

(1985) 04 MP CK 0014

Madhya Pradesh High Court (Gwalior Bench)

Case No: None

Ramvilas and Others

APPELLANT

Vs

State of Madhya
Pradesh

RESPONDENT

Date of Decision: April 4, 1985

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162, 164, 173, 207
- Evidence Act, 1872 - Section 137, 145, 157, 32, 33
- Penal Code, 1860 (IPC) - Section 148, 149, 302, 307, 34

Citation: (1985) CriLJ 1773

Hon'ble Judges: R.C. Shrivastava, J; N.K. Singh, J

Bench: Division Bench

Judgement

R.C. Shrivastava, J.

In Sessions Trial No. 105 of 1980 First Additional Sessions Judge, Morena, convicted and sentenced the appellants u/s 148 of the Penal Code and sentenced them to undergo rigorous imprisonment for two years each and u/s 302. read with Section 149 of the Code for the murder of Sultansingh, Ramdayal, Savitribai, Karansingh and Lakhansingh and sentenced them to undergo imprisonment for life. The appellant No. 1 Ramvilas was further convicted u/s 307 and the remaining appellants u/s 307 read with Section 149 of the Code for attempt to murder Mst. Gangadevi and sentenced to undergo rigorous imprisonment for 5 years each. All the sentences were ordered to run concurrently. Being aggrieved, they have come up in appeal.

2. The appellants 3 and 4 namely Gourishankar and Ramdin, respectively, are real brothers, being sons of Sanwale, The appellants 1 and 2 namely Ramvilas and Mevaram, respectively, are sons of the appellants 4 and 3, respectively, Keshav and Sheonarayan are also sons of the appellant No. 3 while Kailashi is also a son of the appellant No. 4.

3. Siyaram eldest brother of the appellants 3 and 4, had abducted Garsingh's (P.W. 11) mother with a daughter Chhoti about 30 years ago. In retaliation, about 15 years ago, Garsingh (P.W. 11) abducted daughter of the appellant No. 3 and, since then, she has been living with him as his wife. Garsingh (P.W. 11) had a distant uncle Fatehsingh, who was murdered by Siyaram about 15 years ago for which he was convicted and sentenced to death. The deceased Sultansingh was real brother of Garsingh (P.W. 11).

4. The deceased Sultansingh used to live at village Jouha along with his wife Mst. Gangadevi (P.W. 7) daughter Savitri aged about 10 years and three sons namely Malkhansingh (P.W. 26) aged about 8 years, Karansingh a aged about 4 years and Lakhansingh aged about 1½ years and an uncle Ramdayal. The appellants used to live in an adjoining village Bag-tila, where Keshav, Kailashi and Sheonarayan also lived.

5. The prosecution case was that, on the morning of 24-12-1979, the appellants, Keshav, Kailashi and Sheonarayan constituted an unlawful assembly with the common object of murdering Sultansingh and all the members of his family. In prosecution of that common object, they killed Sultansingh the same forenoon when he was on his way back from haveli where he had gone earlier in the morning for fetching wheat-husk. Then, the same afternoon, Keshav, Kailashi, Ramviias (appellant No. 1) and Mevaram (appellant No. 2) reached his house. Keshav was armed with a gun, Kailashi with a spear and the appellants 1 and 2 with Farsas. On reaching there, they beat Sultansingh's uncle Ramdayal to death and the appellant No. 1 Ramviias dealt a Farsa-blow unto Sultansingh's wife Mst. Gangadevi (P.W. 7) in order to cause her death and told her that they had already killed her husband and that they would kill them all. They also looted some articles from the house and, then forcibly took Mst. Gangadevi (P.W. 7) and her three children namely Savitri, Karansingh and Lakhansingh towards a spot known as Tari, at that time, Sheonarayan, who was standing outside the house, also accompanied them. He was armed with a gun. The appellants 3 and 4 namely Gourishankar and Ramdin were standing at that spot (Tari) armed with lathis. From that spot, all those assailants forcibly took Mst. Gangadevi (P.W. 7) and those children to another spot known as Chhukariyawali Tari situated at a distance of about 2 furlongs. At that spot, they attacked her and the children with intention to cause their deaths. The three children died on the spot due to the injuries inflicted upon them. Mst. Gangadevi (P.W. 7) also sustained injuries. Then, the assailants left the spot mistaking that she was also dead. A villager Chhotaiya (P.W. 6) happened to come across her and he took her to her house. Thereafter, at 4.30 p. m., Gayaprasad(P.W. 1) gave information to police station Ambah on telephone. Investigation was started and, after completion thereof, the challan was put up against the appellants only as Keshav, Kailashi and Sheonarayan were absconding.

