Balak Ram Vs State of U.P.
Mohd. Sayeed Khan and Others Vs State of U.P.

Court: Supreme Court of India

Date of Decision: Aug. 16, 1974

Acts Referred: Constitution of India, 1950 â€" Article 136
Criminal Procedure Code, 1973 (CrPC) â€" Section 107, 144, 164, 374
Penal Code, 1860 (IPC) â€" Section 120
Uttar Pradesh Police Regulations, 1948 â€" Rule 115

Citation: AIR 1974 SC 2165 : (1974) CriLJ 1486 : (1975) 3 SCC 219 : (1974) SCC(Cri) 837 : (1975) 1 SCR 753

Hon'ble Judges: Y. V. Chandrachud, J; H. R. Khanna, J

Bench: Division Bench

Advocate: Frank Anthony, K.C. Agarwala, M.L.Srivastava and E.C. Agarawala, for the Appellant; D.P.Uniyal, N.K. Johri and O.P. Rana, for the Respondent

Final Decision: dismissed

Judgement

Y.V. Chandrachud, J.
On May 27, 1971 two persons called Tribeni Sahai and Radhey were shot dead in the town of Dataganj, District

Budaun. The four appellants: Balak Ram, Nathoo, Dr. R. P. Kohli and Mohd. Sayeed Khan @ Banney Khan were tried along with two others by

the learned Sessions Judge, Budaun, for various offences in connection with that incident. Balak Ram was convicted u/s 302 of the Penal Code

and was sentenced to death. He was also convicted and sentenced u/s 337 read with Section 149 for causing injuries to Jhilmili and Ram Prakash

and u/s 148, Penal Code. The learned judge acquitted the other five accused of all the charges. Out of these five, we are not now concerned with

Kailash whose acquittal is not under challenge and with Ahmed Sayeed Khan alias Pearey Mian who died during the pendency of the proceedings

in the High Court of Allahabad.

2. The High Court by its Judgment dated December 22, 1972 confirmed the conviction of Balak Ram and the sentence of death imposed on him

u/s 302 as also his conviction u/s 148. The High Court altered his conviction u/s 337 read with Section 149 to one u/s 307 read with Section 149

of the Penal Code.

3. In an appeal against the order of acquittal passed by the Sessions Court, the High Court confirmed the acquittal of Kailash, but convicted

Nathoo, Dr. R. P. Kohli and Mohd. Sayeed Khan @ Banney Khan under Sections 302 and 307 read with Section 149. It further convicted

Nathoo and Dr. Kohli u/s 148 and Banney Khan u/s 147 of the Penal Code. The three accused have been sentenced by the High Court to

imprisonment for life for their participation in the murder of Tribeni Sahai and Radhey and concurrently to ten years'' rigorous imprisonment for

causing injuries to Jhilmili and Ram Prakash. Balak Ram, Nathoo, Dr. Kohli and Banney Khan have filed four separate appeals by special leave of

this Court.

4. The incident leading to the murder of Tribeni Sahai and Radhey arose, indisputably, out of political rivalry, the parties involved being the

Congress (R), Congress (O) and the Bhartiya Jan Sangh. Tribeni Sahai was a sitting Member of the U.P. Legislative Assembly, elected on the

Congress (R) ticket while the other victim Radhey is said to have been his bodyguard. Balak Ram, Nathoo and Banney Khan belonged to the

Congress (O) while Dr. R. P. Kohli was the local President of the Jan Sangh.

5. The elections to the Town Area Committee of Dataganj were scheduled to be held on May 30, 1971. Balak Ram was contesting the election to

the Chairmanship of the Committee as a nominee of Congress (O). Dharam Pal, the rival candidate for Chairmanship was a nominee of Congress

(R). Nathoo and Banney Khan were contesting the election for the membership of the Committee on the ticket of Congress (O). The Jan Sangh

seems to have decided to support the candidature of Balak Ram and others who were put up by Congress (O).

6. The election campaign launched by the rival political parties led to great acrimony. The District Magistrate of Badaun, therefore, promulgated on

May 24,"" 1971 an order u/s 144 of the CrPC, prohibiting the assembly of more than five persons and carrying of arms in public. If defiance of this

order, Balak Ram led a procession of some 25 persons at about 6.30 p.m. on May 27, 1971. While passing by the house of the rival candidate

Dharam Pal, the precisionists raised various slogans whereupon Dharam Pal formed a procession of his own followers. The two processions stood

facing each other at the crossing of a road but the Station House Officer Yogendra Sharma persuaded both the parties to disperse.

7. The case of the prosecution in regard to the main incident leading to the double murder may be stated thus: At about 9.15 p.m. on May 27 the

six accused along with. 15 or 20 of their followers went about canvassing for the candidates put up by the Congress (O). A little later, they went

southwards through a lane which leads to the house of the deceased Tribeni Sahai. He was having an after-dinner stroll with Radhey and as he

reached the inter- Section of a cement road passing by his house and the lane by which the precisionists were proceeding, the appellants who were

leading the processions started raising offensive slogans against him. Tribeni Sahai protested and a wrangle ensued. While hot words were being

exchanged, Dr. Kohli, Banney Khan and Pearey Mian exhorted Balak Ram to fire. Balak Ram stepped out, stood on the raised ground to the east

of the lane, and fired a shot at Tribeni Sahai with a licensed pistol which he was carrying. Tribeni Sahai had sensed danger and was trying to

escape but he was hit by a bullet on the right scapular region. Radhey who was a few paces behind Tribeni Sahai ran forward to protect him when

Balak Ram, Nathoo and Dr. Kohli fired four or five shots. Radhey received a pistol injury on the left back. Jhilmili and Ram Prakash who live

nearby came running in protest but they also received injuries as a result of the shots fired by Balak Ram, Nathco and Dr. Kohli. Nathoo, like

Balak Ram, was carrying a pistol while Dr. Kohli was armed with a licensed revolver. Jhilmili received an injury on his left thigh while Ram Prakash

was found to have a superficial burn on the right side of his abdomen.

