

Ram Bharosey Vs. State

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Court : Allahabad

Decided On : Aug-04-1995

Reported in : 1996CriLJ2023

Judge : B.K. Sharma, J.

Acts : Indian Penal Code (IPC), 1806 - Sections 147, 149, 307, 395, 399, 402 and 497; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 334 of 1980

Appellant : Ram Bharosey

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Tej Pal and ;Ashish Gopal, Advs.

Disposition : Appeal allowed

Judgement :

B.K. Sharma, J.

1. This is an appeal against the judgment and order dated 16-1-1980, passed by Shri B.B. Sisodia, Additional Sessions Judge, Agra in S. T. No. 517 of 1979, State v. Ram Bharosey, whereby he convicted the accused-appellant for the offence

under Section 307 read with Section 149 I. P. C. and for the offence under S. 147 I. P. C. and sentenced him to four years R. I. and one year's R. I. respectively. Both the sentences were ordered to run concurrently.

2. The prosecution story was that S.O. Ram Singh Manral of Police Station Tejganj, Agra made his departure on 10-12-78, along with Constable Shiv Singh and three more constables from the police station; that after doing Patراسي about the dacoity of village Lakewali in Crime Case No. 424 under Section 395/497 I. P. C; when he reached village Guthla he received an information through an informer that some bad characters are about to assemble in the Har of village Gangraue near the Arolly of Ram Khelari for the purposes of committing dacoity in village Gangraue; that on this information he took with him licence holders Jahan Singh and Ghurey Lal of village Guthla as also one Kaptan Singh of village Lothai; that on reaching outside the village Gangraue at the tube well of Bahadur Singh, he told them about the purpose; that after taking the usual search he made two parties; that he kept with him Constable Ram Gopal, Constable Shiv Singh, H. C. Brahma Pratap Shah and licence holder Jahan Singh; that in the second party he kept S.I. Mahendra Pal Singh, Constable Kaptan Singh and public witnesses Ghorey Lal and Constable Gopal Singh; that after the giving of necessary instructions both the raiding parties reached on the spot at 11.30 p.m. and took their position; that at that very time the glow of smoking of Biris was seen coming from north from under the Gular tree which gave an indication about the presence of bad characters; that S.O. Ram Singh Manral challenged them to surrender their weapons and themselves; that thereupon the bad character and on police parties hurling abuses and threats, 'Hamate Pass Hathgole Bhi Hain Bhoon Dalenge'; that then S.O. Ram Singh Manral fired a V. L. P. Shot; that in the light of V. L. P. they saw seven bad characters taking position under the tree; that Constable Shiv Singh identified Shiv Singh alias Shibbo deceased and Ram Bharosey, accused-appellant, in the said light who were seen amongst the bad characters; that at that very time a fire came from the side of bad characters which passed from near the ear of S.O. Man Singh Manral but he escaped injury; that at this he ordered the force to take control over the bad characters and fire in self-defence; that after firing continued from both sides for about 15-20 minutes one bad character Shiv Singh alias Shibeo fell down at the spot on receiving fire-arm injuries and present

appellant also received fire arm injuries but his companions managed to carry him away and ran away towards north while firing shots; that when firing was over Shiv Singh alias Shibbo deceased was found there lying dead on the spot due to firearm injuries; that he found near his right hand an imported gun with an empty cartridge; a. L. G. cartridge in a belt tied in waist, four cartridges of pellets, a cartridge, hand-filled and 3 empties. There were also found lying on the spot four empty cartridges; that Shiv Singh alias Shibbo (died on the spot) and accused-appellant both were absconding having jumped bail in so many cases of murder etc. and they were being prosecuted for several cases of dacoity etc.

3. The S.O. Man Singh Manral then returned to the police station Tejganj, District Agra and lodged a verbal report at 2.05 a.m. on 11 -12-78, on the basis of which a Check Report (Ext. Ka. -12) was prepared and a case was registered at serial No. 52 of the G.D., true copy of which is Ext. Ka.-13.

4. The investigation of the case was entrusted to S. I. Gopali Prasad (P. W. 7). He reached on the spot taking with him Ram Bhajan, Executive Magistrate (P. W. 5) and found the dead body of Shiv Singh alias Shibbo lying over there. Executive Magistrate Shri Ram Bhajan prepared the Panchayatnama in respect of the dead body of Shiv Singh alias Shibbo deceased and forwarded the dead body for postmortem. Then I. O. S. I. Gopali Prasad (P. W. 7) interrogated the witnesses and prepared the site plan (Ext. Ka.-9). He inspected the torches of the witnesses. He found an imported gun with an empty cartridge inside (Ext. Ka-1), a pellet with cartridge (Ext. 2) and empty cartridge (Ext. Ka-3) on the spot and prepared a recovery memo about it (Ext. Ka.-10). After observing necessary formalities the dead body was sent to district mortuary for autopsy.

