

(2004) 08 AHC CK 0092

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 699 of 1981

Badri and Others (in
Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Aug. 13, 2004**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 141, 146, 147, 148, 149

Citation: (2005) 1 ACR 369**Hon'ble Judges:** Vishnu Sahai, J; Rakesh Sharma, J**Bench:** Division Bench**Advocate:** Nagendra Mohan, for the Appellant; Janardan Singh, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.

Through this appeal, Badri, Ram Samujh, Jagat Narain, Jwala Prasad and Bachhu alias Bachhu Lal challenge the judgment and order dated 19.9.1981, passed by II Ird Additional District and Sessions Judge, Barabanki, in Sessions Trial No. 305 of 1979, whereby they have been convicted and sentenced to imprisonment for life for the offence punishable u/s 302/149, I.P.C. In addition, Bachhu alias Bachhu Lal and Jagat Narain have been convicted and sentenced to undergo two years" R.I. for the offence punishable u/s 148, I.P.C. and Badri, Ram Samujh and Jwala Prasad to one year"s R.I. for that punishable u/s 147, I.P.C.

2. The sentences have been directed to run concurrently.

3. Shortly stated, the prosecution case runs as under:

Informant Sant Ram P.W. 1 is the real brother of the deceased Ram Udit. At the time of the incident, the informant, deceased Ram Udit, Siya Ram P.W. 2, Khushi Ram P.W. 3

and the five Appellants, namely, Badri, Ram Samujh, Jagat Narain, Jwala Prasad and Bachhu alias Bachhu Lal were residing in village Kakraha, hamlet of Chhandwal, within the limits of police station Zaidpur, in district Barabanki. Appellants Badri, Ram Samujh and Jagat Narain are real brothers, being the sons of Laxman ; Appellant Jwala Prasad is the son of Appellant Jagat Narain and Appellant Bachhu alias Bachhu Lal is the associate of Appellant Jagat Narain.

4. There was enmity between the Appellants and the deceased. One and a half years prior to the incident, the Appellants along with some Ors. had assaulted the deceased Ram Udit. A case was registered against them which was pending at the time of the incident. The Appellants wanted the deceased to file an affidavit in it and since he did not accede to their wish, they nursed ill-will against him.

5. On 3.5.1978, at about 9.00 a.m., when informant Sant Ram was sitting and feeding cattle at his house, deceased Ram Udit went to jungle along with two buffaloes. While he was returning therefrom to his house, (after leaving them there and had reached the mend (demarcation of mud which divides fields) of his field) Appellants Jagat Narain and Bachhu alias Bachhu Lal armed with guns and Appellants Badri, Ram Samujh and Jwala Prasad armed with lathis emerged. Seeing this, informant Sant Ram came near Ram Udit. Then Appellant Bachhu alias Bachhu Lal instigated Appellant Jagat Narain in terms (sic) (assault the buggar, he should not be allowed to escape today). Thereafter, Appellants Badri, Ram Samujh and Jwala Prasad blocked the way of Ram Udit and Appellant Jagat Narain fired a shot on Ram Udit, as a consequence of which he fell down dead.

6. Apart from informant Sant Ram, this incident was seen by Siya Ram P.W. 2 and Khushi Ram P.W. 3.

7. After murdering Ram Udit, the Appellants ran away. Thereafter, the informant took the corpse of his brother Ram Udit to the door of Haunsila, where he got the F.I.R. scribed by Siya Ram P.W. 2, who after scribing it read it over to him. Then, the informant signed on it and proceeded to police station Zaidpur, where he lodged it.

8. The evidence of Jagdamba Prasad Yadav P.W. 7 shows that on 3.5.1978, at about 10.00 a.m., while he was posted as Head-Moharrir at police station Zaidpur, district Barabanki, informant Sant Ram lodged his F.I.R. on the basis of which he registered a case in the general diary and prepared the chik F.I.R.

9. It is pertinent to mention that a perusal of the chik F.I.R. shows that the distance between the place of the incident and the aforesaid police station was nine miles.