8. According to the prosecution, Rajendra Kumar Misra gave information of the incident at 9.45 p.m. at the police station which is about two

furlongs away. Rajendra Kumar Misra is the brother-in-law of Radhey Shyam Sharma who is the brother of the deceased Tribeni Sahai. Radhey

Shyam was, at the material time, the Deputy Inspector General of Police and was stationed at Lucknow. The Station House Officer, Yogendra

Sharma, asked a head constable to record the First Information Report. The S.H.O. signed the report and hurried to the scene of occurrence.

Rajendra Kumar stayed behind at the police station in order to obtain a copy of the First Information Report.

9. Dharam Pal, who was the rival candidate of the appellant Balak Ram for the Chairmanship of the Town Area Committee, went to the scene of

occurrence on hearing the pistol-fire. Tribeni Sahai is alleged to have told him that Balak Ram had fired a shot at the instigation of Banney Khan,

Pearey Mian and Dr. Kohli. In a short while, the motor cars of Dharam Pal and Rajendra Kumar Misra arrived at the place where Tribeni Sahai

and Radhey were lying injured. Tribeni Sahai was put in the car of Rajendra Kumar Misra and was accompanied by his wife and daughter.

Radhey was put in the other car but before the two cars left on their way to Budaun, Yogendra Sharma the S.H.O. arrived at the scene. He

dispersed the crowd which had surrounded the two cars. He tried to interrogate Radhey but failed to get any response as Radhey was

unconscious. He then went to the either car and the allegation is that he was told by Tribeni Sahai that Balak Ram had fired a shot at the instigation

of Banney Khan, Pearey Mian and Dr. Kohli. The Station House Officer claims to have taken down the dying declaration in the case diary which

he had taken with him while leaving the police station.

10. The tow cars reached the Civil Hospital at Budaun at 11.30 p.m. The District Magistrate and the Civil Surgeon who had in the meanwhile

received information about the incident were waiting for the cars at the hospital. Radhey, on being taken out of the car, was declared dead while

Tribeni Sahai was taken to the Emergency Ward. As his condition was found to be precarious the Sub-Divisional Magistrate, Sada Ram, was sent

for in order to record the dying declaration. On his arrival, Sada Ram recorded Tribeni Sahai''s dying declaration, the third in the series. Tribeni

Sahai was thereafter taken to the Mission Hospital at Barielly but he succumbed to his injury at 8.30 p.m. on the 23.

11. In the meanwhile, Yogendra Sharma had commenced the investigation. He went to the house of Tribeni Sahai and informed the Superintendent

of Police, Budaun, on trunk telephone about the occurrence. He met Jhilmili and Ram Prakash at the scene of occurrence and after inspecting their

injuries and recording their statements he sent them for treatment to Budaun which is about 18 miles away from Dataganj. He took charge of five

empty cartridges and a bullet head from the scene of occurrence. The Superintendent of Police sent a platoon of Provincial Armed Constabulary to

Dataganj and he himself arrived at Dataganj a little after midnight.

12. Dr. Kohli''s house is alleged to have been searched at night but he could not be found nor was any incriminating article discovered. At about

2.30 a.m. the same night, the Investigating Officer is alleged to have arrested Dr. Kohli on receipt of an information that be was proceeding

towards Pearey Mian''s house which was near the Roadways Bus Stand. Dr. Kohli was taken to his house and it is alleged that his wife produced

his licensed revolver from inside the Niwar of a cot. The Investigating Officer opened the chamber of the revolver and found that it was loaded

with three live cartridges and was emanating the smell of a freshly fired bullet. Banney Khan was arrested at 5 a.m. on the 28th Balak Ram''s house

was searched but he could not be found.

13. On the night between the 27th and 28th May, eleven persons were arrested by the Investigating Officer apart from Dr. Kohli, Banney Khan

and Kailash. Those persons were arrested on information given by one Abdul Rahman that they were involved in a conspiracy to commit the

murder of Tribeni Sahai.

14. Balak Ram, Nathco and Pearey Mian surrendered respectively on 29th May, 7th June and 11th June. On 1st June Balak Ram''s father

surrendered in the court of the Judicial Magistrate a licensed automatic Pistol belonging to Balak Ram.

15. The post-mortem examination on Radhey was performed by Dr. A. S. Gupta on 28th May. He found a circular lacerated wound 1/2"" x 3/10

cavity deep on the posterior axillary line on the left side of the axillary pit and a confusion on the right side of the chest. Dr. Gupta recovered a

bullet from Radhey''s body.

16. The post-mortem on the dead body of Tribeni Sahai was performed by Dr. S. Mitra on 29th May. He found on the dead body a gun shot

wound 1C x 1C chest cavity deep below the right scapular region.

17. The injuries of Jhilmili and Ram Prakash were examined by Dr. R. C. Bansal of the District Hospital, Budaun on 28th May. He found on the

person of Jhilmili a fire-arm wound of entry on the left thigh and a wound of exit on the same thigh. On the person of Ram Prakash was found a

superficial burn 1"" x 1"" on the right side of the abdomen.

18. The licensed revolver of Dr. Kohli, the automatic pistol of Balak Ram, the bullet which was recovered from the dead body of Radhey and the

five empty cartridges as well as the bullet head recovered from the scene of occurrence were sent by the Investigating Officer for ballistic tests to

the Scientific Section C.I.D., Lucknow. The ballistic expert, Shyam Narain, opined that the bullet recovered from Radhey''s body was fired from

Balak Ram''s pistol but that the bullet seized from the scenes of occurrence was fired from some other weapon.

19. The defence of the appellants, broadly, was that they were falsely implicated on account of political rivalry. They contended that the witnesses

had given false evidence against them either because they were friends or relatives of Tribeni Sahai or because of the pressure exerted on them by

the police at the instance, partly, of Tribeni Sahai''s brother Radhey Shyam, who was the Deputy Inspector General of Police and a Member of the

Vigilance Commission, U.P.

