



2026:AHC:207688-DB

Reserved On :- 07.08.2026

Delivered On :- 05.10.2026

**HIGH COURT OF JUDICATURE AT ALLAHABAD**

**CRIMINAL APPEAL No. - 1171 of 1990**

Ram Milan And Others

.....Appellant(s)

Versus

State

.....Respondent(s)

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| Counsel for Appellant(s)  | : | Birendra Singh, Deshraj Garg |
| Counsel for Respondent(s) | : | A.G.A.                       |

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**Court No. - 43**

**HON'BLE SIDDHARTH, J.**

**HON'BLE VINAI KUMAR DWIVEDI, J.**

(Delivered by Hon'ble Siddharth, J.)

1. Heard Sri G.S. Chaturvedi, learned Senior Counsel assisted by Sri Rajan Singh and Sri Varad Nath, learned counsel for the appellants; Sri Prem Shankar Prasad, learned A.G.A for the State and perused the material on record.

2. This criminal appeal has been preferred against the judgment and order dated 02.06.1990 by Sessions Judge, Banda in S.T. No. 179 of 1989 (State vs. Ram Milan and Another) convicting and sentencing the appellant no. 1 under Section 302 IPC for the life imprisonment and under Section 307 IPC for 5 years rigorous imprisonment and appellant no. 2, under Section 302/34 IPC for life imprisonment and all the sentences are to run concurrently.

3. The prosecution story, briefly stated, is that Sri Beta son of Ram Sewak resides in village Jamu, P. S. Kamasin, District Banda. He has, besides the house in the abadi, another house in the agricultural plot which was known as Dera. The hamlet of Korin ka purwa lies between this Dera and the abadi of main village Jamu. There has been some rumour that Phallu son of Beta has developed illicit relations with the sister of accused Ram Milan. Ram Milan has threatened to kill Sri Phallu. As a result of this Sri Phallu had to leave his house. The sister of Phallu was married to the son of Sri Ram Ichchha resident of village Birraon. Sri Ram Ichchha was also a distant

relative of accused Ram Milan. Sri Phallu, therefore, approached Ram Ichchha in the middle of May of 1988 to act as a mediator and get a compromise between the parties. On 17 and 18.5.88 Sri Ram Ichchha met separately with Beta and Ram Milan and it was agreed to hold settlement talks. On the morning of 19.5.88 Ram Ichchha, Shiv Sagar and Phallu reached the Dera of Beta. Thereafter all the three of them proceeded for the main village alongwith Beta. When these four persons reached near the village *Korin ka purwa* accused-appellant no. 1, Ram Milan, who was waiting behind a heap of cow-dung cakes, began to fire shots with double barrel gun at about 10:30 a.m. Appellant no. 2, Badri Prasad @ Badri Vishal, was armed with 12 bore licensed gun. Ram Milan fired on Phallu by double barrel gun. Badri Prasad also fired and Phallu fell down and died. Villagers, Kashi, Ashok, Balkesh and Geeta, got injured from the shot made by Badri Prasad. The witnesses protested and raised alarm whereupon Ram Milan went towards village.

4. There was a police outpost at village Jamu in May, 1988. This outpost was situated in the house owned by accused Ram Milan. After the incident at *Korin ka purwa* the two accused reached the police outpost. They informed constable, Kishori Lal, that some miscreants had come near the school of the village. On this information constables, Kishori Lal and Loku Ram, accompanied the accused and reached near the school where they saw the above four persons coming towards the village. The police men went near Beta and others and caught hold of the guns of Shiv Sagar and Ram Ichchha. At the same time Sri Ram Milan fired shot which hit Phallu who fell down. Badri Prasad accused also fired shot. This shot, however, missed its target and pellets hit one man Kashi and three children Ashok, Kamlesh and Kumari Geeta. After firing the shots the two accused ran away. Phallu was found to have died. The police men took Ram Ichchha and Shiv Sagar to the police outpost, considering that they were miscreants. However, at the village they were informed about the identity of these two persons and they were released after sometime. Thereafter, Sri Beta dictated F.I.R. (Ex.Ka 2) to Sri Shiv Sagar. They alongwith the four injured went to P.S. Kamasin where Beta handed over the F.I.R. to the police. The injured were sent for medical examination. The case was registered and investigated. After investigation the charge-sheet was submitted against the accused.

