

**(2005) 12 AHC CK 0185****Allahabad High Court****Case No:** Government Appeal No. 1827 of 1982

State of U.P.

APPELLANT

Vs

Durga Yadav and Others

RESPONDENT

**Date of Decision:** Dec. 2, 2005**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161
- Penal Code, 1860 (IPC) - Section 307, 323, 395, 396, 397

**Hon'ble Judges:** Vinod Prasad, J; M.C. Jain, J**Bench:** Division Bench**Advocate:** R.S. Yadav and R.K. Singh, A.G.A, for the Appellant; P.N. Mishra, Apul Misra and P.C. Srivastava, for the Respondent**Final Decision:** Dismissed**Judgement**

M.C. Jain, J.

The State has preferred this appeal against the judgment and order dated 29.4.1982 passed by Sri B.D.Maurya, the then VI Additional Sessions Judge, Azamgarh acquitting the accused respondents of the murder of one Ganga Yadav. The accused respondents Durga Yadav, Narsingh Yadav and Jagdish Singh faced trial in Sessions Trial No. 358 of 1980 whereas Mata Prasad Dubey was accused in Sessions Trial No. 20 of 1981 which were tried together. The accused respondent Mata Prasad Dubey died during the pendency of appeal and the same stood abated regarding him under order dated 6.11.2003.

2. We state the relevant facts briefly. The incident occurred on 12.8.1979 at about 6.15 P.M. in the locality-Harra Ki Chungi near taxi stand within P.S. Kotwali, Azamgarh. The F.I.R. was lodged at 6.45 PM by an eyewitness Sitai Yadav PW 1. The accused Durga Yadav was the resident of village Abopatti; the accused Jagdish Singh of village Sarfuddinpur; the accused Nar Singh Yadav of village Ukaura and the accused Mata Prasad Dubey of village Azampur, P.S. Kandharpur, District Azamgarh.

The first three villages situate within Police Station Kotwali of Azamgarh city. There was a road going from Azamgarh to Doharighat. At the outskirt of the city there was a locality known as Harra Ki Chungi, where there was a taxi stand and to the west of the road was the Eye Hospital. To the north of the boundary of the Eye Hospital was situate the house of Durga Yadav facing east. There were shops of different kinds on both the sides of this locality including a liquor shop. About 1 1/2 months before the present incident, one Sheo Prasad Yadav-real brother of Durga Yadav was murdered. Angad Yadav-real brother of the deceased of the present case (Ganga Yadav) was also an accused in that murder. At the time of the present incident, Angad Yadav was in District Jail, Azamgarh in that connection.

3. On 12.8.1979, Sitai Yadav, PW 1 and the deceased Ganga Yadav proceeded from their village Mojrapur to District Jail, Azamgarh to meet the said Angad Yadav. Sitai Yadav PW 1 was driving his cycle on which his name was engraved. The deceased Ganga Yadav was sitting at the front rod in the frame of the cycle. Both of them reached the District Jail late and, therefore, could not meet Angad Yadav there. In the evening, both of them again started back journey to their village and at about 6.15 P.M., they reached Harra Ki Chungi. At that time also, Sitai Yadav PW 1 was driving the cycle and the deceased Ganga Yadav was sitting on the front rod in the frame of the cycle. When they were at the Taxi Stand of Harra Ki Chungi, the accused persons suddenly emerged. Durga Yadav was armed with SBBL gun and Narsingh was carrying a DBBL gun. The accused persons shouted aloud that Ganga Yadav should be caught. They encircled Sitai Yadav PW 1 and Ganga Yadav going on cycle. Mata Prasad and Jagdish Singh accused dragged Ganga Yadav from the cycle and downed him on the ground on western side close to the boundary wall of the Eye Hospital. The accused Durga Yadav fired at Ganga Yadav and then two shots were fired by Narsingh Yadav. Again one shot was fired by Durga Yadav at Ganga Yadav. Ganga Yadav instantaneously died on receiving the injuries. Inarman Yadav PW 2, Prahlad Singh PW 3, Ramjeet Yadav and Harihar Yadav were also present there and saw the incident. Inarman Yadav PW 2 was purchasing fodder for cattle at Harra Ki Chungi while returning to his village after selling milk in Azamgarh City. Prahlad Singh was returning from Brahmsthan after meeting the father-in-law of his sister and had stopped at Harra Ki Chungi for taking tea and betel. Leaving the cycle and the dead body of Ganga Yadav at the place of occurrence in the supervision of Harihar Yadav (the then Manager of the liquor shop), Sitai Yadav PW 1 reached Police Station Kotwali, District Azmgarh where he lodged the F.I.R. by oral narration. Chik F.I.R. was prepared and case registered through entry in G.D. by Head Constable Surya Narayan Singh PW 4 in the presence of Investigating Officer SI Atma Ram Pandey PW 6. The Investigating Officer reached the spot at about 7.30 P.M. He prepared the inquest report of the dead body of the deceased and other necessary papers. The dead body was sealed and sent for post mortem. The site plan of the place of occurrence was prepared and the statements of the witnesses recorded whereafter the chargesheet was laid.