5. On 12-12-78, at about 4.18 p.m. accused -appellant Ram Bharosey was admitted in District Hospital, Agra for treatment by one Kunwar Pal Singh. An information about it was sent from Police Station Rakabganj on the same day on the memo of the Hospital received at police station Tejganj. On receipt of this information the accused-appellant was put under arrest and made Ba-parda in the Hospital itself and after discharge of the accused-appellant from the Hospital he was again taken to the district Court and after the preparation of warrant of arrest

he was lodged in the District Jail, Agra, Baparda.

6. The identification proceeding in respect of accused-appellant was conducted by Shri A. P. Shrivastava Executive Magistrate on 8-1 -79, (Identification Memo is Ext. Ka.-17).

7. After completion of the investigation a charge-sheet was submitted against the present accused-appellant, which is Ext. Ka.-11.

8. The post-mortem on the dead body of Shiv Singh alias Shibbo deceased was performed by Dr. M. L. Verma (P. W. 2) on 12-12-78 at 3.30 p.m. His observations were as follows:-

'Probable age: about 28 years.

Probable time since death; half day about.'

9. He found the following ante-mortem injuries on the body of Shiv Singh deceased;

(1) One gun shot wound of entry 4/10' x 8/10' chest cavity deep on front of chest Rt. side and just below the middle of the clavick. No blackening or tattooing present.

(2) Gun shot wound of exit 3' x 1/2' x chest cavity deep on the back of chest Rt. side just below the lower border of Rt. shoulder back middle part, wound is connected to injury No. 1.

(3) Gun shot wound of entry 4' x 3/10' chest cavity deep on the front of chest left side along the anterior axillary fold 3' above the left nipple.

(4) Abrasion 3/4' x 1/2' on front on Rt. shoulder.

(5) Multiple gun shot wounds of entry in an area of 1' x 7 1/2' over left side of abdomen, each wound measuring 2/10' x 2/10'. No blackening or tattooing present.

(6) Gun shot wounds of entry in an area of 11 1/2' x 7' on the left thigh upper and front portion (in 3/4th...of the thigh)

(7) Gun shot wounds of entry in an area of 11' x 6' on the front of Rt. thigh in its upper half portion.

10. A scaled packet of shots containing eleven (11) metallic shots of size of Razor and one metallic pellet of large size handed over to the police constable, to be forwarded to S. S. P. Agra, through S. O. P. S. Tejganj, Agra.

11. On internal examination the Doctor found pleura ruptured on both sides and about 12 ounce blood in both pleure cavities. Right lung; perforated through and through. Left Lung; upper lobe perforated through and through. Five shots recovered from peritoneum.

12. In the opinion of the Doctor, the death was due to shock and haemorrhage as a result of injuries described above.

13. Ram Bharosey-accused-appellant (injured) was medically examined by Dr. S.P. Misra, Medical Officer Sadar Hospital, Agra (P. W. 9) on 12-12-78, at 4.18 p.m. He found the following injuries on his body :

(1) Multiple pellet entrance wounds in an area of 1'-6" x 9" on the front of chest and abdomen and on the right side of chest and abdomen. The injury was 1 1/2' below right clavicle. Average diameter of each wound is 1/10' x 1/10' and of right side chest and abdomen 8/10' x 1/10' of maximum size. The wounds were skin to muscle deep. Margins were inverted, no blackening. Tattooing and scarring seen.

(2) Multiple pellet entrance wounds in an area of 6V2' x 2-3/10' on the front and outer side of right arm 7' below the top of right shoulder. The average diameter was 1/10' x 1/10' and of outer side the maximum diameter was 2/10'x 1/10'. Rest same as injury No. (1).

(3) One pellet entrance wound on the front of left arm 1 -1 /10' x 1/10' above left Elbow. The diameter was 1/10' x 1/10'. Rest same as in injury No. (2).

Injuries : Injury No. (1) was under observation of Ram Bharosey. Advised X-ray. Injury No. (2) and (3) are simple in nature. They were caused by fire arm. Duration about 1 1/2 days to 2 days old.

The injury report of Ram Bharosey is Ext. Ka.-14.

14. The prosecution examined as many as eleven witnesses. Out of them S.O. Ram Singh Manral (P. W. 1), S.I Mhendra Pal Singh (P. W. 3). Ghurey Lal (P. W. 4) and Constable Shiv Singh (P. W. 6) are alleged to be eye-witnesses, while Dr. K.L. Verma (P. W. 2) held autopsy on the dead body of Shiv Singh alias Shibbo deceased and Dr. S.P. Misra. (P. W. 9) medically examined injured accused-appellant Ram Bharosey. Rest of the witnesses were formal witnesses of the prosecution.

15. The accused-appellant denied the incident put forward by the prosecution. On his behalf some evidence was furnished at the stage of trial and some evidence has been produced (during the course of the present appeal, which will be referred to at its proper stage.

16. The learned Sessions Judge has accepted the prosecution case in full and rejected the defence version and consequently convicted and sentenced the accused-appellant under Sections 147 and 307/ 149 I. P. C. as aforesaid. Aggrieved by the same, the present appeal, appeal has been preferred by the present accused-appellant.

17. I have heard learned counsel for the appellant and learned Addl. Govt. Advocate and have also gone through the record.

