Patanjali Bhardwaj And 3 Others - Appellants @HASH State of U.P.

Court: ALLAHABAD HIGH COURT

Date of Decision: Oct. 25, 2016

Acts Referred: Criminal Procedure Code, 1973 (CrPC) - Section 311, Section 367, Section 391

Citation: (2016) 11 ADJ 85 : (2017) 1 AllLJ 738

Hon'ble Judges: Arvind Kumar Tripathi and Mukhtar Ahmad, JJ.

Bench: Division Bench

Advocate: Ravindra Sharma and G.S. Chaturvedi, Advocates, for the Appellants; Govt. Advocate, Amit Kumar Singh, Mukhtar Alam and N.D. Rai, Advocates, for the Respondent

Final Decision: Disposed Off

Judgement

1. An application under Section 367 Cr.P.C. Read with Section 311 and 391 Cr.P.C. has been filed on behalf of the appellants praying that (I)

Head Constable of Police Niranjan Singh (2) Dr. R.K. Verma, Medical Officer, district Hospital Badaun (3) Dr. O.P. Mishra, Radiologist,

Distinct Hospital Badaun and (4) Aditya Prakash Yadav, the then Station Officer, Police Station Hajratput, Badaun be summoned for additional

evidence which directly bear upon the innocence of the appellants.

2. For dealing with the controversy involved therein a brief scatch of facts has to be stated, which is as under:-

(A) That an F.I.R. was got lodged by Madhav Ram of village Koda Gujar P.S. Alapur Badaun on 8.1.2005 alleging that process of nomination

was to be held at Sahkari Samiti Myaun, Block Myaun, District Badaun. He and Pyare Lal of his village had gone to bring Nomination Form but

appellant Patanjali refused to give them Nomination Form. Thereafter Backward Class Certificate of Pyare Lal was received fron Panchayat

Sachiv then Block Pramukh Patanjali Bhardwaj abused him by saying that ""Sale Chamar Yah Pramanpatra nahi milega"" and he also slapped him

and ousted from the block. Thereafter at 2.00 p.m. First informant Madhav Ram along with Omendra Pratap Singh and Sumer Singh reached to

meet Station Officer Alapur in the block. At that time his two sons Pravendra Singh and Arvendra Singh and his nephew Ashok also reached

there. Patanjali Bhardwaj shot fire on Arvendra and Vikas Bhardwaj opened fire on his nephew Ashok. Monu Patanjali opened fire at Omendra

Pratap Singh and Vashishtha Bhardwaj also participated in firing. They tried to escape. It was further alleged that some other persons also

sustained injuries and his son Arvendra succumbed to the injuries. Omendra Pratap and his nephew Ashok sustained injuries and they both were

taken to the district hospital for medical aid. It was also alleged that all the accused persons were having licensee rifle and gun. On this report a

case bearing Case Crime No. 10 of 2005 under Sectioin 148, 302/149, 307/149 I.P. C. read with Section 3(ii)(v) S.C./S.T. Act was registered

against accused persons. Injured Ashok also expired during treatment.

(B) At this stage it would be proper to mention that a cross version F.I.R. was also got lodged by Appellant Patanjali Bhardwaj alleging that on

8.1.2005 at about 1.00 p.m., he being Block Pramukh along with some other persons reached to block Head Office Myaun in respect of election.

His servant Babloo son of Kalyan and Chhotey @ Ajudhi were also with him. Suddenly Omendra Singh, Ravindra Singh sons of Brij Mohan

Singh, Pravenda and Arvendra sons of Madhav Ram, Madhav Ram and Ashok along with 8-10 Persons having rifles and guns came and

surrounded them and threatened that first informant Patanjali Bharadwaj was trying to get his own men elected on all the posts. They also

threatened that they shall not leave them alive and opened firing upon them with a view to kill. Thereafter first informant along with his brother

Vashishtha Bhardwaj succeeded to run away and hide themselves in a room. It was also alleged that his both the servants sustained fire arm

injuries and in cross firing Arvendra and Ashok succumbed to the firearm injuries sustained and Omendra Singh was also injured. It was also said

that the incident was watched by Subedar son of Niranjan Ram, Ram Singh s/o Mithu resident of Alapur and Sneh son of Santosh Kumar resident

of Chitaura. After sending the injured to the hospital first informant came to the police station for lodging the report. He also contented that cousin

of Omendra Singh was one of the candidate for Block Pramukh Election but he was defeated and thereafter the first informant was receiving

information that accused persons wanted to kill him. The F.I.R. was registered at Case Crime No. 10-A/2005 under Section 147,148,149 307

