljit towards east. He further stated that in his presence corpse of Smt.Atli was not recovered from the front of house of Manga but the same day, in the evening, he had come to know that Smt.Atli was also murdered. In the same breath he had stated that he had heard that corpse of Smt.Atli was recovered from near the house of Manga Bhangi. He has further deposed that he had carried injured in a tractor to the hospital and had reached there in half an hour but very significantly had not mentioned the name of Naipal Singh as his companion in the tractor, whose name find mentioned in the injury reports of the two injured. He stated that police station is at a distance of two furlongs from the hospital.

He further admitted that Desh Pal was conscious all through the way and was conversing. Parents of Desh Pal had also accompanied him. From the police station he had returned to the hospital along with the I.O. and waited there for 5-7 minutes. In the hospital I.O. had recorded statements

of both the injured and thereafter when they left for Delhi, informant returned to his village. He confirmed that he was informed regarding Smt. Atli's murder same day of the incident at 4 p.m., in which crime he along with his son Udaiveer, brother Jagdish, deceased Desh Pal and Jasvir were being prosecuted in the same court. Thus this witness had suppressed factum of murder of Smt. Atli same day and the manner in which she was done to death. He is not an injured witness, secondly his name does not find mention in the hospital record also as the person who had brought the injured to the hospital and on the contrary name of one Naipal Singh is mentioned, thirdly, neither from P.W.1 nor from P.W.2, prosecutor got it elicited that informant was also present at the spot. So much so that P.W.2 Hans Raj had denied his presence by making a categorical assertion that when he had sustained the injury then nobody was present along with him, fourthly that FIR lodged by him seems to be ante timed, fifthly he is a resident of a different place and he is also a chance witness and sixthly injured PW2 denied that informant had carried him to the hospital in the tractor when he stated that it was Hardeva, who had brought him to the hospital. Thus testimonies of PW3 is not confidence inspiring. He is an accused in the cross version and therefore on his solitary evidence without any corroboration it is difficult to act. In our view we further find support from the fact that although Brahm Singh, who was none else but the maternal uncle of the deceased, who is also alleged to be present with the deceased at the time of the incident had not come forward to support claim of PW3. No acceptable reason has been spelt out for his non examination and hence what is writ large on the record is that even close relative is not ready to lend credence to the prosecution version. Brahm Singh would have been the star prosecution witness to narrate the real truth but the courts are robbed off of his supportive evidence.

Another significant reason for doubting evidence of PW3 is that his ocular version seems to be inconsistent with medical evidences and injuries sustained by the deceased. According to his deposition injured was rounded up by all the three assailants, who shot at him from a very close range,

which fact is also evident from the nature of injuries sustained by the deceased. However, two of the injuries sustained by the injured/deceased were on most non vital parts of his body, on the wrist and on the ankle joint. Only one injury is on his chest. We have not been able to appreciate that in a murderous assault, with intention to cause death, from such point blank range shooting, two murderers will shoot the injured on such non vital parts without repeating it. If true, this will negate prosecution allegations that all the accused had an intention to commit murder. How and in what manner deceased had sustained injuries on wrist and ankle joint and how Hans Raj sustained injury on his leg, when he was not near by the deceased are all very unconvincing aspects of the whole occurrence. In the site plan Hans Raj was shown to be standing at place 'C', which is quite far off at a good distance from the site, where deceased was shot at from point blank range. I.O. deliberately eschewed mentioning distances between the place 'A' and 'C'. In our view Hans Raj could not have suffered injury in the manner alleged by the prosecution and he seems to have received it in some other manner. It transpires that, probably, because of aforesaid reason that he (Hans Raj) had absolved appellants of the crime.

Another important aspect which remains unexplained is that in the site plan no place has been shown by the I.O. from where the accused persons had fired at the deceased. This seems to be so because the accused persons were in the closest proximity with the deceased, which possibility is very imminent looking to the nature of the injuries. In such fact scenario damage to the pedestal by gunshot injuries fired by the accused also does not inspire any confidence as this could not have occurred in the manner alleged by the prosecution and seems to have caused in a different manner.