18. The learned Sessions Judge accepted the evidence of the police witness S.O. Ram Singh Manral (P. W. 1) in view of the fact that it was corroborated by the testimony of S. I. Mahendra Pal Singh (P. W. 3) and Constable Shi v Singh (P. W. 6) and further corroborated by a public witness Ghurey Lal (P. W. 4), also corroborated by the circumstance that the dead body of deceased Shiv Singh alias Shibbo with ante-mortem injuries was found on the place of occurrence. He relied on the evidence of S.O. Ram Bhajan (P. W. 4) who prepared the Panchayatnama

and other connected papers, namely photo-lash and challan-lash and the post-mortem evidence relating thereto given by Dr. M.L. Verma (P. W. 3). He also claimed that the finding of one country-made pistol with used cartridges, bandolier with used cartridges and live cartridges and the finding of used cartridges near the dead body also corroborated the prosecution version.

19. The accused-appellant in this case was all along in Jail during the trial and was defended by an amicus. The defence case was suggested to the witnesses and was stated by the accused-appellant in the statement recorded under Section 313 of the Cr. P, C. In his statement under Section 313 Cr. P. C. the accused-appellant alleged that he had borrowed Rs. 1600/- from Constable Shi v Singh (P. W. 6) pledging his ornaments with him for meeting the expenses of Pairvi of a murder case, which was pending against him (against accused-appellant), that later on he returned the money but Constable Singh Singh declined to return the ornaments that he (accused-appellant) had pledged; that on account thereof their mutual relations became strained; that on 9-12-78 at the instance of Constable Shiv Singh he was arrested by Constable Shiv Singh and other constables from near the power house at Agra alongwith Shiv Singh alias Shibbo deceased and that they were kept at the tube well of Ghurey Lal in the day and in the night a fictitious encounter was shown, while on that very day both of them were taken out and were tied to trees and the police force fired at them after having so tied; that with the result Shiv Singh alias Shibbo deceased died on the spot and under the belief that he (accused-appellant) too had died, the police threw him and the dead body of Shiv Singh in the adjoining field then went away; that in the late hours of night on regaining consciousness he escaped from there and went to the Hospital for treatment and was admitted there.

20. The defence version was rejected by the learned Sessions Judge on the ground that if the motive was accepted it will flow in the direction of the accused-appellant. The learned Sessions Judge placed reliance on the circumstance that the accused-appellant did not lodge any first information report about the occurrence; nor sent any complaint to the police authorities. He also took support from the fact that the accused-appellant was an injured and claimed that his injuries went a long way to corroborate the prosecution case.

21. The learned Sessions Judge also accepted the identification evidence given by police witness as Constable Shiv Singh (P. W. 6) and that of Ghurey Lal, a public witness, who correctly identified the accused-appellant in the identification parade on 8-1 -79, not long after the date of occurrence i.e. 10-12-78, and the date of the accused-appellant being lodged in Sadar Hospital Agra (12-12-78). He further placed reliance on the evidence of Constable Shiv Singh (P. W. 6), who admittedly knew the accused-appellant from before. He further took support from the fact that the accused-appellant did not produce any evidence in support of his version.

22. The discussions made by the learned Sessions Judge in his judgment appear attractive in the first instance but close scrutiny of the facts and circumstances of the case leaves before me no option but to discard the findings of the learned Sessions Judge. The prosecution witnesses of fact claimed that after taking public witnesses and giving necessary instructions, two parties were made and posted at the respective positions and that as soon as the parties took their position, a glow of smoking Bins was seen coming from neaa Gular tree towards north which gave an indication of the presence of bad characters there and this was followed by a challenge given by the S.O. Ram Singh Manral (P. W. 1) and the encounter. It is a strange co-incident that immediately after the police parties took their position in the vicinity the bad characters appeared at the spot, or if already present on the spot started smoking Bins. It is all the more improbable that an encounter took place with the bad characters, who, according to the prosecution evidence, were seven in number and were armed with weapons, which included an imported gun and a number of cartridges and in which, according to prosecution, firing continued from the side of bad characters and police parties for 15-20 minutes ('...15-20 Minute Tak Goli Chalne Ke Bad...Badmash Fire Karte Huye Bhag Nikle (page 3 of evidence of S.O. Ram Singh Manral. (P. W. 1), '... Badmashon Ki Taraf Se Karib Pandrah Minute Tak Fire Huye the.' (page 9 of the evidence of P. W. 1), '...Kareeb pandrah minute tak dono taraf se goli chalti rahi.' (page 2 of the evidence of S.I. Mahendra Pal Singh (P. W. 3) and in it on the side of bad character, one bad character Shiv Singh alias Shibbo even lost his life on the spot and the present accused-appellant Ram Bharosey also received fire arm injuries, no member of the raiding parties-neither any police man, nor any of the public witnesses, received any fire arm injury on their bodies and not even a scratch was received

on their body. S.O. Ram Singh Manral (P. W. 1) claimed in his testimony that a fire made from the side of the 'bad character passed from near his ear on this he directed the police force to take control over the bad characters and open fire in self-defence. In a real encounter in which there was actual firing from both sides one would expect that the members of the police force and public witnesses or atleast some of them must have received fire arm and other injuries on their body. So the prosecution version is highly improbable.

