

Moti Lan and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : Jul-14-2003

Reported in : 2004CriLJ950

Judge : U.S. Tripathi and ;V.N. Singh, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 296; [Evidence Act, 1872](#) - Sections 135; [Indian Penal Code \(IPC\), 1860](#) - Sections 148, 149, 300, 302, 307 and 452

Appeal No. : Crl. A. No. 2405 and R. No. 4 of 2002

Appellant : Moti Lan and ors.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : V.C. Tiwary, ;A.K. Awasthi, ;M. Tiwary, ;Samit Gopal and ;G.S. Chaturvedi, Advs.

Judgement :

U.S. Tripathi, J.

1. Appellants Motilal, Surendra Singh, Virendra Singh, Amar Singh, Dhunnan Singh, Sharda Singh, Miyadi alias Ram Miyadi Singh and Anil Singh have

preferred this appeal against the judgment and order, dated 11-6-2002, passed by Addl. Sessions Judge (Court No. 4), Deoria in Session Trial No. 184 of 1995, convicting all the appellants under Sections 148 IPC, 302 read with Section 149 IPC, 307 read with Section 149 IPC, 452 and 427 IPC and sentencing appellants Motilal, Surendra Singh, Virendra Singh, Amar Singh and Dhunнан Singh to death and fine of Rs. 10,000/- each under Section 302 read with Section 149 I.P.C. R.I. for a period of seven years and a fine of Rs. 2000/- each under Section 307 read with Section 149 IPC, RI for a period of one year and a fine of Rs. 500/- each under Section 452 IPC, RI for a period of one year and a fine of Rs. 500/-each under Section 427 IPC and RI for a period of one year under Section 148 IPC. In default of payment of fine they were further sentenced to undergo RI for a period of one year, three months and three months RI on each count respectively. And sentencing appellants Sharada Singh, Miyadi alia Ram Miyadi Singh and Anil Singh to imprisonment for life and a fine of Rs. 10,000/-each under Section 302 read with Section 149 IPC, RI for a period of seven years and a fine of Rs. 2000/- each under Section 307/ 149 IPC, RI for a period of one year and a fine of Rs. 500/- each under Section 452, R.I. for a period of one year and a fine of Rs. 500/- each under Section 427 IPC and RI for a period of one year under Section 148 IPC. In default of payment of fine they were sentenced as mentioned above. All the substantive sentences were ordered to run concurrently.

2. The prosecution story briefly stated was as under :--

Appellants Surendra Singh, Virendra Singh and Anil Singh are real brothers and sons of appellants Sharda Singh. Appellants Amar Singh and Miyadi Singh are also real brothers. The above appellants were of the family of Toofani Singh and residents of village Jhanga Tola Sudama Chak, P. S. Hara, district Deoria. Appellant Dhunнан Singh was resident of another village Mangalpur and was associate of Sharda Singh and others. Sita Ram Singh, deceased was of the family of Bichari Singh, Advocate and resident of the village of the appellants. There was enmity between Bichari Singh, husband of Smt. Kaushilya, P.W. 6 and the appellants regarding some land. Sita Ram Singh deceased (40), his wife Smt. Manju Singh, P.W. 5 and his sons Surendra Singh (17) deceased and Jai Govind (14) deceased and Bichari Singh and his family were residing separately in the

house which jointly belonged to them. Bichari Singh was a practising lawyer in District Courts Gorakhpur and was residing there. He often came to his house in village Sudama Chak.

3. On the night of 24/25-6-1994 Sita Ram Singh, deceased along with his wife Smt. Manju Singh, P.W. 5 and sons Surendra Singh and Jai Govind, deceased were sleeping inside the house in the Chhappar of Dalan. Other members of the family and Kaushilya Devi, P.W. 6 were sleeping inside the house. There was electric light inside the house. Before half an hour of the occurrence of this case, Toofani Singh of the family of appellants Sharda Singh and others were murdered. Appellants suspected that Toofani Singh was murdered by Sita Ram and sons of Bichari Singh. At about 1.45 a.m. appellants Motilal, Surendra Singh and Virendra Singh armed with country made pistols (katta), Anil Singh, armed with gun, Miyadi @ Ram Miyadi Singh armed with bomb, Dhunнан Singh armed with Ramma (iron road having edge at one end), Amar Singh armed with pharsa fitted lathi and Thagai Singh (died during trial) armed with lathi came to the house of Sita Ram Singh, deceased and attacked on Sita Ram Singh, his sons Surendra Singh and Jai Govind, Smt. Manju, P.W. 5, Smt. Lachchamina, Ram Lakshan, Pawan Kumar and Smt. Bela all of the family of Sita Ram Singh with their respective weapons. Appellants attacked Sita Ram Singh, deceased into Osara (varandah) of Dalan and caused injuries on him due to which he died. Surendra Singh started running towards southeast in the Sahan and gun shot injury was caused on him due to which he fell down and died. Jai Govind deceased ran towards west inside the house. Gun shot injury was caused on him and he fell down and died. Other injured sustained injuries. Appellants took out the motorcycle kept inside the house of Sita Ram and set it at fire. Hearing shrieks of the injured and sound of explosion of bomb and gunfire Udai Bhan and Ram Bilas came to the spot and saw the occurrence. Smt. Manju Singh (P.W. 5) came to the police station Hata in the same night. She got prepared report Ext. Ka-1 from Dwarika Tiwari, and lodged the same at the police station at 2.40 a.m. in the night of 25-6-94.

