

(2011) 03 AHC CK 0409

Allahabad High Court

Case No: Criminal Appeal No. 102 of 2008

Amar Singh and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: March 4, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2011) 61 ACR 2338 : (2011) 8 RCR(Criminal) 729

Hon'ble Judges: Jayashree Tiwari, J; Imtiyaz Murtaza, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Imtiyaz Murtaza, J.

Challenge in this petition is to the judgment and order dated 20.12.2007 passed by Additional Sessions Judge, F.T.C. No. 2, Jalaun at Orai in S.T. No. 191 of 2002 whereby the Appellants were convicted u/s 302/34, I.P.C. and sentenced to undergo imprisonment for life and fine of Rs. 3,000 each with default stipulation of six months further imprisonment.

2. The first information report in the instant case was lodged by one Vijay Singh who is father of the deceased on 2.3.1999 at 7.15 p.m. at police station Kotwali Kalpi.

3. Shorn of unnecessary details, the brief facts as unfolded from the F.I.R. lodged by one Vijay Singh on 2.3.1999 at 10.30 p.m. at P.S. Kalpi are that on 2.3.1999 at about 7.15 p.m. when Raghvendra Singh, son of the complainant was sitting at the door, accused persons namely, Kripal Singh, Bhupendra Singh alias Bhope and Amar Singh arrived at the scene out of whom Amar Singh and Bhupendra Singh were armed with country made pistol. It is alleged that accused Kripal Singh gave exhortation to eliminate the deceased and acting upon the exhortation. Amar Singh whipped out pistol and fired at Raghvendra Singh. The fire hit Raghvendra Singh in

the stomach. It is further alleged that a second shot was fired by accused Bhupendra, which struck the window of the room resulting in breakage of glass panes. The broken pieces of glass, it is alleged, lay scattered on the ground. It is further alleged that the accused persons were challenged and chased by Kharak Singh and Pratap Singh but the accused persons succeeded in making good their escape. Elucidating on motive, it is alleged that relations between them were aggravated on account of old enmity. It is also alleged that Raghvendra Singh was immediately rushed to hospital where-from he was referred to Hospital at Orai. However, he succumbed to injuries on way to Orai.

4. As stated supra, the report of this occurrence was registered on 2.3.1999 at 10.30 p.m. at Case Crime No. 72 of 1999, u/s 302, I.P.C. by Vijai Singh, the complainant.

5. S.I. Basant Lal Mishra prepared the inquest report, which is Ext. Ka-6. He also prepared report to R.I. and C.M.O. police form 13 and 379 and sample seal, chalan nash, photo nash. He also proved the site plan, Ext. Ka-10. He also proved the recovery of cartridges and broken glass, which are prepared by S.S.I. Ram Milan Dubey, Ex. Ka-11. The dead-body was dispatched for the post-mortem examination.

6. P.W. 4 Dr. Jitendra Maheshwari conducted the postmortem examination of Raghuvendra Singh and noted following ante-mortem injuries on the person of the deceased:

(1) Inverted margins round firearm wound size 1 cm. ✦ 1 cm. cavity deep above umbilicus 1.5 cm. in mid line with blackish margin around wound 0.5 cm. entry wound.

(2) Everted margins round wound size 1.5 cm. ✦ 1.5 cm. ✦ cavity deep, Rt. side of back just below last rib and 3 cms. away from midline to Rt. and 10 cm. above from upper border of Rt. hip bone-Exit fire arm wound.

In the opinion of Doctor cause of death was due to shock and haemorrhage as a result of ante-mortem injuries.

7. After conclusion of the investigation charge-sheet was submitted and case was committed to the court of session. The Sessions Judge framed charges u/s 302/34, I.P.C.

8. The prosecution in order to prove its case examined in all eight witnesses. P.W. 1 Vijay Singh, P.W. 2 Pratap Singh, P.W. 3 Dr. Jitendra Maheshwari, P.W. 4 Dr. Rajendra Prasad. P.W. 5 Basant Lal Mishra, P.W. 6 H.C.P. Rajendra Kumar, P.W. 7 constable Moharrir Harcharan Sania, P.W. 8 constable Siyaram.

