

(2002) 08 AHC CK 0001

Allahabad High Court

Case No: Criminal Appeal No"s. 1992 and 2130 of 2000

Ramji Tiwari

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Aug. 26, 2002

Acts Referred:

- Arms Act, 1959 - Section 25, 27
- Criminal Procedure Code, 1973 (CrPC) - Section 235(2)
- Penal Code, 1860 (IPC) - Section 109, 147, 148, 149, 302

Citation: (2002) 3 ACR 2680

Hon'ble Judges: J.C. Gupta, J; Imtiyaz Murtaza, J

Bench: Division Bench

Advocate: P.N. Misra and Apul Misra, for the Appellant; A.G.A., for the Respondent

Final Decision: Dismissed

Judgement

Imtiyaz Murtaza, J.

Both these appeals arise out of the judgment and order dated 8.8.2000 passed by Sri Madan Lal, Ist Additional Sessions Judge, Siddarth Nagar, whereby the Appellants Virendra Prasad Tiwari, Smt. Godawri, Smt. Laxmi Devi and Chandreshwar Tiwari have been convicted u/s 302 read with Section 109, Indian Penal Code and sentenced to undergo imprisonment for life and Appellant Ramji Tiwari has been convicted u/s 302, Indian Penal Code and sentenced to death.

2. The above appeals are decided by this common judgment.

3. The brief facts of the case are that on 31.10.1997, the Appellants were removing puwal from the land in front of the house of Nazir Jogi, who was neighbour of the complainant Chandrawati Devi. It is alleged that they were taking forcible possession over the land. Nazir objected to it, then accused persons had started abusing him and bent upon assaulting him. It is alleged that when complainant's

husband Bindeshwari S/o Raj Kumar came to intervene, Appellant Smt. Godawri brought D.B.B.L gun and cartridge and gave them to Ramji Tiwari and exhorted him to kill all of them to finish the dispute for ever. Ramji firstly fired at Nazir and then at Smt. Kunna. After the firing, other accused, namely, Virendra Tiwari, Chandreshwar Tiwari and Laxmi exhorted Ramji Tiwari that Bindeshwari was also coming from the lane and he should not be spared. On this Ramji Tiwari fired at Noor Jehan who was standing in front of her hut and also fired at Bindeshwari and his son Raj Kumar. Nazir and Bindeshwari the husband of the complainant died on the spot. Raj Kumar, Smt. Kunna and Noor Jehan were seriously injured. The occurrence was witnessed by Nawwa, Narad, Laxmi and others. The report was lodged by P.W. 1 Chandrawati on 31.10.1997 at 10.40 a.m., which is Ext. Ka-1, chik report is Ext. Ka-6. The deceased and injured were taken to Primary Health Centre, Etwa. Raj Kumar also succumbed to his injuries on way to Primary Health Center. Noor Jehan and Raj Kumar were sent to district hospital Basti for treatment. Noor Jehan had succumbed to her injuries on 31.7.1997 at 3.30 p.m. Kunna had also received injuries, but she was not examined.

4. The post-mortem examinations of the deceased were conducted by P.W. 5, G. M. Shukla and he had found ante-mortem injuries on the dead bodies of Raj Kumar, Nazir and Bindeshwari.

5. The post-mortem of Nazir was conducted on 1.11.1997 at 2.40 p.m. and following ante-mortem injuries were found:

Wound of entry 13.0 cm. below the right nipple 3.0 cm. \times 1.0 cm. Singeing present and margins of wound of entry are inverted. Tattoo marks present on the right side of body small rounded and multiple inverted from right shoulder to right upper thigh.

6. The post-mortem of Bindeshwari was conducted on 1.11.1997 at 4.30 p.m.

Wound of entry: A semi lunar lacerated punctured wound 7.0 cm. \times 4.0 cm. on the left side of chest 8.0 cm. below the left clavicle, margins of wound is inverted. Syncing present, skin, muscle and III vertebra portion lost below the wound. No wound of exit present.

