

Sunder and ors. Vs. State

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Court : Allahabad

Decided On : Apr-05-1957

Reported in : AIR1957All809; 1957CriLJ1378

Judge : Mukerji and ;Choudhry, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 172, 256 and 540; [Evidence Act, 1872](#) - Sections 5, 9 and 114; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 300 and 302

Appeal No. : Criminal Appeal No. 1424 of 1956 and Ref. No. 130 of 1956

Appellant : Sunder and ors.

Respondent : State

Advocate for Def. : S.C. Asthana, Adv.

Advocate for Pet/Ap. : P.C. Chaturvedi and ;M.H. Beg, Adv.

Judgement :

Chowdhry, J.

1. This is an appeal by five persons: Sundar aged 30, Pachchu aged 70 or 75 (65 according to the Sessions Judge), Radhurai aged 30, Sukhlal aged 40 or 45 and Gajraj aged 20 or 21 (25 according to the Sessions Judge). The learned Sessions

Judge of Fatehpur has convicted all of them under Section 302, read with Section 149 or alternatively, with section 34, I. P. C., and sentenced Sundar and Pachchu to death and each of the remaining three to imprisonment for life. He has passed a separate sentence of imprisonment for life on Raghurai under Section 302, read with Section 114, I. P. C.

He has also convicted all of them of rioting and sentenced Sundar and Pachchu to 2 years' R.I. each under Section 148, I. P. C., and Raghurai, Sukhlal and Gajraj to 18 months R.I. each under Section 147, I. P. C. The learned Sessions Judge has said nothing as to whether the sentences of those not awarded capital punishment were to run concurrently or consecutively. The record is also before us for confirmation of the sentences of death passed on Sundar and Pachchu.

2. Sundar belongs to Semra, Pachchu and Raghurai to Dehuli, Sukhlal to Sachauli and Gajraj to Kamalipur, all within police station Thariaon in the district of Fatehpur. Two others tried along with the appellants, Manni Lal of Kamalipur and Indrapal of Dehuli, were given the benefit of doubt and acquitted.

3. The man done to death in this case was Ram Autar, aged about 35 years according to the doctor who performed the post-mortem on his dead body. He belonged to Dehuli but was employed as Head Master of the Municipal Basic Primary School of Fatehpur. In going to Dehuli from Fatehpur one has to go 10 miles east by the grand trunk road and then, leaving the road at a culvert at the 10th mile, one mile due north. The villages to which the appellants belong are situate within the same police station as, and at short distances from, Dehuli.

4. The prosecution case was that the deceased and the appellants belonged to rival factions into which the residents of Dehuli and the neighbouring villages were torn. There was a trial for the murder of one Pooran of the deceased's party in 1952 which resulted in wholesale acquittals, but the appellants Pachchu and Sukhlal and the father's brother Nanku were among the accused and Ram Manohar P. W. 1 and Budhu P. W. 5 were prosecution witnesses in that case.

This was followed by the murder of the Jodhi of the party of the accused in the present case in 1953. Jodhi was an unclie of the acquitted accused Indrapal. The

trial in that case also resulted in acquittals. It is noteworthy that Raghurai appellant along with the two men just named as prosecution witnesses of the present case, Ram Manohar and Budhu, and Ram Manohar's brother Sheo Dularey were among the accused, and the acquitted accused Indrapal's father Binda was one of the prosecution witnesses in that case.

There were two or three proceedings under Section 107, Cr. P. Code, in the years 1954 and 1955 in which Pachchu appellant and the acquitted accused Indrapal were amongst those ranged on one side and the deceased Ram Autar and the said witnesses Ram Manohar and Budhu amongst the opposite side. Raghurai appellant continued to be a party-man of the deceased Ram Autar for he was ranged on the same side with him in one of these security proceedings. There was one other murder, that of one Sheo Mangal of Jharha, a few months before the present murder.

