Nirpal Singh and Others

Vs

State of Haryana

Criminal Appeal No. 149 of 1976

(Syed M. Fazal Ali, P.N. Bhagwati JJ)

01.02.1977

JUDGMENT

FAZAL ALI, J. –

1. In this appeal by special leave, three of the appellants, namely, Nirpal Singh, Gurdev Singh and Jagmohan Singh have been convicted under Section 302 I.P.C. and sentenced to death. Appellants Devinder Singh and Maha Singh have also been convicted under Section 302 I.P.C. but they have been sentenced to imprisonment for life. The Sessions Judge who tried the case made a reference to the High Court which was heard along with the appeal filed by the appellants, and the High Court after considering the judgment of the Sessions Judge and hearing the parties upheld the convictions as also the sentence passed on the appellants and dismissed the appeal. The High Court thereafter refused to grant leave to appeal to Supreme Court against its decision and the appellants have, therefore, come up to this Court after obtaining special leave from this Court.

2. This is a most unfortunate case where the appellants are alleged to have run amuck and started killing as many as five persons, some of them with their guns. They did not leave the spot until the five deceased had been killed. There was of course some background of enmity but the prosecution case as presented reveals five brutal and ghastly murders. What is even more unfortunate is that the occurrence is said to have started on a very trivial provocation which is said to have been given by Amrik Singh who trespassed into the field of Devinder Singh appellant while taking tea for his father in the field. Devinder Singh turned out the little boy on which Nath Singh and Partap Singh deceased who were working in the field protested. The protest of these persons brought a chain of threats by Devinder Singh that he would teach them a lesson. This incident had happened on May 2, 1972 at about 6 p.m. It was soon followed up by the brutal and armed attack by the appellants on the deceased who were chased and shot dead one after the other. Smt. Inder Kaur widow of deceased Tulsa Singh also happened to be in the field and she also received injuries at the hands of Maha Singh who is said to have given two gandasa blows by the blunt end of the axe. Thereafter, according to the prosecution, not content with the brutal murders, the appellants dragged the corpses of Nath Singh and Partap Singh to a place near the field of the accused. The evidence shows that some of the deceased actually begged for mercy and entreated the accused persons to spare their lives, but the accused appear to have turned deaf ears to the human appeals made by the deceased. The deceased persons in the instant case are Partap Singh, Nath Singh, Tulsa Singh Jit Singh and Sewa Singh. According to the version put forward by the eye witnesses, after Devinder Singh had administered threats to Nath Singh and others he returned along with all the other accused variously armed with axes and guns. Maha Singh, Sher Singh and Devinder Singh were armed with gandasas, whereas appellant Gurdev Singh and Jagmohan Singh with double barrel guns and Nirpal Singh was armed with a single barrel gun. As soon as the party of the accused reached near the Kotha of the

Harijans they raised a lalkara and shouted that Sewa Singh should be finished. As a result of this incitement, the appellants Gurdev Singh, Jagmohan Singh and Nirpal Singh fired their guns on Sewa Singh and shot him dead. Sewa Singh fell dead on the kacha road on the side to Girdharpur. The appellants, however, continued their mission and went towards the other deceased persons, namely, Nath Singh, Tulsa Singh, Jit Singh and Partap Singh. When the appellants noticed the presence of these four deceased persons, they again made a lalkara as a result of which the deceased started running towards Girdharpur side being hotly pursued by the appellants. Hardly had the four deceased gone about 1 1/4 Kilas (about 280 feet) they entered the field. The accused also entered the field and ultimately Nirpal Singh and Jagmohan Singh fired at Partap Singh who died at the spot. The other deceased persons, namely, Nath Singh, Tulsa Singh and Jit Singh ran for their lives, but as Tulsa Singh was an old man he could not run fast. He, therefore, pleaded for mercy, but Gurdev Singh fired on him with his gun, as a result of which he died on the spot. Similarly, Nirpal Singh shot Nath Singh dead and Jagmohan Singh fired another shot at Jit Singh who also fell dead in the field. This in brief is the prosecution case against the accused.

3. First Information Report was lodged by Sadhu Ram at police station Ladwa in Kurukshetra District which is at a distance of five kilometers from the village Sonti where the occurrence had taken place. It appears that the F.I.R. was lodged at 7.00 p.m. within an hour of the occurrence and the Investigating Officer PW 23 left for the place of occurrence and prepared inquest reports of the deceased persons and recovered some empties in the next morning which were sent to the ballistic expert. During the course of investigation it is said that two of the accused, namely, Jagmohan Singh and Gurdev Singh made disclosures to the Police Officer Nasib Singh as a result of which guns were recovered from concealed spots. The dead bodies were sent for post-mortem and Smt. Inder Kaur was also sent to the Doctor for examination of her injuries. After the usual investigation a charge-sheet was submitted against the appellants who were tried by the Sessions Judge with the result indicated above.