23. Another circumstance of great importance which the learned Sessions Judge has lightly brushed aside is that no blood was found on the spot after the occurrence even though, according to prosecution evidence, the deceased had been injured and had died on the spot of fire arm injuries (a reference to the post-mortem report will indicate that there were not only gun shot wounds of entry at five parts of his body but also a gun shot wound to exit). It cannot be believed that blood will not ooze out from the wounds of the deceased on the spot if the deceased Shiv Singh alias Shibbo had received his injuries at the scene of occurrence set up the prosecution and his dead body had remained lying there from the lime of occurrence till the time of preparation of the inquest report by the Executive Magistrate next morning. Besides this, if fire arm injuries had-been received by the present accused-appellant also at the spot as per prosecution case, some blood must have oozed put from his wounds also and fallen on the ground at the place of occurrence there. This absence of blood on the spot is a very significant fact which strongly corroborates the defence version that Shiv Singh alias Shibbo and the accused-appellant Ram Bharosey were arrested by the police from another place and were taken to village Guthla and kept there and later on in the night between 10/11-12-78, were shot at there by the police after having been tied against trees and it was only subsequently that their bodies were taken to the spot where the dead-body of Shiv Singh alias Shibbo was actually found by the Executive Magistrate who prepared the inquest report.

24. It has been claimed by S.O. Ram Singh Manral (P. W. 1) in his testimony at page 4 that, Constable Shiv Singh (P. W. 6) has fired one shot from rifle and the rest constables had fired two fires each from rifle. However, I.O. Gopali Prasad (P. W. 7) admitted that he did not find any bullet on the spot and he did not also find

any mark on the spot showing that the bullets were fired there. S.O. Ram Singh Manral (P. W. 1) also stated at page 8 of his evidence that I.O. did not find any bullet on the spot at the time of spot inspection. It is also to be noted that in post-mortem report there is no mention of any bullet having been found inside the dead body of the deceased. The injury report in respect of the accused-appellant also does not show finding of any bullet embedded in his body. All this also shows that the occurrence did not take place in the manner as claimed by the prosecution.

25. It has been argued by learned counsel for the appellant that the location of the ante-mortem injuries of the deceased and the injuries on the body of the accused-appellant are fully consistent with the defence version that they were tied with trees and 'then shot at. It was pointed out that in the postmortem report ante - mortem injury No. 1 was chest cavity deep on the front of chest right side just below the middle of the right clavicle, that anti-mortem injury No. 3 was gun shot wound of entry in chest cavity deep on the front of chest left side, that ante-mortem injury No. 5 consisted of multiple gun shot wounds of entry over left side of abdomen, that ante-mortem injury No. 6 consisted of gun shot wounds of entry on the left thigh upper and front portion and that ante-mortem injury No. 7 consisted of gun shot wounds of entry on the front of the Rt. thigh on its upper half portion. It was further pointed out that ante-mortem injury No. 2 was gun shot wound of exit chest cavity deep on the back of chest right side just below the lower border of right shoulder back middle part. All these ante-mortem injuries indicate that the entire body of the deceased was fully exposed to the fire power of firm arms and that these were not the type of injuries one would expect to be received by the victim when taking position in an encounter with the police. The autopsy surgeon Dr. M.L. Verma (P. W. 2) in his cross-examination claimed that ante-mortem injuries No. 1 and 2 were more likely to come to body of deceased if he was in sitting condition or the firer was on a greater height than the victim. He further stated that this injury could be received in a standing condition only when the assailant fired from a higher level. He further stated that this injury could also come if the victim was in a lying position raising his chest upward and the assailant was in the front. In reply to a Court question the doctor replied that there is no possibility that the ante-mortem injuries No. 1 & 2 come when the deceased was tied with a tree and after being inflicted the remaining ante-mortem injuries his

body bent downward and at that time fire was made. In reply to a defence question he stated that the ante-mortem injury No. 7 was not likely to come whether the injured was in a lying condition and the same was the position with ante-mortem injury No. 6 also and that ante-mortem injury No. 5 could come in a lying position of the deceased if he tried to get up and at that time he was fired from the front side. In reply to a Court question the Doctor stated that ante-mortem injury Nos. 6 and 7 could come in a condition where the victim was sitting with his knees on the ground. If all these replies of the Doctor are viewed against the background that from the side of the prosecution there was not a single injured though cross fires are said to have taken place for 15-20 minutes continuously, it will be easy to perceived a pre-prosecution stand. It is clear from the number and location of these injuries as against Nil injury on the side of prosecution (police officers and public witnesses) that in deceased was inflicted (these injuries) in cold blood.

