

Radha Mohan Singh and ors. Vs. State

Radha Mohan Singh and ors. Vs. State

SooperKanoon Citation : sooperkanoon.com/486680

Court : Allahabad

Decided On : Apr-16-2004

Reported in : 2005CriLJ167

Judge : U.S. Tripathi, J.

Acts : [Evidence Act, 1872](#) - Sections 8 and 154; [Indian Penal Code \(IPC\), 1860](#) - Sections 149 and 300; Code of Criminal Procedure (CrPC) , 1974 - Sections 154 and 161

Appeal No. : Criminal Appeal No. 1334 of 1980

Appellant : Radha Mohan Singh and ors.

Respondent : State

Advocate for Def. : Syed Mahmood, Adv.

Advocate for Pet/Ap. : G.S. Chaturvedi, ;G.P. Dixit, ;R.C. Upadhayay, ;B.K.S. Raghuvanshi, ;S.P.K. Tripathi, ;K.M. Singh and ;A.K. Singh, Adv.

Disposition : Appeal dismissed

Judgement :

U.S. Tripathi, J.

1. This appeal has been nominated by the order of Hon'ble the Chief Justice dated 29-3-2004 to this Bench under Section 392 , Cr.P.C. for opinion, as there was difference of opinion between the Hon'ble Judge (Hon'ble S.K. Agarwal, J. and Hon'ble K.K. Misra, J.) of the Bench which heard and decided it.

2. The appeal was directed against the judgment and order dated 16-6-1980 passed by the Sessions Judge, Ballia in Sessions Trial No. 50 of 1980 convicting the appellants Radha Mohan, Devendra Singh alias Mutuk Singh, Kaushal Kishore, Tej Bahadur Singh and Kapil Deo Singh under Sections 302 read with 149, IPC and sentencing each of them to imprisonment for life, further convicting appellants Tej Bahadur Singh and Kapil Deo Singh under Section 147, IPC and sentencing each of them to undergo R.I. for a period of one year, further, convicting Radha Mohan, Devendara Singh and Kaushal Kishore under Section 148, IPC and sentencing each of them to undergo R.I. for a period of two years. Appellant Kaushal Kishore was further convicted under Section 324, IPC and Kapil Deo Singh and Tej Bahadur Singh under Section 323, IPC and remaining appellants were convicted under Section 324 read with 149 IPC and 323 read with 149, IPC, but no separate sentence was awarded under these sections.

3. The prosecution story, briefly stated, was as under :-

All the appellants as well as Hira Singh, deceased and his brother Ganesh Singh (PW-1) were residents of village Shivpur Diyar, P.S. Kotwali, district Ballia. About 5 days before the occurrence of this case, appellants Radha Mohan Singh and Kaushal Kishore and others had assaulted one Udai Narain and a case was registered in this regard . Ganesh Singh (PW-1) was witness of prosecution in the said case. Radha Mohan Singh and others were pressurizing Ganesh Singh (PW-1) not to give evidence against them in said case , but he was not agreeable to it.

4. Hira Singh deceased, elder brother of Ganesh Singh (PW-1) was residing at Calcutta in connection with his business. Two days before the occurrence of this case, Hira Singh had come to his native village. On 14-3-1979 it was a day of Holt festival. People of the village of the parties were busy in singing Holi songs and meeting with each other. In the evening. Hira Singh deceased had gone to meet Udai Narain. While he was returning from the house of Udai Narain, appellants

Radha Mohan Singh and Kaushal Kishore met him in the way and asked him to ask his brother (Ganesh Singh) not to give evidence against them. Hira Singh told that his brother had seen the occurrence and he would give evidence. The above appellants then threatened him that they would teach him a lesson. Ganesh Singh (PW-1) had also gone -in the village to meet some people and when he returned to his house, Hira Singh told about the threat given by the appellants Radha Mohan Singh and Kaushal Kishore. Thereafter, Hira Singh deceased and Ganesh Singh (PW-1) went to the house of Nand Kishore (PW-5). Mohan (PW-3) and Ram Pyari (PW-6) were also present there. All the four persons then proceeded towards north. After meeting people they were returning to their house. At about sun set when they reached near the house of Nand Kishore (PW -5), the appellants Radha Mohan Singh armed with spear (Bhala), Devendara Singh armed with Lathi and Kaushal Kishore armed with knife met them there. Radha Mohan Singh appellant inflicted spear below on Hira Singh deceased and when Ganesh Singh (PW-1) tried to save him, appellants Tej Bahadur Singh and Kapil Deo Singh inflicted Lathi blows on him. Mohan Yadav (PW-3) and Ram Pyari (PW-6) tried to save them and Kaushal inflicted knife blow on Mohan and Kapil Deo Singh assaulted Ram Pyari (PW-6) with Lathi. On the alarm raised by the injured Ram Jee Singh (PW- 4), Nand Kishore (PW-5), Jagdish Singh and others came to the spot and witnessed the occurrence. Thereafter, the appellants ran away towards east. Hira Singh had sustained spear and Pharsa injuries.

5. A charpai was arranged on which Hira Singh was taken to Bandh and from there to District Hospital, Ballia, where he was medically examined by Dr. M.A.R. Siddiqui (PW-2) at 9 p.m. who found following injuries on his person :-

(1) Incised wound 0.5 cm x 0.2 cm x skin deep on left side chest 19 cm below nipple.

(2) Incised wound 3 cm x 2 cm x bone deep on left side of chest (as far as probed easily 10 cm above left nipple), margins sharp cut, tailing downwards, fresh blood coming out of wound.

6. The injuries were kept under observation and patient was admitted in the hospital. The injuries were caused by sharp edged weapon and were fresh in

duration.