20. Balak Ram pleaded alibi saying that he was at Lucknow from May 25. He led evidence in support of his plea of alibi, Nathoo admitted that he

was related to Balak Ram but contended that he was contesting the election to the membership of the Town Area Committee as an independent

candidate. He also pleaded alibi saying that he had gone to Chandausi on the morning of 27th and returned to Dataganj on May 29. He stated that

he wanted to surrender earlier but being informed that Radhey Shyam, D.I.G., had issued orders for shooting the accused, if found, he could not

surrender till June 7. Dr. Kohli admitted that he was the President of the local unit of the Jan Sangh, but denied that there was any personal enmity

between him and Tribeni Sahai. He denied that he was arrested at about 3.30 a.m. on the 28th May or in the circumstances alleged by the

Investigating Officer or that his revolver was handed over by his wife. He contended that while he was closing his clinic at about 10.30 p.m. on the

27th he was taken by a constable to the police station on the pretext that he was wanted by the Station House Officer. While he was in detention

at the police station, the Station House Officer went to his house and obtained his revolver from his wife. According to Dr. Kohli, Dharma Pal,

Rajendra Kumar Misra and two lawyers, Nawal Kishore and Sultain Ahmed came to the police station and had a long meeting with the

investigating Officer at about 3 p.m. on the 28th. Those under arrest were thereafter sent to Budaun.

21. The two brothers Banney Khan and Pearey Mian admitted that a civil litigation was pending between them and Tribeni Sahai on the date of

occurrence. Banney Khan admitted that he was a candidate for election to the membership of the Town Area Committee as a nominee of

Congress (O). He stated that he was the Vice-Chairman of the Town Area Committee since 1937 and claimed that every candidate he had

supported during the past many years for the Chairmanship of the Committee had been successful. He alleged that he was implicated at the

instance of Dharam Pal who was contesting the Chairmanship on the ticket of Congress (R). Like Dr. Kohli he also contended that he was sent to

Budaun at about 3.30 p.m. on the 28th.

22. Each of the appellants denied knowledge of the order passed by the District Magistrate u/s 144, Criminal Procedure Code and each one

denied his presence in the procession which was taken out at about 6.30 p.m. on the 27th. Their presence in the later procession and their

participation in the incident under inquiry was of course denied by them.

23. The learned Sessions Judge, Budaun, came to the conclusion that none of the eye-witnesses including the injured Jhilmili and Ram Prakash

could be relied upon unless independent corroboration was available to their testimony. The learned Judge took the same view about the dying

declarations alleged to have been made, by Tribeni Sahai. Except for Balak Ram, the other accused were acquitted by the learned Judge as

independent corroboration was not available to the evidence of the witnesses in regard to the part played by those accused. In so far as Balak

Ram is concerned, the learned Judge convicted him for the murder of Tribeni Sahai and Radhey on the view that the evidence of the eye-witnesses

and the dying declarations of Tribeni Sahai were corroborated by the opinion of the Ballistic Expert, Shyam Narain, who stated that the bullet

recovered from the dead body of Radhey was fired from Balak Ram''s pistol. The learned Judge further held that it was not clear as to who else

were members of the unlawful assembly responsible for the murders of Tribeni Sahai and Radhey but since it was clear that there was in fact an

unlawful assembly, Balak Ram was liable to be convicted u/s 148, Penal Code. The learned Judge acquitted Balak Ram of the charge u/s 307

read with Section 149 in regard to the injuries received by Jhilmili and Ram Prakash but he convicted him u/s 337 read with Section 149 on the

ground that his reckless act in firing from his pistol had endangered human life and had caused hurt to Jhilmili and Ram Prakash.

24. Apart from the injured Jhilmili (P.W. 1) and Ram Prakash (P.W. 11), the prosecution examined Rajendra Kumar Misra (P.W. 13) and

Aryendra Nath (P.W. 19) as eye-witnesses to the occurrence. Rajendra Kumar Misra who lodged the First Information Report at the Dataganj

police station is a close relative of the deceased Tribeni Sahai and was at the relevant time the President of the local unit of Congress (R). The High

Court therefore felt that he could not be regarded as an ""entirely independent witness''. But his evidence was accepted by the High Court for the

reason that it was ""corroborated by the first information report lodged by him promptly"". The prompt lodgment of the F.I.R. was in turn held to be

corroborated by the evidence of Head Constable Jai Prakash (P.W. 2) and the Investigating Officer Yogendra Sharma (P.W. 24). The High

Court accepted the evidence of Jhilmili and Ram Prakash who, according to it, were independent witnesses. The two witnesses were said to

corroborate each-other individually and together they were held to corroborate the evidence of Rajendra Kumar. Misra. Aryendra Nath is the

sister''s son of Dharam Pal who, on the ticket of Congress (R) was contesting the election to the Chairmanship of the Town Area Committee. The

High Court therefore held that he could not be considered as an independent witness but his evidence was accepted as it was in ""full accord"" with

that of Jhilmili and Ram Prakash. Finally, the High Court accepted the three dying declarations of Tribeni Sahai as true and voluntary observing that

they provided full corroboration to the testimony of Jhilmili, Ram Prakash and Aryendra Nath. In the result the High Court accepted the

prosecution case in its entirety except in regard to Kailash and convicted Balak Ram, Nathoo, Dr. Kohli and Banney Khan as mentioned earlier.

25. Broadly, the two questions which arise for consideration are whether the High Court was justified in upholding the conviction of Balak Ram

and the sentence of death imposed on him by the Sessions Court and secondly whether the High Court had good and sufficient reasons for

interfering with the order of acquittal passed by the Sessions Court in favour of Nathoo, Dr. Kohli and Banney Khan. Our approach to these two

questions has to be basically different because whereas in regard to Balak Ram there is a concurrent finding of fact that he was responsible for

committing the murders of Tribeni Sahai and Radhey and for causing injuries to Jhilmili and Ram Prakash, in regard to the other three appellants the

two courts have differed, the High Court having interfered with the order of acquittal passed by the trial court in their favour.