10. It is significant to mention that in the F.I.R., the five Appellants, namely, Badri, Ram Samujh, Jagat Narain, Jwala Prasad and Bachhu alias Bachhu Lal are named and on its basis offences under Sections 147, 148 and 302/149, I.P.C. were registered against them.

11. The evidence of Premchandra Chaturvedi P.W. 9, in short, shows as under:

On 3.5.1978, he was posted as Station Officer at police station Zaidpur. The F.I.R. was lodged in his presence by Sant Ram. He took over the investigation and recorded the statement of Sant Ram. He, thereafter, along with police personnel, proceeded for the place of the incident. He found the corpse of deceased Ram Udit at the door of Haunsila ; performed the inquest on it ; and sent it for autopsy. He then prepared the site-plan Ext. Ka-14. From the place of the incident, he seized plain and bloodstained earth, in separate containers, under a recovery memo. He also seized therefrom pellets and ticklies, under a recovery memo. Thereafter he was transferred.

12. From the evidence on record, it transpires that the officer, who conducted the investigation, after the transfer of S.O. Premchandra Chaturvedi, and till 1.7.1978, the date on which Sabhajeet Singh P.W. 6 took over, it has not been examined by the prosecution.

13. The evidence of Sabhajeet Singh P.W. 6 shows that on 1.7.1978, he recorded the statements of Ram Dularey, Sahabuddin and the Appellants and submitted the charge-sheet against the Appellants.

14. Going backwards, the autopsy on the corpse of deceased Ram Udit was conducted on 4.5.1978, at 3.30 p.m., by Dr. A. K. Srivastava P.W. 5, who found on it a multiple gunshot wound over front of chest and upper part of abdomen, in an area of 42 cms. x 32 cms., size varying from 0.5 cm. to 0.75 cm. x 0.5 cm., margins inverted, no blackening or tattooing seen.

15. On internal examination, Dr Srivastava found ribs on both sides and sternum bone punctured ; multiple punctures of pleura, right lung and left lung and pericardium and heart punctured.

16. From heart, Dr. Srivastava recovered four pellets.

17. In the stomach, Dr Srivastava did not find food material. He found both the intestines to be semifull.

18. The cause of death spelt out in the post-mortem report was shock and haemorrhage on account of fire-arm injury.

19. It is significant to mention that in his deposition in the trial court, Dr. Srivastava reiterated the said cause of death and also stated therein that the deceased could have been died on 3.5.1978, at 9.00 a.m. on account of ante-mortem injury suffered by him, which was sufficient in the ordinary course of nature to cause death.

20. The case was committed to the Court of Sessions in the usual manner, where after being charged the Appellants were put up for trial. They pleaded not guilty to the charges

and claimed to be tried. Their defence was of denial.

21. During trial, in all, the prosecution examined nine witnesses. Three of them, namely, Sant Ram P.W. 1, Siya Ram P.W. 2 and Khushi Ram P.W. 3 were examined as eye-witnesses. During cross-examination, the suggestion given to them was that the incident did not take place at the time alleged by them but in the early hours of the morning, while there was darkness and they did not witness the same. They denied the said suggestion.

22. The learned trial Judge accepted the evidence of the aforesaid three eye-witnesses ; rejected the defence of the Appellants ; and convicted and sentenced the Appellants, in the manner, stated in paragraph 1.

23. Hence, this appeal.

24. We have heard Mr. Nagendra Mohan for the Appellants, who has argued this appeal with consummate skill and Mr. Janardan Singh, Additional Public Prosecutor, for the Respondent and perused: The depositions of the prosecution witnesses ; the material exhibits tendered and proved by the prosecution ; the statements of the Appellants recorded u/s 313, Cr. P.C. and the impugned judgment. After the utmost circumspection, we are of the judgment that this appeal deserves to be partly allowed, inasmuch as Appellants Badri, Ram Samujh and Jwala Prasad deserve the benefit of doubt.

