
(2012) 02 AHC CK 0357

Allahabad High Court

Case No: Criminal Appeal No"s. 5201, 5929 and 5985 of 2007

Nannu and others

APPELLANT

Vs

State of U. P.

RESPONDENT

Date of Decision: Feb. 13, 2012

Acts Referred:

- Arms Act, 1959 - Section 25
- Criminal Procedure Code, 1973 (CrPC) - Section 294, 313, 372, 378, 436
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 307

Citation: (2012) 2 ACR 1261

Hon'ble Judges: Yatindra Singh, J; Ram Surat Ram, J

Bench: Division Bench

Advocate: Ram Babu Sharma, Dilip Kumar, Rajiv Gupta and Rajrshi Gupta, for the Appellant; J. S. Sengar, A.G.A., for the Respondent

Judgement

Yatindra Singh and Ram Surat Ram (Maurya). JJ.

1. The main point involved in these three appeals The appeals arise out of conviction and sentence dated 8.8.2007, passed by Additional District and Sessions Judge [Fast Tract Court (F.T.C.)-5], Gautam Buddh Nagar in S.T. No. 72 of 2002. is :

When should a Court accept a part of the statement of a witness, whose other part of the statement has been disbelieved.

THE FACTS

An incident happened at about 17 : 00 hours on 19.10.2001. In this incident Yusuf (the deceased) son of Nanuwa and Rahees (the injured) son of Bholu received injuries.

2. Babu (the informant) son of Raseed lodged the F.I.R. of the incident at about 18 : 10 hours naming six persons namely Gabbu (accused (Ac)-1) Here the abbreviation

Ac stands for accused and the number is the serial, number of the accused in the F.I.R., Jallu (Ac-2), Nannu (Ac-3) all sons of Karimullah, Akram (Ac-4) son of Nannu, Bholu (Ac-5) son of Miduwa (he is other than the father of the injured) and Saleem (Ac-6) son of Samuwa (all six of them are jointly referred to as the accused). The F.I.R. was registered as Case Crime No. 116 of 2001, under Sections 147, 148, 149, 452, 307, 302/34, 504, 506, I.P.C.. Police Station-Kakora, district Gautam Buddh Nagar.

3. The allegations in the F.I.R. are as follows :

- ❖ In the morning of 19.10.2001, at about 10 : 00 hours, there was some altercation between informant's son Irshad and the injured on the one side and Akram (Ac-4) son of Nannu on the other side. This was settled due to intervention of the villagers;
- ❖ On the same day, at about 16 : 30 hours, there was again altercation between the same" persons at the health centre. The informant's children came back because of the altercation;
- ❖ Then at about 17 : 00 hours, the accused came to the informant's house. Gabbu had a D.B.B.L. gun and the remaining had country made guns. They started saying that they would not leave them alive and started firing;
- ❖ Gabbu's shot hit the deceased and he died on the spot. His dead body is lying inside the house;
- ❖ Jallu's shot hit the Injured and the informant has brought the Injured alongwith him;
- ❖ At the time of the incident, Saleem son of Saddiq, Budhuwa son of Bahadur, Furkan son of Bholu (younger brother of the injured) were also there;
- ❖ After seeing the other residents of the mohalla, the accused ran away. The necessary action be taken against them.

4. The police investigated the case and submitted a charge-sheet.

5. The case was committed to the sessions court and was numbered as S.T. No. 72 of 2002.

6. Shiv Kumar Sharma [Sub-Inspector of Police (P.W. 8)] initially conducted the investigation. He arrested Gabbu (Ac-1) (on 20.10.2001), the next day of the incident, alongwith his licensed D.B.B.L. gun number 7110 (made in " Spain) (the D.B.B.L. Gun) and six live cartridges.

7. Gabbu (Ac-1) accepted that the D.B.B.L. Gun Was his licensed gun but claimed that it was taken away from his house.

8. A country made gun is said to have been recovered at the instance of Jallu (Ac-2) on 26.10.2001 at 17 : 00 hours. As this was unlicensed gun, the District Magistrate

also granted permission to prosecute Jallu u/s 25 of the Arms Act on 7.12.2001; an F.I.R. was also lodged in this connection on 26.10.2001. This case was also committed to the sessions court. It was numbered as S.T. No. 73 of 2002 and was connected with S.T. No. 72 of 2002.

9. The Sessions Judge framed charge on 15.4.2002.

❖ The accused were charged under Sections 147, 148, 149, 452, 302, 307 read with Sections 34, 504 and 506, I.P.C.;

❖ Jallu (Ac-2) was also charged u/s 25 of the Arms Act.

10. Among others, the prosecution filed the following documents :

❖ F.I.R. dated 19.10.2011 Ext. Ka-18 :

❖ F.I.R. dated 26.10.2001 Ext. Ka-20 :

❖ Written report dated 19.10.2001 Ext. Ka-1;

❖ Recovery memorandum of the country made gun dated 26.10.2001 Ext. Ka-5;

❖ Recovery memorandum of blood stained and plain earth dated 19.10.2001 Ext. Ka-8;

❖ Recovery memorandum of empty cartridges dated 19.10.2001 Ext. Ka-9;

❖ Injury report of the injured dated 19.10.2001 Ext. Ka-4;

❖ Post-mortem report of the deceased dated 20.10.2001 Ext. Ka-3;

❖ Report of the Vidhi Vigyan Prayogshala dated 16.8.2002 paper No. 64 Ka/4 and 5;

❖ Report of the Vidhi Vigyan Prayogshala dated 15.4.2002, paper No. 64 Ka/7;

❖ Report of the Vidhi Vigyan Prayogshala dated 15.4.2002 paper No. 64 Ka/8;

❖ Order of the District Magistrate dated 7.12.2001. Ext. Ka-11 :

❖ Site plan of the place of the incident with the index dated 19.10.2001 Ext. Ka-7;

❖ Site plan of the place of recovery of the unlicensed gun with the index dated 17.11.2001 Ext. Ka-10.