5. The prosecution has examined ten witnesses in support of its case. Dr. A.K. Upadhyaya (P.W.1) has examined Sri Kashi injured at 7.45 p.m. on

19.5.1988. He has proved the injury report Ex. Ka 1.

6. P.W.2, Sri Beta, is the complainant and father of the deceased. He has given an eye witness account of the occurrence and proved F.I.R. (Ex.Ka 2). He also proved the circumstances which led to visit of deceased and witnesses to the place of occurrence. P.W.3, Sri Ram Ichchha, has also given an eye witness account of the occurrence as narrated above. P.W.4 and P.W.-5 are constables and formal witnesses.

7. P.W.6, Dr. R. D. Mishra, has conducted the post-mortem examination of the dead body of Sri Phallu at 2 P.M. on 20.5.88. He has proved the post-mortem examination report (Ex.Ka 3) prepared by him. In his opinion it was possible that death could have occurred at 10.30 a.m. on 19.5.1988. The following injuries found by him on the dead body were in his opinion sufficient to cause death:-

*"(i) Gunshot wound of entry 5 cms. x 3 cms. on the right side of face 2 cms. lateral to outer angle of right eye and 2.5 cms. medial to right ear. Margins are inverted. Marks of charring and blackening present. Wound directed backward and slighting upward, to wound of exit. Mandible, maxilla, zygomatic, temporal and occipital bone of right side fractured occipital parietal suture of right side opened.*

*(ii) Gunshot injury of wound of exit 2.5 cms. x 1.5 cms. on the right side of occipital region, 6 cms. behind right ear. Margins everted. Base of skull fractured. Brain matter coming out from the wound of exit."*

8. P.W.7, Dr. K. C. Gupta, has examined Kumari Geeta, Kamlesh and Ashok at 8.30 p.m., 9.15 p.m. and 10 p.m. respectively on 19.5.88. He has proved injury reports (Exs. Ka 4 to Ka 6) prepared by him and proved that the injuries found on the three injured were caused by fire arm and were about half a day old.

9. P.W.8, Constable Kishori Lal, was posted at police outpost Jamu in May, 1988. He has also given an eye witness account of the occurrence which led to the death of the deceased, Shri Phallu, in presence of the police men.

10. P.W.9, Constable Mahendra Singh, was posted at P.S. Kamasin in May, 1988. He has registered the case vide G.D. (Ex.Ka 8) and also prepared check report (Ex.Ka 7). He also proved the G.D. entry (Ex.Ka 9) whereby special report was sent to the authorities.

11. P.W.10, S.I., Sri Nand Kishore, is the Investigating Officer. The case was registered in his presence. According to the witness he went to the spot after examining the Head Moharrir. He conducted the inquest and prepared inquest report (Ex.Ka 10) and other allied papers (ExTs. Ka 11 to Ka 16). He sealed the dead body and sent it for post-mortem examination alongwith constable Malkhan Singh and Gopi Ram. He prepared site-plan (Ex.Ka 17). He found blood-stained Safi. He took this Safi and samples of blood found on the spot and simple earth in police custody and prepared *Fard* (Ex.Ka 18 and Ka 19). After recording the statements of witnesses he returned to the Police Station. On 23.5.1988 Sri Babu Lal informed that he has picked up an empty cartridge from the spot and handed it over to the I.O. who prepared *Fard* (Ex.Ka 20). After receiving information that the accused have surrendered, the Investigating Officer interrogated them and on 20.6.1988 obtained police remand of the two accused. Sri Badri Vishal took the Investigating Officer and the witnesses to his house where he took out a licensed gun from the heap of wood kept in the gallery of his house and handed it over to the police. The Investigating Officer sealed the gun and prepared *Fard* (Ex.Ka 21). He also prepared site-plan (Ex.Ka 22) of the place of recovery. Thereafter, Ram Milan took the Investigating Officer and the witnesses to his house and took two empty cartridges kept in the *Chhappar* of his house and handed them over to the police. The Investigating Officer sealed these cartridges and prepared *Fard* (Ex.Ka 23) and also prepared site-plan (Ex.Ka 24) of the place from where these cartridges were taken by the accused and handed over to the police. The witness also submitted charge-sheet (Ex.Ka 25) against the accused.