Another unconvincing aspect denting the credibility of informant's testimony is, that in both the injury reports of Hans Raj as well as Deshraj presence of informant is not recorded. Exhibits Ka-2 and Ka-3 prepared by Doctor PW4, records that both the injured were brought to him by one Naipal Singh son of Raghuvir. None of fact witnesses nor even the informant has named him (Naipal Singh) as one of the persons who had accompanied

him and the injured in the tractor to the hospital. We do not know who this Naipal Singh is. In absence of any evidence in this respect we are not inclined to accept the prosecution story pedantically, without examining it with close quarters that it was informant who had brought the injured to the hospital. Thus from an overall analysis we find informant PW3 to be an unreliable witness.

Now coming to the most significant aspect of the appeal. None of the prosecution fact witnesses, especially the informant PW3, have explained how and in what manner Smt. Atli was murdered. He (PW3) had not stated even a word as to how and in what manner she was shot dead. He offered an unconvincing and evasive answer that he was informed about her murder at 4 p.m. on the date of the incident itself, while admitting the fact that he was one of the named accused in her murder case as a cross version, which was pending in the same court. Not even one sentence of explanation was tendered by the informant regarding her murder nor he had stated any other manner in which she was done to death. It would be appropriate to mention transliteration of depositions of the informant PW3 in this respect, which are as follows:-

"One the day of the incident itself at 4 in the evening I had come to know that mother of Munendra accused Smt. Atli was done to death same day in day. Case of that murder is going on against me, my son Udaiveer, Jagdish and his son Desh Pal and Jasveer."

(Page 5, PW3)

"House of Manga is three houses away from the house of Baljit towards east. In my presence near the house of Manga corpse of Atli was not recovered. That day in the evening I had come to know that Atli had been murdered. I had heard that corpse of Smt. Atli was recovered near the house of Manga."

(Page 6 last/Page7 top)

"It is wrong to say that same day at 7 a.m. , my son Udaiveer, Jagdish and his son Desh Pal and Jasveer armed with rifle, pistol and lathi went to the

house of Munendra and there her mother Smt. Atli who was sitting in Aagan was caught hold of by Desh Pal and Jasveer instigated that she be murdered and Jasveer fired upon her and other people fired upon her with their Kattas. It is also wrong to say that one of shots hit Desh pal as well. It is also wrong to say that we had carried Smt. Atli and injured Desh Pal firing because of which Hans Raj also sustained injury by pellets. It is also wrong to say that we have fabricated this story in connivance with the police and made our relatives witnesses."

(Pages 13/14 of PW3)

Thus the impression which we gather from his evidence is that he(informant) is deliberately and consciously trying to suppress actual incident and manner of assault and death of Smt.Atli. Defence exhibits, copy of GD Ext. Kha -2, Site plan, Ext. Kha 2, Carbon copy post mortem examination report of Smt. Atli, Ext. Kha-3 and copy of Charge sheet, Ext. Kha-4,all proved and exhibited by PW4,PW15 and DW1, unerringly, without any doubt, established that she was murdered by gun shots. Informant himself was a named accused in that murder case and therefore, he is definitely trying to suppress the manner in which Smt. Atali had sustained gunshot injuries and had died. Accused has pleaded a cross version regarding murder of Smt.Atli, wherein they had alleged that she was shot dead same time, same day in the same village by the informant, deceased and their sons, and hence it was incumbent upon the informant/prosecution to explain that murder as to who and in what manner she was murdered. In absence of any explanatory reasons coming forth from the prosecution witnesses, we have no other alternative but to accept that whatever defence had pleaded may be true or in any event prosecution witnesses are not stating actual truth and are trying to conceal real genesis of the incident .Once prosecution is not coming out with true version we cannot rely upon it. Opining thus, we are not at all hesitant to observe that the informant, P.W.3, does not seems to be a wholly truthful and reliable witness and hence, on his testimonies, no implicit reliance can be placed. Tested on the anvil of preponderance of probabilities, at least this much can

be said that genesis of the incident stated by the prosecution does not inspire confidence whereas defence of the accused on that score may be true and thereby accused has succeeded in creating an inroad in the prosecution version, the benefit of which they are entitled to reap.

