

(2002) 11 AHC CK 0145**Allahabad High Court****Case No:** Criminal Appeal No. 579 of 2000

Rakesh Singh

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Nov. 26, 2002**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 300

Citation: (2003) CriLJ 1838**Hon'ble Judges:** S.K. Agarwal, J; K.K. Mishra, J**Bench:** Division Bench**Advocate:** Kripa Shanker Singh, Indra Kumar, A.D. Giri, M.C. Tewari, R.K. Singh, T.B. Islam, P. Ganguly, A.K. Bhatt, K.K. Pandey, S. Trivedi and A.K. Awasthi, for the Appellant; Umesh Narain Sharma and A.K. Bajpai, A.G.A., for the Respondent**Final Decision:** Allowed**Judgement**

S.K. Agarwal, J.

This appeal was filed by appellant Rakesh Singh against the order of his conviction dated 31-1-2000, passed by Sessions Judge, Allahabad in S.T. No. 762 of 1996 and S.T. No. 506 of 1998 u/s 25 Arms Act. He was convicted in both the trials. In S.T. No. 762 of 1996 he was convicted u/s 302, I.P.C. and sentenced to life imprisonment. In S.T. No. 506 of 1998 he was convicted u/s 25 Arms Act and sentenced to one year R.I. and a fine of Rs. 2000/-. In default of payment of fine 6 months R.I. was also awarded. Both the sentences were to run concurrently.

2. The prosecution story as set up in the F.I.R., Ex. Ka-1, is that on 17-7-1996 at about 8.00-8.30 p.m., Anil Kumar Rai alias Chunmun was returning after making some purchase of house hold commodities like sugar, tea and soap along with his younger brother Sunil Kumar Rai alias Lala to their house. When they reached near the crossing of Beniganj that leads to their house, some altercation took place between Sunil Kumar Rai and the appellant and his brother. Sunil Kumar Rai rushed

to his house and informed his elder brother about this altercation. The informant himself went to the spot to settle this quarrel. When they reached there, he found the elder brother of this appellant Triloki Singh exhorted him to kill the deceased. Thereupon the appellant went to his house and soon returned to the spot with licenced gun of his father. He opened fire twice on the deceased from it. As a consequence Sunil Kumar Rai fell to the ground. Both the accused appellant and his brother took to their heels thereafter. Injured Sunil Kumar Rai was immediately rushed to Madnani Nursing Home on a Maruti Van belonging to a neighbour Sanchi Dhaga wala. Written report, Ex. Ka. 1 was prepared by Pawan Kumar Rai. It was lodged at P.S. Khuldabad at 9.30 p.m. Dead body of Shushil Kumar Rai is lying in the nursing home was mentioned in this F.I.R. Distance of the place of occurrence from P.S. Khuldabad is 3 Kms.

3. Head Constable Om Prakash Singh prepared the check report and made entries in the general diary No. 41 at 9.45 p.m. copies of which are Exts. Ka. 4 and Ka. 5. The investigation of the case was entrusted to S.H.O., P.S. Khuldabad in his absentia. He was communicated information of the case on R.T. set immediately. On receiving this information he rushed to the spot. Statement of the informant Pawan Kumar Rai was recorded. He also prepared site plan, Ex. Ka. 12 of the place of occurrence same night. He got information about the movement of accused persons towards G.T. Road. He made their arrest from there. On their arrest they told him that the weapon used in the commission of offence belong to their father who is a Sub-Inspector and they kept this gun in their house. It could be got recovered by them from there. The recovery was effected at the instance of this appellant by Pawan Kumar Singh, S.H.O., P.S. Khuldabad. A belt of live cartridge was also recovered by the S.H.O. On opening the chamber of the gun, one spent cartridge was found embedeed therein. One cartridge was also handed over by the appellant which was lying in front of his house. Recovery " memo of these was prepared by the S.I. The recovered articles were sealed in the presence of the appellant who also signed it. It is Ex. Ka. 2. Thereafter simple earth and blood stained earth were recovered from the spot. Its fard recovery Ex. Ka. 3 was also prepared. These two accused were lodged at police station by S.I. Panna Lal. Thereafter I.O. Pawan Kumar went to Madanlal Nursing Home; Here he prepared inquest memo, Ex. Ka-4, on the body of deceased Sunil Kumar Rai. He also got prepared other papers relevant for post mortem of the deceased. They are Exts. Ka. 5 to Ka. 19. The dead body was sent to mortuary through Constables Govind Prasad Singh and Hira Lal. On the next morning at 8.00 a.m. he again visited the spot and recorded the statement of another eyewitness of the incident Surendra Singh. The recovered gun was sent along with spent cartridges to the Ballistic Expert, Lucknow, for its comparison. Statement of Head Moharrir Om Prakash Singh was also recorded. On 30-7-1996 he recorded statement of Km. Renu Rai, sister of the informant. Investigation in 25 Arms Act case was completed by PW 8 S.I. Surendra Singh.

4. Post mortem examination was conducted by Dr. Nisar Ahmad on 18-7-1996. He found following antemortem injuries on the person of the deceased.

1. Multiple lacerated wound above the anterior abdominal wall, left side in the area of 5" x 5".

2. Multiple lacerated wound above the Dorsal aspect on the right forearm in the area of 5" x 4" scorching and tattooing were present.

5. In the opinion of the doctor, PW 6, the deceased died due to antemortem injuries. The injuries were caused by gunfire. The time of death was, according to him, 8.00 or 8.30 pm. on 17-7-1996.

6. Co-accused Triloki Singh, elder brother of the appellant, was acquitted by the trial Court because his role was of exhortation alone.

7. The prosecution to prove its charge against the appellant examined Pawan Kumar Rai, PW 1, first informant, his brother, Anil Kumar Rai, PW 2 and Vidhya Shankar Rai, PW 3, Apart from them O.P. Singh was examined to prove check report, general them O.P. Singh was examined to prove check report, general diary No. 41 etc. about the registration of the case at 9.30 p.m. Constable Hira Lal, PW 5 escorted the dead body to mortuary. PW 6, Dr. Nisar Ahmad conducted autopsy. PW 7, H.C. Jaikrit Verma was examined to prove general diary entry of registration of case u/s 25 Arms Act against this appellant. S.I. Surendra Singh, PW 8, investigated the case u/s 25 Arms Act. Pawan Kumar Singh, PW 9 is the I.O. of the case 6 of murder. He submitted the charge sheet.

8. The defence case as set up by the appellant is of denial. Appellant has also denied any recovery of the gun at his instance. He stated that it was never sealed. In response to the last question AAPKO KUCHH AUR KAHANA HAI the defence taken up by the appellant was that deceased Sunil Kumar Rai was a criminal and had enmity with many persons in the city. In the darkness he was fired upon by some unknown person, He was killed by some unknown person at some other place and time. Due to enmity they were roped in by informant. It is further stated that it was cloudy since evening on the date of occurrence and there was no electric light available. The whole locality was covered by darkness. Defence has produced one DW 1, Govind Prasad, Record Keeper, office of Superintendent of Police, Sultanpur to prove that father of the appellant was posted as S.H.O. in 1991 in Sultanpur and he had a tiff with father of PW 9, the present I.O. PW 9, has admitted in his cross examination that he is a resident of Sultanpur but denied existence of any grouse due to any quarrel between his father and father of the appellant. He also denied that on that count he involved this appellant and his brother in this offence. Since G.D. was weeded out, therefore, this defence witness could not state anything about these facts.