Sheo Mangal's dead body was recovered in Dehuli. One of the accused in that case was the aforementioned Nanku, brother of the present appellant Sukhlal, and the deceased Ram Autar was one of the prosecution witnesses. The flame of party feeling was fanned by the Panchayat elections in villages Dehuli and Usrehra, which came off towards the end of 1955, and in which the candidates set up by the deceased Ram Autar were successful against those backed by one Gajraj Singh (not Gajraj appellant) of Kamalipur, who has a house in Fatehpur. In these elections Raghurai appellant is said to have gone over to the side of Gajraj Singh.

5. Due to these deadly feuds whenever Ram Autar went from Fatehpur to Dehuli he took the precautionary measure of taking 4 or 5 men with him. According to the prosecution, he made a departure from this practice on February 4, 1956, the day of the present occurrence, for when Ram Manohar P. W. 1. of Dehuli was returning in the afternoon to his village on his bicycle after doing some marketing in Fatehpur, he met the deceased at the bus-stand on the eastern outskirts of Fatehpur and found him going alone to his village. Raghurai appellant was also there. Both the deceased and Raghurai were also on bicycles.

Ram Manohar asked the deceased as to why he was going alone to Dehuli. The deceased replied that he had no previous intention of going to his village but was

doing so at the insistence of Raghurai. So all the three started together for Dehuli on bicycles. It was about 5 p.m. when they reached the culvert at the 10th mile where, leaving the grand trunk road, they were to diverge northwards for the last lap of one mile to Dehuli. Suddenly six men, including the appellants other than Raghurai, emerged from the south of the culvert and launched an attack on Ram Autar.

Sundar was armed with a pistol, Pachchu with a Kanta and the rest with lathis. Leaving his cycles Ram Autar tried to run away but Sundar shot him in the back and the others assaulted him with the weapons with which they were armed, so that he fell down on or by the side of the road at a distance of about 45 paces to the east of the culvert. Sundar shot him once more in the face. Ram Manohar P. W. 1 made towards Ram Autar to help him, but Raghurai appellant, who had accompanied the deceased and Ram Manohar from Fatehpur, caught the latter by the waist. Ram Autar died on the spot and all the assailants ran away towards Kamalipur on the south east. Raghurai also ran away with them leaving his bicycle. To this bicycle was tied a Kanta which belonged to the deceased.

6. Besides Ram Manohar P. W. 1 the incident was witnessed by others too. One such was Ram Sajiwan P. W. 2, who was returning on a bullock cart from the Bazar of Fatehpur to his village Thariaon. Another was Buddhu P. W. 5 of Dehuli, who was proceeding on a bicycle towards Hanswa to fetch medicine for his son for burns. Yet another was Mahadeo P. W. 6, who was returning to his village Bhairwan from Kondarpur. The deceased's 18-years old brother Bishun Dat P. W. 4 used to reside with the deceased at Fatehpur for his studies.

At Ram Manohar's request, Budhu went to Fatehpur instead of Hanswa to fetch medicine and informed Bishun Dat there of what had happened. Some Chaukidars arrived there and went after the assailants but without avail as they were out-distanced. Leaving the dead body in their custody, Ram Manohar went to P. S. Thariaon, 4 1/2 miles to the east of the scene of the incident, and lodged the first information report at 6-20 o'clock the same evening.

All the 6 assailants were named in it, Gajraj appellant being named as the grand-son-in-law of Vishwanath of Kamalipur. The incident was reported as having been

witnessed by the aforesaid witnesses and others, including an ekka driver named Charna. Charna was not produced as a witness. S. I. Ram Pratap Singh P. W. 27, who investigated the case, stated that Charna had colluded with the accused.

7. This officer, who was in charge of the police station and present when the report was lodged, reached the place of occurrence at 8 p.m. He found the dead body of Ram Autar on a cot at mile No. 10, prepared the inquest report and sent the corpse for post-mortem to Fatehpur, Bishun Dat, brother of the deceased, had arrived after the arrival of the Sub-Inspector but before the despatch of the dead body to Fatehpur.

