



**Reserved**  
**AFR**

**Criminal Appeal No.1661 of 1982**

**Swami Nath Rai ..... Appellant**

**Versus**

**State of U.P.....Respondent**

***Connected with***

**Criminal Appeal No.1663 of 1982**

**Sachindra Rai.....Appellant.**

**Versus**

**State of U.P. ....Respondent.**

**Hon'ble Vinod Prasad, J.**

**Hon'ble Pankaj Naqvi, J.**

**(Delivered by Hon'ble Vinod Prasad J.)**

These two connected appeals emanates from the impugned judgment and order dated 26.6.1982 passed by I<sup>st</sup> Additional Sessions Judge, Ballia in S.T. No.196 of 1981, State Vs. Sachindra and others, relating to Police Station Garwar, district Ballia, by which, learned trial Judge while acquitting third accused Smt. Urmila Devi wife of Swami Nath Rai, has held appellant Swami Nath Rai (A-1) and Sachindra Nath Rai (A-2) guilty under section 302/34 IPC and therefore has convicted them of the aforesaid offence and has sentenced them to life imprisonment therefor.

Recapitulated briefly, prosecution allegations, as was stated in

the written F.I.R., Exhibit Ka-2, by the informant Harvansh Rai P.W.1, narrated during the investigation and testified during the session's trial by the three fact witnesses Harvansh Rai P.W.1, Shyam Sunder Rai P.W.3 and Veer Bahadur P.W.4 are that, one Rameshwar Rai was the resident of village Amdaria, P.S. Garwar, district Ballia. He had three sons Shiv Nath Rai, Vishwanath Rai and Swami Nath Rai (A-1). Urmila Devi (acquitted accused) is the wife of(A-1). Informant Harivansh Rai, P.W.1 and Harishanker Rai(deceased) were real sibling brothers being sons of Shivnath Rai. Shyam Sunder Rai P.W.3 is the son of Vishwanath Rai. Thus it is evident that two of the accused, deceased, informant and witness P.W.3 were related with each other as uncle and nephew. Informant had an agricultural field one furlong away from his abode. Four or five years prior to the present incident, all the collaterals lived together with undivided properties but thereafter, a family partition took place and they were separated. Informant was employed in Gadwar block but he often used to visit his village.

On the incident date 29.10.1981 at 7 a.m. Hari Shanker Rai (deceased) went to his agricultural field at Chak No.11, of which informant P.W.1 and appellant (A-1) were joint holders where he spotted that paddy crop of (A-1) was being irrigated by (A-2) and acquitted accused Smt. Urmila Devi from the tube-well of (A-1) through an aqueduct, which ran north - south and then towards west. Deceased inhibited (A-2) not to irrigate his field from the aqueduct which, according to the informant's case, was his private drain. Informant at that time was planting potato seeds in his field. Deceased thereafter approached the informant and informed him about the irrigation done by the accused appellants and also told him

that, since he (deceased) had to irrigate his agricultural field, therefore, he is going to stop paddy crop irrigation by (A-2). After the deceased proscribed (A-2) from irrigating his paddy field, (A-1) and Smt. Urmila Devi retaliated by replying that (A-2) will irrigate his field and deceased may do whatever he could. On this, the deceased barged the aqueduct and stopped irrigation of (A-2) crops. On this (A-1) instigated (A-2) to bring his gun and shoot down the deceased and he will meet the expenses of the consequences which may ensue thereafter. Abiding the call (A-2) rushed back to his house at a distance of one and a half furlong to reappear at the spot after ten or fifteen minutes. Meanwhile informant continued to sow potato seeds and the injured/deceased started mudding the water drain. Ten or fifteen minutes after above verbal tirade, (A-2) armed with D.B.B.L. gun of his uncle Arunandra Nath Rai @ Tunnu Rai, appeared at the incident spot. Informant left sowing of his potato seeds ran towards his brother but when he was twenty five or twenty paces away from him (A-2) shot at the deceased causing him gunshot injuries on the left hand and left side chest as a result of which injured/deceased squatted on the ground. Informant had also spotted Shiv Muni Rai proceeding towards north from a *mahua* tree, which was 8 or 10 paces away from the incident spot. Firing at the injured/deceased Hari Shanker, (A-2) sprinted away towards north. Shyam Sunder Rai P.W.3, Veer Bahadur Rai P.W.4, Sangram Rai and the informant P.W.1 had witnessed the entire episode. Injured had fainted sustaining gunshot injuries, from which blood had trickled down on the ground. Injured was transported to his house and a person was sent to fetch a taxi to Ratsar. In 10 or 15 minutes, the person brought the taxi, in which injured was carried to Ratsar

Hospital in an unconscious state.