26. The injuries of the present accused-appellant also are indicative of the fact that he was exposed to fires and that there were no elements of stealth of the body as one would expect if there was going on an encounter between the police force and the witnesses (Prosecution side) armed with weapons on the one hand and a gang of criminals similarly armed on the other. In his cross-examination S.O. Ram Singh Manral (P. W. 1) stated that at pages 7 and 8 of his evidence in para 5 that at the time when he fired V. L. P. shot two bad characters were in the front i.e. the deceased and the present accused-appellant. As per his statement at page 3 of his evidence, the deceased and accused-appellant, who were identified on the spot, were ahead of the Morche of bad character and that the remaining bad characters were taking position lying on the ground behind the Chooria. He further stated at page 8 of his evidence that that Gheora was 1 1/2 ft. in height and 6-7 ft. in length. However, the I. O. did not find any such Gheora on the spot at the time of spot inspection by him, even when the S.O. Ram Singh Manral (P. W. 1) claimed that he had shown the said Gheora to the investigating officer. He could not explain as to why the I. O. did not show it in the site plan prepared by him about the spot inspection. The I. O. had found on the alleged place of occurrence a Goolar tree, Karab and Bhoose ki burji. If the deceased and the accused-appellant had concealed their bodies behind the Gheora as claimed by S.O. Ram Singh Manral (P. W. 1) then they would not have received the injuries as found

recorded in the postmortem report and the injury report aforesaid about them.

27. It appears in this case that the inquest report about the deceased Shi v Singh alias Shibbo (Ex. Ka. -5) along with other connected papers, namely photo-lash (Ex. Ka.-6), challan-lash (Ex. Ka.-7), letter to R. I., Agra (Ex. Ka.-8), letter to C.M.O. (Ex. Ka.-9) for post-mortem and for intimating the result and taking the clothes in possession were prepared by an Executive Magistrate Ram Bhajan (P. W. 5). In the inquest report (Ex. Ka.-5), there is no mention of Case Crime No. anywhere. In the body writing of the inquest report the words are 'Sooghana Ke Mutibik Main, A. C. M. I. Agra, Adeshanuser Atrikit Jiladhikari, Agra, Dinank 11-12-78, Ko Haar Gram ... Men Gaya'. There is no mention of case Crime No. even in that. In the column of 'nature of the F. I. R. as per informant and the cause of death' 'Police Muthbhak' and nothing else is mentioned. In the photo-lash (Ex. Ka.-6) also there is no mention of any case Crime No. Same was the position about the Challan-lash (Ex. Ka. -7), letter to R. I. (Ex. Ka.-8) and letter to C. M. O., Agra (Ex. Ka. -9). In the inquest report (Ex. Ka.-5) again in the column of date and time of occurrence 2.5 a. m. is mentioned. It seems that originally 1 a. m. was written and it was changed as 2.5 a. m. Even taking it to be 2.5 a. m. a suspicious feature arises because in the G. D. Entry about the registration of the case (Ex. Ka.-9) the time has been written as 2 a. m. and below it by drawing a horizontal line the time 2.5 a. m. has been written below it. Not only this, in the Check report (Ex. Ka.-12) which is on the record and which appears to be the carbon copy of the original check report, which was proved in this case, there is overwriting in the time of the occurrence 2.05 a. m. on the figure '5'. It seems that the time was originally written as 1 a. m. and then it was changed to 2.05 a. m. I may also mention that in the recovery memo (Ex. Ka.-10) prepared by the I. O. only the recovery of Pauna S. B. L. gun with Pati cartridges and empty cartridges found near the dead body of the deceased on the spot written, there is no mention of any case Crime No. even in it. All these circumstances lead to the same direction.

28. The learned Sessions Judge has concluded about the defence suggestion about the dishonesty shown by Constable Shiv Singh regarding the ornaments pledged by the accused-appellant with him that the flow of motive goes otherwise. He has also concluded that the police force had no axe to grind against the

deceased for the accused and further that Ghurey Lal (P. W. 4) was wholly an independent witness and that there was no reason for him to depose falsely against the accused. The pledge matter is an insignificant matter. There are more important matters which were before the learned Sessions Judge which escaped his notice.

29. According to the learned counsel for the accused-appellant, it was Constable Shiv Singh (P. W. 6) who was the 'architect' of this case. He was alleged to be belonging to the same village to which accused-appellant belonged and it was claimed that in August 1975, Jabar Singh's brother Tejveer Singh had been murdered in village Gauchh and the present accused-appellant and Shiv Singh alias Shibbo deceased were falsely implicated in the murder of said Jabar Singh and Tejvir Singh; that in it conviction was made by the trial Court and then criminal appeals were filed by the accused convicts of these cases, that Criminal Appeal No. 2554 was filed by the present accused-appellant that in that case a judgment of acquittal was made by this Court which was dated 19-9-80, (a copy of the said judgment is Annexure-I to the affidavit of Ram Bharosey accused-appellant dated 12-6-95 in this appeal, that Constable Shiv Singh. (P. W. 6) was a co-villager, neighbour, Khandani and close associate of Jabar Singh deceased and Tejvir Singh deceased and that to take revenge of the said murder atrocities began from the side of family of Constable Shiv Singh on the family of the accused. Various other allegations have been made and some documents have also been filed with the affidavit. For our purposes, however, I would confine myself to the judgment (Annexure-I in the CrI. appeal in which murder case the present accused-appellant was acquitted by the judgment of this Court dated 9-9-80, which is indicative of the fact that the trial was pending in the year 1978, when the present occurrence is said to have taken place on 10-12-78. For the rest of the discussion I am confining myself to the evidence which was on record before the learned Sessions Judge. It has come in the evidence of Constable Shiv Singh (P. W. 6) at page 5 that Ram Bharosey (Present accused-appellant) and Shiv Singh (alias Shibbo) (deceased in the present occurrence) were absconders and further that S.O. Ram Singh Manral (P.W.I) knew it that the bad characters of these names were absconders and that he himself also knew that both these accused persons were absconders. He further stated at page 6 of his evidence that he used to come for the parivi of the

