SUPREME COURT OF INDIA

Rafique @ Rauf

Vs.

State of U.P.

Crl.A.No.752 of 2008

(Dr.B.S.Chauhan and Fakkir Mohamed Ibrahim Kalifulla JJ.)

02.07.2013

JUDGMENT

FAKKIR MOHAMED IBRAHIM KALIFULLA, J.

1. This appeal by the eight accused who were proceeded against in Crime No.397/97 in Sessions Case No.35/1998 in the Court of Second Additional Sessions Judge, District Kannauj, were charged and convicted for offences falling under Section 302 read with 149, 307 read with 149, as well as for offences under Sections 452, 148 and 147 IPC. All the accused were convicted and inflicted with the punishment of life imprisonment for the offence under Section 302 read with 149 IPC, 5 year rigorous imprisonment for the offence under Section 307 read with 149 IPC, 1 year rigorous imprisonment for the offence under Section 452 IPC, 6 months rigorous imprisonment for the offence under Section 148 IPC and 3 months rigorous imprisonment for the offence under Section 147 IPC.

2. The case of the prosecution as projected before the Court below was that 7 days prior to the date of occurrence there was some dispute between the children of the parties of the victim and the accused. A goat belonging to the accused persons stated to have gone into the maize field of the deceased Zahiruddin and when the son of the said deceased objected to that, he was caught by the father of the accused 1 to 6. When the deceased Zahiruddin came to know about the said conduct of Masook, father of the accused 1 to 6, he went and protested by questioning him as to how for the grazing of the maize crop by the goat belonging to Masook, the son of the deceased could be held in captivity. The said protest raised by deceased Zahiruddin was not liked by Masook and both stated to have abused each other. Pursuant to the said incident, on 05.09.1997 at about 3.00 pm,

all the appellants-accused armed with country-made gun (Addhi) as well as country-made pistols and the first accused holding his gun, entered the house of the deceased where P.Ws.1 to 3 were conversing with the deceased, Zahiruddin and made indiscriminate firing towards the deceased and the other persons. The deceased, P.Ws.2 and 3 stated to have sustained firearm injuries and they raised alarm pursuant to which others rushed to the spot. The appellants stated to have escaped from the scene of occurrence after giving further threats.

3. The deceased and other injured were stated to have been brought to Kotwali Farrukhabad, where P.W.1 lodged the written complaint Ext. Ka-1. The crime was registered as Crime No.397/97, as was evident from the G.D. entry Ext.Ka-14. The Investigating Officer P.W.6 stated to have recorded the statement of the deceased Zahiruddin purportedly under Section 161 Cr.P.C under Ext. Ka-9. The injured along with the deceased stated to have been sent to the hospital where the injured persons including the deceased were examined by the doctor. The injury report of the deceased Zahiruddin was Ext. Ka-3, the injury report of P.W.2 was Ext. Ka-4 and the injury report of P.W.3 was Ext. Ka-2. The deceased Zahiruddin died on the next day, i.e. on 06.09.1997 at 3:30 pm. The inquest memo was Ext. Ka- 15 and the postmortem report was Ext. Ka-5. P.W.4 Dr. Irfan Ahmad was the doctor who conducted the postmortem and issued the postmortem certificate. The Investigation was initially carried out by P.W.6 and was later on completed by P.W.8. The charge-sheet was Ext.Ka-12. P.W.2, the wife of the deceased suffered two injuries, while P.W.3, the niece of the deceased, suffered one injury. The deceased suffered as many as eight injuries. It was in evidence that all the injuries were due to gun shots. The distance between the place of occurrence and the police station was stated to be 20 kilometers. All the injured were examined by the doctor by 5:45 pm to 6.10 pm on 05.09.1997 itself. It is in the evidence of P.W.5, postmortem doctor that based on the injuries noted on the body of the deceased it could be stated that he was capable of speaking in spite of the injuries sustained by him. The prosecution examined P.Ws.1 to 9. Based on the evidence before the trial Court and the incriminating circumstances existed against the appellants, they were questioned under Section 313 Cr.P.C and all the appellants denied their involvement and stated that due to animosity the evidence had been adduced against them. It was also stated that all of them belong to one and the same family. They did not choose to let in any evidence in support of their defence. It is in the above-stated background the conviction and sentence came to be imposed by the trial Court, which was also affirmed by the High Court in toto.