Adverting to the three dying declarations, on which learned trial judge has placed heavy reliance as supporting and corroborating evidences, we find them suffering from many vices but first of all a quick resurrection of law relating to the dying declarations needs to be looked into. A dying declaration is just like any other piece of evidence and can be accepted or discarded in the same manner as any other oral or documentary evidence. It does not stand on a better or higher footing than oral testimonies of a witnesses. If it is found to be un-tutored, unembellished, reliably documented in the words of the dying man, at the earliest opportunity and does not suffer from vices of failing memory or critical condition of the deceased then, even without corroboration, it is sufficient for holding an accused guilty. Since admissibility of dying declaration is an exception to the rule of hearsay evidence it should be approached by the courts very cautiously, in the given facts and surrounding circumstances, especially because it is seldom made in the immediate presence of the accused who also does not have any opportunity to test the veracity of the maker of such a statement through cross examination. It is because of these reasons that the apex court has to dilate and deliberate on these facets of law, succinctly and lucidly, in Khushal Rao v. State of Bombay: AIR 1958 SC 22 decades ago. Hon'ble Supreme court has lucidly adumbrated in that decision some guide lines for acceptability of dying declarations in the following words:-

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (a) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not

reliable by itself, and that it suffers from an infirmity, then without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case.” —

Again in a full Bench decision in **Thurukanni Pompiah and another v. State of Mysore: AIR 1965 SC 939** apex court, while disbelieving the dying declaration as truthful piece of evidence, on the facts and circumstances of that case, was pleased to observe as under:-

"9. Under cl. (1) of S. 32 of the Indian Evidence Act, 1872, a statement made by a person who is dead, as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is a relevant fact in cases in which the cause of that person's death comes into question, and such a statement is relevant whether the person who made it was or was not, at the time when it was made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. The dying declaration of Eranna is, therefore, relevant and material evidence in the case. A truthful and reliable dying declaration may form the sole basis of conviction, even though it is not corroborated. But the Court must be satisfied that the declaration is truthful. The reliability of the declaration should be subjected to a close scrutiny, considering that it was made in the absence of the accused who had no opportunity to test its veracity by cross-examination. If Court finds that the declaration is not wholly reliable and a material and integral portion of the deceased's version of the entire occurrence is untrue, the Court may, in all the circumstances of the case, consider it unsafe to convict the accused on the basis of the declaration alone without further corroboration."

In yet another decision **Harbans Singh versus State of Punjab : AIR 1962 SC 439** it has been observed by the apex court as

under:-

"18. In view of this latest pronouncement of this Court - which it should be stated in fairness to the Trial Judge was made long after he gave his judgment - it must be held that it is neither a rule of law nor of prudence that a dying declaration requires to be corroborated by other evidence before a conviction can be based thereon. The evidence furnished by the dying declaration must be considered by the Judge, just as the evidence of any witness, though undoubtedly some special considerations arise in the assessment of dying declaration which do not arise in the case of assessing the value of a statement made in court by a person claiming to be a witness of the occurrence. In the first place, the Court has to make sure as to what the statement of the dead man actually was. This itself is often a difficult task, specially where the statement had not been put into writing. In the second place, the court has to be certain about the identity of the persons named in the dying declarations - a difficulty which does not arise where a person gives his depositions in court and identifies the person who is present in court as the person whom he has named. Other special considerations which arise in assessing the value of dying declarations have been mentioned by this Court in 1958 SCR 552; (AIR 1958 SC 22) and need not be repeated here."

Now applying the guide lines to facts and circumstances of the present appeal, we at the very outset, record that none of the alleged three dying declarations mentions about the murder of deceased Smt. Atli and her sustaining gunshot wounds in the same incident and thus all the three dying declarations suffer from the same criticism as that of PW3 and therefore, for concealing injury to the defence side it becomes unworthy of credence.

For separate analysis of each one of them we now turn towards the first dying declaration to check it's authenticity and in that endeavour we find that the same has been proved as Exhibit Ka-4 by Dr. S.C. Gupta, P.W.4. The said dying declaration does not inspire any confidence and seems to be an outcome of fabrication at a later stage. Our reasons are as under-