11. The prosecution examined the following witnesses :

❖ Babu (P.W. 1) : The informant, an eye-witness however, we have disbelieved his presence;

❖ Saleem (P.W. 2) : An eyewitness however, we have disbelieved his presence;

❖ Furkan (P.W. 3) : An eyewitness. We have believed his presence and only a part of his statement;

- ❖ Rahees (the injured) (P.W. 4) : The injured eye-witness. We have believed his presence and only a part of his statement;
- ❖ Dr. R. K. Dabre (P.W. 5) : The doctor, who conducted the post-mortem of the deceased;
- ❖ Dr. S. K. Garg (P.W. 6) : The doctor, who examined the injured;
- ❖ Shyam Pal Singh (P.W. 7) : S.I., the second Investigating Officer;
- ❖ Shiv Kumar Sharma (P.W. 8) : S.I., the first Investigating Officer who conducted the inquest, prepared the site plan of the place of the incident. He had also arrested Gabbu (Ac-1) alongwith the D.B.B.L. Gun and six live cartridges as well as Akram (Ac-4)
- ❖ Madan Singh Visth (P.W. 9) : A.S.I., proved the chik, F.I.R.

12. Bholu (Ac-5) died during pendency of the trial. His case was separated and later on was abated.

13. The statements of the remaining five accused, u/s 313. Cr. P.C., were recorded on 18.8.2004. The accused denied their involvement in the incident and stated that they were falsely implicated as the son and brother of the informant as well as the deceased were convicted at the instance of one Aas Mohammad, nephew of Gabbu (Ac-1).

14. The accused neither filed any documentary evidence nor examined any witness.

15. The trial court after considering the evidence on record :

(i) Acquitted Jallu (Ac-2) u/s 25 of the Arms Act on the ground that the recovery of the firearm was not proved;

(ii) Acquitted all accused u/s 504, I.P.C. due to lack of evidence;

(iii) Convicted the accused under other sections with which they were charged and awarded the following sentences :

- ❖ One year simple imprisonment u/s 148, I.P.C.;

- ❖ Two years simple imprisonment u/s 452, I.P.C. and a fine of Rs. 1,000 and on failure to pay the fine, one month simple imprisonment;

- ❖ One year simple imprisonment u/s 506, I.P.C.;

- ❖ Life imprisonment u/s 302 read with Section 149, I.P.C. and a fine of Rs. 5,000 and in default of payment of fine, one year simple Imprisonment;

- ❖ Ten years rigorous imprisonment u/s 307, I.P.C. read with Section 149, I.P.C. and a fine of Rs. 5,000 and in default to payment of fine, one year simple imprisonment.

As the accused were awarded sentence u/s 148. I.P.C., no sentence was awarded u/s 147. I.P.C. All sentences were to run concurrently.

16. The five accused, (jointly referred to as the appellants) have filed three different appeals :

◆ Nannu, Akram and Saleem (Ac-3, 4 and 6) have filed Criminal Appeal No. 5201 of 2007;

◆ Jallu (Ac-2) has filed Criminal Appeal No. 5929 of 2007;

◆ Gabbu (Ac-1) has filed Criminal Appeal No. 5985 of 2007.

POINTS FOR DETERMINATION

17. We have heard Sri Rajiv Gupta and Sri Rajarshi Gupta for the appellants and Sri Mahendra Singh Yadav, A.G.A. for the State. The following points arise in the case :

(i) Whether the accused fired the shots from inside the house :

(ii) What was the motive for the crime;

(iii) Whether the eyewitnesses were present on the spot at the time of the incident;

(iv) Whether the appellants are guilty;

(v) Whether the bail, as contemplated u/s 437A, Cr. P.C., should have been taken from the appellants ?

1st POINT : FIRED SHOTS FROM KHARANJA

Site Position

18. The site plan of the spot (Ext Ka-7) was prepared by Shiv Kumar Sharma (P.W. 8) on the day of the Incident. In the site plan :

◆ The house of the informant is at the north-east corner;

◆ The informant is said to have seen the incident from place "B", which is in front of his house;

◆ Towards west of the house of the informant is gher of Gunny and then there is passage and the house of Gunny :

◆ Towards south of these houses and gher is brick paved road (kharanja);

◆ The empty cartridges were found at place "K". It is towards south of the gher and is on kharanja :

◆ The shots were said to have been fired from place shown as G". It is two feet east of "K" and 30 paces west of spot "B" from where the informant is said to have seen the incident;

- ❖ On the south of kharanja and opposite Gunny's gher is aangan (courtyard) and house of father of the Injured. The dead body was found in this courtyard;
- ❖ Towards the east of the house of the injured's father is his verandah and baithak;
- ❖ The dead body was at spot "A" in the courtyard of the injured's father. It is about 10 paces south of spot "G" from where the shots were said to have been fired.