9. Learned counsel for the appellant Sri A.D. Girl submitted that presence at the spot of the two brothers PW 1 and PW 2 so also PW 3 at the time of this incident is highly doubtful. According to him it is writ large on the face of their evidence and no other circumstance is required to establish it. It is further contended by him that injuries of the victim may be the result of a solitary fire. The distance of the place of shooting as admitted by the witnesses especially PW 1, and PW 1 and PW 9 is such that no scorching and tattooing is possible in these injuries. This fact is borne out, according to him, from the testimony of the medical officer, PW 6 Dr. Nisar Ahmad also. About the recovery at the instance of the appellant his contention is that it Was manipulated by I.O., PW 9. It is further contended by him that the place of occurrence was changed by the prosecution. He further submitted that the deceased was taken to Madnani Nursing Home alive. He was taken inside the Operation Theater before any operation could be performed he breathed his last. Dead body was found lying inside the Operation Theater by the I.O. Admittedly, according to him, no statement of the doctor of this nursing home was recorded by the police. This clearly shows that deliberately the prosecution has tried to withhold some important facts from the Court. Some notings ought to have been made in the hospital records about the deceased. The claim that two brothers had taken him to nursing home may be false so the prosecution found it convenient to suppress these papers from the Court. It is further contended that the deceased had animosity with one Rakesh Mehtar. He himself lodged a report u/s 307/506, I.P.C. against him. A copy of this report was brought on record as Ex. Kha. 1. Admittedly the assailant Rakesh Mehtar nominated in this F.I.R. was a hardened criminal. This report is dated 27-7-1992.

10. In order to test the submissions made by learned counsel for the appellant, we have to examine the evidence of three eye-witnesses very carefully. Two of them are brothers of the deceased.

11. Pawan Kumar, PW 1, is the informant in this case. We have examined his evidence most carefully. He has some motive to involve the appellant. His sister Km. Renu was harassed by the appellant a few days before this incident. She reported this fact to her family. Something might have occurred between this appellant and the family members of this witness on this score. The deceased, appellant and the witnesses were all very young at the time of occurrence.

12. Thus, from his statement it is apparent that this witness was not present on the spot of occurrence when a quarrel between the appellant and the deceased started. According to him he was informed, by PW 2, his younger brother, who accompanied the deceased for making purchase of the household articles. When he came there he heard brother of the appellant exhorting him to kill the deceased. This accused rushed to his house and came back with a gun and fired upon the deceased twice from it. So far as this witness is concerned, we find it difficult to believe that he came to the spot before the incident. He did not take the deceased to Madnani Nursing

Home. In this context it is relevant to point out that neither any record from Madnani Nursing Home where the deceased was initially examined and taken into the Operation Theater was produced by the prosecution nor the doctor who attended on him was examined. His claim that he all alone took his brother in a Maruti van which belonged to his next door neighbour to Madnani Nursing Home create serious doubt in our mind about the presence of Anil Kumar, PW 2 with him at the time of occurrence. His admission that he singed few papers at the police station when he went to lodge his report further increases doubt in our mind about the authenticity of the first information report, its time of lodging etc. His claim that he did not remember how many people were with him fortifies our inference that he was planted as an eyewitness. After stay for some time at nursing home he went to police station, stayed there for 10-12 minutes. Again returned to nursing home and stayed there for 2-3 minutes. He then came to his house and stayed only for 10 minutes before he came to nursing home a third time. Here he stayed for half an hour and again came back to his house and stayed there for the rest of the night. All this shows that he is dwelling upon his imagination. It seems probable that he visited Madnani Nursing Home on receiving some information about his brother's presence there. He thereafter, came there. His father was not in the town so he did nothing but stayed back at home for whole of the night . It further proves that his injured brother was brought to the nursing home by some other person and a communication was made to their house by some one. Then only they learnt about the incident and came there. Conduct of this witness and his brother is sufficient to warrant this conclusion. He reached Madnani Nursing Home at about 9.00 p.m. No death certificate was neither issued or obtained from Madnani Nursing Home. Presence of dead body inside, Operation Theater clearly leads to the inference that the victim of this incident was taken to the hospital alive and he was taken in Operation Theater immediately for further management. It might be possible that Dr. Madnani thereafter waited for the injured's family members who could sign the necessary papers. In the circumstances, non examination of the medical officer Dr. Madnani who also owned the hospital by the investigating officer create serious doubt in our mind about PW 1 carrying the dead body there. Non examination of the record of the hospital and non production of the same in the trial further strengthens our above inference. Dr. Madnani was withheld by the prosecution obliquely. His examination might have spilled the beans against the prosecution. Non examination of the driver of the vehicle and non disclosure of his name and number of the van etc. are some other circumstances which create serious doubt in the version of the prosecution of the deceased being taken by a van of next door neighbour to the nursing home. How the van became available is in total darkness none of the brothers stand who called it. No blood on his clothes despite the fact that the injuries were bleeding is another circumstance that belied his claim of taking the deceased to hospital. He went to the police station in the same clothes yet it was not noted that his clothes were stained with blood in the G.D. totally belies his assertion that he took his bleeding brother to the said nursing home. His failure

to say that the blood fell in the van or not adds strength to our conclusion. If he himself placed his brother in the van all alone his hands and clothes would not escape being soaked in his brother's blood. He reached nursing home after 45-50 minutes of the incident provides sufficient corroboration to us on this aspect. His meeting with S.O. at 9.45 pm. at the spot on the face of above facts and circumstances relating to his above conduct was made highly improbable from the statement of PW 9 who admitted that he received the papers of the case at 9.40 pm. while he was on guard duty. In the face of this admission by I.O. preparation of site plan by him in between quarter to 10.00 pm. and 10.00 pm. and the arrest of the assailants at 10.00 pm. is not acceptable to us. It is further pertinent to point out that the F.I.R. was got registered at 9.35 pm. Inquest memo was made by the I.O. at 9.45 pm. Thus, it is impossible for the investigating officer to have prepared all these papers at one and the same time. The site plan in between quarter to 10.00 pm. therefore, are rendered highly doubtful. His coming to the spot with 3-4 S.I.S. and some constables shows that he was present in the vicinity and visited the scene of occurrence on receiving some information other than the F.I.R. PW 1 admitted that he told about the incident to I.O. alone and no further reference of the incident was made to any other person by him till then or thereafter confirm the abovesaid facts that he could not be there at about 9.45 p.m. and his statement could not be recorded on this night. His lodging F.I.R. at 9.35 p.m. became highly suspicious too. Number of formalities could not be done together within 1/2 an hour. The I.O. does not show that he recorded his statement before preparing the site plan. PW 1 Pawan Kumar Rai has categorically admitted that no site plan was prepared by the I.O. on his instruction that night. According to him, site plan was prepared the next day i.e. on 18-7-1996. It is also established from his evidence that the first information report was lodged by his brother against Rakesh Mehtar and Bobby for hurling bombs on him. This Rakesh Mehtar was a hardened criminal was also borne out from his evidence. He denied that his brother was a hardcore criminal. Change in place of occurrence is also discernible from his statement.

