

(1995) 11 AHC CK 0116**Allahabad High Court****Case No:** Criminal Appeal No. 1128 of 1980

Rewa Ram and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Nov. 29, 1995**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 174, 313
- Penal Code, 1860 (IPC) - Section 302, 307, 34, 452

Citation: (1996) 20 ACR 237**Hon'ble Judges:** Giridhar Malaviya, J; B.K. Sharma, J**Bench:** Division Bench**Advocate:** A.N. Srivastava, for the Appellant;

Judgement

B.K. Sharma, J.

This is an appeal against the judgment and order dated 3.5.80 passed by Sri Munni Lal, IIInd Additional Sessions Judge, Rampur, in Sessions Trial No. 3 of 1979, State of U.P. v. Rewa Ram and Ors. and Sessions Trial No. 4 of 1979, State of U.P. v. Jagdish, whereby he convicted all the accused-Appellants for the offence u/s 302/34, I.P.C. and sentenced each of them to undergo imprisonment for life, for the offence u/s 307/34, I.P.C. and sentenced each of them to undergo 5 years R.I. and further for the offence u/s 452, I.P.C. and sentenced each of them to undergo 3 years R.I. All the sentences were made to run concurrently.

2. It is a double murder case. The deceased were Mangal Sen and Tota Ram. Both the deceased and the informant Ganga Ram were real brothers inter se. Ram Prasad injured was also their real brother. Mangal Sen deceased was real Mausera brother of accused-Appellant Rewa Ram. Bhajan Lal accused-Appellant is the Bhateej (son-in-law) of accused-Appellant Rewa Ram. Rewa Ram and Jagdish accused-Appellants were residents of Adil Nagar, Police Station Milak, district Rampur. Ganga Ram informant and Mangal Sen and Tota Ram deceased and Ram

Prasad injured also were residents of Adil Nagar, Police Station Milak, district Rampur. Bhajan Lal accused-Appellant was resident of village Mubarakpur, Police Station Lemari, district Rampur. Bhura accused-Appellant was the resident of village Gokul Pur, Police Station Milak, district Rampur.

3. There is a residential house of Ganga Ram informant in village Adil Nagar. To the north of his house there is his Baithak and to the north of his Baithak there is a Galiyara and after it there are two Saar of the informant and behind the same there is his Khaprail To the front of his Baithak towards North there is Baramda. There are seven Dars in the Baramda towards north. After that there is Chabutara towards north. On the east of the informant's house there was a vacant land of Gaon Samaj. To the west of the informants house there is the house of Ram Swaroop. To the south of the informant's house there was Khaprail of Rewa Ram accused-Appellant.

4. The prosecution story was that 2 1/2 months before the occurrence Sita Ram of the village was murdered, who was real Mausera brother of Mangal Sen deceased and also real Mausera brother of Rewa Ram accused-Appellant; that in the said murder case (of Sita Ram) Ram Swaroop, Anokhe Lal, Ram Kumar, sons of deceased Mangal Sen, and informant's son Sita Ram were challenged, that the Pairvi for defence of Sita Ram's murder case was being done by Mangal Sen and Tota Ram, present deceased, Ram Prasad injured and the present informant Ganga Ram; that the accused-Appellants had enmity with them on account of murder of Sita Ram that in the night between 26/27.8.1978 at about midnight Ganga Ram informant was sleeping inside his own house, that in the verandah outside Ram Prasad injured, Mangal Sen deceased and Tota Ram deceased were sleeping on three separate cots and Bundu Ram and Tirkha Ram on one cot, that in the second Dar of the verandah from east a lantern was hanging and burning from which there was sufficient light; that the informant Ganga Ram got up on the sound of the fire; that Smt. Panna, Smt. Kishori and Smt. Dhankia also got up, that all of them came to the verandah; that they saw Jagdish, Rewa Ram, Bhura and Bhajan Lal accused-Appellants assaulting Mangal Sen deceased; that Bhajan Lal accused was armed with lathi, Rewa Ram accused was armed with licensed gun, Bhura accused was armed with Sooja and Jagdish accused was armed with Tabal; that all the four accused-Appellants were assaulting Tota Ram, deceased, Mangal Sen deceased and Ram Prasad injured with their weapons that Rewa Ram was saying that they will take revenge of their brother; that Tota Ram village Loha, Shiv Charan, resident of village Narkhera, who were in Khaprail also came there and all of them asked accused-Appellants as to why there were beating these persons but they did not desist and asked as to where Ganga Ram was; that on hearing this Ganga Ram informant ran away from there; that after it the accused-Appellants searched him inside the house but they could not succeed as he had sealed the wall by and run away; that in the occurrence in all 20-25 fires were made and their empty cartridges were found on the spot that Mangal Sen and Tota Ram deceased both died on the spot on account of injuries on their persons that in the occurrence Ram Prasad

injured was assaulted by Tabal by Jagdish accused-Appellant and Rewa Ram accused-Appellant had fired at him with his gun; that Bhura accused-Appellant had assaulted him with Sooja, which, however, did not strike him; that on receiving his injuries Ram Prasad injured had run from the spot and went into the Sar of she-buffaloes and there he became unconscious and fell on the ground and that thereafter accused persons had gone away from the spot saving that they would see the informant Ganga Ram again.

5. The informant Ganga Ram got the F.I.R. (Ex. ka-1) scribed on the spot from Tota Ram and leaving the women with the dead bodies went to police station Milak, district Rampur by a buffalow-cart in which he also carried his injured brother Ram Prasad and lodged the first information report at the police station Milak, district Rampur at about 10.30 a.m. on 27.8.1978. On its basis Check-report (Ex. ka-7) was prepared by Head Mohirrir Ram Kumar Singh and a case was registered and an entry was made about it in the G.D. at serial No. 22 at 10.30 a.m. whose copy was Ex. ka-8.