4. Chick FIR (Ext. Ka-43) was prepared by Constable Moharrir Sita Ram Rai an endorsement of which was made at GD report (Ext. Ka-44) by Head Moharrir, Prem Singh and a case was registered against the appellants and Thagai Singh

under Sections 147, 148, 149, 302, 307 and 427, I.P.C. Manju Singh, P.W. 5 and other injured Pawan Kumar, Smt. Vijay Laxmi, Smt. Bela Devi and Ram Lakshan were sent to Primary Health Centre Hata where they were medically examined by Dr. Ghan Shyam Singh, P.W. 8 between 5-30 and 6-30 a.m. who prepared injury reports (Exts. Ka-5 to Ka-9).

5. The investigation of the case was taken up by Shri Umesh Chandra Misra, IO, P.W. 9. He received papers of the case and reached the place of occurrence along with Sub-Inspector R. P. Rai. The dead bodies of Sita Ram Singh, Surendra Singh and Jai Govind deceased were lying on the spot. He got conducted inquest of the dead bodies of above deceased persons through Sub-Inspector R. P. Rai (since dead) who prepared inquest report (Exts. Ka-13, Ka-14 and Ka-15) respectively. The dead bodies were sealed and sent for post-mortem. The I. O. took into possessions bloodstained Ramma, empty cartridges, wads and pellets from the spot and prepared recovery memo (Exts. Ka-34 and Ka-35). He arrested the appellants Sharda Singh, Anil Singh, Virendra Singh, Thagai Singh and Surendra Singh at Jhanga Tri Crossing. On 26-6-94 the I. O. interrogated Smt. Manju Singh, P.W. 5, inspected the place of occurrence and prepared site plan Ext. Ka-36. Thereafter he interrogated the injured witnesses. The I. O. took into possession remnants of burnt motorcycle and prepared recovery memo (Ext. Ka-37). The I. O. also recovered the licensed gun, which was used in the incident from the house of Toofani Singh and prepared recovery memo (Ext. Ka-38).

6. The autopsy on the dead bodies of deceased Sita Ram Singh, Surendra Singh and Jai Govind Singh were conducted on 26-6-94 by Dr. K. Singh (P.W. 7) who found ante-mortem injuries on the person of deceased and cause of death due to shock and haemorrhage and prepared post-mortem reports (Exts. Ka-2, Ka-3 and Ka-4). The I. O. Umesh Chandra, (P.W. 9) interrogated other witnesses on 27-6-94. Accused Shesh Narain, Amar Singh and Motilal surrendered in the Court on 28-4-94. On completion of investigation the I. O. submitted charge sheet against the appellants.

7. Cognizance of the case was taken by the Magistrate, who committed the case to the Court of Session.

8. Appellants Motilal, Surendra Singh, Virendra Singh, Dhunnan Singh, Miyadi Singh and Anil Singh were charged with the offences punishable under Sections 148, 302/149, 307/149, 452 and 427 I.P.C., while appellants Sharda Singh, Amar Singh and Thagai Singh were charged with the offences punishable under Sections 147, 302/ 149, 307/149, 452 and 427, I.P.C. The appellants pleaded not guilty.

9. Appellants Sharda Singh and Anil Singh contended that at the time of occurrence of this case they were present at the police station Hata in connection with lodging of the report of the murder of Toofani. The other appellants contended that they were falsely implicated on account of enmity.

10. The prosecution in support of its case examined Manju Singh, P.W. 5 and Smt. Kaushilya, P.W. 6 as witnesses of fact, besides Dr. K. Singh, P.W. 7, Dr. Ghan Shyam, P.W. 8 and Umesh Chandra Misra, I. O., P.W. 9 as formal witnesses. Smt. Vijay Laxmi, Ram Lakshan, Beila Devi and Ram Bilas Tiwari filed affidavits before the trial Court in support of the appellants and since they were cross-examined by the prosecution, they were numbered as P.W. 1 to P.W. 4. The appellants did not adduce any evidence in their defence.

11. Learned Sessions Judge on considering evidence of the prosecution held that the prosecution has Successfully proved the guilt of the appellants for the offence punishable under Sections 148, 302 read with Section 149, I.P.C., 307 read with Section 149 I.P.C., 452 and 427, I.P.C., With these findings he convicted and sentenced the appellants as mentioned above.

12. Appellants Thagai Singh died during pendency of the trial and therefore, the case against him stood abated.

13. Aggrieved with their above conviction and sentence the appellants have come up in this appeal.

14. Learned Sessions Judge had also sent a reference for confirmation of the death penalty to appellants Motilal, Surendra Singh, Virendra Singh, Amar Singh and Dhunnan Singh.

15. We have heard Shri V. C. Tiwari, learned counsel for the appellants, Sri Amar Jeet Singh, learned AGA for the respondent and have perused the entire evidence on record. None appeared from the side of complainant.

16. In this case the death of deceased Sita Ram Singh, Surendra Singh and Jat Govind and injuries on the persons of Smt. Manju Singh, P.W. 5, Pawan Kumar, Smt. Vijay Laxmi, Smt. Beila and Ram Lakshan are not disputed to the appellants.

17. Dr. Ghan Shyam (P.W. 8) stated that he examined injuries of Manju Singh, Pawan Kumar, Smt. Vijay Laxmi, Beila Devi and Ram Laxan on 25-6-94 between 5-30 and 6-30 a.m. and found the following injuries on their person:--

1-Injuries of Smt. Manju Singh. P.W. 5.

(1) Two round lacerated wound of 0.5 cm radius each present in an area of 1 cm on front of right thigh 18 cm above right knee joint bone. Bleeding present;

(2) Two round lacerated wounds of 0.5 cm radius each present at a distance of 4 cm from each other in Rt groin, 10 cm above injury No. 1. Bleeding with clotted blood present, X-ray Rt thigh with hip joint advised.

Injuries were caused by firearm, simple in nature and were fresh in duration.

2-Injuries of Pawan Kumar.