13. The fact that fire was made from a distance of 70-80 feet further caused serious medical discrepancy. It is also doubtful that these injuries were caused by two independent shots. He did not show to the I.O. the spot where his brother suffered injuries and the spot from where he was fired upon. He pleaded ignorance that the I.O. measured the distance between the shooter and injured and it came to be 87 feet. He did not disclose to the I.O. the spot from where he saw the incident. He failed to explain the omission of these facts in his statement to the I.O. made u/s 161, Cr.P.C. He feigned ignorance about the discovery of some pellets from the spot. In this connection his statement is that he did not show to the I.O. the pellet marks on the pole and the door of Ram Gopal Kesarwani in the night. On the next morning the I.O. himself noticed the presence of these marks on the abovesaid place. He further stated that he himself saw it on the gate and the pole during night. No inspection of the site was made by the I.O. in the night. It was made in the morning

at about 8.00-9.00 am. is thus clearly borne out from his evidence.

14. From the above discussion we entertain no hesitation in holding that this witness was neither present at the spot nor witnessed the incident. In the absence of his father he was most likely present at the railway station and came to Madnani Nursing Home with his cousin whose coming to this place was admitted to him at a later stage. Medical inconsistency that the I.O. found the distance between the place of shooting and the place where the deceased suffered firearm injuries to be 87 feet further strengthens our doubt in his presence manifestly. He admitted that he had not shown these spots to I.O. He did not show to I.O. the spot from where he himself witnessed the occurrence. It was not so marked in the site plan. He as a matter of fact did not lodge any report that night is our firm conviction.

15. We have already discarded the statement of PW 1 Pawan Kumar Rai. We find the statement of his younger brother Anil Kumar no better than his. We are not prepared to accept his evidence that he and his deceased brother were returning to their house after making some purchase of house hold commodities. According to him, when he reached Pahalwan Peer Baba temple, he noticed that his younger brother Sunil Kumar Rai and this appellant were already engaged in some altercation. He also noticed that this altercation was assuming serious proportion. He disclosed the motive of the occurrence. According to him altercation was with regard to teasing of his sister a week ago. He claimed that he immediately rushed to his house and informed his elder brother PW 1. He also supported the story of exhortation by the elder brother of the appellant. That is of no consideration now because Triloki Singh was acquitted by the trial Court. From his statement appellant appears to be in possession of the gun from the very beginning whereas PW 1 stated that the appellant rushed back to his house and brought the gun from there after he was exhorted. He claimed Suresh Kumar, Surendra Prasad and some other people of the vicinity as those who reached the spot immediately. He admittedly reached the spot when the incident was going on. If this appellant had the gun from the very beginning the total distance he covered to reach his house and returned again with his brother was more than enough for the appellant to complete the offence and made off the spot before their return. He had a D.B.B.L. gun. He also stated that his elder brother PW 1 carried the deceased to the Nursing Home. His claim that he returned to his house from the spot and did not accompany his brother to the nursing home is a most unnatural conduct unbecoming of an elder brother that he is. It is clear from the statement of these witnesses PW 1 and PW 2 that apart from these two persons no other member of the family visited the spot or nursing home. So his claim that he went to his house and did not accompany his brother to the nursing home, in our opinion, is only a fox pass. He denied that both the witnesses Suresh Kumari and Surendra did not sell books at his stall at the railway platform. His statement was recorded next day at 10.00 am. at the spot of occurrence by the I.O. He was called from his house for this purpose. He stayed at the place of occurrence only for 10-15 minutes and returned to his house thereafter.

He did not notice presence of Suresh and Surendra at the spot of occurrence at the time of incident. They did not meet him on the next day even. He did not know what was transcribed by the I.O. in his statement. He did not read it. He did not remember whether it was written down in the register or a small diary or one loose sheet. He was unable to explain in his 161, Cr.P.C. omission of the fact that he and his younger brother deceased were returning after making purchase from Beniganj crossing to their house. He also denied that information about teasing from Neena was received against the appellant by his mother immediately on her return and the same was communicated to them by their mother. He learnt about this incident on that very day. They felt very sore on learning about it. No complaint at the police station was lodged by them. His sister was studying in Prayag Mahila Vidhyapaeeth in B.A. II year at that time. The I.O. did not make any enquiry from his sister nor she was produced in trial to corroborate this motive part. He also was unable to provide details of item of his purchase except Sugar. They had gone with a bag for the purchase. Neither the sugar baggage nor any article contained therein fell on the ground. He clearly admitted that he did not go to Madnani Nursing Home after the occurrence at all. However, in his 161, Cr.P.C. statement he admitted to have accompanied the injured to the nursing home. He denied making any such statement to the I.O. and did not offer any other explanation for its presence therein. In his statement in the examination in chief he stated that he went to his house first and from there came to Madnani Nursing Home. In his statement to the I.O. it is not disclosed by him that he rushed to his house immediately at the beginning of the altercation and informed his elder brother PW 1. He clearly admitted that name of Pawan Kumar was not specifically mentioned in his 161, Cr.P.C. statement. Only elder brother is transcribed therein. He further clarified that name of Pawan Kumar or elder brother did not occur in his statement for taking his injured brother to the hospital. There is no mention in his statement u/s 161, Cr.P.C. whether his elder brother met him at the house or not. Exhortation part is also not in his 161, Cr.P.C. statement. He did not disclose to the I.O. that appellant Rakesh fired from his gun. He failed to explain these omissions in his 161, Cr.P.C. statement. He did not explain the omission of the fact that impugned gun belonged to appellant's father. In his statement u/s 161, Cr.P.C. it is not mentioned that Rakesh fired twice. He was unable to explain its omission. Striking of the pellets on the main gate of Ram Gopal Kesharwani and the pole were also not present in his statement to the I.O. Blood fell on the spot is also not therein. The fact that his brother went to lodge the report at the police station from Madnani Nursing Home was also missing in his 161, Cr.P.C. statement. He did not offer any explanation for these omissions. He admitted that his statement was recorded only once. He further admitted that the I.O. did not meet him on the night of incident. He reached Madnani Nursing Home quarter to 9.00 pm. It is contrary to the statement of the informant. According to him, he reached at 9.00 pm. and he alone went to the hospital. Madnani Nursing Home admittedly from his house is 200-250 steps. He remained there till the dead body was there. According to him, the dead body was despatched by 11.30 pm. He