4. Assailing the judgment impugned, Mr. Jaspal Singh, learned senior counsel for the appellants after taking us through the relevant evidence on record, as well as

the judgments impugned before us submitted that the presence of P.W.1 in the place of occurrence was doubtful; that there were prevaricating statements by the witnesses about the exact place of occurrence; that there were grave doubts as to whether all the accused opened fire or only few of them; that having regard to the position in which P.Ws.2, 3 and deceased were placed at the time of occurrence the occurrence could not have been witnessed by the said so called eye- witnesses as narrated by them and that though only fire shot injuries were said to have been caused, not even a single pellet or an empty cartridge was recovered from the scene of occurrence. According to the learned senior counsel, there were serious doubts as to whether the postmortem report related to the body of the deceased. The learned senior counsel also contended that the accused were not questioned with reference to the so called dying declaration of the deceased in the 313 questioning. The learned senior counsel, therefore, contended that all the above factors created lot of doubts as to the factum of the occurrence, as well as the crime and that in any event the offence under Section 302 IPC cannot be said to have been made out and at best it may fall under Section 304 Part I or II and that Section 148 will not apply. According to him, if at all the accused had any grievance it could have been only against Shamshuddin, but certainly none had any object to kill Zahiruddin, the deceased.

5. As against the above submissions, Mr. Aarohi Bhalla, learned counsel for the State by referring to the judgment of the trial Court contended that after a detailed consideration of the stand of the appellants, the trial Court was able to conclude with all certainty about the place of occurrence and, therefore, the said submission made on behalf of the appellants do not merit any consideration. According to the learned State counsel, the family of P.W.1 and the deceased were only living in two different portions of the same building and, therefore, the submission raising doubts about the place of occurrence does not merit any consideration. According to him the medical evidence fully established the use of firearm in the incident. The learned State counsel by making reference to Ext.Ka-15, inquest report issued by Irshad Ahmad at 10:55, contended that there was no doubt about the death of the deceased and the postmortem report relating to his death was also proved.

6. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the various submissions made before us, we find that the submissions of learned counsel for the appellants raise the following questions for consideration, namely:-

> I. Whether the reliance placed upon by the High Court on Ext.Ka-9, the recorded statement of the deceased Zahiruddin, which was relied upon by

the High Court as a dying declaration and the confirmation of the conviction on that basis was justified?

II. Whether there was any controversy relating to the place of occurrence in order to doubt the case of the prosecution?

III. Whether there was any doubt about the death of the deceased as submitted on behalf of the appellants?

IV. Whether there was any scope to hold that the offence would fall under Section 304 Part I or II and not under Section 302 and other offences for which they were convicted?

7. At the outset it will have to be noted that except mere denial of the offence alleged against the accused in their 313 questioning no other specific stand was taken on behalf of the appellants nor was any defence evidence, oral or documentary, placed before the Court. The motive for the offence was stated to be the grazing of maize crop by the goat belonging to the father of the appellants-accused 1 to 6 and the grand- father of appellant-accused 8 in the field of the deceased seven days prior to the date of occurrence. Admittedly, all the accused were closely related. Most of them belong to one family, namely, Masook. P.W.2 Shamshuddin, the complainant is the brother of the deceased. As far as the grazing of the maize crop as alleged by the complainant party was concerned not much argument was raised on behalf of the appellants. Even in the evidence nothing was stated to have been brought out in order to reject the said case pleaded by the prosecution. There was also no dispute about the fact that the occurrence took place in the premises of the deceased, as well as the complainant and other injured witnesses, namely, P.Ws.2 and 3. As regards the presence of the deceased and the other injured witnesses, namely, P.Ws.2 and 3 in the police station at the instance of P.W.1 who was also an eye-witness to the occurrence, was also not seriously disputed. We also find that the occurrence, which was stated to have taken place at 3.00 pm on 05.09.1997, was brought to the notice of the police without further loss of time, which was located about 20 kilometers away from the place of occurrence. There was also no serious argument raised as regards the registration of the FIR relating to the occurrence. Both the Courts below, therefore, held in one voice that there was no chance of any manipulation at the instance of the police.