(1) One lacerated wound of 0.3 cm radius x muscle deep surrounded by contusion of 3 cm x 2.5 cm present on outer aspect of dorsum of Rt hand starting from the wrist Joint, red in colour with clotted blood over laceration. X-ray of Rt hand advised.

Injury was caused by hard and blunt object (might be fire arm injury), nature kept under observation and fresh in duration.

3-Injuries of Smt. Vijay Laxmi.

(1) On lacerated wound 3 x 1 cm x scalp deep present on left side of scalp 5 cm above the medial end of left eye brow. Bleeding on cleaning present.

(2) Multiple small rounded laceration of 0.3 cm x 0.5 cm each present on front of left shoulder and left side of chest wall (crest) in an area of 27 cm x 12 cm. Bleeding present from wounds, X-ray of left side of chest with shoulder advised.

(3) One contusion of 6 cm x 4 cm present over left side of face starting from the left lower eye lid of left eye, red in colour.

Injuries were caused by hard and blunt object. Injury No. 2 was caused by fire arm. Nature kept under observation and were fresh in duration.

4-Injuries of Smt. Beila.

(1) One abrasion of 4 cm x 1 cm present on front of right leg, 7 cm above the right ankle joint, bleeding present.

(2) One contusion 7 cm x 2.5 cm present obliquely on right thigh 22 cm above the knee joint bone, red in colour.

(3) One contusion 7.5 cm x 6 cm present on dorsum of right hand starting from right wrist joint, red in colour. X-ray of right hand advised.

(4) Two abrasions of 0.5 cm x 0.1 cm each present on inner aspect of dorsum of right wrist joint, bleeding present.

(5) One contusion of 4 cm x all around the left fore arm 2 cm above left wrist joint line, red in colour, X-ray of left wrist advised.

(6) One contusion of 1.5 cm x 1 cm present on dorsum of second and third toe of left foot 1 cm back to the tip of second and third toe, red in colour.

The injuries were caused by blunt and hard object. Injury Nos. 2, 3 and 5 kept under observation, rest simple and fresh in duration.

5-Injuries of Ram Lakshan.

(1) One lacerated wound of 1 cm x 0.3 cm x skin deep present on outer part of right eye brow, clotted blood with bleeding on cleaning present.

(2) One contusion of 12 cm x 1.5 cm present obliquely on right side of back 15 cm below the inferior angle of right scapula, red in colour.

(3) One contusion of 8 cm x 2 cm present horizontally on right side of back 7 cm below the inferior angle of right scapula, red in colour.

(4) One contusion 7 cm x 2 cm present horizontally on right side of back 2 cm above injury No. 3, red in colour.

(5) One contusion of 9 cm x 2 cm present obliquely on right scapular region 2 cm above the inferior angle of right scapula, red in colour.

The injuries were caused by hard and blunt object, simple in nature and fresh in duration.

18. Dr. K. Singh, P.W. 7 who conducted the autopsy on the dead bodies of the three deceased stated that he found the following ante-mortem injuries on the person of each deceased.

1-Autopsy on the dead body of Sita Ram Singh deceased.

There were following ante-mortem injuries on the person of deceased.

(1) Incised wound with clean cut margins on the left side of neck 11 cm x 3.5 cm x muscle deep, externally just behind the left ear towards lower and medial side of neck.

(2) Incised wound 3.5 cm x 2 cm x muscle deep on the left side of face, adjacent to the left lateral angle of mouth, margins clean cut.

(3) Incised wound with clean-cut margins on the chin 4 cm x 2.5 cm x bone deep.

(4) Incised wound with clean cut margins on the outer and middle part of left fore arm 4.5 cm x 3 cm x muscle deep.

(5) Contused skin on the middle and outer part of right fore arm, radius and ulna bones broken.

The Internal examination showed that larynx, trachea and bronchi were congested. Both lungs were congested, large vessels of left side neck cut, stomach contained semi digested food. The death was caused due to shock and haemorrhage, as a result of ante-mortem injuries caused by sharp edged weapon.

2-Autopsy on the dead body of Surendra Singh deceased.

There were following ante-mortem injuries on the person of deceased:--

(1) Oval lacerated wound 4.5 cm x 4 cm x cavity deep on upper part of right side chest 6 cm above right nipple at 12 O'clock position, margins irregular, inverted, blackened in colour, blackening and tattooing present around the wound.

The internal examination showed that second and third ribs of right side were ruptured pleura was lacerated and congested on right side larynx trachea and bronchi were congested, right lung lacerated and congested, left lung and peritoneum were congested. Semi digested food material present in stomach (rice and potato pieces visible), small and large intestine contained gases and faecal matters.

The cause of death was due to shock and hemorrhage, as a result of ante-mortem fire arm chest injuries.

3-Autopsy on the, dead body of Jai Govind deceased.

There were following ante-mortem injuries on the person of deceased:--

(1) Wound of entry oval lacerated wound 5 cm x 4.5 cm x cavity deep on left lower lateral part of chest 8 cm below the left nipple at 5 O'clock position, margins irregular, inverted, charred and blackened, blackening and tattooing present around the wound.

The internal examination showed that 7th and 8th ribs of left side ruptured, pleura was lacerated and congested, larynx, trachea and bronchi were congested, right lung congested, left lung lacerated and congested, pericardium lacerated and congested, large vessels lacerated and congested, abdominal wall, peritoneum and peritoneal cavity were congested, tongue, pharynx and esophagus congested.

Stomach was lacerated and congested and was empty. Small and large intestines contained gases and faecal matters. Liver, pancreas, spleen and kidney were congested.

The cause of death was shock and hemorrhage as a result of ante-mortem firearm injuries.

19. The appellants have not disputed the above medical evidence and thus it is established by the prosecution that the deceased as well as the injured persons sustained sharp edged, blunt object and firearm injuries and Sita Ram Singh, Surendra Singh and Jai Govind, died on account of the above injuries. It is also established that the three deceased as well as the above injured persons sustained injuries in the same transaction.

