Rameshwar Dayal and Others

Vs

State of Uttar Pradesh

Criminal Appeal Nos. 241-242 of 1972

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

15.02.1978

JUDGMENT

FAZAL ALI, J. -

These two criminal appeals by special leave are directed against a common judgment dated August 1, 1972 of the Allahabad High Court upholding the conviction and sentences imposed by the Sessions Judge, Bareilly on the appellants.

1A. In Criminal Appeal No. 241 of 1972 there are seven appellants, viz., Rameshwar Dayal, Acchmal, Janmejaya Deo, Rohan, Raghunandan, Ram Das and Sudama. In Criminal Appeal No. 242 of 1972 there are two appellants, viz., Rohtas, and Sukhdev. All the appellants were convicted under Section 302/149, IPC and sentenced to imprisonment for life. Rameshwar Dayal, Achhmal Ram, Janmejaya Deo, Rohtas, Sudama, Ram Das, Raghunandan and Rohan were further convicted under Section 324 read with Section 149, IPC and sentenced to one year's rigorous imprisonment. Sukhdev was also convicted under Section 324 whereas Rameshwar Dayal and Janmejaya Deo were convicted under Section 394, IPC and sentenced to four years' rigorous imprisonment. Rameshwar Dayal, Achhmal Ram, Janmejaya Deo, Rohtas, Sukhdeo and Sudama were further convicted under Section 148, IPC and sentenced to 18 months' rigorous imprisonment whereas Ramdas, Raghunandan and Rohan were convicted under Section 147, IPC and sentenced to one year's rigorous imprisonment. The High Court on appeal affirmed the conviction and sentences indicated above.

2. The unfortunate occurrence which resulted in the death of the deceased is an outcome of an outstanding enmity between the two parties. Both the High Court and the Sessions Judge have clearly spelt out the essential features of the prosecution case and it is not necessary for us to repeat the same with all its details. It appears that apart from the long outstanding enmity between the parties the immediate provocation for the long outstanding enmity between the parties the immediate provocation for the occurrence was that proceedings under Section 107/117, Cr. P.C. had been initiated by Babu Ram and Munnalal against each other, and were pending in the Court of the Sub-Divisional Magistrate, Faridpur. In these proceedings a number of persons figure as parties on both sides. December 9, 1969 was the date fixed for giving evidence in the proceedings under Section 107/117, Cr. P.C. which had been initiated against the accused persons on the basis of an application given by the deceased Babu Ram. The leader of the faction against whom the proceedings had been started was Munna Lal.

3. Babu Ram along with his companions left for Faridpur and when he reached near the field of one Laltu Nut, he was surrounded by the appellants who were lying in wait for him in the bushes and

who on seeing the accused and his party emerged and started abusing him right and left. Of the accused persons Rameshwar Dayal was armed with a single barrel gun, Achhmal Ram with a double barrel gun, Janmejaya Deo with a country-made pistol and the others were variously armed with spears, kantas and lathis. Rameshwar Dayal fired his gun at the deceased and Janmejaya fired another shot at the deceased from his pistol simultaneously. Babu Ram fell down as a result of the injuries received by him. Sukhdeo intercepted Chhoteylal when he wanted to protect his brother and inflicted a spear injury on him. Virendra and others who were accompanying the deceased raised an alarm at which Achhmal fired a shot at them which did not hit them. Meanwhile, Rameshwar Dayal snatched away a bag from the belt of the deceased containing his licensed revolver and cartridges and Janmejaya Deo picked up the cloth bag in which the deceased was carrying the papers relating to the proceedings under Section 107/117, Cr. P.C. which was fixed on December 9, 1969, the day of the occurrence. Thereafter, the appellants made good their escape by running away towards the south. A narrative regarding the manner in which the occurrence took place was jotted down by PW 1 Rajendra, son of the deceased at the spot and he carried the same to the Police Station Fatehganj, a mile from the scene of the occurrence where the FIR was lodged at 8 a.m. on the basis of which a case was registered against the appellants under Sections 302, 394 and 324 and other provisions of the Penal Code.