7. Ganesh Singh (PW-1) was also medically examined by Dr. Siddiqui at 9,50 p.m. and following injuries were found on his person :-

(1) Lacerated wound 3 cm x .5 cm scalp deep on right parietal region of head, 12 cm above right ear.

(2) Contusion with swelling 3 cm x 3 cm on right parietal region 6 cm from right ear louble (above) red in colour.

(3) Abrasion 1 cm x 0.5 cm on left side face just lateral to left eye.

(4) Contusion 3 cm x 2 cm on right shoulder outer most.

(5) Contused swelling , 3 cm x 3 cm on front of left knee joint.

8. The injuries were simple caused by blunt object, except No. 3 caused by friction against hard surface. Duration fresh.

9. Ganesh Singh (PW-1) thereafter got prepared report from Madan Yadav and lodged the same at P.S. Kotwali at 10.30 p.m. On the basis of written report (Ext. Ka-1), Head Constable Shamsher Singh (PW-9) prepared chick, F.I.R. (Ext. Ka-17) made an endorsement of the same at G.D. report and registered a case against the appellant under Sections 147, 148, 149, 324, 323, 323 and 307, IPC.

10. The investigation of the case was taken up by Sri Shiv Kumar Singh, I.O. (PW-8). who interrogated Ganesh Singh (PW1) at the police station,

11. Hira Singh deceased died in the hospital at 10.40 p.m. The information regarding his death was sent to P.S. Kotwali, which was received there at 12.10 a.m. the endorsement of which was made at G,D. report (Ext. Ka-20) . On the basis of above information, the case was altered under Section 302, IPC. The I.O. Sri Shiv Kumar Singh (PW-8) reached the spot, where he interrogated Mohan Yadav (PW-3) and Ram Pyari (PW-6) and sent them for medical examination. Thereafter the I.O. interrogated Ram Jee Singh (PW-4) and Nand Kishore (PW-5). The I.O. inspected place of occurrence and prepared site plan (Ext. Ka-12). He

also recovered blood from the spot and prepared recovery memo.

12. The inquest of dead body of Hira oSingh was conducted on 15-3-1979 by Sub Inspector Ram Sabad Singh (PW-7) in the mortuary of District Hospital. He sealed the dead body and sent the same for postmortem along with other relevant papers.

13. Ram Pyari (PW-6) was medically examined on 15-3-1979 at 11.30 a.m. by Dr. S.P. Singh (PW-11) who found following injuries on his person ;:-

1. Painful swelling 2.5 x 1.5 cm on the back of left hand's thumb at its root.
2. Abrasion 3x2 cm on the right side Of head 4 cm above and in front of tragus.
3. Complain of pain on mid front of chest.

14. Mohan (PW-3) was medically examined by Dr. S.P. Singh (PW 11) on 15-3-1979 at 12.10 p.m. and there were following injuries on his person :-

1. Lacerated wound 1.5 x 0.2 cm x skin deep on the palmer aspect of left middle finger at its middle phalanx.
2. Lacerated wound 0.3 x 0.2 cm x skin dep on the palmer aspect of left ring finger just above the middle phalanx.

Both injuries were simple caused by blunt object and 3/4 day old.

15. Autopsy on the dead body of deceased was conducted on 15-3-1979 at 4 p.m. by Dr. Prem Prakash (PW-10), who found following ante mortem injuries on his person :-

(1) Stitched wound 3 cm long on the left side of chest, 1 cm below the clavicle and 5 cm left to the mid-line. On the removal of stitches, it was found that there was a stab wound 3 cm x chest cavity deep on the left side front of chest, 1 cm below the clavicle and 5 cm left to the mid-line. Margins of wound were well defined. Wound was directed inwards downwards and towards right side.

- (2) Incised wound 0.5. cm x 0.2 cm skin deep on the left side of chest in mid axillary line, 16 cm behind the axilla and 24 cm left to the mid-line.
16. Internal examination showed that both the pleuras were punctured. Right pleural cavity contained one pint of blood, Left pleural cavity contained 1 pint of blood, In the right lung punctured wound 1.5 cm x large tissues deep at their middle lobe was present. In the left lung punctured wound 2 cm x 1 cm x through and through at the upper lobe was present. Stomach contained semi digested food . Small intestine contained semi digested food materials and large intestine contained faecal matter.
17. Cause of death was shock and haemorrhage, as a result of injury No. 1.
18. The remaining investigation was completed by Sri S.N. Singh, Inspector, who submitted charge-sheet against the appellants.
19. Cognizance of the case was taken by the Magistrate, who committed the case to the Court of Sessions.
20. Appellants Kapil Deo Singh and Tej Bahadur Singh were charged with the offences punishable under Sections 147, 302/ 149, 324/149 and 323, IPC while appellants Radha Mohan and Devendra Singh were charged with the offences punishable under Sections 148, 302/149, 324/149 and 323/149, IPC. Kaushal Kishore was charged with the offences punishable under Sections 148, 302/149, 323/149 and 324, IPC.
21. The appellants pleaded not guilty and contended their false implication due to enmity.
22. The prosecution in support of its case examined Ganesh Singh (PW 1), Dr. M. A. R. Siddiqui (PW 2), Mohan Yadav (PW 3), Ram Jee Singh (PW 4), Nand Kishore (PW- 5), Ram Pyari (PW 6), Ram Sabad Singh, Sub-Inspector (PW 7), Shiv Kumar Singh, I.O. (PW8), Shamsheer Singh Head Constable (PW 9), Dr. Prem Prakash (PW 10) and Dr. S. P. Singh (PW 11). Ganesh Singh (PW 1), Mohan Yadav (PW 3), Ram Jee Singh (PW- 4), Nand Kishore (PW 5) and Ram Pyari (PW- 6) were witnesses of fact, while evidence of remaining witnesses was

formal in nature. The appellants led no evidence.