20. Before advertng to the points raised by the learned counsel for the parties we would like to refer the gist of evidence of prosecution witnesses.

21. It may be mentioned at very out set that Smt. Vijai Laxmi, Ram Lachhan, Smt. Bela Devi and Ram Bilas Tiwari have been arrayed as P.Ws. 1 to 4, but they were not examined in the Court and instead of It they had filed affidavits. However, they were cross-examined on behalf of the prosecution. We will discuss the admissibility of affidavits of the above persons a bit later.

22. Smt. Manju Singh (P.W. 5) stated that Sita Ram Singh deceased was her husband. He was murdered seven years ago and at the same time her sons Jai Govind and Surendra were also murdered. It was after mid night. She, her husband and her children, were sleeping in her house in the Chhappar of Dalan. Ram Miyadi alias Miyadi, Amar Singh, Moti Lal, Anil Singh, Surendra Singh, Virendra Singh, Dhunнан Singh, Thagai Singh and Sarada Singh came there. Anil Singh was having gun, Sharda Singh were having Lathi, Miyadi was having bomb, Moti Lal was having Katta (Country made pistol), Amar Singh was having Pharsa fitted lathi and Surendra Singh and Virendra Singh alias Ravindra Singh were also having Kattas. Anil Singh, Virendra Singh alias Ravindra Singh were sons of Sharada Singh. Dhunнан Singh was having Ramma and Thagai Singh was having Lathi. Except Dhunнан Singh all the accused were her Pattidars and residents of

her village. Dhunna Singh was associate of appellants. There was electric light in her house. She was also sleeping besides the Charpai of her husband and children. Her daughter-in-law Smt. Laxmina was sleeping inside the Angan. Smt. Kaushilya (P.W. 6) was also sleeping inside the house. All the appellants came to her house extending abuses and they started causing injuries on her, her husband and her sons Jai Govind and Surendra Singh with their respective weapons. She, her husband and her sons sustained injuries. Her husband and her two sons died on the spot. Appellants also caused injuries to Laxmina alias Vijai Laxmi, Ram Lachhan, Pawan Kumar and Smt. Bela Devi. Smt. Kaushilya Devi (P.W. 6) had also seen the occurrence. The appellants took out motorcycle kept in her house and set it at fire. Hearing sounds of bomb, guns and shrieks of the witnesses Udai Bhan, Ram Bilas and others came to the spot and saw the occurrence. Her husband fell down outside the Osara. Jai Govind had fallen in the Angan and Surendra ran outside, but fell down in the Sahan. After the occurrence she went to police station Hata. In the way she got prepared report (Ext. Ka-1) from one Dwarika Tiwari, residents of Hata and lodged the report at the police station. The appellants were having enmity with Bichari Singh Vakil who was of her family and a litigation was pending between them. Some time before the occurrence of the case Toofani Singh of the family of the appellants was murdered. On account of above murder the appellants committed the incident. Her husband and Bichari Singh were living separately in the same house. Her injuries were seen at the police station and she was also medically examined. She further stated that Smt. Vijai Laxmi, Smt. Bela Devi, Ram Lachhan Singh and Ram Bilas were won over by the appellants.

23. Smt. Kaushilya Devi (P.W. 6) wife of Bichari Singh Vakil, stated that on the night of occurrence she was sleeping inside her house and she awoke hearing the sounds of bomb blast. She came out of her room and observed that appellants were saying that those persons had killed Toofani Singh and they should be killed so that nobody should remain to light lamp. Dhunna, Sharda Singh, Ram Miyadi, Moti Lal, Virendra Singh alias Ravindra Singh and Thagai had come to her house. Anil Singh was having gun, Dhunna was having Khatti (Ramma), Amar Singh was having Pharsa, Surender Singh, Virendra Singh and Moti Lal were having country made pistols. Ram Miyadi was having Bomb and Sharda and Thagai were

having Lathis. Except Dhunna Singh all the appellants were residents of her village and she was knowing them from before. All the appellants caused injuries on Sita Ram Singh, his wife and his sons who were sleeping in Osara. Ram Lachhan Singh was sleeping in open place and Lathi blows were inflicted on him. Sita Ram Singh fell down outside and Dhunna and Amar Singh caused injuries on him with Ramma and Pharsa. Surendra Singh deceased ran towards open place, but shot was fired from country made pistol on him. Jai Govind ran towards Angan and appellant Anil caused gun shot injury on him. When Manju Singh (P.W. 5) started crying bomb was hurled on her. Sita Ram Singh, Surendra Singh and Jai Govind died at the places where they sustained injuries. Dead body of Sita Ram Singh was lying at a distance of 2-3 paces from main door. Surendra Singh was lying dead in the Sahan and Jai Govind in the Angan. There was electric bulb light inside outer Verandah and inner house. Her daughter-in-law Vijai Laxmi sustained lathi injuries. Sister-in-law (husband's sister) Smt. Bela Devi and grandson Pawan sustained injuries. She was also chased by the Moti Lal and Virendra Singh appellants, but she entered into her room and bolted it from inside. Gunshots hit at her door, window and on the wall inside the room. The appellants took out motorcycle kept inside the house and set it at fire. Her sister-in-law Manju Singh (P.W. 5) went to P. S. Hata. There was enmity regarding land between her husband Bichari Singh and Toofani Singh and Toofani Singh was murdered in the same night. On account of it the appellants formed unlawful assembly and committed the incident collectively.

