

**Barkaunoo and anr. Etc. Vs. State of U.P.**

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**SooperKanoon Citation :** [sooperkanoon.com/483569](http://sooperkanoon.com/483569)

**Court :** Allahabad

**Decided On :** Apr-23-1996

**Reported in :** 1997CriLJ262

**Judge :** K.C. Bhargava and ;J.C. Gupta, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 148, 149, 302, 323 and 452;  
Code of Criminal Procedure (CrPC) - Sections 107, 117, 161 and 313

**Appeal No. :** Criminal Appeal Nos. 701 and 741 of 1979

**Appellant :** Barkaunoo and anr. Etc.

**Respondent :** State of U.P.

**Advocate for Def. :** Jitendra Mishra, Govt. Adv.

**Advocate for Pet/Ap. :** R.N. Gupta and ;Nagendra Mohan, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**J.C. Gupta, J.**

1. As both these appeals arise out of a common judgment dated 10-9-79 passed by the then VII Additional Sessions Judge, Hardoi, they are being disposed of together by this judgment.

2. Appellants Barikhnnoo, Mahendra and Dayaloo alias Daya Shankar have been convicted and sentenced to undergo R.I. for two years under Section 148 I.P.C. and to Imprisonment for Life under Section 302/149 I.P.C., while Piyarcylal and Ram Narain have been convicted and sentenced to undergo R.I. for one year under Section 147 I.P.C. and to Imprisonment for Life under Section 302/149 I.P.C. All the sentences of each appellant have been ordered to run concurrently.

3. The prosecution story, in brief, is that in village Sandila situate within the area of police station Tandiyawan, District Hardoi, there were two rival groups. One was headed by appellant Piyareylal and the other by one Rain Shankar. Cross Cases under Sections 107/117 Cr. P.C. were pending between these parties. Deceased Subedar was also a resident of the same village. According to the prosecution case deceased Subedar was doing pairvi for Ram Shankar and others in the aforesaid proceedings, on account of which Piyarey Lal and others bore enmity against him.

4. It is alleged that on 7-10-78 the case State v. Ram Shankar under Sections 107/117 Cr. P.C. was fixed for hearing in the Court of Sub-Divisional Magistrate, Hardoi and in that connection Subedar had also gone there. Since the case was adjourned, Subedar along with his son Chhabinath, the first informant, Chhotey Lal, uncle of Chhabinath, Shripal son of Kamta Prasad and Ram Kishore were going to their village Sandila and when the said persons reached near Bhaishaha river in front of Araini village, it is said that all the appellants came out from behind the bushes from western side and challenged Subedar saying that if he was doing pairvi for Ram Shankar, he would not be spared. Appellants Piyarey Lal and Ram Narain possessed lathies, appellant Dayaloo had a country made pistol and the other two appellants Mahendra and Burikanoo were armed with guns. They assaulted Subedar with lathies as a result of which he fell down on the ground and thereafter appellants Mahendra, Barikanoo and Dayaloo fired one shot each at Subedar from their respective fire-arms. The companions of the deceased were at a little distance and seeing the assault on the deceased, they raised cries, whereupon appellants ran away from the scene of occurrence. The witnesses came near Subedar and found him lying unconscious. Chhabinath sent Chhotey Lal to Loka Purwa from where he brought quill and cot of Ganga Ram. Subedar

was then taken to (he District Hospital. Hardoi where Dr. U. D. Kapoor examined Subedar and found that he was already dead.

5. Chhabinath left the dead body of Subedar in the hospital in the care of his companions and himself reached the police station Kotwali, District Hardoi at 7.15 P.M. He dictated the oral report Ex. Ka-1, which was taken down by Head Constable Onkar Nath Bajpai P.W.5. A case was registered in the General Diary, copy of which has been proved as Ex. Ka-15, S. I. Rais Ahmad P.W.4 was present at the police station at the time when the F.I.R. was recorded. The investigation of the case was entrusted to him. He recorded the statement of first informant at the police station and thereafter reached the District Hospital. Inquest could not be done during night. The Investigating Officer then reached the place of occurrence along with the first informant at about 11.00 in the night, but no inspection could be made on account of paucity of light. At 8.00 A. M. in the morning the Investigating Officer recorded the statements of Ram Kishore, Lalloo Ram and Ganga Ram, prepared the site-plan Ex. Ka-2 and also took sample of blood through memo Ex. Ka-3 from the place of incident. He then again reached the District Hospital at 8.30 A. M. where he completed the inquest. After completing the investigation, all the appellants were challaned for committing the murder of Subedar.