23. The learned Sessions Judge on considering evidence of the prosecution held that the appellants were members of unlawful assembly, the common object of which was to commit murder of Hira Singh and to inflict injuries on the persons, who came to his rescue and therefore, the prosecution established the guilt of appellants. With these findings, he convicted and sentenced. the appellants as mentioned above.

24. Aggrieved with their above conviction and sentence, the appellants preferred this appeal.

25. The appeal was once dismissed by the Bench consisting of Hon'ble R.R.K. Trivedi and Hon'ble Ikram-ul-Bari, JJ. vide Judgment and order dated 11-5-1999. The appellants went in appeal before Hon'ble Supreme Court against the above judgment and order. Hon'ble Supreme Court, vide order dated 14-3-2002 allowed the appeal and remanded back the appeal to this Court for fresh decision on merits in accordance with law after giving an opportunity of being heard, as the appeal was decided in the absence of learned counsel for the appellants.

26. After remand of the appeal, the learned counsel for the appellants were heard by Bench consisting of Hon'ble S. K. Agarwal and Hon'ble K. K. Misra, JJ. By the judgment, and order dated 22-3-2004 Hon'ble S. K. Agarwal, J. allowed the appeal and set aside the conviction and sentence of appellants. By separate judgment and order of the same date Hon'ble K. K. Misra, J. dismissed the appeal and confirmed the conviction and sentence of the appellants.

27. In view of difference of opinion between the two Hon'ble Judges of the Bench, the record was placed before Hon'ble the Chief Justice under Section 392, Cr.P.C. who nominated the appeal to this Bench for opinion. This is how the appeal is before this Bench.

28. I have heard Sri A. K. Singh, Advocate holding brief of Sri G. S. Chaturvedi, learned counsel for the appellants and the learned A.G.A. for the respondent and have perused the entire evidence on record.

29. The learned counsel for the appellants contended that the appellants had no motive with the deceased; the occurrence had taken place in the darkness and nobody had seen the occurrence; there was delay in the lodging of F.I.R.; the report was ante-timed the evidence of the ocular witnesses is not reliable and therefore, the appellants could not be convicted.

30. Before advertng to the contentions raised by the learned counsel for the appellants, I would like to refer the gist of evidence of ocular witnesses.

31. Ganesh Singh (PW 1), the younger brother of deceased Hira Singh, stated that about 5 days before the occurrence of this case, appellants Radha Mohan, Kaushal Kishore and others had assaulted one Udai Narain of which he was witness of the prosecution. Radha Mohan and others were pressurizing him not to give evidence in the said case. On the date of occurrence it was Holi festival and people of the village were busy in singing and enjoying Holi songs. Hira Singh deceased had gone to meet village people and while he was returning to his house Radha Mohan and Kaushal Kishore appellants met him in the way and asked him to persuade his brother (witness) not to give evidence against them. On it Hira Singh replied that his brother had seen the occurrence and he would give evidence. The above appellants then threatened him that they would teach him a lesson. Thereafter, the witness along with the deceased went to the house of Nand Kishore, Mohan (PW 3) and Ram Pyari (PW 6) were also present there. All the four persons proceeded towards north. While returning to their house at about sun set when they reached at Rasta near the house of Nand Kishore, appellants Radha Mohan armed with spear, Devendra Singh armed with Pharsa, Tej Bahadur and Kapil Deo armed with Lathi and Kaushal Kishore armed with knife came there. Radha Mohan inflicted spear blow on the deceased. When the witnesses tried to save him, appellants Tej Bahadur and Kapil Deo Singh inflicted Lathi blows on him. When Mohan and Ram Pyari tried to save them, Kaushal Kishore inflicted knife blow on Mohan (PW 3) and Kapil Deo inflicted Lathi blow on Ram Pyari, Pharsa injury was also caused to Hira Singh. On the alarm raised by them, Ram Jee Singh (PW 4) Nand Kishore (PW 5) Jagdish Singh and others came to the spot and saw the occurrence. Thereafter, the deceased, who was in injured condition was taken on Charpai up to Bandh and from there he was taken to District

Hospital, Ballia in a tempo. After medical examination he got prepared report from Madan Yadav and lodged the same at P.S. Kotwali.

32. Mohan Yadav (PW 3) stated that on the date of occurrence, in the evening he along with Hira Singh deceased, Ganesh (PW- 1) and Ram Pyari (PW 6) was sitting at the house of Nand Kishore. From there they went to meet the people of the village. While returning from north when they reached in the Gali near the house of Nand Kishore, appellants Radha Mohan, Devendra, Tej Bahadur, Kapil Deo and Kaushal Kishore came there from southern side. Radha Mohan was having spear, Devendra was having Pharsa, Kapil Deo and Tej Bahadur were having Lathis and Kaushal Kishore was having knife. Raising exhortation, itadha Mohan inflicted spear blow on Hira Singh, Devendra Singh inflicted Pharsa blow on him. When Ganesh (PW 1) rushed to save his brother Kapil Deo and Tej Bahadur assaulted him with Lathi. When the witnesses tried to intervene, Kaushal Kishore appellant inflicted knife blow on him, which hit on his hand. Kapil Deo and Tej Bahadur inflicted Lathi blows on Ram Pyari, who sustained injuries. Nand Kishore (PW 5) Ram Jee (PW 4) and Jagdish Singh also came to the spot and then the appellants ran towards east. Ganesh Singh (PW 1) and Hira Singh were taken to hospital. He and Ram Jee went to hospital on next day, where they were medically examined.

