

(2007) 03 AHC CK 0252

Allahabad High Court

Case No: None

Smt. Premwati alias Bengalin,
Yogendra Narain alias Yogesh
and Mahendra Narain alias
Basant

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 21, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302

Hon'ble Judges: S.S. Kulshrestha, J; A.K. Roopanwal, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

S.S. Kulshrestha, J.

These both the appeals arise from the judgment and order dated 5.3.1982 passed by the Sessions Judge, Etawah in ST. No. 493 of 1978 whereby convicting Smt. Prem Wati @ Bengalin, Devesh @ Chandra, Yogesh @ Yogendra Narain and Mahendra Narain @ Basant for the offence u/s 302/149 IPC for the murder of Satya Narain and separately convicting for the offences u/s 302/149 IPC for the murder of Dev Kunwar and Smt. Savitri and separately awarding sentence for life imprisonment for these offences and also convicting Sri Basant and Yogesh @ Yogendra Kumar for the offence u/s 147 IPC and sentencing them to undergo rigorous imprisonment for one year. Further holding Madho Ram Shukla guilty for the offence u/s 302 IPC for the murder of Deo Kunwar and sentencing him to undergo imprisonment for life j and also convicting him for the offences u/s 302/149 IPC for the murder of Smt. Savitri and Satya Narain and awarding life imprisonment separately?, for those murders. Further holding Smt. Prem Wati @ Bengalin, Devesh @ Devesh Chandra and Madho Ram Shukla guilty for the offence u/s 148 IPC; and also awarding two years rigorous

imprisonment to each of them. All the sentences were ordered to run concurrently.

2. At this stage it may be mentioned that Devesh @ Devendra Narain s/o Raj Bahadur died during the pendency of the trial. Proceeding of the case stood abated against him. Further Devesh Chandra @ Devesh of Lavedi s/o Raj Bahadur and Yogendra Narain @ Yogesh s/o Ram Bharose were reported dead. The proceedings of the appeal also stood abated against them. Now these appeals remain confined to the surviving appellants namely Smt. Prem Wati @ Bengalin. Mahendra Narain @ Basant and Madho Ram.

3. It is said that the trial court has not properly appreciated the materials and evidence on record. Merely on conjecture and surmises established the guilt against the accused appellants. There is no perceivable motive for the appellants to have any animosity towards the deceased in particular Smt. Deo Kunwar and Smt. Savitri. No independent witness was examined by the prosecution. All those who claimed to be eyewitnesses of the incident are closely related to the deceased and no credence can be attached to their testimony. These witnesses were really not present at the spot as they did not rush up for the rescue of the deceased. Further emphasis has also been laid that the genesis of the incident is shrouded with mystery and there is no proximate cause established that why the appellants would do away with the life of Dev Kunwar and Smt. Savitri by pursuing common object. To the contrary it is decipherable from the materials on record that Ram Bharose Lal, husband of Smt. Prem Wati @ Bengalin was murdered at about one year back from the place of incident. Its report was also lodged by Shyam Lal. In that report he nominated Tej Singh Yadav and Rajjan Lal as accused, excluding name of his son Satya Narain (who is one of the deceased in this case). In the report Shyam Lal and Govind s/o Ram Bharose Lal (deceased of that case) were witnesses. Govind in his statement u/s 161 Cr.P.C. also referred the name of Satya Narain (deceased of this case), involved in the murder of his father Ram Bharose Lal. Satya Narain was enlarged on bail in that case. He was not named in the FIR. But other accused nominated in the FIR suffered incarceration and were not let off on bail. This was the reason for their being hostile to Satya Narain. Tej Singh Yadav and his brothers all were hardened criminals. They settled their dispute with Satya Narain who was instrumental in causing the death of Ram Bharose Lal with the hired assassins and got himself excluded from the report. To the contrary it is submitted by the learned A.G.A. that there is ample evidence on record to show the complicity of the accused appellants. There was sufficient motive to the accused appellants to have killed Satya Narain and other two persons of his family who came for his rescue. The testimony of the witnesses remained thorough but consistent and with the common objective they participated in the incident with lethal weapons. The testimony of the witnesses cannot be discarded merely because they are related to the deceased. Their testimony also finds corroboration from the medial report.