6. The investigation of this case was conducted by Gaya Prasad Dubey, the then S.O. Police Station Milak. He interrogated the informant Ganga Ram (P.W. 1) at the police station itself. At that time he could not interrogate Ram Prasad injured because he was unconscious. He sent the injured for medical examination. On reaching the spot he found the dead bodies of Mangal Sen and Tota Ram deceased lying there. He first of all took inquest proceedings in respect of the body of Mangal Sen deceased and prepared Panchayatnama (Ex. ka-9) and connected papers and also took the clothes in custody from the dead body of Mangal Sen deceased. He then took panchayatnama proceeding in respect of dead body of Tota Ram deceased. He then interrogated some witnesses and then prepared the site plan (Ex. ka-23) and took 22 empty cartridges and 30 Tiklis, 165 small pellets and 4 pieces of glass in custody and prepared memo Ex.ka-24. He took blood stained earth and simple earth from the place where the dead body of Tota Ram deceased was lying and kept the same in sealed containers, which were Ex. ka-37 and Ex. ka-38. He also took blood stained and simple earth from the place where the dead body of Mangal Sen deceased was lying and kept the same into two sealed containers Ex. ka-39 and Ex. ka-40 and prepared a separate recovery memo Ex. ka-26 about it. He took into custody four cots and the beddings and gave the same in the Supurdgi of the informant Ganga Ram and prepared Supurdginama Ex. ka-27 about it. He found a lantern hanging from the door of verandah and he found it in proper and working condition. He also found a bullock cart near the dead bodies and gave in into Supurdgi of the informant and prepared a memo Ex. ka-29 about it also. It is unnecessary to dilate about the other aspects of the investigation. The charge-sheet was submitted in this case by IInd Investigating Officer Anuradha Singh (P.W. 8).

7. Dr. T.N. Gupta, Medical Officer, District Hospital, Rampur medically examined Ram Prasad injured. He found the following injuries on the person of Ram Prasad injured

(PW 21:

- (i) Multiple circular gun shot wounds of size about 1/4 cm x 1/4 cm. depth not proved, Blackening, tattooing and scorching present on front of lower chest and upper abdomen. Kept under observation.
- (ii) Incised wound 5 cm x 1 cm on the outer aspect of left upper arm at junction of lower 2/3rd and upper 1/3rd of arm. Depth skin deep.
- (iii) Incised wound 2 cm x 1/2 cm on front of left forearm 8 cm below crease of left elbow joint. Depth muscle deep.
- (iv) Abrasion 2 cm x 1/2 cm over front of left chest 3 cm below of left collar bone.
- (v) Incised wound 6 cm x 1 cm muscle deep on front of lower left thigh 3 cm above upper border of joint.

Injury No. 1 was kept under observation and X-ray examination was advised. The duration of the injuries was about half a day old at the time of examination. Injury No. 1 was caused by firearm namely gun. Injury Nos. 2, 3 and 5 were caused by sharp cutting weapon like Tabal. Injury No. 4 was the result of friction against some hard substance. In the opinion of the doctor the injuries could have been caused on the midnight of 26/27.8.78.

8. Dr. O.N. Gupta (P.W. 5), Medical Officer, District Hospital, Rampur conducted the post-mortem examination on the dead body of Mangal Sen on 28.8.78 at 4.45 p.m. He found the following ante-mortem injuries on the dead body of Mangal Sen deceased:

- (i) Incised wound 4 cm x 1 cm x bone deep on right parietal region head 8 cm above right ear.
- (ii) Whole of face and frontal region head is mescerated into pieces in skull cavity. Liquified brain is seen. On face only ears present.
- (iii) Incised wound 2 cm x 1 cm x 0.5 cm on right scapular region back.
- (iv) Incised wound 6 cm x 0.5 cm x skin deep horizontally on middle of right forearm back side.
- (v) Incised wound 4 (01 x 0.5 cm x skin deep horizontally. On lower 1/3rd of right forearm back side.
- (vi) Incised wound 6 cm x 1 cm x skin deep on middle of right leg front side.
- (vii) Incised wound 3 cm x 2 cm area on middle of left upper arm back side.
- (viii) Incised wound 3 cm x 1 cm x 2 cm area backside left elbow.
- (ix) Piercing wound 2 cm x 1 cm x skin deep on backside left hand 2 cm below ring finger.

(x) Piercing wound 3 cm x 1 cm x abdominal cavity deep horizontally on left inguinal region of abdomen.

(xi) 4 piercing wounds each measuring 1.5 cm x 1.5 cm x chest cavity deep. Two wounds on left side chest above nipple and two right side chest below right nipple.

On internal examination the doctor found the frontal half of the skull half mescerated, the membrances mescerated, the brain whole liquified, wadding piece and shots 28 in number recorded, base mescerated and liquified, Thorax-2 pint fluid present in cavity, pleura punctured at 4 places, two on right side and two on left side, right and left lungs-upper lobes cut at two places through and through, Abdomen-peritoneum cut under injury No. 10, cavity about 2 pint fluid, stomach contains 4 Oz. semi-digested food, small intestine cut under injury No. 10, large intestine faecal matter, bladder empty.

9. In the opinion of the doctor death was due to shock and haemorrhage as a result of injury to brain and other vital organs, the antemortem injury No. 2 was the result of firearm and injury Nos. 1 to 8 except 2 were caused by some sharp cutting weapon like Tabal, injury Nos. 9, 10 and 11 were caused by sharp pointed weapon like Sooja, these injuries could have been caused on the midnight of 26/27.8.78 and the ante-mortem injuries were sufficient to cause instantaneous death.

10. The post-mortem examination on the dead body of Tota Ram deceased was also conducted by Dr. O.N. Gupta (P.W. 5), Medical Officer, District Hospital Rampur on 29.8.78 at 3 p.m. He found the following ante-mortem injuries on the person of Tota Ram deceased:

(i) Incised wound 2 cm x 1 cm x bone deep on top of head vertically 12 cm above right ear.

(ii) Incised wound 4 cm x 1 cm x cut bone seen on back side head occipital region horizontally.

(iii) Two incised wounds each measuring 2 cm x 1 cm x muscle deep on lower 1/3rd back forearm. Left upper arm.

(iv) Incised wounds 3 cm x 1 cm x 1 cm on back side left elbow.

(v) Four incised wounds 3 cm x 1 cm x 1 cm on back side left elbow.

(vi) Two incised wounds 1 cm x 0.5 cm x 0.5 cm on back side left wrist.

(vii) Two incised wounds each measuring bone x 1 cm x muscle deep on middle 1/3rd of left thigh outer vertically.

