

**Ayodhya and ors. Vs. State of U.P. and Etc.**

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**SooperKanoon Citation :** [sooperkanoon.com/484437](http://sooperkanoon.com/484437)

**Court :** Allahabad

**Decided On :** Oct-04-1996

**Reported in :** 1997CriLJ2654

**Judge :** N.L. Ganguly and ;B.K. Sharma, JJ.

**Acts :** Indian Panel Code, 1860 - Sections 147, 148, 149, 302, 307, 323, 324, 425, 426 and 449; Code of Criminal Procedure (CrPC) - Sections 107, 161 and 164; [Evidence Act, 1872](#) - Sections 145

**Appeal No. :** Criminal Appeal No. 2623 of 1978 Connected with Govt. Appeal No. 153 of 1979

**Appellant :** Ayodhya and ors.

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

**Advocate for Def. :** A.G.A.

**Advocate for Pet/Ap. :** A.D. Giri and ;S.K. Agrawal, Advs.

**Disposition :** Appeal allowed

**Judgement :**

**N.L. Ganguly, J.**

1. These two connected appeals arise out of the judgment and order of Sri Suresh Chandra Srivastava, v. Addl. District & Sessions Judge, Deoria dated 16-9-1978 in S.T. No. 155 of 1976 convicting and sentencing the appellants of Criminal Appeal No. 2523 of 1978. Appellant Nos. 1 and 3 Ayodhya and Murlidhar were convicted under Section 148, I.P.C. and sentenced to two years R.I., under Section 307, I.P.C. and sentenced to five years R.I., convicted under Section 426, I.P.C. and sentenced to one month R.I., convicted under Section 449, I.P.C. and sentenced to ten years R.I., under Section 302/149, I.P.C. for life imprisonment and 323, I.P.C. to six months R.I. Appellants No. 2, 4 and 5 Paramhansh, Madho and Chandra Deo have been convicted under Section 148 I.P.C. and sentenced to two years R.I., under Section 426, I.P.C. sentenced to one month R.I., under Section 449, I.P.C. sentenced to ten years R.I., under Section 302/149, I.P.C. and 307/149 I.P.C. for life imprisonment and for a period of five years R.I. respectively and under Section 323/149 sentenced to four months R.I. and under Section 324/149 I.P.C. and sentenced to six months R.I. All the sentences to run concurrently.

2. Government Appeal No. 153 of 1979 was filed against Raj Kishore and 8 others for allowing the appeal and setting aside the judgment and order of acquittal and convicting the accused opposite parties, according to law.

3. The prosecution case, as disclosed by the informant Ram Nakshatra PW-5 shows that there was old enmity on account of the cases going on between the family members of the informant Rain Nakshatra and accused Had Shanker and his family members. Had Shanker accused, who is resident of village Chhitrauli P.S. Bhatni had formed a group of badmas an in the village. Raghu Pandey was the brother of Ram Nakshatra, informant who was employed at Deoria block. He used to come to the village stealthily on account of fear of the accused persons. On 13th September, 1975 Raghunath Pandey had come to village Chhatrauli. On the said elate at about 5.30/6 in the afternoon Raghunath Pandey deceased Nathuni Yadav PW-6 and one other person Shyamdeo had gone to see his paddy field in the west of village Chhatrauli and was returning to their houses. At the grove of Durga Pandey, Durga Pandey and another person Vishwanath enquired about his welfare. Raghunath Pandey stopped and started talking to them. In the mean lime, accused Ayodhya armed with a gun, Murlidhar with a country-made

pistol, Paramhansh with a spear, Madhan and Shridutt armed with pharsas (spade) reached there. Accused Ayodhya accosted and asked to kill Raghunath Pandey. Accused Ayodhya, Murlidhar fired with their gun and pistol. Rahunath Pandey and Nathuni Yadav received gun shot injuries.

4. Raghunath Pandey and Nathuni Yadav ran towards the house of Raghunath Pandey raising voice and crying. The above mentioned five accused persons chased them. Raghunath Pandey and Nathuni Yadav had closed the door after entering in the house. Accused persons Madho, Durgarnani, Jagannath armed with spade (Pharsas), accused persons Doodhnath and Gurdali alias Vishwanalh armed with spears, Raj Kishore, Had Shanker and Ram Chandra armed with lathis, Chandra Deo accused armed with Gandasi reached the house of Raghu Nath Pandey and assembled there. Accused Had Shanker accosted and challenged the accused persons and he alongwith Paramhansh, Murlidhar, Madan, Gurdali and Chandra Deo entered into the house by breaking open the northern door of the house. Raghunath Pandey rushed and ran to the southern room and tried to conceal in the said room by bolting it. The accused persons Madho, Madan, Durgamani and Paramhansh by putting a ladder on the roof from the said room and removed the Khaprail (tiles) of the roof and entered in the said room. Accused Ayodhya and Murlidhar with their gun and pistol fired in the Courtyard and caused injuries to Nathuni Yadav and thereafter accused Ayodhya, Chandra Deo, Gurdali, Shri Dutt and Murlidhar started breaking the door in which Raghunath Pandey deceased had concealed himself. They had broken the door and entered into the room. Accused persons Paramhansh, Shri Dutt, Chandra Deo, Madho, Madan and Durgamani dragged Raghu Nath Pandey, out of the said room to the Court yard and started assaulting Raghu Nath Pandey with their respective weapons. Raghu Nath Pandey died on the spot. The three inmates ladies of the house Smt. Ram Rati, Smt. Laldei and Smt. Phoolmati who had tried to save Raghu Nath Pandey were also assaulted by the accused persons. Smt. Ramrati had received gun shot and pistol injuries. Ram Nakshatra (PW-5) soon after the incident on the same day at 8.15 p.m. lodged a report at the P.S. Bhatni.