4. In order to facilitate the disposal of these appeals a brief resume of the facts may be made. Ram Bharose Lal, the husband of Smt. Prem Wati @ Bengalin, who happened to be Khapdani uncle of the complainant was murdered and in that murder name of Satya Narain (deceased) was also figured. He was on bail and facing trial. Govind and others were feeling enmity with him. This was the reason that Satya Narain started living in Madhya Pradesh and occasionally used to visit his village. On 19.8.1978 at about 6.00 p.m. he left his house and when he reached at the door of Ram Bharose Lal, Smt. Prem Wati @ Bengalin from the Chabootara of her house exhorted that now the time had come to take revenge. She shot fire at Satya Narain inflicting injuries at his hip. Satya Narain made an attempt to run away from that place. He was chased by Devesh @ Devesh Chandra s/o Ram Bharose Lal with his licensed gun, Madho Ram Shukla with the gun, Devesh of Lavedi who is related to Govind armed with country made pistol and Yogendra Narain @ Yogesh and Mahendra Narain @ Basant with Lathi. This was witnessed by the complainant himself, his mother Smt. Deo Kunwar, sisters Savitri and Gayatri from the door of their house. They also followed the accused for the rescue of Satya Narain. The accused made indiscriminate firings from their lethal weapons. Smt. Deo Kunwar and Savitri succumbed to their injuries and there Lathi blows were given by Mahendra Narain @ Basant and Yogendra Narain @ Yogesh. He fell into a Talab (pond). The aforesaid incident is said to have been witnessed by Gayati, Madan Lal, Raghubir Singh Thakur, Vishwanath and Pandit Prabhu Dayal, Soon thereafter Dhanpati Singh, one of the guards who was also deployed at the house of Ram Bharose Lal came at the place of occurrence. The condition of Satya Narain was serious and so he was taken to P.S. Ekdil, Etawah and also for medical aid to District Hospital, Etawah. Its report was lodged at P.S. Ekdil, Etawa. The investigation of this case was taken by Subedar Singh, Station Officer Incharge, P.S. Ekdil and he also recorded the statement of Satya Narain which was also given effect of the dying declaration. It was stated by him that "he came to his house. His brother in law Madan Lal Mishra along with two other persons namely Thaku Raghubir Singh and mechanic Vishwanath Singh were also present in the house. He left his house for Etawah at about 6.00 p.m. and when he reached in front of the house of Smt. Prem Wati @ Bengalin, she came exhorted that now the revenge was to be taken and shot fire at him. He sustained injuries and with a view to save his life started running from that place. He was chased by Smt. Prem Wati @ Bengalin with Tamancha, Devesh s/o Ram Bharose Lal and Madho Ram Shukla s/o Putti Lal with guns and Devesh of with Tamancha. They all attacked at Satya Narain when they reached near to the pond. Devesh Chandra s/o Ram Bharose Lal shot fire from his gun inflicting injuries to him. Simultaneously other persons also shot fire with their guns and country made pistols. When his mother and sisters came for rescue of Satya Narain accused Madho Ram Shukla and Devesh of Lavedi also shot fire inflicting injuries to them. When Satya Narain fell down Yogendra Narain @ Yogesh and Mahendra Narain @ Basant gave Lathi blows. He wanted to catch hold Yogendra Narain @ Yogesh and Mahendra Narain @ Basant gave Lathi blows. He wanted to catch hold

Yogendra Narain @ Yogesh and Mahendra Narain @ Basant but could not control them and he fell into the pond." After coming of the witness all the accused ran away from that place. Satya Narain was taken to the District Hospital, Etawah by Constable Shiv Prakash for medical aid. Examination of his injuries was done by Dr. Sharad Mehrotra. Following injuries were noted by him at the time of medical examination:

1. Lacerated wound 4 x 1/2 cm x 1/4 cm deep bleeding fresh on head, 11 cm from left eye brow. Transverse in direction.
2. Lacerated wound in the middle of top Head 5 x 1/2 x 1/2 cm deep 6 cm lateral and backwards, Transverse in direction.
3. Lacerated wound 2 x 1 x 1/2 cm, 11 1/2 cm above right ear.
4. Lacerated wound 3 x 1/2 x 1/2 x 2 1/2 cm backwards to injury No. 3.
5. Lacerated wound 2 1/2 x 1 x 1/2 cm x 1 1/2 cm lateral to injury No. 4.
6. Lacerated wound 4 1/2 cm x 1/2 x 1/2 cm antero posterior direction 9 cm above left ear.
7. Two gun shot wound of entrance on the right side of Abdomen on axillary line 2 cm above iliac crest 1 cm from each other each of size 2 x 1 cm and 1 x 1 cm depth under observation, direction forward, margins inverted no blackening.
8. Gun shot wound of entrance 1 x 1 cm on upper outer quadrant of Right hip 5 cm below and behind injury No. 7 directed wards margins inverted, no blackening depth under observation.
9. Gun shot wound of entrance 1 x 1 cm outer part of Right hip 12 cm below injury No. 7 margin inverted directed forward depth under observation, no blackening.
10. Gun shot wound of exit 3 1/2 x 1 cm on right side of Abdomen 7 cm in front of inj. No. 7 margins everted directed backwards, one shot palpable under skin in anterior abdominal wall 7 cm in front of this injury.
11. Gun shot wound of exit 1 x 1 cm in right inguinal region 9 cm below injury No. 10 margin everted directed backward depth under observation.
12. Multiple Abrasion 4 cm x 4 cm on left knee joint.

Injury No. 7 was found to be dangerous to life. X-Ray of his skull was also advised It was also opined by the doctor that the injuries No. 1 to 6 were caused by some blunt object and injuries No. 7 to 11 by firearm and 12th by friction. Sri S.K. Trivedi, Addl. Sub-Divisional Magistrate was also summoned. On 19.8.1978 at 8.50 p.m. he recorded the statement of Satya Narain who was fully conscious and fit for giving his statement as was also certified by doctor/endorsed at the bottom of the statement (Extract Ka-7). It was stated by the deceased that "first fire was shot by Smt. Prem

Wati @ Bengali, w/o Ram Bharose Lal, which also caused injuries. Second fire was opened by Devesh Chandra that too also caused hurt to him. Madho Ram Shukla opened fire at his mother. Devesh of Lavedi opened fire but he could not see whether that fire caused hurt to him or to his sister. Younger brother of Devesh had given Lathi blows at his head. This all was done by them to take revenge of an incident for which the case was pending. He thereafter fell into the pond. Satya Narain died there in Ursala Hospital, Kanpur. His post mortem was conducted by Dr. S.C. Prasad (PW-6) on 22.8.1978 at about 5.00 p.m. He found the following ante mortem injuries to have been sustained by him:

(A) Injuries on the skull: (Illustrated in Figure)

1. Lacerated wound on back of head (Occipital region) 2 cm x 1 cm x scalp deep.
2. Lacerated wound 3 cm x 1 cm over poster. Part of left. Parietal region 1 cm above inj. No. (1).
3. Lacerated wound V - shaped - 2 cm x 1 cm over mid line of posterior superior aspect of skull 0.5 cm ahead injury No. (2).
4. Lacerated wound circinative in shape 4 cm x 1 cm 4.5 cm ahead to" injury No. (3).
5. Lacerated wound Lt. Parietal region 8 cm above the left ear.
6. Lacerated wound on lateral aspect of outer part of temporo parietal region (Lt.) 3 cm from injury No. (4).

(B) Stitched wound Rt. Part medial 15 cm x 8 cm suture 5 cm right to umbilicus.

(C) Stitched wound 5 cm x 1 cm suture 2 cm from injury No. (B).

(D) Stitched wound 1.5 cm x 1 stitch in right iliac fossa.

(E) Stitched wound 2 cm above iliac crest in Rt. lumbar region 5 cm x 3.5 stitches.

(F) Stitched wound 1 cm x 1 stitch 4 cm below injury No. (E).

(G) Fire arm wound 1 cm diameter margins inverted present on upper part of Rt. buttock 2 cm below iliac crest (Rt).

(H) Stitched wound 1 cm x 1 stitch on lateral aspect of Rt. hip 4 cm below; Rt. iliac crest.

(I) Abrasion in an area of 4 cm x 3 cm on superomedial aspect of Lt. knee.

(J) Cut open wounds stitched both legs lower part 2 cm above medial malleolus 1 stitch each.

The cause of death is also said to have been on account of ante mortem injuries B to H. Further Dr. S.R. Tripathi (PW-10) had conducted post mortem of deceased Smt. Savitri in the District Hospital, Etawah on 20.8.1978 at 4.15 p.m. and noticed

following anti mortem injuries:

1. Multiple gun shot wounds of entrance in area of 30 x 25 cm in whole of abdomen" & lower part of chest 35 in number size .5 x .5 cm muscles & abdomen cavity deep. No. blackening.