33. Ram Jee Singh (PW 4) stated that on the date of occurrence at about sun set, he reached at the house of Nand Kishore to meet him. He heard alarm from the Gali towards east of the house of Nand Kishore and went there. There he saw that Radha Mohan, Mutuk Singh, (Devendra Singh) Tej Bahadur, Kapil Deo Singh and Kaushal Kishore Singh appellants were assaulting Hira Singh. Radha Mohan was having spear, Mutuk Singh was having Pharsa, Kapil Deo and Tej Bahadur Singh were having Lathis and Kaushal Kishore Singh was having knife. Radha Mohan and Mutuk Singh had assaulted Hira Singh. Ganesh Singh (PW 1) was assaulted by Kapil Deo and Tej Bahadur. Kaushal Singh had inflicted knife blow on Mohan (PW 3) and Kapil Deo Singh had inflicted Lathi blow on Ram Pyari (PW 6). Besides him Nand Kishore (PW 5) and Jagdish Singh had also reached the spot and seeing them, the appellants ran away.

34. Nand Kishore (PW 5) stated that on the date of occurrence, Hira Singh was murdered and Ganesh Singh was assaulted. But he did not know whether Mohan and Ram Pyari were also assaulted. He came to know about the occurrence when he returned to his house and had not seen the actual assault. The witness was declared hostile by the prosecution.

35. Ram Pyari (PW 6) stated that he had not seen the occurrence. He was also declared hostile.

36. The motive alleged in the F.I.R. was that the appellants had old enmity with Ganesh Singh (PW 1) and the deceased, regarding litigations and village party Bandi. The appellants were always trying to suppress Ganesh Singh (PW 1) and the deceased. In his evidence Ganesh Singh (PW 1) stated that prior to 5 days of the occurrence Radha Mohan, Kaushal Kishore appellants and others had assaulted one Udai Narain of his village and he was witness of the prosecution of the said assault. Radha Mohan and others were pressurizing him not to become witness in the said case. But he was not acceding to their pressure. On the date of occurrence, the appellants Radha Mohan and Kaushal Kishore again asked Hira Singh deceased to persuade his brother not to give evidence against them. Hira Singh refused and on it, they threatened him to teach a lesson.

37. Enmity between the parties is not disputed. It is also clear from the cross-examination of Ganesh Singh (PW 1) that Sudama Singh and his wife had initiated a criminal case of Marpit against Ganesh Singh (PW 1) and his brothers, in which father of appellant Mutuk Singh was witness. There was also a civil litigation between Sudama Singh and Ram Jee Singh, in which Sachchida Singh, father of Mutuk Singh was witness. Another criminal case was initiated against Mutuk Singh and his father, in which Ganesh Singh (PW 1) was cited as a witness. It was also suggested on behalf of the appellants to Ganesh Singh (PW 1) that besides him, Ram Jee Singh and Mahabir were also witnesses in the case of assault on Udai Narain. The appellants had also admitted in their statement under Section 313, Cr.P.C. that they were falsely implicated on account of enmity. Therefore, enmity between the parties is not disputed.

38. However, the fact that Ganesh Singh (PW 1) was witness in the case of assault on Udai Narain against appellants Radha Mohan and others is not mentioned in the F.I.R. but it is admitted to appellants that Ganesh Singh (PW 1) was witness in the case of assault on Udai Narain, but they had not assaulted. Therefore, it cannot be said that the factum of assault by appellant. Radha Mohan and others on Udai Narain and Ganesh Singh (PW 1) being witness of the prosecution in the said case was introduced for the first time. Ganesh Singh (PW 1) was interrogated in the said case by the I.O. prior to the date of occurrence. Though there was no date of evidence in the Court in near future, but there is no evidence on record to show that charge-sheet was not submitted in the case. There is also no evidence on record to show that a final report was submitted in the said case. In case the police had interrogated Ganesh Singh (PW 1) in the said case of assault on Udai Narain, it had given apprehension to the appellants that he would appear as witness against them in the Court also and in these circumstances they had to take every steps to win him over, so that they could not be punished in the said case. Therefore, this motive cannot be said improbable.

39. It was further contended that in case Ganesh Singh (PW 1) was witness against the appellants, the appellants had no occasion to pressurize his brother Hira Singh, who was residing at Calcutta and had come to his village for a short period and as such there was no motive against Hira Singh. There appears no force in the above contention. Admittedly Hira Singh was elder brother of Ganesh Singh (PW 1). If Ganesh Singh (PW 1) was not conceding to the pressure of appellants, the appellants in all probabilities had thought it proper to ask his elder brother, who had come to village, to pressurize him in this regard and when Hira Singh also did not agree to their proposal, it was but natural for the appellants to teach him a lesson. There is also evidence on record that the appellants were influential persons of the village and persistence of Ganesh Singh (PW 1) and his brother Hira Singh deceased to give evidence against them would have badly hurt their ego and they would have decided to teach a lesson to them. Even that apart, in this case ample materials are on record to show that the family of the appellants and the deceased were not in good terms and had strained relationship over civil and criminal litigations which itself is more than sufficient to constitute the motive as well. Moreover, in this case there is direct witness and therefore the motive

element does not play such an important role as to cast any doubt on the credibility of the prosecution witness even if there be any doubt in this regard. Therefore, the motive alleged by the prosecution was probable and immediate.

40. The omission regarding above motive in the F.I.R. is not very much material firstly; because the factum of Ganesh Singh (PW 1) being a witness in the case of assault on Udai Narain is admitted and the facts and circumstances in which the report was lodged there was every possibility that informant would have not thought it necessary to mention this motive in detail in the F.I.R and therefore, the omission of this motive is not very much material and it cannot be said that this motive was subsequently introduced.