I.P.C. It also appears that in both the cases Charge sheets were submitted and concerning magistrate committed the cases for trial. S.T. No. 39 of

2009 (State v. Patanjali Bharadwaj and others) arose from Case Crime No. 10/2005 in which appellants were tried while from Case Crime

No.10-A/2005 aforesaid S.T. No. 40/2009 (State v. Ravindra Pratap Singh and another) and S.T No. 41 of 2009 (State v. Amrendra Singh and

others) had arisen, All the three Trials were heard and decided by the court of Additional Sessions Judge/Special Judge S.T./S.T./P.A./Act

Badaun on 06- 9-2014. S.T.No. 40 of 2009 and 41 of 2009 were decided by a common judgment while in S.T. No. 39 of 2009 a separate

judgment was delivered. In S.T. No. 39 of 2009 accused persons were held guilty and awarded punishment while in S.T. No. 40 of 2009 and 41

of 2009 accused persons were acquitted. In S.T. No. 39 of 2009 accused appellants were awarded punishment on 9.12.2014. It further reveals

that no appeal has been preferred against the judgment of acquittal as such judgment passed in S.T.N. 40 and 41 of 2009 has attained the finality.

3. Now appellants prayed for the following additional evidence :-

1. G.D. Entry No. 47 of 23.05 hours dated 8.1.2005.

2. Head Constable Niranjan Singh with a view to prove the aforesaid G.D. Entry.

3. Dr. R.K. Verma, with a view to prove injury reports.

4. Dr. O.P. Mishra by whom X-ray was taken.

5. Aditya Prakash Yadav,S.O.Hazrat Pur.

4. We have heard learned counsel for the parties at length and gone through the record .

5. It is contended on behalf of the appellants that three persons namely Chhotey, Vinod @ Babloo and Arshad Ali had received fire arm injuries

on appellants side in the same transaction and were seriously injured. That aforesaid injured persons were medically examined by Dr. R.K. Verma,

Chief Medical Officer, Distrait Hospital Badaun and all of them were found to have sustained bullet injuries; that injuries were X-rayed by Dr. O.P.

Mishra in which femur bones of injured persons namely Arshad Ali and Chhotey were found fractured as a result of fire arm injuries where as

radio-opaque shadows were also seen in the X-ray of injured Vinod @ Babloo. That the said incident took place in the presence of Station

Officer Alapur Chandrapal Singh who on reaching the police station mentioned the entire incident in the G.D. Bearing entry no. 47 dated 8.1.2005

itself; that Aditya Prakash Yadav the then Station Officer Hazratpur was also present in the block office with police force as per orders of the

Senior Superintendent of Police for assistance to Alapur police for maintaining law and order; that C.B.C.I.D. was entrusted investigation of both

the cases who submitted charge sheet in both the cases. It is also submitted that in S.T. No. 40 of 2009 and 41 of 2009 State v. Madhav Ram and

others as many as eight witnesses were examined form the side of the prosecution. P.W.3. Head constable Niranjan Singh in his deposition proved

Chik Report and G.D. as Exh Ka 2 and Exh Ka 3 respectively. But the then S.O. Chandrapal Singh could not be examined as he died during trial.

6. It is also stated that it is admitted case of both the parties that incident took place in presence of S.O. Police Station Alapur Chandrapal Singh

and S.O. Hazratpur Aditya Prakash Yadav; that Chandrapal Singh on reaching the police station mentioned all the event in the G.D. Vide entry

No. 47 dated 8.1.2005 itself and true copy of the G.D. has been filed as Annexure 3. Injury report of Arshad Ali, Vinod @ Babloo and Chhotey

were also filed as Annexures 2A, 2B and 2C. It has also been stated that Alahpur police had recovered 11 cartridges from the belt found on the

dead body of the deceased Amrendra and one cartridge was recovered from the cover lying on the butt, besides this one rifle and two empty

cartridges were also found from nearby place where dead body of Amrendra was found; that near to the dead body of Ashok DBBL gun having

one cartridge in its barrel and eight live cartridges from the bag were also recovered by the police and recovery memos were prepared but could

not be formerly proved/exhibited for unforeseen reasons; that S.O. Alahpur Aditya Prakash Yadav had seen the occurrence from the beginning to

end his statement was taken by the C.B CID on 1.5.2007 who gave eye witness account of the incident; that the evidence of this witness being a

police officer and totally independent witness could have been of great importance but learned trial court had not deemed it appropriate to summon

the said police officer as no party had requested to summon him as prosecution witness or defence witness. A true copy of the statement of Aditya