8. While the occurrence had taken place at 3.00 pm, the deceased who was seriously injured along with the other injured witnesses P.Ws.2 and 3, were rushed to the hospital from the police station who were examined by P.W.4 between 5.45

pm to 6.10 pm on 05.09.1997. The injury reports Ext.Ka- 3, Ext.Ka-4 and Ext.Ka-2 of the deceased, P.W.2 and P.W.3, read along with the evidence of P.W.4 Dr. Irfan Ahmad, sufficiently establish the nature of injuries sustained by all the three of them. Ext.Ka-9 the statement of the deceased recorded under Section 161 Cr.P.C. by P.W.6 at the police station when he was in the injured condition immediately after the incident, disclose the specific overt act against the appellants- accused as revealed by the deceased himself. It is true that the trial Court declined to rely upon the said statement by treating it as a dying declaration, while the High Court fully relied upon the said statement as a dying declaration of the deceased. In that respect certain other factors, which are relevant to be stated are that the deceased was 45 years old at the time of his death, as noted by P.W.4 Dr. Irfan Ahmad. P.W.5, Dr. P.V.S. Chauhan, who conducted the postmortem of the deceased, in the course of the cross-examination, categorically stated that because of the injury it cannot be concluded that the injured was unconscious and was not able to speak. He further stated that after getting the injuries in the brain it is not necessary that the injured would immediately go to coma stage and that it cannot be definitely stated within which time a person would reach the state of coma. It is also relevant to state that it has come in the evidence of P.Ws.1 to 3 that the families of the deceased Zahiruddin, as well as his brother P.W.1 were living in the same premises in two different portions. The presence of P.W.3, the niece of the deceased Zahiruddin, at the place and time of occurrence has also been sufficiently stated and corroborated by all the three witnesses.

9. Keeping the above factors in mind when we examine the submissions made on behalf of the appellants, as far as the reliance placed upon by the High Court in the impugned judgment on Ext.Ka-9 by treating it as a dying declaration, the High Court has noted the details mentioned in the said exhibit by extracting the same in the judgment impugned, which is to the following effect:

> "On the west side of my house, there is field of corn crop wherein 7 days prior to today i.e. 5.9.97, the goats of my co-villager Massok s/o Altaf had entered. My younger son Ezaz, aged 7 years had caught goat and was taking the same away on which Massok had freed the goat and started to take away my son, on which we came to know and I asked him not to do so that you are making the goat to eat the crop and simultaneously you are taking my son also away, it is not the right thing, on which they hurled abuses. Today on 5.9.97 I was sitting in the verandah of my house that suddenly around 3 o'clock Rauf, Ishtiyaq, Ataullah, Ayub, Pauva alias Pappu, Latif sons of Massok, Nisar s/o Farukh and Karim s/o Rauf came there out of them Latif was carrying Adhi and Rauf was carrying desi gun and others were carrying

tamancha, and they came to my house climbing the stairs, my brother Shamsuddin, my wife Zabira and Mushtaq's daughter Shehnaz also present there. All the accused persons after arriving started firing indiscriminately on myself and my family members with an intention to kill us, on sustaining injuries I fell down on the ground and my wife and Shehnaz d/o Mushtaq also sustained pellet injuries. Then we raised alarm, hearing the same Shamsuddin, who had gone out of the house and Mushtaq s/o Defendar and Majeed s/o Panna came there and challenged the accused persons on which the accused persons went away towards their house. The accused persons were threatening of dire consequences. The accused persons had fired from close distance. I have sustained grievous injuries on different part of my body. My voice is becoming unclear, and my brother Shamsuddin has brought me to Thana on jeep."

10. The said statement refers to the incident, which took place seven days prior to the date of occurrence, which formed the motive for the occurrence. It also refers to the presence of all the accused on 05.09.1997 at 3 O'clock in his house and the arms, which were in their possession. It also mentions the presence of P.Ws.1 to 3 at that time. It further states as to how indiscriminate firing was made by the accused, which resulted in the injuries sustained by him, as well as P.Ws.2 and 3. It also refers to the alarm raised by P.W.2 and the rushing in of Mushtaq s/o Defendar and Majeed s/o Panna pursuant to which the appellants- accused went away after making further threats against the victim. Finally, it was stated that he was taken to the police station by his brother P.W.1 in a Jeep.