4. The defence of the accused was that there was serious enmity between the appellants and the deceased persons resulting from a number of civil and criminal litigations and the relations of the deceased persons along with their friends had conspired to implicate the accused falsely due to enmity. Both the courts below have rejected the defence of the accused. The High Court, on appeal, has acquitted one of the accused Sher Singh because no overt act against him was alleged and this finding has been utilised by Mr. Mulla counsel for Devinder Singh in order to persuade us to acquit Devinder Singh also, because his case is, according to the learned Counsel, completely equated with that of Sher Singh. We shall deal with this argument a little later.

5. The empties recovered from the spot along with the guns were sent to the ballistic expert who had opined that the cartridges could be fired from the guns sent to the expert. Both the courts below have, therefore, rightly held that there can be no dispute about the fact that the guns in question had been used as a weapon of offence for killing the deceased persons and that the cartridges found at the spot were or could be fired from these guns.

6. Mr. Frank Anthony, appearing for some of the appellants, raised a large number of contentions relating purely to appreciation of evidence and the various discrepancies and lacunae, which according to him were found in the prosecution evidence. As this is an appeal by special leave, this Court does not normally reappraise the evidence for itself, unless any striking fact is brought to its notice which itself is sufficient to entail rejection of the prosecution case. We, therefore, do not propose to deal with all the discrepancies and contradictions pointed out by the learned Counsel which have been carefully dealt with by the Sessions Judge and the High Court and rightly repelled.

We propose only to deal with some of the important arguments that have been advanced by Counsel for the parties.

7. To begin with, the central evidence against the accused consists of the testimony of PW 3 Sadhu Ram informant, PW 19 Gurdial Singh, PW 21 Inder Kaur wife of Tulsa Singh, PW 22 Rattan Singh and PW 20 Amrik Singh. Mr. Anthony strongly contended that all the witnesses are interested and have lied on major points and, therefore, their testimony should not be accepted. Most of the comments and criticism levelled against the witnesses have been carefully dealt with by the learned Sessions Judge and affirmed by the High Court, and we do not find it necessary to repeat the reasons given by the Sessions Judge or the High Court in this judgment. We would, however, only refer to the findings of the two courts below. So far as PW 3 Sadhu Ram is concerned, the Sessions Judge, after careful consideration of his evidence and the various comments made against it, came to a finding which runs thus :

> From the history of Sadhu Ram PW given above it may be said that he was not friendly towards the accused party. But it would be not proper to say that he was such a great enemy of the accused party that he would go to any length to involve the accused falsely in a murder case like this.
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> In view of my above discussion I hold that the statement of Sadhu Ram PW inspires confidence and is true.

The learned Judge has, after considering the entire history of the dispute and enmity between the parties, come to a clear conclusion of fact that no direct enmity between Sadhu Ram and the accused appears to have been established and Sadhu Ram, therefore, was not an interested witness. He may not have been very friendly with the accused, but that is no reason to discard his evidence. The High Court fully agreed with the finding given by the Sessions Judge and observed as follows :

> Sadhu Ram had not, except the pre-emption case filed by Sher Singh against him, come directly in conflict with the appellants. In that situation he may not have expected any danger to his life and made an effort to prevail upon the appellants to desist from assaulting the deceased. He did nothing abnormal by going after them. This does not make his conduct suspicious or unacceptable.
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> In spite of the fact that Sadhu Ram sprang from a tainted source, we do not agree with the learned Counsel for the appellants that he had not witnessed the occurrence or had introduced any prosecution witness or any detail of the case falsely in his statement.
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> After hearing counsel for the parties and having gone through the evidence of this witness, we do not see any reason to differ from the findings given by the two courts below.

8. Similarly with respect to PW 19 Gurdial Singh, who appears to be an independent witness, the learned Sessions Judge has believed his evidence and observed as follows

> I see no justification to disbelieve his statement which otherwise inspires confidence. His statement fully supports the case of the prosecution.

This finding of the Sessions Judge has been clearly affirmed by the High Court when it observed

thus :

> Being in neighbourhood of the place of occurrence he could normally be expected around the place of occurrence and be attracted because of the shouts raised by the appellants. He described the part played by each individual appellant in detail. His name was mentioned in the first information report. The learned Counsel for the appellants could not point out any reasonable basis on which his testimony could be said stepped.

9. With respect of PW 21 Inder Kaur, apart from the fact that the evidence has been believed by both the Courts below in view of the fact that she had received serious injuries on her person which could have been caused by the butt-end of the gandasa, her presence on the spot cannot be disputed. The Sessions Judge, after considering the entire comments made against her evidence, has believed her statement and observed thus :

> The presence of Inder Kaur in the fields at the time of occurrence is surely not abnormal. In my opinion her statement inspires confidence and is substantially true.