7. The post-mortem of Noor Jehan was conducted by Dr. A. R. Khan on 1.11.1997 at 5.10 p.m. and he found the following ante-mortem injuries:

(1) Gun shot wound causing multiple small entrance wounds over inner side of right thigh in an area of 22 cm. \times 20 cm., starting from 12 cm. Below ASIS and upto Knee. Blackening present around all wounds. Femur fractured in distal 1/3. Smallest wound is of 2 mm. \times 8 cm. deep. Largest wound is of 3 mm. \times bone deep. No exit wound found.

(2) Gun shot causing multiple pellet entrance wounds on inner aspect and front of left thigh starting from 11 cm. below ASIS and going upto knee blackening present around all wounds. Smallest is of 2 mm. \times skin deep. Largest is of 3 mm. \times bone

deep.

8. After the registration of the case, the investigation was conducted by P.W. 7. He recorded the statement of P.W. 1 Chandrawati at the police station and he reached at the place of occurrence where he was informed that all the injured were taken to Primary Health Centre, Etwa by tractor-trolley. He had prepared the inquest of Raj Kumar, Ext. Ka-8, Inquest of Bindeshwari Ext. Ka-9, Inquest of Nazir, Ext. Ka-10, photo lash of Nazir Ext. Ka-11, letter No. 33 to police and copy of letter to C.M.O. Ext. Ka-12 and Challan lash Ext. Ka-13, photo lash of Raj Kumar Ext. Ka-14 and letter to C.M.O., Ext. Ka-16. Photo of Bindeshwari Ext. Ka-17 and Ext. Ka-18 and letter to C.M.O., Ext. Ka-19.

9. On 31.10.1997 the investigating officer reached the place of occurrence and arrested Appellants Godawri, Chandreshwar and Laxmi Devi and arrest memo Ext. Ka-23 was prepared. On the same day, he had recorded the statement of Narad Tiwari and P.W. 3 Nawwa. He had prepared site plan Ext. Ka-20, three live cartridges were recovered through memo, Ext. Ka-21. Samples of simple and blood stained earth were also taken through memo Ext. Ka-22. He also recorded the statement of Azim Ullah and Mange. On 1.11.1997 he received information that Virendra Prasad Tiwari was detained at police station Etwa and his statement was recorded. He also arrested Ramji Tiwari. He had also received information that the gun which was used in the crime was recovered by the police of police station Etwa. On 3.11.1997 he recorded the statements of Laxmi Tiwari and Sita Ram Tiwari on 9.11.1997 he recorded the statement of writer of First Information Report Ram Bahadur Singh and witness Salim. On 17.11.1997 the investigating officer was transferred and further investigation was conducted by P.W. 9, Harish Chandra Rai. On 24.11.1997 he prepared the inquest report of Noor Jehan, Ex. Ka-24, photo lash, Ext. Ka-25, Form No. 33, Ext. Ka-26 and letters to C.M.O. Exts. Ka-27 and 28. He also recorded the statements of Zamir Ullah, Hasrat Ali, Dr. Sankata Prasad Tiwari, Vakil, Muzaffar Ali and Sallan. On 25.11.1997 he recorded the statement of P.W. 8, Rama Shankar Yadav and also recorded the statement of injured Kunna and filed charge-sheet against the accused, Ext. Ka-32. On 1.12.1997 statement of constable Raghu Nath Prasad was recorded and all the sealed articles were sent for chemical examination. On 25.1.1998 statement of Dr. S. K. Maharaj was recorded and chemical examination report Exts. Ka-34, 35, 36 and 37 were received.