(viii) Two incised wounds each measuring 2 cm x 1 cm x 0.5 cm on left leg lower 1/3rd outer side.

(ix) Four incised wounds each measuring 1 cm x 0.5 cm x 0.5 cm on left side chest parallel to anterior axillary fold starting from 4 cm below left clavicle to middle coastal cage.

(x) Piercing wound 2 cm x 1 cm x chest cavity deep just near the left nipple medially and downwards.

(xi) Three incised wounds each measuring 2 cm x 1 cm x muscle deep on back between scapular region on left side.

(xii) Incised wound 1 cm x 1 cm x muscle deep on right palm of hand below middle finger.

(xiii) Incised wound 3 cm x 1 cm x muscle deep on middle and right thigh back and inner side.

11. On internal examination the occipital bone of head was found cut under injury No. 2, the membrances were also found cut under injury No. 2, the brain was found cut under injury No. 2 and whose mass was meserated, Thorax-pleura was found cut 1 cm x 1 cm under injury No. 10., there was fluid blood about 2 pint, left lung was found cut through and through 1 cm x 1 cm under injury No. 10, pericardium was found cut under injury side empty., weight 8 oz. Abdomen-stomach was found 4 oz. fluid material present, small intestine was found gaseous, large intestine was found having gases, faecal matter present and bladder was found empty.

12. In the opinion of the doctor, the death was caused due to shock and haemorrhage as a result of injuries to vital organs; injuries 1 to 13 except No. 10 were caused by some sharp cutting weapon like Tabal; injury No. 10 was caused by some sharp pointed weapon like Sooja; the death of the deceased could be caused during the midnight of 26/27.8.78, the injuries were sufficient to cause instantaneous death.

13. Ocular evidence at the trial of this case has been given by Ganga Ram informant (P.W. 1), Ram Prasad injured (P.W. 2), Tota Ram (P.W. 3). The evidence given by rest of the prosecution witnesses were formal in nature.

14. From the side of defence Kabir Ahmad (D.W. 1) and N.C. Ram Bilas Sharma (Head Mohirrir) (D.W. 2) have been examined in regard to alibi of Jagdish accused-Appellant.

15. The trial court believed the prosecution evidence and consequently convicted and sentenced the accused-Appellants as aforesaid.

16. Now it is established beyond doubt by the evidence on record that an occurrence did take place in the night between 26/27.8.78 at about midnight at the house of the informant Ganga Ram in which his brothers Mangal Sen and Tota Ram were done to death, and Ram Prasad (P.W. 2) was injured.

17. The defence claim is that actually a dacoity had taken place at the house of the informant and that the culprits could not be identified and the accused-Appellants have been implicated in this case falsely because of enmity.

18. In the prosecution F.I.R. Rewa Ram accused-Appellant is said to have fired 20-25 fires at the spot, whose empty shells were lying at the spot. I.O. Gaya Prasad Dubey (S.O. prepared a memo after visiting the spot in which he found 22 empty cartridges, besides 30 Tiklis, 165 pellets and 1 cork at the spot. The postmortem of deceased Mangal Sen shows that all the ante-mortem injuries, except injury No. 2, were caused by cutting or piercing weapons; in ante-mortem injury No. 2 there were found 28 pellets and 2 wadding pieces. In the post-mortem of Tota Ram deceased, there were found no firearm injuries. The injury report in respect of Ram Prasad injured showed only one firearm wound, which was a multiple firearm wound of entry with blackening, tattooing and scorching present, but there was no firearm injury on his body. It will mean that a large number of shots were fired i.e. indiscriminate firing was made.

19. According to the site plan prepared by the Investigating Officer, all the empty cartridges and pellets were found near about the Chabutara and in the Verandah. The injuries of Ram Prasad injured were simple in nature and no further shots have been fired on him after his receiving simple injuries even when on the prosecution evidence he was well within.

20. Further, as per testimony of the informant, Smt. Panna, W/o Mangal Sen deceased, Smt. Kishori, W/o Tota Ram deceased and Smt. Dhankia. W/o Ram Prasad injured are said to have come to the verandah, where the occurrence took place on the evidence of the informant, but they were not fired at or assaulted. As per prosecution case, Tirkha Ram and Bandu Ram witnesses were also sleeping on the cot in the same verandah, in which two deceased and injured Ram Prasad were sleeping on separate cots, but neither Tirkha Ram, nor Bandu Ram are said to have been assaulted by the assailants even though Tirkha Ram was son of Mangal Sen deceased and Bandu Ram was son of Ganga Ram informant. All these facts tend to support the defence plea that a dacoity had taken place. As a matter of fact such a large number of fires suggests that several assailants were carrying firearms and used the same.

21. The Apex Court has observed in the case of *Maharaj Singh v. State of U.P.* 1984 SCC 1390 (at page 1397):

...F.I.R. in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at trial. The object of insisting upon prompt lodging of the F.I.R. is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons if any, used, as also the names of the eyewitnesses, if any. Delay in lodging

the F.I.R. often results in embellishment, which is a creature of an afterthought. On account of delay, the F.I.R. not only gets benefit of the advantage of spontaneity, danger also crept in the introduction of a coloured version or exaggerated story. With a view to determine whether the F.I.R. was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the F.I.R., called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the F.I.R. was not lodged at the time it is alleged to have been recorded, unless of course the prosecution can offer a satisfactory explanation for the delay in dispatching or receipt of the copy of the F.I.R. by the local Magistrate.... The second external check equally important is the sending of the copy of the F.I.R. along with the dead body and its reference in the inquest report. Even though the inquest report prepared u/s 174, Code of Criminal Procedure is aimed at serving a statutory function to lend credence to the prosecution case, the details of the F.I.R. and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the F.I.R. came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged F.I.R....