11. The important question for consideration, therefore, is whether the said statement made by the deceased can be taken as a dying declaration and reliance can be placed upon the same. The High Court while relying upon the said statement has noted certain circumstances, namely, the evidence of P.W.6, Investigating Officer, who deposed that the deceased was fully conscious when he was brought to the police station with injuries on his face, chest and other parts of the body and that he recorded his statement. It was also noted that after recording his statement the Investigating Officer referred him to the hospital for medical examination and treatment. The High Court, thereafter, noted the evidence of P.W.5 the postmortem doctor who categorically stated in his cross-examination that the injured was also in a position to speak and that it was not necessary that in all cases after sustaining injury in the brain a person cannot retain his conscience or will not be in a position to speak. The High Court noted the further statement of the doctor that it is not necessary that in every such case the patient would immediately go to a coma stage.

12. The High Court, therefore, reached a conclusion that the deceased Zahiruddin, was in a position to speak and that the statement under Ext.Ka-9 was given by him who expired on the next day evening. It further stated that since it was the last statement of the deceased to the Investigating Officer it can very well be treated as a dying declaration. The High Court was conscious of the fact that the trial Court did not place any reliance on the said statement which in the opinion of the High Court was erroneous.

13. In this context when we make reference to the statutory provisions concerning the extent of reliance that can be placed upon the dying declaration and also the implication of Section 162(2) Cr.P.C. vis-à-vis Section 32(1) of the Evidence Act, 1872, we feel that it will be appropriate to make a reference to the decision of this Court reported in Khushal Rao vs. State of Bombay - AIR 1958 SC 22. Justice Sinha speaking for the Bench after making further reference to a Full Bench decision of the High Court of Madras headed by Sir Lionel Leach, C.J., a decision of the Judicial Committee of the Privy Council and 'Phipson on Evidence' – 9th Ed., formulated certain principles to be applied to place any reliance upon such statements. We feel that the substance of the principles stated in the Full Bench decision and the Judicial Committee of the Privy Council and the author Phipson's view point on accepting a statement as dying declaration can also be noted in order to understand the principles ultimately laid down by this Court in paragraph 16.

14. The Full Bench of the Madras High Court reported in In re, Guruswami Tevar - ILR 1940 Mad 158 at page 170 (AIR 1940 Mad 196 at p.200) in its unanimous opinion stated that no hard and fast rule can be laid down as to when a dying declaration should be accepted, except stating that each case must be decided in the light of its own facts and other circumstances. What all the Court has to ultimately conclude is whether the Court is convinced of the truthfulness of the statement, notwithstanding that there was no corroboration in the true sense. The thrust was to the position that the Court must be fully convinced of the truth of the statement and that it should not give any scope for suspicion as to its credibility. This Court noted that the High Court of Patna and Nagpur also expressed the same view in the decisions reported in Mohamad Arif vs. Emperor – AIR 1941 Pat.409 (J) and Gulabrao Krishnajee vs. Emperor – AIR 1945 Nag. 153 (K).

15. The Judicial Committee of the Privy Council while dealing with a case, which went from Ceylon, which was based on an analogous provision to Section 32(1) of the Indian Evidence Act, took the view that apart from the evidence of the deceased the other evidence was not sufficient to warrant a conviction. It was,

however, held that in that case when the statement of the deceased was received and believed as it evidently was by the jury it was clear and unmistakable in its effect and thereby, the conviction was fully justified and was inevitable. The Judicial Committee noted that the factum of a murderous attack, though resulted in the cutting of the throat and the victim was not in a position to speak but yet by mere signs she was able to convey what she intended to speak out, and the said evidence was brought within the four corners of the concept of dying declaration, which formed the sole basis ultimately for the Court to convict the accused, which was also confirmed by the Supreme Court of Ceylon, as well as by the Judicial Committee of the Privy Council.