25. It would become manifest from the above that the learned trial Judge has based the conviction of the Appellants on the ocular account furnished by Sant Ram P.W. 1, Siya Ram P.W. 2 and Khushi Ram P.W. 3. We have gone through their evidence and in our view, it would be safe to accept it against Appellants Jagat Narain and Bachhu alias Bachhu Lal but not against Appellants Badri, Ram Samujh and Jwala Prasad.

26. We now propose examining the evidence of the said witnesses.

27. The evidence of Sant Ram P.W. 1, Siya Ram P.W. 2 and Khushi Ram P.W. 3 shows: On the date and time of the incident (on 3.5.1978, at about 9.00 a.m.) they saw deceased Ram Udit present near his field and Appellants Jagat Narain and Bachhu alias Bachhu Lal, armed with guns, along with Appellants Badri, Ram Samujh and Jwala Prasad with lathis, also present there. Appellant Bachhu alias Bachhu Lal instigated Appellant Jagat Narain to assault the deceased. Thereafter Appellants Badri, Ram Samujh and Jwala Prasad (according to Sant Ram and Siya Ram) blocked the way of Ram Udit. Then Appellant Jagat Narain fired a shot on Ram Udit, as a result of which he fell down dead. Thereafter, the Appellants ran away. They then took the corpse of the deceased to the door of Haunsila.

28. The evidence of Sant Ram P.W. 1 further shows: At the door of Haunsila he got his F.I.R. scribed by Siya Ram P.W. 2. Whatever he dictated Siya Ram scribed. Thereafter Siya Ram read it over to him and he affixed his thumb impression on it.

29. The evidence of Siya Ram P.W. 2 further shows: He scribed the F.I.R. on the dictation of Sant Ram at the door of Haunsila and after scribing it read it over to Sant Ram, who affixed his signatures on it.

30. The evidence of Sant Ram further shows: After signing the F.I.R. he proceeded along with the F.I.R. to police station Zaidpur, where he lodged it.

31. As mentioned earlier, in our judgment, the evidence of Sant Ram, Siya Ram and Khushi Ram inspires confidence vis-a-vis Appellants Bachhu alias Bachhu Lal and Jagat Narain. We say this for the reasons referred to hereinafter:

In the first place, it should be borne in mind that at the time of the incident all of them were living in village Kakraha, where the incident took place and they have explained their presence on the place of the incident.

Sant Ram P.W. 1 has stated that at the time of the incident, he was present at his house feeding his cattle. From his cross-examination, it transpires that his house is situated at a distance of 200-250 paces (about 500 feet) from the place of the incident and from there the place of incident is visible ; there being no obstruction between his house and the place of the incident. His evidence further shows that he noticed deceased Ram Udit, when he had reached his field, and Appellants Bachhu alias Bachhu Lal and Jagat Narain (armed with guns) and Appellants Badri, Ram Samujh and Jwala Prasad (armed with lathis) present there. His evidence also shows that on seeing the Appellants and the deceased he went near the deceased and saw the incident.

The evidence of Siya Ram P.W. 2 shows that on the date and time of the incident, he was returning after answering the call of nature ; the deceased (Ram Udit) was proceeding ahead of him ; when Ram Udit reached near his field, he noticed Appellants Bachhu alias Bachhu Lal and Jagat Narain armed with guns and Appellants Badri, Ram Samujh and Jwala Prasad armed with lathis and thereafter the incident took place.

The evidence of Khushi Ram P.W. 3 shows that on the date and time of the incident, he was sitting at the door of his house, which was situated at a distance of 60-62 paces (about 125-150 feet) from the place of the incident and consequently, saw the incident.

Secondly, the manner of assault attributed by Sant Ram, Siya Ram and Khushi Ram to Appellants Bachhu alias Bachhu Lal and Jagat Narain is identical. All of them stated that when Ram Udit reached near his field, Appellant Bachhu alias Bachhu Lal instigated Appellant Jagat Narain who thereafter fired from his gun on deceased Ram Udit, killing him on the spot.