9. The case of the defence was one of denial and false implication. Appellant Amar Singh stated in his statement u/s 313 Code of Criminal Procedure that prior to the occurrence on 1.3.1999, he had gone to his in-laws house at Bareilly further stating that his daughter Shweta Yadav was residing with her maternal grandfather Ram

Singh at Bareilly where she was studying in Regimental Uchttar Madhayamik School. On the date of occurrence, he stated, he was admitted in the Bareilly District Hospital. The defence had examined R.K. Prasad as D.W.1, Dr. Arvind Agrawal as D.W.2 and D.W.3 D.K. Yadav. The Court had examined two witnesses namely C.W.I Aulad Haider and C.W.2 Adi Ram Yadav.

10. Learned Sessions Judge after scanning the evidence on record rendered verdict of conviction against the Appellants as aforesaid. Hence, this appeal.

11. We have heard Sri V.C. Mishra, senior advocate appearing for the Appellants and Mrs. Usha Kiran, learned A.G.A. for the State.

12. Learned counsel for the Appellants began his submission submitting that Appellants have been falsely implicated in this case and that they were not imbued with any motive for committing the murder of the deceased followed by submission that there was no source of light at the place of occurrence wherefrom Appellants could be identified. The place of occurrence has also been questioned in this case on the premises that the Investigating Officer did not collect any blood from the place of occurrence. The prosecution had examined only interested and partisan witnesses and independent witness Kharag Singh had not been examined in this case. It is further argued that there is obvious conflict between medical examination and direct evidence. He also submitted that in the injury report, Dr. Rajendra Prasad, P.W. 4 did not find any exit wound whereas according to postmortem examination report, one exit wound was found. It is further submitted that the medical evidence is at variance with ocular testimonies because according to the prosecution case the firing was made from a considerable distance, whereas the post-mortem report showed blackening around the wound. It is further argued that after investigation police had submitted final report in the case. It is further suggested that according to the nature of the injury deceased might have received accidental firearm injury. Lastly, it is submitted that from the evidence of defence witnesses, it is proved beyond reasonable doubt that at the time of occurrence Amar Singh was admitted in Bareilly District Hospital and his alibi is thus fully proved.

13. In order to appreciate the submission of learned Counsel for the Appellants it is necessary to examine the evidence.

14. The first witness Vijay Singh deposed that he was serving in the office of District Panchayat Raj Adhikari. He further deposed that his son was murdered by Amar Singh, Bhupendra Singh alias Bhope and Kripal Singh on 2.3.1999. At the time of occurrence, his son was present in the house and was glued to watching television. Amar Singh and Bhupendra carrying countrymade pistol and Kripal Singh carrying one stick came at the house and on being exhorted by Kripal Singh, Amar Singh fired at his son which hit him in the stomach. A second shot was fired by Bhupendra, which hit almirah and resultantly glass embedded to Almirah was broken. The occurrence took place at 7.15 p.m. To a specific query, whether it was dark or there

was enough light, he replied that the light emanated from a glowing bulb. On a further query as to which side the accused escaped to, he replied that the accused persons escaped to the western direction towards their house. He clarified that at the time of occurrence, he was present in his house. He had witnessed the occurrence. Apart from him, Kharak Singh, his nephew Pratap Singh, his wife Munni Devi were also witnesses of the occurrence. He further deposed that after the incident, he took his son to Kalpi where he admitted his son in the Hospital where he was examined. Thereafter, he was referred to Orai. While he was carrying his son to Orai, he died and thereafter his dead-body was brought to house and was kept at "the platform of Radhakrishnan Temple. He also deposed that he lodged the report, which is marked as Ext-Ka-1. After registration of the report, accused were not arrested by the police as the police was favourably inclined towards the accused persons. He also deposed that he pursued the matter with higher authorities and in consequence moved several applications to S.P. and he had also personally met him but it yielded no action. He had also approached the High Court and High Court directed Home Secretary, Uttar Pradesh. He deposed that the police had submitted final report to which he filed objections before C.J.M. He conceded that both his wife, who was Vice Chairman and Kripal Singh were at loggerheads. He deposed that his son being student of B. Com. was prosecuting his education at Datiya and he had come home on account of college being closed for vacation.