10. On submission of charge-sheet, case was committed to the Court of Session and Sessions Judge framed charges under Sections 147, 148, 302 and 307 against Ramji Tiwari and Appellants Virendra Tiwari, Chandreshwar Tiwari, Godawri and Laxmi Devi were charged under Sections 147, 302, 149 and 307, Indian Penal Code

11. The prosecution examined ten prosecution witnesses in order to prove its case. P.W. 1 Chandrawati, P.W. 2 Laxmi Tiwari, P.W. 3 Nawwa, P.W. 4 Kunna are eye-witnesses of the occurrence. P.W. 5 is Dr. G. M. Shukla and P.W. 6 Dr. A. R. Khan, who had conducted post-mortem examination of Noor Jehan, P.W. 7 Dina Nath

Yadav and P.W. 9 H. C. Rai are the first and second investigating officer, P.W. 8 Sub-Inspector Rama Shankar Yadav, P.W. 10 is Sub-Inspector N. K. Shukla, who had recovered the gun.

12. The defence had examined three witnesses.

13. D.W. 1 is Dr. Abhay Chandra Srivastava, D.W. 2 Dr. S. K. Maharaj and D.W. 3 Vishambhar Singh.

14. P.W. 1 Smt. Chandrawati has stated that on the southern side of her house is the house of Nazir Jogi, who had possession over Gram Sabha land and he had collected puwal on the said land. On the date of occurrence, Ramji, Chandreshwar, Virendra, Godawri started removing puwal from the land of Nazir Jogi. When Nazir stopped them, all the accused started abusing and assaulting him. After some time, her husband Bindeshwari and Raj Kumar came there. They scolded the accused and Nazir. In the meantime, Godawri went inside the house and brought the gun and Ramji Tiwari immediately took the gun and fired at Nazir. He had also fired at Smt. Kunna wife of Hasrat Ali. He had also fired at Noor Jehan, daughter of Hasrat Ali. She has further stated that when her husband reached near the window of Ramji, Ramji again fired. He has further stated that Godawri, Chandreshwar, Virendra and Laxmi wife of Ramji who was on first floor had exhorted. Her husband received injury on the left side of his chest. The fire had hit the son also on left side of his chest. Noor Jehan had died instantaneously and after about 15 minutes her son also died and after half an hour her husband also succumbed to his injuries. Noor Jehan had died at about 4 p.m. on the same evening. Kunna had also received injury and this occurrence was witnessed by Nawwa, Laxmi Tiwari, Sita Ram, Narad Tiwari and others. She has stated that at the time of occurrence she was on the roof of her house and from there she had witnessed the occurrence. She has further stated that the report was written by Ram Bahadur, Pradhan of village and she had affixed her thumb impression and the first information report is Ext. Ka-1 and she stated that after the registration of the report her statement was recorded.

15. In the cross-examination, she has stated that Nazir, Noor Jehan and Kunna belonged to one family and they were beggars. They had no agricultural land. The ancestors of her husband had settled Nazir, etc. on the said land. She has stated that between her house and the house of Ramji, there is a lane of about 4 hand width. She has stated that on the southern side of house of Ramji there is a tap, which is of Nazir Jogi. She has further stated that she had not seen any injury on Ramji and Virendra and they were not assaulted by any one at the time of occurrence. She has fully supported the F.I.R. version. She has stated that Ramji Tiwari had taken the gun from Godawri, 8-10 paces away on northern side of the tap of Nazir and after receiving the gun he had moved about two steps and fired at Nazir. He also fired at Kunna and 3rd fire was made at Noor Jehan and after that he fired at Raj Kumar and lastly he fired at her husband. She had no knowledge about the cross-case lodged by Virendra, brother of Ramji against Zameer Ullah, Nazir,

Hasrat Ali, Vakil, Bindeshwari, Raj Kumar and Ram Bahadur.