4. The police visited the spot and after the usual investigation submitted a charge-sheet against the appellants as a result of which they were put on trial by the Sessions Judge and convicted and sentenced by him as indicated above.

5. Two facts need special mention which have taken place during the course of investigation. In the first place, when the Investigating Officer visited the place of occurrence he found one empty cartridge and four live cartridges at the spot. The appellants have challenged the factum of the recovery of four live cartridges at the spot an aspect which has engaged the main attention of counsel for the appellants in this Court as well as in the High Court which will be dealt with a little later.

6. The prosecution had examined three main eye-witnesses in the case, namely, PW 1 Rajendra, PW 2 Mungolal Sharma and PW 3 Chhoteylal. The learned Sessions Judge after a very careful appraisal of the evidence and the circumstances of the case came to the clear conclusion them. It may also be mentioned here that the Sessions Judge found as a fact in his judgment that the cartridges which were found on the spot were live cartridges though by mistake they were recorded as empty cartridges in the evidence of the Investigating Officer Muniraj Singh. In this connection, the learned Sessions Judge while dealing with the evidence of the Investigating Officer, PW 11 observed as follows :

> He also found four live cartridges Ex. 2 of 32 bore revolver near the dead body (the word empty instead of live being wrongly written in the statement as is shown by the memo Ex. Ka-14 prepared in respect of it after being sealed).

7. The learned Sessions Judge further observed as follows :

> Further that four live cartridges said to be belonging to the deceased were found lying at the spot by the I.O. which fact is again not challenged by the defence, the prosecution has succeeded in proving that the incident occurred near the filed of Laltu.

> These two statements of fact made by the learned Sessions Judge in his judgment do not appear to have been challenged by the appellants in their grounds of appeal before the High Court. Normally, this Court. Normally, this Court would not allow the parties to contest any statement of fact mentioned in the judgment unless unerring and cogent evidence is produced to draw a converse conclusion. Neither before the High Court nor before this Court such an evidence has been suggested much less proved in the case.

8. It appears that while the appeal was pending in the High Court where the material exhibits were sent for and after the material exhibits were sent for an application was filed by the accused on April 25, 1972 praying that in view of the fact that an inspection of the material exhibits showed that the cartridges found at the spot were not live cartridges but empty cartridges, additional evidence may be allowed to be taken by the Court to clear up the issue. It may be noted that this application was made almost three years after the memo of appeal was filed in the High Court. The fact that live cartridges were found at the spot does not appear to have been controverted either before the sessions Judges or even at the time when the appeal was filed before the High Court. It fact, it would appear that counsel for both the parties argued the case before the sessions Judge on the footing that the evidence showed that four live cartridges were at the spot.

9. When the matter was taken up be the High Court, at the hearing the High Court examined two witnesses, viz. Mr. Hira Lal Capoor, the Sessions Judge himself and Muniraj Singh, the Investigating Officer on the question as to whether live or empty cartridges were found at the spot. Indeed, if it was proved that empty cartridges were found at the spot, then, having regard to the admitted fact that the deceased was carrying a pistol along with cartridges there may be a possibility of his having himself fired five shots on his assailants and that would naturally change the entire complexion of the case. After the witnesses were examined by the High Court the appellants were re-examined under Section 342, Cr. P.C. Thereafter, the appellants filed an application on April 25, 1972 praying that they may be given an opportunity to rebut the evidence of the Court witnesses summoned by the High Court. In their application the appellants prayed for the examination of two witnesses, namely Shri S. N. Mulla, Bar-at-Law and Shri Bankesh Behari Mathur, Advocate, Bareilly and also called for a document, viz., the Panchayatnama Register of Police Station Fatehganj. The High Court, however, refused to accede to the prayer of the appellants on the ground that they had got full opportunity to cross-examine the witnesses examined by the High Court under Section 540, Cr. P.C.

10. One of the main points taken by the appellants in their petition for special leave was that the High Court judgment was vitiated by the failure of the High Court to give a reasonable opportunity to the appellants in order to rebut the evidence of the witnesses examined by the High Court under Section 540, Cr. P.C. and this argument has been the sheet-anchor of Mr. Garg, counsel for the appellants before us.