It is pertinent to mention that the said overt-acts have been mentioned in the prompt F.I.R. of the incident which was lodged by one of them (Sant Ram) within one hour of the incident taking place, i.e., on 3.5.1978, at 10.00 a.m. It is significant to mention that although the informant Sant Ram, who lodged the F.I.R., and Head Moharrir Jagdamba

Prasad Yadav P.W. 7, who registered the case on the F.I.R., were cross-examined but their claim that the F.I.R. was lodged on 3.5.1978 at 10.00 a.m. could not be disproved.

Since during their cross-examination no question was put to three eye-witnesses that they had not attributed the said overt-acts to the said Appellants in their statements u/s 161, Cr. P.C., it can be safely presumed that even in their statements u/s 161, Cr. P.C., they assigned the said overt-acts to the said Appellants.

It is pertinent to mention that the evidence of these witnesses in terms that Appellant Jagat Narain fired on deceased Ram Udit is corroborated by the autopsy report of the deceased, a perusal of which shows that the deceased sustained a multiple gunshot wound over front of chest. It is significant to mention that the autopsy surgeon Dr. A. K. Srivastava, in his deposition in the trial court, stated that the deceased could have died on account of the ante-mortem injuries suffered by him on 3.5.1978 at 9.00 a.m. (the date and time of the incident alleged by the prosecution).

It is significant to mention that although Sant Ram, Siya Ram and Khushi Ram were extensively cross-examined but nothing could be extracted therefrom which could cast even an iota of doubt on their claim that on the date and time alleged by the prosecution on the instigation of Appellant Bachhu alias Bachhu Lal Appellant Jagat Narain fired on deceased Ram Udit.

32. For the aforesaid reasons, in our judgment, it would be safe to accept the testimony of Sant Ram, Siya Ram and Khushi Ram vis-a-vis Appellants Bachhu alias Bachhu Lal and Jagat Narain.

33. We, however, make no bones in observing that it would not be prudent to accept the testimony of Sant Ram, Siya Ram and Khushi Ram vis-a-vis Appellants Badri, Ram Samujh and Jwala Prasad. The evidence of these witnesses shows that the said Appellants were armed with lathis. It is pertinent to mention that there is a major contradiction in their evidence regarding the part played by the said Appellants in the incident ; whereas Sant Ram and Siya Ram stated that after Appellant Bachhu alias Bachhu Lal had instigated Appellant Jagat Narain to fire upon deceased Ram Udit, the said Appellants blocked the way of Ram Udit, Khushi Ram did not say so.

34. It is equally pertinent to mention that in his F.I.R. informant Sant Ram has not mentioned that the said Appellants blocked the way of the deceased.

35. To us it appears that the aforesaid contradiction crept in because the said Appellants did not participate in the incident and the said witnesses were drawing from their imagination their overt-act.

36. That apart, in our view, had Appellants Badri, Ram Samujh and Jwala Prasad armed with lathis really participated in the incident, they would have assaulted the deceased with lathis. In our view the complete absence of lathi injuries on the person of the deceased

also shows that they did not participate in the incident.

37. In our view, where the evidence comprises of interested/ inimical witnesses (as is the case here), there is a tendency on the part of the witnesses to inflate the number of accused. In our judgment, inasmuch as Sant Ram, Siya Ram and Khushi Ram were inimically deposed off against the said Appellants, the probability that they falsely implicated them, cannot be ruled out. It is pertinent to mention that Sant Ram was the real brother of deceased Ram Udit and in his cross-examination admitted that one Data Ram had lodged an F.I.R. (pertaining to assault) against deceased Ram Udit and eye-witnesses Siya Ram and Khushi Ram and in the case arising therefrom Appellants Ram Samujh and Bachhu alias Bachhu Lal had given evidence on behalf of Data Ram. It is significant to point out that Appellant Badri is the real brother of Appellant Ram Samujh and Appellant Jwala Prasad is the real nephew of Appellant Ram Samujh, being the son of his brother Appellant Jagat Narain.