15. This witness was extensively cross-examined and during cross-examination, he admitted that he did not make a mention of dispute between his wife and Safai Inspector Kripal Singh in his F.I.R. It was also admitted that for the last 40 years, his family was not on speaking terms with the accused, as they were inimically disposed to them. He further stated that it was Holi Festival when the occurrence took place and his son Raghvendra had come to house about 2-3 days prior to occurrence. He also stated that the house was a two storeyed building out of which the upper storey was in his possession and the ground floor was in possession of his brother. The room in which occurrence took place was not in his possession. However, he stated that the baithak situated in front of the said room was in his possession. He further stated that the television set was not kept in the baithak as it remains closed and was being used for storing straw. At the time of occurrence, his son was sitting in the middle of Takhat (wooden plank) and he was watching television for about 15-20 minutes prior to the occurrence. The distance between his house and accused house was less than half kilometre. The occurrence took place within two minutes. To a query whether the accused had fired from outside the channel gate or from inside, the witness replied that there was no connection with the channel gate. There was half a minute gap between two shots. He further stated that before attempting to apprehend accused, he rushed towards his son and other family members also rushed towards the injured. He also stated that since accused were armed with country made pistol they were not chased. He also stated that the persons who gave chase to the accused were Pratap Singh, Subedar and Jai Singh.

The shot fired from the distance of 6 inches. Second shot fired from three feet. Immediately after sustaining injuries, he put his son on the cot. After arranging Maruti van, he was taken to hospital. He further stated that blood was not allowed to ooze out or fall on the ground as the portion hit by fire had been tightly tied with safi (a piece of cloth). The cloth was tied around, which was opened in the hospital and medicine was administered and another cloth was tied.

16. P.W. 2 Pratap Singh had supported the prosecution case. The quintessence of his deposition is that the deceased was related to him as cousin and he was murdered on 2.3.1999. He saw Amar Singh, Bhupendra and Kripal Singh arriving at the scene out of whom Amar Singh and Bhupendra carrying countrymade pistol and Kripal Singh was armed with wooden staff (danda). First shot was fired by Amar Singh, which hit Raghavendra in his stomach. Bhupendra fired the second shot, which hit almirah and glass of Almirah was broken. After committing murder, accused persons bolted away towards their house in the western direction. Thereafter, the deceased who was then injured was taken to the District Hospital, Kalpi and therefrom he was referred to Oral and on the way he succumbed to his injuries. The body was brought to the village and thereafter, his uncle Vijay Singh lodged the report at P.S. Kalpi naming Amar Singh, Bhupendra Singh and Kripal Singh. All the accused, it is deposed, were residents of mohalla Ramganj and he knew all of them prior to the occurrence.

17. In the cross-examination, he deposed that at the time of occurrence he was standing near the cot of his father and the cot was so kept that it straddled half in the baramada and half in the chabutara. At the time of occurrence his uncle Vijay was on northern side. Amar Singh had fired from distance of one bita. At that time Raghvendra was sitting on a wooden takhat and was watching television. After sustaining injuries he fell on takhat.

18. P.W. 3 is Dr. Jitendra Maheshwari, who conducted autopsy the dead-body of the deceased. His dead-body was sealed and brought to mortuary by constable Balram and Suresh. In his opinion, the causative factor of death was shock and haemorrhage and duration of death was one day prior and in his opinion, death was possible on 2.3.1999 at 8.00 p.m. He proved the post-mortem examination report. He also proved paper Nos. Ilka, 14ka, 15ka, 12ka, 13ka, 16ka, 17 ka and 5 ka. He also identified the signature in the F.I.R. He admitted that in the inquest report, injury on the back is not mentioned. He could not pinpoint the distance from which firing was made.

19. P.W. 4 Dr. Rajendra Prasad deposed that on 2.3.1999 he was posted in the Community Hospital Health Centre. He had examined Raghvendra and noted following injuries:

Lacerated wound 1.00 cm. ✦ 1.00 cm. on mid of abdomen depth could not be assessed. Location just above the umbilicus. Blackening around the wound present.