did not accompany the dead body of his brother. He also returned back to his home and remained there all along the night like his brother PW 1. This is in conflict of his earlier version that from the spot he went to his house and remained there. He did not remember when he reached the hospital. He and his brother returned from Madnani Nursing Home at 11.30 pm. after the departure of the dead body. He did not remember name of any other person of his locality who witnessed the occurrence apart from Suresh Kumar and Surendra. He never made any effort to find out their names. He admitted Rajendra is eldest brother of Rakesh. At the time of incident he did not see Rakesh Mahatar and Bobby. He also denied any knowledge of the report lodged by his deceased brother against these two for an incident of 1972 of hurling of bombs. According to him Sunil never referred about it in his presence. There are houses on both sides of the road that leads to the house of the appellant. According to him the fire was made by the appellant from his door. He did not remember whether the house of Satya Narayan Kesharwani was in the vicinity of the place of occurrence. He also specified place where the deceased suffered firearm injuries. According to him it was the gate of Durga Prasad Keshanvani where he was at the time of receiving shots. He was 30-40 steps south-west of this gate. From this place after 50 steps a road lead to his house. His house is just 15 -20 steps from the turn. His brother fell on the same spot. He received the gun shot injuries of only 2 shots and both struck his brother at the same point and the same spot meaning thereby the same spot where he fell. Some pellets hit the gate. He did not help his elder brother in placing his injured brother in Maruti van. His clothes were not stained with blood. According to him after reaching the hospital with the injured his elder brother remained there for only 10-15 minutes. He knew Ramesh Rai. He is his brother and lives in the same house. According to him, on the next day, the I.O. recorded only his statement on the spot of occurrence. I.O. remained there for only 10-15 minutes. He admitted that Tappu is son of his Buwa (father's sister). His Phupha's name is Subhash Rai. He also came to the spot of his own. According to him, this witness Pawan Kumar went to fetch Maruti van. He did not remember how much time was taken by him in bringing the van. It was driven by a driver but he did not know his name. He did not even know that the driver belong to Saanchi Dhagawala, who are his next door neighbour as stated by PW 1 Pawan Kumar. According to him eye-witness Surendra lived in Reewa Kothi. How far his house from Reewa Kothi is he did not know. Suresh resides in Sultanpur Bhawa. How far is this place from his house he did not know. He did not know Vidya Shankar Rai. However, he was nominated in the F.I.R. as an eyewitness. He knew the house number of eye witness Suresh. His explanation for this is that he enquired it from him on the date of occurrence itself. He did not enquire the house number of Surendra from him. In his statement to I.O. his house number was disclosed.

16. Thus it is abundantly clear from the abovesaid discussion that the presence of this witness is highly doubtful at the spot of occurrence. He is the brother of the

deceased and informed PW 1 about the altercation. His conduct in not assisting his elder brother in lifting the deceased to the van and his denial to accompany him to the hospital makes veracity of this witness highly dubious. Enmity was admitted to him against the appellant. He admitted that he did not notice presence of the elder brother Rajendra of this accused on the spot. He came out with a new case that shooting was resorted to from the door of the house of the appellant. Then probably he told on a second thought that one spent cartridge was recovered by the I.O. from the gate of the house of this appellant. He denied knowing of Rakesh Mehatar and also any knowledge about the F.I.R. lodged by the deceased pertaining to hurling of bomb by Rakesh Mehatar and Bobby on him in 1972. He did notice the presence of pellets on the gate of Ram Gopal Kesharwani and the pole. This was not shown by him to the I.O. during night. It was seen by the I.O. himself as stated by PW 1. Site plan was not prepared during night but it was prepared in the morning by the I.O. All these facts lead unerringly to the inference that this witness also like his brother PW 1 was not present at the place of occurrence when the incident occurred. Both were set up as eye witnesses.

17. Vidya Shanker Rai, PW 3, is the last witness of the prosecution. We do not find his statement of any consequence once we rejected the evidence of the two brothers. He is not an eye witness of the occurrence. He was coming from Nihalpur and near the temple of Pahalwan Peer Baba he found some people present along with his friend Kamal Dev Sharma there. He learnt about the murder from them but he did not know who was murdered. At that time 2-3 S.I.s and 2-3 constables brought the appellant on a van. The inspector took the appellant towards his house. He did not know till then about the appellant. He accompanied the S.I. to the house of this appellant. One more person was taken by the I.O. The appellant produced a gun and a belt of cartridges which contained 6 live cartridges before the I.O. When the gun was opened, one spent cartridge was found in one of its chamber. The appellant also gave a spent cartridge lying there on the gate to the I.O. The formalities of sealing of these recovered articles were completed by the I.O. It is Ex. Ka-2. He is the signatory of Ex. Ka. 2. He came to know the name of appellant Rakesh during signature. Ramesh Rai also signed the document. This Ramesh Rai is cousin of PW 1. Recovery memo was readover by the I.O. Thereafter the I.O. proceeded to the police station with the appellant. His statement was recorded after a month and half of the recoveries. In his statement to the I.O. he disclosed that on 17-7-1996 when he was returning from Nihalpur, some people were present near the temple of Pahalwan Peer Baba. His friend Kamal Dev Sharma was also present there. The People informed that a murder had taken place. Why all these facts were not written in his statement, he could not explain. His statement was recorded by the I.O. on lined sheet. In his statement to the I.O. presence of 2-3 S.I. and 2-3 constables alighting from the vehicle is not written. He did not notice that the house from where the recovery was made is a single storey or a double storey house. He is unable to disclose its boundaries as well. He also did not remember how many

papers were written at the time of recovery at the house of appellant. The papers which he signed the spot were not signed by any police personnel or the constables. He did not remember whether any carbon copy of the same was prepared or not. He did not remember whether any examination of B.A. II year took place in the year 1996 or not. He was a resident of Hindu Hostel which is 8-9 Kms. from the spot. He is a chance witness and claimed to have visited Kamal Dev Sharma. He did not even remember the house number of Kamal Dev Sharma. He did not know the name of the owner of the house in which Kamal Dev Sharma is living. He could not tell its location. According to him there was no prominent mark of identification of that house. He did not remember whether his examination were over he-fore he witnessed the recovery. He also did not remember that on the next day or on that very day when the recovery took place any paper of his was held or not. He did not remember in which month he appeared in his B.A. IIInd year examination of the University. He returned to the hospital on the date of occurrence at quarter to 11.00 pm. He has no allotment of a room in hostel in his name. He claimed that he was living with one Mithlesh Kumar Rai. He completed his M.A. course and was preparing for the completion . He admitted that Mithlesh Kumar Rai was not a student of the University. He never paid any rent for his stay in the hostel. He clearly stated that the incident did not at all occur in his presence. He simply witnessed the recovery. He denied that he is a relation of Pawan Kumar Rai, therefore, he signed the recovery memo. His statement was recorded in the police station. He was sent for through a constable by the I.O. When he reached the police station, statement of Ramesh Rai, who was other signatory of the recovery memo was being recorded. He was already present at the police station. He was alone. He did not know Ramesh Rai before the date of recovery. He could not tell where this Ramesh Rai was living nor he felt any necessity of knowing it. He went to Kamal Dev Sharma to know about the studies. He was also a student of B.A. II. His two subjects, Ancient History and Hindi, were common. In the hostel there were 400 students. He did not know how many of them were student of B.A. II. Thus, from his statement it is apparent that he is a wholly got up witness. He could not witness the recovery. Ramesh Rai, other witness of the recovery, was a close relation of the informant. He was set up as witness of recovery at the instance of PW 1. This witness and Mithlesh Kumar Rai were not students in the university and under the normal rules, a person who is not a student of university is not entitled to possess any room. He did not say his statement the recovery made by the police was on the pointing out of this appellant. In the circumstances his statement is of no help to the prosecution inasmuch as the statement made by the appellant to the I.O. regarding recovery of the gun is concerned. For this purpose we have the lone testimony of the I.O.