4. It was Dr. Ghanshyam Chaturvedi PW 5 who conducted autopsy on the dead body of Ganga Yadav on 13.8.1979 at 4.30 P.M. The deceased was aged about 25 years and about one day had passed since he died. The following ante mortem injuries were found on his person:

i. Firearm wound 2.5 cm x 2.5 cm x skull over left front of ear with irregular margins, contused with blackening around the wound and singeing of hair. This wound was from left side up in opposite direction obliquely. Skull bones fractured-maxilla, frontal parietal temporal both sides in multiple lines. Margins lacerated irregularly, wadding material found at the temporal left side and small metallic shots in brain matter over right temporal side. Skull deformed.

ii. Lacerated wound 1/2 cm x 1/2 cm x bone over right side chin below the angle of right mandible. No blackening, no tattooing, no singeing of hair.

iii. Firearm wound 2.5 cm x 2.75 cm oval, over left side front of abdomen 5 cm from umbilicus at 3 o'clock position, margins contused, inverted, blackening, tattooing present around the wound. The mesentery and loops of gut protruding out through the wound. Wound abdominal cavity deep, wadding material recovered from the mesentery, direction of wound from front left side to obliquely upward and to the right lacerating small gut, large gut, stomach and structures below the gut and stomach turned into mass. Faecal matter in peritoneum. Two big metallic pellets recovered from underneath right of stomach below liver.

iv. Firearm wound multiple in an area of 9 cm x 7 cm on right side lower part chest and upper part of abdomen, 8 cm below right nipple. Size varying from 0.5 cm x 0.5 cm to 0.25 cm x 0.25 cm on abdominal cavity deep. The margins contused, inverted with blackening all over the area. Direction from right side directly downward and back. Two metallic big shots (pellets) recovered from the liver substance.

5. On internal examination, skull bones were found fractured including the base. Membranes were lacerated and brain matter was coming out. The entire stomach was also lacerated with no food material therein. The small and large intestine were badly lacerated and turned into a mass with faecal matter coming out. Right lobe of gall bladder was lacerated. 4 big pellets and 6 small pellets were recovered from the dead body. As per the opinion of the Doctor, the injuries were caused by firearms and the cause of death was syncope as a result of ante mortem injuries.

6. The defence was of denial and false implication due to enmity.

7. The prosecution in all examined seven witnesses out of whom Sitai Yadav PW 1, Inarman Yadav PW 2 and Prahlad Singh PW 3 were eyewitnesses. The rest consisted of Doctor and police personnel including the Investigating Officer.

8. The accused also examined one C.L. Dubey DW 1 who proved a jail entry of the admission of the victim Ganga Yadav in jail on 8.1.1973 in a case u/s 395/397 I.P.C. He was again admitted there on 27.11.1973 in another offence u/s 307/323 I.P.C. He

was admitted for the third time on 24.1.1975 in a case inter cilia u/s 396 I.P.C. and yet for the fourth time on 6.1.1976 in a case u/s 396/412 I.P.C.

9. The evidence adduced by the prosecution did not commend itself to the trial Judge. He held that only interested and partisan witnesses were examined who were inimically disposed towards the accused. He also found their testimony to be in conflict with the medical evidence showing that they were actually not present at the time of the alleged incident. On this premise, the acquittal was recorded.

