

**The State Vs. Bhabhootmal and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/760353](http://sooperkanoon.com/760353)

**Court :** Rajasthan

**Decided On :** Apr-02-1979

**Reported in :** 1979WLN(UC)176

**Judge :** K.D. Sharma and; S.N. Deedwania, JJ.

**Appeal No. :** D.B. Criminal Appeal No. 827 of 1971

**Appellant :** The State

**Respondent :** Bhabhootmal and ors.

**Disposition :** Appeal dismissed

**Judgement :**

1. This is an appeal by the State directed against the judgment of the learned Sessions Judge, Pali, dated March 9, 1971 whereby the respondents except respondent Chunni Lal were acquitted of the offences under Sections 148, 302/149 and 201/149 Indian Penal Code. Respondents Jethu Singh and Malamsingh were further charged under Sections 323 and 324 Indian Penal Code respectively but were also acquitted of the same. Respondent Mohan Singh was further charged under Section 379 IPC but was not found guilty. Respondent Chunnilal was charged only with an offence under Section 212 IPC and was acquitted of it.

2. The prosecution case, briefly stated was as under : The incident took place on March 7, 1968 between 10-11 p.m. in village Bisalpur near a water trough of a well known as 'Dadawadi'. Formerly the village was in the Jagir of Prithvi Singh before its resumption after the formation of the Rajasthan State. Near the village, there is compact tract of land measuring about 2000 bighas known as 'Utkara Jav'. The land was in possession of several cultivators. In the samvat year 2013, the Panchayat and residents of the village felt that there should be pasture land. They decided to convert this 'Jav' into grazing ground and the Khatedar tenants of this land were persuaded to give up their holdings by surrendering their Khatedari rights. Prithvi Singh and his uncle Chhatar Singh gave an assurance to the tenants of the holdings that they would be given other lands in lieu of it. On the assurance of this promise the tenants gave up their holdings and did not cultivate them and the entire tract of land surrendered by them was used as pasture land upto samvat year 2019. Prithvi Singh however, did not give other lands to those cultivators who had surrendered their holdings. So thereafter some of the tenants including Chhoga Ram PW 1, his deceased brother Kumpa Ram, Anna PW 4, & Goma Ram PW 25 started cultivating their surrendered holdings in the Jav. During the period Prithvi Singh and accused Bhabootmal were Surpanch and Up Sarpanch respectively of the village Panchayat, Bisalpur. Chhoga Ram and Goma Ram were members of the panchayat. Respondent Bhabootmal moved the Revenue Authorities to take legal action for the cultivation of this land against Chhogaram and others. He was trying to get this 'Utkara Jav' converted into a pasture land. The tenants of the land who had surrendered their holdings but did not get any alternative land resented this move. The villagers were thus divided into two factions because of the dispute relating to 'Utkara Jav'. The respondents were in favour of getting 'Utkara Jav' declared as a pasture land while the other faction led by Chhogaram and Goma Ram opposed this move. No confidence motion was moved against Up Sarpanch Bhaboota Ram which was to be voted on March 8, 1968 Bhaboota Ram called Mohan Singh, Kana and Vijay Singh to the village on March 7, 1968 for his help. On this date, at about 5 p.m., Choga Ram and Goma Ram were coming together and met the party of the respondents near the stall of Mool Chand. Respondent Mohan Singh came near Goma Ram and threatened him whether he had got himself insured and pointed a gun at him. Goma Ram left