At P.H.C., Ratsar, injured was examined by Dr. S.D. Srivastava, Medical Officer. In the emergency register of the P.H.C., it was jotted down at the serial no. 176 that Hari Shanker Rai was brought to the P.H.C. at 8.10 A.M. with sustained gunshot injuries. Such an entry so scribed by the Medical Officer has been proved by pharmacist Chandra Bhushan Singh, P.H.C., Ratsar, District Ballia P.W. 9 as Ext. ka -16. The pharmacist had injected the injured with *Curamin* injection and had dispatched him to the District Hospital, Ballia. From Ratsar Hospital, injured was brought to police station Garwar.

Outside the police station, informant P.W. 1 penned down his FIR Ext. Ka-2 and handed it over to the Head Moharir Aijaz Mohammad who had registered the crime pursuant to Ext. Ka-2, as Crime No. 176/81, u/s 307 IPC and had prepared chik FIR Ext. Ka-22 and crime registration GD, Ext. Ka-23 vide Rapat No. 14. Same Head Moharrir had also prepared conversion GD, converting crime from section 307 to 302 I.P.C., after demise of the deceased vide Rapat No.30 on 30.10.1981 at 7.40 P.M. which is Ext. Ka-24.

Investigation into the crime was commenced by the I.O. P.W. 5, who first of all copied the FIR and the GD and thereafter recorded 161 Cr.P.C. statement of the injured while injured(deceased) was still inside the taxi. This statement by virtue of death of the injured(deceased) now is his dying declaration.

From the same transport, injured was brought to the District Hospital, Ballia, where he was admitted in the emergency ward and his injuries were examined and his medical examination report, Ext. Ka-3 was prepared by Dr. Kailash Singh, M.O., Sadar Hospital, Ballia, PW5 at 10.30 a.m. Injured had sustained following injuries as was

depicted in his injury report Ext Ka-3:-

**Injuries:-**

*"(1) Gunshot wound of 5cm x 2cm x full arm deep on left upper arm lateral side 11cm below tip of left shoulder margins inverted with fresh blood coming through it. Advised X-ray. Wound of entry.*

*(2) Gunshot wound of exit of 12cm x 10cm x communicating with injury no. 1 muscle bone pieces coming out of wound. Advised X-ray. Fresh blood oozing out through it.*

*(3) Gunshot wound in area of 8cm x 8cm x depth not probed on left side front of chest lateral to left nipple. Advised X-ray. Fresh blood oozing through it.*

***Injury. Nos. (1), (2), (3) are kept under observation. Advised X-ray are fresh injury produced by fire arm weapon."***

According to the doctor, PW5, above injuries could have been sustained by the injured at the date and time of the incident and were possible by a single shot.

Since the condition of the injured was precarious, doctor PW5 had sent a memo, Ext.Ka-5, to S.D.M. Ballia for recording his dying declaration and as a follow-up action deceased dying declaration, Ext. Ka-15, was recorded at 11 a.m. same day by Sri M.L. Dwivedi, S.D.M., Ballia P.W.7, in the presence of Dr. Kailash Singh P.W.5, who had appended certificate and had put his signature Ext. Ka-6, on the said dying declaration. The certificate reads "*certified that D.D. recorded at 11 A.M., 29.10.81 patient is fully conscious during giving D/D.*" At the time of recording of the dying declaration, all the relatives of the deceased were sent out of the ward and the dying declaration was recorded in the same dialect in which it was spoken by the deceased. At the time of recording of dying declaration, deceased was fully conscious, as is apparent from the doctor's

certificate.