41. The occurrence in this case allegedly took place at about sun set and the F.I.R. was lodged at 10.30 p.m., while the distance of police station was only 6 miles (10 Km.). The learned counsel for the appellants contended that there was delay in lodging the report. But the facts and circumstances of the case and manner in which the report was lodged indicated that there was no delay. It is clear from the evidence of Ganesh Singh (PW 1) and other ocular witnesses that occurrence took place at about sun set. Hira Singh deceased had sustained spear and pharsa injuries in the incident and after the occurrence a Charpai was arranged on which the deceased was brought up to Bandh and from there he was taken to District Hospital, Ballia in a tempo. The deceased as well as Ganesh Singh (PW 1) were medically examined in the District Hospital at 9 p.m. and 9.50 p.m. respectively and thereafter Ganesh Singh (PW 1) came to police station, where he got prepared the report and lodged the same. It was clarified by Ganesh Singh (PW 1) in his evidence that though buses for Ballia were available at the Bandh, but on the date of occurrence it was Holi festival and therefore, no bus or rickshaw was plying. It was also clarified that there were many rickshaws and tempos in his village, but on account of Holi festival, no rickshaw or tempo was available. That he had to wait for tempo at the Bandh for about 2 hours. He further clarified that he along with his brother reached District Hospital, Ballia near about 9 p.m. Thus, the non availability of rickshaw and tempo in the village of occurrence has been fully explained. It is a matter of common experience that on Holi festival rickshaw pullers and tempo drivers are busy in celebrating festival and they do not

ply their rickshaw and tempo on said day. Thus, the circumstances in which informant Ganesh Singh (PW 1) and deceased Hira Singh were brought to District Hospital and thereafter,' report was lodged, the delay, if any, has been fully explained.

42. The learned counsel for the appellants pointed out that the explanation offered by Ganesh Singh (PW 1) does not appear correct, as according to the witness, the distance of Bandh from the place of occurrence is only about 500 yards and the informant must have reached there at about 6.30 p.m. and it is also admitted to him that distance of police station was only 7 miles and therefore, this distance could have been covered within half an hour. But no inference can be drawn simply by picking up certain sentence from the evidence of a witness. The witnesses are villagers. They stated timing on their speculation and there could be some difference in the timing given by such type of witnesses. Method of mathematical calculation cannot be applied on these witnesses and therefore, by applying mathematical formula the testimony of above witnesses on the point of explanation of delay in lodging the report cannot be disbelieved. As mentioned above, it has also been fully explained by Ganesh Singh (PW 1) as to why he had to wait for about 2 hours for conveyance at the Bandh. Therefore, there is no force in the above contention.

43. The next contention of the learned counsel for the appellants was that the occurrence had taken place in the darkness and nobody had seen the assault.

44. In the F.I.R. the time of occurrence is given at about sun set. Ganesh Singh (PW 1) has stated in his evidence that the occurrence took place at about sun set, while he along with his brother Hira Singh and Mohan (PW 3) and Ram Pyari (PW 6) were proceeding towards the house of Nand Kishore (PW 5). Mohan Yadav (PW 3) also stated in his examination -in-chief that the occurrence took place in the evening. In his cross-examination, he stated that Hira Singh and Ganesh Singh (PW 1) came to the house of Nand Kishore (PW 5) prior to one hour of the sun set. However, his cross-examination was deferred for next day and in his next day's cross-examination he stated that sun had set prior to one and half hour, of the occurrence. However, the witness was declared hostile by the prosecution and

was cross- examined.

45. Ram Jee Singh (PW 4) also stated in his examination in-chief that occurrence took place at about sun set, Nand Kishore (PW 5) and Ram Pyari (PW 6) have not supported prosecution case and were declared hostile. Ram Pyari (PW 6) stated that occurrence took place in the night and three Gharis night had passed when the occurrence took place. On the basis of above evidence it was contended that occurrence took place in the darkness. It is relevant to mention at this stage that Mohan (PW 3) changed his previous version about time of occurrence in his cross-examination of next day, and therefore, the possibility that by next day, he was won over and pressurized by the appellants cannot be easily ruled out. Ram Pyari (PW 6) though injured witness had not supported the prosecution case and he was declared hostile.

46. Regarding admissibility of evidence of a hostile witness, the Apex Court held in State of Rajasthan v. Bhawani, 2003 AIR SCW 3953 : (AIR 2003 SC 4230) as below :-

'The fact that the witness was declared hostile by the Court at the request of prosecuting counsel and he was allowed to cross-examine the witnesses, no doubt, furnishes no justification for rejecting en bloc the evidence of the witness. But the Court has at least to be aware that prima facie, a witness who makes different statements at different times has no regard for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. The Court should be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence. The High Court has accepted the testimony of the hostile witnesses as gospel truth for throwing overboard the prosecution case which had been fully established by the testimony of several eye-witnesses, which was of unimpeachable character. The approach of the High Court, in dealing with the case, to say the least, is wholly fallacious.'

47. If the evidence of Mohan (P. W. 3) is considered as a whole, it would appear that he is an injured witness and sustained injuries in the same transaction and had also supported the case of the prosecution in his earlier statement. As held

above, the possibility that after first day's cross-examination, witness was pressurized and was won over can also not be ruled out. The perusal of entire evidence of the witness shows that he had corroborated the testimony of Ganesh Singh (P.W. 1).