11. We have gone through the judgments of the two courts and have also been taken through the entire evidence. Mr. Garg, learned counsel for the appellants submitted that if the High Court chose to summon the Sessions Judge and the Investigating Officer under Section 540, Cr. P.C. it was incumbent on it to give a reasonable opportunity to the appellants to rebut that evidence and the High Court committed a serious error of law in not summoning the witnesses Shri Mulla and Shri Mathur in spite of a prayer having been made to this effect to it. We find ourselves in complete agreement with the principles adumbrated by Mr. Garg and we feel that the High Court ought to have given an opportunity to the appellants to examine the witnesses.

12. It was also argued that the High Court erred in examining the Sessions Judge as a witness which was a most extraordinary course. In this connection, reliance was placed on a decision in the case of Duke of Buccleuch and Queensberry v. The Metropolitan Board of Works ((1971-2) V English and Irish Appeal Cases 418), where Lord Chelmsford speaking for the Appeal Court observed as follows :

> With respect to those who fill the office of Judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent them being examined.
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> We fully agree with the rule of law laid down in the aforesaid ruling. Judges should not be allowed to become witnesses in case which they decide otherwise that would lead to most anomalous results and would undermine the confidence of the people in the judiciary. A Judge has to decide the case according to the evidence and the circumstances before him and it cannot be allowed to fill up gaps left by the prosecution or the defence by giving statement on oath before a court of law. If any statement of fact made by the Judge in his judgment is sought to be controverted the same should be done by the well established method of filing affidavits by counsel and getting a report from the Judge by the High Court. It is true that under Section 540 of the Criminal Procedure Code the High Court has got very wide powers to examine any witness it likes for the just decision of the case, but this power has to be exercised sparingly and only when the ends of justice so demand. The higher the power the more careful should be exercise.

13. In the case of Regina v. Gazard (173 ER 633) it was held by Patteson, J. that it will be a dangerous precedent to allow a President of the Court of Record to be examined as a witness. In this connection, Patteson, J. made the following observations :

> It is a new point, but I should advise the grand jury not to examine him. He is the president of a Court of Record, and it would be dangerous to allow such an examination, as the Judges of England might be called upon to state what occurred before them in Court.
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> Although in the instant case the Sessions Judge was not a Court of Record but the principles laid down by Patteson, J. would equally apply to him. We do not mean to suggest for a moment that the High Court has no power to examine a Sessions Judge in any case whatsoever for there may be proper and suitable cases where the examination of the Sessions Judge or the trial court may be very necessary but this must be indeed a very rare occasion where all other remedies are exhausted. In the instant case, we feel that there was no good and cogent ground for the High Court to have examined the Sessions Judge because his evidence was not essential for a just and proper decision of the case particularly when the appellants never challenged the statements made in the judgment regarding the live cartridge either before the Sessions Judge or even in the High Court when the memo of appeal was filed before the Court.

14. As far as the evidence of Muniraj Singh the Investigating Officer is concerned that also was not

necessary because that really amounted to allowing the prosecution to fill up gaps, even if we hold that the High Court was justified in exercising its discretion under Section 540, Cr. P.C. the High Court committed a serious error or law in not allowing the appellants an opportunity to rebut the statement of the witnesses examined by the High Court which caused a serious prejudice to the accused.

15. It was argued by counsel for the State that there is no provision in the Criminal Procedure Code which requires the Court to allow the appellant an opportunity to rebut the evidence of witnesses summoned under Section 540, Cr. P.C. This argument, in our opinion, is based on a serious misconception of the correct approach to the cardinal principles of criminal justice. Section 540 itself incorporates a rule of natural justice. The accused is presumed to be innocent until he is proved guilty. It is, therefore, manifest that where any fresh evidence is admitted against the accused the presumption of innocence is weakened and the accused in all fairness should be given an opportunity to rebut that evidence. The right to adduce evidence in rebuttal is one of the inevitable steps in the defence of a case by the accused and a refusal of the same amounts not only to an infraction of the provisions of the Criminal Procedure Code but also of the principles of natural justice and offends the famous maxim audi alteram partem. Section 540 of the Criminal Procedure Code runs thus :

> Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

16. A careful perusal of this provision manifestly reveals that the statute has armed the Court with all the powers to do full justice between the parties and as full justice cannot be done until both the parties are properly heard the condition of giving an opportunity to the accused to rebut any fresh evidence sought to be adduced against him either at the trial or the appellate stage appears to us to be implicit under Section 540 of the Cr. P.C. The words "just decision of the case" would become meaningless and without any significance if a decision is to be arrived at without a sense of justice and fairplay.

17. In the case of Channu Lal v. Rex (AIR 1949 All 692 : 51 Cri LJ 199 : 1950 AWR 147) the Division Bench of the Allahabad High Court ruled as follows :

> Section 540, in our opinion, empowers a Court to take such evidence. If the Court decides to take such evidence, it would be proper for the Court to re-examine the accused with reference to the new evidence recorded and to give an opportunity to the accused to give such further evidence in defence as he may be advised to do.

To the same effect is a decision of the Madras High Court in the case of Rengaswami Naicker v. Muruga Naicker (AIR 1954 Mad 169 : 55 Cri LJ 123 : (1952) 2 MLJ 497) where Ramaswami, J. observed as follows :

> The only rules, which the Magistrate must bear in mind when examining court witnesses are : (1) that the prosecution and the accused are both equally entitled to cross-examine a court witness, and (2) that if the evidence of a court witness is prejudicial to the accused, opportunity to rebut the evidence so given must be given

to the accused.

Same view has been taken by the Lahore High Court in the case of Shugan Chand v. Emperor (AIR 1925 Lah 531 : 26 Cri LJ 1035 : 87 IC 923) and in the case of The Queen v. Assanoollah (13 SWR (Cri) 15) where a Division Bench of the Court observed as follows :

In the present case, the prisoner has had no opportunity of making a defence or calling evidence, with reference to the evidence of the Moonsiff given by him when re-called after the prisoner had concluded his defence. I think, therefore, that the case has not been properly tried, and that the conviction and sentence are not legal. It appears to me that, under Section 405, we ought to quash the conviction, and order a new trial.

18. We find ourselves in complete agreement with the principles laid down and the observations made in the aforesaid cases which represent the correct law on the subject.

19. The High Court seems to have justified the refusal to give an opportunity to the accused to rebut the evidence on the ground that Shri Mulla who was counsel representing the accused did not choose to withdraw from the appeal and that other witnesses sought did not choose to withdraw from the appeal and that other witnesses sought to be examined by the appellants were bystanders. These considerations are absolutely extraneous to the issue. It was not open to the High Court to have pre-judged the merits of the evidence of the witnesses sought to be examined by the defence even before their evidence was recorded. In these circumstances, we feel that the reasons given by the High Court for not examining the witnesses suggested by the accused are wholly unsustainable in law.

20. For these reasons, therefore, we are clearly of the opinion that the High Court was in error in refusing the appellants an opportunity of giving evidence to rebut the evidence of the witnesses examined by the High Court under Section 540, Cr. P.C. Normally, this error would have been sufficient to vitiate the judgment and would have required our remitting the case to the High Court for a fresh decision. We however find that this is a very old case when the occurrence had taken place more than 8 years ago and the appeal in this Court has itself taken more than five years. In these circumstances, we feel that the ends of justice do not require that the case should be sent back to the High Court which would entail further delay. We have, therefore, decided to go into the evidence ourselves after completely excluding the evidence of the witnesses examined by the High Court under Section 540, Cr. P.C. so that we base our decision on the evidence and the circumstances that were before the Sessions Judge.

21. Before going into the merits we might mention a few facts which have been found against the appellants. Both the High Court and the Sessions Judge have believed the evidence of PWs 1. 2 and 3 who proved the assault on the deceased and Chhotey Lal. The Sessions Judge has particularly discussed all the aspect of the case very exhaustively and has combated every possible argument that was or could advanced before him by the appellants.

