



AFR
Court No. 44

1. Capital Crl. Appeal No. 8077 of 2008
Om Nath.....Appellant
vs
State of UP.....Respondent
2. Reference No 17 of 2008
3. Govt. Appeal No. 2314 of 2009
State of UPAppellant
Vs
(1) Vijay Laxmi
(2) Km. Uma
(3) Km. BabyAccused-Respondents
4. Crl. Revision No. 3005 of 2010
RakeshRevisionist
Vs
State of UP.....Respondents

HON'BLE YATINDRA SINGH, J
HON'BLE SURENDRA SINGH, J.

(Delivered by Hon'ble Yatindra Singh, J.)

1. It was difficult to imagine: brother trying to eliminate the family of his younger brother. But such are the facts of this case; such is the World.

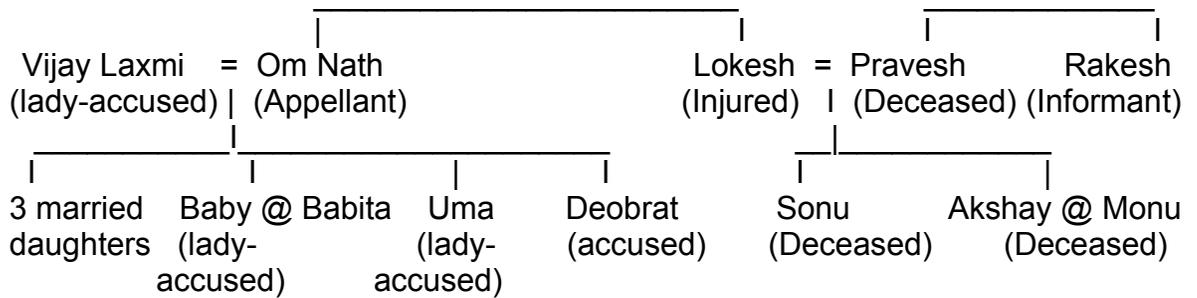
THE FACTS

2. An incident said to have taken place at about 7:30 hours on 9.4.2006 in village Nirmani, district Muzaffarnagar (the Village). In this incident, three persons Smt. Pervesh, her sons Akashay, and Sonu (jointly referred as the Deceased) were killed. Her husband Lokesh (the Injured), was injured.

3. Rakesh (the Informant), brother of Smt. Parvesh, lodged the FIR at 8:50 hours on the same day. In the FIR, Om Nath elder brother of the Injured and his family members—wife Smt. Vijai Laxmi, two unmarried daughters Km. Baby alias Babita and Km Uma, and son Deobrat—(all jointly referred as the Accused) were named.

4. Om Nath (the Appellant) had three more daughters. They were married before the incident and presumably were not living in the village: they were living with their husbands.

5. The pedigree of the parties is as follows:



6. The allegations in the FIR are as follows:

The Informant's sister Smt. Pervesh was married to the Injured. The Informant was also married in the same Village. He had come to the Village; The Injured was having property dispute with the Appellant. At about 7:30 hours, the Informant was standing in front of *Gher* of his brother-in-law (साला). He met the Injured, who was going to the temple for prayer as a daily routine;

At that time, the Accused {Om Nath and Deobrat (wielding firearms), Smt. Vijay Laxmi and her daughters Km. Uma and Baby (wielding *Tabal*, *Balkati* and spear respectively)} came;

They fired shots at the Injured and he fell. Thinking him to be dead, they went away saying that his entire family was to be finished;

The Informant and his brother-in-law (साला) also followed them shouting for help. On their shouting, Rajiv and Babloo came. They tried to stop the Accused but were not successful;

The Accused with their weapons attacked the Deceased and killed them. They also tried to kill the Informant and others but somehow, they escaped; The Accused ran away firing shots in the air and shouting that in case anyone gives evidence then he would also be killed;

The Deceased died on the spot. Their dead bodies are lying on the spot.

The injured was seriously injured and has been taken to the hospital.

7. The police arrested the Accused from behind the shop of Rakesh Garg on the same day at 12:45 hours.

8. At the time of arrest, many things were recovered. Their list is **Appendix-1**. Apart from others, the following firearms were also said to be recovered:

A 12 bore Gun and 3 live 12 bore cartridges from the Appellant. The gun had the butt of 6 *angul* (अंगुल) and barrel of 1 *balist* (बालिस्त) and 2 *angul*

(अंगुल). The gun had one cartridge loaded;

A 315 bore gun and 2 live cartridges from Deobrat (the Juvenile). The gun had body of 6 *angul* (अंगुल) and barrel of 8 *angul* (अंगुल). A part of it was said to have fallen in the morning at the spot. A live cartridges loaded in the gun; A 315 bore gun, a pack with live cartridges, and 315 bore cartridges from Vijay Laxmi. The gun had the barrel of 8 *angul* (अंगुल) and body of 6 *angul* (अंगुल).

The aforesaid description and details are recorded in the recovery memo (Ex Ka-43)

9. The other weapons namely, *tabal*, *balkati*, and spear were recovered at 19:15 hours the same day at pointing of the Appellant. The material exhibits of the weapons recovered at the pointing of the Appellant and other items recovered at the temple and the house is **Appendix-2**.

10. On the basis of the recovery of weapons, crime numbers 274 to 276 of 2006, PS Budhana, district Muzaffarnagar were also registered under section 25 of the Arms Act.

11. The District Magistrate granted permission for prosecuting the case under the Arms Act on 1.6.2006.

12. The Accused Deobrat filed an application for separating his trial and sending the same to the juvenile board. The CJM, Muzaffarnagar by his order dated 4.10.2006 separated his trial and submitted his case to the Juvenile Board, Muzaffar Nagar (the Board) to be decided in accordance with law.