Doctor,PW4 had not admitted the injured patient for the management

of his injuries in his hospital and therefore had not made any entry in the admission register. He had examined both the injured as private medico legal cases and has admitted that he had charged money for examining them. Firstly we do not know how much money he had charged as he had not given any receipt nor prosecution has tendered any such receipt and secondly why he examined injured as private medico legal case when police station Shamli was next door, according to his own statement, which conduct of the doctor does not inspire any confidence. According to his own statement police station Shamli was adjacent to the hospital having a common boundary wall. He had not informed the police next door immediately nor had made arrangements for a Tahsildar Magistrate to record dying declaration. Further he had deposed that he had started recording of D/D after a great delay of 45 minutes after examination of the injured deceased. He had examined the injured at 8.15 a.m. and, according to his own deposition, he had started recording the dying declaration at 9 a.m. and thus time gap, in our view, was more than sufficient to call the police, through a memo, either through a ward boy or through Naipal Singh, which he did not do. Further this alleged dying declaration was retained by the doctor for an un-reasonable period of time for days together, from 25.12.79 to 7.1.80, and was neither given to the police/I.O., when he had arrived in the hospital to record 161 statement of the injured nor was sent to the court forthwith. Doctor had informed the I.O. about it also that he had recorded such a statement of the injured/ deceased. He concealed it from the I.O. although he had certified that deceased was in a fit state to give statement to the I.O. Doctor PW4 also offered a false and an afterthought bogus explanation for retaining the document with him before filing it in the court of CJM, Muzzaffarnagar on 8.1.80. Why he did all this is not known and the only reasonable prognosis can be that the alleged dying declaration is a sham document prepared subsequently on a plain sheet of paper only to bolster up the prosecution case. We refer the testimonies of doctor P.W.4, in this regard which is as under:-

"On 8.1.1980 I had sent dying declaration to C.J.M. I have not

informed about this dying declaration to the police of P.S. Shamli and I cannot state the reasons for the same. Reason for sending dying declaration to C.J.M. with delay was that from 23.12.1979 to 31.12.1979 there was winter vacation and the court was closed and from 1.1.1980 to 7.1.1980 because of general election the courts were closed. It is wrong to say that during election CJM court was not closed. Dying declaration was brought to C.J.M. by myself because it was an important document and therefore I myself had carried it. In the court I had given the dying declaration to CJM."

Such a deposition by this doctor makes him a perjurer. We can take note of the fact that during winter vacations district courts are closed from 25th December to 31st December and even during this period a Remand Magistrate is always available on each day to give remands. During election, the courts are never closed for a long period of a week and only on the polling day there is a public holiday. False explanation offered by Dr. S.C. Gupta for retaining the dying declaration with himself from 25.12.1980 till 7.1.1980 is wholly unacceptable and erodes the credibility of his depositions and makes first dying declaration suspect anointed with sever doubts about it's genuineness. Doctor could have sent the dying declaration to the SSP or in a sealed cover could have sent it to the C.J.M. on the date itself through the police of police station Shamli just behind the boundary wall. He is the only witness of recording of said first dying declaration without any further corroboration and since whole conduct of the doctor is suspect and uninspiring we reject first dying declaration as a sham document. Further we find the conduct of the doctor wholly unacceptable and we are of the opinion that he has prevaricated the said dying declaration and, that is why he had, intentionally and deliberately, concealed it from the I.O. P.W.14, when he had arrived in the hospital to record the statement of the two injured subsequent to said recording. Why this doctor indulged into such an insalubrious practice is not known to us, but we are unable to place any reliance on his testimonies. The defence argument that the first dying declaration was got manufactured subsequently seems to be quite probable when tested on the preponderance of probability. It cannot be said at all

that the said argument is fictitious or not borne out from the evidences on record. In our this view, we are also supported by the fact that although I.O. interrogated injured Desh Pal subsequently, but he too did not intimate him that doctor had already penned down his statement. Moreover, the doctor had not even informed the C.M.O. about recording such a dying declaration and concealed it from the whole world for more than ten days. Such a document does not inspire any confidence nor lend credence to the prosecution story and, therefore, we discard Ext. Ka-4 as being a sham document to which no authenticity can be attached. Conduct of the doctor gives an inkling that probably he connived with the prosecution for the reasons best known to him and on this aspect we would not like to dwell any further.