22. In the present case the occurrence took place in the night between 26/27.8.78 at about midnight. The first information report as claimed by the prosecution was lodged on 27.8.78 at 10.30 a.m. by Ganga Ram informant at the police station which was 8 miles away. The Challan-lash in respect of the dead body of Tota Ram (Ex. ka-21) contains the endorsement of the Medical Officer concerned dated 29.8.78: "Dead body received, sealed and clothed on 27.8.78 at 9.30 p.m. Papers received on 28.8.78 at 3.45 p.m." The Challan-lash in respect of Mangal Sen deceased (Ex. ka-14) contains the endorsement of the Medical Officer, District Hospital Rampur dated 28.8.78. " Dead body received, sealed and clothed on 27.8.78 at 9.30 p.m. Papers received on 28.8.78 at 3.45 p.m." It means that the papers relating to dead body of the two deceased were received by the Medical Officer concerned long long after the receipt of the sealed dead bodies of the deceased by him. These endorsements show that the police papers were not accompanying with the dead bodies when these bodies was taken to the mortuary by the Constables. In the absence of an explanation for the gap in this regard, the only inference available was that the F.I.R. had not yet been recorded in the police records and that was why the police papers were sent subsequently to the autopsy surgeon. It may be mentioned here that the prosecution has withheld from the Court the constables who had taken the dead bodies and papers from the spot to the Police Lines and from thereto the mortuary and delivered the same to the Surgeon.

23. The inquest report in respect of Mangal Sen deceased, Ex. ka-9, records the start of inquest proceedings about him at 2.30 p.m. and completion at 3.15 p.m. and

inquest report about Tota Ram deceased, Ex. ka-16, records the start of inquest proceedings at 3.15 p.m. and their completion at 4 p.m. on 27.8.78. In their first page against the column "Soochna Dene Wale Ke Kathananusar Report Ka Swarup Aur Mrityu Ka Karan" there is no mention of cause of death or nature of weapons used causing the death. This indicates that the F.I.R. had not been as yet drafted when the two inquest reports were prepared by the Investigation Officer i.e. even upto 4 p.m. on 27.8.78, though as per prosecution, the F.I.R. is said to have been lodged on 27.8.78 at 10.30 a.m. In the challan-lash about Tota Ram deceased, Ex. ka-21, the endorsement of the doctor says that the dead body was received at the mortuary on 27.8.78 at 9.30 p.m. and the challan-lash, Ex. ka-14, about Mangal Sen deceased also contained an identical endorsement. In both the challan-lash in the column about the time of arrival of the dead body at the police Head Quarter and of the time of its despatch to the mortuary the entry was of G.D. No. 20 dated. 28.8.78 of 11.25 a.m. the same could not have been received at the mortuary a day earlier on 27.8.78 at 9.30 p.m. It shows that a fictitious entry was made by the doctor in the two challan-lash about the date and time of the receipt of the sealed dead bodies at the mortuary. The distance of the Police Lines from the scene of occurrence was recorded as 25 miles in the two challan-lash aforesaid. The inquest proceedings in respect of Mangal Sen deceased were concluded at 3.15 p.m. on 27.8.78 and in respect of Tota Ram deceased were concluded on the same day at 4 p.m. if the entries in respect of the inquest reports are to be believed. But as per G.D. entry of the Police Lines the dead bodies reached there on 28.8.78 at 11.25 a.m. even though the distance was only 25 miles and there was no explanation of the time taken between 4 p.m. on 27.8.78 and 11.25 a.m. on 28.8.78 in covering 25 miles. It goes to show that the inquest proceedings were concluded at a subsequent time and not at the recorded time. In any case, it appears that the F.I.R. was not yet actually recorded at the police station, when the two inquest reports were prepared as noted above.

24. At this stage it will be useful to refer to the F.I.R. and to the oral evidence regarding the preparation and lodging of the F.I.R. given by the informant Ganga Ram (P.W. 1) and Tota Ram scribe (P.W. 3). This Tota Ram is the son of Baldeo Prasad, R/o Lohapatti Bhola Nath and is not to be confused with Tota Ram deceased, who was son of Khoob Chand, R/o Adil Nagar, P.S. Milak, District Rampur). In the written F.I.R. (Ex. ka-1) it is stated in the end "SABERE BHAISA GADI SE RAM PRASAD JAKHMI BHAI KE SATH THANE AA GAYE HAIN. "It means that first the informant reached the police station alongwith his injured brother Ram Prasad and after it the F.I.R. was scribed. If the F.I.R. had been scribed at the house of the informant for even in the way while going to police station, there will be no mention in the F.I.R. that he has come to the police station taking his injured brother Ram Prasad. As against this, Ganga Ram informant stated in his examination-in-Chief in para 5 that he got the written F.I.R. scribed at the spot from Tota Ram (P.W. 3) "IS GHATANA KI TAHREER MAUKE PAR HEE BOIKAR TOTA RAM PUTRA BALDEO.... SE LIKHAI THI...." In

his cross-examination, he stated in para 9 of his statement that he had started from his house for police station Milak in the morning at 4 a.m. at dawn. He further stated that only he and Ram Prasad injured had gone by the Bhaisagadi and none had accompanied them. He further stated that written F.I.R. had been got scribed at his house, one minute before starting for the police station; that papers, a pen and ink pot were taken from the children of the house; that a kerosene oil Dibbi was put on (burnt) and the F.I.R. was scribed in its light under the Pakar tree at the Chabutra in front of the Verandah; that the writing (the written F.I.R.) was given to him by Tota Ram, P.W. and this writing he (informant) carried to the police station. He made a denial of the suggestion that this writing was scribed at the police station in consultation with the police. The contents of the written F.I.R. noted earlier totally belie his repeated claim in his statement at the trial that the written F.I.R was got scribed at his house before starting for the police station.

25. Tota Ram (P.W. 3) stated in para 6 of his evidence at the trial that Ganga Ram informant had dictated the F.I.R. to him in the Baramda two hours after the occurrence and that it was darkness at that time and that a lantern was burning and the scribing was done in the light of that lantern and that was the same lantern which was burning at the time of the occurrence. He claimed that it had been taken down from the place where it was earlier hanging in order to scribe the F.I.R. This is in conflict with the claim of the informant that a Dibia was burnt and in its light the scribing of F.I.R. was done.