his cycle on the spot and ran away. Thereafter Goma Ram and Choga Ram sent a written report Ex P 1 of this incident at about 8 p.m. with Kumpa Ram to Police out post, Erinpura After lodging the report, Kumpa Ram was returning on his cycle and when he reached near tea stalls of Mool Chand and Ganeshmal at about 10 or 11 p.m. all the respondents, except respondent Chunnilal, attacked him. Respondent Mohan Singh was armed with a gun and Malam Singh with a 'Dhariya' and the other respondents were having lathis. The respondents surrounded Kumpa Ram and pushed him near the water trough. Then Mohan Singh gave blows on the head of the deceased with the butt and barrel of his gun. Respondent Malam Singh inflicted injuries on the head of the deceased by with 'dhariya' The deceased fell down on the ground and then all the other respondents attacked him & gave him lathi blows. Bhopal Singh PW22 informed Choga Ram of the incident. Chogaram went to the scene of the occurrence & saw the respondents beating Kumpa Ram. He tried to intervene & was hit by respondent Malam Singh on his arms & knee by a lathi. Thereafter Chogaram went away to his house and returned at the scene of incident after some time but found that no body was there. It was further alleged that PW4 Anna and PW 17 Kapura Ram witnessed the incident, Chogaram then lodged written report Ex P 2 in police station Sumerpur at 2 a.m on the night intervening 7th and 8th of March, 1968. PW 26 Bhanwarlal, Sub Inspector of Police registered a case and proceeded to the village with Choga Ram He deputed constables to guard the site and tried to search the respondents but could not find anyone of them. In the morning, Bhanwarlal PW.26 inspected the site. From Dadawadi well dead body of the deceased was recovered and memo Ex P 6 was prepared. P.W. 18 Dr. DC. Bafna performed autopsy and prepared the post-mortem report Ex.P.18. Injuries on the person of Choga Ram were also examined by Dr. Bafna and injury report ExP.7 was prepared The respondents were arrested on different dates. A cycle of the deceased was recovered from the hut of Mohan Singh on 14.4 1968 and recovery memo Ex.P.8 was prepared. The seized articles were sent to the Chemical Examiner and to the Serologist. After completing the investigation, the police filed a challan in the court of Munsif Magistrate, Bali, who after necessary committal proceedings, charged the respondents as stated above and committed them to the Sessions.

3. The respondents pleaded not guilty to the charges and claimed trial. Respondent Malam Singh put forward a positive defence that on the alleged night of the occurrence at about 10 30 or 11 p.m., he was coming from the site of the temple of 'Mataji' and when he reached near Dadawadi, deceased Kumpa Ram attached him with a dhariya. In self defence he retaliated with a lathi. In the mean time Choga Ram also arrived there and inflicted injuries on his back and left thigh with a lathi. He also caused some injuries to Choga Ram. with lathi. Malam Singh respondent further took the plea that he was examined for his injuries by Dr. Bafna on the same night. He also sent a report of the incident to the police station Sumerpur. The prosecution examined as many as twenty seven witnesses including the three eye witnesses, viz, PW 1 Chhoga Ram, PW 4 Anna and PW 17 Kapuraram. The learned Sessions Judge came to the conclusion that the testimonies of the eye witnesses were not reliable and they did not witness the incident. They were not worthy of any credence. Thus in the opinion of the learned Sessions Judge, there was hardly any trustworthy evidence connecting the respondents with the alleged offences and consequently he acquitted them of the various charges with which they were charged.

4. With regard to respondent Chunnilal who was charged with the offence under Section 212 IPC, the learned Sessions Judge was of the opinion that the witnesses, namely PW12 Sankaliya & PW 21 Magan Singh examined by the prosecution, to prove the charge were not reliable and trustworthy.

5. It was argued by the learned Public Prosecutor that the learned Sessions Judge was in error in disbelieving the three eye witnesses in the case. The first information report of the incident was promptly lodged. On the other hand, it was argued by the learned Counsel for the respondents that the three eye witnesses were inimical to the respondents, their testimony was improbable and in conflict with the medical evidence. Two of the eye witnesses were chance witnesses and they had no reason to be present at the scene of occurrence. PW 1 Chogaram could not have reached the place of occurrence in time to witness the incident. The witnesses had considerably improved upon the version as disclosed in the first information report. There were material contradictions between their statements during the trial and their earlier statements given in the police,

statements under Section 164 Cr PC and the committal court.

6. It was further urged on behalf of the respondents that in an appeal against acquittal, High Court would not interfere with the trial court's conclusion in the absence of compelling reasons.

7. We have considered the rival contentions and have perused the record of the case carefully. It may be stated that the case of respondent -Chunnilal will be considered separately as the offence sought to be proved against him is a distinct one based on a separate set of witnesses.