13. The Board by its order dated 14.2.2008 held Deobrat to be major on the date of the incident and his case has been sent back. Deobrat has filed an appeal against the same. His trial was separated by the order of the trial court dated 28.2.2008.

14. The police submitted the charge sheet on 13.11.2006 against Om Nath, Vijay Laxmi, Baby @ Babita and Uma (referred to as the remaining-accused) and the cases were committed to the sessions' court. They were numbered as ST No. 907 to 909 of 2006.

15. The Additional Sessions Judge, Court No. 7, Muzaffarnagar (the ASJ) framed

the charges on 15.12.2006. The remaining-accused were charged under section 307, 302, read with section 149, 148 IPC and section 25 of the Arms Act.

16. The prosecution filed documents. Their list is **Appendix-3**.

17. The prosecution examined the following witnesses:

Lokesh (PW-1): Injured eyewitness;

Rakesh (PW-2): Informant and brother-in-law (साला) of the Injured, an eyewitness;

Dr. VP Singh (PW-3): Doctor at the District Hospital, Muzaffarnagar examined the injuries of the Injured;

Dr. Rajesh Singh (PW-4): Doctor, conducted the postmortem;

Suresh Giri (PW-5): Head constable (the HC), recorded the FIR;

Dr. Neeraj Goel (PW-6): Doctor at Chaurasiya Nursing Home, Meerut the (the private nursing home), subsequently examined the injuries of the Injured;

Braj Raj Singh (PW-7): Investigation Officer (IO);

Krishna Pal Singh (PW-8): Head constable, recorded the FIR under section 25 Arms Act;

Jadish Singh (PW-9): Station Officer (the SO), arrested the Accused.

18. The remaining accused were examined under section 313 CrPC on 11.1.2008 and 27.8.2008. They denied their involvement in the crime and stated that:

The incident did not happen at the time and place as alleged by the prosecution;

The real incident has been hidden by the prosecution;

The Accused have been falsely implicated;

They have been implicated so that real culprits may not be arrested.

19. Among others, the remaining-accused filed the following documents:

Photocopy of the general diary entry (the GD) dated 9.4.2006 time 6.30 pm (Ex Kha-1);

Photocopy of the GD entry dated 9.4.2006 time 6.45pm (Ex Kha-2).

20. They also examined the following two witnesses:

Rajvir Singh (DW-1): Constable, brought GD of 9.4.2006 and proved Ex Kha-1 and Ex Kha-2;

Narendra Tyagi (DW-2): Scribe of the written report lodged by the Informant.

21. The ASJ by his judgment dated 10.11.08 acquitted Vijai Laxmi, Babita, and Uma. (referred to as the lady-accused).

22. The Appellant was also acquitted under section 148 IPC and Section 25 of the Arms Act. However, he was convicted under section 302 and 307 IPC. On 11.11.2008, he was sentenced to,

Death penalty and fine of Rs. 20,000/- under section 302 IPC;

Imprisonment for life and fine of Rs. 10,000/- with default stipulation of one year rigorous imprisonment under section 307 IPC.

Hence the Criminal Appeal No. 8077 of 2008 by the Appellant.

23. The ASJ has sent reference no. 17 of 2008 for confirmation of death sentence. The State has also filed Govt. Appeal no. 2314 of 2009 against the acquittal of lady-accused. The Informant has also filed Criminal Revision no. 3005 of 2010 against acquittal of the lady-accused.

POINTS FOR DETERMINATION

24. We have heard Sri Gopal Chaturvedi, Sri Alok Ranjan Mishra, counsel for the Appellant in Capital Criminal Appeal No. 8077 of 2008; Sri Jagdish Prasad Misra, counsel for the lady-accused in Govt. Appeal No. 2314 of 2009 and Crl. Revision No. 3005 of 2010; Sri Satish Trivedi and Sri AK Pandey, counsel for the Informant in Crl. Revision No. 3005 of 2010; Sri Arunendra Kumar Singh, Sri Anand Tiwari, AGAs for the State in all cases.¹

25. The following points arise for determination in the case:

- (i) Was there any motive for the crime?
- (ii) Whether the Information was present at the time of the incident;
- (iii) Whether the incident took place at the time and place as alleged by the prosecution;
- (iv) Whether the FIR was ante-timed;
- (v) Whether the Appellant is guilty;
- (vi) Whether the lady-accused are guilty;
- (vii) In case the remaining-accused are guilty then, what punishment

¹ We are thankful to the counsel appearing in the case for correcting the part of the judgement under the heading 'THE FACTS', 'POINTS FOR DETERMINATION' and 'Appendices'. However, if there are any mistakes, they are ours.

should be awarded.

1st POINT: THERE WAS MOTIVE

26. In the FIR, the motive was mentioned as property dispute. The Injured (PW-1) and the Informant (PW-2) have deposed about the same. They deposed that:

There was joint tube-well and there was the question of partition;

The valuation of the tube-well was fixed Rs. 70,000/- and the Appellant was to give Rs. 35,000/- to the Injured but the amount was not given to the Injured;

The Appellant had said that the Injured should get boring done and he would pay the money afterwards. However, the money was not paid.

27. There was no other enmity, no other dispute, except the payment share regarding tube-well between the two; atleast nothing has come on record. The parties are real brothers. There appears to be no reason as to why the Injured (PW-1) or his brother-in-law (साला) {the Informant (PW-2)} would falsely depose.

28. The Appellant had five daughters. Three were already married before the incident and two were of marriageable age at the time of the incident. The marriage of daughters is an expensive affair in our society. The Appellant may not want to part with money; his hands may be tight.

29. There is no suggestion to the Injured or the Informant that Rs. 35,000/- for the tube-well were already given or were not to be given.

30. In our opinion, the prosecution has proved the motive.

2nd POINT: INFORMANT WAS PRESENT

31. The informant (PW-2) deposed that:

Smt. Pravesh wife of the injured (PW-1) was his sister;

He was also married in the same village;

His village was about 50-55 kilometres from the Village. He often used to come to the village to meet the relations; and

He had come on the day before the fateful day to meet the relations.