19. For better understanding of the spot position, the site plan (Ext. K-7) alongwith the notes is attached as Appendix-1 to this judgment. The appellants have denied their presence on the spot and involvement in the crime but they do not challenge the site map.

20. The eye-witnesses have not deposed otherwise except on the two points. According to them :

- (i) The accused fired the shots from inside the house and not from the spot "G";
- (ii) The injured received injuries in the courtyard and not at the spot "P" in the verandah.

Firing from Outside of the House

21. In the F.I.R.. it is not clear if the shots were fired from inside or outside of the house but the eyewitnesses stated that the shots were fired from close range after entering the house. This is contrary to what has been shown in the site plan (Ext. K-7) prepared the same day. The question is, which version is correct?

22. Five empty cartridges were also recovered (Ext. Ka-9) from the kharanja. An empty cartridge from a shot, generally falls in the vicinity of the spot from where it is fired. No empty cartridge was found inside the house. There is no evidence that cartridges were inside the house and then removed outside on the kharanja.

23. In case, the firing was from inside the house then cartridges cannot fall at the place from where they were recovered. This indicates that the firing might have been done from the kharanja rather than from inside the house.

24. The courtyard where dead body was found is 9 paces (east-west) long and 12 paces (north-south) wide.

25. In the site plan (Ext. Ka-7), it is mentioned that the marks of pellets were also found on the southern and eastern wall of the courtyard. This was also stated by Shiv Kumar Sharma (P.W. 8), who had prepared the site plan. This shows there was dispersal, which is not possible if the shots were fired from the close range.

26. Dr. R. K. Dabre (P.W. 5) conducted the post-mortem of the deceased. This report is Appendix-2 to this judgment. He stated that:

- ❖ There was no blackening or tattooing on the body; and

◆ The pellets were shot from one weapon.

27. According to the prosecution case and the statement of the eye-witnesses, the shot was fired by Gabbu (Ac-1) hit the deceased. He had a standard licensed D.B.B.L. Gun and not a country made gun as assumed by the trial court. This also indicates that the shots were not fired from close range.

28. Dr. S. K. Garg (P.W. 6) examined the injuries of the injured. This report is Appendix-3 to this judgment. He also stated that there was no blackening or tattooing on the injuries of the injured." In his cross-examination, he stated that he could not say if the injuries could be caused from the shots fired at the distance of 15-20 feet but he also clarified that :

◆ The injuries are not possible from shots fired from close range; and

◆ The injuries were not caused by the shots, fired from a close range.

29. The medical evidence also negates the statements of the eyewitnesses that shots were fired from the close range.

30. In our opinion, the shots were not fired inside the house but were from outside the house near the place on the kharanja where empty cartridges were found. But why have the eye-witnesses stated to the contrary? There appears to be a reason for the same and we will refer to it, when we discuss the third point.

2nd POINT : NO MOTIVE

31. In the F.I.R., it was mentioned that the motive for the crime was altercation between the informant's son and the injured on one side and Akram (Ac-4) on the other side at two different times of the same day : one at 10 : 00 hours and the other at 16 : 30 hours.

32. All eye-witnesses (P.W. 1 to P.W. 4), including the informant, have denied the second incident. Only the first incident at 10 : 00 hours has been stated and this was said to be the motive for committing the crime. There was suggestion from the accused side regarding the cause of the altercation but it was denied by the prosecution side. There is no evidence as to why this altercation took place.

33. The injured (P.W. 4) and Furkan (P.W. 3) are real brothers. The deceased is not their real uncle but was a cousin of their father. They have stated that:

◆ Prior to this date, there was no quarrel between, the accused and the deceased or the Injured;

◆ After the altercation in the morning, the parties had gone to the police station and the matter was settled.

There was no other enmity between the parties.

34. In our opinion, the altercation on the day of the incident could not be the motive for committing the crime. The motive for the crime might be something else.

35. The motive for the crime could be money transaction between the parties :

- ◆ There was a suggestion from the defence that the Saleem (P.W. 2) owed some money to the accused side and for that reason the accused were falsely implicated;

- ◆ The injured has also stated that he had gone to collect money in the day time.

However, there is no documentary or credible evidence for the same.

36. In our opinion, the prosecution has not been able to establish any motive and the motive mentioned in the F.I.R. is too weak to commit the crime of murder, especially when dispute was already settled.

37. The absence of motive or motive being weak may be important in a case of circumstantial evidence nevertheless, it cannot be a guiding factor in a case of direct evidence and that too, in a case of an injured eyewitness.

3rd POINT : ONLY P.W. 3 and 4--WERE PRESENT

Injured (P.W. 4) and Furkan (P.W. 3) were Present

38. Dr. S. K. Garg (P.W. 6) is the doctor who had examined the injured (P.W. 4). He has stated that these injuries [see Appendix-3) were caused by a firearm.

39. The injuries are on the left shoulder, left arm, and on the face. No one would inflict firearm injuries on his left side at the height of the shoulder and on his face. There is also no suggestion from the defence that these injuries were self inflicted : the presence of the injured cannot be doubted.