26. Tota Ram, P.W. further stated that he did not remember whether he told the Investigating Officer about the scribing of the F.I.R. in the morning or not. He could not explain, how the Investigating Officer recorded his statement about the scribing of the F.I.R. in the morning by him. He could not explain, how the Investigating Officer recorded his evidence about the scribing of the F.I.R. in the morning by him. I.O. Gaya Prasad Dubey (PW. 7) testified in para 3 of his evidence that Tota Ram had told him "SUBAH BOL BOL KAR GANGA RAM NE MUJHSE TAHIRR LIKHAI." Tota Ram. (P.W. 3) denied the defence plea that he had accompanied the informant to the police station but he claimed in para 7 of his evidence that one Budhsen of Rooppur had accompanied the informant to the police station for lodging the F.I.R. He further stated that Budhsen had come in the morning of the occurrence to the house of the informant. It may be recalled here that according to the informant Ganga Ram, nobody had accompanied him to the police station except his injured brother Ram Prasad (P.W. 2). All these inconsistencies assume greater significance in view of the above-noted alarming facts and lead to the definite conclusion that the F.I.R. was scribed at the police station much later than the time recorded in the Chik report and then ante-timed.

27. Another circumstance leading to the same conclusion is that even though the allegations in the F.I.R. constituted the offence u/s 307, I.P.C. in regard to the injuries of Ram Prasad injured who was brought to the police station and remained

alive but the case that was registered on the F.I.R. was u/s 302, I.P.C. alone and not u/s 302/307, I.P.C. as one would expect in the ordinary course. Further if the assailants were four Section 34, I.P.C. would have also found place in the array of sections of the I.P.C. while registering the case. There is no direct explanation available in the record. The only plausible explanation that comes in the mind is that seeing the two dead bodies the Investigating Officer, who was himself Station Officer of the police station, gave a tentative crime number recording the offence u/s 302, I.P.C. not knowing that there is an injured also and it was not known to him until then whether the assailants were less than 5, or 5 or more? It may be that injured Ram Prasad had not been taken to the police station only after the time when the Station Officer came to the spot and saw the dead bodies of the two deceased.

28. As per prosecution case, Tota Ram (P.W. 3) scribe was himself an eyewitness of the occurrence. The defence claimed that he was not present in the village of the occurrence in the night of the occurrence and had not seen any occurrence at all and that Ganga Ram informant had called him from his village subsequently because he was considered to be much conversant with law and that the F.I.R. had been scribed by him at the police station at the dictation of the police. We have noted earlier that a plain reading of the written F.I.R. shows that it was scribed after the informant Ganga Ram had reached at the police station. That Tota Ram (P.W. 3) was the scribe of the written F.I.R. is not in controversy, but the fact that this scribe does not claim having gone to the police station and that the informant claims that he alone went to the police station taking Ram Prasad injured with him concealing the going of Tota Ram scribe to the police station and that both of them claimed at the trial that the F.I.R. was scribed at the house of the informant, where the occurrence had taken place, and before going to the police station go to show that they have no hesitation in telling lies and a grave shadow of doubt is thereby thrown over the entire prosecution case.

29. Ganga Ram informant (P.W. 1) was an inmate of the house where the occurrence took place. So, regard being had to the common course he would be expected to be sleeping there in the night of occurrence. The defence claim is that he was not present at the house in the night of occurrence. But there is no material to substantiate this claim of the defence. However, further argument on behalf of the defence was that even if he (informant) was present at the house, he did not see the occurrence as claimed in his testimony. He himself admits in his testimony that he ran away from his house and came back only after the departure of the assailants. The defence claims that he ran away at the very beginning out of fear without seeing the occurrence. It is argued that if he had entered the verandah situated towards north of the house, he must have been injured, while he had not received any injury on his body and even he does not claim that any fire or assault was made towards him. It is further claimed that in the ordinary course out of fear he would have closed the doors of the house from inside securely rather than going near the

assailants and in any case, if the assailants had come alongwith weapons the inmates of the house would have invariably concealed themselves or fled away and would have never dared to come face to face with the assailants. In the present case it is highly doubtful that the informant saw the occurrence and could identify the assailants. One circumstance in this regard is that he does not claim that he was fired at or was assaulted by the assailants at any time during the occurrence. His statement that he fled away on hearing the quarry of the assailants from the persons who came to the spot as to where he is; "POOCHHA KI GANGARAM KAHAN HAI?" It shows that he was not visible to the assailants but on the overhearing of the assailants quarry and or on hearing the same he fled away instantly. Whether he was not visible because of absence of light or insufficiency of light or because he was not present in the vicinity of the portion of the house where the occurrence took place. There is oral testimony about the various details of occurrence including the names of the assailants which is highly suspect. If the assailants could find him/recognised him, they would have done him to death. It is also extremely doubtful that the women-folk of the house would be dashing forward and coming to the verandah bare handed while Tirkha Ram and Bandu Ram who are said to have been sleeping in the verandah itself were nowhere found at or near the scene of occurrence and the informant never came forward. As per prosecution case, Tota Ram (P.W. 3), who is the scribe, and Shiv Charan, who were sleeping under the Khaprail, are said to have come to the spot but they had also not been assaulted by the assailants as per prosecution case.

30. In the first information report there is a mention that both the deceased Mangal Sen and Tota Ram and injured Ram Prasad were resting in the verandah of their Baithak on separate cots and Tirkha Ram and Bandu Ram were resting on one cot and that he (informant) himself was resting inside the house. We have already noted earlier the topography of the house of the informant and the deceased persons. Since the informant was resting inside the Baithak he could not see the assailants entering into the verandah, or their various weapons or the firing of any shots by any specific person out of them or the weapons carried by each of the assailants. Yet in the F.I.R. there is not only a mention of the names of the accused persons and of their respective weapons and even of the firing by Rewa Ram accused-Appellant, even though until then, according to the F.I.R., he was yet inside the house and it was on the sound of this fire that he and the women of the house, namely Smt. Panna, W/o Mangal Sen deceased, Smt. Kishori, W/o Tota Ram deceased, and Smt. Dhankia, W/o Ram Prasad injured, got up and came out (of the house) by opening the Kiwar.

