

Mohd. Islam Vs. State of U.P.

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Court : Allahabad

Decided On : Oct-01-1992

Reported in : 1993CriLJ1736

Judge : G.P. Mathur and ;A.S. Tripathi, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; Arms Act - Sections 25 and 27; [Evidence Act, 1872](#) - Sections 6; Code of Criminal Procedure (CrPC) , 1974 - Sections 161, 218, 313 and 464

Appeal No. : Capital Appeal No. 2126 of 1990 and Referred No. 4 of 1990

Appellant : Mohd. Islam

Respondent : State of U.P.

Advocate for Def. : Govt. Adv. and ;S.P. Shukla, Adv.

Advocate for Pet/Ap. : Kamal Krishna, Adv.

Judgement :

G.P. Mathur, J.

1. Mohd. Islam alias Aslam has filed the present appeal from Jail against the judgment and order dated 19-9-1990 of VIII Addl. Sessions Judge, Varanasi in Sessions Trial No. 182 of 1989 and Sessions Trial No. 267 of 1989 whereby he

has been convicted under Section 302, IPC and has been sentenced to death in the former sessions trial and under Section 25/27 of the Arms Act for which he has been sentenced to 1 year's R.I. in the latter sessions trial. The Addl. Sessions Judge has also made the reference to this Court for confirmation of sentence of death awarded to the appellant.

2. The case of the prosecution is as under:

The complainant Mohd. Ahmad resided in mohallah Sheshmani Bazar in the city of Varanasi and was engaged in the business of weaving Sarees. Tahira Bibi is his daughter while the deceased Smt. Jamila bibi was the wife of his brother Hazi Abdul Rasheed. Suhail Ahmad, deceased was son of Smt. Jamila, aforesaid, Mohd. Juber is another brother of the complainant and was residing in the same house. Appellant Mohd. Islam alias Aslam is resident of village Bidhana police station Sabor district Bhagalpur, Bihar, and he was working as servant at the complainant's place for about two years prior to the occurrence. He used to reside in the complainant's house and used to take his food there. About 1 1/2-2 months prior to the occurrence Tahira Bibi was kidnapped by the appellant and was taken to his village in Bhagalpur. Two days thereafter complainant went to the village of the appellant Mohd. Islam where it was learnt that he along with Tahira Bibi had gone to Bhagalpur Court. The complainant then went to Bhagalpur Court where he found Tahira Bibi sitting on a 'Takht' along with another girl. Seeing her father Tahira Bibi immediately embraced him and started weeping. Mohd. Islam who was at some distance slipped away after seeing the complainant. Thereafter the complainant brought Tahira Bibi to Varanasi on a jeep. At about 5.30 p.m. on 2-2-1989 the complainant was in the verandah of the second floor of the house, while Tahira Bibi, Jamila Bibi and Suhail Ahmad were on the first floor. Tahira Bibi and Jamila were preparing food and Suhail Ahmad was sitting near by. The appellant Mohd. Islam, carrying a country made pistol in his right hand, came on the first floor of the house shouting that he would take Tahira Bibi with him on that day and no body can stop him. He rushed towards Tahira Bibi who ran towards a kothari (room) which is towards southern side. Mohd. Islam also tried to enter the kothari when he was asked not to do so by Jamila Bibi and Suhail Ahmad. Jamila Bibi caught hold of the left hand of Mohd. Islam. Mohd. Islam freed his left hand from

the grip of Jamila Bibi and fired upon her head from the pistol. Tahira Bibi ran downstairs raising an alarm. Meanwhile Suhail Ahmad bent towards his mother. The appellant then fired second time from his pistol which hit Suhail Ahmad on his temple and he fell down. The complainant who was seeing the occurrence from the second floor was raising alarm and Tahira Bibi was also raising alarm after getting down. The appellant then entered the kothari and fired from his pistol twice. The complainant got down from the second floor to the first floor, meant while Mohd. Islam also came out of the kothari and held out a threat what he should get away otherwise he too would be killed. Meanwhile many people of the mohallah and some police men also arrived at the first floor. The police personnel took out their fire arms and challenged the appellant who was thereafter caught along with the pistol. Jamila Bibi and Suhail Ahmad died and their bodies were lying inside the kothari. The complainant then dictated a first information report of the incident to Maqbool Hasan and lodged the same at 6.30 p.m. on 2-2-89 at police station Jaitpura on the basis of which a case was registered as crime No. 23 of 1989 under Section 302, IPC. A second first information report was lodged by Ram Kripal Singh, Sub-Inspector, at 6.50 p.m. on the same day under Sections 25 and 27 of the Arms Act, on the basis of which a case was registered as crime No. 24 of 1989 at the same police station which is at a distance of 2 kilo meters from the place of occurrence. After the F.I.R. had been lodged Hari Raj Singh, in charge Second Officer, police station Jaitpura commenced investigation. Inquest was held on the bodies of Jamila Bibi and Suhail Ahmad. Three empties of fired cartridges and two bullets were recovered from the spot and their seizure memo was prepared. Seizure memo of the pistol recovered from the possession of the appellant Mohd. Islam was also prepared. Subsequently on 27-2-1989 investigation was taken-over by Sharada Bux Singh, Station Officer of police station Jaitpura and after completing the same he submitted charge-sheet against the appellant.

3. The Judicial Magistrate III, Varanasi also committed the case under Section 25/27 Arms Act to the Court of sessions on 1-8-1989 and the same was also tried along with the case under Section 302, IPC. The prosecution in support of its case examined Eleven witnesses and filed some documentary evidence. The accused in statement under Section 313, Cr.P.C. denied the prosecution case and stated

that he was employed at Mohd. Islam place and used to reside and eat there. During this period he had love affair with Tahira bibi. She used to often go to market with him. Tahira Bibi went to Bhagalpur where both of them got married and started living as husband and wife. The family members of Tahira Bibi became angry on account of their marriage. The complainant Mohd. Ahmad and Mohd. Juber and their companions came to the appellant's house one week after his marriage and forcibly took away Tahira Bibi with them. They also took away an attache in which documents of marriage and clothes etc. had been kept. On the date of incident he came to Tahira Bibi's house to enquire about her welfare but Mohd. Juber started giving him filthy abuses and assaulted with stone pestle on his head and pushed him inside the kothari. Injury was also caused to his right leg. Tahira Bibi after seeing the assault made upon him ran down-wards raising an alarm. Jamila and Suhail Ahmad were trying to save him. Mohd. Juber who was in a fit of rage took out a pistol, fired upon him but the shots hit Jamila and Suhail Ahmad. Mohd. Juber then ran away leaving the pistol. Meanwhile hearing the alarm, people of the locality arrived at the scene who saved his life. Subsequently police personnel took him to the police station. His injuries were examined in jail hospital. He further pleaded that the complainant by wielding influence and spending money had got him falsely implicated. The accused examined Dr. S. C. Misra, M.O., Jail Hospital in his defence. The learned Sessions Judge believed the prosecution case and convicted and sentenced the appellant as mentioned earlier.