There is no wound of exit. X-ray advised.

20. In his opinion, injury was kept under observation which was caused by firearm object. He proved the medical examination report, Ext. Ka-4 and he was referred to District Hospital and reference slip is marked as Ext. Ka-5.

21. P.W. 5 S.I. Basant Lal Misra deposed that inquest report of the dead body of Raghavendra Singh was finalised on 2.3.1999 at 11.00 p.m. in the night. The inquest report is marked as Ext. Ka-6. He had also prepared R.I. report and also report for C.M.O. in Form Nos. 13 and 379 and sample and proved the report i.e., R.I. 12ka, report to C.M.O. 13 ka, chalan nash 16ka and photo nash 17ka, which is Ext. Ka-7 Ka-10.

22. He also deposed that S.S.I. Ram Milan Dubey was posted alongwith him. He identified his writing and proved paper No. 10 ka. Site plan prepared by Ram Milan Dubey. He also proved paper No. 9 ka. Recovery memo of cartridges and broken glass which are in hand writing of Ram Milan Dubey, (Ext. 11). He admitted that as per inquest report, only one injury was found. He did not find blood where dead body had been kept. He could not remember whether there was blood marks on the clothes. On the bush-shirt and and baniyan of the deceased there was hole due to burning caused by firearm. He also proved the final report dated 23.4.1999 in the hand writing of Ram Milan, which Ex. Kha-1.

23. P.W. 6 H.C.P. Rajendra Kumar deposed that on 2.3.1999 while he was on duty, Vijay Singh had got application. He had prepared report No. 36 at Case Crime No. 72 of 1999 u/s 302, I.P.C. was registered (Ex. Ka-13). He also prepared chik F.I.R. Case Crime No. 72 of 1999 Ex. Ka-14. Copy of the G.D. Entry as Ex. Ka-15. He also admitted that Ram Milan had left the police station vide report No. 30 at 7.45 p.m. on 2.3.1999 on the basis of memo of hospital.

24. P.W. 7 Moharrir Harcharan Saniya deposed that on 2.3.1999 he prepared report No. 30 on the basis of memo of Community Health Centre (Ext. Ka-16). He admitted his signature on the G.D., leaving police station and arrival of S.S.I. Ram Milan Dubey. Ext. Ka-17. He admitted that G.D. No. 34 Ext. Ka-17, description of enquiry conducted by Ram Milan is not mentioned.

25. P.W. 8 Constable Siyaram deposed that he was handed over sealed dead body for being escorted to mortuary. After the post-mortem examination, dead-body and sealed clothes were handed over to him.

26. C.W.1 Aulad Haidar, S.H.O. deposed that he had investigated Case Crime No. 72 of 1999, u/s 302, I.P.C. He had recorded the statement of Dr. P.C. Saxena and Dr. Arvind Agarwal, in the District Hospital Bareilly. He also recorded statement of Dr. J.K. Maheshwari.

27. In the cross-examination of A.D.G.C. he denied that in the C.D. Accused were given benefit. In the cross-examination by defence, he admitted that in parcha No. 4

dated 10.3.1999 it has been mentioned that place of occurrence is doubtful. No blood was found on the takhat or clothes of the deceased.

28. C.W. 2 Adiram Yadav deposed that on 17.7.1999 he investigated the case and recorded statement of witnesses on 1.1.2000. He had collected bed head ticket of Amar Singh and recorded the statement of Doctor Arvind Agarwal, who had admitted Amar Singh. He had also mentioned about some letter written by Suman sister of the deceased which according to him were shown to Suman who pleaded not to disclose these letters as it would result in frayed relations with her husband. The letters related to love affairs between Suman and Bhupendra and at one stage, they had made up mind to tie nuptial knots by court marriage. After collecting all the evidence, he had submitted final report in the matter. He denied the suggestion that on account of complaint made by Vijay Singh against him that the investigation was not properly conducted.