2. 4 gun shot wounds of entrance size .5 x .5 cm on the medial side of Rt. upper arm in lower 2/3 communicated with wound of exit .5 x .5 cm size four in number on inner part of back of Rt. upper arm in lower 2/3.

On that day at about 5.00 p.m. he had conducted the post mortem of Smt. Deo Kunwar, wife of Shyam Lal, who sustained the following ante mortem injuries:

Multiple gun shot wound of entrance 12 in number in area of 20 x 16 cm on Rt. side of face and head from nose to ear & chin to temporal region size .6 x .6 cm depth muscle to bone, four brain deep and one on Rt. Macilla. No. Blackening.

2. Two gun shot wounds of entrance each .6 x .6 cum x muscle deep on Rt. Side of chest in axillary bone 20 cm below axilla.

It was also opined by the doctor that the cause of the death was on account of ante mortem injuries.

5. The Investigating Officer Subedar Singh (PW-11) stated that Satya Narain, the injured was brought at the police station at the time of lodging of the report on 16.8.1978 at about 6.30 p.m. and the statement was given by him. That was also recorded by him in the case diary vide Exhibit Ka -19 (reference of which has already been given above). That was also proved by the witness. He after getting the inquest report¹ of the deceased Smt. Savitri and Smt. Deo Kunwar and after preparing the necessary papers sent their dead bodies for post mortem. After extensive investigation charge sheet was submitted by him.

6. Prosecution further examined Prem Narain (PW-3), who is the eyewitness and the complainant of this case. He reiterated the FIR version. Identical is also the statement of Smt. Gayari, who is the sister of the deceased Satya Narain. Both these witnesses have supported the FIR version. It was stated by them that on the fateful evening at about 6.00 p.m. they both were at the Chabootra of their house along with their mother and elder sister Smt. Savitri. Other persons namely Madan Lal Mishra, Thakur Raghubir Singh and mechanic Vishwanath Singh were also sitting on a cot on that Chabootra. Satya Narain left for Etawah and when he was passing in front of the Chabootra of Ram Bharose Lal, Smt. Prem Wati @ Bengalin ~exhorted and told that she would take the revenge and shot fire at him which hit at his right hip. Satya Narain ran towards the pond. He was also followed by Devesh @ Devesh iChandra with his licensed gun, Devesh of Lavedi with country made pistol, Gogendra Narain @ Yogesh and Mahendra Narain @ Basant with Lathi. Seeing such incident complainant's mother Smt. Deo Kunwar, his sisters namely Smt. Savitri; and. Smt. Gayatri also rushed up for the rescue of Satya Narain. As soon as they

reached near to the pond Mad ho Ram Shukla shot fire at his mother, and Devesh @ Devesh Chandra opened fire at Smt. Savitri. They i"both died instantaneously. Devesh @ Devesh Chandra and Mahendra Narain (5) Basant continued to make firing at Satya Narain, who also fell in the mud near to the pond. Thereafter Yogendra Narain @ Yogesh and Mahenda Narain @ Basant gave blows with Lathi at his head. PW-3 further stated that he had taken the injured Satya Narain in a tractor at P.S. Ekdil and written report (Exhibit Ka-5) was given by him at the police station. On that basis the FIR was registered, as was also stated by the PW-2 Constable Clerk Gajendra Singh, who scribed the Ftp (Exhibit Ka-1) and its entry was also made in the G.D. (Exhibit Ka-2). PW-5 Vishwanath who was also present at the Chabootra of Satya Narain also supported to the FIR version and told that he was a tractor mechanic and used to visit the places where he was called for the purpose. He was also making repairs of the traction of Shyam Lal, the father of the decease Satya Narain. On that fateful day he was called at his house. It was around 6.00 p.m. when he was sitting at the Chabootra of/the house of Shyam Lal, he saw that Satya Narain was leaving for Etawah. When Satya Narain reached "near to the Chabootra of Panditaeen (Smt. Prem Wati @ Bengalin), she shot at him by making utterances that he would take the revenge. That fire hit the hip of Satya Narain. The witness further stated about the participation of Madho Ram, Devesh and another Devesh in the aforesaid incident. All were armed with lethal weapons. The other accused namely Yogendra Narain @ Yogesh and Mahendra Narain @ Basant were armed with Lathi. They chased Satya Narain. For the rescue of Satya Narain his mother and sisters also rushed up. The mother of Satya Narain was shot by Madho Ram Shukla and the fire was opened by Devesh of Lavedi at Smt. Savitri, who also succumbed to her injuries. The witness further reiterated the FIR version that Devesh and Basant also shot fire. Satya Narain fell down near to the Tallayia (pond) and there he was further assaulted by Yogendra Narain @ Yogesh and Mahendra Narain @ Ejasant from Lathi. The trial .court on the basis of the evidence adduced by the prosecution and also considering the dying declaration given by Satya Narain held the accused appellants guilty for the offences indicated above.