32. The counsel for the appellant submitted that:

The allegation that the Informant had come to the Village, on the day before

the fateful day, was not mentioned in the FIR rather it indicated that he had come on the fateful day;

The aforesaid fact was also not stated by the Informant in the statement under section 161 CrPC;

The Informant had neither come a day before nor was he present at the time of the incident.

33. In the FIR, it was not mentioned that the Informant reached the previous day. It was also not recorded in the Informant's statement under section 161 CrPC. However, this is to be seen in the light of circumstances of the case.

34. On the fateful day, Informant's sister, his two nephews were killed and his brother-in-law, was seriously injured; there was little hope of survival of the Injured. No one in such a situation would be in a fit mental condition. The mind would be disturbed.

35. In the written complaint as well as in the FIR it is not mentioned that the Informant come to the village the previous day. The exact words mentioned are as follows:

'आज दिनांक ९-४-२००६ को मैं अपनी ससुराल ग्राम निरमानी में आया हुआ था।'

It means that the Informant was in his in-laws place in Village Nirmani on 9.4.2006. It does not mean that he came to the Village on 9.4.2006. If the Informant wanted to say that he had come to the Village on 9.4.2006 then he would have said,

'आज दिनांक ९-४-२००६ को, मैं अपनी ससुराल ग्राम निरमानी आया।'

The words 'हुआ था' would not have been there.

36. The Informant did depose that:

He had said that he had come the previous day;

It appears that it was not recorded in the FIR;

He had told the IO in the statement under section 161 CrPC about his coming to the Village on the previous day;

It is possible that the IO did not record it.

37. The Informant is a rustic villager. It is possible that he might not have dictated the FIR with precision. Apart from it, he was disturbed. The FIR is supposed to be an information about crime. This is what he had done.

38. The IO might not have considered it necessary to record in the statement under section 161 CrPC that the Informant had come the previous day. And he did not record it. In our opinion, no adverse inference can be drawn on its basis.

39. The Informant (PW-2) has two relationships in the Village. His sister was married to the Injured (PW-1). His in-laws were also in the same Village. PW-2 deposed that he had come on the previous day to meet them. This is not unusual.

40. The Informant deposed that:

He was standing along with his brother-in-law (साला) in front of his *gher* in the morning at about 7:15 or 7:30 hours;

He met the Injured, who was going to temple to pray;

They exchanged greetings;

This was also deposed by the Injured.

41. In our opinion, the Informant had come a day before and was present at the time of the incident.

3rd POINT: PLACE AND TIME—SAME AS PROSECTUION CASE

42. According to the prosecution case, the incident happened at two places. Initially the Injured was shot upon at the temple and thereafter the Deceased, the family members of the Injured namely his wife and his two sons) were killed in the house.

43. In the oral evidence, it has come that the house of the injured is about 150 yards west of the temple. This is not disputed.

44. The site plan (Ex Ka-32) of the temple indicates that the *gher* of Kunwar Sen alias Bholu brother-in-law (साला) of the Informant is on the northern side of the temple. This was also deposed by the Informant (PW-2). This is also not disputed.

45. The injured deposed that he was injured in the temple at about 7:30 hours. The Informant who was present on the spot also deposed the same. The blood and empty cartridges were recovered there (Ex ka-35). There is nothing to disbelieve their statements.

46. The dead bodies of the Deceased were found in the house. The blood stained

soil was also recovered from this place (Ex Ka-34). The empty cartridges were also recovered from the house. The Informant also deposed that the Deceased were killed in their house. It is fortified by the recovery of dead body and empty cartridges from the house.

47. In our opinion, the first part of the incident namely shooting the injured took place in the temple at about 7:30 hours; whereas the second part of the incident namely killing the Deceased took place in their house immediately thereafter.

4th POINT: FIR NOT ANTE-TIMED

48. The Informant (PW-2) lodged a written report (Ex Ka-1). It is on its basis that the FIR (Ex Ka-6) was recorded. This written report was not written by the Informant but was scribed by one Narendra Tyagi (DW-2). He was produced on behalf of the remaining-accused.

49. Narendra Tyagi (DW-2) deposed that:

He (DW-2) had gone to Meerpur, district Ghaziabad at his in-laws house. He came back round about 16:00 hours;

He saw some of the villagers standing in front of the police station and was informed that family members of the Injured have been killed;

At the police station, the people were waiting for the Informant to come;

The villagers asked him to write down the report and he was taken to the SO. He scribed the report on the dictation of the SO. Thereafter, the Informant came.

The police first talked to the Informant and thereafter got his signatures on the written report.

50. The counsel for the Appellant submitted that:

The scribe himself came in the evening and deposed that the Informant reached the police station after him;

This shows that the FIR was ante-timed; and

The entire case has been cooked up by the police.

51. Three persons were killed. The first inquest started at 10:00 hours. The last inquest finished at 13:00 hours. Immediately thereafter, the dead bodies were sent for postmortem. This was, much before the time given by Narendra Tyagi (DW-2).

52. In the inquest reports (Ex Ka-17, Ka-22, Ka-27), the crime number, sections, and the name of the Informant as well as time of lodging the FIR are mentioned.

53. The GD dated 9.4.2006 time 8:50 hours is on record (Ex Ka-7). It was proved by the HC (PW-5). It shows that FIR was recorded at that time.

54. The Accused were arrested at 12:45 hours (arrest memo Ex Ka-43). Thereafter, they were at the police station. In the cross examination, DW-2 stated that he did not see the Accused at the police station. In case, he was at the police station in the evening, writing the FIR, then he ought to have seen them. The fact that he did not see them indicates that he was at the police station before their arrest.