10. We have heard learned A.G.A. for the State and the learned counsel appearing for the accused respondents. The learned A.G.A. submitted that the trial Judge gave undue importance to the alleged partisan character of the eyewitnesses and disbelieved them without any justification. The acquittal, according to him, was manifestly erroneous based on faulty appreciation of evidence. He urged that even in case of contradiction between the eyewitness account and medical evidence, if there was any between the two, the court ought to have accepted the oral evidence account. On the hand, the learned counsel for the accused respondents supported the acquittal recorded by the trial Judge. It has been submitted that the so called eyewitnesses examined by the prosecution were wholly unreliable, partisan and interested as well as inimically disposed against the accused respondents. It has been stressed vehemently that there was apparent conflict between ocular account and medical evidence. It has been urged that the view taken by the trial Judge is a reasonable view on proper appreciation of the evidence and all other aspects of the case, not warranting any interference by this court of appeal.

11. We propose to deal with the material aspects related to the arguments of the two sides in conjunction with the evidence on record which we have carefully perused contained in the record summoned before us. It is settled position of law that in an appeal against acquittal, the appellate court is entitled to reappreciate the evidence on record. However, having done so, it would not interfere with the order of acquittal unless it finds the view of the court acquitting the accused to be unreasonable or perverse. If the view recorded by the trial court acquitting the accused is a possible and reasonable view based on the evidence on record, the order of acquittal would not be reversed. In the instant case, the star witnesses of the prosecution case were Sitai Yadav PW 1 (informant), Inarman Yadav PW 2 and Prahlad Singh PW 3 who claimed to have witnessed the incident. On examining the record, we note that the finding of the trial Judge is perfectly justified that none of them was an independent witness. Rather they were interested witnesses thick with the family of the deceased Ganga Yadav and also inimical to the accused persons and their presence at the spot was quite doubtful. Needless to say, a witness is called a "chance witness" if it is by coincidence or chance that he happens to be at the place of occurrence at the time of its taking place and, if such a person happens to be a relative or friend or inimically disposed towards the accused, then his being a chance witness is viewed with suspicion. Such a piece of evidence is not incredible

or unbelievable but it requires cautious and close scrutiny.

12. Sitai Yadav PW 1 belonged to the village of Ganga Yadav. It is an admitted fact that about 21/2 months before the murder of Ganga Yadav, Sheo Prasad-real brother of the present accused respondent Durga Prasad Yadav had been murdered. It was in that connection that Angad Yadav-real brother of Ganga Yadav deceased was in jail. As per the testimony of Sitai Prasad Yadav PW 1, he and the deceased Ganga Yadav had come to Azamgarh District Jail on the date of incident to meet the said Angad Yadav. Sitai Yadav PW 1 was the son of Kishore Yadav. He pleaded ignorance in his cross-examination about his father having appeared as a witness for the prosecution against the present accused Durga Yadav, his father Ram Dhyan alias Dhyan and others u/s 307 I.P.C. However, the defence filed the certified copy of the statement of Kishore (Ex.Kha-5) showing that Kishore did appear as a witness in the said case against Durga Yadav, his father Ram Dhyan and others on 4.11.1966. Obviously, Sitai Yadav PW 1 was not an independent witness. Inarman Yadav PW 2 was the real uncle of the deceased Ganga Yadav and thus an interested witness. Prahlad Singh PW 3 was in jail in connection with a murder case and was brought therefrom to court when he testified as a witness on 5.3.1982. He stated that there were seven other accused along with him in connection with that murder. Angad (brother of the present deceased Ganga Yadav) was one of them. Apparently, he was thickly bracketed with Angad Yadav. One Pratap (nephew of Ram Samujh Yadav) was also one of the accused in that murder. There was admittedly bitter enmity between the family of Ram Samujh and the present accused Durga Yadav. Ram Adhar Singh was the uncle of Prahlad Singh and had stood surety for the accused Sati Ram in a case u/s 396 I.P.C., State v. Ram Samujh and Ors. So, Prahlad Singh was also of the party of Ram Samujh Yadav, Angad Yadav and Ganga Yadav (deceased). These facts indicated that Inarman Yadav PW 2, Inarman Yadav PW 2 and Prahlad Singh PW 3 were interested in the cause of Ganga Yadav (deceased) and were of the party of Ram Samujh Yadav who had bitter enmity with the present accused Durga Yadav. They were thus inimical to the accused persons.

