

(2000) 09 AHC CK 0164**Allahabad High Court****Case No:** Criminal Appeal No. 1742 of 1980

Janak Singh and Sarvesh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Sept. 9, 2000

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 302, 307, 34

Citation: (2001) 2 ACR 1152**Hon'ble Judges:** J.C. Gupta, J; Bhanwar Singh, J**Bench:** Division Bench**Advocate:** P.N. Misra, for the Appellant; A.G.A. and R.S. Maurya, for the Respondent**Final Decision:** Dismissed**Judgement**

J.C. Gupta and Bhanwar Singh, JJ.

This appeal is directed against the judgment and order dated 16.7.1980, passed by the then Sessions Judge, Agra in Sessions Trial No. 91 of 1980 convicting the Appellants u/s 302 read with Section 34 of the I.P.C. and u/s 307 read with Section 34, I.P.C. and sentencing each of them to imprisonment for life and 7 years rigorous imprisonment respectively.

2. Before coming to the prosecution story, it may be relevant to mention the inter se relationship of the deceased, the accused persons and the prosecution witnesses. The deceased, Khetrapal, Bhuri Singh, P.W. 1 and Janak Singh, accused are real brothers being sons of Durag Singh. The accused Sarvesh is son of accused Janak Singh, while P.W. 7 Sarjeet Singh is son of Bhuri Singh-P.W. 1.

3. The prosecution case, in brief, is that after the death of Durag Singh, each of his three sons became owner of 30 bighas of land. Khetrapal, deceased was issueless. It is said that earlier, Khetrapal used to reside with Janak Singh accused and the latter

used to cultivate the land of the share of Khetrapal also but about a year or 1-1/2 years prior to the incident in question, Khetrapal started living with Bhuri Singh, P.W. 1. The land of Khetrapal Singh, which was earlier being cultivated by Janak Singh, now came into the possession of Bhuri Singh. This was to the disliking of accused Janak Singh. Khetrapal wanted to execute a will in favour of Bhuri Singh. On the date of incident, i.e., 16.10.1979 at about 10 a.m., Khetrapal along with Bhuri Singh and Sarjeet Singh were proceeding to Etamadpur tehsil for execution of will and when they reached near the pit, the accused Janak Singh armed with a country-made pistol and accused Sarvesh with a gun, arrived there and inquired from Khetrapal whether he was going to execute a will in favour of Bhuri Singh and when Khetrapal replied in affirmative, Janak Singh told that they would not allow him to do so. It is said that thereafter both Janak Singh and Sarvesh, accused persons fired upon Khetrapal who fell down on the ground on receiving gunshot injuries. Bhuri Singh and Sarjeet Singh when tried to save Khetrapal, they were also fired upon by the accused persons and they also sustained firearm injuries. When Khetrapal fell down on the ground, Sarvesh accused made another fire on Khetrapal from his gun, resulting in Khetrapal's instant death.

4. Bhuri Singh then got the first information report scribed by Ram Singh and lodged the same at police station Etamadpur on the same day at 1.30 p.m., the distance of police station being 4 miles from the place of occurrence. On the basis of the written report, chik first information report was prepared by the head moharrir, Bihari Ji Yadav and the case was registered in the general diary. The station officer, Mahabir Singh took up investigation and interrogated Bhuri Singh and Sarjeet Singh at the police station itself and sent both of them to hospital for medical examination with constable Lajja Ram.

5. Dr. Rajendra Kumar Gupta, P.W. 5 examined the injuries of Sarjeet Singh at 3.30 p.m. on the same day and found following injuries:

Multiple gunshot wounds of size 1/10" diameter ? muscle deep, (blood was oozing from the injuries). The wounds were situated on right shoulder right deltoid and right front chest upper and outer part.

The wounds were of firearm and were kept under observation. The X-ray was advised. Their duration was half day approximately. Injury report of Sarjeet Singh is Ex. Ka-3.

6. On the same day at 4 p.m., Dr. Gupta also examined Bhuri Singh and found following injuries on his person:

Lacerated wound 3/4" ? 2/10" ? skin deep on the right side of forehead, 3-1/2" above from the mid point of right eyebrow.