6. The appellants were charged with the alleged offences punishable under Sections 148, 302, 302/149, 307/149 and 395/397 of the Penal Code. They pleaded not guilty. After holding the trial the Sessions Court convicted and sentenced them as stated in the beginning and acquitted them of the other charges.

7. The convictions are based on the solitary testimony of Mst. Gangadevi (P.W. 7) and a few pieces of circumstantial evidence. Her evidence was recorded on 7-1-1981, on which date she was examined-in-chief, cross-examined and discharged. Her "dying declaration" (Ex.D-5) had been earlier recorded at 4.20 P.M. on 25-12-1979 by an Executive Magistrate Sanskar Pande (D.W. 2). That statement had not been filed by the prosecution nor had a copy thereof been delivered to any of the appellants. Therefore, when the fact that her "dying declaration" had been recorded, an application was filed on behalf of the appellants on 2-2-1981 praying that she may be recalled for further cross-examination. The application was opposed by the prosecution and the Sessions Court rejected it vide order-sheet dt. 3-2-1981. In revision preferred on behalf of the appellants, vide order dated 20-2-1981, a Single Bench of this Court allowed that application:

It is directed that the Additional Sessions Judge shall obtain the original statement of Mst. Gangadevi recorded on 25-12-79 and then recall her and to afford an opportunity to the accused persons to cross-examine her in the light of this statement.

The trial of the case was in progress. Some prosecution witnesses had still to be examined. After decision of the abovesaid criminal revision the Sessions Court, vide order-sheet dt. 24-2-1981, directed Mst. Gangadevi (P.W. 7) to be resummoned for further cross-examination and posted the case to 5-3-1981. On that date, no witness was present, the Presiding Judge was on leave and the case was adjourned by the Court-Reader to 9-3-1981 for order. On 9-3-1981, the Presiding Judge being on leave, the case was adjourned to 12-3-1981 for order. The order-sheet dated 9-3-1981 does not show whether any witness was present on that date. Mst. Gangadevi (P.W. 7) appeared on 12-3-1981, i.e., the adjourned date of hearing and the Presiding Judge as also the parties were also present. The Presiding Judge adjourned the case to 27-3-1981 with direction to resummon her on the ground that, on the previous date of hearing, i.e., 9-3-1981, the case had been adjourned to 12-3-1981 simply for order. On 27-3-1981, no witness was present and the Presiding Judge had gone to Shajapur for giving his own evidence and, therefore, the case was adjourned to 4-4-1981 for order. On 4-4-1981, the Presiding Judge again ordered Mst. Gangadevi (P.W. 7) and remaining witnesses to be resummoned and posted the case to 23-4-1981. On that adjourned date of hearing, i.e., 23-4-1981, it was found that the summons issued to Mst. Gangadevi (P.W. 7) for her appearance on that date (23-4-1981) had been returned by a constable's report dated 9-4-1981 to the effect that she had died on 8-4-1981. (That report is to be found endorsed on the back of the summons in the trial Court's record). After examining some witnesses who were

present on that date, the Presiding Judge adjourned the case to 21-5-1981 directing the investigating officer Ramsunder Tiwari (P.W. 31) to verify and confirm whether Mst. Gangadevi was really dead. On 21-5-1981, he reported that she had died. Thus, she could not be cross-examined further.