55. The remaining-accused have filed the GD entries dated 9.4.2006 time 18:30 and 18:45 hours (Ex Kha-1 and Ex Kha-2). They indicate as follows:

Ex Kha-1 shows *aamad* (आमद) (entry) of lady constable Saroj Yadav and handing over lady-accused under her supervision;

Ex Kha-2 shows entry that the clothes of lady-accused were changed with the help of lady constable.

The aforesaid documents do not indicate arrival of the Accused in the police station at 18:30 hours.

56. In our opinion,

The FIR was not ante timed;

The statement given by Narendra Tyagi (DW-2) does not inspire confidence;

It appears that he was won over.

5th POINT: APPELLANT IS GUILTY

Difference in Injury Reports—Not Material

57. The Injured was seriously injured in the incident. He was initially taken to the District Hospital, Muzaffarnagar. His injuries were examined there. The injuries according to report (Ex Ka-2) are **Appendix-4**. This injury report was proved by Dr. VP Singh (PW-3).

58. Dr. VP Singh (PW-3) referred the Injured to the Medical College, Meerut. The Injured was taken to Meerut. However, he was not admitted in the medical college, but was admitted in the Private nursing home. His injuries were again examined.

The injuries according to this report (Ex Ka-8) are **Appendix-5**. This injury report was proved by Dr. Neeraj Goel (PW-6).

59. There is a difference between the two injury reports. In the injury report at the private nursing home (Ex Ka-8) two more injuries on the right side of the body are recorded that were not recorded in the injury report (Ex Ka-2) of the district hospital. They are injury numbers (ii) and (v) of the private nursing home report.

60. Dr. VN Singh (PW-3) was the doctor at the district hospital, Muzaffarnagar. He deposed that general condition of the injured was bad and he referred him to medical college.

61. A doctor normally does not examine all injuries, when the condition of injured is critical. He merely examines those injuries that are critical, refers the matter to the hospital that has better facilities. The reason is that delay involved in further examination may worsen the condition of the accused. It appears that this was the case here. It does not cause any doubt or aspersion on the prosecution case.

Guilty U/S 307 IPC

62. The counsel for the Appellant submitted that:

- The injuries on the injured are on the back side;
- This shows that he was hit from behind;
- The injuries were gunshot injuries and were serious;
- The injured must have fallen and could not have seen his assailants;
- His evidence regarding identity of the assailants, should be discarded.

63. The injuries of the Injured indicate that he was hit from behind. The injuries are serious as well. He must have fallen. However, the Injured deposed that he was conscious. It cannot be said that he could not recognise the assailants at that time.

64. The Injured is the younger brother of the Appellant. He deposed that the Appellant and Deobrat were present and fired the shots at him. There is no reason for him to falsely implicate his elder brother and his nephew Deobrat. There is no reason to disbelieve him.

65. Apart from the Injured, the Informant also deposed that:

- After the injured went inside the temple, the Appellant alongwith his family

members entered inside the temple;

The Appellant and Juvenile fired shots at the Injured.

66. Two different kinds of empty cartridges were found in the temple: 12 bore and 315 bore. This indicates that two kinds of firearms were used.

67. In our opinion, the prosecution has proved its case beyond reasonable doubt that the Appellant fired shot at the Injured. The Appellant is guilty under section 307 IPC.

Guilty U/S 302 IPC

68. The Injured also deposed that after injuring him, the Accused killed his wife and his two sons.

69. The Injured fell in the temple. He was not present at the time when his family members were killed. This part of the evidence is hearsay, and may not be admissible. However, there is other evidence as well: the Informant has also deposed about it.

70. The Informant (PW-2) deposed that:

First the Injured was shot at the temple. Thereafter, the Accused went to his house and killed the Deceased;

The Informant and his brother-in-law (साला) had followed the Accused. They had shouted for help;

At the house, the Accused killed the Deceased.

71. At the temple (recovery memo Ka-37) and at the house (recovery memo Ex Ka-38) shows that empty cartridges of 12 bore and 315 bore guns were found. This indicates that two kinds of guns were used at both places.

72. The Informant is brother-in-law (साला) of the Injured. He has no enmity with the Appellant. There is no reason as to why the Informant would leave out the real culprits and would falsely depose or implicate the Appellant unless he was involved in the crime.

73. In our opinion, the prosecution has proved its case beyond reasonable doubt against the Appellant. He is guilty under section 302 IPC as well.

6th POINT: LADY ACCUSED—ENTITLED TO BENEFIT OF DOUBT

74. The AGA and counsel for the Informant submitted that:

The lady-accused were wielding weapons that could cause some of the injuries to the Deceased;

The medical evidence is not inconsistent with the oral testimony;

The trial court committed illegality in acquitting the lady-accused on the ground that there is difference between oral testimony and the medical evidence.

75. The appellate court while hearing a government appeal against an order of acquittal is entitled to re-appreciate the evidence and to go into the question of fact. However, it is not as wide as the trial court. An order of acquittal does add to presumption of innocence in favour of the accused.

76. The Supreme Court has clarified² the powers of the appellate court while hearing an appeal against an order of acquittal. In some cases, the principles had been itemised. However, the thread running in all decisions is,

(i) If on the basis of the evidence on the record two reasonable conclusions are possible and the one in favour of the accused has been taken by the trial court then:

The appellate court should not disturb the finding of acquittal recorded by the trial court;

In such a situation, the appellate court would not be justified in interfering with the order of acquittal, even if in opinion of the appellate court conviction was also a reasonable view.

(ii) The appellate court would be justified in reversing the judgement of acquittal if:

It was perverse or unreasonable; or

The trial court had committed an error of law; or

It had recorded its finding in ignorance of relevant material or on inadmissible material.