Having gone through her evidence, we are also inclined to hold that the evidence of this witness has a ring of truth and was rightly accepted by the trial Court and the High Court. The High Court also affirmed the finding of the Sessions Judge so far as Inder Kaur is concerned and observed thus :

> We do not feel impressed by the argument of the learned Counsel for the appellants that on account of her relationship with two of the deceased she was a got-up witness. The mere fact that the Assistant Sub-Inspector recorded her statement at a belated stage does not reduce her evidentiary value. She had been named at the earliest opportunity and had been examined for her injuries on the following day of occurrence.

10. The last of the eye witnesses is PW 22 Rattan Singh whose evidence has also been believed by the Sessions Judge who observed as follows :

> The fact that his name was not recorded in the First Information Report in a way shows that it was not a case of planned First Information Report otherwise his name would have been mentioned therein. After going through the statement of Ratna PW 1 feel inclined to hold that it also inspires confidence and is true.

The High Court also came to a similar finding as follows :

> Because of his disinterestedness the evidentiary value of the testimony of Rattan Singh deserves a considerable weight.
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> Counsel for the appellants vehemently contended that as the name of Rattan Singh was not mentioned in the First Information Report, although the eye witnesses Sadhu Ram and Inder Kaur have categorically stated that another Rattan Singh of Siria was present at the occurrence, the Court should hold that Rattan Singh is a made-up witness. To begin with, this is essentially a question of fact which was fully noticed by the two courts of fact and in spite of that the courts of fact have believed the evidence of PW 22 Rattan Singh. Secondly, the mere fact that his name was not given in the F.I.R., though of some relevance, would not be sufficient by itself to

> entail rejection of the testimony of this witness. We must realise that five persons had been killed and the informant Sadhu Ram must have been stunned and stupefied at the ghastly murders that took place in his presence and had picked up sufficient courage to run to the police station to lodge the F.I.R. It may be that in view of that agitated mental condition he may have omitted to mention the name of Rattan Singh. The mere fact that Rattan Singh s/o Shri Ram is not mentioned in the F.I.R. does not establish that Rattan Singh PW 22 could not have seen the occurrence. It is possible that both these persons may have witnessed the occurrence and the informant mentioned the name of one and not the other. Other comments were also made against Rattan Singh which have been considered by both the trial Court and the High Court. Both the courts have held that the evidence of this witness inspires confidence. Strong reliance was placed on the conduct of the witness in not reporting to the police officer immediately when he came to the spot. The witness was, according to the findings of the Sessions Judge and the High Court, an independent one and was not at all connected with the litigations between the appellants and the deceased. He, therefore, must have disclosed the version before the police only when he was asked to do so, because he had no interest in the matter at all. For these reasons, we do not see any reason to take a view different from the one taken by the Courts below regarding the credibility of this witness.

11. These were all the eye witnesses produced by the prosecution and their evidence has been believed by the two courts of fact. It is not for us to reappraise the evidence and disbelieve them on the same grounds and comments which have been rejected by the two courts below and in our opinion rightly.

12. This brings us to the evidence of PW 20 Amrik Singh who, though not an eye witness, is a witness to prove the genesis of the occurrence. He is a young boy of 12 years and was taking tea to his father in the field and while doing so he trespassed in the field of Devinder Singh and was abused by him. Nath Singh protested to Devinder Singh for hurling abuses on the innocent child on which Devinder Singh threatened to teach him a lesson. The threats given by Devinder Singh were soon thereafter translated into action when the appellants appeared on the scene armed with guns and gandasis and killed as many as five persons. The trial Court has believed the evidence of PW 20 Amrik Singh, and in our opinion rightly, and observed as follows :

> In such a situation it was normal on the part of Devinder Singh accused to leave that place by throwing a challenge. I, therefore, hold that the statement of Amrik Singh PW inspires confidence and is true.
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> The only serious comment made against this witness was that he was examined by the police 20 days after the occurrence. This is undoubtedly a matter which has to be taken into consideration. The Sessions Judge has considered this defeat and has found that this lapse on the part of the police would not be sufficient ground to reject the testimony of the witness, because there is no intrinsic defect in the testimony of the witness. As Amrik Singh was not an eye witness to the main occurrence, the Investigating Officer may have rightly or wrongly through that he would record the evidence of Amrik Singh after collecting all other material evidence in the case and that may explain the delay in the examination of this witness by the police.

13. Thus in view of the clear findings of fact arrived at by the Sessions Judge and the High Court in

respect of the acceptance of evidence of PWs 3, 19, 21 and 22, there can be no doubt that the prosecution has proved its case. Once the evidence of these witnesses is believed, even if there are other infirmities in the case, they would not go to demolish or introduce an element of doubt in the prosecution case.