8. In the abovementioned circumstances, the learned Counsel for the appellants has vehemently argued that the testimony of Mst. Gangadevi (P.W. 7) recorded on 7-1-1981 cannot be read in evidence u/s 33 of the Evidence Act, for the reasons, firstly, that there is no evidence to prove her alleged death and, secondly, that the appellants did not get full opportunity to cross-examine her. The learned Deputy Government Advocate appearing for the State has, on the other hand, contended that, by not challenging the report as to her death in the Sessions Court, the appellants impliedly admitted that position and that they had full opportunity to cross-examine her earlier on 7-1-1981 and, therefore, her testimony recorded on that date cannot be left out of consideration. Section 33 of the Evidence Act reads as follows:

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided -

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

It is that section to which recourse has been taken by the learned Deputy Government Advocate for his contention that her evidence recorded on 7-1-1981 is relevant. The learned Counsel for the appellants has placed reliance on decision of a Division Bench of Calcutta High Court in the case of [S.C. Mitter Vs. The State](#), . In that case, which was a warrant case instituted on police report, a prosecution-witness was first examined-in-chief on 11-3-1948. On that date, his cross-examination was reserved. At the stage, the accused did not have right to cross-examine him. After framing of charge on 26-5-1948, the witness was recalled and further

examined-in-chief on 9-7-1948, but, before his cross-examination could be concluded, he ceased to be available, for which no cause was proved. It was under these circumstances that their Lordships held that his evidence had to be excluded from consideration and the prosecution was not entitled to invoke Section 33 *ibid*. The circumstances of the present case are different.

9. However, assuming that the testimony of Mst. Gangadevi (P.W. 7) cannot be considered unless it becomes relevant under the said section, I shall hereafter proceed to deal with the rival contentions of the learned Counsel for the appellants and the learned Deputy Government Advocate. One of the essential requirements for attracting the applicability of the section is that "the witness is dead or cannot be found, or is incapable of giving evidence or is kept out of the way by the adverse party, or his presence cannot be obtained without an amount of delay or expense, which, under the circumstances of the case, the Court considers unreasonable". The allegation has to be legally proved like any other fact and the burden of proof rests upon the party which invokes the section. Thus, it was for the prosecution to prove the alleged death of Mst. Gangadevi (P.W. 7) according to law. The contention of the learned Deputy Government Advocate that her death was impliedly admitted by not challenging the report regarding her death and, therefore, it was not necessary for the prosecution to prove it is without any force. In a criminal case, it is not open to the accused to waive its proof. Consent or want of objection on the part of the accused or his counsel to the deposition of a witness being brought on record under the said section cannot make it admissible, if it is not otherwise so. Decision in the cases of AIR 1946 1 (Privy Council) and *Bhagwant Singh v. State* 1960 Jab LJ 755 may be referred to in that connection. In the former mentioned case, the Public Prosecutor applied to the Sessions Court for transferring to the Sessions file the statement of a witness recorded by the Magistrate in commitment proceedings on the contention that, due to his illness, the witness was incapable of giving evidence at the trial before the Sessions Court. Thereupon, the Sessions Court admitted his statement which had been recorded in the Committing Court. Referring to the Section, their Lordships of the Privy Council observed -
Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly.... In a civil case a party can if he chooses waive the proof but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence.

It was held that, it having not been proved that the witness was incapable of giving evidence, his statement recorded in the Committing Court could not be admitted in evidence u/s 33 *ibid*. That decision was relied upon by a Division Bench of this Court in the latter-mentioned case, in which the statement of a witness recorded in the Committing Court was sought to be admitted as evidence before the Sessions Court under that section on the ground that the witness could not be found after due search. No objection having been raised by the defence counsel, the sections

(sessions?) Court allowed that to be done without recording evidence to establish that allegation. Relying on AIR 1946 1 (Privy Council) , their Lordships observed -

It is true that no objection was taken by the counsel for the defence to the grant of this prayer; but as observed by their Lordships of the Privy Council in Chanchal Singh's case (supra), the accused cannot in a criminal trial waive proof of a material fact. The fact that a person is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or his presence cannot be secured without an amount of delay or expense which the Court in the circumstances of the case considers as unreasonable is a condition precedent to the applicability of Section 33 of the Evidence Act to any previous deposition of the witness. This fact must be proved by legal evidence and it is not open to the accused to waive its proof.