31. The F.I.R. is vague as to which door was opened. He claimed that behind the ladies he also went near the door. The words are "KIWAR PANNA...ISHWARI...DHANKIA...KIWAR KHOLKAR BAHAR AAYEEN KI MAI BHI DARWAJE KE PAAS GAYA...." It was not disclosed in the F.I.R. as to where the ladies were sleeping. Coming to the trial the informant stated in para 4 of his statement on

oath"...PANNA...KISHORI...DHANKIA...AUR HAM SABHI UTHKAR BARAMDE MEN AAYE TO MAINE DEKHA...." So at the trial in his examination-in-chief his stand was that not only the ladies but he himself also came inside the verandah. We have already given the topography of the house of the informant. The verandah was at the place where the victims and others were resting on cots and where the occurrence definitely took place. We have noted earlier his statement that the assailants were asking from the persons collected as to where he (informant) is, whereupon he ran away from there. This part of his statement belies his claim that he had entered the verandah, where the occurrence had taken place. When he came to be cross-examined on a subsequent date he stated that by opening a door one comes from Haweli i.e. the house, into the Dehlis and then by opening another door one comes in the verandah (verandah is the place where the occurrence took place). It appears from his testimony that there were two doors in the Haweli which open into the Dehlis (Baithak) and one of the two doors was permanently closed by heaping Upali (cow-dung-cakes) and the other one was used for ingress and egress; that there were three doors in the Baithak which open towards the north into the verandah, where the occurrence took place. The informant stated in para 7 of his evidence that all these three doors have got door-planks. At the time of occurrence all the doors were closed from inside. He further stated on the third date in his cross-examination in para 10 that on hearing the sound of fire, he opened the middle door of the Baithak (this Baithak has also been described as Dehlis by the witness in his testimony) and came in the Baithak and opened the middle door of the Baithak and kept on peeping from there and did not go inside the verandah (where the occurrence took place). The words used are "MAINE FIRE SUNKAR BAITHAK KE BEECH WALA DARWAJA KHOLA AND BAITHAK MEN AA GAYA AUR WAHIN SE JHANKATA RAHA BARAMDE MEN NAHIN GAYA...." He further stated that Rewa Ram accused-Appellant stated as to where is he (Ganga Ram informant) and on hearing this he returned from there into his house and ran away. He further stated that whatever he saw, he saw by peeping from the middle door of the Baithak by opening Kiwar. It will be thus seen that three inconsistent and different statements have been made by him at three stages, in the F.I.R., then in his examination-in-chief and then in cross-examination. The result of these discrepant statements is that no conviction can be recorded on such ocular testimony as given by this witness.

32. Here, it would be useful to make a reference to the site plan prepared by the Investigation Officer. In that site plan he has shown the location from which the informant saw the occurrence by the letters "OG". This point has been shown to the south of the middle door of the Baithak. This point was inside, the Baithak, neither inside the middle door, nor in the verandah to the north of this middle door. So that depicts the case at the time of investigation.

It will also be useful to place on record the statement of the informant at the trial in para 7 that after the running away of the assailants Chheda Lal and others had come to the house. He stated "...IN LOGON NE AANE PAR MUJHSE YA KISI AUR SE

WAKNE KE BARE ME KUCHH NAHEEN POOCHHA AUR NA HAMNE BATAYA YAH LOG JO HALAAT THE? DEKHKAR WAHAN SE CHALE GAYE." This shows that until the time the public witnesses of the village collected it was not known as to who were the assailants. If the assailants had been seen and identified by the informant or their names had been told to him by Ram Prasad injured or by any other witness, he would have named the assailants spontaneously to the villagers at the spot. It cannot be believed that the villagers who would collect would not ask him as to who were the assailants, as claimed by him.

33. Before we take up the testimony of Ram Prasad (P.W. 2), an injured witness of the occurrence, we may take up the testimony of Tota Ram scribe (P.W. 3). We have noted above the discrepancies between the statements of this witness Tota Ram (P.W. 3) and the informant Ganga Ram (P.W. 1) and that they have told deliberate lies to impress that the F.I.R. was scribed, soon after the occurrence. We have already noted the other circumstances showing the ante-timing of the F.I.R. He was not an inmate of the house, nor he was even a resident of village Adilpur, where the occurrence took place. He was a resident of village Lohagara, police station Milak. So in the ordinary course, he was not expected to be present at the house of the informant and the deceased. In other words, he was only a chance witness and chance witnesses are proverbially false. He claimed that a day before the occurrence he had come to village Adilnagar accompanied by Shiv Charan of village Narkheda; that in the night of occurrence he and Shiv Charan were sleeping in the Kachchi Baithak of Mangal Sen deceased. He claimed that he and Shiv Charan had come out on hearing the sound of fire and reached the Chabutra in front of the Baithak and saw the occurrence from there. He does not claim that the assailants made any effort to assault him. He is not an injured in the occurrence. He is also not an independent witness. He admitted that he and Shiv Charan witness were related to each other. He further admitted that Siya Ram, who was an accused in the Sita Ram's murder case, was his Bahnoi's Tayera brother and that Shiv Charan was Mausa of Siya Ram aforesaid. Here it may be mentioned that Sita Ram aforesaid who was the real brother of "Rewa Ram accused Appellant had been murdered 2 or 2 1/2 months before the present occurrence and in that murder case (of Sita Ram) Siya Ram aforesaid, Anokhe Lal, Ram Swaroop and Ram Kumar, all sons of Mangal Sen deceased, were accused, and that their pairvi was being done by Mangal Sen and Tota Ram present deceased, Ram Prasad present injured and Ganga Ram present informant. So, all these three eye-witnesses are partisan witnesses and were inimical to Rewa Ram accused-Appellant even though Rewa Ram was also related to them, being real Mausera brother of Mangal Sen present deceased.