24. Dr. K. Singh (P.W. 7) had conducted autopsy on the deadbody of Sita Ram Singh, Surendra Singh and Jai Govind Singh and Dr. Ghanshyam Singh (P.W. 8) had examined injuries of Smt. Manju Singh (P.W. 5) Pawan Kumar, Smt. Vijai Laxmi Singh, Smt. Bela Devi and Ram Lachhan, regarding which we have referred earlier. Umesh Chandra Mishra (P.W. 9) is the Investigating Officer. He stated that on registration of the case he came to the spot with police force and got conducted inquest of the dead bodies of Sita Ram Singh, Surendra Singh and Jai Govind through S. I. R. P. Rai. He took into possession bloodstained Ramma, cartridges, wad and pellets from the place of occurrence and prepared recovery memo. He interrogated complainant Manju Singh (P.W. 5) and on her pointing out inspected place of occurrence and prepared site plan. He also interrogated injured witnesses

and Smt. Kaushalya (P.W. 6). He also took into possession burnt motorcycle. Licensed gun of Toofani Singh was recovered from his house.

25. It was the gist of evidence adduced by the prosecution.

26. The appellants have not disputed date, time and place of occurrence of the case.

27. According to the prosecution occurrence took place on the night of 24/25-6-1994 at about 1.45 a.m. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) stated that occurrence took place after midnight. The report of the occurrence was lodged at 2.40 a.m. on the night of occurrence i.e. after about 55 minutes of the occurrence, while the distance of police station from place of occurrence was only 5 km. Smt. Manju Singh (P.W. 5) stated that she came to police station on a cycle of an unknown person. Smt. Manju Singh (P.W. 5) and other injured persons were examined in the same night between 5.30 and 6.30 a.m. Smt. Manju Singh (P.W. 5) as well as other witnesses had first come to police station Hata and from there they were sent to Primary Health Centre, Hata after preparation of Chitt his Majroobi through constable Surendra Rai. The injuries of above injured persons were found fresh and Dr. Ghanshyam Singh (P.W. 8) who examined the above injured persons stated that injuries of injured persons could have been caused at about 1.45 a.m. in the same night. Sita Ram Singh, Surendra Singh and Jai Govind deceased lost their lives in the incident. The Investigating Officer visited the spot in the same night and found the dead bodies of above persons lying on the spot. The above evidence, thus, corroborated the evidence of ocular witnesses Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) that the occurrence took place on the night of 24/25-6-1994 at about 1.45 a.m.

28. The learned counsel for the appellants contended that the prosecution was not sure about the time of occurrence and this case was registered at crime No. 151-A of 1994 treating that it was cross case of murder of Toofani Singh, brother of Sharda Singh appellant which took place in the same night at about 1.30 a.m. and therefore, initially in the F.I.R. time of the occurrence was given as 1.30 a.m., but subsequently the above time was interpolated as 1.45 a.m. It is true that there is some overwriting in the original report (Ext. Ka-1) and chik F.I.R. (Ext: Ka-43) and

it appears that initially time of the occurrence was given as 1.30 a.m. night and subsequently some interpolation was made and time of the occurrence was shown as 1.45 a.m. Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) further stated that prior to half an hour of the occurrence of case Toofani Singh of the family of appellants was murdered and the appellants when came to the spot were shouting that Toofani Singh was murdered and all of the family of Sita Ram Singh and Bichari Singh should be eliminated so that no one should remain in the family to light a lamp. It is not disputed that Toofani Singh was murdered at about 1.30 a.m. in the same night and occurrence of this case took place subsequent to the murder of Toofani Singh. It is also not disputed that houses of Toofani Singh and Sita Ram Singh and others are at some distance. The places of occurrence of both the cases are also different. The Investigating Officer Umesh Chandra Misra (P.W. 9) also admitted that this case was not cross case of any other case. It is also not the case of appellant that occurrence of this case and that of murder of Toofani Singh took place at the same time and at the same place. No suggestion was given to informant Smt. Manju Singh (P.W. 5) that initially she dictated the time of occurrence as 1.30 a.m. However, the scribe of the report namely Dwarika Tiwari was not examined by the prosecution. The other in-jured namely Smt. Vijai Laxmi, Ram Lachhan, Bela Devi and Ram Bilas who have filed affidavits in support of the appellants have also given time of occurrence as 1,45 a.m. Thus, it is established from the evidence on record that the occurrence of this case occurred after the occurrence of murder of Toofani Singh and therefore, the occurrence of this case took place at 1.45 a.m. as Toofani Singh was murdered at 1.30 a.m. It appears that the police of P. S. Hata in some confusion initially treated this case as cross case of case crime No. 151 of 1994 at which the case of murder of Toofani Singh was registered and therefore, this case was registered at case crime No. 151-A of 1994. But subsequently, they realized their mistake and Umesh Chandra Misra (P.W. 9) Invesgating Officer stated that this case was not cross case of any other case. Any negligence and mistake on the part of Police Officers does not affect the merit of this case as the prosecution witness had no control over the Police Officer and as mentioned above it is clear from the evidence on record that occurrence of this case took place after 1.30 a.m. i.e. after the murder of Toofani Singh. In this way the prosecution has also established the

time of occurrence i.e. after 1.30 a.m. (at 1.45 a.m.).

29. The motive of the offence alleged by the prosecution was that there was enmity between the appellants and Bichari Singh, elder brother of Sita Ram Singh on account of some landed property and Toofani Singh real brother of appellant Sharda Singh was murdered in the night of occurrence at about-midnight and the appellants were suspecting that the murder was done by Bichari Singh, Sita Ram Singh and his family members. Smt. Manju Singh (P.W. 5) stated that there was enmity between the appellants and Bichari Singh regarding some land and Smt. Kaushalya (P.W. 6) has also stated that when appellants raided her house, they were saying that Toofani Singh was murdered and all members of her family should be eliminated so that none should remain in the family to light a lamp. It is not disputed that Sita Ram Singh was real brother of Bichari Singh. Though, Smt. Manju Singh (P.W. 5) could not tell the nature of litigation pending between appellants and Bichari Singh and the details of subject-matter of the litigation, but the factum of litigation regarding landed property between the parties is not disputed. It is also not disputed that Toofani Singh elder brother of appellant Sharda Singh was murdered. It is also clear from the evidence of Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) that one son of brother of Bichari Singh is in Jail in connection with murder of Toofani Singh and therefore, the appellants were suspecting that Toofani Singh was murdered by the members of the family of Bichari Singh and Sita Ram Singh. As such there was immediate motive for the appellants who belonged to the same family, and Dhunna Singh who is associate of other appellants.