Since no evidence was adduced to prove the ground on which the committing Court statement of the witness was sought to be admitted under that section, their Lordships held, the statement could not be admitted in evidence. Identical views were taken by Division Bench of Calcutta High Court also in the case of [S.C. Mitter Vs. The State](#), . In the present case also, there is no evidence to prove the ground (death) on which the testimony of Mst. Gangadevi (P.W. 7) is sought to be admitted u/s 33. The serving officer's report on the summons and subsequent report of the investigating officer that she was dead do not constitute evidence to prove that allegation. Thus, the alleged death of Mst. Gangadevi (P.W. 7) is not proved. The question that now remains to be considered is whether the appellants got full opportunity to cross-examine when her testimony was recorded on 7-1-1981. It is rightly not disputed that the second proviso to the section contemplate full and not partial opportunity. The contention of the learned Counsel for the appellants is that the opportunity cannot be said to have been full because copy of the "dying declaration" recorded by the Executive Magistrate having not been furnished to any of the appellants, the witness could not be cross-examined with reference thereto. Her statement dt. 25-12-1979 (Ex.D-5) recorded by the Executive Magistrate Sanskar Pande (D.W. 2) does not amount to dying declaration u/s 32(1) of the Evidence Act as it is not proved that she died due to the cause or circumstances mentioned therein. If the maker of the statement is not proved to have died as a result of the injuries received in the incident, the statement cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. Decision in the case of [Moti Singh and Another Vs. State of Uttar Pradesh](#), may be referred to in that connection. The statement (Ex.D. 5) also does not amount to one recorded u/s 164 of the Cr. P.C., 1973, for the reason that a statement under the section cannot be recorded by an Executive Magistrate. That document was not relied upon by the prosecution and, that being so, it was not necessary for the prosecution to forward it with the challan u/s 173(5) or to furnish copy thereof to the accused u/s 173(7) of the Code. Section 207 enjoins upon the Magistrate to furnish to the accused without delay copies of certain documents free

of cost. Dying declaration is not included in the documents mentioned therein and, although Clause (iv) of the section mentions statements recorded u/s 164, the statement Ex.D-5, as already held, does not amount to one recorded under that section. Therefore, the Magistrate was also not bound to furnish the appellants with copies thereof. It follows that the appellants had no right to be supplied with copies of the statement Ex.D-5. That being the position, the fact that copies thereof were not furnished to them cannot be made a ground for contending that the opportunity given to them for cross-examining Mst. Gangadevi (P.W. 7) on 7-1-1981 was not full. It is significant that, earlier at 11.50 P.M. on 24-12-1979 also, her "dying declaration" (Ex.D-2) had been recorded by Dr. Dilip Premi (P.W. 20), that it was similar to the statement (Ex.D-5) subsequently recorded by the Executive Magistrate Sanskar Pande (D.W. 2) and that there is no grievance that copies thereof had not been furnished to the appellants. In that view also, the opportunity cannot be said to have been incomplete. The conclusion that follows is that the opportunity which was given to them for cross-examining Mst. Gangadevi (P.W. 7) when she was examined on 7-1-1981 was full. So, assuming that the evidence of Mst. Gangadevi (P.W. 7) recorded on 7-1-1981 can be considered only by the application of the provisions of Section 33 of the Evidence Act, the prosecution is not entitled to resort to that section for the reason that her alleged death is not proved and her evidence recorded on that date has to be left out of consideration.

10. But, in our opinion, in the circumstances of the present case, recourse to the said section is not necessary to give relevancy to the testimony of Mst. Gangadevi (P.W. 7) as we shall presently show. No decision of the Supreme Court or this Court on this point has been brought to our notice. The rule contained in the section is an administrative expedient for doing justice between litigants in a particular situation. The Court requires a litigant to furnish evidence of the primary grade if it is within his power to do so. So long, therefore, as the proponent can reasonably be required to cause a witness to repeat his evidence regarding admissible facts given on a former occasion, the Court insists that the witness himself be produced. In other words, primary evidence is insisted upon until a satisfactory necessity for offering secondary evidence is made out. When the proponent's necessity for producing evidence of secondary grade is established the right to submit it is recognised by the Court so long as the original evidence is attainable, evidence which is merely substitutionary in its nature cannot be received. The section states the circumstances and conditions under which secondary evidence of oral testimony may be given. Under those circumstances and conditions, the section makes relevant the evidence already given by a person (i) in a prior judicial proceeding or before any person authorised by law to take it or (ii) at an earlier stage of the same judicial proceeding. That is to say, if a party wants to give the evidence of the same person (i) in a subsequent judicial proceeding or (ii) at a subsequent stage of the same judicial proceeding as the case may be, his evidence already recorded earlier can be considered and he need not be examined in the subsequent judicial