5. After lodging of the report. PW-2 Bharat Singh, constable prepared the chick report. The dead body of the deceased Raghu Nalh Pandey was sent for post

mortem examination PW-1 Dr. K.B. Varshney performed the post mortem examination of the deceased at 10 a.m. on 15th September, 1974. The ante mortem injuries found on the dead body are as under: --

1. Incised wound 1 x 1/5' x bone deep on right side forehead direction vertical.
2. Incised wound 1' x x bone deep on right side forehead 2' right to injury No. 1 oblique.
3. Incised wound 1' x 3/4' x bone deep on right side scalp 1' above right ear vertical.
4. Lacerated wound 2' x 1/3' x bone deep on centre of scalp.
5. Three lacerated wounds at about 1' apart size 1/2' x 1/5' x skin deep 1' x 1/5' x skin deep, 3/4' x 1/10' x skin deep on left side of scalp 2' above left ear.
6. Incised wound 2' x 1 1/2' x muscle deep on left upper arm front upper part.
7. Lacerated wound 1' x 1/4' x skin deep on left upper arm 3' from injury No. 5 below.
8. Three contusions on left upper arm outer part 2' x ' x 10' x and 3' x
9. Two lacerated wounds on left upper arm 1' x ' x skin deep. 1' x x skin deep middle front.
10. Left ring finger is sharply cut through and through at distal phalanges.
11. Incised wound on dorsum of left middle finger at level of cut end of left ring finger on distal phalanges size ' x 1/4' x bone deep dorsally.
12. Abrasion 2' x 1/10' on left thigh centre and upper arm.
13. Lacerated wound ' x 1/4' x skin deep on left groin.
14. Lacerated wound 1' x 3/4' x skin deep on Rt thigh medially at middle.
15. Lacerated wound 1' x 3/4' x skin deep on Rt. ankle front.

16. Lacerated wound 1' x 1/10' x skin deep on Rt leg front upper part.
  17. Four abrasions on Rt. thigh 3' x 1/10' to 5' x 1/10' size.
  18. Incised wound 3' x 2' x bone deep on dorsum of Rt. hand cutting dorsal lentous and metacarpels 12, 3, 4
  19. Incised wound 2' x 1' x muscle deep on Rt. wrist dorsally.
  20. Incised wound 1' x ' x skin deep ' above the injury No. 19 on right wrist.
  21. Contusions 2' x ' on Rt. fore arm outer middle.
  22. Penetrating wound with sharp margins 2' x 1' x cavity deep above umbilicus and omphalic coming out. Direction pro. . .
  23. Penetrating wound 1' x 1' x cavity deep on epigastrium with sharp margin.
  24. Incised wound 1' x ' on Rt. side back lower part.
  25. Contusion 1' x 1/3' on Rt. side back middle.
  26. Circular contusion 3/4' diameter on centre of middle of back.
  27. Penetrating wound 2' x ' x cavity deep on left nipple with sharp margins direction lower and Rt. side.
  28. Penetrating wound 5' in number in an area of 5' x 5' on left side of chest lower left axillary area, left upper abdomen all cavity deep size 1' x ' to 1' x 1' all having sharp margins.
6. No fire arm wound present nor any pellet in the body present.
7. Scalp and skull fracture of Rt. parietal bone were present, penetrating wounds were present under injury Nos. 27 and 28 on left side of wall. Left lung was injured due to internal injury No. 27. Pericardium and heart were punctured due to external injury no. 27. Abdomen walls were punctured due to internal injury nos. 22 and 23. Both thoracic cavity were full of blood. Stomach fluid was black about 2

oz. present and same has come out through injury No. 2 wounds corresponding to external injury No. 22 and 23. In the opinion of the doctor, the cause of death was due . to shock and haemorrhage. The Doctor has proved Ext. Ka. 1 and said that rest of the injuries were caused by lathi, sharp edged ballam, Pharsa and gandasas.

8. PW-3 Dr. B.P. Gupta of the District Hospital, Deoria had examined the injuries of injured Nathuni Yadav (PW-6) at 1.15 p.m. on 14-9-75. The injuries of Nathuni Yadav are quoted as under.

1. Multiple gun shot wound of entry 21 in number 4' x 4' area on the left side chest front each measuring 1/10' x 1/10' circular. No surgical emphysema No. scorching and tattooing present. Advised X-ray of the chest kept J.O.

2. Gun shot wound 3' x 1 ' x muscle deep on the front and inner aspect of left forearm middle part 3 ' above the wrist. No scorching, no tattooing present. Margin inverted, lacerated kept under observation. Adv. X-ray.

3. Gun shot wound 5 ' x 2 ' x muscle deep on the front and inner aspect of upper part of left forearm. Margin lacerated and inverted. No tattooing, no scorching present. Kept under observation. A. v. X-ray of upper forearm. Adv. X-ray.

9. PW-4 Dr. O.P. Goyal had examined the injuries of Smt. Ram Rati on 14-9-75 at 6.45 p.m. and found one injury in between axilla 1/4'x 1/4' abrasion which was about a day old which according to his opinion could have been caused by pellet rubbing. The injury reports of Nathuni Yadav (PW-6) and Ram Rati (PW-7) have been proved and marked Exts. Ka-10 and 9, respectively.

10. It is said that Smt. Laldei and Smt. Phoolmati Devi, inmates of the house had also received injuries who were examined by Dr. Sadanand Gupta (PW-9) on 14-9-75 at 11.50 a.m. and 11.30 a.m. respectively whose injury reports have been proved and marked as Ext. Ks 24 and 25, respectively. These two injured Smt. Laldei and Smt. Phoolmati were not produced as witnesses before the Court.

11. The injuries of Smt. Laldei and Smt. Phoolmati are quoted as under: --

Smt. Laldei

1. Reddish bruise 1' x ' x 2' x ' over left illiac crest place. Smt. Phoolmati:

1. Reddish bruise 1 1/4' x 3/10' x 11/4' x 4/10' over Rt. side back middle part.

2. Reddish bruise 3' 5/10' x 5' x 4/10', 4' x 1/10' over Rt. side back upper part.

3. Reddish bruise 2' x ' localised swelling over upper part of front of left hand.  
Complaints of pain.

4. Reddish Bruise 1' x 1' localised swelling over dorsal aspect near right wrist.

5. Localised swelling over dorsal aspect of Rt. legs middle fingers.

12. PW-11 Sri Dinesh Rai is the Station Officer of P.S. Bhatni who had investigated the case. On 13th September, 1975 he had visited the village Chhitrauli with four constables and informant Ram Nakshatra. He had recorded the statements of the witnesses. The inquest memo could not be prepared the same night, it was prepared on 14th September, 1975 in the morning. The dead body was sealed in cloth and was sent for post mortem examination through constable PW-8 Sri Sita Ram Yadav Sub-Inspector was the second S.I. in P.S. Bhatni. He was deputed by the Station Officer to to the village and search and arrest the accused persons. They were not available on searching the village. He had recovered the plain and blood stained earth from the place of incident and sent the same for chemical examination. The properties of accused Raj Kishore, Durgamani and others were attached by him and were given in the custody of the supurdgar. After investigation, the Investigating Officer submitted the charge-sheet against the accused persons.