Deceased, however, could not win over the battle for his life and expired at 1-2 P.M., the same day and consequently Dr. Kailash Singh, P.W. 5 had informed police station Kotwali regarding demise of the deceased vide communication memo, Ext. Ka-4, which was scribed by a compounder. Resultantly registered crime, vide crime no. 176 of 1981, was altered from section 307 I.P.C. to section 302 I.P.C. on 29.10.1981. On the basis of said death memo, S.I. Bhanu Pratap Singh P.W. 6 along with inquest papers left the police station vide GD No. 30 at 3.05 P.M. which GD was penned down by constable moharir A.N. Tiwari. PW6 came to the hospital, where he conducted inquest on the cadaver of the deceased, after appointing inquest witnesses, and prepared inquest memo Ext. Ka-7. Other relevant papers viz: copy of sketch of body Ext. Ka-8, Police Form No. 13 Ext. Ka-9, report for conducting post mortem examination Ext. Ka-10, report regarding recovery of pellets Ext. Ka-11, report regarding seizing the attires of the deceased Ext. Ka-12 and seal impression Ext. Ka-13 were also prepared by P.W.6, who has proved these documents during the Sessions Trial.

Autopsy on the corpse of the deceased was conducted by doctor Abdul Halim, radiologist, PW2, on 30.10.1981 at 10.30 a.m. The dead body was brought to the doctor by CP 486 Maqsood Alam and CP 635 Sudershan Yadav P.W. 8, who had identified deceased's cadaver. According to autopsy doctor twenty four hours had lapsed since deceased's demise. He had an average built body and rigor mortis was present over all his four extremities and his both eyes were closed. Following external physical injuries, sustained by the deceased, were noted by the doctor in deceased's post mortem

examination report, Ext. ka-1:-

**"ANTE MORTEM INJURIES**

*(1) Gunshot wound of Entry 5 cm x 2 cm x whole breadth left arm upper part back and lateral side 11 cm below Left shoulder. Margins irregular inverted through and through wound of exit of Blood vessels of Deep .... (P.T.) side (inner) .... (P.T.) Bone.*

*(2) Gunshot wound of exit 12 cm x 10 cm x through and through wounds of entrance No. (1) Large irregular wound and greatly Lacerated and ...(P.T) of Deeper tissues, greater damage of tissues around, margins and averted without blackening and singing. The wound is 5 cm above elbow joints on inner side about mid part of muscles and Deep structure ragged and ruptured with small chips of Bones.*

*(3) Gunshot wound of Re-entry an area of 8 cm x 8 cm on Left side front and lateral of chest ..... below Left side nipple (L) multiple wound of sized ½ cm x ... (P.T.) going through and through chest wall into Lung (L) pellets 11, (Eleven) recovered from Lungs tissue (L) from different depth, chest wall Lungs effected areas ecchymosed.*

Doctor had further found that chest cavity contained clotted fluid Blood about 14 oz in Left side and Left parietal bone of the deceased and pleura were pierced and fractured. His stomach and small intestine were empty and large intestine had faecal matter. In the estimation of the doctor, deceased had expired due to gun- shot wounds, which had caused haemorrhage & shock and his death might have occurred at or about the incident date and time. PW5, doctor had further detected and removed pellets embedded inside the cadaver of the deceased, which were sent to the S.S.P.

Reverting to the ensued investigation into the crime, which was commenced by S.O. Surya Bali Singh, P.S. Garwar district Ballia, in whose presence the crime was registered, I.O. after recording injured statement at the police station came to the incident spot, where, at the pointing out of P.W.3, conducted spot inspection and prepared site plan map Ext. Ka-17. Blood stained and plain earth as well as the pellets found at the incident scene were recovered by him and recovery memos Exts. Ka-18 and 19 were sketched. Blood stained and plain earth are material Exts.1 & 2. Accused Smt. Urmila Devi, since acquitted, then was questioned by the I.O., who thereafter, recorded the statements of the informant and witnesses Sangram Rai and Veer Bahadur Rai. On 7.11.81, I.O. recorded the statement of(A-1) and subsequent thereto on 20.11.81 recorded the statement of(A-2). Concluding investigation, he had charge sheeted the accused on 26.11.1981 vide Ext. Ka-20.

As an investigatory step, I.O., after obtaining an order from the Magistrate on 20.4.1981 had sent blood stained apparels of the deceased and blood stained earth to Forensic Science Laboratory for testing vide Ext. Ka-21. These attires and the soil have been proved as material Exts. 3 to 5. Forensic Science Laboratory reports, Exts. Ka-25 and Ka-26, dated 22.12.81 indicates that the attires of the deceased contained human blood.

Charge sheeting of the accused vide Ext. Ka-20 resulted in registration of Criminal Case No. 906 of 1981, State Vs. Sachindra Rai and others in the Court of I<sup>st</sup> Additional Munsif, Ballia on 4.10.1981. Finding the offence triable by the Court of Session's, committal court of I<sup>st</sup> Additional Munsif Magistrate, committed the case to the Session's Court for trial, where it was received on

23.12.1981 and was registered as S.T. No. 196 of 1981, State Vs. Sachindra Rai and two others.