proceeding or at the subsequent stage of the same judicial proceeding as the case may be if the circumstances and conditions mentioned in the section are fulfilled. The section contemplates (i) a subsequent judicial proceeding in which that person has to be examined as a witness or (ii) a subsequent stage at which that person has to be examined as a witness in the same judicial proceeding as the case may be. In the present case, there is no question of a subsequent judicial proceeding. Here, the question is whether, in the sessions trial, there was any stage at which it was necessary for the prosecution to give evidence of Mst. Gangadevi (P.W. 7) again. Her evidence had already been recorded at the trial on 7-1-1981 u/s 231 of the Cr. P.C. 1973 read with Section 137 of the Evidence Act and there was no subsequent stage for giving her evidence. As there was no subsequent stage for giving her evidence, there was no occasion for invoking Section 33 of the Evidence Act for giving relevancy to her evidence recorded on 7-1-1981. The relevancy was never lost by it as it was the evidence of primary grade given at the trial. Section 33 ibid states the circumstances under which secondary evidence of oral testimony may be given. When evidence of primary grade has been adduced, there is no occasion to invoke or resort to that section.

11. The fact, however, remains that the appellants were deprived of the opportunity to further cross-examine Mst. Gangadevi (P.W. 7) in the light of her earlier statement dt. 25-12-1979 (Ex. D-5) recorded by the Executive Magistrate Sanskar Pande (D.W. 2). That opportunity was directed to be given to them vide order dated 20-2-1981 in the criminal revision referred to in para No. 7 above. That statement (Ex.D-5) could be made use of by the appellants only for contradicting her u/s 145 of the Evidence Act. It has, therefore, to be examined as to how far the appellants are adversely affected or prejudiced thereby. Reference to her testimony becomes necessary at this stage.

12. According to Mst. Gangadevi (P.W. 7), on the morning of the date of the incident, her husband left for Haveli for the purpose of fetching wheat-husk. He never returned home. Sometime after noon, when she was giving Sani (mixed fodder) to her cow at home, Keshav, Ramvilas (appellant No. 1), Mevaram (appellant No. 2) and Kailashi entered the house. Keshav was armed with a gun, Ramvilas and Mevaram (appellants 1 and 2) with a Farsa each and Kailashi with a spear. Ramvilas (appellant No. 1) dealt a Farsa-blow into her head and stated that they had killed her husband and would kill all the members of the family, Mevaram (Appellant No. 2) asked her as to where husband's gun was and, due to fear, she replied that it was inside the house. At that, all those four persons entered the inner portion of the house and removed her husband's gun, Patta with 24 cartridges and 20 other cartridges from a Dibia. Just then, her daughter Savitri, aged about 10 years, returned from school. At the time of the incident, her uncle-in-law Ramdayal was sleeping in the Madaiya of the house. Those assailants pulled him from the cot on which he was sleeping and beat him to, death. Then, they forcibly took her, her daughter Savitri (aged about 10 years) and sons Karansingh (aged about 4 years) and Lakhansingh (aged

about U/j years) towards a spot known as Tari. When they were forcibly taking her and her children towards that spot, a sweeperess Ramkatori (P.W. 5) was looking from her house and her (P.W. 7) Mst. Gangadevi's eldest son Malkhansingh (P.W. 26), who was playing with a ball outside the house, fled away towards school building,- Shivnarayan was standing outside the house armed with a gun. He also accompanied them to that spot. At that spot, she found Gourishankar and Ramdin (appellants 3 and 4) standing armed with Lathis. She requested them to save her and her children but they said that they would meet the same fate as that of her husband. When she and her children were being taken to Tari, it was witnessed by Pyare Khatik's wife Mst. Ramkatori, who met on the way. From Tari, all the seven assailants forcibly took her and her children to a spot known as Chukariyawali Tari situated at a distance of about 2 furlongs from her house. At that spot, she was shot at and her children Savitri and Karansingh were shot dead by Keshav and Lakhansingh was shot dead by Kailashi and she and her children were also struck by Ramvilas, Mevaram (appellants 1 and 2) and Kailashi also with spear. Then, mistaking that she was also dead, the assailants left the place. After they were gone, she saw that her children were lying dead. After sometime, Chhote Khatik alias Chhotaiya (P.W. 6) came running and escorted her to her house.