14. Nevertheless we would not deal with some of the important contentions raised by counsel for the appellants. In the first place it was submitted by Mr. Anthony that the F.I.R. appears to have been antetimed and must have been prepared at the spot and sent to the Magistrate near about 5 a.m. in the morning of May 3, 1973. The foundation for this argument is laid on the fact that in the column of the F.I.R. which contains the date of dispatch from the police station it is only mentioned "Through Special Report". Our attention was drawn to some of the rules made by the Punjab Government regarding the manner in which the F.I.R. should be despatched to the Magistrate immediately. It would, however, appear that after recording the F.I.R., the Assistant Sub-Inspector had recorded a note as a post script, to the F.I.R. indicating the action he had taken in the despatch of the F.I.R. He had clearly mentioned in this note that on receipt of the F.I.R. the Investigating Officer Dev Dutt along with Deep Chand, Om Parkash, Ram Dayal and Mathura Dass constables had decided to proceed to the spot for investigation. It is also mentioned clearly that after registering the case the special reports were being sent to the concerned officers through Kartar Singh Constable No. 90. The prosecution has further produced the affidavit of PW 26 Kartar Singh who was later examined by the Court to prove that the F.I.R. was despatched immediately without any reasonable delay. Kartar Singh further deposed that he left the police station Ladwa on the night of May 2, 1973 and delivered the copy of the F.I.R. at the house of the Deputy Superintendent of Police which is situated in Kurukshetra. According to his evidence the F.I.R. was delivered at the residence of the Deputy Superintendent of Police at about 10 p.m. on May 2, 1973 and thereafter as he could not get any conveyance from Pipli to Karnal he delivered the special report to the Ilaqa Magistrate in the morning of May 3, 1973 at about 7 a.m. It was contended that the evidence of this witness is trumpeted up by the prosecution. The Courts below have rejected this contentions and in our opinion rightly. Kartar Singh's departure from the police station Ladwa is mentioned in the post script of the F.I.R. itself and in the other police registers which have not been called for to throw doubt on the authenticity of the police records. Moreover, there is one very important circumstance which fully corroborates the evidence of Kartar Singh. It appears from the evidence of the Investigating Officer PW 27 Dev Dutt that the Deputy Superintendent of Police Thanesar with constables reached village Sonti at about 11 p.m. on May 2, 1973. The Deputy Superintendent of Police could not have any means of knowing the incident except through a copy of the F.I.R. which was delivered to him by Kartar Singh at about 10 p.m. In these circumstances, therefore, the presence of the Deputy Superintendent of Police at 11 p.m. on May 2, 1973 clearly demonstrates beyond doubt that the F.I.R. was delivered to the Deputy Superintendent of Police at about 10 p.m. and on receiving the same and learning about five murders having taken place he rushed to the spot at Sonti and gave instructions regarding investigation of the case. This conduct of the Deputy Superintendent of Police can only be consistent with the delivery of the F.I.R. at an earlier hour at his residence as deposed to by Kartar Singh. If this was so, then the other part of the testimony of Kartar Singh that he proceeded to Karnal and delivered a copy of the F.I.R. to the Ilaqa Magistrate at about 7 a.m. on May 3, 1973 cannot be disbelieved. Having regard to these two circumstances the argument of the learned Counsel for the appellants that the F.I.R. was ante-timed does not appear to have any substance and is, therefore, overruled.

15. It was also argued by counsel for the appellants that the inquest reports along with the bodies were sent to the Doctor at about 4 p.m. on May 3, 1973. This argument was put forward on the basis that the F.I.R. itself appears to have been ante-timed and sent in the morning next day and there was

consequent delay in sending the bodies. In view of our finding that the F.I.R. was not ante-timed but was lodged at 7 p.m. on May 2, 1973 as stated by the informant PW 3 Sadhu Ram, the point of time when the bodies were sent to the Doctor loses significance. It is obvious that five murders had taken place and five dead bodies had to be despatched to the Doctor for which suitable arrangements had to be made. All these things may have taken time and that explains the delay in sending the dead bodies to the Doctor for which suitable arrangements had to be made. All these things may have taken time and that explains the delay in sending the dead bodies to the Doctor at 4.00 p.m. next day. The statement of the Investigating Officer that the bodies were sent at about 8.00 a.m. cannot, therefore, be accepted at its face value. It may also be possible that the dead bodies may have been sent in the morning and as the Doctor was not available he was in a position to examine the bodies only at about 4.00 p.m. when he received the bodies personally. At any rate, this circumstances does not at all throw any doubt on the prosecution case.