16. P.W. 2 is Laxmi Tiwari. He has stated that there was a Gram Sabha land on the southern side of Ramji's house which was in possession of Nazir, Hasrat Ali, Zameerul and Jogi and there was a long standing dispute between the parties. He further stated that on the date of occurrence, he was standing outside his house along with Narad and Sita Ram. He heard noise from the southern side of the house of Nazir. He went towards that site and saw that accused were removing puwal from the land which was in possession of Nazir and some altercation was going on between Nazir and accused. Godawri brought the gun from her house and handed over the same to Ramji and exhorted him. Ramji fired at Nazir and he fell down. Then he fired another shot which hit Kunna and then fired at Noor Jehan and again he fired at Raj Kumar. He also stated that he had heard that Bindeshwari had also received fire arm injury and had died. Raj Kumar, Nazir and Bindeshwari had died on the spot. Noor Jehan had died in the hospital. Besides him the occurrence was witnessed by Sita Ram, Narad and Nawwa. The accused persons ran away. The wife of Bindeshwari had got written the report by Ram Bahadur at his house. The investigating officer had collected evidence at his house after three days of the occurrence.

17. In the cross-examination, he has stated that he is pattidar of Bindeshwari. He plies Tata Mini bus in the partnership of witness Sita Ram. The father of accused Ramji was Kanchi. Kanchi had filed a case u/s 435, Indian Penal Code against his sons Radha Raman Jangi and Shiv Shankar. He has further stated that he had not heard the shot, but the first fire was made in his presence. He has stated that when he had reached the place of occurrence he had found Raj Kumar, Kunna, Noor Jehan and Nazir in injured condition. He has stated that Noor Jehan was lying at the place of occurrence where he was standing at a distance of about 10-15 paces. He has stated that when he reached at the place of occurrence Nawwa was already present and Narad and Sita Ram had reached along with him. He has further stated that he had not seen any weapon in the hand of any other accused except Ramji. He also stated that he had not called Ram Bahadur who had himself reached at the place of occurrence.

18. P.W. 3 is Nawwa. He has stated that the house of Hasrat and Nazir was on the southern side of village and on eastern side of his village there was a Gram Samaj land, which was in possession of Zameerul and Nazir. Prior to the occurrence several times altercation had taken place with regard to this piece of land. Nazir and Ramji both claim the land and litigation was also pending. He has stated that the accused were removing the puwal. He has stated that Godawri brought the gun and gave to Ramji and exhorted him to fire. Chandreshwar and Pappu had also exhorted Ramji. The shots firstly hit Nazir, then Noor Jehan and then Raj Kumar. He has stated that when Bindeshwari came he also received injury. Kunna had also received fire arm injury. Ramji ran away after firing the shots. Nazir and Raj Kumar dies

instantaneously. Besides him Narad and Laxmi had come at the place of occurrence. The mother of Raj Kumar was on the roof of her house and she had started crying. Chandrawati had lodged the report and injured were taken to hospital. The investigating officer had recorded his statement at the house of Laxmi.

19. In the cross-examination, he had stated that he is beggar. Nazir and Hasrat are also beggars. He has stated that the ancestors of Bindeshwari had settled his father in the village. He has stated that there is a road on southern side of Ramji's house and upto the road Ramji has possession on that land. He has fully supported the prosecution case.

20. P.W. 4 is Kunna. She has stated that she used to reside in the village in Churihari. After the incident, she went to village Nevuhava. She returned after about a month. She has stated that there is abadi land in southern side of her house which was in her possession and in the possession of Nazir. She has stated that Ramji, Pappu and Chandreshwar started to remove the puwal and Ramji stopped them. The mother of Ramji went inside the house and brought the gun and exhorted Ramji. He fired at Nazir after that he had fired her daughter Noor Jehan. Ramji had fired at Raj Kumar and he also fired at Bindeshwari and she also received the injury on her lips. Nazir and Raj Kumar had died on the spot. Her daughter Noor Jehan was sent to the district hospital Basti where she has succumbed to her injuries at 4.00 p.m. She has stated that due to medical examination of her daughter, she was not examined. She has stated that her statement was recorded by the investigating officer after about one month.