4. The prosecution has examined two persons as main eye-witnesses of the incident namely, P. W. Tahira Bibi, and P. W. 2 Mohd. Ahmad, P.W. 2 Mohd. Ahmad has narrated about the prosecution case in his examination-in-chief. He has further deposed that at the time of the incident Tahira Bibi was aged about 14-14 1/2 years. In his cross-examination he has stated that he was carrying on the business of manufacturing Sarees in his own house. Mohd. Islam accused used to reside in his house and used to do all such work which he was asked to do. Tahira Bibi sometimes went to market along with him for purchasing medicines etc. He was living in the house in a cordial atmosphere and no one had any complaint against him in the period of two years during which he worked at his place. Tahira Bibi had not attended any school but had got her education in the house itself. He was not present in his house when Mohd. Islam took Tahira Bibi to his village and

he returned at about 10 p.m. On the next morning he learnt that Mohd. Islam had taken Tahira along with her. One day thereafter he went to the house of the appellant in search of Tahira. He admitted that he had given a correct statement under Section 161, Cr.P.C. that he had brought Tahira Bibi from the appellant's village 3/4 days after she had left her house. He admitted that Mohd. Islam had kidnapped Tahira Bibi with the object of marrying her but he did not lodge any report about this incident. He denied that Tahira Bibi had contracted marriage with Mohd. Islam. He also denied that when Tahira Bibi was brought from Bhagalpur to Varanasi she had an attache in which documents of marriage had been kept. Regarding the incident he stated that Mohd. Islam was standing at a distance of 1-1 1/2 feet from the place where Jamila and Suhail Ahmad had fallen down. At the time of the incident lights had not been switched, on. He further stated that within 3/4 seconds of reaching the house, the appellant rushed forward to catch hold of Tahira Bibi and by that time he had not come downstairs from the second floor. The moment Tahira Bibi came out of the room, Mohd. Islam fired upon Jamila Bibi and the second shot was fired after 5-7 seconds. The appellant was caught within 5-7 minutes of reaching the house. He further stated that he returned to his house after lodging the F.I.R. by 6.45-7.00 P.M. He was not present at the time when inquest was held on the bodies of the two deceased. He denied the defence suggestion that he had not seen any occurrence or that he had gone out in connection with his business on the date of incident.

5. P. W. 1 Tahira Bibi has given her age as 16 years on 8-12-1989 when her statement was recorded. She has stated that Mohd. Islam had taken her to his village in Bhagalpur by deceit. He had said that he was taking her for showing her a picture, in the cinema-hall. The accused used to allure her by saying that he would take her to Sarnath and to movies. About two months before the occurrence, the accused took her to Moghalsarai (railway-station) at about 8-9.30 p.m. on a tempo. After reaching Moghalsarai she enquired from the accused as to why he had brought her there. The accused took her to a corner and showed a pistol and threatened her that in case she did not accompany him, she would be shot. On account of the threat given to her by the accused, she did not raise any alarm and accompanied him to Bhagalpur by train. He took her to the house of his maternal uncle and there also he gave her a threat. Two days thereafter the

accused took her to Court and obtained her signatures on some papers by giving threat to her life. While she was sitting on 'Takht' in the Court compound her father and some other persons arrived there with whom she came to Varanasi on a jeep. Regarding the main occurrence she stated that about 5-5.30 p.m. Mohd. Islam carrying a pistol in his right hand arrived on the second floor of the house. The accused gave out threat that he would forcibly take her and nobody can stop him. Mohd. Islam rushed towards her and so she ran towards the kothari. The accused followed her but meanwhile Jamila Bibi and Suhail Ahmad intervened and tried to stop him. She got an opportunity to come out of the room, but meanwhile he fired upon Jamila Bibi. She ran towards the stairs for going downwards raising an alarm when she heard sound of second fire which hit Suhail Ahmad. The incident was witnessed by Mohd. Ahmad. Some people of the locality and police personnel and Mohd. Juber rushed towards the first floor of the house hearing the alarm. Subsequently she also went inside her house and found Jamila and Suhail Ahmad lying dead. The accused was arrested by the police personnel and was taken to the police station. Mohd. Islam had entered inside the kothari. In her cross-examination she stated that she studied in a 'Madarsa' and knew elementary Hindi and Urdu. Her father had two powerlooms in the house. She used to occasionally talk to Mohd. Islam but she never went out in his company except when she went for buying medicines. She never disclosed to her family members that Mohd. Islam had asked her to go to movies or Sarnath. She had not gone to movies in the company of the accused prior to the day when she went out with him. The accused prior to the day when she went out with him. The accused had asked her to accompany him to a movie a day previous to the day he went with her to Bhagalpur but she had declined to go. The accused had told her that he would return within 11/2-2 hours. She did not tell about this incident to any one of her family members. She did not complain to any passenger in the train when the accused took her to Bhagalpur, she denied that she stayed with the accused in his house for four days but reiterated that she stayed only for two days. She further denied the defence suggestion that she had married Mohd. Islam for which one Asharfi and Rs. 2000/- were settled as Dower or that she had voluntarily signed her document of marriage or that her father had forcibly brought her to Varanasi. She further stated that she had not seen any injury on the body of accused.

6. P.W. 3 Mohd. Juber has stated that he heard the alarm at about 5.30 p.m. when he was in the gali. He also heard the sound of gun fire. As soon as he reached near the door of his house, Tahira Bibi arrived there and said that Mohd. Islam had fired upon her aunt. He climbed the stairs and when he reached the first floor he saw Mohd. Islam pointing his pistol and saying that every one should get away otherwise he would shoot them. Meanwhile police personnel also arrived who took out their fire arms. Thereafter Mohd. Islam was caught after causing some injuries and a country made pistol was recovered from his right hand. Fired empty cartridges and bullets were recovered from the spot. In his cross-examination he has stated that he was coming after offering 'Namaz' when he heard the alarm. He reached the first floor within 25-30 seconds and within 1-1 1/2 minutes the police personnel arrived at the scene. He denied the defence suggestion that police personnel arrived after considerable delay or a false case was concocted against the accused in collusion with police.