18. PW 4, Om Prakash Singh, is the Head Moharrir. He proved report of this incident which was lodged at 9.35 PM on 17-7-1996. He proved Raznamcha and its carbon copy Exts. K. 3 and K4. He also proved G.D. entry No. 44 of 11.05 dated 17-7-1996 as Ext. 5. He could not inform the Court as to when original check report was sent to

the Magistrate. He admitted that on the date of occurrence any other report of cognizable or non-cognizable offence was not registered at the police station. There is initial of the C.O. on the G.D. but without any date. According to him Pawan Kumar Singh, S.H.O. did not return to police station on 17-7-1996 upto 12.00 pm. He did not note in the G.D. the time of departure of Pawan Kumar Singh from the police station. He admitted that this offence was registered in the absence of S.H.O. Pawan Kumar Singh. He admitted that G.D. pertaining to the staff of the police station dated 17-7-1996 at 6.05 pm. shows the name of S.H.O. Pawan Kumar Singh. In the departure column the destination of his departure is not shown because he was the incharge of the police station. He returned to the police station on 18-7-1996. According to him G.D. of the police station shows his return at 8.30 a.m. There is no mention of his activities in this G.D. Statement of which witnesses was recorded on which date in the course of investigation was also not noted therein. Such entries are to be made in the G.D. according to this witness under the rules. He denied that Ex. Ka. 1 was prepared at the police station much later after due consultation. He also denied Ex. Ka. 3, the check report, was anti-timed. He also denied that the G.D. was withheld and its entries were made later as per convenience. He admitted that the place of occurrence falls within the jurisdiction of Sabji Mandi Chowki. Sunil Kumar Rai was incharge of that chowki at that time.

19. Thus from his statement a suspicion arose in the mind of the Court about the preparation of check report, Ext. Ka.3 at the alleged time. It further clearly makes out that no cognizable or non cognizable offence was registered after the registration of this case. There is no date under the signature of C.O. in the G.D. of this case. When the original of this Ex. Ka. 3 was received by C.O. is neither disclosed nor discernible from his evidence.

20. In the circumstances which are available from the testimony of PWs 1 and 2 read in league with the statement of this witness, there remain no doubt in our mind that the F.I.R. of this case was prepared much later than the time alleged by the prosecution. It is further fortified from the statement of PW 5, Con. Heera Lal who stated that the dead body was taken by him to mortuary on a rikshaw trolley. Both the eyewitnesses stated that it was taken to the mortuary on a tempo. According to PWs 1 and 2, the dead was despatched from Madnani Nursing Home at 11.30 p.m. This constable clearly admitted that he had taken the dead body from here to mortuary at 4.00 a.m. He got reported his arrival at the police line at 6.15 a.m. on 18-7-1996. The body was brought to mortuary thereafter. He took about one and half hour in reaching there. He left the police lines at about 6.20 a.m. He paid Rs. 100/- to the trolley owner but no receipt for this payment was obtained. He did not claim Rs. 100/- from the department as yet. He denied that dead body was taken on tempo. He also denied that he carried the papers alone to the doctor from the police station. In this connection it shall be relevant to refer to the statement of the I.O. who clearly admitted that he had not mentioned in the inquest memo names of those constables who escorted the dead body to the mortuary.

21. All these facts lead us to an irresistible conclusion that preparation of the first information report and the registration of the case was not made at the alleged time. It was probable that the I.O. himself may have learnt about the occurrence from some one and visited suo motu the spot. Admittedly he was present in the near vicinity. Till then no F.I.R. was given at the police station by the informant. The written report was prepared during late hours of the night in consultation with the I.O.

22. Coming to the medical inconsistency reference to the statement of PW 6 is necessary. According to PW 6, Dr. Nisar Ahmad, injury Nos. 1 and 2 of the deceased had scorching and tattooing. The dimension of these injuries were 5" x 5" and 5" x 4". He recovered 26 small size pellets from injury No. 1. According to him these injuries were sufficient to cause death. According to him death was possible at 8.00 to 8.30 p.m. on 17-7-1996 and the injuries were caused by a firearm. Injuries No. 1 and 2, both were likely to be caused from a distance of 3 to 5 feet. Presence of scorching and tattooing in these injuries made his opinion probable. No doubt he admitted that he had no experience of ballistic aspect. He could not tell if range of dispersal is 5" x 5" and 5" x 4" what could be the distance of shooting. He clearly admitted that he gave the distance earlier as 3 to 5 feet on account of presence of scorching and tattooing. He further stated that it is not necessary that where scorching and tattooing is present the dispersal may also occur. This witness was declared hostile by the prosecution and was subjected to leading questions with the permission of the Court. In his response to a leading question he admitted that at P.S. Tharwai a case was registered against him for allegedly preparing wrong post mortem report. He clarified that this F.I.R. was quashed by the High Court later on. He also denied that this appellant being son of Sub Inspector, he was approached by his father for preparing indifferent post mortem report. He admitted in cross examination that in a fire arm having a long barrel dispersal occurs much later than a weapon of small barrel wherein it occurs quickly. He further admitted that in a country made pistol which has a small barrel large dispersal will occur within a distance of 3 to 5 feet and presence of scorching and tattooing is also likely. He admitted that the dead body was received by him in the mortuary at 2.00 pm. on 18-7-1996. He further admitted that he received challan Lash along with papers but in the challan Lash approximate time of death was not mentioned in the appropriate column. This is of crucial importance. It shows that the I.O. when this paper was prepared, was not knowing the exact time of death. It further goes a long way to put the F.I.R. version and its time of lodging open to serious doubt.

23. PW 7 H.C. Jaikrit Verma stated in cross examination that the G.D. generally is sent to C.O. office on the next day. The G.D. contained signature of the C.O. and little away from it a date is also there. It is not made underneath the signature. R-16. 8" is mentioned but who made this entry was not explained.

24. PW 8, Surendra Singh is a retired Sub Inspector. He was posted at P.S. Khuldabad on 15-8-1996. He conducted the investigation of the case u/s 35 Arms Act. He sent the firearm recovered on 1-8-1996 to the scientific laboratory at Lucknow. He did not know anything about this case till 15-8-1996 when he received investigation of this case. His explanation is that he was out of station. He did not remember when he left the police station on law and order duty. He did not remember how many days before 15-8-1996 he returned to the police station. He admitted that the entry regarding his departure and arrival must be in the G.D. of the police station. There is no mention in the G.D. of this case about the place of recording of the statement of the witnesses. He did not remember where two witnesses of recovery met him and where he recorded their statements. PW 3 categorically stated that his statement was recorded at the police station. Both the witnesses met him on the same day. He did not remember where he met them. At one place or at different places. He prepared the site plan of 25-A Arms Act case at the instance of these witnesses. He did not record the statement of any person who lived in the vicinity of the house of recovery. He did not remember names of those policemen who were with him. He did not remember the dates of sending of the Purchase to the C.O. In none of the purchase under the signature of C.O. any date was mentioned. There is no reference in the C.D. regarding the papers that were sent to the District Magistrate for sanction for prosecution of this offence.