7. It is submitted by the learned Counsel for the accused appellants that genesis of the incident had itself shrouded with mystery and there is no proximate cause established as to why the appellants would do away with the life of Deo Kunwar and Smt. Savitri by pursuing common object. It is also said that whatever the motive has-been assigned there in relation to Satya Narain that is also not proved and so, the absence of motive with regard to the other victims namely Smt. Deo Kunwar and Smt. Savitri and the circumstances that Satya Narain himself was a hardened criminal, involved in several cases and extended his criminal activities in State of Madhya Pradesh where he was also facing several trials, would be relevant for assessing the evidence laid by the prosecution] It is further said that the report with regard to the murder of Ram Bharose Lal, the husband of Smt. Prem Wati @ Bengalin was lodged by Shyam Lal, the father of Satya Narain, attributing

allegations against the nominated persons namely Tej Singh Yadav though he was hand in gloves with Satya Narain for the killing of Ram Bnarose Lal. Tej Singh Yadav looking to such conduct of Shyam Lal and Satya Narain, who was enjoying his liberty having been released on bail in that case, with the help of his brothers who were hardened criminals got Satya Narain eliminated but the accused appellants have falsely been roped into this case. In this regard the statement Prem Narain (PW-3), who is one of the eyewitnesses of the incident may also be referred, who stated that at the time of the incident his brother Satya Narain, Tej Singh Yadav, Rajan and Ashok were facing trial at Etawah for the murder of Ram Bharose Lal. Out of those persons Satya Narain was on bail. Others were suffering incarceration. On the release of Satya Narain |on bail the accused persons had developed animosity with him. All the three eyewitnesses namely Prem Narain (PW-3), Smt. Gayatri (PW-4) and Vishwanath (PW-5) have also stated that the accused Smt. Prem Wati @ Bengalin from her Chabootra shouted that now the time had come for taking revenge opened fire at Satya Narayan which caused injury at his hip. Such statements of the witnesses cannot be disbelieved and that would establish the motive for the murder of Satya Narain. As regards the non-assignment of the motive for the murder of Smt. Deo Kunwar and Smt. Savitri is concerned the prosecution version is consistent that soon they reached near to the pond for the rescue of Satya Narain, they were also shot by the accused appellants. Since the animosity was already there with Satya Narain and when his other family members intervened they were also shot at. There could be no reason for specifying any motive for the murder of Smt. Deo Kunwar and Smt. Savitri. In the case of [Sardul Singh and Jagtar Singh Vs. State of Haryana](#), it has also been observed by the Apex Court that motive is not always capable of precise proof, if proved, may only lend additional support to strengthen the possibility of commission of the offence by the person accused. Nothing could be pointed out by the learned Counsel for the accused appellants that all the three were got eliminated by Tej Singh Yadav. Thrust was also laid by the learned Counsel for the State that since motive for the crime of Satya Narain has been established, this proof of motive would itself go long way to tilt the scale against the accused which provides the fundamental material to connect the chain of the circumstances.