Dr. A.N. Singh P.W. 6 conducted the postmortem examination on the dead body of Subedar on 8-10-78 at 3.45 P. M. The deceased was aged about 50 years and he has died about one day before the post-mortem examination. The deceased was of average built. Rigor mortis was passing off from upperextrimities and was present in lowerextrimities. No staining was present on buttocks. Mouth was half open. Eyes were closed.

6. The following ante-mortem injuries were noticed by Dr. Singh :-

1. Fire-arms wound of entry 3 cm. x 2 cm. x bone deep on the left side of the face, just besides the left nostril and 2.5 cm. below the lower eye lid, margins were inverted and blackening was present around the wound.

2. Fire-arm wound of exist 6 cm. x 3 /m. in the socket of the right eye destructing the whole of eye ball. The wound was communicating with the wound of injury No.

I, margins were averted.

3. Lacerated wound 3 cm. x 0.5 cm. x bone deep on the left side front of head. 5cm. above, the left eye brow.

4. Lacerated wound 3 cm x 0.5 cm. x Scalp deep on the left head 5 cm. above and to the right side of injury No. 3.

5. Lacerated wound 6 cm. x 1 cm.x bone deep on the tip of head. 0 cm. behind injury No. 4.

6. Abraded contusions 5 cm. x 2 cm. on the back of the right shoulder.

7. Contusion 4 cm. x 4 cm. on the back of left shoulder.

8. Contused swelling 6 cm. x 4 cm. on the back of left fore-arm middle front with the fracture of ulna bone under neath.

9. Abraded contusion 2 cm. x 1 cm. on the dorsum of left middle forefinger with fracture of middle digit.

10. Lacerated wound 1.5 cm x 1 cm. x muscle deep on the dorsum of left ring finger distal digit with complete loss of nail.

11. Multiple firm-arm wounds of entry in an area of 22 cm. x 11 cm. on the front of whole of right forearm. Each wound is 0.25 cm. x 0.5 cm. with variable depths from partial skull deep to muscle deep. Wounds were circular in shape with inverted margins, 17 small shots were recovered from under the skin and muscular tissues.

12. Fire-arm wound entry 0.25 cm x 0.25 cm. x muscle deep on the front of right forearm, 6 Cm. above the elbow. One small shot was recovered from the injury.

13. Abrasion 2.5 cm. x 1.5 cm. on the front of right knee.

14. Abrasion 2 cm. x 0.5 cm. on the front of right leg, 4 cm. above the knee,

15. Lacerated wound 3 cm. x 1 cm. x muscle deep on the dorsum of right hand 4 cm. below the wrist.

7. On internal examination Dr. Singh found that under injury No. 2 half portion of right frontal bone was fractured. The membrane of the brain was lacerated under the same injury and rest was congested. Six small shots were recovered from the brain matter and cavity. Anterior cranial fossa in right side was fractured in many pieces. Stomach was empty. Small intestines contained gases and faecal matter. Large intestines also contained gases and faecal matter. In the opinion of the doctor death was caused due to shock and coma as a result of ante-mortem injuries. The post-mortem report Ex. Ka-16 was prepared by Dr. Singh, Twenty four pellets, which were found in the body, were kept under seal.

8. During trial the prosecution produced seven witnesses in all, namely P.W.I Chhabinath, P.W.2 Ram Kishore, P.W.3 Shripal, P.W.4 S.I. Rais Ahmad. P.W.5 H. C. Onkar Nath Bajpai, P.W. 6 Dr. A. N. Singh and P.W. 7 Dr. U. D. Kapoor. Out of these witnesses Chhabinath P.W.I, Ram Kishore P.W.2 and Shri Pal P.W.3 are alleged eye witnesses.