16. It was then argued that although the Investigating Officer prepared the inquest reports which contained the signed statements of Roop Singh and Sardar Singh who gave an eye witness account of their version, yet these witnesses have not been examined. In the first place the practice of getting the statements of the witnesses signed has been deprecated by this Court and is in fact expressly prohibited by Section 162 of the Code of Criminal Procedure. Violation of this provision may some time diminish the value of the testimony of the witnesses when they come to the Court. In the instant case, however, as none of these persons were examined as witnesses, this infirmity does not affect the prosecution at all. It is true that the statements of these witnesses have been mentioned in the inquest report, but the statement made by them are clearly hit by Section 162 of the Code of Criminal Procedure and will, therefore, not be admissible in evidence if they were not examined as witnesses. Even so, the Sessions Judge has pointed out that all these witnesses were members of the family of the deceased and, if examined, the comment against them would have been that being interested and partisan witnesses, no reliance should be placed on their testimony. The real question for determination is not as to what is the effect of non-examination of certain witnesses as the question whether the witnesses examined in Court on sworn testimony should be believed or not. Once the witnesses examined by the prosecution are believed by the Court and the Court comes to the conclusion that their evidence is trust-worthy, the non-examination of other witnesses will not affect the credibility of these witnesses. We would, however, like to indicate that it is not at all necessary in law to incorporate the statements of the witnesses in the inquest report. The inquest report is to be made by the Investigating Officer just to indicate the injuries which he has found on the bodies of the deceased persons. It may be witnessed by one or two persons but it is not at all necessary for the Investigating Officer to record the statements of the witnesses or to get the statements of witnesses signed on the inquest report and incorporate the same in it which introduces an element of chaos and confusion and demanding an explanation from the prosecution regarding the statements made therein. For these reasons, therefore, we are unable to hold that merely because Roop Singh and Sardar Singh have not been examined, the prosecution case is not proved. We might mention that it is not necessary for the prosecution to multiply witnesses after witnesses on the same point. In the instant case, once the evidence of the eye witnesses is believed, there is an end of the matter.

17. Another important comment made against the prosecution case by Mr. Anthony was that the medical evidence does not support the ocular evidence adduced by the prosecution. In this connection learned Counsel drew our attention to the evidence of PW 13 Dr. Arya to show so far as Jit Singh is concerned that although the Doctor found two injuries both of which were ante-mortem, yet according to the evidence of PW 3 Sadhu Ram, Jagmohan Singh had fired only one shot at Jit Singh. A belated case appears to have been made out by the prosecution, according to the counsel,

that after having fired one shot and after Jit Singh died, Jagmohan Singh came again to the spot and fired another shot. Counsel argued that in the first place on the evidence of Sadhu Ram there should have been only one injury on the person of Jit Singh, whereas the Doctor found two injuries. Secondly the story that the deceased was fired at after his death is falsified when the Doctor found both these injures to be ante-mortem. In our opinion this infirmity is not of a serious nature so as to render the prosecution case impossible of belief. Having regard to the manner in which the occurrence took place, the brutal and ghastly actions of the appellants who were bent upon taking the lives of one persons after the other, it would be impossible for any of the witnesses to give a meticulous account of the nature or the number of shots fired by the appellants. It may be that Sadhu Ram noticed Jagmohan Singh firing one shot only, whereas in fact he may have fired two. What is important is that Sadhu Ram categorically says that Jagmohan Singh fired a gun shot at the deceased Jit Singh and the Doctor finds in fact that gun shot wounds had been sustained by Jit Singh. In these circumstances the narrative of the witness is substantially corroborated by the medical evidence. As regards the story that Jagmohan Singh came again to the spot and fired another shot after Jit Singh had died, it seems to us that this part of the story has been attributed not only to Jagmohan Singh but to other accused also merely by way of embellishment so as to bring it in line with the nature of injuries found on the deceased persons. It was not at all necessary for the prosecution to have overdone their job, because the evidence of the eye witnesses was clear and cogent and did not require any further corroboration. This orientation or embellishment in the case does not materially affect the truth of the prosecution case.

18. Similarly it was argued that the same Doctor found two injuries on Partap Singh and two others being wounds of entry and exit which flow from injuries (1) and (2). It was submitted that in the F.I.R. it was mentioned that Nirpal Singh and Jagmohan Singh fired shot at Partap Singh from a distance of 1 Kila. If this was so, it was argued, then the tattooing would not be found by the Doctor in injury (2). Thus it was submitted that, according to the Doctor, the injuries were inflicted on the deceased Partap Singh from a close range and not from a distance which falsifies the evidence of PW 3 Sadhu Ram. This also, in our opinion, is not a fact to which much significance can be attached. It is true that in the F.I.R. it is mentioned that Nirpal Singh and Jagmohan Singh fired at Partap Singh while he was at a distance of 1 Kila. The evidence, however, shows that the deceased persons were being chased by the accused and it is quite possible that by the time the shots were actually fired the distance was considerably reduced. In his statement before the Court PW 3 Sadhu Ram has clearly stated that the deceased Partap Singh was shot at from a distance of 10 to 15 paces only. These are, in our opinion, very minor discrepancies which cannot have the effect of destroying the backbone of the prosecution case.

19. It was further contended that so far as Nath Singh is concerned, the medical evidence shows that he had received as many as six injuries. But in the F.I.R. the informant had mentioned that Nirpal Singh had fired a shot at Nath Singh. This statement of the informant in the F.I.R. does not put the prosecution case out of Court.

20. As already pointed out that in the melee and the confusion that followed the dastardly killing of as many as five persons it would be very difficult for the witnesses to remember with absolute precision and accuracy the number of shots inflicted. Moreover, the cartridges contain several pellets which enter the body and spread and may result in multiple injuries. The accused did not cross-examine the Doctor to show that these injures could not be caused by pellets discharged from a single cartridge.