16. The author Phipson in his 9th Ed., of the book on Evidence made the following observations:

> ".....The deceased then signed a statement implicating the prisoner, but which was not elicited by question and answer, and died on March
>
> 20. It was objected that being begun in that form, it was inadmissible:- Held (1) the questions and answers as to his state of mind were no part of the dying declaration; (2) that even if they were, they only affected its weight, not its admissibility; and (3) that the declaration was sufficient, without other evidence, for conviction R. v. Fitzpatrick, (1910) 46 Ir. L.T. 173 (M)."

17. After considering the above legal principles, this Court has set down the following six tests to be applied for relying upon a material statement as a dying declaration:

> "16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a

> competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties." (Emphasis added)

18. We also wish to add that as on date, there is no statutory prescription as to in what manner or the procedure to be followed for recording a dying declaration to fall within the four corners of Section 32(1) of the Evidence Act. The presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements. As has been repeatedly stated in various decisions, it will have to be found out whether in the facts and circumstances of any case the reliance placed upon by the prosecution on a statement alleged to have been made by the deceased prior to his death can be accepted as a dying declaration, will depend upon the facts and circumstances that existed at the time of making the statement. In that case it would mainly depend upon the date and time vis-à-vis the occurrence when the statement was alleged to have been made, the place at which it was made, the person to whom the said statement was made, the sequence of events, which led the person concerned to make the statement, the physical and mental condition of the person who made the statement, the cogency with which any such statement was made, the attending circumstances, whether throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution, the nexus of the person who made the statement to the alleged crime and the parties involved in the crime, the circumstance which made the person to come forward with the statement and last but not the least, whether the said statement fully support the case of the prosecution.

19. In this context, we can also make a reference to a decision of this Court reported in Cherlopalli Cheliminabi Saheb and another vs. State of Andhra Pradesh - (2003) 2 SCC 571, where it was held that it was not absolutely mandatory that in every case a dying declaration should be recorded only by a Magistrate. The said position was reiterated in Dhan Singh vs. State of Haryana – (2010) 12 SCC 277 wherein, it was held that neither Section 32 of the Evidence Act nor Section 162(2) of the Cr.P.C., mandate that the dying declaration has to be recorded by a designated or particular person and that it was only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any doubt or false implication by the prosecution in the course of investigation.

20. In a recent decision of this Court reported in Sri Bhagwan vs. State of U.P. – 2012 (11) SCALE 734, to which one of us was a party, dealt with more or less an identical situation and held as under in paragraphs 21 and 22:

> "21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.
>
> 22. Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162 (2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We

> say so because no other conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected."

21. In the case on hand nothing was let in on the side of the defence to contradict the presence of P.W.1 at the time of occurrence, as well as subsequently when the deceased along with the other injured persons, were taken to the police station immediately after the occurrence. There was no reason to doubt the presence of the deceased and the other injured witnesses at the police station when the alleged statement Ext.Ka-9 came to be recorded by P.W.6. A reference to the details contained in Ext.Ka-9 is in tune with what has been narrated by the eye-witnesses P.Ws.1 to 3 before the Court. There was nothing to contradict from the material available on record in the form of evidence either documentary or oral in order to hold that the deceased, could not have made the statement before P.W.6. As has been noted by the courts below, there was no delay involved in reporting the occurrence to the police and the registration of the FIR. The further finding of the courts below that there was no scope for any manipulation at the instance of the police also strengthens the reliance placed upon by the prosecution on Ext.Ka-9, by treating the same as a dying declaration. When we apply Section 162(2), the statute makes the position clear that the statement as a dying declaration would squarely fall within the said provision and has to only satisfy the stipulations contained in Section 32(1).

22. Keeping the above factors in mind, when we apply Section 32(1) to Ext.Ka-9 we find it, mentioned in every one of the details of the case of the prosecution, which ultimately resulted in the death of the deceased Zahiruddin, as well as the injuries sustained by P.Ws.2 and 3, which fell for consideration before the courts below. The very fact that the deceased who sustained such grievous injuries on the vital parts of his body on 05.09.1997 at 3:00 pm, breathed his last on 06.09.1997 at 3:30 pm, i.e. in a matter of 24 hours, was sufficient to reach a conclusion that