9. Mohammad Rase and Putin Lal were examined as Court witnesses.

10. The case of the accused persons was of complete denial and in their statements before the trial Court recorded under Section 313 Cr. P.C. they stated of their false implication on account of enmity and party-bandi. In defence two witnesses, namely Dr. A. N. Singh and Subhash Chandra compounder were produced. Their evidence was to the effect that Pyarey Lal was having cataract in both of his eyes and his right thumb was completely missing. In addition to this, the defence also filed a number of documents in support of their plea of false implication due to enmity, a reference of which we find in the body of the judgment of the trial Court.

11. On a consideration of evidence, the learned Sessions Judge found the appellants guilty of committing the murder of Subedar and accordingly the appellants have been convicted and sentenced as aforesaid.

12. We have heard the learned counsel for the appellants and also the learned counsel for the State. We have also perused the record carefully.

13. From the perusal of the statement of Dr. A. N. Singh PW6 and the post-mortem report Ex. Ka-16, there could be no doubt that Subedar died a homicidal death and was murdered. Before us also the learned counsel for the appellants did not challenge the factum of death of the deceased Subedar.

14. The learned counsel for the appellants has, however, argued that the evidence on record does not establish the case against the appellants as the presence of three eye-witnesses, namely Chhabinath P.W. 1, Ram Kishore P.W.2 and Shripal P.W.3 at the time of occurrence is not established and since the place of occurrence was situated in jungle, the incident could not be witnessed by any person and Subedar was done to death by some unknown persons, may be robbers. It was further argued that when the dead body of Subedar was found lying in jungle, the first informant Chhabinath PW1 son of deceased, who was a clerk of a lawyer in connivance with Ram Kishore P.W.2, brother of Ram Shankar, the other group leader, manipulated and falsely nominated the present appellants in the present case. Almost to the similar effect suggestions were also put to the eye-witnesses during trial. The learned counsel for the appellants has rightly pointed out that the learned Addl. Sessions Judge has wrongly observed that no evidence was led in defence to substantiate those suggestions and as per the suggestions the time and place of occurrence were admitted to the defence. It is well established law that in criminal cases the burden to prove the guilt of an accused always lies on the prosecution and the same never shifts. The law does not require the accused to substantiate such suggestions as it is not upon him to satisfy the Court as to where, when and in what manner the crime was committed. Such suggestions are thrown generally in support of defence plea of denial. The success of the prosecution case depends upon the nature and quality of evidence produced by it before the Court and not upon the suggestions put on behalf of the defence.

15. We would now proceed to examine the evidence adduced in the present case and the various arguments raised by the counsel for the appellants and the State.

16. The learned counsel for the appellants firstly contended that in the present case the prosecution has not been able to establish motive against the appellants to commit the murder of Subedar, as admittedly he was not a party in the proceedings under Sections 107/117 Cr. P.C. and no immediate motive has also been suggested. It was further argued by him that the motive as put forward by the prosecution that Subedar was doing pairvi for Ram Kishan and others in the aforesaid proceedings, has not been established and in any case the alleged motive was so weak, meagre and inadequate as to have excited and prompted the appellants to commit the crime in question. Undisputedly Subedar was himself not a party in the proceedings under Sections 107/117 Cr. P.C. and there is also no reliable evidence in support of the prosecution allegation that Subedar was doing pairvi for Ram Kishan and others and had gone to Court on 7-10-78 in these proceedings. We, therefore, find that in the present case the prosecution has not been able to prove that 'the appellants had a strong motive to commit the murder of Subedar. Normally there is a motive behind every criminal act, that is why the investigating agency as well as the Court while examining the complicity of accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It is well established that where there is an eye-witness account regarding the incident, the motive loses all its importance and if the evidence of the eye-witnesses is found reliable and trustworthy, absence of a strong motive is not enough to throw the prosecution case. Motive is a thing primarily known to the accused himself and it may not be possible for the prosecution in each and every case to find out the real motive behind the crime. Of course, where the evidence of the eye-witnesses is found to be shaky and unreliable, absence of motive may also be a circumstance which may weigh against the prosecution.