case to police station Tejganj and then he used to meet the pairakar of police station Narkhi, of which Ram Singh Manral (P. W. 1) was the S.O. on the date of occurrence and that the pairakar of police station Narkhi had told him that the accused-appellant and Shiv Singh deceased are absconders in some cases and that they were wanted in a case under Sections 399/402 I. P. C. and in a case of murder on asking further, he admitted in his cross-examination that the murder case in which they were being tried related to the offence of his own village. He further stated that houses of Ram Bharosey accused-appellant and the deceased Shiv Singh alias Shibbo are in the vicinity of his own house. Asked about the result of the said murder case he stated that the prosecution had taken place but he did not know the result of the said murder case. One would expect him to know it in the ordinary course being not only a police constable but also resident of the same village in which the murder had taken place. So he is concealing his knowledge S.O. Ram Singh Manral (P. W. 1) stated at page 4 of his evidence that Ram Bharosey accused-appellant and Shiv Singh alias Shibbo deceased had jumped bail in several cases of murder etc. and that they were being prosecuted in several cases of dacoity and were absconding therein. Against the background of these statements of these two witnesses, it cannot be said that they could have no animus against the accused-appellant Ram Bharosey and Shiv Singh alias Shibbo deceased. There have been reported case, where the police, eliminated the accused persons and showed their death in encounter in cross firing. In the background of the circumstances noted earlier injured body of the judgment the present also appears to be one such case. It is not surprising that in the background of the criminal cases against them the accused-appellant did not dare to go to police authorities to make a complaint to them about the atrocity committed on him and the deceased and the fake encounter shown by the police in the case as he could not expect a sympathetic hearing.

30. The defence claim that it is Constable Shiv Singh (P. W. 6) who is the architect of the case, is corroborated also by the fact that in the prosecution story even though S.O. Ram Singh Manral (P. W. 1) was shown as the leader of the police force departed from the police station in connection with Patarasi of some other case and that a clue was provided to him by an informant, it was Constable Shiv Singh (P. W. 6) who was shown to have performed in leading role inasmuch as it

was he who was said to have identified Shiv Singh alias Shibbo deceased and Ram Bharosey accused-appellant, who were alleged to be ahead of others in the Morcha of bad characters, on the spot. S.O. Ram Singh Manral (P. W. 1) has stated at page 3 of his evidence that Constable Shiv Singh identified Shiv Singh alias Shibbo deceased and Ram Bharosey accused-appellant, who were ahead of others in the Morcha of bad characters, on the spot. Constable Shiv Singh (P. W. 6) also stated likewise at page 5 of his evidence 'Daroga Ji Ne Jab V. L. P. Ka Pahila Fire Kiya Tab Maine Muljirn Ram Bharosey Va Shiv Singh Ko Pahcha'n Liya Tha Aur Tabhi Maine Kaha Tha Ki Ve Shiv Singh Aur Ram Bharosey Main....'There is nothing improbable in the defence claim that Constable Shiv Singh was interested in the prosecution in the aforesaid case relating to the murder of Jabar Singh and Tejvir Singh deceased in village Gauchh. Apparently, upto the date of the present occurrence conviction of the deceased Shiv Singh alias Shibbo and the present accused-appellant Ram Bharosey in that murder case had not yet taken place,

31. A contradiction has come in the prosecution case about the stage at which Shiv Singh alias Shibbo present deceased and Ram Bharosey accused-appellant were identified at the spot Constable Shiv Singh (P. W. 6), the real architect of the case, claimed at page 3 of his evidence that he saw in the light of the first V. L. P. shot by S.O. Ram Singh Manral that Ram Bharosey appellant and Shiv Singh deceased of his village were among the bad characters assembled there. He further stated this at page 5 of his evidence and added that at that very time he had said that they were Shiv Singh and Ram Bharosey and further added that later on he had stated that they are of his own village. S.O. Ram Singh Manral (P. W. 1) stated at page 3 of his evidence that on the first fire of V. L. P. by him ters Shiv Singh alias Shibbo Jaat and Ram Bharosey Dhobi who were ahead of all others. On the other hand, S. I. Mahendra Pal Singh (P. W. 6) who was the leader of party No. 2 at the spot, claimed at page 3 his evidence that after the fire had ceased and the deceased was left on the spot and some of the culprits had succeeded in carrying away the accused-appellant from the spot and after being satisfied that the bad characters had withdrawn on their cartridges had finished, he proceeded ahead and on reaching the spot saw that one bad character was lying dead severely injured and at that time Constable Shiv Singh made identification and

said that he is Shiv Singh alias Shibbo of village Gonchh and that the bad character who had been taken away by the bad characters in injured condition was Ram Bharosey of village Gonchh. Ghurey Lal (P. W. 4), a public witness, made a similar statement at page 3 of his evidence that after finding had stopped and flashlight (of the second V. L. P.) spread he saw that one bad character is lying dead and then on reaching the spot Constable Shiv Singh stated that he is Shiv Singh alias Shibbo, bad character of his village and that the bad character who had been injured and who had been taken away by the bad character from there was Ram Bharosey. This discrepancy also goes to throw grave doubt over the prosecution case.