40. Furkan (P.W. 3) is younger brother of the injured. He has also stated that he was present on the spot. He was aged about 13 years at the time of incident. It is natural for him to be present in his own house.

41. The counsel for the appellants submits that:

- ◆ According to the prosecution case, there was indiscriminate firing;

- ◆ It was from a distance (as held by us while discussing the first point);

- ◆ Furkan (P.W. 3) was not injured and this shows that he was not present.

42. Furkan (P.W. 3) was 13 years old at the time of the incident. He was administered oath by the Court as it was found that he understood the questions and could answer the same.

43. Furkan (P.W. 3) deposed that when firing started, he hid himself behind a wall. A 13 years old boy is small enough to easily hide behind a wall. He was in his own house. His presence cannot be disbelieved merely on the ground that there was no

injury. In our opinion, he was also present at the time of the incident on the spot.

Presence of the informant (P.W. 1) and Saleem (P.W. 2)--Doubtful

44. In the site plan (Ext. Ka-7) [see Appendix-1], the informant is shown to be standing in front of the house at spot "B" at the time of the incident. This is 30 paces east of "G" from where the shots were fired. The dead body was found in the courtyard of injured's father at spot "A", which is 10 paces south of spot "G". The informant's house is diagonally opposite to the house of the injured's father : the distance would be more than 30 paces : it should be roughly 31.6 paces.

45. The informant in the F.I.R. has mentioned that the accused came to his house, however, in his statement he has stated that the accused entered the house of the injured's father, where he was also present. His statement is different than the F.I.R. version. The statement of the informant regarding his position at the time of the incident is also different than his position shown in the site map prepared on the day of the incident by Shiva Kumar Sharma (P.W. 8).

46. In the F.I.R. three incidents are said to have taken place :

- ◆ The first one at 10 : 00 hours;
- ◆ The second one at 16 : 30 hours; at the health centre :
- ◆ The third one at 17 : 00 hours; when shooting took place.

47. The injured (P.W. 4) and Furkan (P.W. 3) have denied the second incident. The informant has also ignored the second incident in his statement and stated that he had never mentioned about the same. However, in the written complaint (Ext Ka-1), which has his thumb impression, it was mentioned.

48. The dead body of the deceased was found inside the verandah of the injured's father. It is 9 paces long and 12 paces wide. The informant has stated that apart from the deceased and the injured, there were six buffaloes as well as four other persons. Out of these four, three were produced as eye-witnesses.

49. The informant P.W. 1 has also stated that the back of the deceased and the injured was towards main door from where the accused are said to have entered and fired the shots.

50. The injuries on the deceased and the injured (see Appendix-2 and 3) are not on the back but on the chest and left side of the face. This is not possible if their back was towards the main door namely north side : as shots were fired from the spot that is further north.

51. The injured has stated that their back (injured's and Deceased's) was not towards main door. The informant, (P.W. 1) 's statement is to the contrary. The informant could also not state toward which side, the accused went away.

52. While deciding the first point, we have held that shots were not fired from inside the house but from a distance near to the gher of Gunny. It is surprising that no injury was caused to the buffaloes "or the informant or Saleem (P.W. 2). This creates a doubt in our mind regarding presence of the informant, or the buffaloes, or other persons.

53. Saleem (P.W. 2) is the person who was examined as an independent eye-witness. He is a chance witness and not related to the victim side. He stated that:

- ◆ He was ill and was going to get medicine;
- ◆ He was 5-6 paces ahead of the accused, who were bearing firearms;
- ◆ The accused started abusing and entered the house;
- ◆ He also entered the house with the accused.

54. From the statement of Saleem (P.W. 2), it is clear that there was going to be an altercation inside the house between the accused and the victims. The accused had firearms with them yet. P.W. 2 chose to enter the house with them. This is not natural. The normal tendency is to distance oneself from trouble. In the site map, prepared on the day of the incident, his presence is not shown. His presence is also doubtful.

Reason for Prosecution Case of Close Range Shots

55. At the end of discussion on the first point, we had indicated that we will refer the reasons for the prosecution case that shots were fired from close range and a few words in this regard are appropriate at this place.

56. The prosecution wanted to provide a reason for presence of the Informant and other persons on the spot; Budhuwa was other person, who was said to be present but was not examined by the prosecution. It appears that presence of buffaloes was mentioned so as to provide a reason for presence of other persons. It was said that the others had come to see the buffaloes. However, the place of buffaloes was neither indicated in the site plan nor deposed by any of the witnesses.

57. There were no injuries on the buffaloes or any person other than the deceased and the Injured. This was not possible in case the shots were fired from a distance as in such event, there was bound to be dispersal. Perhaps, the case of close range firing was taken, in order to get away from this difficulty.

58. In our opinion,

- ◆ The informant (P.W. 1) and Saleem (P.W. 2) were not present at the time of the incident;
- ◆ Furkan (P.W. 3) and the injured (P.W. 4) were present.

59. We have believed the presence of P.W. 3 and P.W. 4. However, we have disbelieved a part of their statement. The question whether should we believe any part of their statement, or not will be considered while discussing the next point.