21. In the cross-examination, she has stated that she had not purchased the land on which they had kept puwal. She has stated that about one or two years back, a false report was lodged against them. She has denied that the land on which the puwal is kept belongs to Ramji. She has denied that no one on the side of accused was assaulted. She had not seen that any one of them had received the injury. Ramji and Pappu were not assaulted in her presence. She has stated that Ramji had not loaded the gun in her presence as the mother of Ramji had given him loaded gun. She has stated that he had fired at two persons then he had loaded the gun and again fired. She has stated that four shots were fired. She has stated that blood has come out from her injury and the investigating officer had not taken her blood stained clothes. She has stated that she had received pellet injury.

22. P.W 5 is Dr. G. M. Shukla who had conducted the post-mortem of Raj Kumar Tiwari, Bindeshwari and Nazir. The ante-mortem injuries are already mentioned in the earlier part of the judgment. The doctor has stated that the deceased had died on 31.10.1997 around 8.30 a.m. and the injuries of all the deceased were sufficient in the ordinary course of nature to cause death.

23. In the cross-examination, he has stated that the injuries of all the deceased can be caused from more than 4-5 feet.

24. P.W. 6 is Dr. A. R. Khan. He had conducted the post-mortem of Noor Jehan. The ante-mortem injuries are already mentioned in remaining part of the judgment. He has stated that the injuries are sufficient in the ordinary course of nature to cause the death and in the cross-examination he has stated that the injuries were caused within a distance 5 feet.

25. P.W. 7 is Deena Nath Yadav who had investigated the case, prepared the inquest report of the deceased. He has also proved the chik F.I.R. which was prepared by Moh. Jalal Ahmad Khan. He has also proved the G.D. No. 1518 dated 31.10.1997 at 10.40 a.m. which was in the hand writing of Jalal Ahmad Khan. Copy of the G.D. is Ext. Ka-7. He had recorded the statement of witnesses and completed the formalities. He had also recovered three empty cartridges from the place of occurrence prior to the recovery of gun, Ext. Ka-21.

26. In the cross-examination, he has stated that he had not received any information during the investigation that the report of cross case is registered at police station Etwa. He has stated that he has no knowledge that when he has done investigation in the cross case. He has stated that he could not tell the place of recovery of bloodstained earth.

27. P.W. 8 is Sub-Inspector Rama Shankar Yadav. He had prepared the inquest of Noor Jehan, which is Ext. Ka-24. He had prepared the photo lash, Ext. Ka-13, letter to C.M.O. and copy of investigation and other papers, Ext. Ka-25 to 29. He had prepared the seal Ext. Ka-30. He had received memo from district Hospital Basti that Noor Jehan had died on 31.10.1997 at 3.30 p.m. The letter of information about the death of Noor Jehan is Ext. Ka-33.

28. P.W. 9 is Sub-Inspector Harish Chandra Rai. He has stated that from 22.11.1997 to 29.1.1998, he was Station House Officer of Police Station, Misraulia. He had started investigation of the case from 22.11.1997. On 24.11.1997 he had received post-mortem report of Noor Jehan. He had recorded the statement of Zameerul and Hasrat Ali. He has also recorded the statement of witnesses of Inquest. On 25.11.1997 he had recorded the statements of Sub-Inspector R. S. Yadav and statement of constable Deo Mani Pathak and Head Constable Sukhram Verma and thereafter on 30.11.1997 he had recorded the statement of Smt. Kunna. The statement of Constable Raghu Nath Prasad Yadav was recorded on 1.12.1997. On 29.1.1998 he had recorded the statement of Dr. S. K. Maharaj. On 25.11.1997 he had submitted charge-sheet, Ext. Ka-32.

29. In the cross-examination, he has stated that Smt. Kunna had received pellet injury which has healed now. She had told him that after killing Nazir, Ramji had assaulted Raj Kumar. He has further stated that he had sent Kunna for medical examination, but the doctor had not found any injury. He has stated that during the investigation he had no knowledge about the cross case. He had not seen the report of the cross case. He had also filed a supplementary charge-sheet.