The injury was kept under observation and X-ray was advised. The duration of injury was half day. The injury report of Bhuri Singh is Ex. Ka-2.

7. After sending the injured persons to hospital, the investigating officer proceeded to the scene of occurrence. On reaching there, he found the dead body of Khetrapal Singh lying in front of the house of Janak Singh. The inquest was held and the dead body of Khetrapal was sent to mortuary for post-mortem examination. From the place of occurrence, the investigating officer also collected samples of plain and blood stained earth. He also found 10 shots and one wad, Exs. 8 and 9, near the dead body. These articles were taken into custody and were kept in a sealed bundle through memo, Ex. Ka-10. The statements of other witnesses, Harendra Singh, Hotam Singh and Manpal were also recorded. Accused, Sarvesh was arrested on October 28, 1979 and Janak Singh surrendered in Court a day later. After completion of investigation, a composite charge-sheet, Ex. Ka-16 was submitted against both the accused persons.

8. In support of their case, the prosecution produced before the trial court 8 witnesses in all. They are P.W. 1 Bhuri Singh, P.W. 2 Manpal Singh, P.W. 3 Hotam Singh, P.W. 4 Harendra Singh, P.W. 5 Dr. Rajendra Kumar Gupta, P.W. 6 Dr. Surendra Nath, P.W. 7 Sarjeet and P.W. 8 Mahabir Singh, station officer. Out of the aforesaid witnesses, Bhuri Singh, Manpal Singh, Hotam Singh, Harendra Singh and Sarjeet Singh were witnesses of fact. Dr. Surendra Nath, P.W. 6 was the medical officer who conducted autopsy on the dead body of Khetrapal Singh on 17.10.1979 at 12.15 p.m. The deceased was aged about 70 years. The following ante-mortem injuries were noticed:

- (1) Lacerated wound 5 ? 1 cm. ? scalp deep on the scalp right side 11 cm. above right ear.
- (2) Firearm wound of entry 3 ? 2 cm. ? abdominal cavity deep on the abdomen left side at the level of umbilicus 10 cm. away from mid line. Margins inverted. Blackening and tattooing present. Direction onward and downward.
- (3) Firearm wound of entry 2 ? 2 cms. ? abdominal cavity deep in the abdomen right side, 4 cm. above the level of umbilicus and 10 cms. Away from mid line. The margins were inverted and blackening was present. The direction of the wound was onward and downward.
- (4) Firearm wound of entry 2 ? 2 ? abdominal cavity deep on the back left side just above the iliac crest 13 cms. Away from mid line. Blackening was present. Margins were inverted and direction of the wound was upward and downward.
- (5) Firearm wound of exit 4 in number, size 1/2 ? 1/2 cm. in an area of 10 ? 7 cm. on the left buttock. Margins were inverted.

On internal examination, clotted blood was found in skull. Abdomen and peritoneum were ruptured and the cavity was full of blood. The doctor also found four shots and four wads during internal examination of the dead body. The post-mortem report of Khetrapal is Ex. Ka-4. In the opinion of the doctor, the cause

of death was shock and haemorrhage as a result of ante-mortem injuries. Before the trial court, Dr. Surendra Nath, P.W. 6 further opined that the ante-mortem injuries of Khetrapal were sufficient in the ordinary course of nature to cause death and they were of firearm.

9. The case of both the accused persons before the trial court was of total denial and they stated of their false implication due to enmity. They however, preferred not to examine any witness in defence.

10. We have heard Sri P. N. Misra, senior advocate, appearing for the Appellants and Sri R. S. Maurya, learned additional Government advocate for the State. We have also perused the record.

11. The learned Counsel for the Appellants submitted before us that the entire prosecution case rests upon the testimony of a single witness, namely, Bhuri Singh, P.W. 1 which is not worthy of reliance, particularly when the witness was inimical to the accused persons and his evidence was in conflict with the medical evidence. It was also submitted that Sarjeet Singh, P.W. 7 who himself is said to have received firearm injuries during the course of same incident did not support the prosecution case. It was argued by Sri Misra that the circumstances indicate that the incident had occurred at some other place and at a different time as suggested by the prosecution.