25. P. W. 9 Pawan Kumar Singh is the investigating Officer. According to him he was on Gast duty. He received on R. T. set an information of registration of this case. He received these papers during the Gast. He received check report from H. C. Rajendra Singh. He claimed that he recorded the statement of Pawan Kumar Rai first and also made cursory inspection of the site of occurrence in the street light. The site plan was prepared. It is Ext. Ka. 12. Thereafter he received information about the assailants that they are moving towards G. T. road stealthily. They could be arrested if immediate steps are taken. The appellant and his brother were arrested just 50 yards from the temple of Pahalwan Peer Baba. This is in the vicinity of the place of incident. The assailants disclosed their names as Rakesh son of Vashishta Singh and Triloki Singh son of Bansi Singh. They admitted their complicity in the offence and offered for the recovery of gun. It is stated by him that from this gun he had fired upon the deceased. This gun belong to his father who is a Sub Inspector. He had concealed it in his house. The appellant was taken to his house. He got it recovered from the front room from its south-western corner. The gun was examined. A spent cartridge was found in one of its chamber. Six live cartridges of 12 bore from a box were also produced by the appellant. One spent cartridge was recovered from in front of the door of his house. Fard of the recovered articles was prepared by him. It is Ext. Ka. 2. He identified his hand writing and claimed that it was written by him. It bore the signatures of the appellant and the witnesses. He also performed other formalities of recovery of blood stained earth and simple earth. Their recovery memo is Ex. Ka. 13. Thereafter he recorded the statement of both these appellants

and sent them through S. I. Panna Lal to the police station. According to him the Panchayatnama was prepared after completion of all the abovesaid formalities at Madnani Nursing Home. It was prepared by Sunil Kumar Rai, incharge of police out-post under his direction. The panchayatnama is proved as Ext. Ka. 14. Dead body was sent through constables Gurubachan Singh and Heera Lal for postmortem. The site of occurrence was again inspected by him on 18-7-1996 in the presence of witnesses Anil Kumar, Suresh Kurmi and Surendra. Statements of witnesses of Panchayatnama Raghunath Rai, Ram Pravesh Dubey, Shivaji Rai, Sitaram Pradhan and Ramesh Rai were recorded by him. Thereafter the statements of witnesses of recovery from the house of the appellant were also recorded by him. He submitted a report an application u/s 156(3) Cr. P. c. for sending the recovered articles to the Vidhi Vigyan Prayogshala in the Court. According to him he conducted the inspection of the site and also prepared site plan between quarter to 10.00 and 10.00 p.m. The accused were arrested at 10.00 P.M. This arrest was effected immediately after the preparation of the site map. Site map was attached to Parcha No. 1 of the C. D. All the papers attached to Parcha No. 1 were referred to in this parcha. He admitted that he had again inspected the site of occurrence on 18-7-1996 in the morning. He made a reference in his case dirary. He admitted that in parcha No. 2 of the case diary there is a reference of preparation of the site map but stated that this reference was in connection with the site map prepared on the previous night. He admitted that there is no mention in this note that this map was prepared on the previous night. He further admitted that in the case diary in parcha No. 1 in the note regarding inspection of the site, there is no mention that site map was also prepared. The site map was prepared at the instance of Pawan Kumar Rai P.W. 1. P. W. 1 clearly contradicts the I.O. on this point. According to him site map was prepared on the next day in the morning by the I.O. He further admitted that the informant disclosed to him the place of shooting and the place where the deceased received injuries. He had shown these places on the site map by spots "A" and "X". The distance from "A" to "X" is 87 Feet. In the site map he marked the place of witnesses by "W" but in the inspection note it was not so recorded. In this parcha details of the site was not disclosed. Even in parcha No. 2 it was not mentioned. He admitted that his return according to the G. D. of the police station dated 18-7-1996 is shown at 20.30 meaning thereby 8.30 P.M. it is G.D. No. 43. He further admitted that he did not mention in this G. D. anything about the witnesses whose statement he had recorded during the investigation u/s 161 Cr. P. C. He admitted that he had knowledge of the police Regulations. He was 25 years already in this job. When he reached Madnani Nursing Home at 10.20 P.M. the proceedings of preparation of the inquest memo were commenced. He did not know the time of death before the preparation of Panchayatnama. He did not record the statement of any doctor of Madnani Nursing Home. During investigation he did not find any necessity to do so. He admitted that in the Chalan Lash time of death is not recorded because till then the time of death was not within his knowledge. He admitted clearly that in the inquest memo all informations were mentioned on the basis of papers within his

custody and on the basis of the statements made to him by the persons present there. The time of lodging of the report is 9.35 P.M. In the inquest memo it is noted as 9.40 P.M. This mistake was deliberate. The word used was "sahaban". He made entries of the C. D. and F.I.R. in his C. D. at Kala Danda where he received the papers. According to him papers were received by him at about 9.40 P.M. He took about 5 minutes in making copies of these papers in his C. D. In the copy of the Fard and Panchayatnama time of occurrence is shown 9.35 P.M. and there is over-writing in the case diary in this time but 9.35, according to him, is clear and visible. There is no mention of gun in the inquest memo as weapon of assault. There is a mention of shooting by firearm alone therein. In parcha No. 1, the recovery memo is copied but it did not contain the names of witnesses who were its signatories. He denied that it is not so because till then none signed these recovery memos. On reaching the spot he learnt that the deceased was taken to Madnani Nursing Home. Before this he did not know this fact though he had already copied the F. I. R. in the case diary. This further shows that no F. I. R. was in existence till then. He admitted that in the F.I.R. it was written that the dead body is lying in Madnani Nursing Home. There is no mention of sufficiency of light in the C.D. at the spot. It is his mistake he admitted. Temple of Pahalwan Peer Baba is just 33 steps from the place of occurrence in the West. He admitted that he disclosed the distance in the site map after measuring them by Steps. He took only 5 minutes in preparing the site map. First Parcha was closed at 11.30 P.M. thereafter he remained in the area. He was there in search of wanted criminals, pending investigation and also in the maintenance of law and order. On the next day he again visited the site at about 8.00 A.M. Investigation was started thereafter. He did not go to his quarter which is inside the police station compound before his return to the police station on 18-7-1996. He admitted that he is a resident of Amethi district Sultanpur. His father and other male members of his family are living there. He denied that Vashishtha Singh was posted in 1990-91 in that police station and an altercation occurred between Vashishtha Singh, father of the appellant Rakesh, and his father during that period. He claimed that he recorded the statements of Surendra and Suresh but he could not identify now these witnesses. He disclosed their places of residence on examination of the case diary. It showned that he recorded their statements on his own without anyone being before him. He did not record the statement of any witnesses whose houses were shown by him in the site plan. He himself explained it by stating that they live out of station in connection with their business but there is no reference of this fact in the case diary. Three sub-inspectors and few constables on a jeep came with him. A. S. I. was sent to Madnani Nursing Home. He was sent at about 9.40 P.M. How the S. I. went to nursing home he failed to disclose. He recorded the statements of the witnesses of inquest at the spot. He could not tell the time when he did so. He did not visit the residences of Suresh Kurmi and Surendra. They were summoned through the Head Constable of police out post and other policemen. He claimed that Ramesh Rai son of Ram Pratap Rai mentioned in the case diary and Ramesh Rai son of Ram Prakash Rai mentioned in the recovery memo are one and the same person. He did not