26. The powers of the Supreme Court under Article 136 are wide but in criminal appeals this Court does not interfere with the concurrent findings

of fact save in exceptional circumstances. In 276873 it was observed that it was best to bear in mind that normally the High Court is a final court of

appeal and the Supreme Court is only a Court of special jurisdiction. This Court would not therefore re-appraise the evidence unless, for example,

the forms of legal process are disregarded or principles of natural justice are violated or substantial and grave injustice has otherwise resulted. In

dealing with the appeal filed by Balak Ram we shall have to keep this position in mind.

27. In so far as Nathoo, Dr. Kohli and Banney Khan are concerned the question for consideration is whether the High Court was justified in

interfering with the order of acquittal passed in their favour by the Sessions Court. In 277487 this Court held after a review of previous authorities

that if the High Court has set aside an order of acquittal the Supreme Court in an appeal under Article 136 will examine the evidence only if the

High Court has failed to apply correctly the principles governing appeals against acquittal. It was held in that case that the powers of the High

Court are as full and wide in appeals against acquittal as in appeal against conviction but, amongst things, if two views of the evidence are

reasonably possible the High Court ought to interfere with the order of acquittal passed by the trial court.

28. It would be convenient to deal first with the appeals filed by Nathoo, Dr. Kohli and Banney Khan who have the benefit of an order of acquittal

passed in their favour by the Sessions Court. For a proper understanding of the case it is necessary to have a glimpse of the political canvass of

Dataganj. The deceased Tribeni Sahai, Dharam Pal who was contesting the election to the Chairmanship of the Town Area Committee, the 79

year old Banney Khan and Dr. Kohli who was the President of the Jan Sangh unit were keyfingers in the Datagani politics. The story of their

doings is the not unfamiliar tale of floor-crossing and internal splits. In the Assembly election of 1967 an independent candidate--incidentally, a

retired District Judge-won on the support of other political parties though some of these parties had put up their own candidates. The Congress (R)

candidate supported by Tribeni Sahai lost that election and the Judge won. In the election to the Town Area Committee held in the same year.

Tribeni Sahai supported a Jan Sangh candidate as against Dharam Pal who was put up by the Congress. Dr. Kohli, though an ardent Jan Sanghite,

supported Dhram Pal. In the 1969 mid-term poll Tribeni Sahai won as a Congress candidate, this time with the help of Dharam Pal. The Judge,

Harish Chandra Singh, who as a Bhartiya Kranti Dal candidate had the support of Dr. Kohli, Banney Khan and others lost the election.

29. Coming nearer the date of occurrence, the Town Area Committee elections were to be held in Dataganj on May 30, 1971. Dharam Pal, a

Congress (R) candidate for the Chairmanship of the Committee had the support of Tribeni Sahai while Balak Ram, now under death sentence,

who was a Congress (O) candidate for Chairmanship had the support of other parties. Dr. Kohli and Banney Khan were partisans of Balak Ram.

Banney Khan was himself a Congress (O) candidate for the membership of the Committee. The Congress (R) and Congress CO) had each fielded

10 candidates for the 10 Committee seats. Nathoo, apparently an independent candidate, was in fact a dummy candidate put up by Congress (O)

in order 10 provide for the possible disloyalty of its official candidate. Nathoo is Balak Ram''s brother-in-law.

30. Of Banney Khan it is said that since 1937, candidates put up by him for Chirmanship of the Town Area Committee had won consistently, no

matter which party they belonged to or which party the rival candidates belonged to. In 1948 Banney Khan had supported Tribeni Sahai for

Chairmanship and the latter won. Banney Khan was himself the Vice-Chairman of the Committee since 1937. Dharam Pal who was the Chairman

of the Committee since 1953 had the unwavering support of Banney Khan through all these years. They fell out on the eve of the 1971 elections.

31. Political differences evidently polluted the social life of the Dataganj citizens. They carried those differences into their private lives and their

social relationship was marked by a series of quarrels and court cases. A civil suit was filed in 1965 by Banney Khan and his brother Pearey Mian

against Tribeni Sahai and others for a permanent injunction restraining them from realising Tehbazari dues from the market. This six year old suit

was, not surprisingly, pending on the date of the occurrence. A criminal case was then filed against Banney Khan and Pearey Mian u/s 307, Penal

Code, for a murderous assault on one Suleman whose brother Mohammad Sultan Vakil was an active follower of Tribeni Sahai. The case against

Banney Khan was later withdrawn and Pearey Mian was acquitted. In 1967-68 Tribeni Sahai had filed a case u/s 120-B, Penal Code, charging

Dharam Pal, Pearey Main and others for conspiracy to murder him. In those days Dharam Pal belonged to a rival party. In 1970 Tribeni Sahai had

filed a similar case against Pearey Main and others accusing them of a conspiracy to murder him. On August 3, 1970 Pearey Mian had lodged

report against Tribeni Sahai and his bodyguard Radhey u/s 394, Penal Code. It is obvious that a point to gain on the political plane was enough

excuse for all these gentlemen, to involve one another into grave charges like murder and dacoity. Dharam Pal who was strongly supported by

Tribeni Sahai in the 1971 elections for the Chairmanship of the Town Area Committee has admitted in his evidence that in earlier days Tribeni

Sahai used to harass him with false cases. In a trial against two persons called Tullan and Beni u/s 394 of the Penal Code, Dharam Pal had

deposed as a defence witness that Tribeni Sahai had falsely implicated those persons as they were his supporters. Beni, in fact, was in Dharam

Pal"s employment as a driver. It seems that the two accused were initially convicted but were acquitted in appeal. Most of the cases described

above seem to have been politically motivated. The fact that such serious charges lacked a true foundation was irrelevant to the way of life which

these gentlemen had adopted.

32. It is not surprising, though it is to be regretted, that in the din of these political and personal feuds the witnesses had a heavy commitment to

factitious loyalties. When key witnesses deny the obvious, pretend ignorance of facts within their special knowledge and give free play to their

imagination on crucial matters, pursuit of truth becomes a wild goose chase and the befogged trial Judge has then to discharge the unenviable duty

of seeing and hearing such witnesses.