P.W. 4 Aminuddin has stated that his house is close to the house of P.W. 2 Mohd. Ahmad. He was moving in a procession after offering 'Namaz' and when he was coming in the company of P.W. 3 Juber Ahmad, and others and was at a distance of 75 steps from the house of P.W. 2, he heard an alarm. He also heard sound of two gun fires. When he reached near the outer gate of the house of P.W. 2 Tahira Bibi came out who informed that Mohd. Islam had fired upon Jamila Bibi. He then entered the house of P.W. 2 when he heard sound of two more gun fires. When he reached the first floor of the house, he saw Mohd. Islam standing with a pistol in his hand and shouting that he should be allowed to leave otherwise he would kill every one. Meanwhile two Sub-Inspectors and three constables arrived on the spot and after pointing their weapons asked the accused to surrender. The accused was then caught after causing injuries and pistol was recovered from his hand. Three empties of fired cartridges and two bullets were recovered from the spot in his presence. In his cross-examination he has stated that the mosque where he had gone to offer Thursday-Namaz is at a distance of 150 paces from the house of Mohd. Ahmad. After offering 'Ashra-Namaz' on Thursday evening, people come out in procession and meet each other. He denied the defence suggestion that when he reached the spot the accused was lying in injured condition. He also denied that he saw any blood oozing out from the head of the accused.

7. P.W. 6 Ram Kripal Singh has stated that he was posted as Sub-Inspector at Police Station Jaitpura and he left the police station at 16.35 hours. At about 5.30 p.m. he along with other police personnel was going towards Sheshmani Bazar when he heard an alarm and sound of gun fire. He immediately ran towards that direction and when he reached near the house of Mohd. Ahmad he saw that a croud had collected there. He also went upstairs and saw a person pointing his pistol and giving threat that he had killed two persons and would kill others as well. This person was sometimes going in the room and was sometimes coming in the verandah. The police personnel challenged him after pointing their fire arms towards him. After using ordinary force, he was arrested and a pistol was recovered from his possession which contained a fired cartridge in its barrel. Two fired empties and two bullets were also recovered from near the place where the bodies were lying. The man arrested was the appellant Mohd. Islam. After arresting the accused, the Sub-Inspectors took him to the police station where he lodged the F.I.R. under Section 25/27 Arms Act on the basis of which a case was registered at crime No. 24/1989. After lodging the F.I.R. he returned to the spot. He held inquest on the body of Jamila Bibi and also prepared other necessary papers, whereafter the bodies were sent for post mortem examination. In his cross-examination, he denied the defence suggestion that when he reached the spot he saw Mohd. Islam lying in injured condition in the room or that blood was oozing out of his head, or that there was no pistol in his hand. He further stated that he reached the police station at 6.50 P.M. along with the accused and at that time Mohd. Ahmad was already present there. P. W. 9 Subhash Chandra Tripathi has stated that he had also accompanied P.W. 6 Ram Kripal Singh. He has given identical statement as given by P.W. 6 and has deposed about the arrest of the accused and recovery of pistol from his possession. He held inquest on the body of Suhail Ahmad. In his cross-examination he has stated that he did not see any injury on the body of the deceased and denied the defence suggestion that when he reached the spot, he saw the accused lying in the room in an injured condition or that no pistol was recovered from his possession.

8. P.W. 5 Raghunath has stated that he was Head Moharrir at Police Station Jaitpura on 2-2-1989. Mohd. Ahmad gave a written report of the incident at 6.30 p.m. which is Ex. ka 1 on the record and on the basis thereof he registered a case

as crime No. 23 of 1989 under Section 302, IPC. At 6.50 p.m. Ram Kripal Singh, S.I. lodged another F.I.R. under Sections 25/27, Arms Act which is Ex. ka 5.

9. P.W. 7 Madan Gopal Yadav constable has stated that he took the dead bodies from the spot to the mortuary for post mortem examination and the same were produced before the doctor in the night itself.

10. P.W. 8 Dr. S.P. Shukla of S.S.P.C. Hospital, Varanasi has stated that he conducted postmortem examination on the body of Jamila Bibi at 1.05 a.m. on 3-2-1989 and found the following injuries on her person.

(1) Wound of Entry Fire arm wound 6 cm. x 2 cm. x Brain Cavity Deep, inverted margins in left side Fore Head 2 cm above the left eye brow, Brain matter coming out from wound. Fr. of frontal bone left anterior cronic fossa left present.

Internal examination showed that frontal bone and left anterior cronic fossa had fractured and left frontal lobe of brain had ruptured. One bullet was recovered from brain. The post mortem examination report is Ex. ka 3 on the record. He also performed post mortem examination on the body of Suhail Ahmad as 12.05 a.m. (afternoon) on 3-2-89 and found following antemortem injuries on his body.

(1) Fire arm wound of entry lacerated wound with inverted margins, 5 cm. x 2 cm. x Brain Cavity deep present in Rt. side occipital region 2.5 cm. above the Mastoid region. Back of Rt. Bar, & 4 cm. lateral Rt. from a occipital toberosity, Brain matter coming out from the wound.

11. Internal examination showed that occipital bone had fractured and brain had lacerated. One bullet was found in the right side of brain.

12. P.W. 11 Hari Raj Singh has stated that he was Second Officer Incharge of police station Jaitpura. He recorded the statement of Mohd. Ahmad after F.I.R. had been lodged by him and meanwhile Sub-Inspectors R.K. Singh, S.C. Tripathi and A.P. Singh came to the police station with the accused Mohd. Islam. They also deposited a country made pistol, two bullets and three empties of fired cartridges which had been sealed. Thereafter he proceeded to the spot along with the Sub-Inspectors. A big crowd had collected there and he tried to control them.

The bodies were sent for post mortem examination after holding inquest. He recorded statement of Tahira Bibi, Mohd. Juber, Amin Uddin and others on 3-2-1989 and also seized blood stained clothes, plain and blood stained earth from the spot. He also investigated the case under Sections 25/ 27, Arms Act and recorded statements of witnesses. He sent the pistol, bullets and empties of cartridges to Ballistic Expert and proved his report which is Ex. 27 on the record. He further stated that he had sent blood stained clothes, plain and blood stained earth to Chemical Examiner but its report had not been received. He has proved extract of 161 statements of some of the witnesses. P. W. 10 Sharda Bux Singh has stated that he took investigation in his hand on 27-2-1989 and after completing the same he submitted charge-sheets against the appellant. In his cross-examination he has stated that he was on leave on the date of incident and therefore, took the investigation in his hand after he had returned for duty.