13. The trial Judge, in our opinion, rightly found that the testimonial assertions of the witnesses did not have the ring of truth. According to Sitai Yadav PW 1, he was driving the cycle while coming back to his village from jail and the deceased Ganga. Yadav was sitting on the front rod in the frame of the cycle. According to him, when they reached the road near the Eye Hospital at Harra Ki Chungi locality, the accused persons suddenly emerged and exhorted to kill Ganga Yadav. Two accused, namely, Mata Prasad .Dubey and Jagdish Singh dragged Ganga Yadav from the cycle and downed him on the ground on the western side. He was positive that the accused Mata Prasad Dubey and Jagdish Singh still continued holding Ganga Yadav while he was lying on the ground and when accused Durga Prasad and Narsing Yadav opened shots on him. Durga Yadav first fired from his SBBL gun. Then Narsingh Yadav fired two shots from his DBBL gun and one more shot was fired by Durga Yadav from a very close range. It was wholly unnatural that two of the accused

would have caught hold of the victim even when the shots were fired by the other two. Indeed, the instinct of self preservation is strongest in all living beings. The victim would not have kept lying like a log of wood. Catching hold of the victim during the course of shooting was very risky and great improbability because the shot(s) could hit the catcher(s) also.

14. Another improbability emerges from the testimony of Sitai Yadav PW 1. Ganga Yadav (deceased) was sitting on the front rod in the frame of the cycle which he himself was driving, but when he (Ganga Yadav) was dragged by the accused Mata Prasad and Jagdish Singh, he (the witness Sitai Yadav PW 1) was neither dragged nor his cycle fell down. He stated in paragraph 26 of his statement that he did not get down from the cycle during the course of dragging of Ganga Yadav by the accused persons from the front rod of the cycle and he kept standing with one foot on the ground and holding the cycle. In fact, Ganga Yadav could not be dragged by the accused from the front rod of the cycle in the position described by this witness without affecting the driver of the cycle.

15. Inarman Yadav PW 2 uncle of the deceased also deposed that the two accused Mata Prasad and Jagdish Singh dragged Ganga Yadav from his cycle when he was sitting on the front rod in the frame of the cycle and was felled down and then Durga Yadav and Narsingh Yadav fired at him from close range. At the time of shooting also, he insisted, the said two accused persons were holding Ganga Yadav, which as we said above, was highly improbable and unnatural. Similar is the deposition of Prahlad Singh PW 3. The core of this version is wholly inconsistent with medical evidence as we would indicate a little later. It is also significant to note that despite the alleged presence of Inarman Yadav PW 2 (own uncle of the deceased), Sitai Yadav PW 1 allegedly left for the Police Station leaving the dead body in the supervision of one Harihar and not of Inarman Yadav, the own uncle of the deceased. It gives a scent that actually Inarman Yadav PW 2 was not at all present at the scene.

16. According to Sitai Yadav PW 1, the main purpose to go to Azamgarh was to meet Angad Yadav who was in jail. He and Ganga Yadav had started from the village for Azamgarh at about 7 AM reaching Azamgarh at about 8 A.M. Sitai, however, left Ganga Yadav at the Chowk in the heart of the city and he himself went to the house of Ram Badan-father of the deceased Ganga Yadav, situated in Mohalla Kalinganji close to Chowk. Ganga Yadav told him that he would be reaching the house of his father a little while later and they would go to District Jail for meeting Angad. Satai Yadav did not inquire from Ganga Yadav as to where and why he was going without first accomplishing the mission of meeting Angad Yadav. At about 10 or 10.30 A.M., Ganga Yadav reached the house of Ram Badan and then both of them allegedly started at about 1.30 P.M. for District Jail on cycle. From the house of Ram Badan, the District Jail was at 10-15 minutes distance on cycle. Sitai Yadav PW 1 stated that the time for meeting prisoners was over and so they could not meet Angad Yadav.