8. At the outset, it may be stated that it was not disputed that Kuma Ram met a homicidal death. The doctor D .C Bafna (PW 18) who conducted the autopsy found the following ante mortem injuries on the person of deceased Kumpa Ram:

1. Lacerated wound 1/2' x 1/2' bone deep over right chin of tibia in middle.

2. Wounds over scalp:

(a) Lacerated wound 1 1/4 'x 1/2' bone deep nearly over mid line 3 1/2 above the nasion,

(b) Lacerated wound 3/4' x 3/4' x 1/2', four inches above the left external ear.

(c) Punctured wound 1/2' x 1/2' x 4' situated 3' behind the left external ear.

(d). Lacerated wound 1/4' x 1/4' x 1/2' situated 1' behind the left external ear.

(e) Lacerated wound 1/2' x 1/2' x 1/4' over back of left external ear.

3. Bruises 1/4 x 1/2' over tight elbow joint posterior aspect.

9. All the above said wounds were gaping, edges were stained and the staining was not removed by washing. Clots of blood were found.

10. According to the doctor, the cause of death was shock and haemorrhage. as a result of head injuries. Injury No. 2 (a) was sufficient in the ordinary course of nature to cause death and injuries No. 2 (b) and 2 (c) were also individually

sufficient to cause death in the ordinary course of nature.

11. The doctor also examined Choga Ram and found the following injuries on his person:-

1. Incised wound 1 1/4' x 1/4' x 1/8' over ventral aspect of right little finger.
2. Bruise 1 1/2' x 1' over upper end of left scapular region with swelling around.
- 3 Abrasion 2'x1' over dorsal aspect of right knee joint lower portion.

The witness also stated that at about mid night of 7.3.1968, he examined Malam Singh and found the following injuries on his person:

1. Incised wound 2 1/3' x 1/4' bone deep situated over scalp 4' above the left external ear.
2. Incised wound 3' x 1/4' x 1/4' over back of neck.
3. Abrasion 6' x 1/4' horizontal crossing the vertebral column at the level of medial angle of scapula.
4. Abrasion 1/3' x 1/3' at the level of inferior angle of scapula.
5. Abrasion 5' x 1/8' vertical over the lower part of anterior aspect of thigh.

12. This takes us to the next question whether any offence was established against the respondents. It was not disputed before us that the relations between the parties were strained. The prosecution witnesses have admitted this fact It was established that there were two factions in the village. The faction led by respondent Bhabumal wanted conversion of 'Utkara Jav' into pasture land while the other faction led by Chogaram and Gomaram opposed this move and wanted to continue recultivation of their holdings in the Jav. Criminal casts were pending between the parties on this account and motion of no confidence was fixed for consideration and voting on March 8, 1968. The atmosphere was tense. In our opinion, in such circumstances the evidence of the partisan witness has to be examined very carefully.

13. Apart from the testimony of the eye witnesses, there were no incriminating circumstances available against the respondents like recovery of blood stained clothes, arms or other articles. The case therefore, hinges solely on the ocular testimony of the witnesses.

14. The prosecution witnesses have stated that when Kumpa Ram was lying on the ground, respondent Bhagwat Singh picked up a stone lying near the stall of Ganeshmal and dropped it on the head of Kumpa Ram. Dr. D.C. Bafna appeared to be of the opinion that none of the injuries found on the person of Kumparam could be caused by dropping stone Ex 8. He thus stated:

Question : The witness was shown stone Ex 8 and was asked by the P.P. whether the multiple fractures of left zygomatic bone could be caused by the fall of this stone.

Reply ; If this stone was made use of in inflicting injuries as above said, then the above said injuries could be caused but in that case, there would have been other external injuries because the size of the stone is bigger one Since there were no external injuries on the face, so I say that this stone was not used for causing the above said injury.'

'Question : Please have a look at the stone Ex 8 and also feel its weight. If such a stone is picked by a man and thrown on a lying man with a view to cause injury to him, on the head, will it cause a big depression on the head?

Reply : It will cause a crushed injury of the part of his head which comes in contact with the object.

15 The crusing will be severe looking to the weight of the stone Ex 8

Question : Please see stone Ex 8 and also dimensions of injuries 2(a), (b), (d) and (e) and state whether such injuries of similar dimensions could be caused with a big stone like Ex 8 if it is dropped on the head of a lying person?