Additionally P.W. 4, in no uncertain terms, had said that in the medical examination report of Desh Pal, he had scored out p.m. and had written a.m. and in injury no.3, he had scored out word "entry" and had written word "exit". He had further admitted that he has not recorded the dying declaration in question answer form and he had also not got injured identified by anybody. Further we note that no certificate was appended by the doctor prior to the recording of the dying declaration showing the urgency to record to such a declaration. Nowhere it is mentioned in the dying declaration that the condition of the deceased was such that recording of dying declaration was an un-eschewable necessity. He has also not deposed that when the dying declaration was recorded then Naipal was present inside the room or not. Further it is his categorical deposition that along with the injured only one person Naipal Singh had come to him. Firstly, this rules out the presence of the informant in the hospital and secondly that the doctor had not asked Naipal to call the police from the adjacent police station. Doctor S.C. Gupta, PW4 does not seem to be a reliable doctor also for the reasons that he stated that he had not referred injured Hans Raj to Delhi, which statement of his is a patent lie, as has already been noted herein before. Memo sent by the doctor was concealed from the court and was not got proved from PW4 by the prosecution for the

reasons that it does not contain any mention of the two injuries on the wrist joint and ankle of the deceased. It does not mention that injured also had gunshot injury. It is evident from the writing that it was prepared only after injured were already referred to Delhi. So much is the analysis of the first D/D.

Turning towards the second one, which is statement under section 161 Cr.P.C., we are of the opinion that the same has been prepared by the I.O. on his own. When cross examined, I.O. had stated that he had reached Shamli Hospital at 9.30 a.m. and in the hospital, he became aware that the condition of injured Desh Pal was serious. He admitted that in the hospital he was made aware of the fact that doctor PW4 had already written a dying declaration. Why then the I.O. did not take the dying declaration from the doctor and made it a part of the case diary. He had not obtained any certificate from the doctor that the injured Desh Pal was in a fit mental state to give statement although he himself had deposed that injured condition was serious. What was the condition of the injured at the time when his alleged 161 Cr.P.C. statement was recorded is not known to us. I.O. had further stated that when he was recording the dying declaration then in that room, hospital workers and the attendants of the patient were present. Doctor Gupta was also present inside the room. This does not rule out possibility of tutoring of the deceased by his relatives. Since the attending circumstances create suspicion about recording of statement of the injured/deceased, we cannot rely upon 161 Cr.P.C. statement, which could have been penned down even later on by the I.O. Perusal of it also indicates that is a verbatim reproduction of the FIR. In his 161 Cr.P.C. Statement, he had tried to exonerate Raj Pal as he had stated that Munendra and Vijai Singh had rifle in their hands whose shot had hit him. He had not said that the shot made by Raj Pal also hit him. Since we suspect recording of aforesaid statement of the deceased, we cannot place any reliance in it. In our this view, we also take support from the fact that at 12.30 a.m. injured/deceased was already admitted in Safdarjang Hospital, New Delhi as is mentioned in his post mortem examination report. If the I.O. had reached

the hospital at Shamli at 9.30 a.m. he must have taken at least half an hour to record such a long declaration. It is impossible to reach Delhi in two and half hours covering a distance of 200 kilometres as was deposed by doctor P.W.4 and get the patient admitted in Safdarjang Hospital, New Delhi. The person, who had carried the injured to Delhi for treatment was not examined by the prosecutor and was withheld, therefore, defence was denied the opportunity to cross examine the prosecution on such an important aspect of the matter, which further create doubts.

Coming to the third declaration made before Dr. Chug as is mentioned in Ext. ka-16 we are of the view that the said declaration is not acceptable for the reasons that it mentioned a different story. The exact words noted by the doctor are " *Alleged to have sustained gunshot injuries in a quarrel with the Munendra Singh, Vijai & Raj Pal around 7.30 a.m. today at his village Bhiswal Muzzafar Nagar*". Further it is not known who made this disclosure statement to the doctor because it is not mentioned in Ext. Ka-16 as to who gave this information and more over it was recorded long after the incident and meanwhile the injured was always in the company of his relatives, who had already lodged the FIR meanwhile, and hence deceased could have been tutored. It is not the earliest version and could have been tutored midway to the hospital at Shamli as well as to Delhi. Moreover in this statement also there is no reference about murder of Smt. Atli. Moreover the noting is not a dying declaration but it is only an information to the doctor. It is not in the words of the deceased. As mentioned earlier one of the significant reason for discarding dying declarations is that in none of the dying declarations, deceased had disclosed regarding murder of Smt. Atli from gunshot injury, which had occurred at the date and time of the incident. The deceased also, thus, had tried to suppress the real genesis of the incident and therefore, his declarations suffers from the same criticism as that of any other witness. On the basis of his declarations, without any convincing corroborative evidence, we find it wholly unsafe to sustain the conviction of the appellants. It is trite law that dying declaration is just a piece of evidence like any other evidence and can be criticised in the same

manner in which the oral testimony of a witness can be snipped. The accused do not get an opportunity to cross examine the maker such a declaration. It is considered to be reliable because normally it is expected that a man under the cloud of his death will not speak falsehood and is based on a legal maxim "Nemo moriturus praesumitur mentiri". This, however, does not mean that a dying declaration is always reliable howsoever, inconsistent or unconvincing it may be.