33. Take Jhilmili and Ram Prakash. The firearm injuries on their person establish their presence at the scene of offence but to be present is only to

have an opportunity to witness. Presence does not ensure truthfulness nor is it any insurance against the common human failing to involve the

innocent along with the guilty. The presence of Jhilmili and Ram Prakash may indeed discredit them if they were components of the procession

which marched towards Tribeni Sahai"s house. The question which requires examination is whether, as contended, by the defence, they were

members of the procession and were injured accidentally when the precisionists opened fire or whether, as contended by the prosecution, they

received injuries when as disinterested by-standers they rushed to protect Tribeni Sahai.

34. It is surprising that the First Information Report lodged by Rajendra Kumar Misra does not refer to the presence of either Jhilmili or Ram

Prakash. Rajendra Kumar claims to have seen the incident from a close angle and he has mentioned in the Report the names of persons who had

seen the occurrence Jhilmili and Ram Prakash were admittedly injured in the firing incident and witnesses have uniformly stated that there was

enough light at the scene of occurrence. Jhilmili had received a through and through bullet injury on the thigh while Ram Prakash had received a

firearm burn on his abdomen. The question is not of the routine variety and one cannot brush aside the failure of the first informant to refer to the

two witnesses by saying that he may not have noticed their presence. The point of the matter is whether, having seen them, he dropped them

deliberately as they were on the side of the accused.

35. Rajendra Kumar Misra is himself a relative of Tribeni Sahai, being the brother-in-law of Radhey Shyam Sharma, the brother of Tribeni Sahai.

In the F. I. R. Rajendra Kumar mentioned that Loki, Ganga Ram and Aryendra had seen the incident. Ganga Ram was a Bataidar of Tribeni Sahai

and sometimes he used to live with Tribeni Sahai. Arvendra is the sister''s son of Dharam Pal who as a Congress (R) candidate was contesting the

election for the Chairmanship of the Committee with the active support of Tribeni ''Sahai. Neither Ganga Ram nor Loki was examined by the

prosecution and the learned public prosecutor stated that Loki had been won over by the defence. Such a bald assertion, unsupported by any

data, is insufficient to absolve the prosecution from its duty to examine witnesses whose evidence is necessary for upholding its case.

36. A large number of persons had gathered at the scene of offence and the Investigating Officer, Yogendra Sharma, himself arrived within a short

time. Arrangements were made to take Tribeni Sahai and Radhey to Budaun in two cars but no notice whatsoever was taken of the presence of

Jhilmili and Ram Prakash or of the injuries received by them though they were crying in pain. Yogendra Sharma says that he asked a constable to

take them to the police station with instructions that they should be taken to the hospital thereafter. As a matter of normal routine, they should have

been taken to Budaun along with Tribeni Sahai and Radhey especially when the two cars of Dharam Pal and Rajendra Kumar were so readily

available. If that was thought unnecessary steps should have been at least taken to send them to the local dispensary. Instead, they were first sent

to the police station, then to the dispensary, back to the police Station and ultimately to Budaun hospital.

37. During the trial in the Sessions Court, Jhilmili''s sons, Chotey and Chironji, were sitting in the group interested in the accused. Besides, Jhilmili''s

son-in-law Sia Ram and another relative Ved Prakash were contesting the election for the membership of the Committee as candidates of

Congress (O). Jhilmili stated that he did not know which party Sia Ram and Ved Prakash belonged to. In fact, he pretended ignorance of any such

political parties as Congress (R) and Congress (O). He had voted for Sia Ram and Ved Prakash but said that he did not know what symbols were

allotted to them.

38. Jhilmili is a secretive witness for, though his son got employment in the Provincial Armed Constabulary after the incident, he denied all

knowledge about it and added that he was not even aware that the son was posted at Kanpur. He also denied that he had opened a bank account

two months after the incident with an initial deposit of Rs. 1000/- and stated falsely that the account was opened prior to the incident with a deposit

of Rs. 600. He stated that he had deposited a sum of Rs. 50 only in that account after the incident but, a true copy of his bank account shows that

he had deposited a sum of Rs. 500 in November, 1971. Jhilmili was asked whether he knew that Dr. Kohli was associated with the Jan Sangh and

his answer was that since he had not heard the name ''Jan Sangh'', he could not speak of the association.

39. The manner in which Jhilmili claims to have received injuries is difficult to accept. He says that he rushed to the rescue of Tribeni Sahai after

Balak Ram had fired a shot. The procession consisted at least of six persons arid an open exhortation is alleged to have been given by Dr. Kohli

and others that Balak Ram should fire. It is impossible that Jhilmili could have jumped into the firing range.

40. A large part of the criticism in regard to Jhilmili''s evidence holds good in regard to Ram Prakash also. Tribeni Sahai had filed a prosecution

against Ram Prakash''s father and others for conspiracy to murder him. Tribeni Sahai had also instituted a case u/s 107, Criminal Procedure Code,

against Ram Prakash''s father and. others. Ram Prakash surprisingly denied knowledge as to whether the first mentioned case was pending or not.

He admitted that he was standing at the scene of offence for quite some time after the incident and that he did not tell any one including his mother

that his injuries should be attended to. He saw Yogendra Sharma arrive but did not complain to him about the injury which he had received. Ram

Prakash, like Jhilmili, made a fanciful assertion that Dr. Kohli, Banney Khan and Pearey Mian shouted together in one voice asking Balak Ram to

open fire. Realising the infirmity of that, assertion, Ram Prakash made a funny embellishment: ""Banney Khan had initially started asking Balak Ram

earlier than others. Banney Khan accused had shouted the word Balak Ram before other accused started saying. Then the sentences were

completed by all of them. All the three accused had said the same thing i.e. ''Balak Ram Maro Goli''

41. The learned Sessions Judge was right for some of these reasons in holding that the evidence of Jhilmili and Ram Prakash could not be accepted

without independent corroboration. The High Court treated them as independent witnesses and held that they had corroborated each other.