22. Regarding PW 1 the High Court accepted his evidence and observed as follows :

> We are satisfied that Chhoteylal (PW 3) was also present in the company of his brother Babu Ram when he was shot dead.

23. Similarly, rejecting the adverse comments made against the testimony of PW 2 the High Court said that "his explanation for his presence in the company of the deceased when he was shot at is

quite plausible. He is in our judgment, a thoroughly reliable witness".

24. Similar opinion was given by the High Court in respect of Chhotey Lal, PW 3 where the High Court observed as follows :

> Rajendra whom we have found was present during the occurrence has supported the statement of Chhoteylal. In the First Information Report lodged by him without any delay whatsoever it had been mentioned that Chhoteylal had been injured by Sukhdeo with a spear wielded by him.

25. Similarly, the trial Court has also accepted the evidence of these witnesses in the same terms. We have also gone through the evidence of these three witnesses in their entirety and we find that they have given straightforward answers and their evidence has the ring of truth in it.

26. One of the most important circumstances which proves the prosecution case is the fact that although the main person against whom proceedings under Section 107 had been initiated by the deceased was Munna Lal yet Munna Lal has not at all been made an accused in this case nor has any act been attributed to him. This is an intrinsic evidence of the fact that the prosecution had no intention of falsely implicating any person even though he may have been the greatest enemy of the deceased.

27. Another pertinent fact which deserves particular mention is that the FIR appears to have been lodged within a hour of the occurrence and there was hardly any time for the parties to discuss or deliberate. The FIR contains a brief but full narrative of the manner in which the deceased was killed and the names of the accused persons are also mentioned therein. It is true that some of the witnesses who have been mentioned in the FIR as having accompanied the deceased have not been examined by the prosecution but that by itself in our opinion in the circumstances of the present case does not appear to be a fatal defect in the prosecution case. This Court in the case of Dalbir Kaur v. State of Punjab ((1977) 1 SCR 280 (1976) 4 SCC 158 : 1976 SSC (Cri) 527) said that it is manifest that what is important is not as to who were not examined but as to whether the witness who had actually been examined should be believed and while enunciating the principles on the basis of which this Court would interfere in an appeal by special leave observed as follows :

> 1. That this Court would not interfere with the concurrent findings of fact based on pure appreciation of evidence even if it were to take a different view on the evidence.
>
> 2. That the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on.
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> 3. That the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court.
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> 4. That the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provisions of law or procedure resulting in serious prejudice or injustice to the accused.

> 5. This Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence.

In the instant case, having regard to the concurrent findings of fact by the High Court and the Sessions Judge that the evidence of PWs 1, 2 and 3 is worthy of credence, and after perusing the evidence we also do not see any reason why the evidence of these witnesses should be discarded.

28. All the three witnesses have been mentioned in the FIR as being present on the scene of occurrence. PW 3 has an injury which according to the doctor could not be self-inflicted. The presence of the injury on the person of Chhotey Lal is a strong corroboration of the evidence of the eye witnesses.

29. We shall now deal with some important contentions raised by the appellants on the merits of the case. In the first place, great reliance was placed on the evidence of PW 11 the Investigating Officer who had said in his statement before the Sessions Court that he had found four empty cartridges at the spot. Mr. Garg submitted that this admission of the Investigating Officer knocks the bottom out of the case of the prosecution. It was argued that if the empty cartridges were recovered from the spot as deposed to by this witness the entire complexion of the case changes and it would appear that the prosecution had not presented the true version of the case before the court. We have ourselves gone through the evidence of PW 11 carefully and we find that either the witness has made some confusion regarding the finding of four empty cartridges or the word "empty" has been wrongly recorded in the statement of the witness as is clearly found by the learned Judge in his judgment extract of which has been quoted above. We have already pointed out that although the trial Judge had clearly held that the word "empty" instead of "live" was wrongly written in the statement yet this statement of fact made by the Sessions Judge in his judgment was not controverted by the appellants in their memo of appeal filed in the High Court nor was any attempt made by the appellants to prove that the said statement was wrong on a point of fact either by examining counsel who had conducted the case before the trial Court or by producing any other proof. Furthermore, the learned Judge has clearly mentioned in his judgment that the fact that four live cartridges belonging to the deceased were found lying at the spot was not even challenged by the defence. Even this fact was not controverted either before the Sessions Court or in the memo of appeal filed in the High Court.