Prakash Yadav under Section 161 Cr.P.C. has also been annexed as Annexure 4. It is also submitted that above mentioned documentary and oral

evidence directly bears the innocence of the appellants but perhaps due to inadvertence of learned counsel for the appellants who was conducting

the trial in the trial court either did not request the court to summon the Head Constable Niranjan Singh, Dr. A.K. Verma, Dr. O.P. Misha for their

examination as defence witness to prove the above mentioned documentary evidence. Similarly S.O. Hazratpur Aditya Prakash Yadav who in his

statement under section 161 Cr.P.C. gave eye witness account of facts to the investigation officer, was not summoned. That Learned trial court did

not visualise the significance of direct evidence of S.O. Hazratpur Aditya Prakash Yadav and also G.D. entry No. 47 having been made in official

capacity by public servant in discharge of his official duty which is relevant fact under Section 35 of the Evidence Act; that from the evidence on

record it comes out that prosecution party was aggressor and resorted to indiscriminate firing with a view to kill appellant no. 1 and 2 and recovery

of rifle and DBBL gun along with live cartridges is sufficient to prove the defence version; that for want of aforementioned evidence applicants will

not be able to prove their innocence or to substantiate the plea of private defence. It is also mentioned that earlier the application was filed for

summoning of aforesaid witnesses excluding the one Aditya Prakash Yadav but the same was withdrawn for certain reason and copy of order

dated 2.4.2015 passed by this court has also been made available on record as Annexure-5. On these grounds the aforesaid witnesses along with

relevant record prayed to be summoned in exercise of powers conferred on this Court by virtue of Section 367, 311 and 391 Cr.P.C.

7. The application has been opposed by the learned A.G.A. and Learned counsel for the complainant. It is vehemently argued that previously an

identical application was moved by the appellants which was rejected as not pressed and appeal was fixed for final arguments hence the order

dated 2.4.2015 shall be treated as an order on merits which has attained finality so this second application for the same prayer is not maintainable.

Moreover there is no change in the circumstances giving reason to exercise discretion by this Court in receiving additional evidence as there is

already sufficient evidence on record to decide the case; that in absence of any plea with regard to alleged exercise of right of private defence

during trial and previous withdrawal of the application for additional evidence could not be agitated again as powers under Section 391, 367 and

311 Cr. P.C. are discretionary in nature cannot be used for filling up of the lacuna as has been held by the Hon"ble Apex Court in case of

Rambabu v. State of Maharastra AIR 2001 SC 2120. So the additional evidence which is prayed to be taken on record is totally irrelevant.

Further it is settled preposition of law that additional evidence should not be received as a disguise for retrial or to change the nature of the case

;that it is wrong to allege that appellant want to prove innocence and to substantiate the plea of private defence as appellants in their statement

under Section 313 Cr.P.C. have not taken plea of self defence and even a single word has not been stated in this regard. Moreover even in the

F.I.R. Lodged by Patanjali Bhardraj registered as Case Crime NO. 10-A of 2005 there is absolutely no averment in respect of right of private

defence and for the first time appellant cannot be permitted to take a plea of exercise of right or private defence which is also against the F.I.R.

Version arising out of Case Crime No. 10-A of 2005 lodged by the appellant Patanjali Bhardwaj. That none of the appellants received any injury

in the entire incident though allegedly they were targeted by the alleged attack which totally falsify the story of private defence. It is also alleged that

all the appellants are history sheeters and list of cases against hem have also been filed as Annexures to the counter affidavit. It is also said that

Sanjay Bhardwaj real bother of Patanjali Bhardwaj happened to be the S.I. in U.P. Police who is presently under suspension and he is also

involved in so many criminal cases and history sheet of Sanjay Bhardwaj has also been filed as annexure. History sheet of other brother of Patanjali

Bhardwaj are also filed as annexures; that the appellants want to fill up the lacuna by additional evidence for which he could not be permitted;that

the witnesses who are prayed to be summoned are not required to be summoned for additional evidence. On these grounds application is prayed

to be disregarded by its rejection.

8. We have given thorough consideration to the submissions made on behalf of the rival parties and gone through the record.