12. On the other hand, learned additional Government advocate argued that Sarjeet Singh turned hostile on account of the fact that he is closely related to the accused persons and he appears to have been won over. However, the testimony of Bhuri Singh, P.W. 1 who himself sustained firearm injuries in the same incident is sufficient to uphold the conviction of the Appellant, especially when the same gets corroboration from the medical evidence and attending circumstances of the case. He also argued that in this case, the first information report was lodged with all promptness and the same lends corroboration to the evidence of its maker, P.W. 1 Bhuri Singh.

13. The factum of death of Khetrapal Singh on account of ante-mortem injuries which were found during post-mortem examination has neither been disputed nor challenged. It is also evident from the statement of Dr. Surendra Nath P.W. 6 who conducted autopsy that the ante-mortem injuries of Khetrapal Singh were sufficient to cause death in ordinary course of nature. On internal examination, doctor found clotted blood below the skull. There were three firearm wounds of entry in the abdominal region which caused rupture of peritoneum, stomach, small intestines, large intestines, liver and right kidney as well as urinary bladder, right pelvic bone was also found ruptured. Four shots of big size and four wads were extracted from the body of the deceased. Therefore, there could be no doubt that Khetrapal Singh died a homicidal death.

14. It is also not disputed before us that Sarjeet Singh P.W. 7 also sustained firearm injuries which were examined by Dr. Rajendra Kumar Gupta, P.W. 5, who also opined that the injuries were about half day old and could be caused on the same day at about 10 a.m.

15. As per the prosecution case, Bhuri Singh P.W. 1 was also attacked in the course of same incident in which deceased Khetrapal Singh and Sarjeet Singh were fired upon. Dr. Rajendra Kumar Gupta P.W. 5 had examined the injuries of Bhuri Singh on 16.10.1979 at 4 p.m. and proved injury report as Ex. Ka-2. In his statement before the court below, Dr. Gupta categorically stated that the injury found on the person of Bhuri Singh could be caused due to friction of pallets, at about 10 a.m. on the same day. In the cross-examination of Dr. Gupta, nothing could be brought out which may demolish the opinion expressed by Dr. Gupta regarding the nature and kind of injury of Bhuri Singh.

16. Before the trial court, prosecution produced five witnesses of fact, namely, Bhuri Singh P.W. 1, Man Pal P.W. 2, Hotam Singh P.W. 3, Harendra Singh P.W. 4 and Sarjeet Singh P.W. 7.

17. P.W. 1 Bhuri Singh who is real brother of deceased Khetrapal Singh and who himself had suffered firearm injuries during the course of incident fully supported the prosecution case and gave a vivid account of the incident. We shall deal with his evidence later while considering the merits of the case. P.W. 2 Man Pal did not support the prosecution story and was declared hostile as he stated that he had not witnessed the incident. He was confronted with his statement recorded u/s 161, Cr. P.C. wherein he claimed to have witnessed the entire incident. P.W. 3 Hotam Singh also turned hostile and stated that he was not present at the time of occurrence. He was also confronted with his statement recorded u/s 161, Cr. P.C. Similarly, Harendra Singh P.W. 4 also denied to have witnessed the incident. He was also declared hostile. Therefore, the evidence of these three witnesses is of no avail to the prosecution.

18. P.W. 7 Sarjeet Singh stated that deceased Khetrapal Singh was his tau while accused Janak Singh is his uncle and accused Sarvesh is son of Janak Singh-accused. In his statement before the trial court, he further stated that on the day of incident, he was present inside his house, time was about 10 a.m. On hearing sound of fire, he came out of his house and soon he was also hit by shot. However, he did not know who had fired upon him. This witness was also declared hostile and was confronted with his statement recorded u/s 161, Cr. P.C. It is significant to note that during cross-examination made by State counsel, he admitted that his father Bhuri Singh had also sustained firearm injuries. It would appear from his evidence that he supported the prosecution case that an incident had occurred at about 10 a.m. near the house of Khetrapal Singh deceased and in that incident Khetrapal Singh, Bhuri Singh and he himself sustained firearm injuries, but he did not name any of the Appellants as assailants.