29. D.W.1 R.K. Prasad, Chief Pharmacist, District Hospital, Bareilly proved the Bed Head Ticket of Amar Singh in the O.P.D. Register dated 8.2.1999 to 17.4.1999. He also filed copy of the medical certificate and O.P.D. Register. In the cross-examination, he admitted that in the book of medical certificate in the last page there is no signature of any Senior Officer but the same is on the first certificate 18.2.1999 and in the last certificate date 19.3.1999 is mentioned. To a Court question, he admitted that on the next page at serial No. 1398 there was overwriting at No. 9 and after serial No. 1398 there was gap of two lines and he admitted that last page of the register was taken and it was not sealed by any Senior Officer.

30. D.W.2 Dr. Arvind Agarwal deposed that on 2.3.1999 Amar Singh was admitted at 9.55 p.m. and he was discharged on 3.3.1999. Copy of the bed head ticket paper No. 192 Ext. Kha-1 was proved. He also identified his signature on discharge slip paper No. 183 Kha, which is Ex. Kha-2. In the cross-examination he admitted that in the discharge slip Ex. Kha-2, time of admission and discharge was not mentioned.

31. D.W.3 Dheeraj Kumar Yadav deposed that he is brother-in-law of Amar Singh. After marriage Amar Singh used to come his house and in the night of 1/2-3-1999 at about 2.00 a.m. Amar Singh came to his house and stayed there for 3-4 days. On 2.3.1999 at about 8.00 p.m. Amar Singh made complaint about pain on the chest. He was admitted in the District Hospital and he remained there up till next day 9.00 a.m. He expressed his ignorance about the case pending against Amar Singh.

32. The first submission of learned Counsel for the Appellants centres round motive relating to the commission of offence. It is submitted that the Appellants was imbued with no motive to have committed murder of the deceased. It is argued that in the first information report, no motive for commission of the crime finds mention. The first informant in his deposition in Court deposed that his wife was Vice Chairman in Nagar Palika and Kripal Singh was Sanitary Inspector in Nagar Palika

and in connection with the sanitation work, some occasional altercations resulted in frayed relations between them.

33. He further submitted that first informant had made complaint about teasing of his daughter by Bhupendra to Circle Officer and in connection with this submission the statement of Bhupendra u/s 313 Code of Criminal Procedure is also relevant. He stated that Suman, daughter of first informant was on intimate relation with him and they wanted to marry but it was resisted by the first informant and he attributed this as the strong reason for his false implication. It would suffice to mention here that there was some dispute between the parties and whether this was potential enough manifesting itself in the commission of any crime cannot be judged. This is a case of direct evidence and depends on testimonies of witnesses and law is well-settled on this point. A suggestion for false implication was also given on the ground that the deceased had affairs with the daughter of a politician and therefore, a suggestion was made that he was killed by some unknown person. We do not find any substance in the submission, which is highly improbable. It is not comprehensible that screening the actual assailants, innocent persons will be falsely implicated in this case.

34. Next submission of learned Counsel for the Appellants that occurrence took place on 2.3.1999 at 7.15 p.m. and at that time there was no light in which Appellants could be identified. In the first information report, no source of light is mentioned. In connection with the submission, it is significant to mention that it brooks no dispute that the occurrence took place in the house of the Appellants and when occurrence took place while the deceased was watching the television and therefore, it cannot be said that there was complete darkness. The accused were previously known persons. Therefore, it cannot be inferred that there would be difficulty in identifying the assailants. From the testimonies on record, it leaves no manner of doubt that the power was also present in the house otherwise there was no question to allege that the deceased was watching the television. It can also not be worth accepting that in the dwelling house at 7.15 p.m., there will be complete darkness as it is not the usual time when the persons go to sleep.

35. Next submission of learned Counsel for the Appellants centres round the argument that the deceased was assaulted at some other place and to fit in the bill, wrong place of occurrence was altered and set up to suit the prosecution version. It is submitted that occurrence did not take place where it is alleged to have taken place. The main ground for challenging the place of occurrence is that Investigating Officer did not find any blood in connection with submission.