12. Accused, Ram Milan, informed that his licensed gun was kept with the Lala Gun House on the date of occurrence. The Investigating Officer, therefore, examined the register of this gun house and found that a forged entry has been made in the register. He therefore, reported the matter to the Superintendent of Police. The prosecution also tendered in evidence the affidavit of constable, Ram Sajiwan, who has taken the four injured for medical examination on 19.5.1988 and constable, Gopi Ram, who has produced the dead body before the doctor who conducted the post-mortem examination. The defence did not examine any witness but produced documents in support of its version. The prosecution has proved its case by the ocular statements of P.W.2, Sri Beta, father of the deceased; P.W.3, Sri Ram Ichchha and P.W.8, Constable Kishori Lal. None of these have any

enmity with either of the accused. Death of Sri Phallu has been proved by the statements of these witnesses. P.W.6, Dr. R.D. Mishra, has examined the dead body brought by P.W.5, Constable, Gopi Ram.

13. The accused pleaded not guilty. They have suggested that Ram Ichchha was not related to accused Ram Milan. There has been no rumour of illicit relations and accused did not feel any enmity towards Sri Phallu. Phallu was a man of doubtful character and society. In the morning of 19.5.1988 there was an encounter between police men and some miscreants. In this encounter Sri Phallu was killed and Kashi and other children who were going to ease were hit by stray pellets. The accused were falsely implicated.

14. Learned Senior Counsel for the appellant has submitted that the incident took place in a region where dacoits and robbers were active. A special police team was stationed in the police and the incident in dispute was an incident of police encounter; P.W.-2 had previous enmity with appellant no. 1 regarding property inherited by him from maternal side which was not liked by the local villagers; all the prosecution witnesses of facts are interested witnesses being friends and family members of the deceased; firing is alleged to have been made from elevated platform on the deceased but the direction of the bullet was from downward to upward when it should have been upward to downward; the ballistic report of the weapon recovered had not reached the court till the time of the judgment passed by the trial court; the ballistic report stated that bullet shells recovered were not fired from the rifle; in the post mortem report of the deceased his stomach was found to be empty when the incident took place on 19.05.1988 at about 10:30 p.m; therefore the incident could have taken place in the early morning on the same day or in the late night of 18.05.1988 and as per the prosecution witnesses, the rifle used by appellant no. 2 was a single barrel rifle but recovery of a double barrel rifle was made without recovery of any shells.

15. Learned A.G.A appearing on behalf of state has submitted that it was only Ram Milan who fired on the deceased after climbing the *lidouri* (cow dung heap). P.W.-2 denied that Badri Prashad did not climbed over the *lidouri*. He has further submitted that the doctor. P.W-6 has stated that if at the time of firing the barrel of the gun had been at the height of chest and shoulder the injury could have been caused on the head of the deceased. The doctor also opined that if at the time of suffering of the injury head of the

deceased was tilted towards the back the direction of the injury would be slightly upward. As per the statement of doctor the death of deceased could have taken place at 10:30 a.m. P.W.-7 examined the injured and found that they suffered injury by fire arm. He has submitted that there is no delay in lodging of F.I.R. The inquest report has been prepared as per the procedure. The post mortem report supports the prosecution case and there was no negligence on the part of investigating officer while conducting the investigation.