13. The appellant examined one witness namely D.W. 1 Dr. S.C. Misra, Medical Officer, District Jail Varanasi, who stated that he examined Mohd. Islam at 12.05 p.m. on 4-2-1989 and found the following injuries on his person.

(1) Lacerated wound on top and skull size 3' x 2/8' wound in healing stage (semi healed) (old).

(2) Lacerated wound on front of Rt. leg, Entry 3' x 2' bluish in colour. There are also lacerated wound 1 1/2' x 2/8'. Skin deep. Movement was painful and was in limited area. Advised X-ray.

The injury report is Ex. ka 1 on the record. After noting the injuries the doctor has made following remark in the injury report.

Opinion--

(1) Type of injury after x-ray

(2) caused by blunt weapon

(3) duration about 3 days old (except wound No. 1...).

14. The witness further stated in his statement that he had put plaster over the leg of the appellant. Besides the above noted oral evidence, the appellant filed two papers which are affidavits of Tahira Bibi and Islam, appellant, sworn before Notary Public, Bhagalpur on 27-12-1988. In this affidavit Tahira Bibi has stated that she was about 18 years of age and had married Mohd. Islam of her own free will and she was living in his residence as his wife, Mohd. Islam has stated in his affidavit that he had married Tahira Bibi daughter of Mohd. Ahmad Ansari of Sheshmani Bazar, Banares and she was living with him as his wife. These papers have not been exhibited by the learned Sessions Judge.

15. The chain of events leading to the tragedy in which two innocent lives were lost begin with Tahira Bibi's departure from her parental home in the company of Mohd. Islam it therefore, becomes necessary to examine whether she left her home as a result of deceit played upon her by the appellant or she voluntarily and willingly went with him. In her statement Tahira Bibi has given her age as 16 years. In the first information report her age has been given as 14-15 years by her father P.W. 2 Mohd. Ahmad and in his examination-in-chief he has given her age as 14-14 1/2 years. In a very first sentence of his cross-examination he has stated that he was married 22-23 years back and his eldest daughter Zahira was born 2 1/2 years after marriage and she was 2 years elder to Tahira Bibi According to this statement the 'age of Tahira Bibi comes to 17 1/2-18 1/2 years. It, therefore, appears that at the time of the incident Tahira Bibi was about 18 years in age. She has admitted that she has been educated in a Madarsa and knows Hindi and Urdu. Her father carries on Saree manufacturing business and appears to be a man of some status. She does not come from a rural area but has been residing in the city of Varanasi. Therefore, she is a girl who understands worldly affairs. Her evidence further shows that whenever the appellant talked to her about going to movies or to Sarnath, she never divulged the same to any one in her family. She had been occasionally going out to market with the appellant. The appellant was a young man of less than 23 years of age at the time of the incident. He had been living in the house of the complainant for two years and had been faithfully serving him. Mohd. Ahmad has also admitted that the appellant had most cordial relations with every one in the family and nobody had any complaint against him. The statement of Tahira Bibi is that on the date when she left her parental home, the

appellant took her to Moghalsarai on a tempo at about 8 -- 8.30 p.m. This incident took place in a December night and obviously it was no time to go to Sarnath which people visit during day hours. Every one living in the city knows that a cinema show starts at 6 or 6.30 p.m. It is therefore impossible to believe that she went in the company of the appellant for the purpose of seeing a movie. Moghalsarai is one of the busiest Railway Junction of the country and is a very busy station. Her statement that when she protested after reaching Moghalsarai station, the appellant showed a pistol and threatened her and therefore, she quietly boarded a train for Bhagalpur is wholly unworthy of belief. Even if it is accepted for a moment that she was brought to Moghalsarai by deceit, she would have immediately realised the game played by the appellant after reaching Moghalsarai and would have raised an alarm which would have attracted many people for her help. All the trains stop for considerable duration at Moghalsarai and even after boarding the train she could have raised an alarm and fellow passengers would have helped her. There is a big police force of G.R.P. and R.P.F. at Moghalsarai station and in case she had raised slightest alarm, the appellant would have been immediately apprehended. She could have protested after reaching Bhagalpur court but she did nothing of the sort. All this shows that in fact she was having an affair with the appellant and she voluntarily and willingly left in his company for Bhagalpur with the object of marrying him. The way she left and the time of leaving the parental home which was about 8.30 p.m. in a cold winter night and specially when her father was not present in the house, shows that both of them had planned the whole thing quite in advance. No grown up and mature girl is likely to leave her parental home in this fashion with a young man who is not related or connected to her unless she is deeply in love with him. We have not the slightest doubt that Tahira Bibi was infatuated with the appellant and left in his company in order to marry him. The case of the appellant is that after reaching Bhagalpur both of them married according to Muslims rites and started living as husband-wife. It is true that no 'Nikah-nama' or proof of marriage has been brought on the record. The papers filed by the appellant namely the copies of the affidavits filed before the Notary public of Bhagalpur have not been exhibited and have been held to be inadmissible by the learned Sessions Judge. These papers do not bear any stamp though there is a seal of Notary public of Bhagalpur

and bears the signature of Notary-Anand Prasad Singh. The affidavit of Tahira Bibi purports to bear her signature in Urdu and the date of the affidavit is 27-12-1988. The accused was defended by a lawyer provided at State expense. Probably he had no one who could assist him and for this reason he could not legally prove the affidavit sworn by Tahira Bibi before the Notary public at Bhagalpur on 27-12-1988. Even if these papers are held inadmissible in evidence, the material on record does lead to an inference that Mohd. Islam and Tahira Bibi were living together as husband and wife after they left Varanasi. The statement of P.W. 2 Mohd. Ahmad that he went to Bhagalpur and found Tahira Bibi in the court compound corroborates the fact that she had been taken there for preparation of some document which could be used as evidence of marriage. All these circumstances show that Tahira Bibi had a deep sense of attachment and feelings for the appellant which a wife has for her husband.