32. The learned Sessions Judge has considered Ghurey Lal (P. W. 4) to be an independent witness and on this ground placed great reliance on his testimony. It is correct that even now there is no material to show any direct enmity between him on the one hand and the accused-appellant and/or Shiv Singh alias Shibbo deceased, yet he is not an independent witness. He had links with the police. He has himself stated in his evidence at page one that he is a licence holder. In one ordinary course the licence holders of the village have association with and are at the beck and call of the police. In this case there is positive material to show that he had association with Constable Shiv Singh. It has come in para 3 of his evidence at page 4 that he knew Constable Shiv Singh as he used to come to his village in patrolling but at page 5 he denied old acquaintance. Shiv Singh Constable (P. W. 6) stated at page 5 of his evidence that he knew that the witness for one or two months before the occurrence. Ghurey Lal (P. W. 4) stated at pages 3 and 4 of his evidence that his tubewell is half kilometer from the scene of occurrence. He did not belong to the village of present occurrence. His village was Guthla while the occurrence took place in village Gangraua. He is said to have been taken from the Chaupal of Jahan Singh, village Pradhan of village Guthla. He claims that he was present at the Chaupal of Jahan Singh at 10 p. m. on 10-12-78, and was warming himself by fire, when the police came there and took them with it. In the ordinary course in the month of December, which is the coldest month in the year, it was unlikely for him to assemble at 10 p.m. at the Chaupal of the village Pradhan Jahan Singh simply for gossiping. He did not say that he had gone there for any particular purpose. It is significant to note that in his statement

he has specifically stated. 'Dinank 10-12-78 Ki Bat Hai Main Pradhan Jahan Singh Ke Sath Uski Chaupal Par Tha....'. It is astonishing that he remembered the date of the occurrence, which shows that he is interested in the prosecution.

33. Here it is significant to note that there was a definite suggestion from the side of defence to Ghurey Lal P. W. 4 in his cross-examination that it was at his tubewell that deceased Shiv Singh and the present accused-appellant were brought by Constable Shiv Singh (P. W. 6) and other police men and confined in a Kothari before being fired at. He, of course, denied the defence suggestion. But against the background of the facts and circumstances of the case the learned Sessions Judge ought to have taken the evidence of this witness with caution. It is to be noted that he is not a natural witness of the occurrence on the spot. He has admitted at page 3 of his evidence that his tubewell is situate in village Guthala, at a distance of about 1 1/2 Kms. from the scene of occurrence and that one of his agricultural fields adjoins the scene of occurrence. It is also significant to note that the prosecution has not been able to explain as to how the police and public witnesses have succeeded in escaping themselves from the alleged firing by the bad characters who were said to be safe. It has come in the evidence of this very witness Ghorey Lal at page 4 that no neighbour of the spot came to the spot on hearing the sound of fires from both sides.

34. S. I. Mahendra Pal Singh (P. W. 3), one of the police eye-witness of the alleged occurrence, stated at page 5 of his evidence that after the occurrence only the S.O. had gone to the police station and the rest of the police personnel and the public witnesses remained on the spot till 1.30 p. m. in the day until the conclusion of panchayatnamu and despatch of the dead body for post-mortem. He further stated that uptill 1.30 p. m. next day they did not go from the spot even for taking drink and food. He further stated that (in the day) the public kept on coming there and going from therefrom and that from them food material had been called for, that it was called through a person of village Gangraua and further that it was taken to be consumed by the police. personnel and the witnesses present on the spot. on the contrary Ghurey Lal, a public witness, stated in his evidence at page 4-5 that while S.O. left the spot after identification of the dead body of Shiv Singh deceased, rest of the persons kept on staying there and they had burnt 'Aag' there

and were warming itself by it; that they remained on the spot till 10-11 a.m. in the day and that from there he went to his own tubewell and that Kaptan Singh and Jahan Singh witnesses too went to their tubewell, that on the tubewell he took his bath and then went to take his food. He categorically stated that he did not take any food, nor any person on the spot took any food and even S.O. did not take any food there. In the background of the circumstances of the case even this discrepancy becomes of value.

35. The I. O. stated at page 3 of this evidence that Ghurey Lal (P. W. 4) was found on the spot when he inspected the spot and that he interrogated this Ghurey Lal on the spot at 12 noon. Obviously, this Ghurey Lal was a highly interested witness who kept on staying on the spot upto the Panchayatnama proceedings on the spot were over.