16. The argument of the learned counsel for the appellants that it is a case of police encounter wherein the deceased suffered two fatal gun shot injuries and died needs consideration. We find that this plea was taken by the accused in their statements under Section 313 Cr.P.C also. The trial court has considered this defense and has found that there was no motive for the police to cause encounter. The trial court refused to accept the argument that deceased, Phallu, was member of a dacoit gang and therefore he was killed by the police. The trial court found that had it been the case, police would have admitted that they have killed Phallu who was member of a dacoit gang and would have claimed reward for the bravery. The police would never have permitted Ram Milan, appellant no. 1, to get credit of murder of Phallu. However, we find that no evidence was led by prosecution to prove that deceased, Phallu was a dacoit. Therefore, the finding of trial court are not well merited.

17. The next argument of the counsel for the appellants is regarding the enmity of appellant no. 1 with P.W.-2 because appellant no. 1 had inherited property from his maternal side in the village of P.W.-2. We find from the cross-examination of P.W.-2 that he was not cross-examined regarding this defence. Therefore, this argument raised on behalf of the appellant cannot be accepted.

18. The next argument raised on behalf of the appellants is that all the prosecution witnesses are either friends or family members of deceased. There is possibility of conspiracy of P.W.-2 and the police to conduct police encounter of Phallu and falsely implicate the appellants. This argument seems probable and shall be considered hereinafter.

19. The next argument of the counsel for the appellants that the direction of the injury caused from the height by Ram Milan, appellant no. 1, to the

deceased from height of 1-2 feet should have been from upwards to downwards, when doctor has found it to be from downwards to upwards needs consideration. The trial court has considered this issue in detail and we also find that the level of the land was not proved as to whether the *lindouri* was on the same level of the land as the level of land on which the deceased was standing. In case the land was uneven and *lindouri* was below the level of land such injury could have been caused to the deceased. Even if the fire was made by the accused by standing over the *lindouri* from the level of his chest it could have easily hit the deceased on his head. In case the deceased tilted his head upward to look towards Ram Milan the direction of injury would be upward though it was parallel to the earth. This argument does not have much force and is turned down.

20. The last argument of the counsel for the appellants is that the incident in dispute could not have taken place at 10:30 a.m on 19.05.1988 because the doctor conducting post mortem found the stomach of the deceased to be empty. The incident may have been caused in the early morning or in the late night one day ago. We find that there is no rule that everyone should eat something before 10:30 a.m. The deceased was called to a panchayat and he may have awoken late and was rushing towards the place of panchayat where he was to reach in time. In the F.I.R., P.W.-2 only stated that he and his son (deceased) after taking bath were proceeding towards the place of panchayat. Even in the F.I.R it is not mentioned that they had eaten something before proceeding to the place of panchayat. But only this argument cannot belie the prosecution case.

21. A perusal of the post-mortem examination report leaves no doubt that death of Sri Phallu was caused by fire arm. The shot penetrated his skull, fracture of occipital, parietal, temporal, medial maxilla, zygomatic, and damaged the brain causing instant death. The statement of P.W.1, Dr. Upadhyaya and P.W.7, Dr. K.C. Gupta, shows that Sri Kashi as also Kumari Geeta and Master, Balkesh and Ashok, have also received gunshot injuries at almost the same time when Sri Phallu received fatal injuries. The only issue is who caused the same.

22. We find that the offence dispute was committed in the presence of police as per the case of the prosecution itself. The presence of police cannot be said to be fatal to prosecution case but the delay in lodging the F.I.R raises serious doubt about the prosecution case. The incident in dispute took place

at 10:30 a.m on 19.05.1988 but the F.I.R was lodged on the same day at 10:00 p.m. This raises suspicion about the manner of incident stated in the F.I.R. The suspicion supports the argument of the learned Senior Counsel for the appellant that the incident took place in the area where dacoits and robbers were active and this incident never took place as alleged by the prosecution. The prosecution story suffers from the serious suspicion, in view of the delay in lodging of F.I.R and the firing on the deceased by appellant no. 1 in the presence of police. It is further notable that the incident took place in the presence of police but no police personnel was examined either as prosecution witness, defence witness or the court witness before the trial court. The prosecution case that the appellant no. 1 himself went to the police station then came back with police and then fired upon the deceased is highly suspicious.