4th POINT : ONLY GABBU AND JALLU ARE GUILTY

60. The counsel for the appellants submits that:

- ◆ The presence of the informant (P.W. 1) and Saleem (P.W. 2) has been disbelieved by the Court;
- ◆ A major part of the evidence of Furkan (P.W. 3) and the injured (P.W. 4) (relating to place of firing and presence of the buffaloes and other persons) has been disbelieved;
- ◆ The statement of P.W. 3 and P.W. 4 regarding involvement of the appellants should also be disbelieved : and
- ◆ The appellants are entitled to benefit of doubt.

61. In substance, the counsel for the appellants is pressing us to apply the legal maxim of "falsus in uno, falsus in omnibus".

Legal Maxim--Not Applicable

62. The aforesaid legal maxim is a Roman legal principle. It means false in one thing, false in everything : a witness who wilfully deposes falsely is not a credible witness for any matter. This maxim is generally used to impeach the credibility of a witness.

63. The Courts in India have held (see below) [Nisar Ali Vs. The State of Uttar Pradesh](#), ; [Sohrab and Another Vs. The State of Madhya Pradesh](#), ; [Laxman and Others Vs. The State of Maharashtra](#), ; [Rizan and Another Vs. State of Chhatisgarh, through The Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh](#), ; [Ram Udgar Singh Vs. State of Bihar](#), ; [Pandurang Sitaram Bhagwat Vs. State of Maharashtra](#), ; [Syed Ibrahim Vs. State of Andhra Pradesh](#), ; [Rajendra and Another Vs. State of Uttar Pradesh](#), and [Ranjit Singh and Others Vs. State of Madhya Pradesh](#), .

- ◆ The maxim to be a rule of caution rather than a mandatory rule of evidence and inapplicable in our country;
- ◆ Neither it to be a sound rule of law, nor a rule of practice for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth, or at any rate, exaggeration, embroidery, or embellishment.

The result is that the evidence led by the parties has to be appreciated as a whole and the grain is to be separated from the chaff.

64. In other countries also, the maxim has been applied in the same way. The "Corpus Juris Secundum" Volume 98 paragraph 469 explains the law in U.S. as :

Under the maxim, falsus in uno, falsus in omnibus, as strictly interpreted, if a witness testifies falsely as to any one material part of his testimony, it should be discarded as a whole and cannot be relied on for any purpose whatever, unless corroborated. This rule is not inflexible, or to be applied in all cases, and by the weight of authority the maxim is not a mandatory rule of evidence, but is rather a permissible inference that the jury may or may not draw.

The general rule..... is that while the fact that a witness has wilfully testified falsely as to a material matter in the case or proceeding which is then on trial or is being tried lays him open to suspicion and Justifies a jury in rejecting all of his testimony except such part thereof as may be sustained by some evidence in corroboration of his statements."

65. In our opinion, even if some parts of the oral testimony of a witness is false, the other part of oral testimony may be accepted if that part is supported by other credible evidence. Let's consider the remaining part of the testimony of the injured (P.W. 4) and Furkan (P.W. 3] and find out if it is corroborated or not.

66. There were six accused. They can be easily classified into two groups :

- ◆ The first one consisting of Gabbu (Ac-1), who was given specific role of shooting the deceased and Jallu, (Ac-2), who was also given specific role of shooting the injured;

- ◆ The second one consisting of remaining four accused, who were not given any specific role of shooting anyone but were said to have fired in the air. One among them {Bholu (Ac-5)} is no more.

Let's consider the involvement of these two groups separately. First, we will consider involvement of the two accused who were given specific roles.

First Group-Given Specific Role-Guilty

67. Gabbu (Ac-1) had a licensed D.B.B.L. gun. The D.B.B.L. Gun alongwith six live cartridges were recovered from him. The manner of recovery has been disputed but there is no dispute that the D.B.B.L. Gun of Gabbu alongwith six live cartridges were taken away by the police.

68. The D.B.B.L. Gun alongwith six live and five empty cartridges (recovered from the site of the crime) were sent to the Vidhi Vigyan Prayogshala, Agra for ballistic report. The ballistic report is dated 16.8.2002 and is paper No. 64 Ka/4 and 5. It is a report by an expert and is admissible in evidence u/s 294, Cr. P.C.

69. In the ballistic report, the five empty cartridges were numbered as EC-1 to EC-5; six live cartridges were marked as EC-6 to EC-11; and the D.B.B.L. Gun was marked with 1/2002. According to the ballistic report :

- ◆ The empty cartridge EC-1 was fired from right barrel of the D.B.B.L. Gun; and

◆ The empty cartridge EC-2 was fired from left barrel of the D.B.B.L. Gun.

This clearly proves that the D.B.B.L. Gun was used in committing the crime.

70. Considering that--

◆ The injured (P.W. 4) and Furkan (P.W. 3) have stated that Gabbu (Ac-1) fired a shot at the deceased that killed him. And there is no contradiction in their statement;

◆ The D.B.B.L. gun was used in committing the crime;

◆ There is neither any evidence nor any suggestion to any witness or statement u/s 313, Cr. P.C. that the D.B.B.L. Gun of Gabbu (Ac-1) was stolen or taken away by some one else--

The presence of Gabbu (Ac-1) at the time of incident cannot be negated. There is no reason to disbelieve that part of testimony of the injured (P.W. 4) and Furkan (P.W. 3) that Gabbu (Ac-1) fired the shot that killed the deceased.