Reply : By throwing this stone over the head, these injuries cannot be caused. But by keeping the stone in one's hand and if blows are given by it several times then

only such injuries can be caused.

We are, therefore, definitely of the opinion that prosecution version as far as it related to the dropping of a stone on the head of Kumparam was false as none of the injuries found on his person could be caused by dropping a stone.

16. It is again also extremely unlikely that a punctured wound 4' deep of 1/2'x 1/2' size could be caused by a 'dhariya' Ex 6. The punctured wound was 1/2'x 1/2' x 4' situated 3' behind left external ear. The doctor in his cross examination stated as follows in this regard:

Question : Looking to the 1/2' width of punctured wound, could you tell how much portion of Ex 6 Dharia should have entered into the body?

Reply : To cause wound of 1/2' width, unless length and depth of the wound are not told to me, I cannot give my opinion.

Question: Please measure from the tip of Ex 6 to that extent 4' length comes and what is the breadth of the blade at that point?

Reply: The witness by means of thread measured 4' length and then put that thread on the tip of the blade and stretched it in its length. The width of the blade at that point is 1.4.

The width of the tip of Dharia Ex 6 is 4/10'. I have put in service of 11 years. The 12th year is running, '

Question : In as much as the terminal of Dharia Ex 6 is curved, the wound caused by thrusting, must also exhibit signs of a curved wound.

Reply : The shape of the wound is always round out from the aperture of the wound. Whether the instrument is curved or straight, it cannot effect the shape of the aperture of the wound. This reply of mine is with reference to Ex 6.

Question : Whether curvature of Ex 6 will not reflect in cutting of the tissues of the wound?

Reply : This will definitely reflect in cutting of the tissues but in this case, whole of the brain substance was lacerated, behind the injury hence I could not make out the shape of the wound in the substance of the brain.

If Ex 6 is not used as a stabbing instrument i.e. thrusting it by the terminal end, then such a punctured wound could not be caused.'

17. There was another inconsistency in the prosecution evidence. With reference to the medical evidence. Chogaram had an incised wound 1/4' x 1/4' x 1/8' over the ventral aspect of right little finger. The doctor had given an opinion that this could not be caused by dhariya Ex 6. The learned Public Prosecutor could not explain or reconcile the inconsistency between eye witness account and the medical opinion with regard to the aforesaid injuries. We feel that in a case where death is due to injuries caused by a weapon, it is always the duty of the prosecution to prove by medical evidence that it was likely for the injuries to have been caused with the weapon with which and in the manner in which they were alleged to have been caused. Therefore the prosecution has failed to prove a material part of their case and thus the alleged eye witness account of the incident has become doubtful.

18. In the first information report Ex P 2, it was not alleged that respondent Malam Singh gave any dhariya blow to Chogaram, rather it was positively alleged that Chogaram was given lathi blows on his knee and hands by Ma'am Singh. During the trial it was stated that Malam Singh with a dharia and Jethu Singh with a lathi gave blow<sup>9</sup> to Chogaram This contradiction which was not suitably explained throws further doubt on the testimony of the eye witnesses. The first information report was not available as a check to test the truthfulness of the statement of Chogaram because he made considerable improvements over it in his statement during the trial.

19. At this stage it would be appropriate to read the statement of eye witnesses PW 1 Choga, who was the elder brother of the deceased. He stated that on March 8, 1968 the motion of no confidence against Up Sarpanch Bhabutmal was to be debated. On March 7, 1968 in the night at about 10 or 10.30 p.m. he heard cries of Kumparam He started for the scene of occurrence, Bhopal Singh met him 8 to 10

steps away from his house and informed him that the respondents Mohan Singh, Vijay Singh and Malam Singh were beating his brother Kumpa Ram. When he reached near the water trough, he saw that his brother was surrounded by the respondents. Respondent Mohan Singh gave blows with the butt and barrel of his gun and Malam Singh gave a dhariya ablow on the head of Kumparam. The other respondents, except Bhabutram were beating Kumpa Ram with lathis. His brother fell down, Vijay Singh sat on his chest while Bhabut-mal, Kana and Natha Ram caught his legs and the other respondents continued to beat his brother with lathis. The witness further stated that Malam Singh ran after him and gave a dhariya blow which struck his little finger of the right hand as he moved his hands to ward off the blow. Jethu Singh lit him with a lathi on his shoulder and right knee. The witness further deposed that after receiving the blows, he went to his house and returned from there after half an hour and found none on the spot. He then went to Bagtaram and got the report P/2 scribed by him.