Learned trial Judge/ 1<sup>st</sup> Additional Sessions Judge, Ballia, after perusing the case diary and after hearing the submissions of the prosecution and the accused, vide order dated 2.2.82, charged all the accused with offence under section 302/34 IPC, which charge was read out and explained to the accused who denied the same and claimed to be tried and consequently, to establish their guilt, session's trial procedure was resorted too by the learned trial court.

Prosecution in it's efforts to establish accused's guilt relied upon oral testimonies of ten witnesses, out of whom informant Harvans Rai P.W. 1, eye witness Shyam Sunder Rai P.W. 3 and Veer Bahadur P.W. 4 were the fact witnesses. Dr. Abdul Halim, post mortem Doctor P.W. 2, Dr. Kailash Singh, who had examined the injured deceased in district hospital P.W.5, S.I. Bhanu Pratap Singh, who had conducted inquest on the cadaver of the deceased P.W. 6, M.L. Dwivedi, SDM, Ballia, who had recorded the dying declaration P.W. 7, C.P. Sudershan Yadav, who had carried the dead body for autopsy purposes P.W.8., pharmacist Chandra Bhushan Singh, who had proved notings in the emergency register of PHC Ratsar, Ballia P.W.9 and I.O. Surya Bali Singh, S.O. Police station Ratsar P.W. 10 were the formal witnesses.

Besides, oral testimonies of aforesaid witnesses, prosecution relied upon various documentary evidences in the form of various exhibits and some material exhibits, which has already been mentioned herein above, while describing background facts, prosecution version and investigatory steps, and hence are being eschewed from being re-produced.

Incriminating circumstances appearing against the accused in the prosecution evidences were put to them u/s 313 Cr.P.C. wherein, all the accused admitted the relationships, as were divulged by the fact witnesses, but denied rest of the circumstances. They further denied the water channel drain to be a private aqueduct and took the defence of false implication because of enmity. P.W.2 narrated the specific defence that the deceased was murdered in the night and after due consultation, and deliberation, prosecution had concocted a feigned story and had nailed them. Rest of the accused(A-1) and his wife, however, did not plead any specific defence.

Learned trial Judge after analysing the prosecution evidences, both oral and documentary, summing the facts and circumstances concluded that guilt of Smt. Urmila Devi wife of(A-1) has not been established and therefore, she is entitled for acquittal and consequently acquitted her of all the charges. It further disbelieved evidence of fact witness Veer Bahadur P.W.4 and in his respect recorded a finding, *"I am also of the opinion that this witness must not being present at the time of the occurrence. He appears to be a got up one."* In spite of disbelieving PW4 and recording above finding, learned trial Judge found that prosecution has anointed appellants' guilt clear of all doubts to the hilt for charges under section 302/34 IPC and therefore, convicted and sentenced them, as already noted above, vide impugned judgment and order and resultantly, challenged has been made to the aforesaid conviction and sentence in this appeal by the two appellants.

When the appeal was called out for hearing, nobody appeared for appellant (A-1). Way back in 2007 warrant were issued against

him but no report in his respect has been received. The appeal cannot be kept pending on the dockets of this Court and therefore, we appointed Sri Raghuraj Kishore Mishra as *amicus curiae* on his behalf. We have heard Sri Raghuraj Kishore Mishra learned *amicus curiae* for(A-1), Sri Brijesh Sahai, learned advocate for (A-2) and Sri Sangam Lal Kesherwani, learned AGA for the prosecutor State and have perused the entire trial court's record including oral and documentary evidences and the impugned judgment.

Snipping the conviction and sentence of the appellants, it was canvassed by learned counsel for the appellants that the prosecution story is the outcome of fabrication after discovery of the dead body of the deceased in the morning. There was no reason for the appellants to involve themselves in a crime and the motive, as alleged by the prosecution to indulge into the crime, was trivial in nature. It was further submitted that the reason for false implication lied with the prosecution and cause for accused to involve themselves in the murder was totally absent. Because of business rivalry, the accused were framed in feigned story, submitted appellants' counsel. It was further submitted that water channel, which was blocked was at the junction of BC and AD, as depicted in the site plan map, which lied towards west and north of the tubewell of Swami Nath (A-1). Deceased and informant P.W.1 had not been shown having any field towards that direction and therefore, blocking of the water channel by the deceased is a cooked up story. It was harangued by Sri Sahai that in fact deceased was murdered in the wee hours of the morning when he had gone to attain the nature's call and, later on, the entire prosecution story was cooked up. It was further submitted that the Investigating Officer in the site