48. The learned counsel for the appellants further contended that Ganesh Singh (P.W. 1) has admitted in his cross-examination that he started from his house for meeting people on Holi festival at 4.30-5 p.m. That he visited about 10 houses. That he spent about 1 or 2 minutes at each house and it took about 2 hours and therefore, he could not reach the place of occurrence prior to 6.30 or 7 p.m. Having considered the evidence of Ganesh Singh (P.W. 1) I find that above contention is not correct. The witness stated that he started from the house of Nand Kishore (P.W. 5) at about 4.30-5 p.m. He denied the suggestion of appellants that it took about 2 hours to complete the visit. Further, he stated that he returned within 1 1/2 hours. He also stated that there was no singing at the houses which he visited and thus in all probabilities he returned and reached the place of occurrence at about 6.15 p.m. In the months of March when the occurrence took place sun sets at about 6 p.m. and there is twilight for about 30 minutes after sun sets and therefore at the time of occurrence there was sufficient light.

49. It is not disputed that the appellants and the witnesses are of the same village and the appellants were well known to the witnesses. It is also not disputed that occurrence had taken place on the day of Holi festival. Holi occurs on succeeding day of Purnima (full moon night) and on that day, the moon rises just after the sun set. The occurrence had taken place in the open place and assuming that darkness had started, there was sufficient light of twilight as well as moon light in which the known persons could be easily identified as the parties are residents of village and used to live in the midst of nature and accustomed to live without light. The known person can be easily recognized even in dim light (see Shivraj Bapuraj Jadhav v. State of Karnataka 2003 (6) JT SC 165 : (AIR 2003 SC 3578). It is further clear from the evidence of ocular witnesses that injured witnesses had come in close contact with the appellants and they being known persons could be easily recognized in such light. Thus, from above evidence on record and

discussions made above it is clear that there was sufficient light at the time of occurrence and there could be no mistake in recognizing the assailants, who were known persons.

50. The next contention of the learned counsel for the appellants was that the FIR was not lodged at the time alleged by the prosecution and it was ante timed. The occurrence had taken place at about sun set and the report was lodged at 10.30 p.m. Informant Ganesh Singh (P.W. 1) has explained that after the occurrence arrangement for a Charpai was made and deceased Hira Singh, who was in injured condition was brought up to Bandh on the said Charpai. There they waited for conveyance for about 2 hours and then got tempo and reached the hospital. After medical examination of the deceased and the informant he went to police station, got prepared the report and lodged the same. The evidence of Shamsheer Singh, Head Constable (P.W. 9) shows that the informant Ganesh Singh (P.W. 1) handed over written report (Ext. Ka 1) at the police station at 10.30 p.m. on the basis of which he prepared a chik, FIR and made an endorsement of the same at the G.D. report. The evidence of Dr. M.A.R. Siddiqui (P.W. 2) shows that Hira Singh was examined at 9 p.m. and Ganesh Singh (P.W. 1) was examined at 9.50 p.m. Informant Ganesh Singh (P.W. 1) went to police station after his medical examination. Ganesh Singh (P.W. 1) stated that it took about 30 minutes to get the FIR prepared. Thus, in all probabilities, the report would have been lodged at 10.30 p.m. It is also established from the evidence of Shamsheer Singh, Head Constable (P.W. 9) that after lodging of the report, a memo was received from the hospital at 10.35 p.m. regarding admission of Hira Singh in hospital and another memo was received at 12.10 p.m. regarding death of Hira Singh deceased, on the basis of which the case was altered under Section 302, IPC, vide G. D. report (Ext. Ka-21). He further stated in his cross-examination that special report of the case was sent at 3.10 a.m. through Constable Nagina Ram, who returned back at the police station at 7.15 a.m. The special report was probably sent after altering the case under Section 302, IPC. The case was altered under Section 302, IPC at 00.10 a.m. and some time must have been taken in preparing special report, deploying constable and sending the same. Sending special report at 3.10 a.m. suggests that FIR was lodged at the time alleged by the prosecution.

51. The learned counsel for the appellants contended that informant Ganesh Singh (P.W. 1) was medically examined at 9.50 p.m. and thereafter he came to police station Kotwali; that Police Station Kotwali is at a considerable distance from the hospital and therefore, no report could be registered at 10.30 p.m. at the instance of Ganesh Singh (P.W. 1), who admitted that it took about 30 minutes in preparation of the report. There is no evidence on record to show that P.S. Kotwali, Ballia is at a considerable distance from District Hospital, Ballia. The distance between hospital and police station has not been elicited from any of the witness. Judicial notice be taken of the fact that Ballia is a small city and without any evidence regarding above distance, it cannot be inferred that police station Kotwali is at a considerable distance from the hospital. In small cities like Ballia the distance of Kotwali could be covered within 10 or 15 minutes. Therefore, there is no force in the above contention that Ganesh Singh (P.W. 1) could not reach the police station prior to 10.30 p.m.

52. It was further contended that the inquest report was not prepared in the night as crime number and sections of the offences were noted down in the inquest report with different ink and it shows that FIR was not in existence till inquest memo was prepared.

Perusal of inquest report and the evidence of Sub-Inspector Ram Sabad Singh (P.W. 7) shows that inquest was prepared on 15-3- 1979 in the morning. Sub-Inspector Ram Sabad Singh (P.W. 7) stated that he departed from police station at 6.30 a.m. and reached there at 7 a.m. It is however mentioned in the inquest report that inquest report could not be prepared in the night for want of sufficient light and Ram Sabad Singh came to mortuary in the morning and prepared inquest report. However, he further stated that sending of G. D. report and chik, FIR along with inquest report is not necessary, but the post-mortem report shows that 8 enclosures were also sent along with the dead body. It has not been clarified from Dr. Prem Prakash (P.W. 10) who conducted autopsy that copy of report and G.D. were not received along with the dead body. Assuming that these papers were not sent, the lodging of the report at 10.30 p.m. cannot be doubted, as the special report was sent in the same night at 3.10 a.m. No clarification was sought from Sub-Inspector Ram Sabad Singh (P.W. 7) as to how and under what

circumstances interpolations were made in Sections of the crime in the inquest report. Unless clarification is sought, it cannot be said that Sub- Inspector Ram Sahad Singh (P.W. 7) himself had made interpolation. Therefore, on this basis, it cannot be said that FIR was not lodged at the time alleged by the prosecution and it was not in existence till the preparation of inquest report.