² (i) State of Goa Vs. Sanjay Thakran; (2007) 3 Supreme Court Cases 755 (ii) Narayanamurthy Vs. State of Karnataka and another; AIR 2008 SC 2377 (iii) Nepal Singh Vs. State of Haryana; AIR 2009 SC 2913 (iv) KA Vish Vs. State of Maharashtra; AIR 1971 SC 2256 (v) Dharmadeo Singh and others Vs. The State of Bihar; (1976) 1 SCC 610; (vi) Muluwa Vs. State of MP; (1976) 1 Supreme Court Cases 37 (vii) Labh Singh Vs. State of Punjab; (1976) 1 SCC 181 (viii) Suratlal and others Vs. State of MP; (1982) 1 SCC 488 (ix) Solanki Chimanbhai Ukabhai Vs. State of Gujrat; (1983) 2 SCC 174.

77. The Appellant's family consisted of his wife, five daughters and a son (the juvenile). Out of five daughters, three were married at the time of the incident. There is no evidence, but normally they would be living with their husbands and not with their parents. The family of the Appellant at the time of the incident in the Village consisted of his wife, two unmarried daughters and his son Deobrat. The entire family that was in the Village is accused in this case.

78. Vijay Laxmi, (wife of the Appellant), Baby and Uma (daughters of the Appellant are said to be wielding *tabal*, *balkati*, and spear. *Tabal* and *balkati* are a kind of sharp edged weapons, whereas, the spear is a pointed weapon. The lady accused are said to have accompanied the Appellant and Deobrat, who were wielding firearms not only at the temple but thereafter also at the house.

Injuries: The Injured

79. The injuries of the Injured are appended as Appendix-4 and 5. He did not have any injuries that could be caused by weapons held by the lady-accused.

80. Dr. Rajesh Singh (PW-4) conducted the postmortem. He proved the postmortem reports (Ex Ka-3 to Ka-5). He deposed about the antemortem injuries as well. The injuries caused to the Deceased are appended as **Appendix-6 to 8**.

Injuries: Akshay alias Monu

81. Akshay alias Monu had firearm injuries only. He did not have any injuries that might be caused by the weapons wielded by the lady-accused.

82. The Informant (PW-2) deposed that Akshay alias Monu was hit by *tabal*, *balkati* and spear. He was hit with *tabal* when he was standing and by *balkati* and *spear* when he had fallen. It is surprising that none of them could hit Akshay alias Monu. He had no injury that could be caused by these weapons said to be wielded by the lady-accused.

83. The other two deceased have some injuries that might be caused by the weapons held by the lady-accused.

Injuries: Smt. Pravesh

84. All injuries except injury no. (iv) on the dead body of Smt. Pravesh are gunshot wounds. Injury no. (iv) on her body is an incised wound. It could be caused by a

sharp edged weapon like *tabal* or *balkati*.

85. The Informant (PW-2) deposed that:

Baby alias Babita (daughter of the Appellant) hit Smt. Pravesh with the spear. This was done when she had fallen;

Vijay Laxmi (wife of the Appellant) hit Smt. Pravesh by *tabal* one-two times;

Uma (daughter of the Appellant) hit Smt. Pravesh by *balkati* one-two times;

Vijai Laxmi and Uma had hit with the weapons raising their hands above the head.

86. It is surprising that Baby hit Smt. Pravesh with the spear when she had fallen yet she missed hitting her.

87. There should be at least two, if not four, incised wounds on the body of Smt. Pravesh. And if the weapons were hit raising their hands above their heads than it should not only be muscle deep: it should be deeper.

Injuries: Sonu

88. There are three injuries on the dead body of Sonu that are not gunshot wounds. They are as follows:

Injury no (i) of Sonu could be caused by blunt weapon. It could be caused by a weapon wielded by the lady-accused if they hit with the blunt side;

Injury no. (iii) and (iv) of Sonu are punctured wounds and could be caused by the pointed weapon like a spear.

89. The Informant (PW-2) deposed that Sonu was hit with *Tabal*, *Balkati*, and spear. According to the oral testimony there should be many more injuries by *tabal* and *balkati*; they should be more severe too. However, they are neither in that numbers nor are they severe.

90. The Informant (PW-2) deposed that Sonu was hit by *tabal* on the back of the neck. However, there is no wound on the back of the neck.

91. Injury no. (i) of Sonu could normally be caused by blunt weapon. However There is no evidence that he was hit with the blunt side of *tabal* or *balkati*. This injury could also come if Sonu falls on a raised stone.

92. Injuries no. (iii) and (iv) are punctured wounds. They could come by spear. However, looking into their size, it appears that they were caused by falling on a pointed stone etc.

93. In view of our discussion, it cannot be said that the oral testimony is inconsistent with the medical evidence: some injuries could have been caused by the weapons said to be wielded by the lady-accused. However, according to oral evidence the injuries said to be caused by weapons wielded by lady-accused should be more severe and more in number than found on the dead bodies. The oral evidence might not be inconsistent but it is in variance with the medical evidence.

Other Factors

94. As previous injuries said to be caused by the lady-accused could come by falling as well. Apart from this, the incident should be seen along with other factors that are present in the case.

95. The Appellant, and Deobrat—the menfolk in the family—had carried the firearms. It seems unusual for the lady-accused to accompany them when they were carrying firearms. They were sufficient to kill anyone. They also had to cover two places. They came to the temple first and went to house afterwards. It seems improbable that all the womenfolk of the family would accompany them, when it was not necessary.

96. The prosecution case and the oral testimony is that all of them attacked the Deceased, suggesting that it was simultaneous. The weapons said to be wielded by the lady-accused could cause injuries from the close quarter only. No person would fire the shots at the time, when weapons held by lady-accused were being used: lest the fire shots might hit them. The chances are that both the firearms and other weapons were used at different times and by the same persons.

97. The accused were arrested together, while trying to run away at 12:45 hours the same day. The Appellant and his son were involved in the incident and they might have thought of taking everyone in the family, but merely for this reason, adverse inference cannot be drawn against the lady-accused.