21. Lastly it was argued that according to the prosecution Nath Singh and Partap Singh had been

dragged upto a distance of 1 Kila, i.e. 70 feet, which appears to be improbable. The medical evidence, however, shows that the dead bodies contained abrasions which could only be produced if the bodies were dragged. It was suggested by the learned Counsel appearing for the State that in a sheer state of desperation the accused wanted the suites of the occurrence near their own fields so as to claim the right of private defence and that is why they wanted to drag the bodes from the place of occurrence to somewhere near their own fields. This appears to us to be a plausible explanation for the act of the accused in dragging the bodies. It would thus be seen that there is no real inconsistency between the ocular and the medical evidence. It is not a case where the direct evidence shows the killing of the deceased with guns, but the injures found by the Doctor are either lathi or bhalla injuries, nor is it a case where the evidence shows that the deceased were fired at by a gun whereas the ballistic expert says that the deceased could only have been fired by a rifle. It is in such cases where there is any direct conflict between the ocular and the medical evidence that the Court has to reject the prosecution case. In the instant case we are satisfied that there is no inconsistency between the direct and the medical evidence.

22. Another important evidence adduced by the prosecution in support of its case was (1) the recovery of empties from the spot, and (2) recovery of the guns, at the instance of two accused persons, namely, Jagmohan Singh and Gurdev Singh. So far as the recovery of the empties from the spot is concerned, the Sessions Judge rejected this evidence but the High Court has reversed this finding and in our opinion for very good reasons. According to the prosecution three empties were recovered on the night of May 2, 1973 when the police visited the spot and were preparing the inquest reports. These empties were recovered near the dead body of the deceased Sewa Singh. A recovery memo Ext. P. K. K. was prepared and although the witnesses to that seizure memo have not been examined the Investigating Officer PW 23 who does not bear any animus against the accused deposed on oath that he had discovered these three empties in the night. Further more, the Sessions Judge failed to notice that the fact that these empties were recovered is clearly mentioned in the inquest report at p. 43 of the High Court Paper Book where it is clearly mentioned thus :

> Three empty cartridges of 12 bore were taken into police possession from near the dead body.
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> It would thus appear that the recovery of the three empties was mentioned in the inquest report prepared soon after the occurrence and, therefore, it cannot be said that it was a fabrication by the prosecution. The mere fact that Roop Singh and Sardar Singh mentioned as witnesses in the recovery memo, have not been examined is not sufficient in the present case to reject this part of the prosecution. If the empties would not have been recovered, there could be absolutely no occasion for this fact to have found place in the inquest reports which were prepared during the night of May 2 and 3, 1973.

23. Another comment made by the learned Sessions Judge was that Sadhu Ram had stated in his evidence that no article was recovered in his presence. This stray statement, in our opinion, is not sufficient to discredit the recovery of the three empties. Sadhu Ram when questioned about the recovered articles may not have in mind the recovery of the empties but some other material items like clothes, weapons, etc. The Sessions Judge was, therefore, wrong in rejecting the recovery of three empties merely because of a stray statement made by PW 3 Sadhu Ram in his cross-examination. The High Court, while reversing the finding of the Sessions Judge on this point, has observed as follows :

> We do not find any defect in this evidence of the prosecution and the learned trial Judge in our view was on the wrong premises to reject this evidence.
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> Perhaps the High Court has also not noticed that in one of the inquest reports the recovery of three empties is clearly mentioned, which in fact settles the controversy once for all. In these circumstances, therefore, we are of the opinion that the three empties from near the dead body of Sewa Singh had in fact been recovered on the night of the occurrence.

24. Again the recovery of the seven empties on the next day i.e. May 3, 1973 the Sessions Judge has disbelieved this part of the case for most perfunctory and unconvincing reasons. The Sessions Judge seems to believe that since these empties were not recovered at night although the Investigating Officer searched for the same in the light of the torch and lantern, their recovery in the day must be deemed to be a fabrication. We are unable to agree with this fallacious process of reasoning. After all night, however lighted it may be, cannot be a good substitute for a day light or for the light of the sun. The empties were very small articles measuring about 1/2" to 1" and it is common experience that there are a number of small articles which one may not, with due diligence, be able to find even with the aid of a torch or electric light, yet they could be easily found in the day. In these circumstances, therefore, the reasons given by the learned Sessions Judge do not appeal to us at all and the High Court was right in reversing the finding of fact which was both wrong and perverse. In this connection, the High Court observed as follows :