8. It has next been contended by the learned Counsel for the Appellants that the manner and sequence of the incident as set up by the prosecution do not get corroboration from, the medical evidence and attending circumstances. Such evidence cannot be relied upon. Reference has been made to the statement PW-3 Prem Narain, who is the star witness of the incident. It was stated by him that when Satya Narain was passing through the lane and reached in front of the Chabootra of Smt. Prem Wati @ Bengalin exhorted that now the revenge would be taken and shot fire from that Chabootra. It has also been clarified by him that the lane on which Satya Narain was going, was having slope towards pond and the Chabootra from where the fire was shot by Smt. Prem Wati @ Bengaiin in the standing position was about 3-4 Ft. in height. In that background it is said that injury Nos. 8 and 9 as

shown in the injury report (Exhibit Ka-3) could not possibly come from that fire shot. It is also said that even Dr. Sharad Mehrotra (PW-1) made it clear in his statement that these injuries were forward and caused from lower side to upper side. Sustaining of such injuries was consistently stated by all the three eyewitnesses and also by Satya Narain in his dying declaration. It is urged that the medical evidence is contrary to the version of the so called eyewitnesses. Fire was shot from Chabootra, which was at a height from the lane where Satya Narain was going which had also the slope towards Tallaiya (pond). Such injury could not be explained by the prosecution. We found that the evidence of witnesses more particularly the dying declaration of the injured have been carefully analysed by the trial court. Such discrepancy about the place from where first fire was shot would not affect the credibility of the witnesses. Such nature of injuries Nos. 8 and 9 as shown in Exhibit Ka-3 does not in any way dilute the otherwise cogent evidence of the eyewitnesses. Further no significance can be attached to the fact that some of the wounds show an upward trajectory. It shall be useful to refer the observations made by the Apex Court in the case of [Birendra Rai and Others Vs. State of Bihar](#),

...We do not attach much significance to the fact that some of the wounds showed an upward trajectory. A bullet may possibly be deflected if it hits a hard surface. The fact remains that all the shots fired have caused wound of entry as well as exit wound, and from the description of the wounds given by the doctor it appears that the firing was done from very close range. The evidence of the witnesses is to be same. They have clearly stated that they came near the deceased after firing took place. There was indiscriminate firing at the deceased who fell down after receiving the first injury. One cannot assume that the deceased was lying still in one posture after falling on the ground. He must have been writhing in pain when several shots were fired at him....

9. Strass has been laid by the learned Counsel for the accused appellants that evidence tendered by Prem Narain (PW-3), Smt. Gayatri (PW-4) and Vishwanath (PW-5) is not in harmony with the medical report as the injury Nos. 8 and 9 at the hip could not be sustained by Satya Narain if the fire was shot from a height of 3-4 Ft. when the victim was going in the lane. Such evidence is said to be not acceptable. This part of the statements of the witnesses would not be sufficient to throw out the entire prosecution case. Even if this portion of the evidence as to how those injury Nos. 8 and 9 on Satya Narain could be achieved is found to be deficient not getting corroboration from the medical report, but the residue is sufficient to prove the guilt of the accused. Falsity of a particular material witness or material particular would not ruin a prosecution case from beginning to end. It is merely a rule of caution and not necessarily it should be rejected in totality. Reliance may also be placed in the cases of (i) [The State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh](#), and (ii) [Lehna Vs. State of Haryana](#). Further on the plea raised by the learned Counsel for the appellants that the injury Nos. 8 and 9 of Satya Narain as noticed by the doctor are at variance with the ocular version it may be mentioned that the medical

evidence does not totally improbabilities the ocular evidence and so the veracity of the evidence cannot be suspected See [Surinder Singh and Another Vs. State of U.P.](#), Minor discrepancies in the medical report and eyewitness account would not render this prosecution evidence unacceptable. It was observed by the Apex Court in the case of [Anwar and Others Vs. State of Haryana](#), as under:

...If is true that Dr Jai Kishan (PW- 9) who conducted the autopsy in his post-mortem examination report described Injury 1 as being incised, wound 20 cms x 2 cms causing fracture of the underlying bone. He further noticed lacerated sounds on the neck of the right ear of the size 1 cm x 2 cm causing fracture of the underling bone. While giving evidence in the court, he described an incised wound as Injury 1 and lacerated wounds as Injury 1-A. He further testified that it was a bona fide mistake in not describing these two injuries separately. Mr. Sushil Kumar urged that Dr. Jai Kishan (PW 9) has made material improvement in his evidence before the court to suit the prosecution and to lend support to the evidence of eyewitnesses and therefore, such an improved version which demolishes the evidence of eyewitnesses be not accepted. His submission, is an attractive one but having regard to the facts and circumstances of this cask, it is not possible to accept the same. The consistent evidence of both these eyewitnesses was that A-1 had fired from his pistol on Baddal causing "firearm injuries on his head and this evidence, in our opinion, is quite a Credible one. Both these witnesses have referred to the firearm Injuries on Baddal on his head whereas lacerated wounds were found behind the right ear. In an assault of this nature, the exact description as regard to location of the firearm injury might be no accurate but that by itself would not render their evidence untrustworthy, it needs to be mentioned that medical evidence is an opinion evidence which is used to lend corroboration to the evidence of eyewitnesses. If the medical evidence is found to be totally inconsistent with the ocular evidence on a given set of facts, it would be permissible for the court to reject the ocular evidence. As far as the facts of the present case are concerned as pointed out earlier, the inconsistency between the ocular evidence and the medical evidence is of very minor nature and we do not think it proper to reject the evidence of these two eyewitnesses on that score.