38. For the aforesaid reasons, in our view, the safer course would be to give benefit of doubt to Appellants Badri, Ram Samujh and Jwala Prasad.

39. The aforesaid discussion would show that we have only accepted the participation of Appellants Bachhu alias Bachhu Lal and Jagat Narain in the incident and are going to acquit Appellants Badri, Ram Samujh and Jwala Prasad. That being so the number of persons who participated in the incident from five, would come down to two. Consequently, in our view, Appellants Bachhu alias Bachhu Lal and Jagat Narain would have to be acquitted for the offence punishable u/s 148, I.P.C. because the said offence stipulates of a person committing rioting armed with a deadly weapon and a perusal of Section 146, I.P.C. would show that for the offence of rioting there has to be an unlawful assembly and a perusal of Section 141, I.P.C. would make it manifest that for an unlawful assembly, there has to be a minimum membership of five persons.

40. We are also of the view that the conviction of Appellants Bachhu alias Bachhu Lal and Jagat Narain cannot be sustained for the offence punishable u/s 302/149, I.P.C. because for the application of Section 149, I.P.C. the essential prerequisite is the existence of an unlawful assembly and as we have seen above for an unlawful assembly (as per the provisions contained u/s 141, I.P.C.) there has to be a minimum membership of five persons.

41. We make no bones in observing that the circumstance that the conviction of Appellants Bachhu alias Bachhu Lal and Jagat Narain cannot be sustained for the offence punishable u/s 302/149, I.P.C. does not mean that they would go scot-free, because there would be no impediment in convicting them for the offence punishable u/s 302/34, I.P.C. We are not oblivious to the fact that they have not been charged for the said offence but in our view, it would be open for us to do so because no prejudice would be caused to them.

42. In this connection, we feel it apposite to refer to para 44 of the decision of the Apex Court, rendered in the case of [Willie \(William\) Slaney Vs. The State of Madhya Pradesh](#), wherein the Apex Court has held that any error or omission in framing a charge would only be material if prejudice is caused.

43. In our view, in the case in hand no prejudice would be caused to the said Appellants for the failure of the learned trial Judge to frame a charge for an offence u/s 302/34, I.P.C. against them because not only have the three eye-witnesses stated that on the instigation of Appellant Bachhu alias Bachhu Lal Appellant Jagat Narain fired on the deceased but the said fact has also been put to the said Appellants in their statements u/s 313, Cr. P.C.

44. In this connection, we would like to advert to the decision rendered by the Apex Court in the oft-quoted case of [B.N. Srikantiah and Others Vs. The State of Mysore](#), wherein dealing with a similar situation in paragraph 9, the Apex Court observed thus:

"The omission to mention Section 34 of the Indian Penal Code in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. The charge was that the Appellant and Ors. were members of an unlawful assembly, the common object of which was to murder the deceased. Although there is a difference in common object and common intention, they both deal "with combination of persons who become punishable as sharers in an offence", and a charge u/s 149, Indian Penal Code is no impediment to a conviction by the application of Section 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all".

Emphasis supplied

45. We would be failing in our fairness if before proceeding to the operative part of the judgment we do not advert to the principal submissions canvassed by Mr. Nagendra Mohan, learned Counsel for the Appellants.

46. Mr. Mohan firstly contended that since all the three eye-witnesses, namely, Sant Ram, Siya Ram and Khushi Ram are interested and inimical to Appellants Bachhu alias Bachhu Lal and Jagat Narain, it would be improper to sustain the conviction of Appellants on their testimony.

47. We have reflected over the said submission and are constrained to observe that we do not find any merit in it. Way back in the year 1965, in the oft-quoted case of [Masalti Vs. State of U.P.](#), the Supreme Court has held that the testimony of a interested/inimical witness cannot be mechanically rejected but should only be accepted after scrutinising it with caution. We have exercised the said caution and found it to be credible vis-a-vis Appellants Bachhu alias Bachhu Lal and Jagat Narain.