remember when Parcha No. 2 was closed. Some of the witnesses of inquest and recovery memos were called by him through constables. They were residents of Reewa Kothi and Sultanpur Bhawa. He did not remember whether it rained on the date of occurrence. He admitted that in the site map he has not shown the presence of any electric light or pole. The inquest memo admittedly did not bear the signature of S. I. Sunil Kumar Rai but he claimed that it was prepared by him. He proved handwriting of Sunil Kumar Rai. All the papers pertaining to inquest were prepared by Sunil Kumar Rai but none of them were signed by him. He denied that these papers were prepared later on at the police station and he intended to sign them. He did not record the statement of Vidhya Shankar Rai during the investigation. Statement of this witness is recorded in the C. D. He is P.W. 3. He proved that Anil Kumar Rai, P. W. 2, did not state in his 161 Cr. P. C. statement that in the night at about 8.00-8.30 P.M. he and his younger brother were returning from Beniganj crossing after making some household purchases. His statement contained that, he was returning from Beniganj crossing but no time was disclosed by him. He further proved that this Anil Kumar Rai P. W. 2 told him during 161 Cr. P. C. statement that they placed his brother in a Maruti van belonging to Saanchi Dhaga Wala and took him to Madnani Nursing Home. This witness disclosed to him that he went to his house first and then went to Madnani Nursing Home. This witness did not disclose to him in his statement name of Pawan Kumar Rai. It only contains the words, "his elder brother". This witness did not inform him during 161 Cr. P. C. statement that the gun used by Rakesh belongs to his father. His statement contained only that Rakesh fired. He did not disclose to him that two shots were fired. He also did not tell him that pellets of one shot struck the gate of Ram Gopal Kesharwani and the pole, blood fell on the spot or his brother went from Madnani Nursing Home to lodge the report. He did not meet Anil Kumar in the night of occurrence. His statement was recorded on 18th. Statements of Suresh and Surendra were also recorded on 18th. No time for it is there in the C. D. He recorded statement of his sister Renu Rai and Reena Rai on 30th but they were not made witnesses in the charge-sheet. During investigation he did not learn that the deceased had enmity with any one else. He did not go to the Madnani Nursing Home with Pawan Kumar Rai, P. W. 1. Pawan Kumar, P. W. 1 clearly stated that while he was returning to Madnani Nursing Home from his house, I.O. met him and went to Madnani Nursing Home with him. He admitted that parchas and the Case Diary were sent to C. O.'s office regularly and endorsement was always made at the C. O.'s office and C. O. used to sign. In the purchas of the case diary of this case, there are endorsements of the C. O. with his signature but no date is noted underneath his signature. He denied that the report of this case was prepared on the next day after consultation and it was wrongly shown as registered on previous day. He also denied that he prepared parchas of C. D. at the police station on single day and antedated them. He also denied that the appellants were arrested from their house. He also denied that the gun was taken into possession from a place where it was safely locked after breaking open the lock by him and the recovery memo was prepared after firing it.

He did not record the statement of the doctor who conducted autopsy. There is no mention in the recovery memo that the gun belongs to Vashishta Singh. father of the appellant. In the parcha dated 30-7-1996 this fact for the first time was mentioned. When the dead body was despatched was not mentioned anywhere in the C. D. The time it disclosed in the memo of inquest was contradicted by constable P. W. 4. The cloth in which gun was sealed crime number and name of the appellant is mentioned. It contained his signatures but it did not contain the signatures of the witnesses. On the sealed cover of the cartridges also signatures of witnesses are not there. On the seal cover of belt also neither name of the witnesses nor the name of the appellant is there. According to him when he went to the house of the appellant hundreds of people were present there. He picked up two witnesses from amongst them. These two witnesses were present amongst the people collected there and they met him at the place of occurrence. Thus, from his statement it is apparent that the spot of occurrence was the house of the appellant. He denied that all these papers pertaining to the recovery were not prepared at the spot but were subsequently prepared at the police station. These recovery witnesses were never called. They were nominated by the informant P. W. 1, Pawan Kumar. The report u/s 25/30 Arms Act was registered at police station on 18-7-1996 despite the recovery being made on 17-7-1996. It also shows that the recovery was effected on the night of occurrence but in fact it was made later on on 28-7-1996. It also renders their arrest on the very night of occurrence doubtful.

26. From the statement of this witness we find it next too impossible to believe that he could perform all the activities at the time he claimed to have performed them. All the papers on 17-7-1996 were prepared within half an hour. Admittedly he received the papers from the police station i. e. check F. I. R. and the copy of the C. D. at 9.40 P.M. away from the police station and he copied them in the case diary. He reached the spot thereafter. He claimed that he prepared the site map first at the spot and recorded the statement of the informant thereafter. In preparing site map he took 15 minutes whereas in his statement he disclosed that he took only 5 minutes. Thereafter he reached Madnani Nursing Home at 10.20 P.M. and got the inquest memo prepared from Sunil Kumar Rai but neither in the inquest memo nor in other papers pertaining to the post mortem prepared by Sunil Kumar Rai, signatures of Sunil Kumar Rai are there. The dead body, according to him, was despatched at 11.20 P. M. by a tempo. No mention of this fact is made in the C.D. H.C. Om Prakash Singh belies his testimony on this point out and out. According to him, he took the dead body 4.00 A. M. on a trolley and reached the police lines at 6.20 A. M. It was escorted by P. W.5, Constable Heera Lal. It was not taken in a tempo but in a rikshaw trolley. The dead body was received by Medical Officer at 2.30 P.M. along with papers and Chalan Lash. It did not contain approximate time of death. According to this witness time of death was not known to him till the preparation of the inquest. Had an F. I. R. been lodged and received by him at 9.40 P. M. this omission should not have been there, it is also not scribed in the inquest memo that

the dead body was lying at Madnani Nursing Home. Omission of this fact especially when it was mentioned in the F. I. R. leads to no other inference but one that the F. I. R. was not available to this witness till the inquest was prepared. In all probability this witness was not present when the inquest was prepared by Sunil Kumar Rai. He admitted clearly that all the papers including the inquest memo and other papers pertaining to post-mortem were prepared in the hand writing of Sunil Kumar Rai. Absence of any signature of Sunil Kumar Rai makes it out clearly that till then the S. O. was not present at the spot. He did not sign it purposefully. There is no mention of the weapon of assault in the inquest. It only mentions GOLI MAR KAR HATYA KI GAYEE. These are the circumstances that fortifies our conclusion that there was no F.I.R. in the night and at the time of preparation of the inquest especially. In our opinion it was prepared and P.W. 1 Pawan became available with the police consultation.

27. These are some other circumstances which further lend assurance to this fact. Under the signature of C. O. no date of its receipt an important circumstance in this direction. Statement of P. W. 4 that he went with the dead body at 4.00 A. M. further belies the fact that the dead body was despatched at 11.30 P. M. Body was received by the doctor at 2.30 P.M. These facts clinch against the integrity of investigating officer and also against the registration of the first information report at 9.25 P. M. Mention of 9.40 P. M. as the time of occurrence in the inquest memo further strengthens our inference in this regard.