13. In her statement (Ex.D-5) dt. 25-12-1979 recorded by the Executive Magistrate Sanskar Pande (D.W. 2), it was not stated by her that Ramvilas (Appellant No. 1) at all told her that he and his companions had killed her husband and that they would kill her and other family members also. Instead she stated that she did not know that they had come after killing her husband. In that statement, she implicated only Ramvilas (appellant No. 1), Mevaram (appellant No. 2), Keshav and Kailash and not Gourishankar (appellant No. 3), Ramdin (appellant No. 4) and Sheonarayan. The names of Gourishankar, Ramdin and Sheonarayan were conspicuously absent therefrom and, towards the end, she stated that all the four assailants (Ramvilas, Mevaram, Kailash and Kailashi) left her children dead. These would have constituted material contradictions with which she could be confronted in case the appellants would have been able to cross-examine her further in pursuance of the order dt. 20-2-1981 referred to in para No. 7 above. To this extent, the case of the appellants was adversely affected and prejudiced due to her reported death and the benefit thereof goes to them. It follows that her versions with regard to the said statement attributed to Ramvilas (appellant No. 1) and with regard to the alleged complicity of the appellants 3 and 4 cannot be accepted. Another version, in Ex.D-5, with which she could be confronted, was that her children were struck only by Kailashi with a spear and that nobody shot at them. That is not of material significance because her version in the witness-box that they were shot dead is corroborated by the medical evidence on record. All that can be said in the circumstances is that she did not notice as to by which of the four assailants they were shot dead.

14. It follows that the appellants 3 and 4 namely Gourishankar and Ramdin, respectively, must be acquitted and, there being no other evidence to prove the

alleged liability for Sultansingh's death, the appellants 1 and 2 have to be absolved of the responsibility for his death. The versions of Mst. Gangadevi(P.W. 7) that the appellants 1 and 2, Keshav and Kailashi entered her house, that the appellant No.1 Ramvilas dealt a Farsa blow into her head, that her uncle-in-law was done to death, that she and her deceased children were forcibly taken by them to Chhukariyawali Tari and that her children were killed by them are corroborated by her statement (Ex.D-5) recorded by the Executive Magistrate and also by her earlier statement (Ex.D-2) recorded by the doctor. Those statements can be -used by the prosecution u/s 157 of the Evidence Act for the purpose of corroborating her testimony. Discrepancies in describing minor details are 1 immaterial and entirety insufficient to overthrow her version that the appellants 1 and 2, Kashav and Kailashi were the assailants. The fact that her versions with regard to the alleged complicity of the appellants 2 and 3 Sheonarayan are not reliable does not necessarily lead to rejection of her testimony with regard to the complicity of the appellants 1 and 2. There is no such hard and fast rule that, if a witness is disbelieved with regard to the alleged complicity of an accused, her testimony with regard to the other accused should also be rejected. Her versions with regard to the alleged complicity of the appellants 1 and 2 are clearly separable from those with regard to that of the appellants 3 and 4 and Sheonarayan. That being so, her versions with regard to the complicity of the appellants 1 and 2 can be acted upon despite its rejection with regard to that of the appellants 3 and 4 and Sheonarayan. It is very significant that she is mother of the deceased children. Normally, relatives of the deceased would be the least disposed to falsely implicate someone in substitution of the real culprit. Such a relationship as she had with the deceased children is often a sure guarantee of truth. The maxim "Falsus in uno, falsus in omnibus" is neither a sound rule of law nor a rule of practice for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or, at any rate, exaggerations, embroideries or embellishments. In most cases, the witnesses, when asked about details, venture to give some answer, not necessarily true or relevant, for fear that their evidence may not be accepted in respect of the main incident which they have witnessed, as pointed out by their Lordships of the Supreme Court in the case of [Sohrab and Another Vs. The State of Madhya Pradesh,](#) . Some differences and discrepancies in detail are generally found in the case of honest witnesses and, unless they are material, they need not necessarily be disbelieved and it is also open to the Court to accept a part of the evidence of a witness while rejecting the rest of it. In the circumstances of the present case, we see no sufficient reason to disbelieve Mst. Gangadevi's (P.W. 7) versions mentioned above at the beginning of this paragraph.