71. The ballistic report (paper No. 64) also states that empty cartridges EC-4 to EC-5 were not fired from the D.B.B.L. Gun and no comparison could be done with the empty cartridge EC-3 as there were no distinctive marks. It shows that at least two guns were involved in the incident : the D.B.B.L. Gun and another gun.

72. It is difficult to imagine a person carrying a D.B.B.L. gun in one hand and a single barrel gun in the other hand and firing shot with both. In view of this, at least one more person was involved.

73. The injured (P.W. 4) has stated that the shot fired by Jallu (Ac-2) had hit him. This was also stated by Furkan (P.W. 3). There is no contradiction between the two. This also finds corroboration from the ballistic report that at least one more gun was involved. In view of this, we have no reason to disbelieve this part of their statement that Jallu was present and fired a shot that hit the Injured.

74. The ballistic report supports the statement of Furkan (P.W. 3) and the injured (P.W. 4) regarding involvement of Gabbu (Ac-1) and Jallu (Ac-2). One of the eye-witnesses is an injured eye-witness. It is correct that the prosecution has not been able to prove the motive of the crime but it is equally correct that the defence has not been able to suggest any reason as to why Gabbu (Ac-1) or Jallu (Ac-2) are being falsely implicated in the crime.

75. The counsel for the appellants submits that:

◆ Aas Mohammad, nephew of Gabbu (Ac-1), had instituted a case u/s 308, I.P.C. It was merely to terrorise the prosecution witnesses In that case that the accused were falsely implicated;

◆ Saleem (P.W. 2) owed some money to the accused side and it is for this reason they have been falsely implicated.

76. In our opinion, the aforesaid suggestions cannot be the reason for the injured (P.W. 4) and Furkan (P.W. 3) for not telling the names of the real assailants and to falsely implicate Gabbu (Ac-1) and Jallu (Ac-2) as :

- ◆ The case u/s 308, I.P.C. is said to be against the son and brother of the informant and the deceased. It was not against the injured;
- ◆ The money is said to be owed by Saleem (P.W. 2) and not by the injured (P.W. 4) or Furkan (P.W. 3).

77. We have no reason to doubt that in case the shots were fired by someone else, then the injured (P.W. 4) and Furkan (P.W. 3) would have named them instead of naming Gabbu (Ac-1) and Jallu (Ac. 2). In our opinion, the prosecution has proved its case beyond reasonable doubt against Gabbu (Ac-1) and Jallu (Ac-2). However, the same cannot be said about the other group of three appellants who have not been given any specific role of shooting anyone.

Other Group--Without Specific Role-- Not Guilty

78. The A.G.A. submits that :

- ◆ The presence of Furkan (P.W. 3) and the injured (P.W. 4) has been believed;
- ◆ They have also stated that Nannu (Ac-3), Akram (Ac-4), and Saleem (Ac-6) were also present on the spot and fired the shots in the air;
- ◆ This part of the statement of P.W. 3 and P.W. 4 should also be believed; and
- ◆ They are also guilty of the crime.

79. According to the prosecution case, the main target of the accused was the injured and not the deceased. The injured did not die. There was no occasion for anyone to shoot in the air and not on their main target. This group did not fire shots at the injured. This indicates that this group might not be present on the spot.

80. Six accused were named in the F.I.R. It is accepted that they are from the same family. Three are real brothers, fourth one is son of one of the brothers and the remaining two others are of the same family from the mother's side of the brothers. It is not uncommon in our country that when a crime is committed, everyone of the family is named even if he is not involved.

81. Furkan (P.W. 3) was thirteen years old child at the time of the incident : it is an Impressionable age. He may readily believe what others say even though he might not have seen it.

82. The injured (P.W. 4) has stated that immediately after he was hit, he fainted and regained consciousness after a day. He might not remember as to who was present from the accused side and believe what others say. He could easily be tempted to involve others of the same family even though, they were not involved.

83. Considering that-

- ◆ A part of evidence of the Injured (P.W. 4) and Furkan (P.W. 3) has been disbelieved and the part disbelieved might be to improve the prosecution case :
- ◆ Neither any specific role has been assigned to Nannu (Ac-3), Akram (Ac-4), Saleem (Ac-5) in the F.I.R., nor in the oral testimony; and
- ◆ There is no corroborative evidence as far as they are concerned.

The presence of Nannu (Ac-3), Akram (Ac-4) and Saleem (Ac-63 is doubtful. They are entitled to benefit of doubt.

5th POINT : FRESH BAIL BONDS--A SUGGESTION

84. These criminal appeals were nominated to one of us at the hearing stage, as they were released by other benches. At the time of hearing neither the counsel for the parties pointed out non-compliance of Section 437A, nor it crossed our mind to check it.

85. This appeal was heard and immediately thereafter the judgment was dictated in the open Court. It was only after dictating the judgment that we realised that bail in terms of Section 437A has not been obtained. Requiring the appellants at this stage to furnish bail in terms of Section 437A, Cr. P.C., would have meant postponing the judgment that was already delivered.

86. It is for the aforesaid reason that we have not discharged the bail bonds filed by the appellants in Criminal Appeal No. 5201 of 2007. Their bail bonds already furnished will be treated as effective and will be taken to be for the purpose and in terms of Section 437A (see Appendix-6 also). However, we wish to suggest and recommend some measures regarding this section.