36. We have bestowed our most anxious considerations on the testimonies of the witnesses. The case of the prosecution is that when the deceased was shot at, he was sitting on a wooden takhat and was watching the television. Immediately after sustaining injury the first informant, it is on record, covered wound with safi (cloth) and by this reckoning, if Investigating Officer did not find any blood on the takhat or

on the floor, it has no measure of substance in the submission that occurrence did not take place at the place set up by the prosecution. In connection with it, testimony of P.W. 1 may be referred to whereby he deposed that he did not see whether blood had fallen on takhat or floor attended with further clarification that if 2-4 drops of blood had fallen on the takhat or on the ground, he did not take care to notice the same. He also clarified that cloth which he wrapped around the wound, was unknotted in the hospital. According to the prosecution case, two shots were fired. First shot hit the deceased in the stomach, which was fired by Amar Singh while the second shot was fired by Bhupendra, which did not hit the deceased and rather it hit the Almirah. This shot hit the almirah and glass had broken and fallen on the ground. The Investigating Officer had collected part of broken glass from the place of occurrence and he prepared its recovery memo marked as Ext. Ka-12. Defence did not challenge the recovery of broken glass and cartridges from the place of occurrence, which, in our opinion, fully lends corroboration to the testimonies of the witnesses about the actual place of occurrence, by this reckoning. Challenge to the place of occurrence has got no substance. Learned Counsel for the Appellant submitted that Kharak Singh, who was an eye-witness is not produced by prosecution and only close relative P.W. 1, father of the deceased and P.W. 2, cousin have been examined. The prosecution in order to prove its case had examined P.W. 1 Vijay Singh, P.W. 2 Pratap Singh. It is not necessary for prosecution to examine all the witnesses. It is settled position in law that if independent witness is not examined it does not mean that it would in any manner emasculate the prosecution case.

37. Next submission of learned Counsel for the Appellants is that according to the prosecution case, deceased after the occurrence was immediately rushed to the District Hospital. Kalpi where he was examined Dr. Rajendra Prasad, P.W. 4 had examined the deceased and he had noted one entry wound. He did not find any exit wound. In the inquest report also, there was only one entry wound. We do not find any substance in this submission. According to the prosecution case, deceased was killed by firearm and firearm entry wound was found. Dr. Rajendra. Prasad, P.W. 4 had examined him and immediately referred him to District Hospital. Orai. If he had not examined the exit wound, the only inference which may be deducible is that being in serious condition, he must have wanted that the injured should receive immediate proper medical attention and care and therefore, it would gravely affect the prosecution case if the injured person was not examined in detail. At the same time, it is worthy of mention here that If the Investigating Officer did not mention exit wound, it was his own fault. The prosecution case from the very beginning is that the police were favourably disposed to the accused persons and they had also filed final report and aggrieved, the first informant had to approach the High Court for proper investigation of the case.

38. Next submission of learned Counsel for the Appellants is that there was conflict between the ocular testimony and post-mortem examination report inasmuch as

blackening was found around the wound, which shows that injury was from a close range and in consequence it was suggested that deceased might have sustained accidental shot.

39. We have considered the submissions in all its pros and cons and in connection with this submission, the testimonies of P.W. 1 and P.W. 2 being relevant may be adverted to. P.W. 1 deposed that Amar Singh had fired from the door and at the time of firing his one hand was inside the room, one leg was in Veranda and one leg was in the room. He also deposed that firing was made from very short distance. The post-mortem examination report fully corroborates the ocular witness account and there is no discernible conflict.

40. Last submission on behalf of the Appellant is that at the time of occurrence, Amar Singh was admitted in Bareilly Hospital and it was not possible for him to have reached Kalpi from Bareilly. To rephrase it, he has taken the plea of alibi. In support of his submission, the defence has examined three witnesses. D.W.1. R.K. Prasad, Chief Pharmacist, District Hospital, Bareilly proved bed head ticket of Amar Singh in O.P.D. register for the period from 8.2.1999 to 17.4.1999. D.W. 2 Dr. Adiram deposed that he had examined Amar Singh on 2.3.1999 at 9.55 p.m. and he was discharged on 3.3.1999. D.W. 3, Dheeraj Kumar Yadav, brother-in-law of Amar Singh deposed that Amar Singh reached Bareilly in the night of 1/2.3.1999 and on 2.3.1999 at 8.00 p.m. he complained chest pain and was admitted in the hospital and remained there up till 9.00 a.m. next date.