Coming to the impugned judgement by the learned trial court we find that on dying declarations and as well as on other aspects of the case, which we have referred to herein above, we are constraint to observe, that the analysis by the learned trial court is wholly one sided and learned trial Judge has not made any endeavour to separate the grain from the chaff. Although, accused/defence had convincingly brought on record, through their pleas and various defence exhibits, that in one and the same incident Smt. Atali was murdered, but the learned trial Judge, by fetching out a third case, without any evidence on record, observed that she had sustained injuries in any other manner. It was neither pleaded by the prosecution nor by the defence that Smt. Atli died in some other manner. On what evidence such an observation was made by the learned trial Judge is not born out from the record. Time of incident and place and date in both the cross FIRs are the same. We remind ourselves that accused is not required to establish it's case beyond all reasonable doubt. His defence plea is to be tested on the anvil of preponderance of probabilities only. It is alien to our criminal jurisprudence that accused is required to establish his defence to the hilt. Instead of critically appreciating the evidence of the informant P.W.3, and the three dying declarations, learned trial judge has accepted them on their face value, without fathoming out intrinsic inherent improbabilities into it. The aforesaid exercise in our opinion is erroneous.

Coming to the question as to which of the two versions are convincing, we are of the opinion that primarily the burden of proof never shifts from the shoulders of the prosecution. It is for the prosecution to establish it's case beyond all reasonable doubt pointing out the guilt of the

accused. It is only in case that they discharge their initial burden of proof beyond all reasonable doubt that the defence of the accused can be looked into to test the veracity of the prosecution case. It is only when prosecution has discharged its initial burden of proof and appoints accused guilty successfully that the burden shifts on the shoulders of the accused to establish, on preponderance of probability, that his defence version may be true. If the accused succeeds in that attempt he discharges his burden. It is only in cases where prosecution proved accused guilty with no other hypothesis that the accused can be convicted. If prosecution fails the benefit has to accrue to the accused. In the event where both prosecution version and defence of accused are false even then there is no escape than to err in favour of accused because in that eventuality it cannot be said that guilt has been proved to the hilt. Once the case of the prosecution itself was found wanting, indefensible and unworthy of credence, the benefit has to be reaped by the accused. Weakness of defence does not establish prosecution case. Prosecution cannot derive any benefit out of it. Here in the present case on the preponderance of probability defence has successfully discharged its burden of establishing that Smt. Atli was shot dead on the date and time of the incident. Their cross story is quite reasonable on the evidence tendered in the case. Solitary prosecution witness had not offered any explanation regarding the murder of Smt. Atli as to how and in what manner and at what time, she was done to death. He had tried to suppress that factum of the incident and therefore, we are of the opinion that the entire prosecution story is incredible and suffers from unreality and an attempt was made to suppress genesis of the incident. In the net result, we find that the conviction and sentence of the appellants, as is recorded in the impugned judgment, is indefensible and unsustainable. At last we only refer to some of the apex court decision as exemplars only support our derived conclusions. In **MAHENDRA PRATAP SINGH VERSUS STATE OF U.P: (2009) 11 SCC 334** it has been held as under:-

"47. The High Court has found the evidence of PW Laxman Dass, PW Matin Khan, PW Prahlad Babu, PW Vimal Kumar Tiwari and PW

Shikhar Chand Naik believable and satisfactory on all material aspects and observed that as the few contradictions appearing in their evidence were of very trivial nature, therefore, the appellant could not be given benefit of doubt on the basis of those minor contradictions. Three dying declarations recorded by the Sub-Divisional Magistrate were rejected by the High Court on the ground that they were not recorded correctly and honestly. We are afraid to agree with the findings of the High Court in setting aside the order of acquittal of the appellant passed by the trial Judge. On independent analysis of the evidence of the material witnesses discussed hereinabove, we find that the High Court has failed to appreciate the same in proper perspective.