He recovered the bicycle of Raghurai appellant near the culvert with a Kanta, recognised as that of the deceased, tied to it. These were never put up in any test identification. About five paces to the east he recovered the bicycle and two jholas, or canvass bags, of the deceased. An empty cartridge was recovered about 20 paces to the east of the culvert and 2 cartridge discs 5 paces further east. He also recovered blood-stained earth at the spot about 45 paces to the east of the culvert, where the deceased is said to have fallen and put an end to.

The reports of the Chemical Examiner and the Serologist were that the earth was smeared with human blood. The investigating officer also prepared a site plan. Constable Harish Bahadur Singh P. W. 10 arrested Raghurai at 10 a.m. on 5-2-1956 between Kamalipur and Hanswa, Others were alleged to be absconding and a report for proceedings under Sections 87 and 88 Cr. P. Code, was made. Sukhlal was arrested by S. I. Ram Pratap Singh on 9-2-1956 about a furlong to the north of Kondarpur. Sundar surrendered in court on 9-2-1956, Pachchuan 10-2-1956 and Gajraj on 20-2-1956.

8. Dr. S. C. Rastogi P. W. 23, Medical Officer of the District Hospital at Fatehpur, performed the post mortem on the dead body of Ram Autar at 3-45 p.m. on 5-2-1956. According to him the probable age of the deceased was 35 years and the probable time since death 24 hours. The latter opinion approximates to the time of occurrence given by the prosecution witnesses. He found in all 21 injuries of which two, one in the back and the other on the face, were gunshot wounds, four incised wounds (3 on the skull and one on the left index finger), 8 contusions on the left

arm, back and left thigh, 3 abrasions on the right arm, right leg and left thigh, and 4 circular abrasions on the right arm and the right leg. in the opinion of the doctor, death was caused by shock and haemorrhage resulting from these injuries, specially the gun-shot injury on the face.

9. Besides the above four eye-witnesses, the prosecution also produced Sheo Prasad Singh P. W. 3, an assistant teacher in the school at Fatehpur of which the deceased was Head Master, and the deceased's brother Bishun Dat P. W. 4 to prove that on the day of the occurrence the deceased had been taken from Fatehpur by Raghurai appellant to go with him to Dehuli. Two witnesses, Sheo Prasad P. W. 21 and Ram Saran Das P. W. 22, were produced to suggest a previous conspiracy between Gajraj Singh and all the accused except Sundar, first two days, and then about four hours, before the occurrence.

Four separate test identifications were conducted by a first class Magistrate, S. N. Sagar P. W. 11 in the district jail of Fatehpur on 6-3-1956. In three of them Sundar, Raghurai and Gajraj appellants, and in the fourth the acquitted accused Indrapal, were separately put up for identification. The results of those tests relating to the aforesaid three appellants will be considered when dealing with their cases respectively.

10. Raghurai appellant admitted existence of two parties, one led by the deceased and the other by Pachchu appellant; but he contended that he belonged to the deceased's party and denied having gone over to the rival party in the elections. He said that he was helping the deceased's party in the elections. He denied having taken Ram Autar to Dehuli from Fatehpur on the day of the occurrence. He also denied having had any act, or part in the occurrence itself.

He denied that one of the bicycles alleged to have been recovered on the spot was his. He stated that he was falsely implicated because he did not submit to the pressure that was brought to bear upon him by the two lawyers of Fatehpur, Messrs. Gauri Shankar Kackewar and Abdul Rauf M.L.A., to appear as an eye-witness in support of the prosecution. He said that he did not submit to the pressure because he had not witnessed the occurrence. In this connection he gave a long story for the first time in the Sessions Court. That story, in his own

words, was as follows :

'I was at Dehuli on the date of murder of Ram Autar. A little after nightfall I heard the cries of Ram Manohar, Budhu and Parmeshwar Din saying that the Pandit had been killed. We all came to the place of the occurrence at Mile No. 10 on the Grand Trunk Road. There were two Chaukidars there and Ram Autar was lying dead. Ram Sarup and Ram Bhajan were also there. Ram Bhajan asked me and Ram Manohar to go to the house of Gauri Babu Vakil and call Bishun Dutt.