98. Women traditionally have softer emotions. They would be loathed to be

involved in such an incident; they are often moot spectators of the activities of their menfolk; unable to register their opposition.

99. In the incident, real sister and two nephews of the Informant were brutally killed, His brother-in-law seriously injured. The Appellant and his son were involved in the crime: revenge and anger would in the mind of the Informant.

100. In such a situation, the normal reaction would be to involve everyone in the family of the Appellant. In fact everyone in the family, who was in Village, was involved. The possibility of false implication of lady-accused cannot be ruled out.

101. Considering the entire facts and circumstances, it cannot be said that the view of the trial court is unreasonable or perverse or is not a reasonable view. The government appeal is liable to be dismissed.

7th POINT: REFERENCE SHOULD BE ACCEPTED.

102. The counsel for the Appellant submitted that:

- (i) There is no evidence to show as by whose fireshot resulted into fatal injury;
- (ii) The Appellant may be a motivator but he is not the author of death;
- (iii) The reference should not be accepted and the death penalty should not be confirmed.

103. The Appellant was wielding a gun. He fired shot at the Injured but he was lucky: he survived the tragedy but is crippled for life. However the maximum corporal punishment under section 307 is imprisonment of life and we award it to the Appellant.

104. There has been three murders. The wife and two children of the Deceased. The main reason of death of the Deceased are the firearm injuries.

105. In the house, where dead bodies were found, the empty cartridges of 12 bore and 315 bore guns were found. This indicates that two kinds of firearms were used.

106. We have already held that the Appellant is guilty of 302 IPC. We have no reason to doubt that shots fired by the Appellant also hit the Deceased. He was also responsible for their deaths. Even if it is taken that shots fired by the Appellant

did not result into death of the Deceased; it does not matter: the facts are such.

107. The Appellant was head of the family. He was the elder brother. It was his duty to see fair share was given to the younger brother. He instead of holding the family together, spread hatred. He instead of paying Rs.35,000 that he was supposed to pay, tried to eliminate the family of the younger brother.

108. The entire family of younger brother has been killed and the younger brother was lucky to survive but is left to live a lonely and crippled life.

109. In our opinion, the reference should be accepted.

110. The trial court has imposed fine as well. Considering that:

The reference is accepted and the death penalty is awarded to the Appellant;

The Appellant's wife and his two daughters are there. The daughters are to be married;

The fine would be realised from the property of the Appellant in the hands of his wife,

It is not a fit case of imposition of any fine. The fine imposed by the court is set aside.

CONCLUSIONS

111. Our conclusions are as follows:

- (i) There was motive for committing the crime;
- (ii) The Informant had come to the Village the previous day and was present at the time of the incident;
- (iii) The incident took place at the time and place as alleged by the prosecution;
- (iv) The FIR was not ante-timed;
- (v) The prosecution has proved its case beyond reasonable doubt against Om Nath (the Appellant) under section 307 and 302 IPC;
- (vi) It is case where reference should be accepted however fine may not be imposed.

112. In view of our conclusions, Criminal Appeal No. 8077 of 2008, Government Appeal No. 2314 of 2009, and Criminal Revision No.3005 of 2010 are dismissed. The Reference no. 17 of 2008 is accepted.

113. The conviction dated 10.11.2008 in ST No. 907 of 2006 is maintained but fine is not set aside. Om Nath (the Appellant) is sentenced to,

Imprisonment for life under section 307 IPC;

Death penalty under section 302 IPC. He shall be hanged by the neck till his death.

With these observations, the reference is accepted; the appeal and revision are dismissed. However, imposition of fine is set aside.

Date: 17.08.2010

SKS

Appendix-1

List of Material Exhibits recovered at the time of arrest of the Accused as per judgement and statement of the prosecution witnesses.

Sr no	Material Exhibit no.	Description	Related Document exhibit
1	1	Blood stained Pajama from Om Nath	Memo of arrest Ka-43
2	2	Blood stained Baniyan from Om Nath	do
3	3	Blood stained Pant from Devbrat	do
4	4	Blood stained Saree from Vijai Laxmi	Ka-44. Arrest memo is Ka-43
5	5	Blood stained Suip (Upeer Apparel) Baby @ Babita	do
6	6	Blood stained Salwar (Lower Apparel) from Baby @ Babita	do
7	7	Country made pistol of 12 Bore from Om Nath	Arrest memo is Ka-43. (FIR under section 25 Arms Act Ka-45).
8	8,9	Two live cartridges of 12 bore from Om Nath	do
9	10	One live Cartridge of 12 bore in the Chamber of the Pistol from Om Nath	do
10	11	A country made pistol of 315 bore with broken Butt from Deobrat	do
11	12, 13	Two live cartridges of 315 bore from Deobrat	do
12	14	One live cartridges of 315 bore in the Chamber of Pistol from Deobrat	do
13	17	One country made pistol of 315 bore from Vijai Laxmi	do
14	18 to 27	Ten Live Cartridges of 12 Bore from Vijai Laxmi	do
15	28 to 29	Two Live Cartridges of 315 Bore from Vijai Laxmi	do

Appendix-2

List of Material Exhibits recovered on the pointing out of Appellant as per judgement and statement of the prosecution witness.

Sr no	Material Exhibit no.	Description	Related Document exhibit
1.	42	Spear	Ka-39.
2.	44	Tabal	Do
3.	46	Balkati	Do

List of Material Exhibits recovered from the Temple as per judgement and statement of the prosecution witness

Sr no	Material Exhibit no.	Description	Related Document exhibit
1	31	Blood stained soil	Ka-35
2	32	Plain soil.	do
3	33	Piece of cement	do
4	48	One empty cartridge of 12 bore	Ka-37
5	49	One empty cartridges of 315 bore	Do

List of Material Exhibits recovered from the house as per judgement and statement of the prosecution witness.