16. Now reverting to the main incident which took place at 5.30 p.m. on 2-2-1989, Tahira Bibi has stated that the appellant Mohd. Islam came to the first floor of the house carrying a pistol and after calling her said that he would definitely take her along with him and he would see who stops him. He immediately rushed towards her but she ran towards the kothari. The appellant followed her but meanwhile Jamila Bibi and Suhail Ahmad intervened and tried to stop him. It was at this stage that the appellant fired upon Jamila Bibi. She has further stated that while she had moved towards the stairs, she heard the sound of a second firing and shrieks raised by Suhail Ahmad. In the end she has stated that she was on the ground floor at the time when the appellant was arrested. It may be mentioned here that the appellant himself admits the presence of P. W. 1 Tahira Bibi on the spot at the time of the 'incident'. The statement of Tahira Bibi appears to be most-truthful and natural. We have held earlier that Tahira Bibi was deeply in love with the appellant and both of them lived as husband and wife for some time. Tahira Bibi had not left the company of the appellant of her own but she had been brought to Varanasi from Bhagalpur by her father. Looking to this back ground and the feeling she must be having for the appellant in her heart, it is impossible to believe that she would implicate him in a false murder case. No wife or a girl deeply in love with a young man would falsely implicate him in such a serious offence which may entail a death sentence. In case Tahira Bibi wanted to implicate the appellant she would

have deposed about the entire prosecution case claiming herself to be an eye-witness of the whole incident. However Tahira Bibi has not done so which again lends credibility to her statement. Though she has narrated about the firing done by the appellant upon Jamila Bibi, she did not state to have actually seen the shot fired upon Suhail Ahmad but only said that she heard the sound of the second gun fire and shrieks of Suhail Ahmad as she had proceeded towards the stairs. Again she has frankly stated that she did not witness the actual arrest of the appellant as she had come out of the house and was standing on the ground the statement of Tahira Bibi is most truthful and natural and inspires complete confidence. From her statement it is established beyond any shadow of doubt that the appellant came to the second floor of the house at about 5.30 p.m. on the date of the incident carrying a pistol and that he fired upon Jamila Bibi. It is also established that almost immediately thereafter the appellant fired second time and in consequence thereof Suhail Ahmad received fatal gun shot injuries. Her statement also negatives the defence case that either any injury was caused to the appellant by Mohd. Juber with a stone pestle or that Mohd. Juber fired from pistol which hit the two deceased.

17. P.W. 2 Mohd. Ahmad has stated that he was on the second floor of the house when the incident took place. His presence in his own house is most natural. He has given a truthful statement when he stated that appellant Mohd. Islam was having most cordial relations with every one in the family and during the two years when he worked with him nobody had any complaint against him. In case he had any axe to grind against Mohd. Islam, he would not have given such a statement but would have said something against his conduct and character. This again lends assurance to the statement given by him. The topography of the house shows that a person standing on the second floor could have clearly seen the exents taking place on the first floor. He has stated that the whole incident took place within few seconds and by the time he had not reached the stairs for coming to the first floor. He has clearly deposed about the two shots fired by the appellant which hit Jamila Bibi and Suhail Ahmad. Nothing has come out in his cross-examination which may discredit his testimony. In our opinion, he has given a truthful version of the incident and there is absolutely no reason not to place reliance upon the same. The testimony of this witness again establishes the

prosecution case and negatives the plea taken in defence that shots fired by Mohd. Juber hit the deceased.

18. Besides the testimony of the above mentioned two eye-witnesses there is corroborative evidence of very clinching nature on the record. P.W. 3 Mohd. Juber is the real brother of Mohd. Ahmad and resides in the same house. He has stated that he was in the gali when he heard the alarm and sound of gunfire. When he reached near the door of his house, Tahira Bibi came out in a very disturbed condition and said that the appellant had shot her aunt. This evidence is admissible under Section 6 of the Evidence Act. It is fully covered by illustration (a) to Section 6. Witness further stated that when he reached the first floor of the house he saw the appellant with a pistol in his hand and threatening every one to get away otherwise he would shoot just as he had shot the mother and son. He has also stated that the police personnel came and thereafter the appellant was arrested after some injuries had been caused to him. The testimony of this witness is truthful and reliable. The fact that he does not claim to be eye witness of the shooting done by the appellant lends assurance to his testimony. In case he wanted to depose falsely, he could have easily deposed about the main part of the incident as the same happened in his own house and there would have been no reason to doubt his presence. However he has given an honest statement to the effect that he was outside the house and has only deposed about the fact that the appellant was threatening every one with a pistol in his hand and was saying that everyone should get away otherwise he would kill as he had done to other persons. This part of the statement of the witness as to what the accused was saying is admissible under Section 6 of the Evidence Act. The witness has also stated about the arrest of the appellant. In our opinion he is a truthful witness and his testimony is entitled to full weight. The testimony of P. W. 4 Amin Uddin is similar to the testimony of P.W. 3 Mohd. Juber as he was in the company of the former at the time when they heard the alarm. Both of them rushed together. The Mosque where he had gone to offer 'Namaz' is only at a distance of 150 steps from the house of Mohd. Ahmad and therefore, his presence on the spot cannot be doubted. Nothing has come out in his cross-examination which may cast doubt upon his evidence. In our opinion his testimony is reliable and trustworthy.

19. P.W. 6 Ram Kripal Singh, S. I. and P.W. 9 Subhash Chandra Tripathi S. I., who were patrolling in the area have stated that they heard the sound of gun fire and alarm of the people and then they rushed to the first, floor of the house of the complainant. There they saw the appellant pointing his pistol and shouting that he had killed two persons and would kill other as well. Thereafter he was arrested when the police personnel pointed their fire arms towards him. The witnesses have further stated that there was a fired empty cartridge in the barrel of the pistol and two fired empties and two bullets were recovered from the spot. The testimony of these witnesses again establishes that almost immediately after the shooting the appellant was found at the spot and at that time he Was pointing a pistol and was also shouting that he had killed two persons and would kill others. The statement attributed to the appellant by these witnesses to the effect that he had shot two persons is admissible under Section 6 of the Evidence Act. The arrest of the appellant with the pistol is also established from the testimony of P.W. 6 and P.W. 9. There is absolutely no reason not to place reliance upon the testimony of these witnesses.

20. Thus from the oral evidence P.W. 1 Tahira Bibi, P.W. 2 Mohd. Ahmad, P.W. 3 Mohd. Juber, P.W. 4 Amin Uddin, P.W. 6 Ram Kripal Singh and P. W. 9 Subhash Chandra Tripathi, it is fully established that the appellant Mohd. Islam fired upon Jamila Bibi and Suhail Ahmad from the pistol which he was carrying and further that he was arrested almost immediately on the spot and from his possession a country made pistol was recovered.

21. P.W. 8 Dr. S. P. Shukla had performed post-mortem examination on the body of the two deceased. His testimony shows that both the deceased had sustained fire arms injury and that the said injury could have been caused at 5.30 p.m. on 2-2-89. He has further deposed that he found one bullet each in the brains of the two deceased. The recovery of bullet from the body of the deceased corroborates that the weapon used in the incident was a fire arm from which a cartridge having bullet had been fired. The medical evidence thus completely corroborates the oral evidence in the case.