We all got into a truck which was coming from Allahabad and we came to Bishun Dutt and we three then went to the house of Gauri Babu Vakil and told him that Ram Autar had been killed. Gauri Babu took out his car and we all three along with Gauri Babu went to the house of Sri Abdul Rauf. Gauri Babu talked with Sri Abdul Rauf and then all of us came to the place of occurrence along with Sri Abdul Rauf in Gauri Babu's car. On enquiry as to whether any report had been lodged, Parmeshwar Din stated that he had already sent Ram Bhajan to the police station.

Gauri Babu, Sri Abdul Rauf, myself, Ram Manohar and Bishun Dutt then came in Gauri Babu's car to the police station. Gauri Babu and Sri Abdul Rauf then talked with the Sub-Inspector who stated that he would not do anything unless his officer (Inspector) also agreed to it. They enquired as to where the Inspector was and then the Sub-Inspector told them that he had gone to Khaga. Sri Abdul Rauf and Gauri Babu then went to Khaga and I and Ram Manohar and Bisun Dutt came to the place of occurrence.

They asked me to become a prosecution witness along with Ram Manohar, Budhu and that all the six accused should be named as the assailants of Raja Autar. I did not agree to this because I had not seen the occurrence. Great pressure was brought on me but I refused to be cowed down. All these persons then began to talk between themselves, but I do not know what talk they had. Next morning I was taken to the police station from the place of occurrence and kept in the lock up. Thereafter I was brought to the house of Gauri Babu, who told me that I might still come to the prosecution side, but I said that I would look to it. The police brought me from there to the court and from the court I was sent to the jail. I was called from the jail to the court again on next Tuesday without Purdah for my statement in

court. I did not give any statement and I was sent back.'

This statement of Raghurai appellant is suggestive of two things : that neither he nor the prosecution witnesses Ram Manohar and Budhu were present at the time and place of occurrence, and that a false report implicating him and the other accused was concocted by the aforesaid two lawyers in collusion with the police. The defence witness Sheo Balak deposed to having accompanied Raghurai appellant and Ram Manohar and Budhu witnesses to the place of occurrence and found the dead body of Ram Autar and only one bicycle lying there.

The defence witness Ramzani of Fatehpur was produced to prove strained relations between Abdul Rauf and Gajraj Singh, co-conspirator with the accused, on communal grounds. The other appellants Stated that they had been falsely implicated due to enmity. In particular, they attributed their false implication to the aforesaid lawyers of Fatehpur. Sundar also pleaded alibi and produced a witness to support the plea.

11. The learned Sessions Judge acquired Indrapal and Manni Lal giving them the benefit of doubt because Ram Manohar and Budhu were the only witnesses who had named them, but these witnesses had reason to be inimical to them. As regards the remaining accused, viz, the present five appellants, he discarded the alibi of Sundar and the story set up by Raghurai, including the suggestion that the report had been concocted by the said lawyers in collusion with the police. He did not find the circumstantial evidence of Sheo Prasad P. W. 21 and Ram Saran P. W. 22 convincing, but he believed the testimony of the aforesaid four eye-witnesses produced by the prosecution, corroborated as, in his opinion, it was by the first information report and the medical evidence and the motive suggested by the prosecution.

He found that the five appellants formed an unlawful assembly with the common object of attacking Ram Autar and murdering him. He was of the opinion that that was also their common intention within the purview of Section 34, I, P. C. He accordingly convicted and sentenced them as aforesaid.

12. In this Court the time and place of occurrence as given out by the prosecution were not questioned. Nor was it contended that, provided there was reliable evidence in support of the prosecution, the appellants had no motive to commit the offence. There was also no attempt at a resuscitation of the evidence of alibi produced by Sundar appellant, which in our view was rightly rejected by the learned Sessions Judge. But stress was again laid on the version given by Raghurai. There were other arguments advanced, too, impugning the prosecution case generally and the prosecution witnesses in particular. Support of Raghurai's version falls in the former category and, many-sided as it is, we might do worse than take it first.