He admitted that he did not give any application in jail for permission to meet Angad Yadav. He could not say if any such application was given by Ganga Yadav. On being unable to meet Angad Yadav, they returned. Sitai Yadav also stated that neither he nor Ganga Yadav told Ram Badan that they had come to Azamgarh to meet Angad Yadav. It was unnatural. If they had really gone to Azamgarh to meet Angad Yadav, starting from the village at about 7 A.M. and reaching Azamgarh at about 8 A.M., they would have first attended the work for which they had come, instead of wasting time here and there unnecessarily ignoring the main purpose of visiting Azamgarh. If they had really come to Azamgarh to meet Angad in jail, it was wholly unnatural that they would reach Jail at about 1.30 P.M. He admitted that he knew that applications for meeting were given to jail authorities at about 9 A.M. and meetings materialized by the noon time. The trial Judge rightly observed that their this conduct was also unexpected that they did not tell Ram Badan (own father of Ganga Yadav) that they were going to meet Angad Yadav.

17. Sitai Yadav PW 1 stated that he and Ganga Yadav stayed in jail for about 10-15 minutes and thereafter started back journey for the village. It also came down from his evidence that it was about half an hour journey from jail to Harra Ki Chungi situate at a distance of about" 3 kms. If they started at about 2 o'clock from jail, it could not be appreciated as to why they reached Harra Ki Chungi at about 6 PM. It is also noted from the testimony of Sitai Yadav that he did not inform Ram Badan-father of the deceased about his murder. He stated that when he was coming to lodge the F.I.R., he did not go to the house of Rarn Badan to tell him about the murder of his son. He also did not inform him while going back from Police Station to Harra Ki Chungi after lodging the F.I.R.

18. Inarman Yadav PW 2 testified that on the day of the incident he had come to supply milk to Pyare Halwai near Civil Court, Azamgarh. According to him, he had started at about 12 o'clock in the noon from his village and reached the shop of Pyare Halwai at about 3 PM. He further stated that he stayed for a while at Harra Ki Chungi to purchase fodder for cattle and in the meantime, the incident took place which he witnessed. He never told the Investigating Officer in his statement u/s 161 of the Code of Criminal Procedure about the purpose for which he had come to Azamgarh. He did not say this either that he purchased any article from Harra Ki Chungi. 12.8.1979 was holiday being Sunday and the market was closed on that day. He could not make any purchases from the market and that is why he improved in his testimony before the court that he was purchasing fodder at Harra Ki Chungi. It was for the purpose of covering the excuse for his presence at the spot. Further, in case he was present at the place of occurrence at the time when the Investigating Officer reached there the same evening, there was no reason as to why his statement was not recorded that day. His positive statement was that he remained there till the dead body was brought to mortuary. He accompanied alongwith the dead body and remained there during night. He left the mortuary at 4 P.M. after the post mortem had been conducted on 13.8.1979.

19. Prahlad Singh PW 3 tried to explain his presence in connection with a visit to one Surya Bhan Singh-a relative of his sister as her Sasur (father-in-law). Surya Bhan was plying taxi from Brahmsthan to Budhanpur and used to return to his house in the evening for stay in the night. He deposed that he had gone to Brahmsthan to meet Surya Bhan Singh and after meeting him, he was returning to his house in village Kakrahata. At about 6 or 6.15 PM, he reached the place of occurrence and stayed there for a while to take tea and betel when the incident occurred. In cross-examination, he stated that his said sister Damyanti was married to Surendra Singh. He could not tell the name of the father of Surendra Singh, his own brother-in-law. Nor could he say as to whether Surendra Singh had one or more brothers. Then he stated that one brother of Surendra was called Padohi but he could not tell his real name. He could not tell the relationship of Surendra Singh and Surya Bhan Singh so as to justify that Surya Bhan Singh was related to her sister as her father-in-law or uncle- in-law. He did not know the name of father of Surya Bhan Singh. Nor could he say as to how many members were there in his family. The reason assigned by him for his alleged presence at the spot was farfetched and fabricated.

20. The conclusion drawn by the trial court was justified that only interested and partisan witnesses were examined whose presence at the spot was most doubtful in view of inherent improbabilities flowing from their statements as to the manner of the incident. They belonged to one faction comprising of Ram Samujh with whom the accused Durga Prasad and his associates were at daggers drawn. As a matter of fact, two other witnesses, namely, Harihar Yadav-Manager of nearby liquor shop and Ramjeet were also mentioned in the F.I.R. (though not examined) but it was apparent that only trusted persons were mentioned in the F.I.R. who could be expected to support the prosecution case.