53. Thus, from the above evidence and discussions it is clear that the FIR was lodged at the time alleged by the prosecution and there was no ante timing.

54. To substantiate the manner of occurrence and complicity of appellants, the prosecution has relied on ocular testimony of Ganesh Singh (P.W. 1), Mohan (P.W. 3), Ram Jee Singh (P.W. 4), Nand Kishore (P.W. 5) and Ram Pyari (P.W. 6).

55. Ganesh Singh (P.W. 1) is the complainant and real brother of the deceased. He claimed that at the time of occurrence, he along with his elder brother Hira Singh deceased was returning to his house after meeting the people of the village on the occasion of Holi and when he and the deceased reached near the house of Nand Kishore at about sun set, the occurrence took place. In his statement the witness had given each and every detail of the occurrence, weapon possessed by each of the appellants and role played by each of them. He is also injured witness and his injuries were examined just after examination of injuries of the deceased at 9.50 p.m. in the same night. He had also taken deceased up to the hospital. He went to the police station and lodged the report. The witness has categorically stated that while appellants Radha Mohan was inflicting spear blow on the deceased, he tried to save him and then appellant Tej Bahadur Singh and Kapil Deo Singh inflicted Lathi blows on him. The injuries sustained by witness, as stated by Dr. M.A.R. Siddiqui (P.W. 2) were lacerated wounds and contusions and contused swelling. Dr. Siddiqui stated that these injuries were caused by blunt object except injury No. 3, which was caused by friction. The above medical evidence supports the evidence of Ganesh Singh (P.W. 1). The duration of injuries of the witness and that of Hira Singh are the same. Thus, it is established that witness sustained injuries in the same transaction, in which the deceased sustained injuries. The injuries on the person of the witness in the same

transaction confirms his presence on the spot.

56. As held above, there was sufficient light and opportunity for the witness to recognize the assailants, who were known to him from before.

57. It was pointed out by the learned counsel for the appellant that the witness stated in his cross-examination that when the assailants came near him, he recognized them and it shows that he could not see the role of each accused. This contention is misconceived. The word 'Najdik' occurring in the statement of the witness has not been got clarified. It may be 10 paces or 2 paces. Moreover, there is categorical evidence of the witness that when appellant Radha Mohan inflicted spear blow on the deceased, he tried to save him and he was assaulted with Lathi by appellants Tej Bahadur Singh and Kapil Deo Singh. Assuming that he could not notice the movement of the appellants from before, he had seen them assaulting the deceased as well as him and therefore, it cannot be said that there could be any mistake in the recognition of the assailants.

58. No doubt, the witness is close relative of the deceased, but this is no ground to discard his testimony. It was also contended that the witness was inimical with the appellants and therefore the accused persons were nominated on account of suspicion due to pre-existing enmity. Enmity between the parties is admitted. In this case, as held above, enmity was motive for committing the murder of the deceased and assault on the witness. As held above, there was sufficient light and witness has full opportunity to recognize the assailants and therefore, there was no question naming the appellants on account of suspicion alone.

59. It was further contended that the witness had made certain subsequent developments in his statement, as he had not mentioned in the FIR regarding going to village along with the deceased to meet people as well as threat given by the appellants to Hira Singh. No doubt, the above facts do not find place in the FIR but this omission is not very much material. FIR is not encyclopedia of evidence of the prosecution and only gist of the occurrence is mentioned in the FIR to move the police machinery in motion. At the time of lodging of the FIR the brother of the witness was admitted in hospital in precarious condition and he had also sustained injuries and in such circumstances it was not possible for the witness to give each

and every detail of the prosecution story in the FIR.

60. The place of occurrence has been mentioned in the FIR and it is supported by the evidence of I.O. Ram Sabad Singh (P.W. 7), but found blood and trodden earth at the spot. The place of occurrence has also not been seriously disputed.

61. It was further contended that Ganesh Singh (P.W. 1) stated that during course of Marpit appellant Kaushal Kishore inflicted knife blow on Mohan (P.W. 3) and the latter caught hold the knife, but the medical evidence of Dr. S. P. Singh (P.W. 11) and injury report of Mohan shows that he had sustained lacerated wounds and no incised wound. The witness has stated in his cross examination that Mohan had caught hold knife, but he could not snatch it. There is nothing on record to show that knife was pulled. While Mohan had caught hold and in case the knife is not pulled in such a way, it could not cause incised wound. The lacerated wounds of Mohan (P.W-3) were on left middle finger and left ring finger. Therefore, in all probabilities, these injuries were caused when he had caught hold knife. Therefore, on this ground, the testimony of Ganesh Singh (P.W. 1) cannot be discarded.

62. The learned counsel for the appellants contended that according to evidence of Ganesh Singh (P.W. 1) deceased was assaulted with spear and Pharsa but his injury report and evidence of Dr. M.A.R. Siddiqui (P.W. 2) shows that deceased had sustained only two incised wounds and no punctured, penetrating or stab wound and there was no spear injury. Therefore, evidence of Ganesh Singh is contradictory to medical evidence. This contention bears no force in view of evidence of Dr. Prem Prakash (P.W. 10) and postmortem report. Dr. Siddiqui (P.W. 2) described injury No. 2 as incised wound 3x2 cm x bone deep on left side chest. Dr. Prem Prakash (P.W. 10) stated that ante-mortem injury No. 21 was stitched wound 3 cm. long on left side chest. He found that on removal of stitches there was a stab wound 3x2 cm x chest cavity deep on left side of front of chest 1 cm below clavicle and 5 cm. below to mid line. Margins of wound were well defined. It is therefore clear that from outer appearance injury No. 2 of injury report corresponding to injury No. 1 of post mortem report resembled as incised wound, but in fact it was a stab wound. Ganesh Singh (P.W. 1) had stated in his cross-

examination that blade of spear was about 3 Anguls (about 1xh inches) wide. It means that spear had pointed as well as sharp edge and therefore it caused incised as well as stab wound. Therefore, one injury of the deceased was caused by spear. Thus, the evidence of Ganesh Singh (P.W. 1) is in conformity with medical evidence.