Sr no	Material Exhibit no.	Description	Related Document exhibit
1	34	Plain soil where dead body of Sonu was found	Ka-34
2	35	Blood stained soil from where dead body of Sonu was found	
3	38	Blood stained soil where dead bodies of Monu and Smt. Pravesh were found	
4	40	Plane soil from where dead bodies of Monu and Smt. Pravesh were found	
5	50-52	Three empty cartridges of 12 bore	Ka-38
6	53-56	Four empty cartridges of 315 bore	Do
7	57-58	Two Bullets each one bullet was found under the body of deceased Monu and Smt. Pravesh	Do
8	59-60	Two Pieces of broken Butt (Wooden) of country made pistol	Do

Appendix-3

Among others, the following were Documents filed by the Prosecution:

Exhibits	Description
Ka-1	Written Report of Crime.
Ka-2	Injury Report of Lokesh examined at District Hospital, Muzaffarnagar.
Ka-3	Post Mortem Report of Smt. Pravesh
Ka-4	Post Mortem Report of Sonu
Ka-5	Post Mortem Report of Akshay alias Monu
Ka-6	First Information Report
Ka-7	General Diary
Ka-8	Injury Report of Lokesh (Chaurasiya Nursing Home).
Ka-9	Supplementary Report
Ka-10	Receipt of District Hospital
Ka-11	X-Ray Form
Ka-12	Admission Slip of Chaurasiya Nursing Home
Ka-13	Report of the Health Care Centre
Ka-14	Report of the Health Care Centre
Ka-15	Report of Health Care Centre
Ka-16	Discharge Card
Ka-17	Inquest report of Sonu
Ka-18	Photo Nash of Sonu
Ka-19	Letter sent to the RI (Sonu)
Ka-20	Letter sent to the CMO (Sonu)
Ka-21	Form-13 (Sonu)
Ka-22	Inquest report of Smt. Pravesh
Ka-23	Photo Nash of Smt. Pravesh
Ka-24	Letter sent to the RI (Smt. Pravesh)
Ka-25	Letter sent to the CMO (Smt. Pravesh)
Ka-26	Form-13 (Smt. Pravesh)
Ka-27	Inquest Report of Akshay @ Monu
Ka-28	Photo Nash of Akshay @ Monu
Ka-29	Letter sent to the RI (Akshay @ Monu)
Ka-30	Letter sent to the CMO (Akshay @ Monu)
Ka-31	Form – 13 (Akshay @ Monu)
Ka-32	Site Plan (Temple)
Ka-33	Site Plan (House).

Ka-34	Recovery memo of Bloodstained soil (House)
Ka-35	Recovery memo of Bloodstained soil (Temple).
Ka-36	Recovery memo of shoes and slippers near the house.
Ka-37	Recovery memo of one 12 Bore and one 315 Bore empty Cartridges (Temple)
Ka-38	Recovery memo of one 12 Bore, 315 Bore empty Cartridges and 2 Bullets and broken butt of country Made pistol (House).
Ka-39	Recovery memo of Tabal, Balkati and spear.
Ka-40	Site Plan (where the Accused were arrested).
Ka-41	Site Plan (Recovery of balkati, tabal and spear)
Ka-42	Charge sheet
Ka-43	Memo of arrest and recovery
Ka-44	Memo of Bloodstained Sari from accused Smt. Vijay Laxmi
Ka-45	First Information Report 25 of Arms Act
Ka-46	General Diary of 25 of Arms Act.
Paper No. 14 Kha-1&2	Report of the chemical examination.

Appendix-4**Injuries in the injury Report of Lokesh Tyagi at the District Hospital,
Muzaffarnagar.**

(i) Gunshot wound of entry on (Lt) side Back over (Lt) lumber region about 4 cm (sic) iliac crest size 2.5 cm x 2 cm x pro found Bleeding present, cavity deep x inverted margins, bleeding present around the wound.

(ii) Abrasion contusion (Lt) side back over iliac crest size 2.5 x 1 cm x oozing blood present x Reddish colour.

(iii) Gun shot wound entry on post surface of (Rt) forearm just below to (Rt) Elbow size 4 cm x 3.25 cm x muscle (torn) & Bony pieces present in the wound underlying bone fractured x margins inverted x bleeding present, margins inverted, Blackening present.

(iv) Abraded contusion on post. Surface of (Lt) Elbow size 2.5 cm x 1 cm x at pieces oozing blood present x reddish colour.

GC-V Low, pulse – 110 /mt. Feeble Temp. fever present BP 80/60
Anaemic poor prognosis.

Opinion : For inj. No. (1) & (iii) adv. X ray & for refer for medical college Meerut and caused by discharge of firearm inj. no. (ii) & (iv) by blunt & (six) object and simple in nature.

Appendix-5**Injuries in the injury Report of Lokesh at Dr. Chaurasiya Nursing Home,
Meerut.**

- (i) A large wound of about 2" x 2.5" dimensions present in left side of lumber area about 5" left lateral to spine & about 2" above the Iliac crest and about 3" below the 15th rib. Margins are Irregular & bruised and blackened. Wound is freshly bleeding and muscle deep. Underlying fractured bony segments of spine palpable deeply in this wound.
 - (ii) A wound of about 2 cm length & 0.5 cm width present over right side of lumber area about 2" above the Iliac crest and about 6" right lateral to spine margins are tattooed soft tissue deep, freshly bleeding.
 - (iii) Palpatory crepitations present over back of lumbar area.
 - (iv) Numbness present over soles.
 - (v) A wound of about 1" x 0.5 elongated present in right axilla lateral wall, margins are tattooed and freshly bleeding, soft tissue deep.
 - (vi) A large wound of about 2.5" x 1.5" present over back of right elbow, irregular, margins are contused, freshly bleeding underlying fractured bony pieces are visible and palpable movements are restricted.
 - (vii) A small abrasion over right lateral aspect of chest present.
- Type of Injury by fire arm
Nature of injuries Grievous.