48. The discrepancies coming on record in the evidence of PWs 4, 8, 9, 10 and 13 in no circumstances can be termed to be minor in nature which in our view, are vital for disbelieving and discrediting the evidence of the eye witnesses. The High Court discarded the important pieces of evidence on the basis of surmises and conjectures. On the day and time of the incident none of the eye witnesses including the injured witnesses had seen the appellant travelling on Bus No. MPR 5393. It is their evidence/ testimony that there were some more persons present at the bus-stand, who took the luggage of the appellant after the same was unloaded from the rooftop of the bus. It has come in the evidence of these witnesses that one person hit PW Laxman Dass. The investigating officer has not cared to find out the identity of those persons who were accompanying the appellant on the scene of occurrence and took his luggage or out of those persons who hit PW Laxman Dass with a stone.

49. It appears that the prosecution has suppressed the genesis of the incident.....”

In another decision State of M.P. versus Gopi:AIR 1992 SC 1878 apex court has countenanced conclusion arrived at by the high court by observing thus:-

"7. As mentioned above the occurrence took place on June 30, 1977. Investigating Officer recorded the statement of Ramvishal P.W. 3 and Halku P.W. 4 on September 30, 1977 and October 7, 1977 respectively. The statement of Kalidin P.W. 6 was also recorded on July 30, 1977. No satisfactory, explanation, according to the High Court was given for this delay in recording the statements specially of P.W. 3 and P.W. 41 who were the alleged eye-witnesses.

8. Rajju-accused, according to the prosecution, was armed with a gun. It is

highly improbable that in an attack with the intention of causing fatal injuries Rajju would not have used his gun and permitted others to use less effective weapons. Even after Rajju had received grievous injuries the gun was not used by Rajju.

9. We are of the view that the High Court was justified in reversing the findings of the trial Court and acquitting the respondents. We see no infirmity in the High Court judgement. We agree with the reasoning and the conclusions reached therein. We, therefore, dismiss the appeal."

In the present case also we found that the deceased could not sustained wrist and ankle injury as alleged by the prosecution from point blank range as that would indicate that all the accused had no intention to commit murder of the deceased otherwise why they will shoot him on most non vital part of the body without any repetition. In yet another decision **Hem Raj versus State of Punjab: AIR 2003 SC 4259** it has been held by the apex court as under:-

"Though a person of the defence party was injured, the prosecution had no explanation for the same. There was doubt as to manner in which according to prosecution the occurrence took place and its time. In the facts of the case it was not possible to outright reject the defence case. Consequently, the accused persons were acquitted by the trial Court. In the state of evidence on record, the view taken by the trial Court is also a possible reasonable view of the evidence on record. The evidence adduced by the prosecution is rather inconsistent and creates a serious doubt about the truthfulness of the prosecution case. Even if it may be possible to take a different view, it could not be said that the view taken by the trial Court is not a reasonable view of the evidence on record and therefore, the High Court should not have reversed the order of acquittal passed by the trial Court."

In another decision **State of Rajasthan versus Madho and another: AIR 1991 SC 1065** apex court has affirmed acquittal of accused for the reasons that prosecution version was incredible. It was held thereunder as follows:-

"2. According to the prosecution, on April 13, 1973, around noon time when PW 1- Gouri Lal was getting a well dug, the dug- up earth was thrown on the adjoining land to which the accused protested. The two respondents abused PW 1 and thereafter Kanwari attacked him and gave lathi blows to PW 1. On hearing an alarm, PW 2 - Lal Chan(i anti the deceased rushed to the site. The respondent Madho struck a farsi blow on the leg of PW 2 which resulted in fracture. The deceased removed PW 2 to the house of Bapu Chamar at a short distance from the field. The prosecution case is that the two respondents and the other four acquitted accused persons followed the deceased and PW 2 the two respondents entered the house of Bapu Chamar and gave farsi blows on the head of the deceased to which he ultimately succumbed. Thus the prosecution case is divided in two parts, namely, the incident which took place in the field where PW 1 was getting a well dug and the incident which took place at the house of Bapu Chamar. So far as the first part of the incident is concerned, both the Courts came to the conclusion that the prosecution version that Kanwari launched the assault on PW 1 and the other three ladies also attacked him is not worthy of acceptance. As regards the second part of the incident the trial Court came to the conclusion that the two respondents were not entitled to any right of private defence because they had actually followed PW 2 and the deceased when the latter was removed by the former to Bapu Chamar's house and had belaboured the deceased there. Therefore, even though the respondents had sustained injuries they were not entitled to right of private defence as they were the aggressors. In this view that the trial Court took it convicted the two respondents as stated earlier. The High Court on a re-appreciation of the evidence came to the conclusion that the prosecution witnesses were guilty of shifting their stand and had failed to explain the serious injuries on the two respondents. So far as PW 1 is concerned, the High Court noticed that he had changed his version from the one stated in the First Information Report as well as his evidence before the committing Court. Before the committing Court he had stated that after he received injuries he became unconscious and had not noticed the assault on PW 2 as