17. It is apparent from the evidence on record that there were two rival groups in village Sandila. One was headed by Piyarey Lal appellant and the other by Ram Kishan. From the documents filed in defence, it further emerges out that on the report made by Barkanoo appellant. Ram Kishore P.W.2 and his brother Ram Shankar, head of other rival group and Kailash were prosecuted and Shi v Narain, younger brother of Ram Kishore P.W.2 was convicted in a case wherein appellants Mahendra and Ram Narain appeared as prosecution witnesses against

the accused persons of that case. Mahendra appellant was also a witness against Ram Shankar and Kailash brother of Ram Kishore P.W.2 in a case under Sections 452 and 323 I.P.C. Ram Kishore P.W. 2, his brother Ram Kailash and Shiv Narain were opposite parties in the proceedings under Sections 107/117 Cr. P.C. The learned counsel for the appellants contended that the party of Ram Kishore P.W.2 which was headed by Ram Shankar, had a stronger motive to falsely implicate the accused persons as compared to the one attributed to the appellants to commit the murder of Subedar with whom they have no direct enmity. Enmity is a double edged weapon, which cuts both ways. It may constitute the motive for the commission of crime and it may also provide the motive for false implication. The evidence and circumstances of the present case do not rule out the possibility of the appellants false implication at the instance of Ram Kishore P.W. 2 in collusion with Chhabinath P.W.I son of deceased Subedar, who was working as a clerk of a lawyer. This being the position, the evidence adduced in the present case requires careful examination.

18. The learned counsel for the appellants argued before us that the evidence of all the three eyewitnesses is not reliable inasmuch as all the witnesses are interested, inimical and chance witnesses and their evidence further suffers from serious infirmities and is also in conflict with the medical evidence.

19. P.W.1 Chhabinath is admittedly the son of deceased Subedar. He was not a party in the proceedings under Sections 107/117, Cr.P.C. He himself admitted that during the relevant time he was working as a clerk of a lawyer in Hardoi Court and used to reside in Hardoi and not in village Sandila. In the circumstances appearing in the case, it was highly doubtful that he himself had gone to the Court of Sub-Divisional Magistrate to attend the date of the case under Sections 107/117, Cr.P.C. against Ram Shankar and others. It may again be repeated that Subedar deceased was also not a Party in the said proceedings. P.W. 2 Ram Kishore, as pointed out above, was highly inimical to the accused persons and he himself was a party in the proceedings under Sections 107/117, Cr.P.C. A theft case against this witness and his two brothers was launched by appellant Barhkannoo. Appellants Mahendra and Ram Narain appeared as prosecution witnesses and Shiv Narain, brother of P.W. 2 Ram Kishore was convicted on their evidence. The

rival group leader Ram Kailash is his own brother. P.W. 3 Shripal is also admittedly a close relation of Subedar. As per his statement, this witness<sup>1</sup> had gone to Hardoi in the afternoon at about 1.30 or 2.00 p.m. for purchasing clothes, Haldi and Mircha and was waiting at 'Phatak' to board bus for his village and at that place by chance he met Subedar, Chhabinath and Ram Kishore at about 3.30 p.m. and then he dropped the idea of going to his village by Bus and accompanied those persons on foot. He is, therefore, certainly a partisan and chance witness. The reason disclosed by this witness of his being present along with other persons at the time of incident is not convincing besides being contradictory to the statements of other witnesses and the First Information Report. In the First Information Report Chhabinath P.W. 1 mentioned that he, his father Subedar, uncle Chhotey Lal and Shripal son of Kamta Prasad and Ram Kishore were going back to their village after attending the date of the proceedings under Sections 107/117, Cr.P.C. In the First Information Report, it was the definite case of the prosecution that Shripal also had gone to Court to attend the date of the aforesaid case and it was nowhere disclosed that he met the other persons in the way at 'Phatak'. This was also not disclosed by P.W. 1 Chhabinath to the Investigating Officer in his statements recorded under Section 161, Cr.P.C. It would, thus, appear that at the initial stage the case put forward by the first informant was that Shripal had also gone to the Court; whereas during the trial a development was made that Shripal had gone to Hardoi market and met Chhabinath and others at the 'Phatak', where he was waiting for boarding Bus. 20. From the above discussion, it is, therefore, clear that all the three eye-witnesses, produced by the prosecution, were inimical, partisan and chance witnesses. Having regard to the fact that the place of incident was situated in a jungle and the evidence consists of partisan, inimical and chance witnesses, their testimony had to be examined and scrutinised with Care and caution before being accepted. In the case *State of U.P. v. Sughar Singh* AIR 1978 SC 191 : 1978 All LJ 466, it was held that the evidence of a partisan witness ;has to be viewed with caution, but that by itself cannot be a sufficient ground to reject it, unless the same is found to be untruthful by reason of other infirmities. Similarly in another decision in *Arjun v. State of Rajasthan* (1994) 5 JT (SC) 410 : AIR 1994 SC 2507, it was held that it is not a safe rule to reject the testimony of the witnesses merely on the ground that they are inimical to the