30. P.W. 10 is Narendra Kumar Shukla, Station House Officer. He has stated that on 31.10.1997 he was posted as S.H.O. at P.S. Etwa. After receiving information on R.T. set about the murders he had searched the accused and arrested Pappu alias Virendra Tiwari. On the information of Pappu alias Virendra Tiwari he had recovered the gun from the house of Kishori Jaiswal. He had prepared the recovery memo and registered a case against Kishori Jaiswal u/s 25/27 Arms Act. The recovery memo is Ext. Ka-33.

31. In the cross-examination, he has stated that he was not investigating the case u/s 302, Indian Penal Code. He has stated that Virendra had lodged the report at police station on 1.11.1997 at 12.45 p.m. in case Crime No. Nil/1997 under Sections 147, 148, 323, 504, 506, 352 and 307, Indian Penal Code, copy of the report is Ext. Kha-2.

32. The defence has denied the prosecution case. Ramji Tiwari and Virendra Tiwari had filed written statement also and in their statements, they have stated that there is a land on the northern and southern side which was in their possession. Bindeshwari wanted to take forcible possession of the land with the help of Nazir. Earlier also, they had filed report against Nazir and ultimately, a compromise was arrived at in the presence of several persons including the Pradhan of the village. Both of them also stated that on 31.10.1997 Zameer Ullah, Nazir, Hasrat Ali, Vakil, Vindeshwari, Raj Kumar and Ram Bahadur came on the disputed land armed with lathi and ballam and started throwing the "Ghoora". When Virendra stopped them, Bindeshwari exhorted and Raj Kumar and Bindeshwari chased Virendra with lathi and Bindeshwari assaulted Virendra on the head. He fell down and Raj Kumar started assaulting him when he was lying. Raj Kumar was armed with a gun. He also assaulted with the gun and lathi and fired from his gun. Noor Jehan was carrying a bomb and asked Nazir to assault him by bomb and Raj Kumar fired from his gun and the firing was made in exercise of right of private defence. Raj Kumar went to police station Etwa to lodge the report and had deposited the gun at the police station. Their injuries were also examined and they were medically examined in the Jail.

33. The accused persons examined three defence witnesses. D.W. 1 is Abhay Chandra Srivastava, D.W. 2 is Dr. S. K. Maharaj and D.W. 3 is Vishambhar Singh. The accused have also filed Ext. Kha-1, G.D. No. 17 at 10.45 a.m. dated 31.10.1997 of Crime No. 111/97, P. S. Etwa, Ext. Kha-2, Chik report dated 31.10.1997, Case Crime No. 111/97, Ext. Kha-3, Medical Report of Ramji Tiwari, Ext. Kha-4 Medical report of Virendra Tiwari, Ext. Kha-5 compromise dated 18.11.1996, Ext. Kha-6 charge-sheet of Case No. 22/96, P. S., Ext. Kha-7 report of Case Crime No. 237/96, Ext. Kha-8 charge-sheet of Case Crime No. 218/97 and Ext. Kha-9 report dated 24.12.1996 of Case Crime No. of 1996.

34. D.W. 1 is Dr. A. C. Srivastava.

He has stated that on 31.3.1997, he was Medical Officer in District Jail, Basti. He had examined Ramji Tiwari in jail and had found following injuries:

(1) Multiple bruise (3 in number) largest 8 cm. x 2 cm. smallest 6 cm. x 2 cm. on the medio postero aspect of right upper arm, 6 cm. below acromian process, each 2-3 cm. apart obliquely placed, bluish in colour with minimal surrounding oedema.

(2) Bruise of size 10 cm. x 2 cm., 2 cm. below right angle of scapula on right side of chest, bluish in colour.

(3) C/o pain at nape of neck o/k tenderness present to apparent ext. inj. Present.

Duration: about 3 days. Cause: caused by hard and blunt object.

He has proved the injury report as Ext. Kha-3. He has stated that all the injuries could be caused by lathi and danda. In the cross-examination, he has stated that he had not seen any head injury and these injuries were not on vital part of the body. Excepting injury No. 3, all injuries were simple. As regards injury No. 7, he advised for X-ray.