30. The report of this case was lodged at 2.40 a.m. in the same night i.e. after about 55 minutes of the occurrence. Smt. Manju Singh (P.W. 5) stated that after the occurrence she proceeded to the police station and got lift of a man who left her at Hata Tahsil where she got prepared report from one Dwarika Tiwari and lodged the same at the police station. As mentioned above the distance of police station is only 5 km. and this distance could be easily covered within 15 or 20 minutes if travelled by cycle.

31. The learned counsel for the appellants contended that the manner in which Smt. Manju Singh (P.W. 5) reached the police station is highly unnatural and improbable, firstly; because there were other male members in her family and she admitted that Udai Singh was also present at the house and he was not injured and; secondly that her husband and two sons were murdered and in these circumstances she was not in a position to go to police station and dictate a detailed report to the scribe and thirdly that he could not go to the police station alone in odd hours of night on a cycle of unknown person. Therefore report was not lodged at 2.40 a.m. and it was subsequently written making it ante time. Smt. Manju Singh (P.W. 5) stated that Ram Lachhan her brother-in-law was injured. Pawan Kumar other injured was aged about one and half years. There was no male member in the family of Bichari Singh at that time as his sons were studying outside. Bichari Singh was also not present at the house in the night of occurrence. Paras Singh was also not present. However, she admitted that Udai Singh was present. It was not clarified that who was Udai Singh. It is true that Smt. Manju Singh (P.W. 5) stated that after the occurrence she remained in the village for less than half an hour and none had accompanied her to the police station. One person had left her on a cycle to police station and she did not remember his name. She had not stated that the person who left her to police station was unknown, but she had stated that she was not knowing his name. The possibility that the above person was of the village of the witness and had come on the spot knowing about the occurrence, cannot be easily ruled out. It is true that husband and two sons of the witness were murdered and even then she could collect the courage to go to the police station, as the truth is bitter than fiction. Therefore, there appears no Improbability in going of Smt. Manju Singh (P.W. 5) to the police station in the manner stated by her.

32. Smt. Manju Singh (P.W. 5) has further stated that she got prepared report from Dwarika Tiwari who often came to Bichari Singh in connection with some case and therefore, she was knowing him. Smt. Manju Singh (P.W. 5) was faced in such situation that she could take help of any person who was known to her from before. Therefore, dictating report to Dwarika Tiwari at Hata near Registry Office was also not unnatural as she was knowing the scribe from before.

33. Undisputedly, the injuries of Smt. Manju Singh (P.W. 5) were examined by Dr. Ghanshyam Singh (P.W. 8) at 5.30 a.m. It is also clear from evidence on record that after lodging report of the occurrence at 2.40 a.m. the other injured persons also came to the police station and Chitthi Majroobi of all the injured persons was prepared and the injured persons including Smt. Manju Singh (P.W. 5) were sent to Primary Health Centre, Hata through Constable Surendra Rai. The possibility that the Doctor in such odd hour of night was called from his residence cannot be easily ruled out and therefore, there appears no long gap in between lodging of the report at the police station and medical examination of Smt. Manju Singh (P.W. 5) and other injured persons. Therefore, the report of the occurrence appears to have been lodged at 2.40 am. and there is nothing on the record to show that the report was ante time.

34. Smt. Manju Singh (P.W. 5) is admittedly injured witness. Injuries on her person at the time of occurrence is not disputed. The witness is wife of Sita Ram Singh deceased and mother of Surendra Singh and Jai Govind Singh deceased. The occurrence had taken place in odd hours of night and she stated that at the time of occurrence she was sleeping near the Charpai of her husband and sons. Therefore, it was but natural for the witness to be present on the spot. As held by Apex Court in the case of Mohar Singh v. State of U.P., 2003 SCC (Cri) 121 : (2002 All LJ 2226 : 2002 Cri LJ 4310) testimony of an injured witness has its own efficacy and relevancy. The fact that a witness has its own efficacy and relevancy. The fact that a witness sustained injuries on his body would show that he was present at the place of occurrence and has seen the occurrence by himself. Convincing evidence would be required to discredit an injured witness. Similarly, every discrepancy in the statement of a witness cannot be treated as fatal. A discrepancy which does not, affect the prosecution case materially cannot create any infirmity.

35. The learned counsel for the appellants pointed out that Smt. Manju Singh (P.W. 5) stated in her cross-examination that she was attacked by bomb and the above bomb hit on her thigh and exploded, but evidence of Dr. Ghanshyam Singh (P.W. 8) shows that injuries of Smt. Manju Singh (P.W. 5) could not be caused by blast of bomb on her body, but the bomb blasted somewhere else and the

splinters hit the body of Smt. Manju Singh (P.W. 5) due to which she sustained injuries as if a bomb blasts on a human body it removes flesh of the portion on which it is exploted. Thus, there is conflict between her evidence and medical evidence. It is established that injuries No. 1 and 2 of Smt. Manju Singh (P.W. 5) were on right thigh and on right groin, which were caused by splinters of bomb. She further stated that she is illiterate lady and therefore, could not distinguish whether the bomb exploded on her body or on the ground. But her, evidence that she sustained bomb blast injuries is corroborated by medical evidence. Therefore, above minor discrepancy does not affect her testimony, and her evidence is not contradicted by medical evidence.