9. Initially it is to be considered as to whether this application is legally maintainable? It is admitted point that previously an application for taking

additional evidence was filed on behalf of the appellants but the same was disposed of as not pressed vide order dated 2.4.2015 passed in this

appeal. Thereafter this application has been moved. It is not disputed that previous application was not decided on merits .In our view since

previous application was disposed of as withdrawn and it was not rejected on merits so this application is legally maintainable. In our view if on an

earlier date the court had exercised its jurisdiction negativing the prayer for additional evidence, it may not be a bar to consider the prayer on

certain changed circumstances, if the court felt that it was necessary in the ends of justice in exercise of power under section 367 Cr.P.C.

10. Now we proceed to consider the merits of the application.

11. It is admitted version of the parties that the defence set up in this appeal was prosecution version in S.T. No. 40 of 2009 and 41 of 2009

arising out of Case Crime No. 10-A of 2005 as stated above. It is also not disputed that following 08 witnesses were adduced in the aforesaid

Trials from the prosecution side-

PW1. Patanjali Bhardwaj, first informant, eye witness (Appellant no.1 in this appeal)

PW2. Chotey, injured witness.

PW3. Head Constable Niranjan Singh, Inscriber of Chick, F.I.. and G.D.

PW4. Vinod @ Babloo, injured witness.

PW5. Dr. R.K. Verma who examined the injuries of injured witnesses.

PW6. Dy. S.P., C.B., CID, Ranvir Singh, I.O.

PW7. Dy. S.P., C.B., CID, Shiv Ram Yadav, I.O.

PW8. Dy. S.P., C.B., CID, Satya Sen Yadav, I.O.

12. Learned Trial Court heard the aforesaid trials and S.T.No. 39 of 2009, from which present appeal has arisen together and decided all the trials

on the same date i.e. On 6.12.2014 but delivered saperate judgments. In session trials No. 40 and 41 of 2014 the evidence adduced on behalf of

the prosecution was not found to be reliable and accused persons were acquitted, whereas in S.T. No. 39 of 2009 the prosecution was found to

have proved its case beyond reasonable doubt and defence version was not accepted as such accused persons/appellants were convicted and

awarded sentence as stated above.

13. For appreciating the arguments it is also opt to extract Section 311, 391 and 367 Cr.P.C.

Section 311 Cr.P.C. - Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other

proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall

and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence

appears to it to be essential to the just decision of the case.

Section 391 Cr.P.C. - Appellate Court may take further evidence or direct it to be taken.

1. In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and

may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session

or a Magistrate.

2. When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and

such Court shall thereupon proceed to dispose of the appeal.

3. The accused or his pleader shall have the right to be present when the additional evidence is taken.

4. The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

Section 367. Power to direct further inquiry to be made or additional evidence to be taken.

(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon,

any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made

or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such

evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such

Court.

The aforesaid provisions make it clear that -

1. As per Sections 311 and 391 Cr.P.C. The Court has a discretion to summon and examine or recall and reexamine any such person if his

evidence appears to it to be essential to the just decision of the case.

2. As per Section 367 Cr.P.C. It is the High Court which when thinks that additional evidence should be taken upon for ascertaining the guilt or

innocence of the convicted person then such additional evidence may be taken on record.

14. In this background we have to assess the relevance of the evidence sought to be taken on record.

1. The G.D. Entry No. 47, 23.05 hours dated 8.1.2005, the copy of the same has been annexed as Annexure-1 to the affidavit. To avoid

repetition it would be sufficient to mention that it is the F.I.R. Version of the cross case.

2. Head Constable Niranjan Singh who is prayed to be summoned to prove the G.D. aforesaid. It would be relevant to mention here that the

author of the aforesaid G.D. Chandrapal Singh the then Station Officer has expired and G.D. has also been reported to be weeded out. The report

of weeding out of the G.D has been proved by Constable Niranjan Singh, who has been examined as Pw5 in S.T.No. 39/2009. It is preposition of

law that Police diaries cannot be summoned at the instance of the accused or his agent and if it is used by the police officer for refreshing his

memory only then it may be used for the purpose of contradicting the evidence of such police officer. Section 172 Cr.P.C. Prohibits the accused

or his agent to call for the Police diaries. Sub. section 3 of that Section is reproduced below-

172(3) Cr.P.C. - Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely

because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses

them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence

Act, 1872 (1 of 1872), shall apply.