plan map has nowhere shown the places from where the witnesses and the informant had seen the incident, which unerringly is appoiner towards the fact that they were not present at the spot during the incident. No tube-well of P.W.3 has been shown in the site plan map, which also creates a dent in the prosecution story submitted learned counsel for the appellants. It was also submitted that no place and direction from where the injured deceased was fired upon has been shown in the site plan map, which reveals that the prosecution version is an afterthought and a mendacious version. It was next argued that there was no reason for(A-2) to fire upon the deceased, as he belonged to a different pedigree and therefore, he has been falsely implicated because he had left irrigating his field from the tube-well of PW1 and had started using the tube-well of (A-1), after paying him the charges for water irrigation. It was next argued that in any view of the matter proven crime, from the evidences on record, will not fall outside the purview of Section 304(II) I.P.C. and consequently recorded conviction under Section 302 IPC is unsustainable. Dying declaration recorded by the Magistrate is suspect and cannot be believed as, before recording the dying declaration, doctor's certificate regarding fit mental condition of the injured was not obtained and in this respect Magistrate had himself deposed that after he had recorded the dying declaration that he had obtained the certificate from the doctor, which was appended on the dying declaration. Primary on these submissions, it was urged that prosecution had failed to successfully bring home guilt of the accused and therefore appellant's appeal deserves to be allowed and they be acquitted of the charge. Another submission was in respect of non- sustainability of conviction u/s 302 I.P.C.

wherefor it was urged that proven crime against the appellant shall not fall outside purview of Section 304(II) I.P.C. and they could be convicted only for that crime and therefore their sentence also deserves to be diluted suitably especially considering the fact that the incident had occurred more than three decades ago when( A-2) was a young boy of 20 years of age. For( A-1), it was urged by *amicus curie* that he must have been dead and if not since, he should be above 90 years of age, as of now, therefore in the matter of his sentence, a sympathetic approach be adopted.

Learned AGA argued to the contrary submitted that it is a day light incident with consistent medical reports and an eye-witness account and therefore, there is no reason to absolved the appellants of their guilt. At the instigation of (A-1), (A-2) had shot the deceased causing him fatal injuries and therefore, the guilt of the appellants fall within the ambit of Section 302 IPC as,(A-2) after instigation had retreated to his house and had reappeared at the incident scene armed with a lethal weapon, which he had wielded to cause fatal injuries to the deceased. It was next argued that the surrounding circumstances and other proven facts establishes the prosecution story beyond all reasonable doubt and therefore, both the appeals lacks merit and deserves to be dismissed.

We have considered the rival submissions in the light of oral and documentary evidences and have collated and vetted them. From the critical analyses to unravel the truth, it is discernible that some vital aspects of the case, as was alleged by the prosecution, remained unchallenged by the defence. These facts include the date and place of the incident. The only challenge is to the time of the murder, which according to the defence suggestion was wee hours of

the morning, whereas prosecution alleged it to have occurred at 7 a.m. It was the month of October and hence there does not seem to be much of difference between both the versions and defence argument does not improbably prosecute the story. It is also admitted to the defence that the deceased was shot dead and therefore, use of gun or a firearm in the crime is also beyond doubt. Consequently the residue remains to be judged is circumscribed within a small area of analysis as to whether it were the appellants who had perpetrated the crime or somebody else had orchestrated it. To put it differently, it is to be adjudged as to whether the prosecution version of the deceased being shot dead by (A-2) at the instigation of (A-1) is a credible allegation or not?