34. In his cross-examination Tota Ram (P.W. 3) stated that on the evening preceding the night of occurrence he came to the house of the informant alone at 5 p.m. and at that time Shiv Charan witness was sitting at the house of the informant. This statement he has made with a view to impress that he and Shiv Charan Lal had not come together. He further stated that he wanted to go to meet Siya Ram, Anokhe

and others who were accused in the aforesaid Sita Ram's murder case and was in jail, because it was a Sunday. He did not give this reason for his visit before the Investigating Officer as is clear from the statement of the Investigating Officer. He had earlier given a different explanation in his statement before the Investigating Officer. It was that he had come for consultation in respect of bail and pairvi of Siya Ram, Anokhe and others and also to take Mangal Sen and others with him for the purpose. He admitted that he gave this statement before the Investigating Officer. We have noted earlier that in his statement he tried to show that he and Shiv Charan had not come to the informant's house together by saying that Shiv Charan Lal was already present at the house of Ganga Ram informant when he reached there. But he stated in the next sentence that the reason of coming to the house of Ganga Ram informant was the same for both of them and that was told by him to the Investigating Officer. He was put the discrepancies between the two reasons pointed out by him for his visit to the informant's house Ganga Ram (P.W. 1) given at the trial and the other earlier to the Investigating Officer. He replied that he did not remember as to what he told to the Investigating Officer. The Investigation Officer has proved the statement given to him and he also admitted that the statement was given by the informant to him on the point. It is clear that there was enmity between the informant and Rewa Ram accused-Appellant on account of said Sita Ram's murder case. While this enmity between the two sides could be a motive for the commission of the occurrence, it could also be a ground for a false implication. This put the Court on its guard while assessing the oral evidence given by such a witness at the trial. The position of Tota Ram (P.W. 3) is also quite clear. He too shared the enmity with Rewa Ram accused-Appellant and Ram Prasad (P.W. 2), the real brother of the informant Ganga Ram, also shared the said enmity. Jagdish accused-Appellant is the son of Rewa Ram accused-Appellant and Bhajan Lal accused-Appellant is son-in-law of Rewa Ram accused-Appellant. So, no implicit reliance can be placed on the ocular testimony unless there is corroboration lending assurance to the Court that the testimony is worth believe. We have noted earlier the state of evidence. We may mention here that though all the eye-witnesses say that all the four assailants used their weapons in the occurrence but there is not a single injury corresponding to the alleged yielding of lathi by Bhajan Lal accused-Appellant. This is one more reason to cast doubt over the prosecution story.

35. Ram Prasad (P.W. 2) is an injured witness and the injuries of this witness are the hallmark of his presence on the spot. However, intrinsic words of his testimony is to be assessed in the light of the surrounding circumstances. It is also to be seen whether he had sufficient opportunity to see and identify the assailants and whether the nomination of the accused persons by him is worthy of reliance.

36. He claimed arrival of all the four accused-Appellants with their respective weapons and also assaults by them. But about himself he stated that he was assaulted by a Tabal by Jagdish accused-Appellant and thereafter was fired at by

Rewa Ram accused-Appellant. He further claimed that Bhurey Lal accused-Appellant gave a blow with Soqja but that did not strike him. The medical report shows that he received three incised and also a multiple fire-arm injury. He did not receive any Lathi or Sooja injury on his body. He testified in his examination-in-chief to a single injury by Tabal and a single fire-arm injury by gun on him. In his cross-examination he stated that Jagdish gave two blows by Tabal on his body which struck him. Actually there were three sharp weapon injuries on his body, which means one sharp weapon injury was received by him before his awakening. He stated that he received Tabal injury and firearm injury and ran away from there and fell down at that place and became unconscious. So on his own saying he had a very short span of time during which he could see and identify the assailants.

37. The prosecution did claim the presence of lantern light at the time of occurrence. On the totality of the circumstances it appears that either the lantern was not burning or its light was so insufficient that no identification or proper identification of the assailants could be made. We have noted earlier that the informant admitted that he did not name any assailant before the villagers who had collected at the spot after the departure of the assailants. If the informant had seen and identified the assailants he would have stated to the villagers as to who were the assailants. It may be added that Ram Prasad (P.W. 2) must have told the informant about the names of the assailants in any case if he had identified them. The prosecution cannot be allowed to take shelter behind the plea that Ram Prasad had become unconscious when he fell down after receiving the injuries because even though Ram Prasad (P.W. 2) makes claim to have become unconscious after falling down on the ground this claim of the prosecution is belied by the G.D. entry (Ex. ka-8) about the registration of the case. There is no mention therein that Ram Prasad injured was in an unconscious condition and the injury report in respect of Ram Prasad injured (Ex. ka-2) also does not make any mention whatsoever of his nay sort of unconsciousness. Dr. T.N. Gupta (P.W. 4), who recorded the injury report of Ram Prasad injured, admitted in his cross-examination in para 3 that he has not recorded in the injury report whether the injured was in an unconscious condition. He stated that when the condition of the patient is more serious and his pulse is weak it is recorded in the injury report and if his condition is of unconsciousness it is recorded in the injury report. He categorically stated that since it has not been recorded in his injury report that he was unconscious, it shows that he was not unconscious. He further stated that on receiving the injuries he may or may not have become unconscious. He further stated that if the injured became unconscious he could have regained consciousness only after giving first aid. He further stated that upto the time of his medical examination he was not given any first aid. So his testimony belies the statement of Ram Prasad injured witness (P.W. 2) that after falling down to the ground he became unconscious.

In the ordinary course, there would have been a trail of blood starting from the place where Ram Prasad was sleeping on his cot upto the place where he fell down

to the ground and there must have been some blood at the place where he had fallen down to the ground. But the Investigating Officer did not find any such trail of blood at all. The informant gave an explanation in para 10 of his evidence that somebody had tied Chadar on his leg injury but it was only hearsay and Ram Prasad injured himself did not make any such claim. This all throws doubt on his testimony. Here I may mention that the informant testified in para 10 of his evidence that Ram Prasad injured ran and fell down on the Modha Le. exit outside the Sar of she-buffaloes. He further stated in the same pare that Ram Prasad did not fall at the Modha of the Sar on which Tota Ram and Shiv Charan witnesses were sleeping, but he fell down at the Modha of the Sar situated near the Chabutra. He further stated that both doors of this Sar open towards his Chabutra and the doors of the Sar, in which Tota Ram and Shiv Charan were sleeping, open towards the middle Sar. He further stated that Ram Prasad had fallen down near the western Modha situated adjoining his Chabutra. He further stated that Ram Prasad had fallen down towards the Chabutra from this Sar.

38. Ram Prasad (P.W. 2) testified that after receiving injuries he ran and went to the Sar of she-buffaloes and became unconscious there. In his cross-examination he stated in para 2 of his evidence that he had fallen inside the Sar situated to the north of the Chabutra and he did not go to the Sar situated to the north of the Sar, nor fell down there. In this regard when he was confronted with what he had stated in his statement before the Investigating Officer that he fell down on the land in front of the Sar of the catties, he admitted having given this statement and also admitted that he had not fallen inside the Sar.