The accused persons Ayodhya and Murlidhar were charged under Sections 148, 307, 449, 425, 302/149, 323/149 and 324/149, I.P.C. Accused Paramhansh, Madan and Shridutt were charged under Sections 148, 449, 425, 307/149, 302/149, 323/149, 324/149, I.P.C. Accused Madho, Durgamani, Chandra Deo and Gurdeli were charged under Sections 148, 449, 425, 307/149, 302/149, 323/149, 324/149, I.P.C. Accused Doodhnath and Jagannath were charged under Sections

148, 325/149, 302/149, 323/149, 324/ 149, I.P.C. Accused Hari Shanker was charged under Sections 147, 449, 425/149, 302/149, 307/149, 323/149, 324/149, I.P.C. Accused Raj Kishore and Ram Chandra were charged under Section 147, 426/149, 302/149, 307/149, 323/ 149, 324/149, I.P.C.

13. The accused persons pleaded not guilty and claimed to be tried.

14. The prosecution in trial examined PW-5 Ram Nakshatra (not injured witness), PW-6 Nathuni Yaday and PW-7 Ram Rati, who are injured witness. PW-10 Vishwanath Pandey was examined as one of the eye witness, but he is not an injured witness.

15. PW-1 Dr. K.B. Varshney, PW-2 Bharath Singh, Constable PW-3 Dr. B.P. Gupta, PW-4 Dr. O.P. Goyal, PW-8 Sita Ram Yadav, S.I. PW-9 Dr. Sadanand Gupta and PW-11 Sri Dinesh Rai, I.O. were examined as formal witnesses in the case.

16. We have heard Sri A.D. Giri, Senior Advocate, appearing for the appellants in Criminal Appeal No. 2623 of 1995 on behalf of Ayodhya and 4 others. He also appeared as counsel for the accused respondents in the Government Appeal. Sri Jagdish Tewari, A.G.A. argued the Government Appeal against the judgment and acquittal of Raj Kishore.

17. We have heard the learned counsel for the parties and perused the record in detail. The judgment of the trial Court was also placed by the learned counsel for the parties before us.

18. PW-5 Ram Nakshatra in his statement before the Court stated the relationship of the accused Hari Shanker inter se which is tabulated as under: --

|                                 |         |         |         |           |         |       |
|---------------------------------|---------|---------|---------|-----------|---------|-------|
| Hari                            | Shanker | Brij    | Kishore | Sri       | Krishna | Roshi |
| _____                           |         |         |         |           |         | Param |
| Hansh Kashi                     | Ayodhya | Triyogi | Ayodhya | (accused) | _____   |       |
| Subhash Madho Munendra(Accused) |         |         |         |           |         |       |



19. Ram Nakshatra (PW-5) further stated that accused Ram Chandra Pandey, is the maternal cousin of accused Ayodhya. Accused Murlidhar and Madan are brothers, Jagannath and Doodhnath are real brothers, accused Raj Kishore and accused Durgamani are uncles and nephew. Accused Chandradeo and Gurdeli are accused in other (contd. on col. 2) cases alongwith accused Ayodhya. The accused Chandradeo and Gurdeli are on visiting terms with Ayodhya. Witness Nakshatra stated that there had been a case under Section 107 Cr. P.C. between Harishanker and his family members on one side and the family members of deceased Raghu Nath Pandey and accused Doodh Nath and Jagannath had filed civil suit in Civil Court which was dismissed. Prior to the present occurrence, accused Ayodhya, Murlidhar, Shri Dutt, accused Raj Kishore, Subhash and kashi had assaulted him. The report was lodged and the case was pending at that. time. He corroborated the FIR version that Raghunath was working in Deoria Block and on the date of occurrence, he had come on leave to the village. He narrated that in the evening at about 5.30 and 6 p.m. when Raghu Nath Panday was returning after seeing his paddy field alongwith Nathuni Yadav (PW-5) Shyam Deo near the grove of flower of Durga Pandey where he was talking with Durga and his brother Vishwanath who had stopped and enquired about his welfare. At the said time, Ram Nakshatra (PW-5) was cutting grass on the north east of the flower grover near Vishwanath's field. There he heard the noise of accosting and saw the accused persons Ayodhya armed with gun, Murlidhar with pistol, Paramhansh with ballam who had accosted, Murlidhar and Ayodhya fired from their fire arms, which hit the deceased and Nathuni Yadav. After receiving the gun shot and pistol shots the deceased and Nathuni Yadav ran towards the house Shyam Deo had rushed near them. Vishwanath (PW-10) ran away towards the east and had gone to his house and started raising alarm by running helterkelter. Raghu Nath Pandey deceased and Nathuni Yadav (PW-5) had closed the door of house after entering in it. In the mean time, all the five accused persons chased and reached there. Besides the said five accused persons, Madho, Durga and Jagannath accused persons armed with pharsas, Gurdeli and Doodhnath with spears, Chandra Deo with gandasa, Raj Kishore, Hari Shanker and Ram Chandra were armed with lathis. On the accosting and challenge by Hari Shanker accused that today do not miss the chance. The accused persons started breaking the door of the house and

Ram Nakshatra (PW-5) saw that they entered by breaking open the door and remained inside the house for half an hour. This witness stated to have entered the house of the victim after the accused persons have left the place. Ram Nakshatra (PW-5) after entering into the house of the victim saw Nathuni Yadav lying injured. Smt. Laldei, Smt. Phoolmati and Smt. Ram Rati had received injuries. Raghu Nath Pandey was lying dead in the Court-yard. His brother was also present there. Nathuni Yadav (PW-6) and inmates ladies of the house informed the details to the informant who wrote the FIR and submitted a report to P.S. Bhatni. The Sub, Inspector alongwith 3-4 constables of the village recorded the statements of the witnesses, took samples of the blood stained and plain earth panchayat-nama was prepared.