On the above aspect, when oral and documentary evidences are tested on the anvil of probability and acceptability, it emerges that both the witnesses have told the prosecution story with consistency and clarity and they have not budged even slightly. They have not faltered in narration of facts about genesis and manner of happening of incident in its main substratum. It is their categorical depositions that the incident had occurred because of blocking of water flow to paddy crop of (A-2) through aqueduct by the deceased. At that moment informant was sowing his potato seeds. Initially all the three appellants were present at the tube-well of (A-1) from which (A-2) was irrigating his paddy field. Genesis of the incident was engineered by the deceased when he had forbade (A-2) to stop irrigating his paddy field and had blocked the water channel through which (A-2) was irrigating his crop. It is also established with sufficiently convincing evidences that gun fire shot was fired at the deceased by (A-2) at the instigation of (A-1). In spite of lengthy and searching

cross-examinations, defence has not been able to dislodge the aforesaid allegations by the fact witnesses. P.W.1 had even deposed that he had not endeavoured to save the deceased when (A-2) had arrived at the incident scene carrying DBBL gun, because he could not have imagined that he (A-2) will shot at the deceased on such a trivial dispute of irrigating the field. Role of (A-1) was also spelt out with sufficient clarity from the very beginning by prosecution witnesses. It is recollected that (A-1) was closely related with the deceased and the informant as he (A-1) being their real uncle and his wife Smt. Urmila Devi (acquitted accused) being their aunt. It is also clear from the pedigree that Shyam Sunder Rai P.W. 3 is the cousin brother of the deceased and the informant and real nephew of(A-1). These witnesses, thus could not have any motive to create a false story against the appellants, if they were not the actual perpetrators of the crime. It will be puerile and absurd to cogitate that the nephew will fabricate a concocted story against their own uncle regarding the murder of their real / cousin brother without any rhyme or reason. The defence suggestion that because of business dispute regarding income from irrigation, that the appellants were implicated, is such a facetious and unappealing submission that it does not require any detailed deliberation and deserves to be repelled outright and we do hereby reject it as such.

Interdicting prosecution case for another reason that the deceased had no field towards west of the tube-well of ( A-1) and, therefore, there was no reason for the deceased for blocking the aqueduct, we find said submission also bereft of any merit. Site plan map, on which a heavy reliance has been placed by appellants' counsel, itself shows the place at which the water channel was

blocked. It is just two paces away from where the deceased was fired upon. Thus, the presence of the deceased, blocking of aqueduct and place of incident are all an established facts. This incident had occurred in day light with eye witness account of close relatives and hence there is total absence of any viable reason not to lend credence to such a version on such unconvincing argument. There was no ostensible reason for the fact witnesses, in absence of any ulterior motive and previous animosity to state a fabricated version before the Court. From the cross examination of the witnesses, defence has not been able to bring on record any material or evidences to indicate that, but for appellants, anybody else could have committed the crime. It also transpires that on the incident day (A-2) was irrigating his paddy field for the first time from the tube-well of (A-1) and, therefore, there could not have been any reason to harbour feeling of business rivalry regarding payment of irrigation money. Contention of appellants' counsel, therefore, is unappealing and is rejected for the above mentioned reasons.

Prosecution story is credibly supported by the two dying declarations. First one is in the form of 161 Cr.P.C. statement of the injured, subsequently deceased, which, from the perusal of the case diary, was recorded at 9.15 a.m. The aforesaid statement under section 161 Cr.P.C., by virtue of death of the deceased, is now his dying declaration covered under section 32 of the Evidence Act. Perusal of it indicates that the deceased had narrated that at 7a.m., he had gone to his field where he spotted that from his drain,(A-2) was irrigating his paddy field from the tube-well of (A-1) and other two accused (A-1) and his wife Smt. Urmila Devi were present there. Injured/ deceased inhibited (A-2) not to irrigate his field from

aqueduct because he had to irrigate his field, on which (A-1) & Smt. Urmila Devi replied that (A-2) will irrigate his field from the same duct. Injured/deceased had further stated that thereafter (A-1) gave an instigation call to bring the gun from the house and murder the injured on which (A-2) had brought a DBBL gun from his house and fired upon him which had caused him gunshot injuries on his left hand and left side chest and thereafter (A-2) had escaped from the spot. This 161 Cr.P.C. statement/dying declaration was corroborated by the other dying declaration recorded and proved by SDM, P.W. 7, wherein injured/deceased had conspicuously stated that he was fired upon by (A-2) at the instigation of (A-1). This dying declaration was recorded in the local dialect by the SDM as was dictated to him by the injured/ deceased. Though there is some discrepancy regarding the fact as to whether (A-2) had brought the gun from his house or whether he was only given a cartridge at the spot and he was already carrying a gun with him, but the main substratum of the incident regarding firing at the injured/ deceased by (A-2) at the instigation of (A-1) remains unaltered, which corroborates earlier 161 statement/ dying declaration and the prosecution version. We do not find any reason to disbelieve the said dying declarations and, therefore, are of the view that so far as participation of (A-1) & (A-2) in the incident is concerned it is well anointed without any ambiguity and doubt and consequently of the view that the conviction of both the appellants is well merited and cannot be set aside.