13. Now, on a perusal of evidence of the defence witness Sheobalak, who was produced in support of Raghurai's version, we are in entire agreement with the learned Sessions Judge that he was not a reliable witness. All that has appeared relating to the aforesaid two lawyers of Fatehpur is that they and the deceased and the Circle Inspector of Police lived in the same quarter of Fatehpur, that one of these lawyers, Mr. Gauri Shankar Kackkar, had appeared in some cases for the deceased, and that the other Mr. Abdul Rauf, had a communal bias against the man Gajraj Singh who is said to have been in league with the accused against the deceased.

Thus the element of interest in the deceased was supplied by one lawyer and that of animus against the accused (through Gajraj Singh) by the other. One important link in this chain forged by the defence is, however, missing; there is no suggestion, much less evidence, as to why the two lawyers should have combined to bring about that cohesion of the aforesaid two elements without which the story set up by Raghurai could not move an inch. Another link, as seen already, has snapped, namely, that of the accused's conspiracy with Gajraj Singh.

The learned Sessions Judge has described the lawyers, one of whom was also a member of the State legislature, as respectable and responsible persons. We are in full accord with him, again, that there was no reason why these two lawyers should have behaved in the manner indicated by Raghurai.

14. The allegations against the police also appear to be equally unfounded. The complicity of the lawyers having been found to be baseless, the party, to begin with, with whom the police are said to have colluded was non-existent. The investigating officer Rarn Pratap Singh P. W. 27 has categorically repudiated the suggestion. Considerable stress was laid on the circumstance that the inquest report took a long time-from about 8 p.m. to 1 a.m. to prepare. It was sought to be inferred therefrom that the first information report was concocted upto, say, about 11 p.m. and then the inquest proceedings started.

The investigating officer has said that he reached the place of occurrence at 8 p.m., which was natural taking into view the time of the lodging of the report and distance of the police station. He says that he had to wait for the preparation of the inquest report because he had to send for respectable inhabitants of the neighbouring villages. The inquest report shows that there were 5 men who signed it of whom 3 were of Dehuli, 1 of Usrehna and 1 of Kondarpur. Collection of these men must have taken considerable time. One of them, Ram Narain P. W. 26 of Kondarpur, has been produced, and he says that he was sent for through a police constable and reached the place of occurrence at 8-30 p.m.

There is no wonder then that the proceedings were not concluded until about 1 o'clock in the night. Actual proceedings could not have started at 8 p.m. immediately the investigating officer reached the place of occurrence. He was not asked to explain why he noted 8 p.m. as the starting time, but it appears presumably to have been due to his having taken the proceedings to have started the moment he took the step of sending somebody to fetch the inhabitants of the neighbouring villages. Otherwise, the lodging of the report and the subsequent steps in investigation were all duly recorded in the diary, and there is no reason to suspect any manipulation there.

The clerk constable Tirjugi Narain P. W. 7, who registered the report, stated in cross-examination that this report was the only report of a cognisable offence taken down between the 1st and 8th of February. It was therefore argued that the police had the opportunity of noting down any time of its registration they liked. But the question is whether the police did misuse the opportunity. Of that the evidence

on record is next to none. There is no presumption that if the police has the requisite opportunity, they will abuse or misuse it. The presumption, on the contrary, should, as in the case of any witness, be the very opposite of it. We are of the view that Raghurai's version is unfounded and fantastic.

15. Another argument of a general nature put forward was that the eye-witnesses produced by the prosecution were chance witnesses and that natural witnesses were not produced. Now, a chance witness is a witness who should not normally be where and when he professes to have been. From that point of view, one may be a chance witness even at one's own house if, for instance, one should at that hour have been in one's office, and even a nomad in the desolation of (sic) may not be a chance witness if his being there and then was on his itinerary.