19. Before advertig to the evidence of Bhuri Singh P.W. 1, we may first deal with the motive. According to the prosecution case, deceased Khetrapal Singh, Bhuri Singh and accused Janak Singh had inherited one third share each in the property left by their father Durag Singh. It is not disputed that Khetrapal was issueless. Earlier he was residing with Appellant Janak Singh. During the period when Khetrapal Singh resided with Janak Singh, the latter used to cultivate the land falling in the share of Khetrapal Singh also. However, one and a quarter year before the present occurrence, Khetrapal Singh moved to reside with P.W. 1 Bhuri Singh and he took over possession of his share of land from Janak Singh and gave the same to Bhuri Singh. This was disliked by Janak Singh and, therefore, he and his family members were annoyed with Khetrapal Singh. The evidence of Bhuri Singh further revealed that about 2 days before the present occurrence, Khetrapal Singh desired that he would make a will in favour of Bhuri Singh. The accused persons any how came to know of this fact. It is thus evident that Janak Singh must have felt highly aggrieved on account of Khetrapal Singh moving to Bhuri Singh's house and parting with his share of land to Bhuri Singh. The fact that Khetrapal Singh decided to bequeath his share of land in favour of Bhuri Singh must have added fuel to the fire to the cause of annoyance of accused Janak Singh and his family members including Appellant Sarvesh who is son of Janak Singh. Thus, we find that both the Appellants had a strong motive to commit the murder of Khetrapal Singh.

20. Regarding the occurrence in question, Bhuri Singh P.W. 1 stated that on the day of occurrence at about 10 a.m., Khetrapal Singh accompanied by Bhuri Singh P.W. 1 and Sarjeet P.W. 7 was proceeding for Etmadpur tehsil to execute a will in favour of Bhuri Singh and when all the three reached near the manure pit of Janak Singh, Appellant Janak Singh armed with a country-made pistol and Appellant Sarvesh having a gun came there and inquired from Khetrapal Singh whether he was going to make a will in favour of Bhuri Singh and when Khetrapal Singh replied in affirmative, accused Janak Singh told that he would not allow him to do so whereupon Khetrapal Singh said that he would go ahead with his plan. This infuriated the Appellants and they both fired upon Khetrapal Singh who sustained injuries and fell down on the ground. When Bhuri Singh and Sarjeet Singh intervened, they were also fired upon by the Appellants whereby both of them also sustained gun-shot injuries. When Khetrapal Singh had fallen down on the ground, Sarvesh made another fire upon him resulting in his instant death. It is further stated by Bhuri Singh that he got first information report Ex. Ka-1 scribed by his relation Ram Prakash and carried the same to the police station Etmadpur where the same was registered at 12.30 p.m. In cross-examination, Bhuri Singh stated that before Khetrapal started living with him, he was residing with accused Janak Singh for the last 14-15 years. During his stay with Appellant Janak Singh, deceased Khetrapal Singh used to treat sons of Janak Singh like his children. For some reason, Khetrapal Singh became annoyed with Janak Singh and he switched over to reside with complainant Bhuri Singh. It is further stated by this witness that on account of

this action of Khetrapal Singh, the relations between him and accused Janak became strained and on some occasions, there had been exchange of hot words and abuses. It is further stated by him that the manure pit falls in the way which leads to tehsil from Bhuri Singh's house. As per the medical evidence furnished by Dr. Rajendra Kumar Gupta P.W. 5, this witness also sustained pellet injuries, therefore, his presence at the scene of occurrence cannot be doubted.

21. Learned Counsel for the Appellants vehemently argued before this Court that the injury report of Bhuri Singh indicates that only one lacerated wound was found on his person which could be of a blunt object and not of any missile. On examining the statement of Dr. Gupta P.W. 5 and other evidence on record, we find no substance in this submission of learned Counsel for the Appellants. Dr. Gupta P.W. 5 has categorically stated that injury of Bhuri Singh was caused by a firearm. He further elaborated his opinion by stating that since this injury was on part of head and where any gunshot just passed grazing the seat of injury, it would give a shape of lacerated wound. Even otherwise also, it is well known that lacerated wound can be caused by firearm. We have already pointed out above that in the statement of Dr. Gupta nothing could be brought out in cross-examination which may justify in holding that the injury of Bhuri Singh was not of firearm more particularly looking to the dimension of the injury. If injury was caused by blunt weapon, there would have been irregular laceration on the margins of the wound and there would have been bruising of the surroundings and under line tissues with irregular edges. The possibility of the said injury, therefore, having been caused by a firearm is not ruled out.