Suggestions and Recommendations

87. Section 437A, Cr. P.C. is as follows :

437A. Bail to require accused to appear before next appellate court.--(1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence of the appellate court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for six months.

(2) If such accused fails to appear, the bond stand forfeited and the procedure u/s 446 shall apply.

88. Law Commission of India considered the insertion of Section 437A, Cr. P.C. in Chapter VII of its 154th report on the recommendation of the Division Bench order dated 13.1.1994 of the Gujarat High Court in Criminal Appeal No. 51 of 1991 : [State](#)

[of Gujarat Vs. Harish Laxman Solanki,](#) (the Solanki case). A note about this case is Appendix-6 to this judgment.

89. Section 437A, Cr. P.C. was introduced by Clause 40 of the Code of Criminal Procedure (Amendment) Bill, 2006 (the Bill). It has been enacted as Code of Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009) (the Amending Act) and enforced with effect from 21.12.2009. Section 437A has been inserted by Section 31 of the Amending Act.

90. Notes on Clause 40 (by which 437A was introduced) of the Bill provides the purpose of the amendment,

to provide for the Court to require accused to execute bail bonds with sureties to appear before the higher Court as and when such Court issues notice in respect of an appeal against the judgment of the respective Court"

91. The basic purpose of this section is to secure attendance of the accused at appellate stage if any appeal is filed against the acquittal or for enhancement of the sentence.

92. Form 45 of the Cr. P.C. provides the attendance of the accused before the police during the investigation or before the trial court.

93. The heading of form 45 of Cr. P.C. has been amended by Section 32 of the Amending Act to include Section 437A in its heading. Notes on Clause 41, by which it has been introduced, states this amendment is consequential to the insertion of a new Section 437A. However, the text in the body of form-45 has not been amended to accommodate the terms of Section 437A. It appears to be incomplete.

94. A reading of Section 437A suggests that perhaps before reserving the order or pronouncing the judgment in a criminal case, if a person is already on bail then another bail bonds may have to be furnished by the accused incorporating the terms of Section 437A. To us, it seems unnecessary.

95. Generally, bail is granted during pendency of trial though in some cases it is refused. Similar is the case in appeal against the conviction. Perhaps, a better workable procedure would be that whenever bail is granted during investigation or at the trial or appellate stage, a clause may be added in the bail bonds incorporating terms and condition of Section 437A. This will obviate the execution of fresh bail bonds for the second time and unnecessary duplication of paper would be saved.

96. The Court, while granting a bail, may also specifically order that the bail bonds shall also incorporate terms and conditions of Section 437A, Cr. P.C. and the Magistrate may also ensure that it is there.

97. The text of existing form-45 is not sufficient to cover the terms and condition of Section 437A, Cr. P.C. In order to incorporate them, a clause in the existing form 45 may suffice. We have appended a form 45 in English and Hindi as Appendix-4 and 5

to this Judgment, incorporating the necessary clause. The clause added by us is in italics to distinguish it with the existing form. The Magistrates while considering the bail bonds may ensure that this or similar clause is incorporated.

98. There is no form of the bail bonds when the bail is granted during pendency of appeal : form-45 is not applicable. It is to be applied with suitable variations as clarified u/s 476, Cr. P.C. However, in practise, in these cases, printed forms with different format and different text are being used in different districts. It would be convenient to add the terms of Section 437A in the same way as we have suggested in case of form-45.

99. The High Court may, on administrative side, consider uniform format of the bail bonds in light of newly added Section 437A and suggestions made by us. If necessary.

General Rules Criminal may be suitably amended.

100. Section 437A, Cr. P.C. also requires some clarification. Take a case, where bail was not granted or granted but the accused/ convict could not be released on bail as he could not furnish sureties, or a case where accused/ convict is in jail and in pursuance of requiring bail bonds to be furnished u/s 437A, Cr. P.C. states that he cannot furnish sureties. Does it mean that the trial will not be conducted or appeal will not be heard, or in case he is acquitted then would not be released for six months? Perhaps, in such situation personal bond should suffice. But the existing language of Section 437A, Cr. P.C. does not permit it (see Appendix-6).

101. The other provision, which requires clarification is newly added proviso to Section. 372. It confers a right on a victim to file an appeal against an acquittal though Section 378 grants right to the State or complainant by leave of the Court. Perhaps, similar right ought to have been conferred.

102. The aforesaid difficulties are not involved here and we leave it open to be decided in an appropriate case but the Law Commission of India can always consider it or Union Government may like to clarify.

CONCLUSIONS

103. Our conclusions are as follows :

(a) The shots were not fired from inside the house but from the place on the kharanja near spot K" (where empty cartridges were found) mentioned in the site plan;

(b) The informant (P.W. 1) and Saleem (P.W. 2) were not present on the spot at the time of the incident;

(c) Furkan (P.W. 3) and Rahees (P.W. 4) were present on the spot at the time of the incident :

(d) The prosecution has not been able to prove any motive for the crime;

(e) The prosecution has not been able to prove its case beyond reasonable doubt against Nannu son of Karimulla, Akram son of Nannu and Salim son of Samua (accused 3, 4 and 6) (the appellants in Criminal Appeal No. 5201 of 2007). They are acquitted of all charges.