15. In Abdul Salam v. State, 1966 Alld. 222 this Court has observed in paras no. 4 and 6 as under;

4. Section 172 Cr. P. C. directs every police officer making an investigation to enter his proceedings in the investigation in a diary setting forth the

time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a

statement of the circumstances ascertained through his investigation. Sub-section (2) prohibits the use of the diary as evidence in the case. The

accused is further prohibited from seeing the diary or call for them except to contradict the police officer in case he uses the diary to refresh his

memory.

6. That may be so. Section 172 Cr. P. C. is a special rule of evidence. In so far as it goes, it overrides the provisions of the Evidence Act. It

prohibits the use of the police diary of a case as evidence in the case. It also provide for the various matters which have to be mentioned in the

diary of the case. Some of the matters mentioned in Section 172 (1) are common to Section 44 of the Police Act and the Regulation framed there

under. But Section 172 (1) Cr. P. C. directs that the diary of the case will contain "a statement of the circumstances ascertained through

investigation". This is a matter which is not prescribed to be mentioned in the general diary by Section 44 of the Police Act or Regulation 295.

16. In Malkiat Singh and Ors v. State of Punjab 1991 (4) SCC 341 : 1991 SCC (Crl) 976 the Hon''ble Supreme Court held-

unless the investigating officer or the court uses the entries in the case diary either to refresh the memory or contradicting the investigating officer as

previous statement under section 161 Evidence Act, that too after drawing his attention thereto as is enjoined under section 145 of the Evidence

Act, the entries cannot be used by the accused as evidence. Therefore, the free use thereof for contradicting the prosecution evidence is obviously

illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon.

17. In Shamshul Kanwar v. State of U.P. 1995(4) SCC 430 the Hon''ble Apex Court in respect to use of General Diary has observed as

under:-

It can therefore be seen that the right of the accused to cross examine the police officer with reference to the entries in the General diary is very

much limited in extent and even that limited scope arises only when the court uses the entries to contradict the police officer or when the police

officer uses it for refreshing his memory and that again is subject to the limitations of Section 145 and 161 of the Evidence Act and for that limited

purpose only the accuses in the discretion of the court may be permitted to peruse the particular entry and in case if the court does not use such

entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question

of accused getting any right to use the entries even to that limited extent does not arise.

18. In view of the discussion it is clear that except such copies, which are required to be furnished to the accused under section 207 Cr.P.C.,

neither the accused nor his agent shall be entitled to call for such diaries or to see such diaries merely because those are referred by the court.

However, if such diaries are used by the police officer, who made them, to refresh his memory before the court or if the court uses such papers of

diaries for the purpose of contradicting such police officer then the provision of section 161 or 145 Indian Evidence Act shall apply.

19. As far as the General Diary (G.D.) is concerned, the entries are made about all the events that take place in the police station in Chronological

order. As far as proceeding in the investigation including statement of witnesses under Section 161 Cr.P.C. is concerned that has not to be

mentioned in the general diary but in the present case in G.D. entry made by Mr. Chandrapal, the then Station Officer almost the cross version

mentioned in the FIR was noted representing him as an eye witness because he was present at the place of incident for maintaining law and order.

Apart from that all those contents, which is cross version mentioned in Case Crime No. 10-A of 2005 has already been proved by Head

Constable Niranjan Singh in S.T. No. 40 of 2009 and 41 of 2009. Apart from that admittedly that G.D. has already been weeded out in view of

the police regulation after five years, which was proved by the same Head Constable Niranjan Singh. The Chandrapal Singh the then Station

Officer, who made entries in the G.D. regarding the occurrence witnessed by him also expired during trial hence there is no question of summoning

of that G.D. entry as well as Head Constable Niranjan Singh to prove the same.

20. Now we have to consider as to weather Dr. R.K. Verma, Dr. O.P. Mishra and Aditya Prakash Yadav are required to be summoned as

prayed by the appellants.

21. Dr. R.K. Verma was examined as P.W. 4 in cross version S.T. No. 40 of 2009 and 41 of 2009 on behalf of the prosecution and as Pw5 in

S.T. No. 39/2014 to prove the injury reports. This witness has proved the injury reports of injured Arshad Ali, Chhotey Lal and Vinod @ Bablo.

The certified copies of his statement might have been filed in S.T.No. 39/2012.We are of the view that it is permissible in cross cases where

injuries are alleged to be sustained in same transaction, as in the present case. In Kuldeep Yadav v. State of Bihar 2011 Cr.L.J. 2640 (S.C.)