35. D.W. 2 is Dr. S. K. Maharaj, on 1.11.1997, he was posted at Primary Health Centre, Etwa. On the same day at 2.25 p.m., he had examined Virendra Prasad Tripathi and had found following injuries:

1. L.W. 5 cm. x 1 cm. scalp deep, on left side head near midline.

2. Contusion with swelling 6 cm. x 2 cm. on left arm C/o pain on right leg back no mark of ext. Injury seen.

C/o pain on back both side but no mark of ext. injury seen.

He has stated that the injuries were simple in nature and could be caused on 31.10.1997 at 8.30 a.m. The original injury report is filed in Case Crime No. 21/98. The case is pending in the Court of Chief Judicial Magistrate, Siddarth Nagar. Certified copy of the injury report is Ext. Kha-4.

In the cross-examination, he has stated that injury No. 1 could be caused by a single blow and this injury could be caused by accidental fall also.

36. D.W. 3 is Vishambhar Singh. He has stated that he lives in village Kate Khas and accused Ramji lives in village Churihari which are adjacent to each other. He has stated that Zameerul is the son of deceased Nazir and Hasrat Ali is brother of Nazir and Noor Jehan was daughter of Hasrat Ali and Kunna witness is the wife. He has stated that there was a compromise with regard to the land on the southern side of the house of Ramji. He had prepared the compromise, which is signed by several persons, copy of the compromise is Ext. Kha-5. In the cross-examination he has stated that he was called at the time of compromise because he was living in the neighbouring village and on the request of every one he had prepared the compromise. He has stated that the compromise map of the land is not given. He

has stated that a case of Hasrat Ali v. State is pending in the Court of Judicial Magistrate, Siddarth Nagar. He has stated that he had given statement against Hasrat Ali and Bindeshwari. He has denied that the compromise is forged and Nazir, Zameerullah had not affixed their thumb impressions.

37. We have heard Sri P. N. Misra, senior advocate for the Appellants and learned A.G.A. for the State and perused the record.

38. In this case even as per the version of both sides, the occurrence took place on 31.10.1997 at about 8.30 a.m. in the village. The occurrence took place when the accused were removing the puwal from the land which was claimed by the accused as well as Narsingh. The death of deceased persons is not disputed. The case of the Appellants is that the complainant side was forcibly removing the Ghoor from the land which was in possession of the Appellants for a long time and the Appellants were assaulted and thereafter in exercise of the right of private defence, firing was made. The prosecution witnesses have fully supported the prosecution case. As far as the role of the Appellant Ramji Tiwari is concerned, all the witnesses have stated that Ramji Tiwari had fired with the gun. The counsel for the Appellants submitted that P.W. 1 Chandrawati was not in a position to witness the occurrence as according to her, she was standing on her roof and as there was an intervening Khaprail, she could not be in a position to witness the incident. Secondly, it was contended by the counsel for the Appellants that in case, P.W. 1 Chandrawati was present at the alleged time of occurrence, she would have definitely touched the bodies of her husband and other family members and in that process, her clothes must have been soaked with blood. The contention of the learned Counsel for the Appellants is not correct as at the alleged time of occurrence, she was on the roof. It is wrong to say that she was not in a position to see the occurrence due to obstruction of Khaprail. A perusal of the site plan indicates that the deceased were shot dead at different places and as far as the question of blood on the clothes of witness is concerned, in this case four persons were shot dead and immediately, it would not have been possible for the witnesses to reach near the dead bodies. As regard P.W. 4 Kunna, the presence of this witness is doubted simply on the ground that she was not medically examined by the Doctor and she had stated that she had also received injuries in the occurrence. She had explained that her daughter was seriously injured, therefore, she was medically examined and she had returned to the village after about one month.