21. It was admitted by Sitai Yadav PW 1 that Ramjeet was taking contract of Teahbazari along with Ram Badan (father of Ganga Yadav deceased) and in that connection, he came to know that man. He also admitted that in Tahbazari contract taken by Ram Badan, Ram Samujh (with whom Durga Yadav accused had bitter enmity) was a partner. Inarman Yadav PW 2 admitted in his crossexamination that his sister's daughter was married with Ramker in village Pathkhauli and Harihar Yadav and this Ramker were collaterals.

22. We have stated these facts as a passing reference to indicate that right from the beginning the prosecution heavily relied on the testimony of interested witnesses who were inimical to the accused and could be trusted to support the prosecution case through their testimony based on imagination.

23. There was apparent conflict between medical and ocular evidence also. It would be recalled that according to the prosecution witnesses, in all four shots from DBBL and SBBL guns had been fired from a very close range. The deceased allegedly sustained four gunshot wounds of entry but it is significant to note that in ante

mortem injury No. 4 the size was 9 cm x 7 cm and dispersal of this firearm wound was disproportionately larger than ante mortem injury nos. 1 and 3. If two of the accused had fired shots from guns on the deceased from a very close range, the size of attributed gunshot wounds of entry would have been almost the same. It goes without saying that shorter the barrel, larger is the dispersal. There was blackening in gunshot wounds no. 1, 3 and 4 sustained by the deceased, meaning thereby that they were close range fires but disproportionate dispersal in ante mortem injury No. 4 indicated as if two types of weapons had been used and one of these was definitely not gun. The barrel of one of these was much shorter than a gun. It could be a countrymade pistol or likewise weapon. It is not necessary for this court to speculate on this aspect of the matter. What we wish to emphasize is that this ante mortem injury No. 4 was in clear conflict with the ocular version delivered by the so called eyewitnesses that one SBBL gun and one DBBL gun had been used in shooting the deceased from a close range. Moreover, it is also to be noted that ante mortem injury No. 2 was only of the size 1/2 cm x 1/2 cm x bone over left side chin below the right mandible. There was no blackening around this wound which was suggestive of the fact that it could not be a close range fire. It ran in the teeth of the ocular testimony of so-called eyewitnesses that all the four shots had been fired at the victim from the SBBL and DBBL guns from close range. This ante mortem injury No. 2 was lacerated wound 1/2 cm x 1/2 cm x bone over right side chin below the angle of right mandible. In fact, it was a blunt weapon injury and not a firearm injury. Dr. Ghanshyam Chaturvedi PW 5 also stated that it could be sustained as a result of fall. The other three gunshot wounds ante mortem injury nos.1,3 and 4 were of three shots as testified by the Doctor. If the shots were fired from very close range after the fall of the victim on the ground, there could hardly be any possibility of the shots missing the target. The witnesses did not say it either that any of the shots fired by the accused had missed. The factum that the deceased received only three gunshot wounds of entry could not be reconciled with the ocular testimony and the theory of four shots having been received by the deceased. Further, it may be stated at the risk of repetition that ante mortem injury No. 4 with larger dispersal, as mentioned above, was of a weapon of shorter barrel than the gun(s) which caused ante mortem injury Nos.1 and 3.

24. The deceased Ganga Yadav was himself a jail bird and had no dearth of enemies. C.L. Dubey DW 1 Assistant Jailer, Azamgarh proved with the help of jail admission register that he was himself in jail on 8.1.1973 in a case u/s 395/397 I.P.C. He was again admitted there on 27.11.1973 in a case inter alia u/s 307 I.P.C. For third time he was admitted in jail on 24.1.1975 in a case inter alia u/s 396 I.P.C. and for the fourth time he was admitted in jail on 6.1.1976 in a case u/s 396 I.P.C.

25. In view of the above discussion, the impression is gathered that the so-called eyewitnesses examined by the prosecution were not present at the spot and they simply deposed heavily relying upon their imagination occasioning conflict between their version and medical evidence.

26. The acquittal recorded by the trial judge is perfectly justified on proper valuation of the evidence and the attending circumstances. It does not call for interference in this appeal.

27. The Government appeal is hereby dismissed. It has already abated in respect of accused respondent No. 4-Mata Prasad Dubey under order dated 6.11.2003.

28. Judgment be certified to the Court below immediately.