22. As far as the place of incident is concerned, the evidence on record fixes the same as claimed by the prosecution. Dead body of Khetrapal Singh was found by the investigating officer near the manure pit in front of the house of Janak Singh as is evident from the site plan prepared by the investigating officer on spot inspection and his statement given at the trial. Samples of blood stained and plain earth were also collected from that very place and the chemical examiner's report indicated that the blood stained earth was fully soaked with human blood. It may also be mentioned here that the investigating officer had found 10 shots and one wad near the dead body of Khetrapal Singh. Therefore, there could be no doubt regarding the place of incident and the evidence on record fully establishes that Khetrapal Singh was shot dead at the place as alleged by the prosecution and we find no force in the submission of learned Counsel for the Appellants that the incident had occurred at some other place in a quarrel between Bhuri Singh, his son and Khetrapal Singh. It is also significant to note that Sarjeet Singh P.W. 7, who otherwise supported the Appellants in not naming them as assailants of the deceased, clearly admitted in unequivocal terms that the incident of firing occurred at about 10 a.m. outside the house of Janak Singh. It is true that this witness was declared hostile because he did not name the Appellants as the assailants of the deceased, but for that reason alone his entire evidence cannot be thrown overboard. In the case of Dhananjay

Chatterjee alias Dhana Vs. State of W.B., the Apex Court held that testimony of a hostile witness should not be ignored totally and Court should scrutinize his evidence and it is permissible to accept that portion of his evidence which receives corroboration from other evidence on record. His testimony is not liable to rejection even without its scrutiny. We therefore, find that the evidence of Sarjeet P.W. 7 regarding time, place of incident and presence of Bhuri Singh gets corroboration from the evidence of Bhuri Singh P.W. 1 who himself sustained injury in the same incident and other circumstances appearing in the case and to that extent evidence of P.W. 7 Sarjeet Singh can be acted upon.

23. It was vehemently argued by learned Counsel for the Appellant that in the present case, only Bhuri Singh P.W. 1 supported the prosecution case while all other witnesses turned hostile and did not support the prosecution case, though they were also closely related to or connected with the deceased. It was submitted that in such circumstances, the Appellants" conviction should not be based on solitary testimony of Bhuri Singh P.W. 1. It is well-settled that there is no rule of law that conviction cannot be based upon the testimony of a single witness. What is important is not how many witnesses have supported the prosecution case but what is the nature and quality of evidence on which prosecution relies. The evidence of a single witness may be found sufficient to sustain a sentence of death whereas a host of vulnerable and untrustworthy witnesses may fail to connect an accused charged for an offence of simple hurt. Therefore, the question for consideration even in such cases is as to what is the worth of the evidence of the witness. We have already found above that presence of Bhuri Singh P.W. 1 at the time of occurrence cannot be doubted as he himself had sustained firearm injury in the same course of incident. The incident occurred in broad day light, therefore, there could not be any difficulty for him in identifying the assailants who were his close relatives being brother and nephew.

24. It was vehemently argued by the learned Counsel for the Appellants that there is a remarkable conflict with the ocular testimony of Bhuri Singh with the medical evidence, therefore, he could not be held to be a reliable witness. It is submitted that as per the medical evidence, the firearm injuries of the deceased were caused from a close range within a distance of 3-4 feet whereas according to the statement of P.W. 1 Bhuri Singh firing was made upon the deceased from a distance of 20-25 paces. This point was also argued before the learned Sessions Judge and the same was considered and rejected with cogent reasons. The learned Sessions Judge observed "I have to consider the entire statement of Bhuri Singh. Bhuri Singh in examination-in-chief stated that actually the assailants came to Khetrapal Singh and the witnesses and then the attack took place and the shots were fired. Actually this was also the version contained in the first information report Ex. Ka-1 which was lodged promptly. There can, therefore, be two possibilities. Bhuri Singh, it appears, has given a confused statement in cross-examination. Apart from it, he has given the distance just as a layman estimate. If any argument was to be applied on this