well as the deceased. The High Court further noticed that on his own showing he has gone to his residence from the field for drinking water and by the time he reached Bapu Chamar's house the deceased had fallen on the ground with injuries. In other words PW 1 cannot be said to be an eye-witness of the second part of the incident. So far as PW 2 is concerned we find that according to his version he received an injury on the leg when he went to the rescue of PW 1. His version that PW 1 was belaboured by the ladies has not been accepted by both the Courts. Even in regard to that version he is found to have shifted his stand. He deposes that after he was lifted to the house of Bapu Chamar the respondent and their companions followed them and belaboured the deceased after he was laid on the 'otle'. According to his statement thereafter the deceased went over to the road where he was belaboured by the respondents. Now this witness was engaged to the daughter of the deceased. As stated earlier his evidence regarding the involvement of the ladies has been rejected by both the Courts and in our opinion rightly. In his cross:-examination he stated that he could not say if the accused persons kept on following and throwing stone, a statement which casts a doubt on his version that the accused had followed the deceased after the latter had lifted him to the 'otle' of Bapu Chamar and had thereafter belaboured him. He was unable to explain how the two respondents sustained injuries. If we turn to the injuries sustained by the two respondents which have been set out in paragraph 25 of the trial Court judgment, we find that the respondent Kishna had sustained as many as six injuries, five of them on the skull region. The respondent Madho too had sustained six injuries, two on the skull region, two on the scapular region, one on the forehead and one on the right index finger. Thus some of the injuries were on exposed parts of their bodies and we would expect the prosecution witnesses to explain how the two respondents sustained the said injuries. No explanation worth the name is forthcoming. The trial Court, however, brushed aside this infirmity by pointing out that in the cross case filed at the behest of the respondent Kishna the evidence disclosed that there was no farsi blow and, therefore, the defence theory was not

acceptable. Counsel for the respondents, however, questioned the admissibility of the said evidence. Be that as it may, mere acquittal of the accused (prosecution side herein) in that case does not render the defence version false. The defence version has to be evaluated on the basis of the prosecution evidence tendered in the present case. The fact remains that both the respondents had sustained serious injuries, Kishna mainly on the skull whereas Madho on the skull as well as scapular region. If the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the same incident. It gives the impression that the witnesses are suppressing some part of the incident. The High Court was, therefore, of the opinion that having regard to the fact that they have failed to explain the injuries sustained by the two respondents in the course of the same transaction, the respondents were entitled to the benefit of the doubt as it was hazardous to place implicit reliance on the testimony of the injured PW 2.

3. The High Court also examined the evidence of the other prosecution witnesses including PW 10 - Bai Kali and came to the conclusion that their evidence did not enhance the prosecution case. In fact Bai Kaili gave out a version which was neither the case of the prosecution nor that of the defence. The High Court, therefore, brushed aside her evidence as unworthy of credence.

4. In view of the above, we do not think that the High Court had committed any error in the evaluation of the prosecution evidence. The view taken by the High Court cannot be said to be against the weight of evidence or one which has resulted in gross injustice. In our view the evaluation of the prosecution evidence by the High Court in the context of the injuries sustained by the two respondents is quite proper and does not call for interference by this Court."

Armed with above supportive views the net result of our marshalling exercise is that we allow the appeal, set aside the impugned judgment of

conviction and sentence order dated 31.3.82, recorded by IVth Additional Session's Judge, Muzaffarnagar in S.T. No.231 of 1981, State versus Munendra and two others, under section 302/34 I.P.C., and acquit the appellants and set them at liberty. All the appellants are on bail, they need not surrender, their personal and surety bonds are hereby discharged.

Let a copy of this judgment be certified to the trial Court for its intimation.

Dt.21.12.2012

Rk/Arvind/Tamang/-