Now adverting towards the second limb of the argument as to what offence has been committed by the appellants, we are of the considered opinion that from the proven facts and surrounding circumstances, appellants cannot be said to have carried with them

an intention to commit murder of the deceased and hence no offence punishable under section 302 I.P.C. is disclosed against them. Our reasons for drawing such an opinion are firstly, that there was no enmity in between the deceased and the appellants since prior to the incident and hence there was absence of any previous motive to indulge into the crime. Secondly, that the incident had occurred all of sudden without any premeditation and according to the prosecution case itself (A-2) was empty handed when the deceased picked up the quarrel. Thirdly, that the occurrence was engineered by the deceased and it seems that he was hot headed. He firstly came to his field and saw that (A-2) was irrigating his field from the tube well of (A-1), which was going on since more than one hour. He did not act immediately and went to P.W. 1 to inform him about that and also informed him that he was going to block the irrigation activity by (A-2). This certainly was an act which must have rankled the appellants especially (A-2). It was a voluntary act of the deceased without any provocation from the two appellants. Fourthly, that deceased not only forbade (A-2) to stop irrigation but he erected mud obstruction to stop irrigation of (A-2) paddy crop, which requires lots of watering otherwise it will get destroyed. This self-created mischief by the deceased, considering the loss, which (A-2) would have suffered from destroying of his paddy crops, had enough potentiality to infuse grave and sudden provocation to (A-2), who was in his youth aged about 20 years of age and having agriculture as his only source of livelihood. Fifthly, mischief had not ended when (A-2) had brought the gun, but it continued even when firing was made as erected mud obstruction was not removed by then, by the deceased, and hence mischief by the deceased was a continuing act

of grave and sudden provocation, as the fear of drying up of paddy seedlings never ended. Sixthly, that retreating back to his house and returned to the incident scene after fifteen or twenty minutes, on the facts and circumstances of the appeal, is no reason to aggravate the crime committed by the appellants as provocation and mischief was still continuing and it had not dissipated. At no point of time (A-2) was relieved of his anguish of destroying of his crops because of the mischief done by the deceased. Seventhly, only a single shot was fired without any repetition. Eighthly,(A-1) and another acquitted accused( his wife) remained bare handed throughout entire episode and hence it cannot be said to have carried an intention to commit murder. Ninthly, that there was no preconcert of minds to commit murder since prior to the occurrence and, at the spur of the moment also, it never developed and there is lack of evidence of *census-iridum* for committing murder of the deceased. A single shot in the wake of extreme anguish of destroying of his crops by an agriculturist youth is not necessarily indicative of possessing an intention to commit murder.

Our above opinions are based on the evidences that the prosecution witnesses had deposed that from both the tube-wells, belonging to P.W.3 as well as (A-1),farmers used to irrigate their crops using the same water channel since quite a long time. (A-2), therefore, was not doing something new on the incident date. He was following the routine course of irrigating his field from the same aqueduct. It has also been deposed by the witnesses that the irrigation charges for irrigating the crops from both the tube-wells were the same. It is also proved, through the prosecution evidences, that (A-2) was irrigating his field since wee hours of the morning and

the incident had occurred after he had already irrigated his field for more than two hours. Deceased was not present at the spot when (A-2) had started irrigating his field. He subsequently came to the spot and just to create mischief and to show criminal force that he proscribed (A-2) to stop irrigating his crops as he wanted to irrigate his own agricultural land. Injured deceased did not stop there, he even blocked the flow of irrigating water channel towards the field of (A-2). At the time of the incident, (A-2) was less than 20 years of age and was in a prime youth. There was enough reason for (A-2) to go into a rage of anger. (A-2) seems to be a poor farmer agriculturist whereas (A-1) seems to be a moneyed person as his instigation call was that he will spend money if the deceased is shot at. The circumstances, which have been stated by the fact witnesses projects that before the fire was made there must have been verbal onslaught between both the factions. For a youth to control his fit of anger in such a situation must have been very difficult. There is nothing on record to indicate that (A-2) had other members in the family. What can be said without ambiguity and with certainty that (A-2) acted in hot haste only to teach a lesson to the deceased with whom he had no animosity at all prior to the incident. A single shot, in the facts and circumstances of the case, to us, does not seem to imbibe an intention to commit murder and therefore, we are of the opinion of the guilt of the appellant will not travel beyond 304 Part (II) I.P.C., for which crime alone appellants could be held guilty. At the beginning of the incident, according to the prosecution case itself, both the appellants, were bare handed and this also indicates that he had no intention to commit murder.