20. Sri A.D. Giri pointed out after placing the FIR Ex. Ka. 10 that the occurrence took place at two places in continuation. He submitted that the first part of the incident took place near the (lower grove of Durga Pandey when Raghunath Pandey deceased alongwith Nathuni Yadav (PW-6) and Shyam Deo were returning after visiting the paddy field towards the house. When they had reached the flower grove of Durga Pandey and Vishwanath PW-1 started enquiring about the welfare of the deceased Raghunath Pandey who had estopped and was talking with them. In the mean time Ayodhya, Paramhans, Murlidhar, Madan Pandey and Shridutt of the village armed with gun, pistol, gandasa, and ballam arrived and on the accosting of Ayodhya accused attacked the deceased, Raghunath Pandey to kill him. Ayodhya accused with his gun and Murlidhar accused with pistol had fired which hit Raghunath Pandey deceased and Nathuni Yadav PW-5. After receiving the injuries, these two persons ran towards the house raising voice and the accused persons started chasing them.

20A. Shri A.D. Giri thereafter submitted that after this part of the occurrence, the deceased Raghunath Pandey and Nathuni Yadav PW-6 entered the house and closed the door. In the meantime, Madho, Raj Kishore, Durgamani, Doodhnath, Jagannath, Hari Shanker of village Chhitrauli, Gurdeli accused of village Demuktola Tiwaripura, Chandradeo of village Piyara Bithai, Ram Chandra Pandey of village Matiara PS Khukhundoo armed with spear, pharsa, gandasa and lathi reached the door of the house of informant Ram Nakshatra and deceased

Raghunath Pandey. Accused Hari Shanker accosted and instigated not to miss today and some of the accused persons started breaking open the door and after breaking open the door, entered the house, started searching deceased Raghunath Pandey and Nathuni Yadav. The inmates ladies of the house started raising cries. Inside the house, Ayodhya and Murlidhar had fired several shots. Since the door had not till then broken, Madho, Madan Pandey, Durgamani and Paramhansh armed with spear, pharsa and gandasa by putting a ladder climbed on the roof and removed the tiles of the roof to the extent to enable them to enter inside the room. In the mean time, the door was also broken. The accused persons namely Paramhansh, Sridutt, Chandradeo, Madho, Madan and Durgamani dragged the deceased to the Court-yard and assaulted him with spear, pharsa, gandasa and lathis and killed him there. Nathuni Yadav was also injured by pistol shot. The Bhabhi and aunt of the informant tried to save the deceased who were also injured by lathi and fire arms. Sri. Giri submitted that the second part of the occurrence which no doubt if in continuation of the first part, is specified to the actual role of the accused persons in causing the injuries.

21. Shri Giri submitted that five accused persons namely Ayodhya, Paramhansh, Murlidhar, Madho and Chandradeo have been convicted and sentenced, nine accused persons Raj Kishore, Doodh Nath, Hari Shanker, Sri Dutt, Madan, Jagar Nath, Durga Mani, Ram Chander, and Gurdeli alias Vishwanath have been acquitted. He submitted that the conviction and sentence awarded by the Court below to the five accused appellants, mentioned above is wholly unwarranted. He submitted that the findings of the Court below acquitting nine accused persons and the reasonings given by the Court below for their acquittal was fully available to the present five appellants. The Court below committed the mistake in making out a third case for convicting Ayodhya and four others which is wholly unwarranted. Sri Giri pointed out that the findings of the learned Sessions Judge about the reliability of FIR about the non participation of co-accused persons namely Raj Kishore, Doodh Nath, Hari Shanker, Sri Dutt, Madan, Jagar Nath, Durga Mani, Ram Chander and Gurdeli were such findings of fact after appraisal of evidence by the Sessions Court, benefit of which should have been given to the present appellants. Shri Giri submitted that the witness PW-5 Ram Nakshatra and Vishwanath Pandey PW-10 are not reliable witnesses and their evidence have

been discarded by the Sessions Judge. Vishwanath, though had claimed to be present at the time of occurrence, when firing was done, he received no injury at all.

22. Sri Giri also submitted that PW-6 Nathuni Yadav, who is an injured witness, had given a statement in presence of the Magistrate to Dr. Sadanand Gupta PW-9. In the said statement, Nathuni Yadav PW-6 had named seven persons out of which five have been convicted and sentenced and two persons named in the said previous statement before Dr. Sadanand Gupta were Subhash Mtisra and Rani Briksha. These two names were not mentioned in the FIR. They were not prosecuted. Sri Giri laid much emphasis that the previous statement of Nathuni Yadav PW-6 before the Doctor was concealed by the prosecution which was a material piece of evidence which creates doubt in the entire prosecution case. The learned counsel also referred to the passage of the judgment of the Court below where it was held that the origin of the marpit itself was doubtful Shri Giri submitted that the FIR was not lodged at the lime as said by the prosecution. The informant Rain Nakshatra was not examined under Section 161 Cr. P.C. from the record. Sri Giri pointed out that there was forgery in the police record about the recording of the time in the inquest memo Ext. Ka 2, The abovcrnentioncd points are the broad points urged by Sri A.D. Giri.

23. Before proceeding further and examining the arguments advanced by Sri Giri, we would like to refer the findings of the Sessions Judge in the judgment impugned.

24. In para 36 of the judgment, the learned Sessions Judge recorded the finding that the occurrence had not taken place at the flower grove of Durga Pandey. He also found that the FIR could not have been lodged at the police station at 8.15 p.m. The interpolation in the time recorded in the panchayat nama Ext. Ka. 26 shows that 20.30 was interpolated and forged as 22.30.