Appendix-6**The antemortem injuries of Smt. Pravesh**

- (i) Firearm injury wound of entry size 06 cm x 03 cm on Rt. side neck . 04 cm below Rt. ear muscle deep all muscle of neck are ruptured and great vessels are ruptured. Margins are everted. No tattooing presents. (However, Dr. Rajesh Singh (PW-4) deposed that it was inverted).
- (ii) Firearm wound of exit. size 12 cm x 05 cm on left side face & neck upper part left ear lobule present under lying mandible bone fracture present. All muscles & great vessels are ruptured. Injury no. 1 & 2 are corresponding to each others & cervical vertebrae 5 & 6 are fractured.
- (iii) Firearm injury of entry. Size 1.5 cm x 1.5 cm circular on left side chest, chest cavity deep 15 cm below left nipple at 5 O'clock position margin are everted tattooing present in an area of 21 cm x 14 cm wound goes to on dissection stomach ruptured liver ruptured under lying left 9 & 8 rib fractured and a yellow metall colour bullet recovered from the Rt. chest wall muscles 9 & 10. internal muscle on ruptured.
- (iv) Incised wound size 05.5 cm x 01 cm x muscle deep on left forearm back side 10 cm below left elbow. Dead body & PM report after PM handed over to constable.

Appendix-7

The antemortem injuries of Akshay alias Monu

- (i) Firearm wound of entry size 2.5 cm x 1.5 cm x Rt chest cavity deep on Rt. side chest 6.5 cm from Rt. nipple at 11 O' clock position. On dissection of wound 3 Rt. rib fractured. Rt. lung ruptured. Rt. scapula fractured Margins are inverted & irregular. The edges are contused.
- (ii) Firearm wound of exit size 2.5 cm x 1.5 cm on left scapula back side 10 cm. below the tip of left shoulder. Margins are everted & irregular. Both wound No. (1) & (2) are corresponding to each other.
- (iii) Firearm injury of wound size 1.5 cm x 01 cm x abdominal cavity deep. Margins are inverted circular in shape. Tattooing present in an area of 26 cm x 23 cm in front of chest & abdomen. Abraded collar present under injury. Liver ruptured.
- (iv) Exit wound of firearm size 01 cm x 0.5 cm. on midline 11 cm on Rt side back. A yellow coloured bullet recovered from the injury site. Margins are everted. Injury no. 3 & 4 are corresponding to each other.
- (v) Firearm injury - size 02.5 cm x 2.5 cm on left shoulder 03 cm from tip of shoulder a plastic wad present 2 pieces of cardboard recovered from the wound & underlying bone (sic) Fractured (fractured).

Appendix-8**The ante mortem injuries of Sonu**

- (i) Lacerated wound 1.5 cm x 01 cm left side head & Bone deep 06 cm above from a left ear underlying parietal bone left fractured.
- (ii) The Abraded contusion 05 cm x 2.5 cm left side forehead just above left eyebrow.
- (iii) Punctured wound circular 0.5 cm x 0.5 cm circular x muscle deep on Rt. upper arm 07 cm below Rt. shoulder.
- (iv) Punctured wound circular 0.5 cm x 0.5 cm x muscle deep circular on Rt. side upper arm 04 cm. below injury no. (3).
- (v) Firearm wound (Entry wound) size 01 cm x 0.5 cm x left chest cavity deep. Margins are inverted. 03.5 cm away toward midline from a left nipple at 9 O' clock position. Tattooing present in an area of 19 cm x 13 cm both side front of chest. On dissection of wound underlying 4 & 5 left rib fractured. Both lungs are ruptured & heart ruptured.
- (vi) Exit wound of firearm size 1.5 cm x 1 cm on Rt. side back 13 cm below Rt. scapula 06 cm. from midline. Margins are inverted. Wound No. (5) & (06) are corresponding to each other.
- (vii) Contusion 13 cm x 011 cm (eleven) on Rt. side back extended to left side back.

1. Capital CrI. Appeal No. 8077 of 2008
2. Reference No 17 of 2008
3. Govt. Appeal No. 2314 of 2009
4. CrI. Revision No. 3005 of 2010.

HON'BLE YATINDRA SINGH, J

HON'BLE SURENDRA SINGH, J.

1. The reference is accepted. Criminal Appeal No. 8077 of 2008, Government Appeal No. 2314 of 2009 and Criminal Revision No.3005 of 2010 are dismissed. The conviction dated 10.11.2008 in ST No. 907 of 2006 is maintained but imposition of fine is set aside.

2. Om Nath (the Appellant) is sentenced to,
Imprisonment for life under section 307 IPC;
Death penalty under section 302 IPC. He shall be hanged by the neck till his death.

For orders, see our orders of the date on separate sheet of papers.

Date: 17.8.2010

SKS

Govt. Appeal No. 2314 of 2009

State of UPAppellant

Vs

(1) Vijay Laxmi

(2) Km. Uma

(3) Km. BabyAccused-Respondents

Hon'ble Yatindra Singh, J

Hon'ble Surendra Singh, J

Government Appeal No. 2314 of 2009 is dismissed.

For order see our order on separate sheet of papers placed in the record of CCA
No. 8077 of 2008.

Date: 17.8.2010

SKS

Crl. Revision No. 3005 of 2010

RakeshRevisionist

Vs

State of UP.....Respondents

Hon'ble Yatindra Singh, J

Hon'ble Surendra Singh, J

Criminal Revision No.3005 of 2010 is dismissed.

For order see our order on separate sheet of papers placed in the record of CCA
No. 8077 of 2008.

Date: 17.8.2010

SKS