41. We have examined the testimonies of P.W. 1, 2 and 3 and also findings recorded by Sessions Judge rejecting the plea of alibi. We fully agree with reason of the Sessions Judge, who rejected the plea of alibi. There is no doubt that the record of the District Hospital produced by D.W.1, Chief Pharmacist was manipulated. The Sessions Judge has also considered paper No. 184 Kha filed by defence. Paper of admission of Amar Singh is of 2.3.1999 wherein some overwriting has been done. It is also important to mention here that D.W. 2 Dr. Adiram deposed that he had examined Amar Singh but he did not identify Amar Singh in Court. He only deposed that Amar Singh was admitted on 2.3.1999 at 9.55 p.m. and he was called for his treatment and he was discharged on 3.3.1999 but he did not identify Amar Singh. It is also important to mention that in papers and in bed head ticket, no mark of identification of Amar Singh was mentioned.

42. We fully agree with the findings of Sessions Judge that plea of alibi of Amar Singh is not acceptable. After considering pros and cons, we are of the firm opinion, the learned Sessions Judge has rightly rejected the plea of alibi.

43. Lastly we have to examine the testimonies on the point whether it would be absolutely safe to convict Kripal Singh on the basis of testimonies on record. The case of the prosecution is that all the three accused persons came at the place of occurrence and on the exhortation of Kripal Singh, other two accused persons fired

at the deceased. In the first information report, Kripal was not armed with any weapon. He did not cause any injury to the deceased and except role of exhortation there is nothing against Kripal Singh. In Court P.W. 1 and P.W. 2 stated that Kripal Singh was armed with danda.

44. As regard part of exhortation to accused Kripal Singh for committing the murder of Raghvendra Singh is concerned, it is argued that exhortation is a weak type of evidence and in the facts and circumstances of the case it cannot be accepted as a gospel truth to fasten the liability of committing the murder of Raghvendra Singh. Few cases may be noticed on the above aspect and the first case in the line is [Balwantbhai B. Patel Vs. State of Gujarat and Others](#), in which the Apex Court observed as under:

We are also not unmindful of the fact that allegations of catching hold of an attack victim or of an exhortation are invariably made when the number of injuries on the injured party do not co-relate to the number of accused or in the alternative in an attempt to rope in as many persons as possible from the other side.

45. The second case on the point is *Bajwa v. State of U.P.* (1973) 1 CC 714 at page 725, the Apex Court has held as under:

The evidence through which we have been taken by the learned Counsel at the bar has been examined by us with care and anxiety because in cases like the present where there are party factions, as often observed in authoritative decisions there is a tendency to include the innocent with the guilty and it is extremely difficult for the Court to guard against such a danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the Court.

46. Having given our anxious considerations to the facts and circumstances of the case and also to the decisions mentioned above, we are of the irresistible opinion that the conviction of the Appellant Kripal Singh cannot be sustained inasmuch it is inferable that it was an individual role of Bhupendra Singh and Amar Singh who fired shots at the deceased, in furtherance of their common intention to kill the deceased.

47. In view of the above, the appeal filed on behalf of Amar Singh and Bhupendra is dismissed. Their conviction and sentence awarded by the trial court is affirmed. The Appellant Amar Singh is in jail. He shall be kept there to serve out the sentence awarded by the trial court and affirmed by us. Appellant Bhupendra alias Bhopey is on bail. His bonds are cancelled. The C.J.M., Jalaun at Orai is directed to take him into custody forthwith and send him to jail to serve the sentence awarded by the trial court and affirmed by us.

48. The appeal filed on behalf of Kripal Singh is allowed. He is on bail. He need not surrender and the bonds furnished by him shall stand discharged.

49. Office is directed to send a copy of this judgment to the Court concerned within two weeks for compliance.