20. We have considered the statement of the witness carefully. The witness has given details of weapons, i.e. with what weapons 9 respondents were assaulting the deceased but no such details were available in Ex P 2, first information report-which he made. Malam Singh was ascribed a lathi in the first information report but with a dhariya during the trial. In the first information report the witness alleged that he was given blows with a lathi by Malam Singh while during the trial he deposed that Malam Singh gave a dhariy blow & Jethu Singh caused him injuries with a lathi. The witness also stated that when he reached the scene of occurrence, Kumparam was standing while in the first information report it was definitely alleged that Kumpa Ram was lying on the ground. The witness was unable to afford any explanation for these contradictions in the first information report and his statement during the trial. The witness failed to give almost any details of beating given to Kumparam in the first information report while during the trial he gave graphic description of the incident. When the attention of the witness was drawn towards various omissions in the FIR he tried to explain them by giving another false statement that he had stated all the facts to Bhagta Ram, the scribe of the first information report, but could not say why did he not incorporate these details in the first information report.

21. The witness also could not afford any plausible explanation for the various contradictions between his police statement Ex D 3, statement Ex D 2 given, in the committal court and his statement during the trial. We have noticed these contradiction but all of them need not be mentioned as they have been dealt with in detail by the learned Sessions Judge.

22. Thus, a careful perusal of the statement of this witness, reveals that he has made considerable improvements in his statement during the trial over the version which he gave in the first information report. He also could not afford any explanation for the contradictions in his court statement and the statements D/2 and D/3.

23. The witness admitted that his house was at a distance of 500-600 steps from the scene of occurrence i.e. about half a mile. It is therefore, obvious that he could not hear any cries from that distance while sitting in his house. The witness - further admitted that Bhopal Singh met him when he was at a distance of 10 or 15 poundas from his house. It is also extremely doubtful that this witness could have walked 400- 500 steps from his house and then seen the incident. PW 22 Bhopal Singh stated that at about 11 p m. he was going to his house from his flour mill. Near Dadawadi Malam Singh, Vijay Singh and Kaniya Dholi were manhandling Kumparam. He met Chogaram at a distance of 4 to 6 steps from Ghogaram's house. The witness further stated that he told Chogaram that Vijay Singh, Malam Singh and Kaniya were manhandling Kumparam. Thus, it is apparent that Bhopal Singh informed about the incident to Chogaram after he has also traversed a distance of about 400 500 poundas. This in our opinion conclusively established that PW I Choga could not have left for the scene of occurrence after hearing cries of Kumpa Ram He could not also reach the scene of occurrence in time even after being informed by Bhopal Singh. The witness therefore, could not satisfactorily explain how he reached the scene of occurrence in time to witness the incident Taking all the circumstances into consideration, we have no hesitation in arriving at the conclusion that the witness did not see the incident and has made a false statement.

24. PW 4 Anna stated that on the fateful night he was going at the hotel of Moolchand at about 11 or 11 p.m. and saw all the respondents sitting on the platform of the hotel of Mool Chand Kumparam came there on a bicycle from the side of the station. Respondents went near him Jethu Singh caught hair of Kumparam with his hand and then respondents manhandled him and took him near the water trough. Mohan Singh gave butt and barrel blows on his head. Chogaram elder brother of Kumparam arrived at the scene of incident. Malam Singh gave a dhariya blow on the head of Kumparam and then respondents beat him with lathis. Kumparam after receiving a dhariya blow fell on the ground Then Bhagwat Singh picked up a stone and dropped it on the head of Kumpa Ram After Kumpa Ram had fallen on the ground, Bhabutmal, Nathu Ghanchi and Kaniya Dholi caught his legs and Vijay Singh sat on his chest. Choga Ram protested, then Malam Singh attacked him with a dhariya. Chhoga Ram raised right hand to ward off dhariya blow and it struck his little finger Jethu Singh gave two lathi blows to Chhoga. He then ran away. We have considered the statement of this witness which does not appear to be true. It was extremely unnatural for the witness to go to take tea at the hotel of Mool Chand at that late hour of night. He visited the hotel for the first and the last time in his life. The presence of the witness at the scene of occurrence was therefore, doubtful and he had no reason to be there.