42. In fact, the High Court went a step further and held that these two witnesses corroborated Rajendra Kumar Misra also. Rajendra Kumar is the

brother-in-law of Tribeni Sahai''s brother Radhey Shyam Sharma who at the relevant time was stationed at Lucknow as Deputy Inspector General

of Police and as a Member of the Vigilance Commission. The trial court observed rightly that the witness could not be disbelieved merely because

he was related to Tribeni Sahai. But it gave various reasons for not accepting his evidence at its face value.

43. In the first place, the omission to make a reference to the presence of Jhilmili and Ram Prakash in the F. I. R. was not an oversight on the part

of Rajendra Kumar. The omission was deliberate because it was not then known whether they would support the prosecution case. Jhilmili has

stated in his evidence that he had seen Rajendra Kumar coming from the western side at the time of the incident. Apart from this, the conduct of

Rajendra Kumar is highly unnatural. After the precisionists dispersed and ran away he did not even try to find out what injuries Tribeni Sahai and

Radhey had received and whether they required medical attention. He claims to have seen the whole incident but, on his own showing, as a mute,

silent spectator. He raised no alarm, he did not go near any of the injured persons and made a straight dash for the police station. There are also

serious discrepancies as regards the spot from which he claims to have seen the incident. He says that he saw one incident from three or four paces

east of the north-western corner of Aryendra''s house. The particular spot is said to be about 18 paces from the scene of occurrence. According

to Jhilmili, Ranjendra Kumar had come only as far as the house of one Dr. Suresh. Paragraph 5 of the Notes of Inspection made by the learned

Sessions Judge shows that a person standing in front of Dr. Suresh''s house could not recognise persons standing at the scene of occurrence. At

the time the incident started, Rajendra Kumar claims to have been sitting at his Baithak. But neither in the F. I. R. nor in his police statement did he

mention where exactly he was at the time when the commotion started. In the F. I. R. he alleged that Pearey Mian, Banney Khan and Kailash were

also among the assailants but he admitted in the Sessions Court that these persons had not participated in the actual assault. It is significant that the

witness had not mentioned Banney Khan''s name before the Investigating Officer at all in connection with this incident and was unable to give any

satisfactory explanation of this omission.

44. We do not propose to dissect the question whether the F. I. R. was lodged immediately as claimed by Rajendra Kumar or whether it was

lodged on the next day as contended by the defence. The better view would, however, seem to be that it was lodged soon after the incident though

perhaps not as immediately after the incident as Rajendra Kumar claims. The Sessions Judge has expressed his finding with welcome restraint in

saying that the case of the defence that the F. I. R. was not filed at the time at which it purports to have been filed cannot be said to be ""wholly

unfounded.

45. That leaves for consideration the evidence of Aryendra who -also claims to be an eye-witness. He is the sister''s son of Dharam Pal who was

contesting the election for the Chairmanship of the Committee. Dharam Pal has admitted in his evidence that he had brought up Aryendra and that

he was living with him for about 17 or 18 years after the death of his father. Aryendra is said to have shifted to the house of his father-in-law

because his mother-in-law was all alone in the house. That house occupies a vantage position being quite near the scene of occurrence.

46. In the first place, there is no reliable evidence to show that Aryendra was living in the house of his father-in law since March, 1970 as alleged

by him. After leaving Dharam Pal''s house he admittedly shifted to the house of one Umrao Lal Halwai but he says that he lived in the house of that

man for two or three months only. The learned Sessions Judge has referred to the voters'' lists and other documents to show that it was doubtful

whether Aryendra had left the Halwai''s house and was living in the house of his father-in-law at the material time.

47. Aryendra claims to have been sleeping on the eastern roof of his father-in-law''s house. It was common ground that if he were sleeping on the

western side, which was a more convenient place, he could not have seen the incident. He explained this by saying that there used to be a dog on

the western roof to keep watch and the eastern roof had no regular staircase making it difficult for the dog to get on there. When his statement was

recorded ""by the Sub-Divisional Magistrate u/s 164 of the Criminal Procedure Code Arvendra stated that Pearey Mian. Banney Khan. Dr. Kohli,

Balak Ram; Kailash and Nathoo were ""also"" in the procession. His case then was that there were others also in the procession. In fact, he had

stated then that 8 or 10 persons had stood near the door of the house of one Uma Shanker, a statement which he falsely denied to have made. It is

not without relevance that as many as 11 others were arrested on the night of the incident for conspiracy to murder Tribeni Sahai. Finally,

Aryendra has also like the other eye-witnesses given the incredible version that Banney Khan, Kohli and Pearey Mian exhorted Balak Ram in one

voice to open fire.

48. It cannot be overlooked that the statements of Jhilmili, Ram Prakash and Aryendra were recorded u/s 164, Criminal Procedure Code, in June

1971, soon after the incident. The Investigating Officer says that he got the statements recorded by way of precaution. That could be true and it

would be wrong to find fault with the Investigating Officer merely because he got the statements of these witnesses recorded u/s 164. Nor can the

evidence of a witness be discarded for the mere reason that his statement'' was recorded u/s 164. But the High Court overlooked that the evidence

of witnesses whose statements are recorded u/s 164 must be approached with caution. Such witnesses feel tied to their previous statements given

on oath and have but a theoretical freedom to depart from the earlier Version. A prosecution for perjury could be the price of that freedom. It is,

of course, open to the Court to accept the evidence of a witness whose statement was recorded u/s 164, but the salient rule of caution must

always be borne in mind. That is all the more necessary when almost all the eyewitnesses are subjected to this tying-up process. Even Aryendra,

the sister''s son of Dharam Pal, was not thought to be above suspicion.