39. Tota Ram (P.W. 3) stated in para 3 of his evidence that Ram Prasad injured had fallen in the Sar of catties, half inside and half outside.

40. Thus discrepancy has come at every steps. I may place on record a few contradictions that had been pointed by the defence Counsel at the time of hearing before us. In the F.I.R. the informant had claimed that Smt. Panna, Smt. Kishori and Smt. Dhankia had come in the verandah where the occurrence had taken place. The informant stated likewise in his examination-in-chief. As against this, Ram Prasad (P.W. 2) stated in para 2 of his evidence that he did not see the women folks in the house anywhere near the scene of occurrence. The informant in his testimony stated in para 10 that Rewa Ram accused-Appellant fired a shot which hit Ram Prasad while he was resting on his cot and then Jagdish accused-Appellant gave a Tabal blow on his body, and on receiving the Tabal injury Ram Prasad got up and ran away. Thus according to him first Ram Prasad received a firearm injury and then he received a Tabal injury and then he ran away. As against this Ram Prasad P.W. testified in para 2 of his evidence that he was first hit by Tabal while he was resting lying on the cot and then he was fired at by Rewa Ram accused-Appellant and then he ran away. Thus the sequence given by these two witnesses is completely inconsistent with each other, which speaks for itself. If the informant was also

present at the time of the occurrence then this contradiction also goes to show that either there was no light or no sufficient light at the scene of occurrence.

41. Something has been said about the time of taking food as given by the witnesses but it is unnecessary to dilate on this point because it is undisputed that the occurrence took place at about midnight.

42. There was also an argument raised on behalf of the defence that the Investigating Officer had found three dead bodies on the spot while the Panchayatnama proceedings were taken about two only. This plea has been raised on account of misreading the point "M" as given in the site plan. In the original site plan the word used is "Cork". A reference to the case diary made the position quite clear. So this plea of the defence has no substance. But as noted earlier the prosecution has already failed on the overall assessment of the facts and circumstances of the present case.

43. Before we close, it is only proper to refer to the alibi set up by the defence in respect of Jagdish accused-Appellant. This accused-Appellant stated in his statement recorded u/s 313, Code of Criminal Procedure that in the night of occurrence he was going from Ludhiyana to Rampur and at Laksar Station he was arrested and locked up in G.R.P. police station. Kabir Ahmad, ticket collector (D.W. 1) testified that in the night of 26/27.8.78 he was on duty as a ticket collector and that at that night he had arrested a passenger from 50 Down Train who gave his name as Jagdish Kumar, S/o Rewa Ram, r/o village Adil Nagar, police station Milak. district Rampur, who had not been able to pay the fare. He further stated that consequently he was handed over by him to G.R.P., He of course, could not say whether Jagdish, accused-Appellant was the same person or not. His cross-examination reveals that in that night his duty was from 8 p.m. to 8 a.m., that 50 Down Amritsar Howrah Express arrived at Laksar junction in his presence, that its normal arrival time at Laksar junction was about 1 p.m. though he could not tell at which time the said train had come in that night. He further stated that the person who was caught by him travelling without ticket met him at the exit gate of the Railway Station and that he could not say from which train or how that passenger had reached at that gate. This statement he made on 11.2.80 and so the discrepancy in giving the details was not surprising. There is also evidence of Constable Ram Bilas Sharma. (H.C.) (D.W. 2) that on 27.8.78 he was posted as Head Mohirir at G.R.P. Laksar Junction and that on that night at 2.20 a.m. accused Jagdish, s/o Rewa Ram of police station Milak, had been arrested for travelling without ticket by ticket collector Kabir Ahmad and he was lodged at the police station there and its entry was made in G.D. No. 4 by him whose copy is Ex. kha 5. A perusal of Ex. kha 5 will indicate that this Challan was made for travelling without ticket. Ticket fare from Ludhiyana to Laksar junction is Rs. 12.25 and excess charge Rs. 12.15 were due, which he (Jagdish passenger) was called upon to pay but he failed to do so. There is a mention in this G.D. entry that the case related to travelling without ticket from Ludhiyana to Laksar junction. This entry indicates

arrest of the person from the train coming from Ludhiyana to Laksar junction, while the train arrived at Laksar junction and passengers were coming down from the train at the platform and going towards the exit door of the Railway platform. It is significant to note that the prosecution nowhere suggested to the said ticket collector or the Head Constable that the person who was arrested and lodged at the G.R.P. police station was someone other than this accused. In view of this the alibi is rendered believable if the distance factor goes in favour of the accused. The occurrence took place in village Adil Nagar, Police Station Milak, whose distance from police station Milak was 8 miles and from Head Quarter Rampur was 25 miles. A reference to Railway Time Table of the Northern Railway, shows that Laksar Railway Station is 175 kms. towards west from Rampur by train and that Milak Railway station is 24 kms. towards east from Rampur. So if one comes from Adil Nagar to Milak Railway Station he had to travel 8 miles and from Milak Railway Station to Laksar Railway Station the distance would be 199 kms. and from Adil Nagar if one comes to Rampur Head Quarter he has to travel 25 miles and from Rampur he has to travel as many as 175 kms. to come to Laksar Railway junction. So in the ordinary course it will be very difficult, if not impossible, for this accused-Appellant to be present at Laksar Railway Station at 1. p.m. or even at 1-30 p.m. or 2 p.m. and at the same time to participate in the murder i.e. the present occurrence at Adil Nagar, Police Station Milak. This afibi evidence is yet another circumstances which goes to demolish the prosecution case.

44. In view of the above discussion, the convictions and sentence of the accused-Appellants made by the learned Sessions Judge cannot be allowed to stand for a moment. The accused-Appellants are certainly entitled to the benefit of doubt and acquittal.

45. The appeal is accordingly allowed. The conviction and sentence of the accused-Appellants for the offences under Sections 452, 302/34 and 307/34, I.P.C. are set aside and all of them are acquitted of the said charges. They are on bail from this Court. They need not surrender to it. Their bail bonds are cancelled and sureties discharged.

46. Let a copy of this judgment be certified to the Sessions Judge, Rampur for information and compliance within a week from today. The compliance report shall be submitted to this Court within a month from today.