Considering that the incident took place on the grand trunk road, only passers-by could have been natural witnesses of the same. As noticed already, all the four eye-witnesses profess to have been passers-by at the time. The time for that was also not unusual since it was only about 5 o'clock in the evening. Whether the witnesses were speaking the truth when they said that they were passing by at the time is another matter. But, subject to that it could not certainly be said that they were mere chance witnesses.

16. The so-called natural witnesses, whose non-production was adversely commented upon, were the Chaukidars and Charna ekka-driver. It was also urged in this connection that if the prosecution failed to produce them it was for the Sessions Judge to have examined them under Section 540, Criminal Procedure Code. Now, the discretion of the court in making use of the power under this section, though wide, is to be exercised judicially, and the measure for doing so is that the evidence of the witness in question should appear to be essential to the just decision of the case.

That could not however be said of either the Chaukidars or of the ekka-driver. The Chaukidars had no doubt admittedly arrived, but it does not appear from the testimony of any witness, nor was it suggested even in the cross-examination of any of them, that the Chaukidars had arrived in time to have witnessed the occurrence, or at least to have recognised the assailants. True, it is admitted in

Gross-examination by Ram Manohar P. W. 1 and Mahadeo P. W. 6 that the Chaukidars chased the assailants, but the former has also said that 'the Chaukidars tried to chase them from a distance' and the latter that 'the accused had already left but even then they (meaning the Chaukidars) chased them for some distance.'

It would appear therefore that the Chaukidars arrived too late to have seen the assailants, and that they chased the assailants only in the sense of having gone after them and not of having pursued them. As regards Charna the ekka-driver, the investigating officer explained that Charna had colluded with the accused. This explanation was not impugned by a word of cross-examination. If then the Chaukidars had seen nothing to which they could usefully depose, and if Charna had colluded with the accused, neither the prosecution need have produced them nor the court examined them under Section 540 of the Code. Adverse comment on the non-production of these witnesses was therefore unjustified.

17. Coming now to the four eye-witnesses, Ram Manohar P. W. 1, Ram Sajiwan P. W. 2, Buddhu P. W. 5 and Mahadeo P. W. 6, there is no doubt that the two witnesses belonging to Dehuli, viz. Ram Manohar and Buddhu, were partisan witnesses at least qua Pachchu and Sukhlal appellants since they were ranged against these appellants in the various litigations mentioned above. And since all the appellants (save Raghurai, whose case, as will be noticed presently, stands on a different footing) admittedly belong to the same party, these two witnesses may be taken to be partisan witnesses as against those appellants also.

But the testimony of the remaining two witnesses, Ram Sajiwan and Mahandeo, is not 'open to criticism on the ground of partisanship. The learned Sessions Judge has given adequate reasons for that view, and those reasons were not challenged before us. Mahadeo's testimony was called in question on another ground. The witness was at the time coming from Kondarpur by a kuchcha road which joins the grand trunk road. He professed to have seen the incident from the kuchcha road. This kuchcha road was not shown in the site plan prepared by the investigating officer and therefore the learned. Sessions Judge made a local inspection at the instance of the accused with due formality under Section 539B of the Code of

Criminal Procedure.

He recorded a memorandum of the facts observed by him and also prepared a site plan. It appears that there were two kuchcha roads from Kondarpur side joining the grand trunk road, one at a distance of 980 feet (about a furlong and a half) and the other at a distance of only 560 feet from the culvert. The learned Sessions Judge came to the 'conclusion that the witness was coming by the latter route, that the point of junction of this route with the grand trunk road was only about 440 feet from where Ram Autar fell down dead under the combined lathi, Kanta and pistol attack, that the witness was also not stationary but must have drawn nearer still to the scene of the occurrence as compared to the point of time when he first saw the assailants giving blows, and that therefore he was in a position to notice who the assailants were. We see no reason to differ from this view of the learned Sessions Judge which he formed after making an inspection of the locus in quo.