accused and/or close relatives of the deceased. In such a situation it only puts the Court with a solemm duty to make deeper probe and scrutinise the evidence with more than ordinary care. Similar view was also expressed in the case of Shiv Nath Singh v. State of U.P. (1994) 1 JT (SC) 423 : 1994 All LJ 1038.

21. Keeping these principles in view, we have examined the evidence of the three eye-witnesses, namely Chhabinath P.W. 1, Ram Kishore P.W. 2 and Shripal P.W. 3 in a realistic manner having due regard to the surrounding facts and circumstances and find that the same falls below the standard required to be achieved to demand conviction.

22. As already stated above, it was highly doubtful if Subedar had gone to Court in connection with the proceedings under Sections 107/117, Cr.P.C. and was being accompanied by Chhabinath, Ram Kishan and Shripal. According to Chhabinath P.W. 1 when they took Subedar in an unconscious state from the place of occurrence to the District Hospital, Hardoi, all the three witnesses accompanied Subedar. When Dr. Kapoor declared that Subedar had already died, Chhabinath P.W. 1 left the dead body in the care of his companions. Shripal P.W. 3 was closely related to Subedar, while Ram Kishore P.W. 2 also must have been highly interested in Subedar, if in fact the latter was doing pairvi for him in proceedings under Sections 107/117, Cr.P.C. However, surprisingly none of these two witnesses could be found by the Investigating Officer in the District Hospital, when he reached there soon alter the lodging of the First Information Report. As per the Investigating Officer S.I. Rais Ahmad P.W. 4, he recorded the statement of Ram Kishore P.W. 2 in the morning of 8-10-78 at the place of incident as he was not available during the night either in the District Hospital near the dead body or at the scene of occurrence. It has also come in evidence that witness Shripal could be interrogated by me Investigating Officer on the next day only in the evening at about 5.00 p.m., meaning thereby that Shripal was also not available to the Investigating Officer during the night or in the morning and not even at the time when the Investigating Officer completed the inquest. When Chhabinath had left the dead body of Subedar in the care of Ram Kishore P.W. 2 and Shripal P.W. 3, who were closely related to the deceased, the conduct of these witnesses in leaving the dead body unattended was highly unnatural and inconsistent with

normal human conduct which creates doubt about their presence at the time of the incident. Their delayed interrogation by the Investigating Officer further lends support to this Doubt.

23. The evidence discloses that the accused persons had no direct motive against Subedar deceased and Ram Kishore P.W. 2 was their staunch enemy. According to the prosecution case Ram Kishore P.W. 2 was also accompanying Subedar. The accused persons had selected an isolated place and were waiting there behind the bushes having loaded fire-arms with a pre-determined plan, it was most unlikely that they would have spared Ram Kishore P.W. 2 untouched even after finding that he had witnessed the incident and was accompanying the deceased.