25. It does not stand to reason why the appellants permitted the witness to see the incident and why was he not attacked by them.

26. The witness stated that after the incident he went to the house of Goma Ram and informed him of the occurrence Goma Ram after hearing about the incident went inside his house. This behaviour is again unnatural. The witness Goma Ram was supposed to take some action. He could have made attempt to contact Choga.

27. There are number of contradictions between his statement during the trial and his committing court statement Ex D 4, his committing court statement Ex D 4, his statement recorded under Section 164 Cr PC. Ex D 5 and his police statement Ex D 1. The witness could not afford any explanation for these contradictions. A few of them may be stated:

My stay at the place of the occurrence when I reached and then I left as stated above was of 15 minutes. My statement in connection of this case was recorded in the court of the Munsif-Magistrate, Bali. My statement Ex D 4 dated 24-8-68 I have given correctly. Its portion A to B 'after half an hour of my arrival at the place of the occurrence, Kapuraram came there' I have heard this portion. I stated correctly in the lower court. Portion C to D of this very statement 'I left the place of occurrence after one and a half hour when the beating was started to Kumparam'. This portion I stated correctly Today, I stated that Kapooraram came after two or three minutes I reached there and I stayed there for only 15 minutes. These are correct things I have stated.' 'My statement was recorded in Tehsil Bali, which I had given correctly. After I had reached at the hotel, say then minutes after Kumparam came on the place of the occurrence on his bike. Portion A to B of the statement Ex D 5 dated 22-3-68, 'After half an hour of my reaching there, Kumparam came from the side of the station there'. I have heard this portion. I had deposed correctly before the Tehsildar. I had given correct statement. When the court enquired that before this Court you stated the after ten minuts Kumparam had come on the spot while before the Tehsildar you stated that after half an hour he had come there, which of the two versions is correct, the witness stated that correct version that after ten minutes Kumparam had come. This statement is correct which I have made today. By lapse I had stated in my statement before the Tehsildar that after half an hour Kumparam had come there, In the statement Ex D. 4 portion C to D I stated that I stayed on the place occurrence for one and half hour. That fact is wrong. In fact, I stayed only for 15 minutes.'

I have heard my police statement Ex.D. 1, statement recorded under Section 164 Cr PC. Ex D.5 and the statement Ex.D.4 recorded in the committing court, in which there is no mention about Chunnilal accused. By mistake, I forgot to mention his name in them. The witness then stated that Chuni Lal was not present, at the place of occurrence. I falsely named him to be present today in my statement.

While giving statement Ex.D.5, I stated that accused Mohan Singh inflicted injuries by means of butt and barrel of the gun on the person of Kumparam. But these facts were not mentioned by the Magistrate.

In my police statement Ex.D. 1, and in my statement recorded under Section 164 Cr PC, which is Ex.D. 5, there is no mention that Jethusingh accused chased Choga. But I did state in those statements.

28. There are other material contradictions also in the statement of the witnesses given in the court and his earlier statements Ex.D 1, D 4 and D.5. It does not stand to reason that Malam Singh and Vijay Singh who had asked neighbours to close windows of their houses, would allow this witness to remain on the spot. The witness stated that each of the respondent gave 2-3 blows but the number of injuries found on the person of Kumpa-ram were only 7. We therefore, definitely find that this witness is not worthy of any credence, for the aforesaid reasons.