whether or not he was in the expectation of his death, there could not have been any scope to doubt the veracity of his statement as to the manner in which the occurrence took place and the persons who were responsible for the incident in question. Taking into account the totality of the circumstances, namely, the motive behind the incident, the mentioning of the names of the appellants who were known to the deceased, as all of them belong to the same village, the use of the weapons by the assailants, the situation in which he was placed at the time when he made the statement before P.W.6, where he could not have been tutored to make the statement, having regard to the time factor, the further statement of the doctor who issued the postmortem certificate having come forward with an expert opinion that in spite of the nature of injuries sustained the deceased was fully capable of and was in a mind set to make a statement, sufficiently demonstrated that Ext.Ka-9 was rightly relied upon by the High Court as a dying declaration, squarely falling within the statutory prescription of Section 32(1) of the Evidence Act, in order to rely upon the same for convicting the appellants. We are, therefore, convinced that such reliance placed upon by the High Court was perfectly justified and we do not find any good grounds to differ from the same. We, therefore, conclude and answer the said question in favour of the prosecution.

23. When we come to the other question as to whether there was any controversy relating to the place of occurrence in order to doubt the case of the prosecution, Mr. Jaspal Singh, learned senior counsel appearing for the appellants contended that in the FIR the complainant P.W.1 himself stated that he came later and that the incident took place in his house; that the staircase in the house was leading upto the first floor; that the place where the incident took place was a narrow one; that he was not certain as to whether all the accused opened fire or one or two alone opened fire; that the firing took place only for a minute; that when the accused entered the place P.Ws.2 and 3, as well as the deceased were facing north and that in another place he stated that the deceased was present on the roof and that no pellets were seen on the wall, nor any empty cartridge was recovered. The learned counsel by referring to the evidence of P.W.2 submitted that according to her she was in her house and that P.W.1 came later. It was pointed out that the staircase inside the house led upto the second floor, while P.Ws.2 and 3 and the deceased were in the Verandah of the third floor, that the house of P.W.1 was on the eastern side of the house of P.W.2, that the directions mentioned by her as to how the parties were positioned at the time of occurrence, were all circumstances, which go to show that there was no cogency in the evidence of the so called eye-witnesses to confirm that the occurrence took place at the place and in the manner as narrated by them.

24. While making reference to the above submissions, we only state that all the above submissions were considered threadbare by both the courts below. In the High Court the so called contradictions referred to on behalf of the appellants were considered in detail in the following paragraphs and ultimately rejected by stating as under: "Much emphasis was laid on the contradictions regarding place of occurrence. According to the prosecution case, the incident took place in the verandah of the house. Some contradictory statements have been given by the eyewitnesses regarding the situation of verandah. The I.O. prepared the site plan, Ext.Ka-6, in which he has marked the place of occurrence by letter 'X'. From letter 'A' the accused persons had made fire, at place 'P' he got the pellets and from place A-1, L, B, the witnesses had seen the occurrence. According to the site plan Ext.Ka-6, the place of occurrence was the third floor of the house. This house was three storied. The I.O. has shown 1st floor, 2nd floor and 3rd floor in his site plan, meaning thereby, technically speaking, the ground floor has been shown as 1st floor and 1st floor as 2nd floor and 2nd floor as 3rd floor. There was also misunderstanding between eyewitnesses regarding narration of the storeyes of the house. The witnesses were the illiterate rustic villagers who did not know the difference between storey and floor. The ground floor is narrated as 1st storey or 1st floor. We are of the opinion that the I.O. had made negligence in preparing site plan and did not show important things in it. For example, he has not shown the house of PW-1 Shamshuddin in the site plan. He has also not described in the site plan that the 2nd and 3rd storey of the house was in the level of agricultural field situate towards west or the ground floor or 1st floor was situate on the low level of the agricultural field situate towards west or the ground floor or 1st floor was situate on the low level of the agricultural field situate towards west.

> PW-1 Shamshuddin, the real brother of the deceased has stated in his cross-examination that the house of the deceased was three storeyed. There was a 'Zeena' in the second storey of the house but there was no 'Zeena' in the 2nd storey. Further he has stated that in the 3rd storey there were three rooms and verandah but later on he has stated that three rooms and verandah were situated in the 2nd storey and in the 3rd storey there were two rooms and one verandah, in which the incident took place. Further, he has stated that 'Zeena' was present on the second storey of the house from where the accused persons entered the Verandah.
>
> PW-2 Smt. Zabira has stated in her cross-examination that the third storey of the house was in the level of agricultural field situate towards west. Further, she has stated that the incident had taken place in the 3rd storey of the house.