18. Thus, while no doubt two of the eye-witnesses, Ram Manohar and Buddhu, may well be said to be partisan witnesses, that charge could not be levelled against the other two, Ram Sajiwan and Mahadeo. All of them were also in a position to have seen the assault and notice the assailants. Ram Manohar's presence finds corroboration from the prompt lodging of the report by him, and his statement in court stands corroborated by the contents of that report. The eye-witness account stands further supported by the medical evidence and, so far as the appellants other than Raghurai are concerned, by the evidence of motive.

And Ram Sajiwan and Mahadeo being undoubtedly witnesses of truth, Ram Manohar and Buddhu should also be deemed to have been actuated by veracity and not partisanship in supporting what Ram Sajiwan and Mahadeo have testified. In these circumstances, participation of that appellant should be taken as having been established against whom there is testimony of not only Ram Manohar and Buddha but also that of Ram Sajiwan and Mahadeo or at least one of them.

19. Before examining the Individual cases of the appellants from this view point there were two points taken by the learned counsel for Sundar and Gajraj appellants relating to the test identifications which may shortly be disposed of. Some of the accused were not known by some of the witnesses. Test

identifications were conducted in respect of the same. It was urged that the number of witnesses who failed to identify an accused should be set off against those who did identify him.

So that if an accused was identified by two, but not by two others, he should be deemed to have been identified by none, There seems however to be no justification for this view, and this for the simple reason that a witness should be judged on the strength of what he himself has seen and not on the inability of somebody else to see it. The next point taken was the following. It appears that four identification parades were held by the Magistrate on one and the same date in the district jail of Fatehpur in which each of Sundar, Raghurai and Gajraj appellants and the acquitted accused Indrapal was put up for identification separately.

Thus, only one accused was put up for identification in each parade. The learned counsel submitted that the evidentiary value of a witness against all the accused should be judged in the light of the cumulative result of all the four parades and not of the particular parade in which he may have identified a particular accused. This submission is well-founded and should be given effect to because all the four tests were held on one and the same date.

20. Now, Sundar appellant was named by Ram Manohar and Buddha. The appellant was also identified correctly in the test identification as well as in court by Ram Sajiwan. Ram Sajiwan correctly identified Sundar. Inderpal and Mannilal had committed only one mistake, he is therefore a good witness of identification. Pachchu appellant has been named by all the four witnesses and Sukhlal by all of them but Mahadeo. The conviction of these three appellants appears therefore to be well-founded. Gajraj appellant has however been named by only Ram Manohar and identified by only Buddha. He has neither been named nor identified by any of the independent witnesses Ram Sajiwan or Mahadeo.

On the principle of judging oral evidence enunciated above therefore it is not possible to maintain the conviction of Gajraj. It is noteworthy that this appellant was not named in the first information report but was described as grand-son-in-law of Vish(sic) There was considerable controversy in the (Sic) below and also in

this court as to whether the apperiant was the man meant. It is not necessary to enter into that controversy. Suffice it to say that as Gajraj has been named and identified by only partisa'n witnesses, but not by either of the two independent witnesses, it would not be safe to base his conviction on the testimony of the former. A reasonable doubt therefore arises in his case and, g'v-ing him the benefit of that doubt, he should be acquitted.

21. There remains only the case of Raghurai appellant. He has been named by Ram Manohar, Buddhu and Ram Sajiwan and also identified by Mahadeo. Apparently, therefore, the evidence against him is over-whelming, as remarked by the learned Sessions Judge. But does that evidence bring the guilt home to him? The only incriminating circumstances against him were that he took the deceased from Fatenpur, and that he caught hold ot Ram Manohar when the latter proceeded to help Ram Antar at the time of the assault.

The former circumstance is however not necessarily consistent with his guilt since it may be that the reason for which he was taking Ram Autar to Dehuli on the day of the occurrence was a genuine-one and not that he wanted to act as a decoy. None of the witnesses produced by the prosecution is clear as to what was the reason given out by the deceased or the appellant tor which the appellant was taking the deceased to Dehuli. It is noteworthy that admittedly this appellant was a partisan of the deceased.