22. Both P.W. 6 Ram Kripal Singh and P.W. 9 Subhash Chandra Tripathi have stated that a fired empty cartridge was found in the barrel of the pistol and that they also recovered two fired empties and two bullets of 303 bore from the spot. A seizure memo of these articles was prepared which is Ex. ka 2 on the record. These articles had been sent to Ballistic Expert and his report is Ex. ka 27 on the record. The report of the Ballistic Expert shows that the three cartridges and the bullet had been fired from the pistol which had been recovered from the possession of the appellant. Thus the report of the Ballistic Expert also corroborates the prosecution case.

23. The defence version of the incident may now be examined. According to the appellant, he came to the house of Tahira Bibi on the date of incident to enquire about her welfare when P.W. 3 Mohd. Juber started abusing him and also caused injuries by stone pestle on his head and leg. Seeing the assault made upon him, Tahira Bibi ran down stairs raising alarm and Jamila and Suhail Ahmad tried to save him. Meanwhile Mohd. Juber who was in a fit of rage, brought a pistol and fired upon him which hit both the deceased. Mohallah people then came to save his life and police personnel took him to the police station. In this connection the injuries sustained by the appellant may also be examined. The injury report shows that there was a lacerated wound on the head but the doctor described the said injury as semi healed and again wrote the word (old) after describing the injury. At the bottom of the injury report it is mentioned that duration was about 3 days except wound No. 1 which was the head injury. It is, therefore, extremely doubtful as to whether the head injury had also been caused at the same time when injury No. 2 had been caused to the appellant. The medical examination of the appellant was done nearly 42 hours after the incident. The leg injury has been described as 3 days old but the doctor considered the head injury still older. In his statement C.W. 1 Dr. Misra has said that he had put plaster on the leg of the appellant and treated him for months. However, in his cross-examination he has admitted that he had not seen the x-ray plate or x-ray report of the injury sustained by the appellant. He has also admitted that he had not mentioned in the injury register that there was any fracture in the leg of the appellant nor there is any mention in the register that he had put a plaster. He has admitted that he had put plaster by way of precaution and that he was, neither a radiologist nor a bone Specialist. The

statement of C. W. 1 does not establish that the appellant had sustained any fracture in his leg nor does it establish positively that the lacerated wound on his head had been caused to him at the time of the incident in question. The version of the appellant that the two deceased received injuries on account of firing done by Mohd. Juber is wholly unworthy of belief. Jamila Bibi was wife of Hazi Abdul Rasheed and Suhail Ahmad was his-son. Mohd. Juber is real brother of Hazi Abdul Rasheed. The recovery of two bullets from the spot shows that at least four shots were fired as two bullets were found in the bodies of the deceased. It is impossible to believe that though Mohd. Juber wanted to fire upon the appellant and he did actually fire four times, yet every time he missed the appellant and caused fatal injuries to his own nephew and sister-in-law. It is also noteworthy that both the deceased have sustained injuries on the head which again rules out an accidental shot.

24. There is another reason to discard the defence case. It was not a case of arranged marriage of Tahira Bibi with the appellant nor the same had been solemnised by the parents or family members. The appellant had not gone to the house of Mohd. Ahmad in the capacity of a son-in-law where he would have got warm welcome or would have been showered with traditional hospitality which is shown to a son-in-law in India. The appellant was a fugitive and a treacherous person in the eyes of Mohd. Ahmad and others as he had taken undue advantage of the confidence reposed upon him. In such a situation the appellant must have been aware that he would not be treated cordially but with utmost contempt and hostility. He must be aware that no one would allow Tahira Bibi to go with him. It was therefore, most natural for him to come fully prepared and carry a lethal weapon in order to achieve his objective namely to take away Tahira Bibi whom he considered as his wife, by force. The defence case that he came unarmed merely to enquire about the welfare of Tahira Bibi does not at all appear to be natural or probable in the background of the events which had taken place.

25. In our opinion the incident happened in the manner suggested by the prosecution and the defence version put forth by the appellant is false.

25A. Sri Kamal Krishna, learned counsel for the appellant has submitted that the evidence on record shows that the firing was done from a very close range but there was no blackening or tattooing around the injuries and therefore, eye witness account was in conflict with the medical evidence and should be discarded. In this connection he referred to the statement of P.W. 1 and P.W. 2. Which showed that the distance between the appellant and Jamila Bibi was 1 1/2-2 paces. Learned counsel has brought to our notice authoritative books on Medical Jurisprudence by MODI COX and GLAXTON wherein the learned authors have opined that in case firing is done from a distance of less than 2', there will be a blackening. Learned counsel has submitted that as the hand of the assailant would have been stretched at the time of shooting, the actual distance between the barrel of pistol and Jamila Bibi could only be few inches and therefore blackening or tattooing around the injuries was an absolute must if the eye witness account was correct. Sri S. P. Singh learned Government Advocate has however, submitted that in the present case a country made pistol had been used and Ex. ka 2 (recovery memo) showed that refilled cartridges had been fired. According to learned counsel the opinion expressed in the authoritative text is with regard to standard factory made guns and cartridges and it will be too hazardous to discard the oral testimony on the basis of such opinion where a country made weapon and hand-filled cartridges have been used. He has drawn the attention of the court towards the following observations made on page 347 in 'Medical Jurisprudence by Dr. Bernard Knight' (6th Edition-1990) --

When a country made weapon is involved, the specific datas are not of much help in determining the time of firing from the fire arm. In such cases when the cartridges are also country made, their composition is not known and therefore, their results will vary according to their components. The effect of charring and tattooing will also depend on the contents of the cartridge and a Ballistic Expert will not be in a position to give accurate result resulting from each cartridges unless he gets an opportunity to have test fires by similar cartridges.

26. The author has also described the result of an experimental study undertaken with a view to compare the result by a 12 bore shot gun with 12 bore country made pistols from varying distance which are as follows:--

Scorching was found up to a distance of 1 feet with the standard shot gun and up to 6 inches with the country made pistol.

Tattooing was obtained upto a distance of 2 feet with the standard 12 bore shot gun and upto 1 feet with the country made pistol.

Blackening was obtained upto a distance of 3 feet with the standard gun and 1 feet with the country made pistol.

27. The learned author has summed up his conclusion by saying that application of the data of standard shot gun to calculate the distance of firing by a country made pistol is both fallacious and misleading.