30. Finally, the High Court itself has pointed out that Shri S. N. Mulla and Shri R. K. Shangloo who had represented the appellants in the appeal in the High Court and has also appeared for the appellants before the trial Court on enquiry by the High Court whether the revolver cartridges exhibited at the trial were live or empty were not in a position to refute the statement made by the prosecutor Shri B. C. Saxena. In this connection, the High Court observed as follows :

> Shri S. N. Mulla and Shri R. K. Shangloo represent the appellants in Criminal Appeal No. 2561 of 1969. Both these learned counsel had appeared on behalf of the defence before the trial court. It was Shri Mulla who had cross-examined the Investigating Officer. When we enquired from them as to whether the revolver cartridges when exhibited at the trial were live or empty neither of the two learned counsel found himself in a position to refute the statement made by Shri B. C. Saxena.

Shri B. C. Saxena who had appeared for the prosecution before the trail Court emphatically asserted

that when the sealed packet containing Ex. 2 was opened it contained four live cartridges. Shri Saxena also asserted that during the arguments the attention of the Sessions Judge was pointedly drawn to the statement made by the Investigating Officer on when reliance has been placed by the appellants and both the parties proceeded on the footing that the cartridges were live when they were produced before the Court. All these facts have been clearly mentioned in the judgment of the High Court. The conduct of counsel for the appellants is fully consistent with the observations made by the Sessions Judge in his judgment that there appears to be some inadvertent mistake in recording the evidence of the Investigating Officer.

31. Apart from this there is overwhelming documentary evidence to show that the statement of the Investigating Officer in Court that he found four empty cartridges is factually incorrect. To begin with there is Ex. Ka-10 which is the panchayatnama or the inquest report prepared by the Investigating Officer himself which he proves in his evidence by stating as follows :

> I reached the place of the occurrence at 9 a.m. There I found the dead body of Babu Ram near the chak road towards the north of the filed of Laltu Nai (sic Nut) lying on the ridge at a distance of about 2-3 paces. I had prepared the panchyatnama Ex. Ka-10.

In this inquest report it is clearly mentioned by the Investigating Officer that he had found for live cartridges. The exact words used are. The Investigating Officer does not say in his evidence that this finding of fact in the panchayatnama or the inquest report was incorrect. The statement in the inquest report was made by the Investigating Officer soon after the occurrence and was, therefore, the earliest statement regarding a fact which he found and observed. The earlier statement, therefore, is a valuable material of testing the veracity of the witness.

32. In the case of Baladin v. State of U. P. (AIR 1956 SC 181 : 1956 Cri LJ 345) it was pointed out by this Court that statements made by the prosecution witnesses before the investigating police officer being the earliest statements made by them with reference to the facts of the occurrence are valuable material for testing the veracity of the witnesses examined. In this connection, this Court observed as follows :

> Statements made by prosecution witnesses before the investigating police officer being the earliest statements made by them with reference to the facts of the occurrence are valuable material for testing the veracity of the witnesses examined in court .... but the statements made during police investigation are not substantive evidence.

Reliance was placed by the learned counsel for the appellant on this decision in support of his argument that the statements made in the inquest report were inadmissible in evidence being hit by Section 162, Cr. P.C. In the first place, the statement made by the Investigating Officer in Ex. Ka-10 is not a statement made by any witness before the police during investigation but it is a record of what the Investigating Officer himself observed and found. Such an evidence is the direct or the primary evidence in the case and is in the eye of law the best evidence. Unless the record is proved to be suspect and unreliable, perfunctory or dishonest, there is no reason to disbelieve such a statement in the inquest report.