24. There is yet another glaring difficulty in accepting the evidence of the eye-witnesses and it is that the version of the incident as put forward by these witnesses is not only inconsistent with human normal conduct, but is also in conflict with the medical evidence. It does not sound to reason that when the accused persons were waiting with a predetermined plan to commit the murder of Subedar and three of them were armed with loaded fire-arms, they would assault Subedar only with lathis specially when Subedar had started moving towards east to save himself and would use the fire-arms only when Subedar fell down on the ground and not before that. This looks to be somewhat inconceivable and against the normal human reaction and conduct. According to the eye-witness account, only two accused persons, namely Piyarey Lal and Ram Narain were having lathis. Piyarey Lal, as per the evidence on record, was an old man of about 65-70 years of age and was having cataract in both of his eyes. As per the statement of Dr. A. N. Singh D.W. 1 the right thumb of Piyarey Lal was altogether missing from its base. A perusal of the post-mortem examination shows that as many as eleven blunt weapon injuries including three on head were found on the body of the deceased. It looks to be doubtful that the two appellants, namely Piyarey Lal and Ram Narain were able to cause a larger number of lathi injuries despite the fact that Piyarey Lal was an old, feeble and infirm person. When the accused persons had made up a plan to kill Subedar and had selected a place removed far away from village Abadi, it does not seem probable that the assault would have taken place in the manner as stated by the witnesses. Not only this, the medical

evidence is in sharp conflict with the ocular version of the incident.

25. Injury No. 1 as per the post-mortem report, was a fire arm wound of entry 3 cm. x 2 cm. x bone deep on the left side of the face, just beside the left nostril and 2.5 cm. below the lower eye lid. This injury had blackening around the wound. Injury No. 2 is the wound of exit corresponding to injury No. 1 and seat of this injury was socket of the right eye destructing the whole of eye ball. All the three eyewitnesses have categorically stated that when Subedar had fallen down on the ground after the assault by lathi Walas, the three accused, who were armed with fire-arms, fired one shot each from their respective fire-arm and 'during' the entire firing Subedar laid on the ground and accused persons remained standing. At that time the head of Subedar was towards east and his feet towards west. He was lying with his chest upwards. Mahendra accused fired one shot from his gun from south from a distance of 2-3 paces, while Dayaloo and Barkhannoo accused fired one shot each from their fire-arms from west from a distance of 5-6 paces. Dr. A. N. Singh P.W. 6, who conducted the post-mortem examination, in his statement before the Court stated that the direction of injuries Nos. 1 and 2 was upwards. He, in clear terms, opined that if the assailant was in a standing position and the victim was lying on the ground when the shot was fired, in that event injuries Nos. 1 and 2 could not be caused. We have given our anxious thoughts to this part of the statement of Dr. A. N. Singh P.W. 6 and find no good reason to differ from the opinion expressed by him. The learned Additional Sessions Judge has referred to that part of the statement of Dr. Singh wherein he stated that if the victim was lying on his right side and the shot was fired from left, injury No. 1 could be caused. Dr. Singh made this statement in the examination-in-chief, but in the cross-examination when his attention was specifically invited to the situation that if when the shot was fired the assailant was in a standing position and victim was lying on the ground, Dr. Singh firmly opined that in that event there was no possibility of injuries Nos. 1 and 2 being caused on the victim. The learned Additional Sessions Judge, to us, appears to have over-looked the direction of injury No. 1 which was upwards as slated by Dr. Singh, as also is apparent from the persual of the post-mortem report. The wound of entry was on the left side of face near left nostril and the exit wound was in the socket of right eye ball, meaning thereby that the direction of the shot of injury No. 1 was upwards and from left to right. That being