36. Therefore, the discrepancies pointed out by the learned counsel for the appellants in the evidence of Smt. Manju Singh (P.W. 5) were not fatal and we find no ground to discard her testimony.

37. Regarding Smt. Kaushlya (P.W. 6) it was contended by the learned counsel for the appellants that she was not present on the spot, firstly; because she was residing in Gorakhpur along with her husband Bichari Singh, secondly, because she had not sustained any injury and, thirdly, that it was not mentioned by the informant in the F.I.R. that she had also witnessed the occurrence.

38. It is true that Smt. Kaushalya (P.W. 6) in her cross-examination stated that she was residing in Gorakhpur in connection with the study of her daughter aged about 13-14 years, but she also stated that she often came to her village on holidays and that she had come to her village prior to 4-5 days of the occurrence. It is not disputed that Smt. Kaushalya (P.W. 6) is the wife of Bichari Singh, elder brother of Sita Ram Singh deceased (and Sita Ram Singh deceased) and Bichari Singh were residing in the same house but separately in separate portions. Smt. Kaushalya (P.W. 6) further stated that she had employed a servant who was looking after her agriculture and cattle. Therefore, she had agricultural land in the village and her visit to village was necessary for looking after her property in the village. The occurrence of this case had taken place in the month of June when schools and colleges are closed. Therefore, coming of Smt. Kaushalya (P.W. 6) to her village was natural and probable. Her presence in her house in the night of occurrence is

also proved from the statement of Investigating Officer Umesh Chandra Misra (P.W. 9) who stated that on 26-6-1994 he visited the spot and interrogated Smt. Kaushalya (P.W. 6) along with other witnesses.

39. Smt. Kaushalya (P.W. 6) had also explained the absence of injury on her person. She stated that on hearing sound of explosion of bomb she awoke and came out of the room to see as to what was happening. The appellants Moti Lal and Virendra Singh saw her and chased her. She ran away and entered into her room and bolted it from inside. Two shots were fired on her out of which one hit at the door and the other which was fired through window hit on the inner wall of the room. She saved herself by standing besides the Charpai. As such attempt was made on her but she entered into her room and closed it from inside and escaped from injuries. Therefore, she has fully explained the absence of injury on her person and the absence of injury is no ground to disbelieve her presence on the spot.

40. No doubt the informant has not mentioned in the F.I.R. that Smt. Kaushalya (P.W. 6) also saw the occurrence, but she stated in her evidence that Smt. Kaushalya (P.W. 6) was also present in her room. On this ground her presence cannot be doubted. It was held by the Apex Court in the case of Pammi alias Brijendra Singh v. Government of Madhya Pradesh, AIR 1998 SC 1185 : (1998 Cri LJ 1617) as below :--

'Learned Senior Counsel attacked their testimony (P.W. 2 and P.W. 4) mainly on the ground that their names did not find a place in the F.I.R. or in the Inquest Report, but the investigating officer came to know of them only at a later stage on investigation. It is a matter of appreciation of evidence and the mere fact that (P.W. 1) in the injured condition did not mention the names of all the eye witnesses when he gave his first information statement is no ground to frown at the evidence of (P.W. 2 and P.W. 4). The High Court cannot be said to have gone wrong in acting on the testimony of those two witnesses which was subjected to rigorous cross examination and no material has been elicited to doubt their presence. At any rate as it relates to appreciation of evidence, we are not taking a different view from what the High Court has taken about that.'

41. We have also scrutinized the evidence of Smt. Kaushalya (P.W. 6) and she has faced rigorous cross examination and nothing could be elicited from her evidence to doubt her presence on the spot in the right of occurrence. Therefore, merely on the ground that she was not mentioned in the F.I.R. her testimony cannot be discarded.

42. From the above discussion we find that presence of Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) on the spot and the fact that they had witnessed the occurrence is established.

43. The learned counsel for the appellants contended that Smt. Vijay Laxmi, Ram Lachhan, Smt. Bela Devi and Ram Bilash Tiwari who have been sited as P.Ws.1 to 4 by the trial Court and except Ram Bilas all were injured witnesses have filed affidavits and have not supported prosecution story regarding complicity of the appellants and according to their version contained in their affidavits they could not recognize assailants due to darkness and categorically deposed that none of the appellants were amongst the assailants. We may point out at this stage that the trial Court has wrongly entertained the affidavits of above witnesses and treated them prosecution witnesses 1 to 4. Section 276 of the Criminal Procedure Code which deals with the recording of the evidence in a trial before the Court of Sessions says, that in all trials before the Court of Sessions, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf. Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of the such evidence in the form of question and answer. The evidence so taken down shall be signed by the presiding Judge shall form part of the record.

44. Section 135 of the Indian Evidence Act says that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil criminal procedure respectively, and in the absence of any such law, by the discretion of the Court. Section 137 of the Indian Evidence Act says that the examination of a witness by the party who calls him shall be called

his examination-in-chief. The examination of a witness by the adverse party shall be called his cross-examination. The examination of a witness, subsequent to the cross examination by the party who called him, shall be called his re-examination. Section 138 of the Indian Evidence Act says that witnesses shall be first examined in chief then (if the adverse party so desires) cross examined, then (if the party calling him so desires) re-examined.

45. Therefore, the mode of examination and cross-examination of the witnesses is contained in Criminal Procedure Code and Evidence Act. The above procedure does not prescribe taking evidence of witnesses of fact on affidavit that too in absence of parties. However, Section 296 of the Criminal Procedure Code says that the evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code. The above section further says that the Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine any such person as to the facts contained in his affidavit. Therefore, evidence of a witness may be given on affidavit provided the evidence of a particular witness is formal in character. The witnesses who filed affidavit, their evidence admittedly was not of a formal character, but they are the witness of the occurrence and therefore, their evidence could not be legally taken on affidavit.