(f) The bail bonds of the aforesaid appellants in Criminal Appeal No. 5201 of 2007 are not discharged. They will be treated as operative. The bail bonds already executed shall be taken to be bail bonds for the purpose and in terms of Section 437A. Cr. P.C. as if they were executed in pursuance of the same;

(g) Gabbu (Ac-1) and Jallu (Ac-2) both sons of Karimullah (appellants in Criminal Appeals Nos. 5985 and 5929 of 2007) are acquitted under Sections 148, 452 and 506 read with Section 149, I.P.C. but are convicted under Sections 302 and 307 (both read with Section 34). I.P.C. They are awarded the following sentences :

(i) Life imprisonment u/s 302 read with Section 34, I.P.C.;

(ii) Ten years rigorous imprisonment u/s 307 read with Section 34, I.P.C.

In view of our conclusions :

◆ The Criminal Appeal No. 5201 of 2007 is allowed;

◆ The Criminal Appeals No. 5985 of 2007 and 5929 of 2007 are partly allowed.

Gabbu son of Karimullah (Ac-1) is in jail. He will serve out his sentence. Jallu son of Karimullah (Ac-2) is on bail. His bail is cancelled. He shall be taken into custody to serve out the remaining part of his sentence.

Appendix-1

Appendix-2

The ante-mortem injuries of the deceased mentioned in the postmortem report:

(i) Multiple pellets wounds of entry in the area of left side of chest middle and upper in the supra clavicular region, anterior surface of left shoulder, lateral surface of left chest, anterior surface of neck, left side of neck; right side of neck, right side of face near chin, one in lower central chest near epigastrium : Anterior surface of right shoulder, lateral surface of left upper arm; left side of face below left eye, size : 0.4 x 0.3 cms. and skin to cavity deep.

Appendix-3

The injuries of the injured [Rahees (P.W. 4)] :

- (i) Multiple (about 8) gun shot wound of entry (pellet) in front of left shoulder and upper left arm and outer side size 0.3 cm. x 0.3 cm. and 0.4 cm. x 0.4 cm. no blackening and tattooing present. Advised x-ray.
- (ii) Multiple gun shot wound of entry (about 14) on whole of right of face + right eye. size of wound 0.3 cm. x 0.3 cm. and 0.4 cm. x 0.4 cm. Depth not known. No blackening and tattooing. Advised x-ray, face, right eye and referred to eye surgeon.

Appendix-4

(The words added by us are in italics)

Form No. 45

Bail and bail-bond for attendance before officer in charge police station or Court

[See Sections 436, 436A, 437, 437A, 438 [3] and 441]

I..... (name), of..... (place) having been arrested or detained without warrant by officer in charge of.....police station [or having been brought before the Court of.....) charged with the offence of..... and required to give security for my attendance before such officer or Court on condition that I shall attend such officer or Court on everyday on which any investigation or trial is held with regard to such charge and after conclusion of the trial and delivery of the judgment shall attend the higher Court as and when such a higher Court issues notice within a period of 6 months from the date of judgment on any appeal or petition filed against the judgment and in case of my making default herein I bind myself to forfeit the Government the sum of Rs.

Signature

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the above said (name).....that he shall attend the officer in charge of.....Police station or the Court of..... on every day on which any Investigation into the charge is made or any trial on such charge is held, that he shall be, and appear, before such officer or Court for the purpose of such investigation or to answer the charge against him [as the case may be] and after the conclusion of the trial and delivery of the judgment shall attend the higher Court as and when such a higher Court issues notice within a period of 6 months from the date of judgment on -any appeal or petition filed against the judgment and in case of his making default herein I hereby bind myself [or we hereby bind ourselves] to forfeit to Government the sum of Rs.

Signature

Appendix-5

(The words added by us are in italics)

Appendix-6

(A comment about the Solanki case and the directions issued by us)

(1) Law Commission of India, in its 154th report, relied upon the observations of the Division Bench of the Gujarat High Court in [State of Gujarat Vs. Harish Laxman Solanki](#), (the Solanki case), while recommending insertion of Section 437A. Cr. P.C.

(2) In the Solanki case, the Division Bench of the Gujarat High Court had expressed anguish over silence of the Legislature in not enacting such a law and had issued direction that:

While accepting the bail and bail-bonds for securing attendance before the Officer in-charge of the Police Station or Court, as provided in Form No. 45 in Schedule-11 of the Code, all the criminal courts shall also take the same covering the appellate as well as revisional stage... the same should be taken for a further period of 12 months from the date of order of acquittal."

This was done in pursuance of inherent powers u/s 482, Cr. P.C.

(3) In pursuance of the directions in the Solanki case, the bail was asked from those, who were acquitted. This was challenged and the question regarding validity of the aforesaid directions was referred to the Full Bench of the Gujarat High Court.

(4) The Full Bench in [Omprakash Tekchand Batra and Another Vs. State of Gujarat](#), (the Batra case) overruled the directions issued in the Solanki case.

(5) There are some observations in the Batra case that these directions might be ultra vires the Constitution. We have not considered the constitutionality of Section 437A. Cr. P.C. and have proceeded, treating it to be valid piece of legislation.

(6) We have issued directions mentioned in paragraph 104 (f) of the Judgment, in view of the peculiar circumstances of this case mentioned in paragraphs 85 to 87 under the heading 5th POINT : FRESH BAIL BONDS-A SUGGESTION.