> We do not find any element of untruth in this or any fabrication in the recovery of seven empty cartridge shells by the Assistant Sub-Inspector Dev Dutt on the morning following the occurrence. The recovery of all the empty cartridge shells from two different places inspires confidence and we have no hesitation to accept this.
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> The recovery of these seven empties is mentioned in seizure memo Ext. PY and apart from PW 23 the Investigating Officer the recovery has been proved also by PW 19 Gurdial Singh who is an eye witness and who has also been held by the Courts below to be an independent and disinterested witness. Both these witnesses have deposed on oath regarding the recovery of seven empties from the spot. Merely because other witnesses were not examined would be no ground to reject their evidence. We would, however, like to point out that in future the Investigating Officer should not associate any eye witness with the recovery memos, because that partakes of an attempt to make the witness omnibus. For these reasons, the recovery of three empties on the night of May 2, 1973 and seven empties in the morning of May 3, 1973 has been established beyond reasonable doubt and we see no reason to distrust the credibility of Exts. PKK and PY. The recovery of the empties is a very important circumstances which fully corroborates the evidence of the eye witnesses, taken along with the evidence of the ballistic expert that some of these empties could have been fired from the guns sent to him.

25. We now come to the recovery of the guns Exts. PZ/1 and PAA/1. According to the prosecution the appellant Jagmohan Singh made a disclosure statement to the Police Officer Nasib Singh in the presence of Kishan Singh Ex-Sarpanch that he was prepared to point out the gun which he had concealed at a particular place. This statement is Ext. PAA and is witnessed by Kishan Singh. The accused was accordingly taken to the spot on May 25, 1973 and according to the evidence of Kishan Singh, who appears to be an absolutely independent witness and against whom no animus, though

suggested, has been established, it is clear that the disclosure statement was made by accused Jagmohan Singh to Nasib Singh in his presence and the accused was taken and he recovered the gun from underneath the bushes standing on the old khal situated at a distance of 30 paces from the Forest Nursery in village Saunti. Similarly the witness deposed about the disclosure statement having been may to Nasib Singh Police Officer by accused Gurdev Singh at whose statement a gun was recovered from the bundle of wheat crop lying in a vacant piece of land. Nasib Singh has corroborated the testimony of Kishan Singh regarding the recovery of these two guns at the instance of the appellants Jagmohan Singh and Gurdev Singh. The learned Sessions Judge rejected this statement mainly on two grounds firmly, the learned Sessions Judge thought that Kishan Singh was merely a chance witness and he had no occasion to go to the police station and, therefore, his presence was doubtful, and secondly, the learned Judge took a serious note of a small discrepancy between the statement of Kishan Singh and that of the Police Officer Nasib Singh. According to Kishan Singh, Gurdev Singh made the disclosure statement in reply to the very first question, whereas according to Nasib Singh the accused had taken about half an hour to make the disclosure statement. Kishan Singh was not at all interested in the accused and there was no reason why he should have spoken a falsehood. Nasib Singh by saying that the accused took half an hour appears to have so stated in order to show that the disclosure was voluntary. This part of the statement of Nasib Singh may not be accepted and may have been deliberately introduced by way of pure embellishment but this does not destroy the fabric of evidence of an independent witness Kishan Singh. Being a police officer Nasib Singh may have thought that he should give the case a colour of truth by providing him an opportunity of reflection on the part of the accused before he made a disclosure statement. The fact, however, remains that the accused persons had been interrogated probably from May 23, 1973 and it was only after their conscience pricked them and they really felt penitent that they agreed to give a disclosure statement and recover the guns at their instance. Such a statement which is admissible under Section 27 of the Evidence Act cannot be lightly brushed aside on trivial grounds given by the learned Sessions Judge. Furthermore, regarding Kishan Singh being a chance witness the Sessions Judge appears to be factually incorrect. In his statement Kishan Singh says that he and Sardara Singh had gone to the police station to inquire about the arrest of the accused persons. The Sessions Judge, however, relied on the statement made by Kishan Singh before the police which is Ext. DF at p. 73 of the High Court Paper Book. In this statement he merely stated that he had gone to the police station Ladwa by the way. His statement does not show that he was present only by chance or without any purpose. On the other hand his statement clearly shows that he had gone to the police station and was present there for some reason or the other when Gurdev Singh made the statement. Thus the learned Sessions Judge has misread the statement of this witness before the police as put to him in his cross-examination. Being a villager one can fully understand the anxiety of the witness to find out whether the accused had been arrested, particularly because they were absconding for quite some time. The High Court has also not considered the fact that the reasons given by the learned Sessions Judge are either factually incorrect or based on purely artificial appreciation of evidence of Kishan Singh and Nasib Singh. We, therefore, do not agree with the findings of the Sessions Judge and the High Court that the recovery of the guns evidenced by Exts. PZ/1 and PAA/1 had been introduced or fabricated by the prosecution. If the recovery of the guns is believed, then it affords a substantial corroboration of the case of the accused persons presence in the light of the report of the ballistic expert.

26. Moreover, the courts below appear to have overlooked an important fact that the two guns had not been recovered from places which were open and accessible to all and sundry, but care had been taken by the accused to conceal in the bundle to wheat crop lying in a vacant field and in the bushes standing on the old khal in the forest so that even with the greatest possible care the police would

not have been able to recover these weapons unless clues were furnished by the appellants Jagmohan Singh and Gurdev Singh themselves. This circumstances by itself appears to be a sufficient guarantee of the truth and authenticity of the recovery of the guns referred to above.