25. Sri Giri placed before us the statement of PW-5 Ram Nakshatra informant of the FIR. He pointed out that it was stated that Ram Nakshatra PW-5 was cutting grass in the nearby plot of Vishwanath Pandey. The presence of Vishwanath Pandey PW-10 at the time of occurrence when the incident started has been

doubted by the Court below. The Sessions Judge in para 36 of the judgment referred to the statement of PW-11 Sri Dinesh Rai, I.O. who stated that there were two separate fields of Vishwanath Pandey. In the FIR Ram Nakshatra PW-5 had stated that his brother the deceased and Nathuni Yadav after receiving the fire arm injuries, ran raising voice towards the house. In the cross-examination of Nathuni Yadav PW-5, he denied that Raghunath Pandey deceased had received any injuries near the flower grove. PW-5 Ram Nakshatra had stated that Nathuni Yadav PW-6 had stated that Raghunath Pandey had received injuries in his arms, he has not seen causing of injuries to Raghunath Pandey.

26. Sri Giri submitted that Ram Nakshatra PW-5 and Vishwanath Pandey PW-10 are eyewitnesses, who are not injured witnesses. PW-6 Nathuni Yadav and PW-7 Smt. Ram Rati are the injured witnesses. Sri Giri placed the evidence of Nathuni Yadav PW-6 and Smt. Ram Rati PW-7 before us. The injuries received by PW-6 Nathuni Yadav is collected in the earlier part of the judgment. It is said that he had received injury at the flower grove of Vishwanath Pandey and had fallen down in the Varandah of the house of the deceased Raghunath Pandey. Nathuni Yadav was examined by Dr. B.P. Gupta. Medical Officer, Sadar Hospital, Deoria on 14-9-75 at 1.15 a.m. PW-9 Dr. Sadanand Gupta, M.O. Primary Health Centre, Bhatni Stated that Dr. R.S. Singh had recorded the statement of Nathuni Yadav in his presence between 10.55 p.m. to 11.15 p.m. He had proved the signature of Nathuni Yadav on the statement recorded by Dr. R.S. Singh. The Sub Divisional Officer (Ag), Bhatni was also present there who had also signed the statement. Nathuni Yadav PW-6 in his statement denied having given any statement to the Doctor at the hospital. In reply to question 62 Nathuni Yadav PW-6 denied having given any statement to the Doctor nor admitted the signature on the said statement. However in reply to question No. 64 Nathuni Yadav stated that the Doctor at Bhatni got his signature on blank paper. The statement of Nathuni Yadav recorded by the Doctor and proved by PW-9 Dr. Sadanand Gupta as Ext. Kha I was in the knowledge of the Investigating Officer but the said important piece of evidence was tried to be concealed by the prosecution.

27. As referred above that presence of PW-5 Ram Nakshatra informed and Vishwanath Pandey PW-10, who claimed themselves to be the eye witnesses,

have been discarded by the trial Court and the evidence of PW-6 Naihuni Yadav and PW-7 Smt. Ram Rati was discarded by the trial Court.

28. Sri Jagdish Tewari, A.G.A. submitted that the judgment and order of acquittal of nine accused persons of the charges is wholly illegal and perverse. He submitted that the judgment and order of acquittal of nine accused persons and the findings recorded by the Sessions Judge about them is of no consequence and no benefit could be given to these accused persons. He submitted that the Sessions Judge had wrongly without any basis of cogent reasons disbelieved the first part of the occurrence, as disclosed in the FIR. He submitted that the eye witnesses namely Vishwanath Pandey PW-10 Ram Nakshatra PW-5, though not injured in the incident, are reliable witnesses and their evidence could not have been discarded. Sri Jagdish Tewari, A.G.A. submitted that the evidence of PW-6 Nathuni Yadav and PW-7 Smt. Ram Rati who are injured witnesses have great evidentiary value. The evidence of Vishwanath Pandey PW-10 and Ram Nakshatra PW-5 who were at the spot when the marpit began, could not have been discarded.

29. Sri Jagdish Tewari, A.G.A. also submitted that the statement of Nathuni Yadav PW-6 said to be recorded by the Doctor in presence of Dr. Sadanand Gupta PW-9 is a fictitious document which was wholly unreliable, and concoction on the part of defence. He also submitted that Dr. Sadanand Gupta PW-9 with the Investigating Officer had conspired to spoil the prosecution case. Sri Jagdish Tewari placed before us Ext. Kha 1 and submitted that the writing of this document shows that it was so manipulated and written to fill up the whole page and the sizes of the letters show that it has been manufactured by the defence at a later stage to suit their defence. PW-6 Nathuni Yadav denied the making of dying declaration before the Doctor at the hospital and admitted to have made signature on blank paper. Sri Jagdish Tewari submitted that in the original record Ext. Kha 1 in the end it has been written 'MAI SAB PARKAR SAMAJH LIYA.' He referred to statement, of Dr. Sadanand Gupta PW-9 who stated that the statement was read over to Nathuni Yadav and the signature of Nathuni Yadav was made by him in his presence. Shri Tewari submitted that Dr. Sadanand Gupta has made a false statement that his evidence was wholly unreliable and Ext. Kha 1 that statement of Nathuni Yadav

injured in the hospital was wholly inadmissible in evidence. It was not proved by the Doctor who actually wrote the statement. Merely saying out by Dr. Sadanand Gupta that it was written in his presence and was read over to Nathuni Yadav, was not sufficient proof of the statement of Nathuni Yadav. He submitted that the evidence of Dr. Sadanand Gupta is wholly unreasonable, and not believable who was in-collusion with the accused persons. Sri Jagdish Tewari also submitted that the Magistrate S.D.O. (Ag) was present there and had signed the statement which shows that a Magistrate was present there and it was his duty to have recorded the statement of the injured witness after getting it certified by the Doctor that he was in a fit condition to make a statement. When Dr. Sadanand Gupta was in the witness box, the prosecution have not asked a single question as to why the other Doctor who recorded the statement was not produced nor it was suggested to him that the S.D.O. (Ag) was an Executive Magistrate competent to record the statements under Section 164 Cr.P.C. All Sub-Divisional Officers are not Executive Magistrates competent to record statements under Section 164 Cr. P.C. The submission of Sri Jagdish Tewari that a Magistrate was there, who was competent and he should have recorded the statement is without merit unless it was shown that there was an Executive Magistrate. We are not unaware that in several Departments, Sub-Divisional Officers are there who are not Executive Magistrates.