The appellant is said to have gone over to the rival party in the elections of 1955, but evidence oa that point is of an indefinite character.' The conduct of the deceased himself on the day of the occurrence vis-a-vis this appellant negatives the allegar tion since not only did the deceased readily agree to go with the appellant alone to Dehuli, but he even tied his Kanta to the appellant's bicycle and did not carry it himself. The deceased would not have evidenced such utter, such vital, confidence in the appellant had not the appellant continued to be not only a member but a trusted member of the deceased's own party.

His conduct at the time of the assault was capable of having been misunderstood since he may have caught hold of Ram Manohar, not because the appellant wanted to prevent him from saving Ram Autar, but because he was anxious that

Ram Manohar may not put himself in the same jeopardy in which Ram Autar was. It is noteworthy that the appellant is not alleged to have participated in the assault, which he could well have done seeing that the deceased's Kanta was at his disposal. The only remaining circumstance against the appellant deposed to by the witnesses was that after the assault he ran away along with the assailants.

No details of this alleged running along with the assailants are given. Was he in the midst of them? Or was he behind them all, and, if so, was he not sufficiently behind to exclude the possibility of his having formed the same party with the assailants? It would be very unsafe therefore to hold him guilty on a circumstance of such an inconclusive character particularly in view of the other circumstances of an exculpatory nature noticed already. The one circumstance which would appear to be more incriminating than any other was that he set up a defence which has been found to be untrue.

For one thing, falsity of defence, while it may lend assurance to other evidence of a convincing character against an accused, cannot by itself form the basis of conviction. For another, even an innocent person may set up a false defence in his anxiety to save himself. We are therefore of the view that the evidence against Raghurai appellant, which is evidence of only a circumstantial nature, does not fulfil the rule of circumstantial evidence. The case against him cannot in consequence be held to have been established beyond reasonable doubt, and he should therefore be acquitted.

22. Thus, conviction of only the three appellants Sundar, Pachchu and Sukhlal is to be maintained. Sundar was reasonable for firing the final shot into the face of Ram Autar which gave Ram Autar his quietus. He is therefore clearly guilty of the offence for which he has been convicted. In view of the acquittals, conviction of the other two for that offence with the help of Section 149, I. P. C., is not possible. That does not however present any difficulty since they were charged and have been convicted, in the alternative with the help of Section 34, I. P. C., as well. Seeing that the assailants lay in wait together from before; that the assault on the deceased was a concerted one and that after the assault all of them fled away together, there is no doubt that Section 34, I. P. C., was rightly applied. Pachchu

and Sukhlal are therefore, guilty of the offence punishable under Section 302, read with Section 34, I. P. C.

23. A word about the death sentences imposed on Sundar and Pachchu. There is no extenuating circumstance in the case of Sundar appellant, and he was the man who fired the fatal shot. His sentence of death should therefore stand. Pachchu, sharing with others the common intention to kill Ram Autar, had armed himself with a dangerous weapon like Kanta. No one else was armed with a weapon capable of inflicting incised wounds. Medical evidence shows that Pachchu dealt four Kanta blows out of which 3 were dealt on a vital part like the skull. In the circumstances, the mere fact that he is 70 or 75 years of age (though 65 according to the Sessions Judge) should not be taken to be a circumstance warranting commutation of his sentence. He was old enough to have known better, and he has lived long enough to lay the soothing function to his soul that his life is not being nipped in the bud. His sentence should also therefore stand.

24. The appeal is allowed so far as Raghurai and Gajraj appellants are concerned, their convictions and sentences are set aside and they are acquitted. They shall be set at liberty forthwith unless required in any other connection. So far as the remaining appellants Sundar, Pachchu and Sukhlal are concerned, the appeal is dismissed and their convictions and sentences are maintained. The reference for confirmation of the sentences of death passed on Sundar and Pachchu is accepted. The various sentences passed on Sukhlal will run concurrently.

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