PW-3 Smt. Shahnaz has stated in her cross-examination that in the second storey of the house there was no room but it was in the shape of verandah. Further, she has stated that the incident had taken place in the 2nd storey of the house. Further, she has stated that the 'Zeena' was situate in the 2nd storey of the house, which was in the level of the agricultural field situate towards west.

The learned Trial Court has made a detailed discussion over the said contradictions and he has given a finding that due to illiteracy and rustic background some contradictions have come in their statements. The I.O. found blood in the 'Verandah' of the third storey. He also found some pellets there. He had prepared memo Ext.Ka-7. It is also said that the incient had taken place in the 'Verandah' of the third storey of the house. PW-2 Smt. Zabira has clearly stated in her cross- examination that at the time of the incident all the injured were sitting in the 'Verandah' of the third storey. Thus, the place of occurrence was not doubtful."

25. Having considered the various facts noted by the Trial Court and approved by the High Court in dealing with the above submissions, we hold that the said submission does not impress upon us in order to interfere with the judgment impugned in this appeal. The said question is also, therefore, answered against the appellants.

26. The next question that arises for consideration is as to whether there was any doubt about the death of the deceased, as submitted on behalf of the appellants. Mr. Jaspal Singh, learned senior counsel in his submissions referred to the evidence of P.W.4, Dr. Irfan Ahmad, who examined the injured including the deceased at 5:45 pm on 05.09.1997 and contended that according to the doctor all the injuries were caused by firearm, that such injuries might have been caused from the distance of 40 feet, that the injuries were on the front side, that there was no injury on the head as compared to the evidence of P.W.5, the postmortem doctor, who stated categorically that injury No.1 was on the right side of the head, which might have been caused by Lathicharge, which was also the version of P.W.3. The learned counsel made further reference to Ext.A- 18 by which the death of the deceased was communicated by the doctor to the police station for conducting a postmortem and the postmortem held on 07.09.1997. By making further reference to Ext.Ka-5, the postmortem report, which was issued by U.H.M. Hospital, Kanpur by one Dr. B.S. Chauhan while the name of P.W.5 the postmortem doctor who gave evidence was mentioned as Dr. P.V.S. Chauhan of Ursala Hospital, Kanpur, the learned counsel submitted that there were serious doubts as to whether it related to the

corpse of the deceased and the concerned postmortem report really related to the deceased Zahiruddin in this case. Though, in the first blush, the said contention made on behalf of the appellants appear to be of some substance, on a close reading of the evidence of P.Ws.4 and 5, we find that such instances pointed out by learned counsel were all of insignificant factors and based on such factors it cannot be held that there was any doubt at all as to the death of the deceased or the injuries sustained by him as noted by P.W.4 in Exts.Ka-2, Ka-3 and Ka-4. Ext.Ka-3 is related to the deceased. Ext.Ka-5 postmortem certificate was issued by P.W.5. We should also state that nothing was put to the above said witnesses with reference to those alleged doubts relating to the death of the deceased Zahiruddin. We are not, therefore, inclined to entertain the said submission at this stage in order to find fault with the case of the prosecution.

27. With that when we come to the last of the submissions made on behalf of the appellants, namely, whether there was any scope to hold that the offence would fall under Section 304 Part I or II and not under Section 302 IPC and that no other offence was made out, we can straight away hold that having regard to the extent of the injuries sustained by the deceased, P.Ws.2 and 3 and the aggression with which the offence was committed as against the victims, which resulted in the loss of life of one person considered along with the motive, which was such a petty issue, we are of the firm view that there was absolutely no scope to reduce the gravity of the offence committed by the appellants. We are, therefore, not persuaded to accept the said feeble submission made on behalf of the appellants to modify the conviction and the sentence imposed.

28. For all the above stated reasons, we do not find any merit in this appeal. The appeal fails and the same is dismissed.