27. Mr. Mulla appearing for Devinder Singh contended that the accused Devinder Singh stands on the same footing as that of Sher Singh and the High Court having acquitted Sher Singh should have acquitted Devinder Singh also. We are, however, unable to agree with this contention. The High Court appears to have given benefit of doubt to Sher Singh for two reasons. In the first place, no overt acts have been attributed to him and secondly he being an old man of 72 years there was a possibility of his being roped in by the prosecution due to enmity. The same, however, could not be said of Devinder Singh. The High Court and the Sessions Judge have rightly found that Devinder Singh was the evil genius of the whole show. It was he who abused Amrik Singh and turned him out of the field when he could have shown a little restraint and forbearance. It was he who had administered threats to Nath Singh and others he would teach them a lesson and translated the threat into action soon thereafter when he along with the other appellants came to the spot and made brutal assault on the deceased. In these circumstances, the case of Devinder Singh is distinguishable from that of Sher Singh. The argument of Mr. Mulla, learned Counsel for Devinder Singh, on this score must, therefore, be overruled.

28. After having gone through the entire evidence on the record and the judgments of the courts below and after hearing counsel for the parties and for the reasons that we have already given, we are fully satisfied and convinced that the prosecution case against the appellants had been proved beyond reasonable doubt and that the appellants were rightly convicted by the Sessions Judge and the High Court.

29. This, however, does not dispose of the matter completely, because it appears that the commitment inquiry was held under the Code of Criminal Procedure, 1973 and the Sessions Judge after delivering the judgment of conviction has not given any opportunity to the accused of being heard on the question of sentence separately. In Santa Singh v. State of Punjab ([1976] 4 SCC 190 : 1976 SCC (Cri) 546) this Court has taken the view that under the provisions of the Code of Criminal Procedure, 1973, it is incumbent on the Sessions Judge delivering a judgment of conviction to stay his hands and hear the accused on the question of sentence and give him an opportunity to lead evidence which may also be allowed to be rebutted by the prosecution. This procedure has not been adopted by the learned Sessions Judge and, therefore, the sentences of death passed on the appellants Nirpal Singh, Gurdev Singh and Jagmohan Singh cannot be sustained although the convictions recorded against them are confirmed by us and will not be repended under any circumstances whatsoever.

30. Counsel for the State has drawn our attention to the fact that in some cases the accused have raised the question that once the case is remitted to the Sessions Judge, then the accused is entitled to claim a de novo trial on the question of conviction also. In this connection, reliance was placed on Payare Lal v. State of Punjab ([1962] 3 SCR 328 : AIR 1962 SC 690 : (1962) 1 Cri LJ 688 : (1962) 1 LLJ 637). In the first place, this case was based on an interpretation of Sections 251 to 259 of the Code of Criminal Procedure, 1898, and the reason why this Court held that the proceedings by a successor Judge cannot be started from the stage left out by his predecessor was that a Judge who had heard the whole of the evidence before had the advantage of watching the demeanour of the witnesses which would be lost if the successor Judge was to proceed from the stage left by his predecessor. It is true that under Section 326 of the Code of Criminal Procedure, 1973, there is a discretion given to the successor Magistrate to act on the evidence already recorded and not to hold

a de novo trial and no such provisions is made in case of a trial by the Sessions Judge or a Special Judge. The ratio of Payare Lal's case (supra), however, is not applicable to the present case. Once the Judge who hears the evidence delivers a judgment of conviction, one part of them trial comes to an end. The second part of the trial is restricted only to the question of sentence and so far as that is concerned, when a case is remitted by us to the Sessions Court for giving a hearing on the question of sentence under Section 235(2) of the Code of Criminal Procedure 1973, there would be fresh evidence and the principle that the Sessions Judge may not act on evidence already recorded before his predecessor and must conduct a de novo trial would not be violated. In these circumstances, therefore, the ratio of Payare Lal's case mentioned above cannot be applied or projected into the facts and circumstances of the present case or to cases where the trial has ended in a conviction but the matter has been remitted to the trial Court for hearing the case only on the question of sentence.

31. So far as the case of Devinder Singh and Maha Singh are concerned as they have already been given sentences of life imprisonment and this is the minimum sentence that could be passed under Section 302 I.P.C. it is not necessary to remit their cases to the Sessions Judge. The convictions and sentences of these two accused are, therefore, confirmed and their appeals are dismissed. As regards the appeals by the three other appellants, namely, Nirpal Singh, Jagmohan Singh and Gurdev Singh, we confirm their convictions which would not be reopened under any circumstances, but set aside the sentences of death passed on them and remit their cases to the trial Court for passing sentences on them afresh after hearing the accused in the light of the observations made by us and to this extent only the appeals of the three appellants are allowed so far as their sentences are concerned.

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