28. We are, therefore, of the opinion that in view of the country made weapon and hand-filled cartridges used by the appellant it will not be proper to proceed on the basis of data given in authorities on Medical Jurisprudence which relate to standard factory made guns and cartridges. In this view of the matter, it cannot be held that oral evidence is inconsistent with the medical evidence.

29. Sri Kamal Krishna has vehemently contended that P.W. 2 Mohd. Ahmad was not present on the spot and the F.I.R. had not come into existence as alleged by the prosecution and therefore prosecution case cannot be accepted. In support of his contention he has submitted that inquest on the bodies of Janaila Bibi and. Suhail Ahmad had been conducted by two persons namely, by P.W. 6 Ram Kripal Singh, S. I. and P.W. 9 Subhash Ghandra Tripathi, S. I. respectively yet in both the inquest reports the actual time of the lodging of the F.I.R. and the time when the inquest was commenced has not been mentioned. The same omission is there in form No. 13 which is a document prepared for sending the body for post-mortem examination. Another discrepancy pointed out by the learned counsel is that in the inquest report Hazi Abdul Rasheed is shown as the person who gave information at the police station and that the copy of the F.I.R. was not sent to the doctor who performed the post-mortem examination. On these facts the learned counsel submits that if Mohd. Ahmad was present on the spot and the F.I.R. had actually been lodged, such discrepancy could not have occurred. Both P.W. 6 and P.W. 9 were cross-examined on these points and they have stated that when they

reached police Station with the accused, Mohd. Ahmad was already present there. They have further stated that at the time when inquest reports were being prepared, the crowd collected on the spot was becoming uncontrollable and the Investigating Officer who had copy of the F.I.R. and other papers with him had gone down stairs. It was due to this reason that the actual time of the lodging of the F.I.R. was not mentioned and inadvertently the time of the commencement of the inquest and conclusion thereof was also not mentioned. They have further said that when they were holding inquest they enquired as to who was the heir of the deceased and as the name of Hazi Abdul Rasheed (husband of Jamila and father of Suhail Ahmad) was given out, they noted his name in the inquest report. We have carefully examined the explanation offered by P.W. 6 and P.W. 9 and in our opinion the same appears to be convincing. The ghastly crime had been committed by an earstwhile servant in a densely populated locality and naturally news of such an incident would have spread like wild fire and collection of a big crowd at the spot appears to be most natural. Learned counsel has submitted that if the I.O. of the case had not taken steps to control the crowd, the mob might have killed the appellant then and there. In such a situation it is quite probable that the Investigating Officer, who had the necessary papers with him would have gone down stairs to control the crowd and it may not have been possible for P.W. 6 and P.W. 9 to contact him at the time of holding inquest to ascertain the time of the lodging of the F.I.R. The record further shows that by the order of the District Magistrate post-mortem examination was conducted on the body of Jamila Bibi at 1.05 a.m. on 3-2-1989 which means in the night itself and within 7 hours of the occurrence. Learned counsel for the complainant has submitted that the family members of the deceased wanted to bury the body the same night and therefore, on a special request postmortem was performed at 1 in the night. It is, therefore, obvious that the body would have been despatched for post-mortem examination with utmost speed and in such circumstances no adverse inference can be drawn by the mere fact that a copy of the F.I.R. was not sent to the doctor. Learned State Counsel has further submitted that the inquest report and Form No. 13 as well as other papers bear the crime number namely 23 as well as Section 302, I.P.C. and the mentioning of the crime number shows that the F.I.R. had been lodged and a case had been registered. He has further submitted that the second F.I.R. had

also been lodged at 6.50 p.m. on the basis of which a case had been registered as crime No. 24 of 1989 under Section 25/27 Arms Act and this could not have been done unless the F.I.R. of the case under Section 302, I.P.C. had actually been lodged and necessary entries in the general-diary had been made. We are in agreement with the submission made by the learned counsel and are of the opinion that other entries in police papers and circumstances of the case show that Mohd. Ahmad was present and he had lodged the F.I.R. at 6.30 p.m. as alleged by the prosecution.

30. Sri Kamal Krishna has then submitted that the witnesses have not explained the injuries sustained by the accused and therefore, the prosecution case is rendered doubtful. In support of his submission he has placed reliance on *Lakshmi Singh v. State of Bihar*, AIR 1976 SC 2263 : (1976 Cri LJ 1736) and *State of Gujarat v. Bai Fatima*, AIR 1975 SC 1478 : (1975 Cri LJ 1079). We have considered the injuries sustained by the appellant in detail in the earlier part of the judgment. We have held that it is not established that the accused sustained any fracture in his leg or injury on his head in the incident in question. The prosecution is required to explain the injuries on the body of the accused only if it is established that the same were caused in that very incident, where some one has been assaulted and the accused is charged for such an assault. If the injuries found on the body of the accused are shown to have been caused at a different time or at a different place, there is no duty cast upon the prosecution to explain such injuries. P.W. 3 Mohd. Juber, P.W. 4 Amin Uddin, P.W. 6 Ram Kripal Singh and P.W. 9 Subhash Chandra Tripathi have all stated that the appellant was arrested after surrounding him and causing some injuries. The police personnel had come on the spot. Even the accused has admitted in his statement that the police personnel took him out from the room and thereafter he was taken to the police station. The manner in which the ghastly crime was committed, it is natural that police personnel must have given few blows by the thick cane which they normally carry. Thus it cannot be said that no explanation is forthcoming for the injuries on the person of the accused. The dictum laid down in the authorities cited by the learned counsel has, therefore, no application to the facts of the present case.

31. Learned counsel next submitted that though the appellant has not raised the plea of self-defence yet the evidence on record showed that he acted in exercise of his right of self-defence as he had been assaulted by Mohd. Juber and he had received serious injuries on his head which could give rise to apprehension of grievous hurt to him. In support of his submission he has placed reliance on *G.V.S. Subbrayanam v. State of A.P.*, AIR 1970 SC 1079 : (1970 Cri LJ 1004) where the accused had pleaded alibi but the Court acquitted him holding that he had caused injuries in exercise of his right of self-defence. As a proposition of law, it is well settled that even if the accused does not take a plea of self-defence, the Court would not convict him if it is found that he had acted in exercise of such a right. However, facts and circumstances of the present case completely rule out the possibility that the appellant fired shots upon the deceased in exercise of his right of self-defence. We have already held that Mohd. Juber was not present on the spot but was in the gali at the time of the incident. We have further held that it is not established that the appellant had sustained injury on his head or fracture in his leg in the incident in question. Jamila Bibi and Suhail Ahmad had not caused any injury or harm to the appellant. The appellant had no apprehension that any injuries much less grievous injuries could be caused to him. Therefore, there was no occasion for him to cause injuries to others in exercise of any right of self-defence.