39. The next contention of the learned Counsel for the Appellants is that there is conflict in direct medical evidence. The witnesses have stated that the firing was made from a long distance but the post-mortem reports indicate that the deceased had received injuries from a distance between 4 to 6 feet. This contention of the counsel for the Appellants has no force as the witnesses have stated that the Appellant Ramji Tewari did not remain standing at one place. He had moved to a few steps before shooting other persons. As far as the injuries on the side of the

accused are concerned, the contention of the counsel for the Appellants is that the injuries have not been explained by the prosecution. A perusal of the injury reports shows that the injuries were simple in nature which at any rate did not give any right of causing death of as many as four persons and the Doctor has also mentioned that the injuries of Ramji Tiwari could be caused by fall also.

40. The counsel for the Appellants submits that non-explanation of injuries of the defence indicates that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version, the witnesses are lying on a most material point and, therefore, their evidence is unreliable. The injuries of the defence are simple in nature and most of the witnesses had reached on hearing the altercation and sound of firing. P.W. 1 was standing on the roof of her house. There was every possibility that they might have not noticed the superficial and simple injuries of accused persons. According to the statement of Ramji Tiwari and Virendra, they were assaulted by lathi and ballam. The Doctor had not found any injury of ballam. They have not mentioned about bomb with the accused. The Investigating Officer did not find any bomb or any other weapon at the place of occurrence. The Investigating Officer had found dead bodies and blood stains far away from the place which the accused claimed to be there. In order to justify the killing of as many as four persons, accused had introduced bomb in the hand of Noorjahan. The prosecution has fully proved its case beyond reasonable doubt. The act of the Appellant Ramji Tiwari in shooting down as many as four persons cannot be justified as an act done in exercise of right of private defence.

41. So far as the participation of Appellants Godawri, Virendra Tiwari, Chandreshwar and Laxmi Devi is concerned, it is alleged that they had exhorted Ramji Tiwari. The Sessions Judge has convicted them under Sections 302/109, Indian Penal Code The Sessions Judge has acquitted all these four persons u/s 147/148/307, Indian Penal Code These Appellants were charged only for the offence u/s 147/302 read with Section 149, Indian Penal Code They were not charged u/s 302/149, Indian Penal Code The Supreme Court in the case of Vakil Yadav v. State of Bihar 2001 SCC 149, had observed:

That the Appellant having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substitutedly convicted for offence u/s 302, Indian Penal Code with the aid of Section 109, Indian Penal Code There was obviously thus not only a legal flaw but also a great prejudice to the Appellant in projecting his defence. He, on such error committed by the High Court, has rightly earned his acquittal.

42. In view of the above, the conviction of the Appellants Godawri, Virendra Tiwari, Chandreshwar and Laxmi Devi is bad in law and the same cannot be sustained.

43. As regard the sentence of Ramji Tewari, it is submitted by the learned Counsel for the Appellant that the trial court has wrongly sentenced him to death and this

was not the case of rarest of rare nature and the Sessions Judge has also not followed the mandatory provisions of Section 235(2), Criminal Procedure Code

44. As regard the sentence, the Sessions Judge has wrongly sentenced the Appellant Ramji Tewari to death as there has been unmistakable shift in the legislative emphasis for awarding life imprisonment for murder and capital punishment is to be resorted to only as an exception and for special reasons. There is a changing trend against imposition of capital punishment. Having regard to the totality of circumstances of the case and in view of the violation of provision of Section 235(2), Criminal Procedure Code, we are of the opinion that this case does not fall in the category of rarest of rare cases and extreme penalty of death is not called for. The occurrence took place at the spur of moment and without pre-meditation. We would, therefore, modify the sentence of death to life imprisonment.

45. In view of the above Criminal Appeal No. 1992/2000 filed by Virendra Tiwari, Smt. Godawri, Smt. Laxmi Devi and Chandrashwar Tewari is allowed and they are acquitted of the offences charged for. They are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

46. Reference No. 111/97 is rejected.

47. Criminal Appeal No. 2130/2000 filed by Ramji Tewari is dismissed with the modification that his sentence of death is modified to life imprisonment. He is in jail where he will serve out his sentence.