33. Reliance was also placed by counsel for the appellants in the case of Surjan v. State of Rajasthan (AIR 1956 SC 425 : 1956 Cri LJ 315) where this Court observed as follows :

> But the statement in the inquest report is not evidence by itself and it certainly cannot be pitted against the evidence of the medical witness given in Court.

This case is clearly distinguishable from the facts and circumstances of the present case. What had happened in that case was that a description of an injury found on the head of the deceased as given by the Investigating Officer was inconsistent with the medical evidence. This Court pointed out that where a statement in the inquest report was pitted against the medical evidence it had to yield before the opinion of the expert. It is obvious that the description given by the Sub-Inspector was merely his opinion which was not the opinion of an expert and could not, therefore, stand scrutiny before the evidence of a duly qualified expert, viz., the doctor. This principle cannot be applied here for it does not require an expert knowledge to find out whether a live cartridge was there or not. In these circumstances, therefore, the two cases cited by the appellants do not appear to be of any assistance to them.

34. Reliance was further placed on a decision of this Court in the case of Razik Ram v. J. S. Chouhan (AIR 1975 SC 677 : (1975) 4 SCC 769). This case has also no application to the facts of the present case because what had happened in that case was that a statement of the witness Parmeshwari was recorded by the Investigating Officer and thumb-mark was being used in an election petition. It was held by this Court that the statement was hit by Section 162, Cr. P.C. This proposition is well settled. Any statement made by any witness to a police officer during investigation is clearly hit by Section 162 and can be used only for contradicting or corroborating the other witness and is not a substantive piece of evidence. A statement contained in Ex. Ka-10 is not a statement of a witness at all but is a memo of what the Investigating Officer had himself found and observed at the spot and to such a case Section 162 would have no application at all.

35. Reliance was also placed on a recent decision of this Court in the case of Caetano Piedade Fernandes v. Union Territory of Goa, Daman & Diu, Panaji, Goa ((1977) 1 SCC 707 : 1977 SCC (Cri) 154). This case is also wholly irrelevant to the issue in question because there the Court on a consideration of the evidence found as fact that the panchnama was not a genuine document and did not inspire confidence. There is no such finding by the High Court or the Sessions Judge in the instant case nor has the inquest report been shown to be unreliable or perfunctory of suspect.

36. Apart from the inquest report Ex. Ka-10 there is another document which throws a flood of light on this question - Ex. Ka-18 which is the site plan prepared by the Investigating Officer at the spot from where the empty cartridges of 12 bore were recovered. This is also a record of what the Investigating Officer himself found at the spot. The learned counsel for the appellants submitted that the site plan was also not admissible in evidence because it was based on information derived by the Investigating Officer from the statement of witnesses during investigation. Reliance was placed on a judgment of this Court in the case of Jit Singh v. State of Punjab ((1976) 2 SCC 836 : 1976 SCC (Cri) 341) where this Court observed as follows :

> It is argued that presumably this site plan also was prepared by the Investigating Officer in accordance with the various situations pointed out to him by the witnesses .... We are afraid it is not permissible to use the site plan Ex. P-14 in the manner suggested by the counsel. The notes in question on this site plan were statements recorded by the Police Officer in the course of investigation, and were hit by Section 162 of the Code of Criminal Procedure. These notes could be used only for the purposes of contradicting the prosecution witnesses concerned in accordance with the provisions of Section 145, Evidence Act and for no other purpose.

In our opinion the argument of the learned counsel is based on misconception of law laid down by this Court. What this Court has said is that the notes in question which are in the nature of a statement recorded by the Police Officer in the course of investigation would not be admissible. There can be no quarrel with this proposition. Note No. 4 in Ex. Ka-18 is not a note a note which is based on the information given to the Investigating Officer by the witnesses but is a memo of what he himself found and observed at the spot. Such a statement does not fall within the four corners of Section 162 Cr. P.C. In fact, documents like the inquest reports, seizure lists or the site plans consist of two parts one of which is admissible and the other is inadmissible. That part of such documents which is based on the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under Section 60 of the Evidence Act whereas the other part which is based on information given to the Investigating Officer or on the statement recorded by him in the course of investigation is inadmissible under Section 162, Cr. P.C. except for the limited purpose mentioned in that section. For these reasons, therefore, we are of the opinion that the decision cited by the counsel for the appellants has no application to this case.