49. We have indicated broadly some of the more serious infirmities in the evidence of the eye-witnesses in order to show that the Sessions Court

was justified in taking the view that it was unsafe to act on their evidence without corroboration. Ignoring the impact of these infirmities, the High

Court erroneously treated the witnesses as independent and held that they had corroborated one another. None of the four eye-witnesses was true

enough to afford corroboration to the evidence of others. Corroboration in such cases must be forthcoming from an independent source.

50. The prosecution relied very strongly on the three dying declarations alleged to have been made by Tribeni Sahai. The first of these was made

to Dharam Pal, the second to the Investigating Officer Yogendra Sharma and the third was made in the Budaun hospital before the Sub-Divisional

Magistrate. It is necessary to examine closely the circumstances attendant upon these dying declarations.

51. Not much reliance was placed before us on the first two dying declarations and rightly so. In regard to the oral dying declaration alleged to

have been made by Tribeni Sahai to Dharam Pal immediately after the shooting outrage, neither Jhilmili nor Ram Prakash who were admittedly

present at the scene of occurrence all through say anything about that dying declaration. Even Aryendra who is Dharam Pal''s sister''s son did not

say that Tribeni Sanai made a dying declaration to Dharam Pal. Surprisingly, though the investigation was otherwise prompt, the statement of

Dharam Pal was recorded by the investigating Officer on June 2, 1971 which was six days after the incident had taken place.

52. The second dying declaration is alleged to have been made to the Investigating Officer. Investigating Officers are keenly interested in the

fruition of their efforts and though we do not suggest that any assumption can be made against their veracity, it is not prudent to base the conviction

on a dying declaration made to an Investigating Officer. Yogendra Sharma says that while Tribeni Sahai was lying in a car at the scene of offence

he made a statement implicating the accused. Yogendra Sharma produced a true copy of an entry in his case diary stating that even as he was still

in the car, he recorded the dying declaration in the case diary which he was carrying with him-It is difficult to appreciate why, if there was time

enough to reduce the dying declaration into writing, Yogendra Sharma did not obtain Tribeni Sahai''s signature or at least the signatures of any of

the large number of persons who had surrounded the car. Rule 115 of the U.P. Police Regulations expressly enjoins the Investigating Officer to

record a dying declaration, if at all, in the presence of two respectable witnesses and after obtaining the signature or mark of the declarant at the

foot of the declaration. Besides, if the Investigating Officer was in such haste that he did not even think it proper to wait at the police station until

the various columns on the first page of the F.I.R. were duly filled in, it is rather difficult to believe that seized by such a pressing sense of

emergency, he would take the case diary with him on the off chance that a dying declaration may be in the offing.

53. The dying declaration (Ex-Ka-47) made by Tribeni Sahai at the Budaun hospital was recorded by the Sub-Divisional Magistrate Mr. Sada

Ram at 11.50 p.m. Learned counsel appearing for the appellants submitted that this dying declaration is a fabrication and must therefore be

discarded. We are not inclined to go that far. The circumstances surrounding the dying declaration, though uninspiring, are not strong enough to

justify the view that officers as high in the hierarchy as the Sub-Divisional Magistrate, the Civil Surgeon and the District Magistrate hatched a

conspiracy to bring a false document into existence. The Civil services have no platform to controvert allegations, howsoever grave and unfounded.

It is therefore, necessary that charges calculated to impair their career and character ought not to be accepted except on the clearest proof. We

are not prepared to hold that the dying declaration is a fabrication.

54. All the same, one must face the question whether, in the circumstances of the case, it is safe to act on the uncorroborated dying declaration of

Tribeni Sahai. The evidence of Dr. R. C. Bansal who was the Medical Officer of the District Hospital, Budaun, shows that Tribeni Sahai was in a

critical condition when he reached the hospital. Before the dying declaration was recorded, an attempt was made to give him saline but even after

making incisions on the hands and a leg, the attempt did not succeed. Dr. Bansal has stated that Tribeni Sahai was in ""severe pain"", that he was

under a ""great shock"", that there was ""profuse bleeding"" from the injury, that his respiration was poor, that his pulse was ""feeble and thready"" and

that the ""blood pressure was not recordable"". Dr. Bansal explained that by ""shock"" he meant ""a state of profound depression of the vital processes

of the body resulting from injury."" It taxes one''s ordinary experience of human affairs to accept that Tribeni Sahai, thus tormented, was in a fit

mental and physical condition to make a volitional statement after he had reached the Budaun hospital.

55. Quite apart from this consideration, the dying declaration can have hardly any evidential value because Tribeni Sahai was in the midst of friends

and admirers right since the time of the incident until the dying declaration was recorded. Dharam Pal was in his constant company and it is not

unlikely that names of political opponents like Balak Ram, Dr. Kohli and Banney Khan were freely banded about. The dying declaration could then

be naturally influenced by the opinion and inferences of close friends like Dharam Pal.

56. If Tribeni Sahai were to go on record as a person of unquestioned rectitude it might, perhaps, have been possible to approach the dying

declaration a little differently. But the long lists of cases which he had filed against the political opponents shows that he had no compunction in

pointing an accusing finger at innocent persons. Dharam Pal himself was a victim of such machinations and even he conceded that Tribeni Sahai

used to harass him by making false charges when he was in the opposite camp.

57. Therefore, we find it impossible to accept the conclusion of the High Court that: ""All the three dying declarations of Sri Tribeni Sahai provide

full corroboration to the testimony of the two injured eyes witnesses and Aryendra that it was Balak Ram, who was responsible for the fatal injury

to Sri Tribeni Sahai and that he fired instigated by Dr. Kohli, Pearey Mian and Banney Khan.

58. The aforesaid discussion of the various items of evidence must at least yield the result that the conclusion to which the learned Sessions Judge

came was a reasonable conclusion to come to. It cannot be denied that two views of the evidence are reasonably possible in regard to the

participation of Nathoo, Dr. Kohli and Banney Khan. The High Court, therefore, ought not to have interfered with the judgment of the Sessions

Court in their favour.