15. It may be mentioned that Mst. Ramkatori (P.W. 5) obviously turned hostile and that Mst. Gangadevi's (P.W. 7) son Malkhansingh (P.W. 26), aged about 8 years only, could not give evidence properly, most probably due to lack of understanding or underdeveloped brain. When questioned, he gave at random and self contradictory

statements. In examination-in-chief, he tried to support his mother Mst. Gangadevi's (P.W. 7) versions with regard to the incident at home but, in cross-examination, gave at random and self-contradictory statements. It appears that due to insufficient understanding on account of tender age and being a rustic village-boy, he could not face the, clever questions of the defence-counsel. At the end of his deposition, he stated that his earlier statement had been read over to him and he was asked to give the same statement in Court. By earlier statement, he obviously meant his statement recorded-by the investigating officer u/s 161 of the Cr. P.C. That also renders his testimony valueless, as I shall presently show. Sub-section (1) of Section 162 of the Cr. P.C. 1973, which sub-section is reproduction of Sub-section (1) of Section 162 of the Cr. P.C. 1898, lays down as follows:

No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution contradict such witness in the manner provided by Section 145 of the Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

It is clear that the statement made by him to the police during the course of investigation was made use of in contravention of the above provisions. Nobody can say what he would have said had his memory not been refreshed in that manner before he entered the witness-box. It does not make any difference that the statement was narrated to him not when he was in the witness-box but shortly before entering the witness-box, because the fact remains that it was narrated to him for the purpose of giving evidence at the trial. That is tantamount to making use of the statement at the trial. In the case of AIR 1947 75 (Privy Council) a witness, while in the witness-box, refreshed his memory by actually looking into his signed statement recorded u/s 162. As regards the statutory prohibition against signing of the statement their Lordships held that contravention of that statutory provision did not make the evidence of the witness inadmissible but the value of his evidence may be seriously impaired as a consequence thereof. As regards use of the statement for refreshing memory, their Lordships observed as follows:

The use by a witness while he is giving evidence, of a statement made by him to the police raises different considerations. The categorical prohibition of such use would

be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or Presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible.

That decision was considered in the case of [Kanbi Vaghji Savji Vs. State of Gujarat](#), in which case one witness Jiwanlal admitted towards the end of his deposition that his police statement was read over to him before he gave his evidence in Court. In that case, reference was also made to an unreported decision of the Bombay High Court, in which reliance was placed on the aforesaid decision of the Privy Council, and the following observations made by the Division Bench of the Bombay High Court in that case were quoted by their Lordships of the Gujarat High Court.

In order that the observations of their Lordships made by them in the above mentioned case may be attracted, the police statement of a witness need not necessarily be in his hands or before his eyes at the time of giving evidence in the Court. Speaking for myself, I have no doubt that their Lordships' observation would apply with equal force even if a witness made a mental use of his police statement, which was just previously read out to him, because by reason of such mental use, the witness's evidence was bound to be moulded by or modelled on his police statement,

...

We agree with what has been observed in the above two cases. Even if it is held that the evidence of a witness whose police statement has been read out to him a short time before he steps into the witness-box, does not become inadmissible, the value to be attached to such a witness would be very little, because when the witness deposes to the particular incident from the witness-box he or she would not be deposing from the recollection of that incident but from what has been read out from the police statement a short time before the deposition started. Under these circumstances, in the first place the entire evidence of Laddu Jivraj becomes inadmissible in evidence and even if it be held that it is admissible in evidence, no value whatsoever can be attached to the word of this witness Laddu Jivraj.