30. The Investigating Officer PW-11 Sri Dinesh Rai stated that during the investigation, he had come to know that statement of Nathuni Yadav was recorded by the Doctor at Bhatni Hospital. The Investigating Officer had not examined the Doctor of Bhatni Sri Jagdish Tewari submitted that Nathuni Yadav PW-6 has specifically having given the statement to the Doctor of Bhatni but stated to have made signature on blank paper. It is curious to note that Ram Nakshatra PW-5 himself had lodged the FIR at the police station. Ram Nakshatra PW-5 claimed himself to be an eye witness and had stated to have witnessed the occurrence which took place near the flower grove of Vishwanath Pandey and outside the house of deceased.

31. Sri Jagdish Tewari submitted that PW-7 Smt. Ram Rati is an injured witness and there is not good ground of discarding her statement.

32. When the Court is considering an appeal against a judgment and order of conviction of some of the co-accused in the same trial and also considering the Government Appeal against the judgment and order of acquittal of other co-accused persons, then it is the duty of the Court to examine and appraise the evidence of prosecution witnesses and defence itself. The State is not to suffer on the ground that certain findings of fact after appraisal of evidence, have been recorded by the trial Court by acquitting the same of the co-accused persons. When the Court is considering an appeal against the order of acquittal, its power to appraise the evidence on record is not limited or abridged. It has the power to appraise the evidence on record of all the witnesses but the Court will always be cautious while appraising the evidence on record and will not lightly brush aside the findings recorded by the Trial Judge after appraisal of evidence who had the opportunity of looking to the demeanour of the witnesses in the Court. The findings of the trial Court arrived after appraisal of evidence and demeanour of the witnesses is not likely to be brushed aside unless it is shown that the same is per se. perverse, and no person with average prudence would arrive at such a conclusion.

33. The Hon'ble Supreme Court in, 1994 Supp (3) SCC 137 (Krishna Reddy v. State of Karnataka) held that the Sessions Judge after giving good reasons for rejecting the evidence of all the witnesses which are correct and sound, interference in an appeal against acquittal by the High Court, in these circumstances, was uncalled for. In (1978) SCC 371 : (AIR 1979 SC 135) (Ganesh Bhavan Patel v. State of Maharashtra). The Apex Court was pleased to observe as under (at p. 143 of AIR):--The over-all view of the evidence taken by the trial Court was reasonable. While it is true that some of the reasons given by the trial Court if taken individually, do not appear to be substantial or irrefragable, but taken in their totality, they certainly render the evidence of the material prosecution witnesses unsafe to be acted upon.

The Apex Court observation while setting aside the judgment, reversing the judgment of the High Court by which the trial Court judgment was set aside observed as under (at p. 143 of AIR):-



All the infirmities and flaws pointed out by the trial Court assumed importance, when considered in the light of the all pervading circumstance that there was inordinate delay in recording Ravji' s statement (on the basis of which the 'FIR' was registered) and further delay in recording the statements of Waliji, Pramila and Kuvarbai. This circumstance, looming large in the back-ground, inevitably leads to the conclusion, that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion.

34. We have appraised the evidence on record, keeping in mind the law innunciated by the Hon'ble Supreme Court. We would like to deal with the evidence of PW-5 Ram Nakshatra and PW-10 Vishwanath Pandey who are not injured witnesses but said to be eye witnesses. Nathuni Yadav PW-6 had given his statement before the Doctor who has been proved by Dr. Sadanand Gupta marked as Ext. Kha 5. The submission of Sri Jagdish Tewari, A.G.A. that it was a forged and fictitious document and the manner of writing and the letters in the first part of the paper and in the end varies is not correct. We have ourselves looked to the original record Ext. Kha-1. We do not find any such material as submitted by Sri Jagdish Tewari. It is not possible to say that the writing in Ext. Kha 1 was not written at one sitting. It is not necessary that the size of letters would be exactly same from the top to bottom. The other submission of Sri Jagdish Tewari that in the end of Ext. Kha 1, Nathuni Yadav is said to have written 'MAI SAB PARKAR SAMAJH LI YA' is contradictory to what has been stated by Dr. Sadanand Gupta PW-9 who stated that the statement was read over to him. This is a minor variation. No question was put to Dr. Sadanand Gupta PW-9 when he was in the witness box to explain whether it was read over or the witness Nathuni Yadav wrote it himself If Sri Jagdish Tewari submitted that the said document is not a statement which would be used as a document for contradiction under Section 145 of the Evidence Act.

35. We do not agree to the submission. The statement of Nathuni Yadav PW-6 that his signature was taken in the hospital on bank paper was disbelieved by the trial Court. In Ext Kha 1 it was specifically stated that Nathuni Yadav and Raghunath Pandey were sitting at the door when Ayodhya and others were

chasing and surrounding them, and Raghunath Pandey went inside the house and bolted the door. Accused person Ayodhya broke open the door and went inside who received gunshot injuries. The statement Ext. Kha 1 is totally silent about the occurrence, as stated to have taken place near the flower grove of Durga Pandey. The trial Court disbelieved the statement of Nathuni Yadav. The other aspect of the matter, as found by the trial Court that PW-6 Nathuni Yadav is said to have received injuries in arms near the flower grove of Durga Pandey but no blood was found near the flower grove of Durga Pandey. The case of the prosecution that after receiving gun-shot injuries in the arm, Nathuni Yadav and Raghunath Pandey ran to the house and Raghunath Pandey bolted the door from inside and was pressing the door from inside when attempt was made to break open the door. In pressing the door, Nathuni Yadav must have applied force and there was all likelihood of bleeding from the gun-shot wounds inside the room also but no blood was found inside the room. PW-11 I.O. Sri Dinesh Rai stated that he could not find any blood inside the room. Thus, the Court below found that the evidence shows that Nathuni Yadav had not received any gunshot injuries outside, as stated by the prosecution. The Court below also appraised the evidence on record and observed that the enmity was with Raghunath Pandey and the assault was planned to murder Raghunath Pandey. It was said that fire arm shots were given from a distance of 8 to 10 paces near the flower grove but Raghunath Pandey had not received any fire arm injury there near the flower grove. The accused persons were chasing Raghunath Pandey with arms and according to the statement of PW-11 Sri Dinesh Rai, the distance is of 130 paces. The accused Persons simply chased the deceased and Nathuni Yadav did not try to use their weapons which were in their hands. The distance has been stated by Nathuri Yadav from the house of Raghunath Pandey and Hari Shanker about 150 to 200 paces and there were houses of Puja, Ali Hassan, Rajbali and Dallu etc. None of the witnesses of the nearby houses came to support the prosecution case. The story that Vishwanath Pandey PW-10 who claimed to be an eye witness and said to be present near the flower grove when he was cutting grass, was also disbelieved. His presence has been doubted by the learned Sessions Judge.