29. The same criticism applies to the evidence of PW 17 Kapura Ram. He also stated that he went to the hotel of Ganeshmal at 10.30 or 11 p.m. to take tea. He found the hotels of Ganeshmal and Moolchand closed. The reason of the presence of the witness at the place of incident therefore, does not appear to be true, we feel that the witness was not at the spot and has come out with an imaginary statement against the respondents who were admittedly inimical to him. He ascribed 5 or 7 blows to each of the respondents but only seven injuries were found on the person of Kumpa Ram. His remaining on the scene of occurrence was unnatural because out of fear he should have run away as his relations with the respondents were admittedly very strained. Kapuraram did not appear to be a truthful witness even to the prosecution which got him declared hostile as in the examination-in-chief he did not advert to all the details of the alleged incident. When the witness was cross examined by the public prosecutor he admitted the details of the incident given by him in his earlier statements. This fact by itself detracts from his testimony. We, therefore, hold that the evidence of this witness is not reliable, more so as the witness also did not afford any reason for the contradictions in the statement made during the trial and his earlier statements. We notice a few of them:

After the occurrence, I narrated the incident to my wife alone and to no other person till I was examined by the police Portion O to P of Ex P 17 'I did not narrate the event to my wife or to my children after I reached there'. I have heard it. I might

have stated so by a mistake.

In Ex D 9, portion C to D, 'Mohansingh hit on the head of Kumparam by means of a gun i.e. by the butt end of the gun'. I have heard it. I have stated wrongly this fact that the blow was given by the butt side of the gun.'

Portion E to F of Ex D 9, 'Vijaysingh told Mohansingh to raise shouts that if anybody came, he would be killed " I have heard it. Now I do not remember whether I stated so or not but if I had stated so, it was wrong.'

In Ex D 9 and Ex P 17, statements recorded under Section 164 and in committing court respectively, there is no mention that the accused Vijaysingh had sat on the chest of Kumparam deceased. The reason for its omission that I might have forgotten to state at the time of statements.

30. After a careful scrutiny of the testimony of all the eye witnesses, we have no hesitation in coming to the conclusion that these witnesses did not see the incident. The learned Sessions Judge rightly disbelieved them and the public prosecutor could not point out any infirmity in the reasoning of the Sessions Judge to find them unreliable. The presence of the witnesses at the place of occurrence cannot be satisfactorily explained. Their evidence is not natural and probable and in contradiction with the medical opinion. They were definitely partisan witnesses as they belonged to the same faction and further their relations with the respondents were inimical. There were numerous contradictions and omissions in their statements during the trial and their earlier statements. For all these reasons we find that it would not be safe to rely upon them to arrive at a conclusion of the guilt of the respondents.

31. Respondent Mohan Singh was also charged with the offence of theft of a bicycle. The only evidence against him was recovery of the bicycle of Kumparam from his hut. It has come in prosecution evidence that it was an open place and accessible to all. The bicycle was not recovered in pursuance of any information given by the respondent. We therefore, hold that the prosecution has failed to establish that any bicycle was recovered from exclusive possession of the respondent and no presumption could be raised against him that he was the thief

of the bicycle.

32. Now we may take the case of Chunnilal who was charged only with an offence under Section 212 IPC. Once it is established that the prosecution has failed to prove that the other respondents killed Kumparam, question of this offence does not arise, at all. The two witnesses examined in this behalf do not inspire confidence. PW 12 Sanklia and PW 21 Magan Singh also had animus against the appellants because of dispute regarding pasture land. PW 12 Sankalia did not support the prosecution case. PW 21 Magan Singh stated that he went to Sankalia to enage his cart and saw Chunnilal driving a tractor in which Vijay Singh, Mohan Singh and Kaniya were sitting. The statement is unnatural as there could hardly be any occasion for the witness to go to Sankaliya to enage a cart at that late hour of the night at about 11.30 p.m. We, therefore hold that the statement of Magan Singh could not be relied upon to prove the fact that he saw Chunnilal driving a tractor in which Vijay Singh and Kaniya were sitting.

33. The prosecution has thus failed to prove any offence against any of the respondents. It is not necessary to discuss the other prosecution evidence which could hardly improve upon its case. It is also unnecessary to consider the defence put forward by Malam Singh. In a criminal trial onus to prove an offence against the accused never shifts and question of exception only arises in case the offence has been proved against the accused beyond reasonable doubt. It was not the case of the prosecution that Malam Singh alone inflicted fatal injuries to Kumparam or gave some injuries to Chhogaram and therefore, he was guilty of any offence. The plea taken by accused Malam Singh therefore, could not be looked into to build any case against him. The prosecution has to stand or fall upon its own legs.

34. In the result we find no substance in this appeal and consequently dismiss the same. The bail bonds are discharged.