23. P.W.-6, Dr. R.B. Mishra, stated that he did not find any pellet or bullet inside the body of the deceased in the entry and exit wounds. He opined that the injuries were caused by the rifle. In such a situation the ballistic expert should have been called.

24. On the aspect of non-examination of ballistic expert and its impact on the prosecution case, one of the earliest decisions of the Apex Court was rendered in ***Gurucharan Singh Vs. State of Punjab, AIR 1963 SC 340***. Apex Court observed that there is no inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused by a gun and those prima facie appeared to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. However, in what cases the examination of a ballistic expert is essential for the proof of the prosecution case must naturally depend upon the circumstances of each case. This Court held as under:

*"41.... These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder*

*caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case...."*

25. This issue was again examined by Apex Court in ***Sukhwant Singh Vs. State of Punjab (1995) 3 SCC 367***. In that case, Court observed that though the police had recovered an empty cartridge from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution did not send the recovered empty cartridges and the seized pistol to the ballistic expert for examination and expert opinion. Apex Court was of the view that if such opinion would have been called for, comparison could have been made which in turn could have provided link evidence between the crime and the accused. It was noted that this again was an omission on the part of the prosecution for which no explanation was furnished. It was thereafter that this Court declared as follows:

*"21.... It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.*

*25.1. Thus, in the aforesaid case, this Court emphasized that in cases where injuries are caused by firearms, the opinion of the ballistic expert becomes very important to connect the crime cartridge recovered during the investigation to the firearm used by the accused with the crime. Failure to produce expert opinion in such cases affects the*

*creditworthiness of the prosecution case to a great extent."*

26. However, in ***State of Punjab Vs. Jugraj Singh, (2002) 3 SCC 234***, Apex Court opined that when there are convincing evidence of eyewitnesses, non-examination of the expert would not affect the creditworthiness of the version put forth by the eyewitnesses, which is not the case.

27. Thus, what can be deduced from the above is that by itself non-recovery of the weapon of crime would not be fatal to the prosecution case. When there is such non-recovery, there would be no question of linking the empty cartridges and pellets seized during investigation with the weapon allegedly used in the crime. Obtaining of ballistic report and examination of the ballistic expert is again not an inflexible rule. It is not that in each and every case where the death of the victim is due to gunshot injury that opinion of the ballistic expert should be obtained and the expert be examined. When there is direct eye witness account which is found to be credible, omission to obtain ballistic report and non-examination of ballistic expert may not be fatal to the prosecution case but if the evidence tendered including that of eyewitnesses do not inspire confidence or suffer from glaring inconsistencies coupled with omission to examine material witnesses, the omission to seek ballistic opinion and examination of the ballistic expert may be fatal to the prosecution case.

28. Applying the above proposition to the facts of the present case, we find that the evidence tendered by the eyewitnesses suffer from serious lacunae. Thus, their evidence cannot be said to be credible. That apart, material witnesses have not been examined. On the whole, the evidence tendered on behalf of the prosecution cannot be said to be full proof so much so that non-recovery of the weapon of offence, non-obtaining of ballistic opinion and non-examination of ballistic expert would be immaterial.

29. Regarding non-production of material witnesses, the Apex Court in ***Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145*** has held as under :

*"It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the*

*prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself ? whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court."*

30. We find from the record that the material witnesses, Shiv Sagar and four injured were not examined before the trial court.

31. In view of the above facts and circumstances of the case, we hereby extend benefit of doubt to the appellants and acquitted them of all charges.

32. The appellants are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender.

33. The judgment and order of trial court is set aside.

34. The Criminal Appeal is allowed.

35. Let the trial court record be returned along with the copy of judgment for necessary compliance.

36. Before parting with this case, we would like to put in words of appreciation for Research Associate, Mr. Priyanshu Upadhyay, attached to one of us, for his dexterity in research and superlative assistance in drafting of this judgement.

**October 5, 2026**

Rohit

**(Vinai Kumar Dwivedi,J.) (Siddharth,J.)**