37. Exhibit Ka-13 is a memo relating to the recovery of the empty cartridges found at the spot by the Investigating Officer. The title of this memo runs thus :

> Memo relating to the recovery of Khokha (empty case of cartridge of 12 bore from the site in the case as offence No. 126, under Sections 147/148/149/302/392/324, IPC).

It appears that where an empty cartridge is mentioned it is described as Khokha whereas in the case of live cartridge the word "cartridges - Kartoos" has been clearly mentioned. Ex. Ka-13 is the seizure memo of the recovery of an empty cartridge of 12 bore which was found at the spot and which was said to have hit the deceased having been fired from the gun of one of the appellants. It was also mentioned in this memo that smell of the gunpowder was coming out of the Khokha. When the Investigating Officer deposed before the Sessions Judge that smell was coming out from the cartridge he was actually referring to the empty cartridge which was recovered from the spot and which was fired from the gun of the appellants. Ex. Ka-14 however is the seizure memo of the four live cartridges found by the Investigating Officer at the spot, in which it is mentioned that four cartridges of .32 bore revolver are recovered. The exact description is given thus :

> Description of the Cartridge. - Four cartridges of .32 bore of revolver of brass cap and blacks lead Kynock .32 S. and W. engraved on the brass cap, old.

38. It would be seen that the description of the four cartridges with brass cap on lead intact shows that the cartridges were live and not empty because if the cartridges were empty then there was no question of there being any black lead in existence at the spot. The Investigating Officer has clearly proved these documents in his evidence before the Sessions Judge and stated that he had prepared these documents. Thus these documents having been prepared immediately after occurrence are undoubtedly reliable.

39. Having regard, therefore, to the documentary evidence and the circumstances mentioned above we find ourselves in complete agreement with the view taken by the court below that what had been recovered at the spot by the Investigating Officer were four live cartridges which had fallen at the spot when the bag of the deceased was taken away by the appellants. We are unable to find any reliable evidence to prove that the four cartridges found at the spot were empty cartridges. The argument of the learned counsel for the appellants to the contrary must be overruled.

40. Great reliance was placed by the appellants on an application given by Rajendra son of the deceased before the S.D.M. Court at Bareilly informing the court that Babu Ram had been murdered. This application is Ex. Ka-1 and was filed before the Magistrate on December 9, 1968. It is true that in this application it was mentioned that Shri Babu Ram had been murdered but neither the names of the appellants nor the circumstances under which he was murdered have been mentioned. It was argued by Mr. Garg that the absence of the names of the appellant clearly showed that the deceased was murdered by unknown persons, and, therefore, only the fact of his murder was mentioned in this application. The argument appears to be attractive, but on closer scrutiny it is without any substance. PW 1 had already rushed to the police station to lodge the FIR wherein he had narrated the facts which led to the death of the deceased. Rajendra, son of the deceased who had been sent to Bareilly was sent for the limited purpose of informing the court regarding the death of Babu Ram. In the proceedings under Section 107 there was no occasion for mentioning the names of the assailants of Babu Ram or for detailing the circumstances under which he was killed because that was not germane for the proceedings. In these circumstances, therefore, the absence of the name of the assailant in this application cannot put the prosecution out of Court.

41. Learned counsel for the appellants made certain comments against some of the witnesses which have been carefully dealt with by the courts below. The discrepancies relied upon by the appellants do not appear to be of much consequence and do not merit serious consideration.

42. On a careful consideration of the entire facts of the case we are clearly of the opinion that the prosecution case against the appellants has been proved beyond reasonable doubt and we find no reason to interfere with the judgment of the High Court upholding the conviction and the sentences passed on the appellants in both the appeals. The result is that the appeals fail and are accordingly dismissed.

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