There are few other circumstances for our aforesaid conclusions

to palliate the crime and those are that prosecution story regarding actual incident, prior to firing of gunshot and what really happened remains in a realm of uncertainty and are contradictory. According to the FIR version, which was reiterated during the trial by the informant, that (A-2) went back to his house and returned at the incident scene armed with a gun. This is what was stated by the deceased also to the I.O., under his interrogatory statement u/s 161 Cr.P.C. but when, the SDM P.W. 7 recorded his dying declaration, the deceased narrated altogether the different story. According to the dying declaration, Ext. Ka-15, (A-2) was already carrying a D.B.B.L. gun along with him from the beginning of the incident which belonged to Sachindra @ Gyani and it was Shiv Muni Rai son of Jung Bahadur, who had given (A-2) a cartridge only, which he had filled in the barrel and had fired. Shiv Muni Rai was neither made an accused nor was prosecuted. Why this inconsistency and incongruities had occurred in the prosecution version is not known to us. Thus, happening before the firing lies in a state of uncertainty and we do not know what actually transpired.

Lastly, turning towards the quantum of sentence, we find that the incident had occurred on 29.10.1981 more than three decades ago at the spur of the moment by the mischief generated by the deceased himself. At that time (A-1) was 65 years of age whereas (A-2) was 20 years of age. As of now (A-1) must be 95 years of age and (A-2) must be 51 years of age. (A-2) must have settled in life. In such a view, the period undergone between the incident and today as well as keeping their ages and totality of circumstances, and also considering that both the appellants had no criminal background or criminal proclivities to their credit, we are of the opinion that a fine

of Rs.40,000/- on (A-1) and 5 years R.I. with fine of Rs.40,000/- and, in case of default, to undergo one year R.I. to (A-2) u/s 304( II) I.P.C. with a compensation of Rs. 40000/= to the deceased family out of fine to assuage their feelings and sentiments will meet the ends of justice.

In the net result appeal is allowed in part. Conviction of the appellants under section 302/34 IPC and imposed sentences of life imprisonment therefor are scored out and instead both the appellants Swami Nath Rai (A-1) and Sachindra Nath Rai (A-2) are convicted under section 304( II) I.P.C. and for the said crime, appellant Swami Nath Rai(A-1) is imposed with a sentence of fine of Rs. 40,000/-. In case of default in payment of said fine (A-1) shall serve 1 year R.I. as default sentence. Sachindra Nath Rai (A-2), for the aforesaid offence u/s 304 (II) I.P.C., is sentenced to 5 years R.I. with fine of Rs. 40,000/-. In default of payment of fine, he shall undergo 2 years further R.I. as default sentence.

In case the fine is deposited by both or any of the appellants, Rs.40,000/- out of it, shall be awarded as compensation to the deceased family by the learned trial Court, after noticing them. Both the appellants are allowed a month's time to deposit the fine imposed herein above.

Swami Nath Rai (A-1) is on bail. He need not surrender for the aforesaid period of 1 month. If he fails to deposit the fine within the permitted period, learned trial Judge will take him into custody and will send him to jail to serve out the default sentence. It is further directed that in case appellant Swami Nath Rai (A-1) is found to have been expired, the above sentence imposed upon him shall not be executed against him, and this appeal in his respect shall be

deemed to have been abated.

Sachindra Nath Rai (A-2) is also on bail. His bail bond and surety bonds are cancelled and he is directed to be taken into custody and send to jail forthwith to serve out his sentence imposed herein above.

Let the copy of this judgment be certified to learned trial Court for it's intimation and further action.

Dt.14.09.2012

Rk/Arvind/Tamang

**Hon'ble Vinod Prasad, J.**

Hon'ble Pankaj Naqvi, J.

Sri Raghuraj Kishore Mishra, learned *Amicus Curiae* has rendered valuable assistance in deciding the appeal, which was pending since last three decades and, therefore, he is directed to be paid Rs. 8,000/- as his fees by the office of this Court.

**Dt.14.09.2012**

**Rk/Arvind/Tamang**