Finally, with regard to the evidence of Jiwanlal, their Lordships observed as follows:

The evidence of such a witness may be shaken, as the witness is likely to depose to the particular incident on the basis of what he had just read his statement made before the police, and not so much on the basis of what he actually recollected about what he had said in respect of that incident before the police. Even then the consideration of evidence of such a witness would depend upon the circumstances of the case. We, therefore, hold that the evidence of Jiwanlal suffers from the infirmity on that basis as well, and in view of other circumstances in the case, we do not attach importance to his evidence in this case.

The rejection of the testimony of Mst. Ramkatori (P.W. 5) and Malkhansingh (P.W. 26) does not, however, go to render the testimony of Mst. Gangadevi (P.W. 7) unreliable.

16. As regards circumstantial evidence, in this Court, the learned Deputy Government Advocate has referred only to the testimony of Ramjilal(P.W. 13) and Sobaransingh (P.W. 14), who tried to prove that, about a year before the date on which their evidence was recorded 5 men, including Mevaram (appellant No. 2) and Ramdin (appellant No. 4), crossed Chambal river by a boat at Holapura Ghat for Rajasthan on the border between Madhya Pradesh and Rajasthan. Their evidence was recorded on.8-1-1981. The date of the incident in question is 24-12-1979. Their evidence is too vague and discrepant and, even if accepted at its face-value, does not go to correlate it to the incident in question. That being so, it does not help the prosecution case. Evidence regarding other circumstances is also highly discrepant and the learned Deputy Government Advocate has rightly not placed reliance thereon.

17. In the circumstances already discussed, i we believe Mst. Gangadevi's (P.W. 7) versions that, sometime after noon on 24-12-1979, when she was giving sani (mixed fodder) to her cow at home, the appellants 1 and 2, Keshav and Kailashi reached there, that Keshav was armed with a gun, the appellants 1 and 2 with a Farsa each and Kailashi with a spear, that the appellant No. 1 Ramvilas dealt a Farsa-blow into her head, that her uncle-in-law Ramdayal was killed by them, that, at that time, her daughter Savitri returned home from school, that those four assailants then forcibly took her and the three children to Chhukariyawali Tari at a distance of about 2 furlongs from her house, that, at that spot, they attacked her and the children, that she was also shot and her children were shot dead there, that the assailants then left the place mistaking that she was also dead and that she was, after some time, taken back to her house by Chhotaiya (P.W. 6). The circumstances clearly go to show that all that was done by those four assailants in furtherance of the common intention of them all. Thus, for the attempt to murder Mst. Gangadevi (P.W. 7), the appellant No. 1 Ramvilas is guilty of the offence punishable u/s 307 while the appellant No. 2 Mevaram is guilty of the offence punishable u/s 307 read with Section 34 of the Penal Code and, for causing the deaths of Ramdayal, Savitri, Karansingh and Lakhansingh, both of them are further guilty of the offence punishable u/s 302 read with Section 34 of the same Code.

18. In the result, the appeal is partly allowed. The conviction and sentence imposed upon the appellant No. 1 Ramvilas u/s 307 of the Code are maintained. The conviction and sentence imposed upon the appellant No. 2 Mevaram u/s 307 read with Section 149 are altered into those u/s 307 read with Section 34 of the Code. The conviction and sentence imposed upon them u/s 302 read with Section 149 are altered into those u/s 302 read with Section 34 of the Code for the murders of Ramdayal and the three children. The sentences shall run concurrently. The

convictions and sentences imposed upon them u/s 148 are set aside and they are acquitted of that charge. They are also acquitted of the charge of Sultansingh's murder. The appellants 3 and 4 namely Gourishankar and Ramdin are acquitted of all the charges levelled against them and are directed to be set at liberty forthwith if not required in any other case.-Their convictions and sentences are set aside.

19. The Sessions Court's order regarding disposal of the seized articles has not been challenged and the same is maintained. It may be mentioned that the seized articles include a rifle and a licence seized from the appellant No, 3 Gourishankar who is father of the appellant No. 2 Mevaram and the absconder Keshav. In the circumstances of the case, we do not think it to be proper to direct return thereof to the appellant No. 3, lest it might be used by his sons for commission of offences.