It has next been contended that according to PW-3 Prem Narain when he and his mother and sister were following the accused for the rescue of Satya Narain, non of the accused shot fire at them. It was also clarified by the witness that they were hardly at a distance of 15-20 paces from the accused. Such non sustaining of the injuries by any pf the witnesses would not be a sufficient ground to reject their testimony. The testimony of all these witnesses with regard to the participation of the accused remained consistent.

10. It was submitted by the learned Counsel for the accused appellants that the witnesses are partisan and so no reliance can be placed on their testimony. The testimony of these witnesses cannot be discarded merely on the ground that they

are partisan, interested or closely related to the deceased. Their testimony was found to be trust worthy and credible after making scrutiny with care and caution. Further nothing could be elucidated in the cross examination of these eyewitnesses to discard their evidence. Their evidence finds corroboration with the medical report so; far as the sustaining of the injuries by the deceased there near to the pond. Therefore the evidence of these witnesses could not be rejected even though they are closely related to the deceased. Reliance may also be placed in the case of Pulicherata Nagaraju v. State of Andhra Pradesh 2006 SCW 4143.

11. It has further been argued by the learned Counsel for the accused, appellants that there are two dying declaration made by the deceased, one to the investigating officer and the other to the Executive Magistrate. Such statements appear to have been taken in the presence of several persons and cannot be said to be voluntary and fair statements. No reliance can be placed on those statements. Amongst the items of the incriminating evidence in the form of the dying declarations we would first discuss the statement which was recorded by the investigating officer Subedar Singh (PW-11) on 19.8.1978 at about 6.3p p.m. at the police station. Heaving apart the question whether it can be considered as dying declaration or statement recorded u/s 161 Cr.P.C. we have no doubt that this statement is a manipulated document introduced by overzealous investigating officer to buttress the prosecution case. This entire statement refers to above also goes to the extent of reiterating the total FIR version. The intrinsic worth and reliability of the so called dying declaration becomes doubtful from its tenor and contents themselves.

12. Coming to the dying declaration recorded by Sri S.K. Trivedi, Sub-Divisional Magistrate, Etawah at 8.50 p.m. It is said that the statement so recorded by the Executive Magistrate does not appear to be accurate or an unalloyed version of the decease. The possibility of certain embellishment cannot be ruled out. It cannot be relied upon. In this regard it may be mentioned that the learned magistrate recorded the statement of the victim while he was conscious and oriented as clarified by the doctor at that time. The victim gave the sequence of the injuries suffered by him and others. It was stated by him that first fire was shot by Smt. Bengali wife of Ram Bharose Lal which hit him. Second fire was made by Devesh. which too caused hurt to him. Madho Ram Shukla shot fire at his mother. Devesh of Lavedi made fire which he exactly could not tell whether it caused hurt to him or his sister. Devesh and his two younger brother attacked at his head. This was all done by them for taking revenge because a case pending against him. After sustaining firearm injuries he fell into the pond. This statement read as whole does not lead to the inference that the Executive Magistrate did not at all record the statement. If any third person was present there he had shown his ignorance of anybody's presence at that time. Though the learned Counsel for the accused appellants had drawn out attention to the deposition of PW-1 Dr. Sharad Mehrotra that when the victim was brought at the hospital police officers and several persons were present there. In a critical condition if he was brought to the hospital by several persons that

would not create doubt about the voluntary statement of the victim. All the requisite formalities were observed while recording the dying declaration in the presence of the doctor who also certified about the deceased being conscious and in fit condition to make the declaration. There appears no inhibition for believing the said dying declaration. The acceptability of the alleged dying declaration (Exhibit Ka-4) in the instant case has been scrutinized carefully. It is appearing to be true and free from any effort to introduce the deceased to make a false statement and it is coherent and consistent. There appears no legal impediment to make it a basis of conviction. There is no material or record to show that this dying declaration was result of project of imagination, tutoring and prompting. It is trustworthy and has credibility. The Apex Court in the case of Muthu Kutty v. State by Inspector of Police Tamil Nadu AIR 20005 SC 1473, formulated certain guidelines for testing the trustworthiness of the dying declaration a sunder:

- (i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. See [Munnu Raja and Another Vs. The State of Madhya Pradesh,](#)
- (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. See [State of Uttar Pradesh Vs. Ram Sagar Yadav and Others,](#) and [Ramawati Devi Vs. State of Bihar,](#)
- (iii) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, promoting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. See [K. Ramachandra Reddy and Another Vs. The Public Prosecutor,](#)
- (iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. See [Rasheed Beg and Others Vs. State of Madhya Pradesh,](#)
- (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. See [Kake Singh Alias Surendra Singh Vs. State of Madhya Pradesh,](#)
- (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction See [Ram Manorath and Others Vs. State of Uttar Pradesh,](#)
- (vii) Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected See [State of Maharashtra Vs. Krishnamurti Laxmipati Naidu,](#)
- (viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. See [Surajdeo Ojha and Others Vs. State of Bihar,](#)

(ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. See [Nanhau Ram and Another Vs. State of Madhya Pradesh,](#)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. See [State of U.P. Vs. Madan Mohan and Others,](#)

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted. See [Mohanlal Gangaram Gehani Vs. State of Maharashtra,](#)

Just in the background of the legal principle as enunciated above the dying declaration recorded by the Magistrate has credibility. On the basis of such oral evidence and also of the dying declaration made by the deceased Satya Narain, the complicity of the accused in the aforesaid offences is established.

13. It is next submitted by the learned Counsel for the accused appellants that out of surviving accused appellants, Mahendra Narain @ Basant was about 15 years of age on 9.6.1981 when his statement was recorded. Even the learned Sessions Judge has [also endorsed at the bottom of his statement that he is appearing to be of 15 years of age. Since the incident had taken place in August 1978 and so when this incident had taken place the accused Mahendra Narain @ Basant was juvenile and hardly about 12 years of age. The law throws a cloak of protection around juveniles and seeks to isolate them from criminal offenders because the emphasis placed by law is not on incarceration but on reform. Law also protects the young children from condemnation with hardened criminals as is also apparent from Section 27 of the Children Act, 1951 (the Act) which provides, subject only to a few limited and exceptional cases referred to in the proviso, that notwithstanding anything contained to the contrary no court can sentence a child to death or imprisonment for any term or commit him to prison in default of payment of fine. Even where a child is convicted of an offence, he is not to be sent to a prison but he may be committed to an approved school u/s 29 or either discharged or committed to suitable custody u/s 30 of the Act. Even in the case of Pratap Singh v. State of Jharkhand 2005 (3) JIC 129 which is on the Juvenile Justice Act, 1986 it has been held that the determination of the age of the juvenile would be the date of the occurrence. This Court in the case of Gangiya and two Ors. v. State of U.P. 2006 (55) ACC 894 held that no order of sentence can be passed against a child who was juvenile at the relevant date whether or no he" has now attained the age of majority.

14. In the net result, we conclude that the appeal stands abated on behalf of accused Yogendra Narain @ Yogesh and Devesh Chandra, conviction and sentences of the surviving accused appellants Smt. Prem Wati @ Bengalin and Madho Ram are upheld. The conviction of Mahendra Narain @ Basant u/s 147, 302/149 IPC for the murder of Satya Narain and further; conviction under Sections 302/149 IPC for the murder of Smt. Deo Kunwar are affirmed. The sentence passed against Mahendra Narain @ Basant is quashed as he was child as per U.P. Children Act, 1951 at the time of the incident. He shall not suffer any sentence He is on bail. He need not to surrender. Send the copy of the judgment to the lower court for incorporating necessary entry in the relevant register and for taking necessary steps for ensuring the arrest of Smt. Prem Wati @ Bengalin and Madho Ram to serve out the sentences awarded to them.