The Hon,ble Supreme Court has provided the procedure in cross cases, which is sub-stracted as under:-

Procedure in respect of cross cases

(9) In order to understand the above issue, it is useful to refer Section 223 (d) of the Code, which reads as under:

223. What persons may be charged jointly.

- The following persons may be charged and tried together, namely:-

(a) xx

(b) xx

(c) xx

(d) persons accused of different offences committed in the course of the same transaction;

(e) xx

(f) xx

(g) xx

(10) The above provision has been interpreted by this Court in the following decisions. In Harjinder Singh v. State of Punjab and Ors. (1985)

1 SCC 422, the question before the Court was whether under Section 223 of the Code it is permissible for the Court to club and consolidate the

case on a police challan and the case on a complaint where the prosecution versions in the police challan case and the complaint case are materially

different, contradictory and mutually exclusive. The question was whether the Court should in the facts and circumstances of the case direct that the

two cases should be tried together but not consolidated i.e. the evidence be recorded separately in both cases and they may be disposed of

simultaneously except to the extent that the witnesses for the prosecution which are common to both may be examined in one case and their

evidence be read as evidence in the other. After analysing the factual details, this Court has concluded:-

8. In the facts and circumstances of this particular case we feel that the proper course to adopt is to direct that the two cases should be tried

together by the learned Additional Sessions Judge but not consolidated i.e. the evidence should be recorded separately in both the cases one after

the other except to the extent that the witnesses for the prosecution who are common to both the cases be examined in one case and their evidence

be read as evidence in the other. The learned Additional Sessions Judge should after recording the evidence of the prosecution witnesses in one

case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter he shall proceed to

simultaneously dispose of the cases by two separate judgments taking care that the judgment in one case is not based on the evidence recorded in

the other case.....

(emphasis supplied by us)

22. In view of the above injury reports and the evidence of Dr. R.K. Verma adduced in S.T. No. 40 of 2009 and 41 of 2009 can be read as

evidence in the present case hence no further examination of this witness is required.

23. Dr. O.P. Mishra had taken X-ray of injured witnesses. Since the injuries found on the body of the injured were fire arm injuries as has been

proved by Dr. R.K.Verma, who has also proved the x ray report prepared by Dr. O.P. Mishra so his summoning is also not required in our

opinion.

24. Aditya Prakash Yadav, the then S.O. Police Station Nazratpur is said to be present in block Myaun where the alleged incident had taken

place along with Chandrapal Singh, S.O. Police Station Alapur District Badaun. He is prayed to be summoned to give eye witness account on the

ground that he had also witnessed the incident along with Chandrapal Singh and since Chandrapal Singh could not be produced in the witness box

as he had expired so evidence of Aditya Prakash Yadav is very much required. It would not be out of place to mention here that the cross version

evidence was adduced in S.T.No 40 and 41 of 2014 and as many as 08 witnesses were produced in cross cases to prove the guilt of the accused

persons of that case. Beside Aditya Prakash Yadav so many other witnesses were also present at that time and prosecution cannot be compelled

to produce all the witnesses and to examine any particular witness as has been held in case of Ajai Misra v. State of U.P., 2001(43) ACC 815.

So summoning of this witness, in our opinion is not required.

25. Before departing the matter it may be considered in this aspect also that in cross version session trial No. 40 of 2009 and 41 of 2009 the

accused persons were acquitted and no appeal has been preferred challenge their acquittal so the judgment passed in the aforesaid Session Trials

has attained finality and if the additional evidence is taken on record then certainly it would not only reopen the S.T. No. 39 of 2009 but shall also

re-open the S.T.No. 40 of 2009 and 41 of 2009 without any appeal.

26. It cannot be doubted that the Court has ample power to take or receive additional evidence at any stage but it may not be exercised in a

routine manner and is required to be exercised very sparingly for the ends of justice. It may also be mentioned that in the application private

defence appears to be set up in the garb of additional evidence though it has not been pleaded any where earlier neither in their statements under

section 313 Cr.P.C. nor in cross version case, as such appellants in garb of additional evidence can not be permitted to change their case or set up

entirely a new case.

27. In view of the discussions made above, the application lacks merits and is hereby rejected.

28. Let the capital case with connected appeal be listed for final hearing before the appropriate bench, at the earliest.