48. Hence, this submission fails.

49. Secondly, Mr. Mohan contended that the F.I.R. of the incident is ante-timed and had not been lodged within one hour of the incident as alleged by the prosecution. He contended that according to the prosecution, the incident took place on 3.5.1978, at about 9.00 a.m. and the F.I.R. was lodged the same morning at 10.00 a.m. at police station Zaidpur, which was situated at a distance of nine miles from the place of the incident. He urged that this claim of the prosecution cannot be accepted because the evidence of informant Sant Ram shows that after the incident he took the corpse of his brother to the door of Haunsila where he got his F.I.R. scribed by Siya Ram and thereafter he covered a distance of nine miles to police station Zaidpur where he lodged it. He contended that the informant must have taken some time in shifting the corpse of deceased Ram Udit to the door of Haunsila's house ; sometime must in getting the F.I.R. scribed by Siya Ram and atleast an hour if not more in covering a distance of nine miles to police station Zaidpur, where he lodged it.

50. We have reflected over the submission of Mr. Mohan and are constrained to observe that we do not find any merit in it.

51. In this connection, we feel it apposite to advert to the cross-examination of Sant Ram P.W. 1, who in paras 52 and 53 has stated that after the Appellants ran away, he remained at the place of the incident (near the corpse) for 3-4 minutes ; thereafter took the corpse to Haunsila's door where he remained for 15-20 minutes during which time he got the F.I.R. scribed by Siya Ram ; immediately after getting the F.I.R. scribed by Siya Ram he proceeded to Ahamadpur which he reached within 10-15 minutes ; and within 4-5 minutes he got a tempo at Ahmadpur for Zaidpur, on which he reached police station Zaidpur within half an hour. The aforesaid admission made by Sant Ram in his cross-examination does not rule out that the F.I.R. could have been lodged at 10.00 a.m. That apart it should be remembered that Sant Ram is a rustic witness and rustic witnesses do not have a chronometric sense of time. That being so, in our view, his statement that the incident took place on 3.5.1987, at 9.00 a.m. should not be mathematically construed. The possibility that it took place between 8.30 a.m. 9.00 a.m. also cannot be ruled out and once that was there the F.I.R. could have been lodged at 10.00 a.m. as alleged by the prosecution.

52. Hence, this submission also fails.

53. Thirdly, Mr. Mohan contended that the admission of informant Sant Ram in his cross-examination that after sustaining fire-arm injury deceased Ram Udit staggered to a distance of 12-13 paces in southern direction and thereafter fell down cannot be accepted because the autopsy surgeon Dr. A. K. Srivastava found the heart of the deceased to be punctured and in his cross-examination (in para 9) admitted that after the heart has been punctured a person would not be able to stagger but would fall down instantly.

54. We have reflected over Mr. Mohan's submission and do not find any merit in it. It is true that a perusal of the post-mortem report shows that the heart of the deceased was

punctured. It is equally true that Dr. A. K. Srivastava stated that in the above terms but we are not prepared to construe his statement to mean that in 100 per cent cases after the heart of a person is punctured, he/she would not be able to stagger to a distance of 12-15 paces. In our view, when Dr. Srivastava made the said admission what he meant was that normally a person whose heart was punctured would fall down instantly and not be able to stagger. At any rate, in our judgment, the aforesaid admission of Dr. Srivastava is too innocuous to reject the weighty ocular account furnished by three eye-witnesses vis-a-vis Appellants Bachhu alias Bachhu Lal and Jagat Narain.

55. Hence, this submission also fails.

56. Fourthly, Mr. Mohan contended that had Siya Ram P.W. 2 actually witnessed the incident, in the F.I.R. his name would have been mentioned. He contended that a perusal of the F.I.R. shows that Siya Ram is not named therein. He urged that since Siya Ram scribed the F.I.R. there was no question of his omitting his name therein.