28. Coming to the medical inconsistency we find sufficient material that the injuries sustained by the victim were the result of firing from a very close range. Presence of scorching and tattooing in his injuries leave hardly any room for doubt in the very proximate shooting. In this case shooting apparently was resorted to by the miscreant from left and not from the front as is available from the testimony of two eye witnesses. The gate of Ram Gopal Kesharwani where some pellets allegedly struck, in the circumstances, as alleged by the prosecution, rules out shooting from the front completely. This was possible only if the shooter was in the left of the deceased. The distance between this place and the gate of Ram Gopal Kesharwani was 8-9 steps as admitted by P.W. 2, Anil Kumar Rai. In this manner we find serious discrepancy in the manner of assault also. According to P. W. 2 shooting was resorted to from the gate of the house of the appellant. This also renders the prosecution story wholly doubtful. Absence of any mention of any source of light in the case diary by the investigating officer further creates serious doubt in the availability of any light at the place of occurrence. The appellant in his statement u/s 313 Cr. P. C. very categorically stated in response to question No. 36 that the deceased was an anti social element and had enmity with some other persons also. He was killed at some other place and appellant and his brother were roped in falsely in this case due to enmity. He further stated that on the date of occurrence from the evening clouds were covering the horizon and no light was available in the locality. P. W. 1 has admitted that it rained at about 12.00 P.M. This corroborates to

some extent the statement made by the appellant.

29. So far as P. W. 1 and P. W. 2 are concerned we have already discussed their statements. They did not appear to be probable witnesses of the incident. P. W. 1 was, according to his own statement, was called to the spot at the fag end of altercation by his younger brother P. W. 2 who claimed that when he was returning he saw the accused appellant and the deceased already engaged in some altercation. Non recovery of any household article claimed to have been purchased by this witness, especially P. W. 2, from the spot further creates doubt in his presence. None of these witnesses stated that Anil Kumar Rai P. W. 2 had carried these articles to the house along with him when he rushed to inform his family members. Non production of any public witness of the locality further creates serious doubt in the truthfulness of the prosecution case. Presence of other witnesses including Suresh Kurmi and Surendra was alleged but no explanation was offered why at least Suresh and Surendra were not produced. Signatories to the recovery memo were close acquaintance or relation of the informant or his family members. There is greater probability that the informant being present at the railway station to look after the business of his father when this incident occurred. His father had been in Bihar from before the date of occurrence. He returned from there the next day. No mention of names of the witnesses of recovery of gun and other articles from the house of the appellant in the case diary further creates serious doubt in the authenticity of the recoveries. Had these witnesses signed the memo of recovery of the gun and cartridge as alleged by P. W. 9 Pawan Kumar Singh on the same night this omission would not have been there. According to him P. W. 3 Vidhya Shankar Rai was present at the time of occurrence. In our opinion, his presence was a highly doubtful fact. He claimed that he was a student of B. A. II year and resided in Hindu Hostel. He came to meet Kamal Dev Sharma in the locality of occurrence on that day. In our opinion, it cannot be believed. He could have easily consulted his colleagues in the hostel itself about his studies. His admission that there was no allotment of any room in the hostel to him further strengthens our inference. His claim that he is living with one Mithlesh Kumar Rai who was not a student of the university further confirms our above inference. No payment for the hostel room by him to the university further bears testimony to our conclusion. Hundreds of people of the locality were present at the time of recovery of the weapon as admitted by P. W. 9 then why these two related witnesses of the caste of the deceased alone were picked up. Had they been present there why their names were not mentioned in the case diary in which these recovery memos were copied. All these goes to suggest that the signatures of these witnesses, were obtained on the recovery memo on some other date. These witnesses were nominated to him by the informant. No case diary was prepared on the night of occurrence. It was prepared later on that is why C. O. has put the date of receipt underneath his signatures. Medical conflict with the prosecution story regarding manner of assault further is another circumstance that create serious doubt in the story of the

prosecution regarding manner of assault and also in the presence of this witness. Presence of scorching and tattooing in both injuries of the deceased and the dimension of the injuries clearly show that the weapon used in the assault was not a gun but it was a short barreled weapon. The admission of the doctor that these injuries could be possible only from a distance of 3 to 5 feet bears faithful testimony to our conclusion. He being declared hostile by the prosecution and put to some leading questions by prosecution further exhibits the weakness of the prosecution in this context. Admission in this regard by P. W. 9 Pawan Kumar Rai that he measured that distance to be 87 steps leaves no room for doubt that the doctor played no foul in preparing the post mortem report. The charge levelled against him, therefore, is unworthy of credence.

30. So far as the recovery of the weapon on the very night of incident is concerned we have serious doubt in our mind about its genuineness and authenticity. In this case investigation was not conducted honestly and fairly. This clearly appears a plantation upon the appellant. Arrest of the appellants that very night from hardly 100 to 150 steps from their house at 10.00 P. M. i.e. an hour and half after the occurrence is not acceptable to us in the manner in which the prosecution has tried to prove it. According to P.W. 3 Vidhya Shankar Rai, appellants were brought to the spot on a jeep and appellant was taken out from it. There were 3 Sub-Inspectors and some Constables before he was taken to his house and the recoveries made. Statement of this witness clearly shows that there was no where mentioned in his statement made to the police u/s 161, Cr. P. C. that this appellant made any disclosure to the police. He did not state a word about any such statement in his statement in Court. His statement further shows that one shot was found embedded in the gun and the other spent cartridge was found outside the door of the room. It further leads to the inference that this gun was fired and that is why one cartridge was found outside the house and other was shown in the gun itself. In these circumstances it shows that gun was fired after its recovery. If the shooting was resorted to from the front as alleged by prosecution there is no probability of the pellets hitting the gate of Ram Gopal Kesharwani and the pole. There is also no possibility of two injuries on the person of the victim. The probability that the first fire struck the appellant on his left hand and the dispersed pellets struck the gate of Ram Gopal Kesharwani and the pole nearby it. The second shot struck the victim on his abdomen. The dimension of both the injuries were virtually identical with scorching and tattooing. It leaves no possibility of the shots being fired from a distance of 87 feet as alleged by P.W. 1 and P.W. 2 were proved by P.W. 9.

31. Learned counsel for the informant Sri U. N. Sharma has also stressed upon the promptness of the first information report and the recovery of the gun promptly at the behest of this appellant as well as ballistic opinion that this cartridge recovered from the barrel of the gun and other from the door of his house was fired from this gun leads to only inference that it was he who caused the death of the deceased. The enmity is on record. All these contentions we have already repelled while

discussing the prosecution evidence sufficiently. We find no force in his contentions. He has referred to some judgments of the Apex Court and other Courts on F.I.R., recoveries and laches of the investigation. In our opinion these judgments are not relevant for our consideration so far as the facts of this case are concerned. Every judgment is relevant in the facts of these cases. Criminal law is dependant upon facts. No fact of two cases can be identical or similar. Therefore, no decision can be binding on facts of other cases. In criminal law principles of general application can be declared on such issues which relate to definition and application of any particular law on the facts akin to such principles. No pronouncements on facts can be of common application.

32. In the result this appeal is allowed. The appellant is acquitted of the charges for which he was convicted. He is in jail. He shall be released forthwith if not wanted in any other case.