the position, we agree with the opinion of Dr. Singh P.W. 6 that injuries Nos. 1 and 2 could not be caused in the manner as stated by the three eye-witnesses. It is also pertinent to note that injury No. 1 had blackening around the wound. This injury was thus caused from a close range. However, none of the accused persons is alleged to have fired from a close range. Injuries Nos. 11 and 12 are other two fire arm injuries. Injury No. 11 was multiple fire arm wounds of entry of the size of 22 Cms. x 11 Cms. on the front of right forearm and each wound was of the size of 0.25 cm. x 0.25 cm., while injury No. 12 was a firearm wound of entry of the size of 0.25 ..x 0.25 x muscle deep on the front of right forearm, 6 cm. above the elbow. Dr. A. N. Singh P. W. 6 in his cross-examination also admitted that there was a great possibility that injuries Nos. 11 and 12 were caused by a single shot. From the seat of the injuries and their nature, it is apparent that these two injuries were caused from a long distance. According to the eye-witnesses Barhkannoo was having a gun and Dayaloo possessed a country made pistol and they both fired one shot each from their respective weapons on Subedar from western side from a distance of 5-6 paces. There seems to be weight in the opinion of Dr. Singh that there was a greater possibility that injuries Nos. 11 and ! 2 were caused by a single shot from a long distance. The evidence of the eyewitnesses is, however, opposed to it. After examining the entire matter carefully, we are of the opinion that injuries found on the dead body of Subedar could not be caused in the manner indicated by the prosecution witnesses in their evidence which makes their presence at the scene of occurrence highly doubtful.

26. Apart from the above infirmities, the First Information Report in the present case also looked to be a suspicious document. The First Information Report is alleged to have been recorded at 7.15 p.m. on the oral dictation of Chhabinath. In the General Diary entry, whereby case was registered at the police station, there is no mention of assault on the deceased by lathi. P.W. 5 Head Constable Onkar Nath Bajpai in his cross-examination admitted that in the General Diary entry there was only a mention of murder by the use of fire-arm. There seems to be weight in the argument of the learned counsel for the appellants that had the First Information Report come into existence at 9.15 p.m. such an omission would not have occurred in the General Diary entry. Absence of mention of assault by lathi in the General Diary entry lends supports to the defence contention that up to the

time when the matter was reported to the police, it was not known that deceased had also suffered lathi injuries. Further it is admitted by P. W. 5 that there is overwriting in the General Diary entries Nos. 36 to 60. The General Diary entry in question was recorded at serial No. 58. P. W. 5 tried to explain these over-writings by stating that a mistake had occurred at serial No. 36 and over writing in other entries was the result of correction. It would follow that the General Diary entries were not made at the time when they purport to have been made and they were most likely made at one point of time. If the mistake had occurred in putting serial No. 36 and if the entry had been made at the purported time, mistake would not have occurred at serial No. 58, which was made much later in point of time. This circumstance coupled with the facts that the inquest was not made during the night, that the statements of the eye-witnesses named in the First Information Report were not recorded during the night, though they were alleged to be present in the hospital near the dead body being close relatives of the deceased, leads to a suspicion that most likely the First Information Report was not recorded during the night at the time it purports to have been made in the police papers. In the case of *Maharaj Singh v. State of U.P.* (1994) 3 JT (SC) 440 : 1994 All LJ 1032 it was held that with a view to determine whether the First Information Report was lodged at the time it is alleged to have been recorded, the Courts generally look for certain external checks. One of the checks is the receipt of the copy of F.I.R. called a Special Report in a murder case, by the local Magistrate. If this report is received late by the Magistrate, it gives rise to an inference that the F.I.R. was not lodged at the time it is alleged to have been recorded unless of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the F.I.R. by the local Magistrate. In the present case there is no positive evidence to show as to when the Special Report was despatched from the police station and at what point of time the same was received by the Magistrate. The dead body after inquest was sent in the afternoon of 8-10-78 and the papers were also received by the doctor in the afternoon of 8-10-78. On the check report Ex. Ka-1, we find an endorsement of the 1 Circle Officer of 9-10-78 to the effect that the report be sent to the Court. No explanation of any kind whatsoever was offered or given by the prosecution about this late endorsement of the Circle Officer. In the background of these facts and circumstances and having

regard to the fact that Chhabinath P.W. I was himself u clerk of a lawyer, we feel that the possibility of (he present appellants having been falsely nominated due to enmity or under suspicion at the instance of Ram Kishore P. W. 2 and his party men cannot be ruled out.

27. After having carefully examined the evidence and other materials on record in the light of the surrounding circumstances, we are unable to endorse the decision of the trial Court or to uphold the conviction of the appellants and in our opinion the appellants were entitled to get the benefit of doubt.

28. We accordingly allow the appeals, set aside the conviction and acquit the appellants of the offences charged for. The appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

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