57. We have reflected over the said submission and are constrained to observe that we do not find any merit in it. In our judgment the graphic manner in which Siya Ram has described the incident certainly shows that he witnessed the incident. That apart it should be borne in mind that the evidence of both the informant and Siya Ram P.W. 2 shows that the former (informant) dictated the F.I.R. to the latter and in our view since the former (informant) must have been in a highly mentally perturbed condition since his brother was murdered just 15-20 minutes before his dictating the F.I.R. he forgot to mention in his F.I.R. the fact that Siya Ram witnessed the incident.

58. We wish to make it clear that the circumstance that a witness is not named in the F.I.R. does not mean that his evidence has to be ipso facto rejected. It should be rejected or not in a given case would depend whether the prosecution has a credible explanation for the failure of the informant to nominate him in the F.I.R. If it has, as is the case here, the omission would be inconsequential but if not it would be unsafe to accept his testimony because the probability of his name having been introduced by way of afterthought cannot be ruled out.

59. Hence, this submission also fails.

60. Finally, Mr. Mohan contended that Appellant Bachhu alias Bachhu Lal deserves the benefit of doubt. He urged that the only role assigned to him is of exhortation and the said role is often deployed by witnesses to inflate the number of accused in a case. He contended that since all the three eye-witnesses are inimical, they falsely implicated Appellant Bachhu alias Bachhu Lal by attributing the said role to him. He further contended that since Appellant Bachhu alias Bachhu Lal was armed with a gun and nursed ill-will against the deceased (like Appellant Jagat Narain) had he participated in the incident, he would not have remained satisfied by merely instigating Appellant Jagat Narain to fire upon the deceased but would have also fired upon him.

61. We have reflected over the said submission of Mr. Mohan and do not find any merit in it. There is no rule of thumb, having universal application, that the evidence of instigation is always manufactured by witnesses for inflating the number of accused in a given case. In our view, what the Court has to bear in mind before accepting the evidence of instigation in a given case is whether the evidence in respect of it is clear, cogent and consistent and if it is, as is the case here, it would have no compunction in accepting it.

62. In the instant case, we find that the evidence of instigation fulfils the said requirements. It is pertinent to mention that in the F.I.R. of the incident which was lodged by Sant Ram within one hour of the incident taking place it has been clearly mentioned that Appellant Bachhu alias Bachhu Lal instigated Appellant Jagat Narain to fire upon the deceased. Again all the three eye-witnesses in their substantive statements have stated to the said effect. Since during cross-examination no question was put to them that in their statements u/s 161, Cr. P.C. they did not depose about instigation being made by Appellant Bachhu alias Bachhu Lal, it would be reasonable to infer that they must have deposed about it therein. The submission of Mr. Mohan that had Bachhu alias Bachhu Lal participated in the incident he would have fired on the deceased, cannot be accepted. In our judgment, there may be many reasons why he did not fire upon the deceased. It may be that he felt that since the shot fired by Jagat Narain was itself sufficient to kill him there was no need for him to fire. It may equally be that because the witnesses reached there, he decided not to fire and, therefore, he and the other Appellants decided to run away. Different people react differently in different situations and often in the calm and composed atmosphere of a court room wherein cases are argued, we tend to forget this and examine the conduct of accused persons on pure rationality.

63. Hence, this submission also fails.

64. No other substantial submission has been canvassed before us by Mr. Nagendra Mohan, learned Counsel for the Appellants.

65. In the result, the appeal is partly allowed. We acquit Appellants Badri, Ram Samujh and Jwala Prasad for the offences punishable under Sections 302, I.P.C. and 147, I.P.C. and set aside the sentence of imprisonment for life and one year"s R.I. awarded to them respectively thereunder. They are on bail. They need not surrender. Their bail bonds shall stand cancelled and sureties discharged.

66. We acquit Appellants Bachhu alias Bachhu Lal and Jagat Narain for the offence punishable u/s 148, I.P.C. and set aside the sentence of two years" R.I. awarded to them thereunder. We convert their conviction for the offence punishable u/s 302/149, I.P.C. to one u/s 302/34, I.P.C. but maintain the sentence of imprisonment for life awarded to them thereunder. They are on bail and shall be taken into custody forthwith to serve out their sentence.