36. Before I make a brief reference to the identification evidence I may mention that the story of the prosecution started like the usual story of cases under Section 399/402 I. P. C. in which information is received by the police from an informant that gang of dacoits is about to assemble at a particular date, time and place and would make preparation to commit dacoity and then on this information police proceeds and reaches the spot and as soon as parties take their position the dacoits had given a challenge and then a shot was fired and then some of the culprits are said to have been arrested on the spot and some of them are said to have run away with their weapons. However, in this case no case has been registered against the accused-appellant or against any other person under Section 399/402 I. P. C. though the total number of bad characters is said to be seven. Instead, the case has been registered under Sections 147 and 307/149 I. P. C. The charge-sheet has also been submitted under Sections 147 and 307/149 I. P. C. alone. The learned Sessions Judge framed the charges against the accused-appellant under Sections 147 and 307/149 I. P. C. alone. The charge under Section 147 I. P. C. is about being member of an unlawful assembly, the common object whereof was to commit murder of members of police force headed by S.O. Ram Singh Manral of P. S. Tajganj or to cause hurt to them. The charge under Sections 307/149 I. P. C. is about firing shots on the members of police force in the prosecution of the aforesaid common object. It is astonishing that there

is allegation of firing shots by the accused in the prosecution of the aforesaid common object, but prosecution side (police and public witnesses) did not receive even a scratch on their bodies by the alleged firing in the prosecution of the common object, and the accused-appellant is said to have himself received fire-arm injuries by the fires from the side of the police. What corroboration can be had from his injuries for the charge of firing at the police with intention to take their lives.

37. Now I come to the identification aspect of the case. Once the prosecution story deposed to by Ram Singh Manral, S. O. (P. W. 1), Constable Shi v Singh (P. W. 6) and S. I. Mahendra Pal Singh (P. W. 3), and Ghurey Lal (P. W. 4), a public witness, is discarded nothing revolves in the identification made by S. I. Mahendra Pal Singh (P. W. 3) and Ghurey Lal (P. W. 4) as the identification parade. Otherwise also this identification evidence cannot be accepted. It is an undisputed fact that the accused-appellant was admitted in the District Hospital on 12-12-78, by a private person in injured condition and an information about his admission in the Hospital was sent to police station but the identification at the trial given by the witnesses who claimed that they did not know the accused-appellant from before the occurrence can only be accepted when the prosecution succeeds in showing that the accused-appellant was really kept Baparda all along from the time of admission in the District Hospital, Agra till the time of identification proceeding and on one of them had the opportunity to see him in this period. The prosecution has failed to place on record such type of evidence. It has come in the evidence of S.O. Ram Singh Manral (P. W. 1) at pages 9 and 10 that on 12-12-78, accused-appellant was got admitted in the Distt. Hospital, Agra in the evening and that information about his admission in the Hospital was received from police station Rekabganj on telephone, who was taken into custody Baparda and was sent to Jail Baparda, that on receiving the said information the S. O. of police station Tajganj after taking some police force from police station Tajganj and same special force from the police lines had gone to arrest the accused-appellant and that the accused-appellant was arrested in the Hospital and he was kept in custody in the Hospital. He has admitted at page 10 of his evidence that the accused-appellant was arrested in the Hospital and remained in the Hospital in police custody and that all along he had remained in the custody of the police of

police station Tajganj. This obviously provided ample opportunity to the police force of the police station to show him to the witnesses as has been claimed by the defence, even though the usual denial has been made by all of them. In the Hospital the accused-appellant is said to have been kept Baparda from 12-12-78, till 18-12-78. H. C. Om Prakash (P. W. 10) claimed that on 12-12-78, he made departure from the police station at 18.35 p.m. to the District Hospital, Agra and he kept the accused-appellant in the Hospital Baparda all along from 12-12-78, till 18-12-78, when after the accused-appellant was discharged from the Hospital he took him to Court and obtained proper custody warrant and took him to jail and lodged him there the same day (18-12-78). Here it is to be noted that in the G. D. entry dt. 12-12-78, about his departure from the police station on 12-12-78, for the District Hospital, there was no mention of any direction to keep the accused-appellant Bagarda. and then in the G. D. entry dt. 18-12-78, about his return to the police station also, there is no mention of the accused-appellant having been kept Bajarda by the police at the Hospital and in the way. Then in the ordinary course the duties of constables must have been changing after every eight hours and so this constable could not give direct evidence of the accused-appellant having been kept Baparda from 12-12-78 till 18-12-78. The failure of the prosecution to adduce evidence about each individual date is itself fatal. Consequently, this identification evidence of the accused-appellant is rejected for these reasons as well.

38. In view of the above discussion, this criminal appeal ought to be allowed and the accused-appellant deserves to be acquitted of all the charges.

ORDER

39. The appeal is allowed. The conviction of the accused-appellant by the Addl. Sessions Judge for the offences under Section 147 I. P. C. and 307/149 I. P. C. is set aside. He is in jail custody at present. He will be released forthwith unless wanted in any other case.