32. Learned counsel has also made a serious criticism of the evidence given by the witnesses in Court on account of the fact that they had not given such a statement, under Section 161, Cr. P. C. during the course of investigation. It is submitted that the witnesses have given a different version and have vastly improved the prosecution case while deposing in Court. We have carefully considered the submission made by the learned counsel and in our opinion the so-called improvement made by the witnesses in their testimony in Court comes within the purview of 'omission' and they are not contradictions. It is only a contradiction with the statement under Section 161, Cr. P. C. which can be legally proved and utilized by the accused and not an omission. Therefore, the statement of the witnesses cannot be discarded on this ground.

33. In the present case the time of incident, place of incident, his presence on the spot as well as, his arrest from there within minutes of the commission of the crime is not disputed by the appellant. Having considered the evidence on record, we are satisfied that the-prosecution has proved its case against the appellant beyond any shadow of doubt. It is fully established that the appellant fired from a pistol upon Jamila Bibi and Suhail Ahmad at 5.30 p.m. on 2-2-1989 due to which both of them immediately lost their lives. The appellant is thus guilty of having committed Offences under Section 302, I.P.C. It is also established that the appellant had a country made pistol in his possession. It was used by him for commission of the crime and therefore, he has committed offence under Section 25/27 of the Arms Act.

34. The learned Sessions Judge has framed a single charge under Section 302, I.P.C. against the appellant for causing death of Jamila Bibi and Suhail Ahmad. Since the appellant had killed two persons by two separate shots, he should have been charged twice under Section 302, I.P.C. Section 218 Cr. P.C. provides that for every distinct offence of which any person is accused, there shall be a separate charge. However, we are of the opinion that non-framing of separate charges for the two murders committed by the appellant amounts to a mere irregularity and in view of Section 464, Cr. P. C., the conviction of the appellant cannot be set aside unless the non-framing of separate charges has occasioned a failure of justice. The object of framing the charge is that the accused should be made aware as to what is the prosecution case against him and he should get full opportunity to meet the same. The charge framed against the appellant clearly mentions that he had committed the murder of two persons, namely Jamila Bibi and Suhail Ahmad. Therefore, the appellant fully knew the import of the prosecution allegation against him and he was not in dark about the same. The non-framing of separate charge has not caused any prejudice to the appellant nor it has occasioned any failure of justice. Therefore, the conviction of the appellant cannot be set aside on this ground.

35. Now comes the question of sentence as the appellant has been awarded death penalty. We have held in the earlier part of the judgment that there was a love affair between the appellant and Tahira Bibi. She had not left her parental

home on account of any deceit played by the appellant but she had gone with him to his native place so as to live as husband and wife. Tahira Bibi did not part company with the appellant of her own freewill but she was made to accompany her father and other relations. She did not even get an opportunity to talk to the appellant before leaving Bhagalpur. Though it is not fully established that marriage according to Muslims rites had been performed yet the appellant always thought that Tahira Bibi was his legally wedded wife. From the time when Tahira Bibi was taken away by her father and other relations, the appellant must have been under a great agony and torture. He must be feeling that on account of his social status being much lower than that of Tahira's father he had been physically deprived the company of his wife. It was in this mental state that he came to Varanasi on 2-2-1989 and the sole objective of his visit was to take away his wife to his own home. He thought that she was being illegally detained by her family members. After reaching the house of Mohd. Ahmad and seeing the conduct of Tahira Bibi in not welcoming him and in running away, he must have lost his mental balance. The murders had not been planned nor was there any motive to commit the crime. It is true that two innocent lives have been lost but it appears to be an act of a mad person who had suddenly lost all balance. In these circumstances, we are of the opinion that death penalty would be too harsh. Ends of justice would be met if the appellant is sentenced to imprisonment for life. Sri B. P. Shukla, learned counsel for the complainant has submitted that the appellant deserves extreme penalty provided by law as he shot dead two persons at point blank range without any provocation. He has placed reliance upon *Machhi Singh v. State of Punjab*, AIR 1983 SC 957 : (1983 Cri LJ 1457) in support of his submission. This case is clearly distinguishable on facts as 17 lives were lost in the said incident. Even in this case it has been held that extreme penalty of death need not be inflicted except in rarest cases of extreme culpability. It has been further held that circumstances of the 'offenders' also require to be taken into consideration along with the circumstances of the crime. If we take into consideration the circumstances which led to the commission of the crime by the appellant, the only proper sentence which could be awarded to the appellant would be one of life imprisonment and not a death sentence. The present case appears to be a shade better than *Doodhnath Pandey v. State of U.P.*, AIR 1981 SC 911 : (1981 Cri LJ 618) where

the accused committed a planned murder of a college going boy because he was trying to wean away his sister from the influence of the accused who had set his heart upon her. Though the girl had repeatedly said that she had nothing to do with the accused but the Supreme Court set aside the death penalty on the ground that the accused was in a state of mental turmoil and the sense of being socially wrong. There is another aspect which has weighed with us in setting aside the death penalty. The appellant was sentenced to death by the learned Sessions Judge on 19-9-1990. For reasons not clear from the record, the appeal was posted for hearing for the first time 27-7-1992 before a division bench when it was directed to be listed before another bench. The hearing before us commenced on 16th September and concluded on 22nd September, 92. The appellant, for no fault of his is under suspense and agony of a death sentence for two years.

36. Before parting with the case we must observe that Sri Kamal Krishna who appeared as amicus curie argued the appeal with commendable ability and dexterity and brought to our notice minutest details of the case though he was handicapped as there was no one on behalf of the appellant to brief him. Sri S. P. Singh, learned Government Advocate, Sri Ashok Singh A.G.A. and Sri B. P. Shukla learned counsel for the complainant also rendered valuable assistance.

37. The appeal is accordingly partly allowed. The conviction of the appellant under Section 302, I.P.C. is affirmed but the sentence of death imposed upon him by the learned Sessions Judge is set aside. The appellant is instead sentenced to imprisonment for life under the aforesaid charge. The conviction of the appellant under Sections 25/27 Arms Act and the sentence imposed upon him by the learned Sessions Judge are hereby affirmed. The appellant is in jail. He will undergo the sentence. Reference made by the learned Sessions Judge for confirmation of death sentence is rejected.

38. The office is directed to send a certified copy of the judgment to the prisoner and also supply a copy of the judgment to his counsel free of charge.