36. The other injured witness namely Smt. Ram Rati PW-7 stated in her statement that Nathuni Yadav was not on visiting terms at her husband's house. Nathuni

Yadav was resident of another quasba namely Telia Tola which is at a distance of 5-6 big has. The injuries of Smt. Ram Rati are very superficial i.e. abrasion 1/4' x 1/4' on the left axilla middle. She was examined on 14-9-75 at 6.45 p.m. Dr. O.P. Goyal PW-4 stated that the injury of Smt. Ram Rati could be made by scratching with nails, but the Court below was not fully satisfied with the statement of Smt. Ram Rati and we do not think it safe to place implicit reliance on her statement to arrive at a conclusion that 14 accused persons committed the offence, as stated by the prosecution.

37. The presence of PW-5 Ram Nakshatra and PW-10 Vishwanath Pandey, after appraisal of evidence by the trial Judge, was found to be doubtful. The Court below arrived at a conclusion on appraisal of evidence that presence of Vishwanath Pandey at the place of the incident, where the first occurrence took place, is doubtful. If the statement of Nathuni Yadav Ext. Kha 1 is correct, then there was no occasion for Vishwanath Pandey to be present near the flower grove of Durga Pandey. The two witnesses, who claimed themselves to be eye witnesses, have been disbelieved by the Sessions Judge and we, after appraisal of evidence, do not find any justification to interfere in the finding of the Sessions judge about the testimony of these two witnesses. Nothing has been shown by Sri Jagdish Tewari that the statement of these two witnesses have been appraised in a perverse manner by the trial Judge.

38. The sessions Judge found that the FIR was not reliable. The learned Sessions Judge while referring to the statement of Nathuni Yadav recorded in the hospital Ext. Kha 1, where Nathuni Yadav had named Ayodhya, Paramhansh, Madan, Murlidhar and Chadradeo and two others namely Subhash Misra and Ram Briksha, who he said to have seen and identified and 7-8 other persons whom he could not recognise had entered into the house of Raghunath Pandey by breaking open the door and attacked on him. The Sessions Judge referred to the statement of PW-5 Rain Nakshatra who claimed to be present at the place of occurrence, and is the informant of the FIR had not named Subhash Misra and Ram Briksha. The witness Ram Nakshatra PW-5 could not explain the omission of the two names if the report was lodged after instruction from Nathuni Yadav, there was no good ground for omitting these two names. The evidence of Ram Nakshatra (PW-

5) was, thus, disbelieved.

39. The Court below also doubted the correctness of FIR Ext. Ka 10 said to have been lodged at the police station by Ram Nakshatra. It appears that as found by the Court below Ext. ka 10 has not come into existence before the statement of Nathuni Yadav was recorded in the hospital. The Court below appraised the evidence and according to the prosecution case, the place of occurrence is 7 miles from P.S. Bhatni. The occurrence took place at 5.30-6 p.m. in the evening. According to the general diary entries Ext. ka 1, the written FIR was recorded at 8.15 p.m. which is 1 page written report and it was estimated to consume 20 minutes to half an hour's time in writing the same. If Ram Nakshatra started immediately after writing the report, it was not possible for him to reach the police station before 6.30 p.m. It was observed by the Court below that it was not possible for him to reach the police station before one and a half hour. If Ext. ka. 10 FIR was submitted at 8.15 p.m., there was no justification for the I.O. for not recording the statement of Ram Nakshatra PW-5 under Section 161, Cr. P.C. The I.O. Sri Dinesh Rai PW-11 denied that he had proceeded after Nathuni Yadav arrived at the police station between 9 or 9.30 p.m. He denied the suggestion that FIR was written after consultation. The learned Sessions Judge after perusing the inquest memo found that it showed that the time 20.30 p.m. was interpolated to look like 22.30 p.m. The Court below gave a cogent reason for giving the finding about the interpolation in the record. The Court below after finding that the incident has not taken place, as stated, near the flower grove. Vishwanath Pandey, that there was interpolation in the police record, that the presence of Vishwanath Pandey and Ram Nakshatra was doubtful. The Court below acquitted nine accused persons, who are accused respondents in the Government Appeal, however the five appellants of Criminal Appeal No. 2623 of 1978 have been convicted and sentenced, as detailed above.

40. Now we consider whether the seven accused persons out of which five who are before the Court convicted and sentenced by the trial Court, have been legally and correctly convicted and sentenced. The Sessions Judge observed in para 38 in his judgment that Raghunath Pandey deceased had bolted the door from inside. Nathuni Yadav was also inside the house. Thus, it was not possible for Nathuni

Yadav to see who were the accused persons actually breaking the door nor Smt. Ram Rati PW-7 could see who was breaking the door. The evidence of Nathuni Yadav PW-6 was not accepted that accused Ayodhya, Murlidhar, Paramhansh, Madan and Chandradeo broke open the outer northern door. However, the trial Court observed that Nathuni Yadav had no opportunity to see and recognise the assailants. He observed that no person would implicate persons with whom there was no enmity. Nathuni Yadav had received 21 pellets injuries on the chest. Since he was injured, the brother of Nathuni Yadav thought it necessary to send him to the hospital for treatment at the earliest. In carrying the injured Nathuni Yadav, seven miles on a cot, 3-4 hours time must have been consumed and his statement was recorded at 10.55 p.m. in the hospital. He had excluded the names of Ram Briksha and Subhash Misra. He stated that he did not know them. The Sessions Judge speculated that Ram Nakshatra PW-5 had known that Nathuni Yadav (PW-6) had given a statement in the hospital and named seven persons in the said statement. Ram Nakshatra had to implicate 7-8 other persons who are inimical to him and he, thus, got Nathuni Yadav's consent to name those persons and names of Subhash Misra and Ram Briksha were omitted. Nathuni Yadav in his statement had not stated as to which accused had got which weapon. Nathuni Yadav in his statement stated that Ayodha had fired. No other question was put and it was not stated what weapon was held by these other six persons. The Sessions Judge observed that the statement of Nathuni Yadav could not be ignored. The Sessions Judge him self found that PW-7 Smt. Ram Rati had got the fictitious injury report. The Investigating Officer in his case diary stated that she stated to have received pellet injury. The sketch map prepared by the Investigating Officer was faulty. The other two injured witnesses were not examined in the Court and the Court below observed that it is not necessary to examine them.