59. A revolver was recovered from the house of Dr. Kohli at the time of his arrest on the night of the incident and it is said that the revolver emitted

a foul smell. If anything, the evidence of the ''ballistic expert Shyam Narain (P.W. 14) shows that none of the five empties recovered from the

scene of offence could have been fired from Dr. Kohli''s revolver. The expert was also unable to give a definite opinion that the bullet, Ex. 25,

which was recovered from a drain near the scene of offence was fired from Dr. Kohli''s revolver.

60. In regard to Nathoo, he is not named in the dying declaration recorded at the Budaun hospital. What is more, his name which was first written

towards the end of that dying declaration was subsequently scored off. Mr. Sada Ram, the Sub-Divisional Magistrate, says that he scored off

Nathoo"s name from the dying declaration because Tribeni Sahai did not say anything when Nathoo"s name was read out that was fair of Mr.

Sada Ram but when Nathoo scores one more point.

61. The old Banney Khan is an old hand at politics. He was Vice-Chairman of the Town Area Committee since 1937 and even Dharam Pal has

admitted that Banney Khan was a king-maker. He was 79 years old on the date of the incident and the only evidence against him consists of that

artificial assertion that he, Dr. Kohli and Pearey Mian exhorted Balak Ram with one voice to shoot at Tribeni Sahai. Banney Khan"s implication

could reasonably be traced to the personal enmity between him and Tribeni Sahai.

62. In the result the order of conviction and sentence passed by the High Court against Nathoo, Dr. R. P. Kohli and Mohammad Sayeed Khan

alias Banney Khan is set aside and their appeals are allowed. Banney Khan is on bail and he need not surrender to his bail. Nathoo and Dr. Kohli

shall be released forthwith.

63. That leaves us for consideration the appeal filed by Balak Ram who has been found guilty by the Sessions Court as well as the High Court.

Mr. Frank Anthony made an impassioned plea for his acquittal but we are unable to accept the submission of the learned Counsel.

64. It is urged that Loki and Ganga Ram whose names were mentioned in the F.I.R. were not examined and therefore an adverse inference should

be drawn against the prosecution; that the relevant columns in the Inquest Report were deliberately left blank so as to facilitate a manipulation of

evidence, that the F.I.R. was ante-dated; that the she plan was deliberately drawn in a vague and general manner; that there was no immediate

motive for the offence and that the High Court had failed to consider the evidence of the defence witnesses at all which it was its duty to consider in

a reference u/s 374, Criminal Procedure Code.

65. The more important of these points stand answered by what we have already said while discussing the appeals of the other accused. But, it is

necessary to add that in the first place, the other accused had the benefit of an order of acquittal passed in their favour by the trial court and

secondly we have only endeavoured to indicate that since the view taken by the trial court was a reasonable view to take, the High Court ought not

to have interfered with the judgment of acquittal.

66. In regard to Balak Ram, there is a concurrent finding that the shot fired by him caused the death of Radhey and we see no reason for taking a

different view. The evidence in regard to the part played by him is natural and consistent and is corroborated by the opinion of the Ballistic Expert.

Such corroboration was lacking as against others. The evidence of the Ballistic Expert shows that the bullet (Ex. 27) which was extracted from

Radhey''s body was fired from the pistol (Ex. 5) belonging to Balak Ram. Mr. Anthony made a severe attack on the evidence of the expert and in

order to show infirmities in that evidence he read out to us various passages from ""The Identification of Firearms and Forensic Ballistics"" by Major

Gerald Burrard; J. S. Hatcher''s ""Text Book of Firearms Investigation, Identification and Evidence"" (5th Ed. 1946)"" and Modi''s ""Medical

Jurisprudence and Toxicology."" We have considered these submissions but are unable to see a reason strong enough to justify a reversal of the

concurrent view taken by the two courts. The normal rule that this Court does not reappraise evidence in such cases must apply.

67. Stated briefly, Mr. Anthony''s contention is that the bullet (Ex. 25) which was recovered from the scene of offence must have been the one

which after hitting Tribeni Sahai made an exit wound not since that bullet, according to the ballistic expert, could not have been fired from Balak

Ram''s pistol (Ex. 5), he cannot be held guilty for causing the death of Tribeni Sahai. Mr. Anthony says that the evidence of the eye witnesses

stands falsified by the evidence of the expert. The difficulty in accepting this contention is that there is no warrant for saying that the bullet Ex. 25

must be the one which passed through Tribeni Sahai''s body.

68. Mr. Anthony spent considerable time in showing that the striations on the bullet (Ex. 27) which was extracted from Radhey''s body are of a

different pattern from the striations on the test bullets fired from Balak Ram''s pistol. The evidence of the expert has been closely considered by the

High Court and we consider their finding on this aspect as open to no exception.

69. Balak Ram examined two witnesses, Shiv Govind Singh (D.W.7) and Udainarain Singh (D.W. 8) to establish his plea of alibi but that evidence

was rightly rejected by the trial court. It is in the least degree likely that Balak Ram who was contesting the election for Chairmanship of the

Committee would be away from the hubbub of politic on the eve of elections. All the same, the High Court ought to have considered that evidence

for what it was worth. In a reference for confirmation of the death sentence u/s 374, Criminal Procedure Code, the High Court must examine the

entire evidence for itself, independently of the Sessions Court. (See 282777 and Jamman and Ors. v. The State of Punjab (1). Fortunately, the

failure of the High Court to examine the defence evidence has led to no miscarriage of justice.

70. Balak Ram''s conviction must, therefore, stand. On the question of sentence, there is no reason for interference. Balak Ram was carrying a

pistol and he fired from that pistol without any provocation either from Tribeni Sahai or from Radhey. Neither of them was armed, not even with a

walking stick, and all that Tribeni Sahai did was to ask the precisionists to desist from shouting vulgar slogans. Politics may or may not be a clean

game but no court can suffer with equanimity such flagrant defiance of law by members of political parties, whatever their colour or creed. They

must know that it will not pay to carry pistols in processions for being used as weapons of offence against political rivals. Accordingly, we confirm

the order of conviction and the various sentences including the sentence of death imposed on Balak Ram and dismiss his appeal.