point, the investigating officer should have been cross-examined to ascertain the distance of the house of Janak Singh from the pit. This was not done. I may also mention that after the door, lies the chabutara of Janak Singh and he may not have remained static and may have moved anywhere from that chabutra. There is one other possibility also, namely, that Janak Singh is the real brother of Bhuri Singh, Bhuri Singh's son Sarjeet has tried to save Janak Singh by saying that he did not see as to who fired at him. The other witnesses, who were examined also tried to save the accused persons and all this would strongly indicate that in view of the close relation between Bhuri Singh and accused persons, there is a soft corner for the accused persons."

25. Apart from the reasonings advanced by the learned Sessions Judge in rejecting the above submission made on behalf of the accused persons, it may not be forgotten that P.W. 1 Bhuri Singh was a rustic and illiterate villager. He got his first information report written by his relation Ram Singh and had put his thumb mark over the same. When he was examined as a prosecution witness before the trial court, again he put his thumb mark on his statement. It is thus apparent that Bhuri Singh was not even competent to sign. It was not assailed on behalf of the defence that Bhuri Singh was an illiterate person. It may also be noted that during the course of incident Bhuri Singh himself sustained firearm injury on his head. In such a situation, it could not be expected from him to remember with precision the distance of firing. It was held in the decisions in State of Uttar Pradesh Vs. Sughar Singh and Others, and Karnail Singh v. State of Punjab AIR 1997 SC 2119, that where there is direct evidence of the eye-witnesses who had seen the incident from close quarter and their evidence substantially tallied with the medical evidence on record especially in the light of the alternate possibilities elucidated from the doctor in cross-examination by defence, some inconsistency, relating to the distance from which gunshots were fired between the evidence of medical expert and the eye-witnesses would be of no consequence. Bhuri Singh was an illiterate and rustic villager. The incident occurred all of a sudden and he himself sustained firearm injury on a portion of his head. It was, therefore, nigh impossible for him to state with absolute precision and accuracy about the distance from which firing was made over Khetrapal Singh. In our opinion this so called discrepancy would have no adverse effect upon the veracity of the evidence of Bhuri Singh P.W. 1.

26. It is also worth while to mention here that the first information report of the incident was lodged with all promptness at 12.30 p.m. on the same day at police station Etmadpur which was about 4 miles away from the place of occurrence. Nothing could be elucidated in the course of examination of the witnesses examined on prosecution side which may even remotely create any doubt about the authenticity and genuineness of the first information report. Mahabir Singh P.W. 8 was posted as station officer at police station Etmadpur. First information report was registered at the police station in his presence. He immediately took up the investigation and recorded statements of Bhuri Singh and Sarjeet at the police

station itself. Since Bhuri Singh and Sarjeet Singh had injuries on their person, they were immediately sent for medical examination to S.N.M. Hospital, Firozabad with constable Lajjaram. The investigating officer lost no time in reaching the place of occurrence and inquest proceedings started at 3 p.m. on the same day and dead body was sealed at 4.15 p.m. The other relevant papers were also prepared on the same day. Blood was also collected on that very day so also shots and wad found at the scene of occurrence. Not only that, the F.I.R. was lodged without any delay, the investigation also ensued promptly. In the circumstance the first information report of the present case carries with it corroborative value.

27. For the reasons assigned above we find that the case against the present Appellants has been fully established beyond doubt and they have been rightly found guilty by the learned Sessions Judge u/s 302 read with Section 34, I.P.C. and u/s 307 read with Section 34, I.P.C.

28. For the discussion made above, the appeal is dismissed. The conviction and sentence recorded by the trial court are upheld. The Appellants are on bail. Their bail is cancelled and they are directed to surrender to their bail bonds before the Chief Judicial Magistrate, Firozabad forthwith. In case they fail to comply within fifteen days from today, the Chief Judicial Magistrate, Firozabad shall take all necessary and appropriate steps for the arrest of the Appellants and after their arrest, they shall be sent to jail for serving out their respective sentences.