63. The evidence of Ganesh Singh (P.W. 1) also finds corroboration from medical evidence, FIR and other circumstances of the case referred to above. Therefore, his evidence is clear, cogent and trust worthy.

64. The next witness of the occurrence is Mohan (P.W. 3). As mentioned above, the witness had given each and every detail of the occurrence in his examination-in-chief as well as in the cross-examination of first day. However, when he was cross-examined on next day, he stated that due to darkness he could not see whether Ganesh Singh (P.W. 1) had fallen down or not. He also stated that there was complete darkness at the time of occurrence and he could not recognize the assailants. But as mentioned above, the evidence of witness cannot be discarded in toto simply because he was declared hostile. A perusal of entire evidence of the witness shows that on the next day, he was made to say something in favour of appellants, as he appears to have been won over. The subsequent evidence of the witness that there was complete darkness on the spot is totally belied by the fact that the night of occurrence was moon lit night and occurrence had taken in the open place and therefore, there was no question of pitch dark. The assailants were also known persons to the witness. He had also sustained injuries and presence of the witness on the spot cannot be doubted and his subsequent statement was due to influence of appellants and therefore, entire testimony of the witness cannot be discarded on this ground.

65. It was further contended by the learned counsel for the appellants that the injuries of the witness do not support that he was assaulted with knife. As mentioned above the witness stated that he had caught hold edged portion of the knife, but he clarified that Kaushal Kishore suddenly snatched the knife and in these circumstances, lacerated injuries were caused on his left middle and ring fingers.

66. The learned counsel for the appellants contended that injuries of Mohan (P.W. 3) were examined on next day i.e. 15- 3-1979 and it indicates that his injuries were subsequently prepared to make him an eyewitness. The I. O. Sheo Shankar Singh (P.W. 8) clarified that he interrogated Mohan (P.W. 3) on next day and since he had sustained injuries he sent him for medical examination. The injuries of the witness were not serious and being Holi festival if the witness did not go to hospital in the night of occurrence, no adverse inference can be drawn and considering duration of his injuries it cannot be said that his injuries were prepared subsequently.

67. Therefore, the evidence of Mohan (P.W. 3) to the extent he corroborated prosecution story is believable.

68. The next witness is Ram Jee Singh (P.W. 4). The trial Court had not relied on the testimony of this witness on the ground that he had enmity with the appellants, his house was at some distance and therefore he was a chance witness and that there were discrepancies between his statement under Section 161, Cr. P.C. and given in the Court. It is true that the witness had some enmity with the appellants and he had also his house at some distance. But the witness has given plausible explanation for his presence on the spot. The discrepancies between his statement under Section 161, Cr. P.C. and in the Court are not very much material. Though he had not sustained any injury, but he cannot be termed a chance witness. The name of the witness finds place in the FIR. Even that apart the prosecution story is established from other eye-witnesses referred to above.

69. The other two witnesses of the occurrence namely Nand Kishore (P.W. 5) and Ram Pyari (P.W. 6) have not supported the prosecution story and therefore their evidence is of no avail.

70. It was further contended by the learned counsel for the appellants that on the date of occurrence some children of Hindu community had thrown colour on Sageer and Meer Hasan, members of Muslim community and on account of it, some altercation had taken place and it appears that Hira Singh deceased and other injured had sustained injuries in the above altercation. Having considered the evidence on record I find no force in the above contention. The appellants had

nowhere stated in their statements under Section 313, Cr. P.C. that Hira Singh deceased and other injured witness sustained injuries in the Marpit between Hindu and Muslim communities. A half hearted suggestion was given to Mohan (P.W. 3) that children of the family of Ganesh Singh (P.W. 1) had thrown coloured water on Sageer and Meer Hasan in which some altercation (Jhanjhat) had taken place. But there is no suggestion that either Hira Singh or any other injured sustained injuries in the said altercation. There is also no evidence to prove this fact. It has also not been clarified that the above altercation took place at the time of occurrence or prior to it. Therefore, above alleged altercation cannot be linked with the occurrence of this case and it cannot be said that Hira Singh and other injured sustained injuries in the said altercation. Had it been so, Ganesh Singh (P.W. 1) informant, the real brother of the deceased, would have not spared the real assailants.

71. It is true that the fatal injuries on the deceased was caused by Radha Mohan and Devendra alias Mutuk Singh by spear and Pharsa respectively and deceased had not sustained any other injuries, but the evidence on record shows that all the appellants had simultaneously come to the spot armed with various weapons and had caused injuries from their respective weapons to the deceased and other injured. Therefore, there was active participation by all the appellants and they had shared common object to unlawful assembly, to which they were members. Therefore, the appellants were rightly convicted and sentenced under various Sections with the aid of Section 149, IPC. Thus, the guilt of all the appellants have been established and they were rightly convicted and sentenced by the Trial Court.

72. In this way, there is no force in the appeal.

73. The appeal is, accordingly, dismissed and conviction and sentence of each of the appellants recorded by the Trial Court are confirmed.

74. Let this judgment along with the record of the case be placed before the concerned Bench at an early date for further action.