41. The learned Sessions Judge in para 43 of the judgment arrived at a conclusion after appraisal of evidence that Nathuni Yadav and Smt. Ram Rati correctly stated that ten persons broke open the northern door of Raghunath Pandey and entered in the house. Ayodhya and Murlidhar armed with gun and country-made pistol fired and caused serious injuries to Nathuni Yadav. Smt. Ram Rati also received injuries. The Court below also found that the statements of these two witnesses that Madho and Paramhansh and two other persons removed the tiles of the roof

in which Raghunath Pandey was concealing himself. His wife was also there. The other co-accused persons broke open the door and they dragged Raghunath Pandey outside in the court-yard and assaulted with lathi, ballam, pharsa, and gandas. Smt. Laldei and Smt. Phoolmati also received injuries in the said incident.

42. We have now to examine whether the Court below was legally correct in convicting and sentencing the five accused appellants of Criminal Appeal No. 2323 of 1978.

43. Sri A.D. Giri, Senior Advocate, appearing for the appellants submitted that the conviction and sentence of the five appellants is illegal and unwarranted. He cited, AIR 1976 SC 975 (Bhagrith v. State of Madhya Pradesh). The Apex Court in the said judgment observed as under (at p. 977 of AIR):--

It is well settled that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the Court, on its own make out a new case for the prosecution and convict the accused on that basis.

The learned counsel submitted that the presence of PW-5 Ram Nakshatra and Vishwanath Pandey PW-10 has been disbelieved by the trial Court. Their evidence is of no help to the prosecution. So far the evidence of Nathuni Yadav PW-6 is concerned, who also claims to have received fire arm injury near the flower grove of Durga Pandey, that part has been disbelieved by the Court below. The statement of witness Nathuni Yadav recorded by the Doctor in the hospital clearly shows that he was sitting at the door of the house of Raghunath Pandey deceased. It has been submitted that the prosecution case, as set up, cannot be changed and yet a new case had made out by the Sessions Judge for recording conviction of some of the accused persons. It is further submitted that the persons subsequently added out of animosity were included in the prosecution case and Ram Nakshatra got acceptance of Nathuni Yadav for including their names. It is not the sweet will of the prosecution to add or subtract any person as it suits to the prosecution. Learned counsel for appellant also referred to the decision, AIR 1965 SC 277 (Ughar Ahir v. State of Bihar). The Apex Court observed as under (at

p. 279 of AIR):--

It is true that the maxim falsus in uno, falsus in omnibus (false in one thing, false in every thing) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the Court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain, from the chaff. But it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest.

In the present case, the Hon'ble Supreme Court's observation in Ugar Ahir is repeated. The substratum of the prosecution case has been changed by the Court below and a new case has been made out.

44. Same is the observation in, AIR 1971 SC 1444 (Devilal v. State of Rajasthan). The Apex Court in para 13 of the said judgment observed as under:

In criminal trials it is of prime importance for the accused to know as to what the exact prosecution case is. If the pivot of the prosecution case is not accepted a new prosecution case cannot be made to imperial defence.

This principle also fully helps the appellants and the submission of Sri A.D. Giri is well founded.

45. Sri A.D. Giri, learned counsel for the appellants submitted that there were two witnesses Nathuni Yadav PW-6 and Smt Ram Rati PW-7. The question is whether their evidence is worth believing. These two witnesses at no stretch of imagination, can be treated as wholly reliable witnesses, witness whose statement is found to be partly reliable and partly unreliable, cannot be the basis for seeking corroboration. One witness whose evidence is not wholly reliable, cannot be utilised for the purpose of corroborating another party reliable witness. Thus, in view of settled law reported in, 1957 Cri LJ 1000 : (AIR 1957 SC 614), Thavers case the evidence of Nathuni Yadav and Smt. Ram Rati cannot be the basis for recording conviction of the accused appellants of Criminal Appeal No. 2623 of

1978.

46. After perusal of record and conscious considerations of the facts and circumstances of the case, we find that the Court below committed a gross illegality in making out a third case which was neither the case of the prosecution nor the defence for convicting the five appellants of criminal Appeal No. 2623 of 1978. The prosecution version and the manner and beginning of the occurrence have been found by the Court below to be false and unbelievable. The witness Vishwanath Pandey and Ram Nakshatra were disbelieved. They could not have witnessed the occurrence near the flower grove of Durga Pandey. The solitary injury of Smt. Ram Rati PW-7, as admitted by the Doctor who examined her, could have been caused by scratch of nai<sup>1</sup>. She cannot be taken to be really an injured witness. Nathuni Yadav PW-6 cannot be treated as reliable witness. He denied to have given the statement before the Doctor in the hospital where he had named two persons who have not been charge sheeted even. The FIR is found to be not recorded at the police station at the time, as stated by the prosecution. The police record about registering of the case at the police station and inquest memo also is doubtful and creates a grave doubt in the prosecution case. He thus, find that the prosecution case is not proved beyond all reasonable doubts against the appellants of Appeal No. 2523 of 1978. They are entitled to be given benefit of doubt.

47. Government appeal No. 153 of 1979, for the facts and circumstances, discussed above, deserves to be dismissed.

48. Criminal Appeal No. 2623 of 1978 is allowed. The accused -- appellants are acquitted from all the charges. They are on bail, their bail bonds are discharged.

49. Government Appeal No. 153 of 1979 is hereby dismissed.