46. The learned counsel for the appellants contended that assuming that evidence of ocular witness could not be taken on affidavit, those witnesses were cross examined by the prosecution and the portion of cross-examination be read into evidence. If the evidence given by those witnesses on affidavit was itself not admissible, their cross examination though in the Court can also not be admissible. However, in their cross examination the above witnesses have simply confirmed the facts deposed in the affidavit which is not admissible. Therefore, the evidence given on affidavit by above witnesses (P.Ws. 1 to 4) cannot be taken into consideration and it can simply be inferred that those witnesses had not come before the Court have not supported the prosecution case, but on this ground the prosecution story cannot be thrown away as the Court is under duty to decide the merits of the case, on the basis of evidence or record. Moreover, Smt. Manju

Singh (P.W. 5) has stated that above witnesses were won over by the appellants. It is not uncommon that witnesses are overpowered and if a witness who has been won over is not examined, it will not falsify the prosecution case. We have already mentioned that the evidence of ocular witnesses Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) is worth reliable and therefore, the non examination of other injured witnesses or non support of prosecution story by them is not material.

47. The learned counsel for the appellants further contended that there was no light on the spot and therefore, the witnesses were not in a position to recognise the assailants. We find no force in this contention, as there is categorical evidence of Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) that there was electricity light in their house and the assailants who were of their own village were recognised in the said light. They also stated that the appellants Dhunnan Singh was not of their village but was associate of Sharda Singh appellant and others and they were knowing him from before as he often visited their village. It is also mentioned in the F.I.R. that there was source of electricity light on the spot. The L.O. who visited the spot on next day had also shown electric pole at point 'H E' in the site plan in front of house of Sita Ram Singh. Smt. Manju Singh (P.W. 5) also repelled the suggestions of the appellants that there was no electricity connection in the house of her and Bichari Singh. There is no evidence from the side of appellants to show that there was no electricity connection in the house of Sita Ram Singh and Bichari Singh. The existence of electricity pole in front of house of Sita Ram Singh supports the evidence of above ocular witnesses that there was electricity, connection in their house. Moreover, the appellant except Dhunnan Singh were Pattidars of the witnesses and there is also evidence on record to the effect that they attacked on the deceased and injured witnesses abusing and saying that everybody of the family be eliminated. Therefore, in these circumstances the appellants could be easily recognized even in dim light. Thus, there was no question of non recognition of the appellants and mistaken identity of the assailants.

48. Lastly it was contended that presence of appellants Sharda Singh and his son Anil Singh at the police station Hata at 2.10 a.m. in the night of occurrence is admitted to Sri Umesh Chandra Misra (P.W. 9) and therefore, they could not be

present on the spot at the time of occurrence. The occurrence of this case took place after mid night at about 1.45 a.m. Assuming that occurrence took place earlier to 1.45 a.m. but after mid night, the distance of police station is only 5 km from the village of occurrence and this distance could not be travelled within 10-15 minutes. It is also clear from evidence on record that the appellants committed the incident in question as a retaliation of murder of Toofani Singh. Therefore, after the occurrence of this case i.e. 1.45 a.m., appellants Sharda Singh and Anil Singh could easily reach on the police station Hata at 2.10 a.m. Therefore, their presence at the police station at 2,10 a.m. does not absolve their complicity in the offence.

49. From our above discussions and observation we find that the evidence on record established that the appellants formed an unlawful assembly the object of which was to eliminate entire family of Sita Ram Singh deceased and in prosecution of common object of their such unlawful assembly they committed murders of Sita Ram Singh, Surendra Singh and Jai Govind Singh as well as caused injuries on injured persons including Smt. Manju Singh (P.W. 5) with lethal weapons and also burnt motorcycle kept in the house of Sita Ram Singh. Therefore, appellants Moti Lal, Surendra Singh, Virendra Singh, Dhunнан Singh, Miyadi and Anil Singh were rightly convicted under Sections 148, 302 read with Section 149, 307 read with Section 149, 452 and 427, I.P.C. However, appellants Sharda Singh and Amar Singh were charged with the offence punishable under Section 147, I.P.C. but they were also convicted under Section 148, I.P.C. Therefore, their conviction under Section 148, I.P.C. is liable to be altered under Section 147, I.P.C.

50. The appellants Moti Lal, Surendra Singh, Virendra Singh, Amar Singh and Dhunнан Singh have been sentenced to extreme penalty of death under Section 302 read with Section 149, I.P.C. by the trial Court treating that it was a rarest of rare case. The learned counsel for the appellants contended that it was not a rarest of rare case and therefore, imposition of death penalty was improper.

51. Therefore, it is to be considered as to what sentence be imposed on the above appellants.

52. The trial Court has imposed extreme penalty of death on the above appellants taking into consideration the number of deceased and the cruel manner of committing murder of three persons and that according to medical evidence there were Pharsa and Ramma injuries on the person of Sita Ram Singh and firearm injuries on the persons of Surendra Singh and Jai Govind Singh deceased and the above five appellants caused injuries with Kattas (country made pistol), Pharsa and Ramma. On the above situation the Trial Court treated the case of above five appellants to be exceptional one of brutally and cruelty.

53. Under Section 354(3), Cr.P.C. sentence of imprisonment for life has been made the rule and the capital sentence is a exception of this rule. It has been made mandatory for the Court awarding the death sentence to record special reasons as to why only that alternative has been chosen. The discretion of the Court to select either of the two penalties is no more wide and a great care is to be taken while selecting the exceptional sentence of death. A Constitutional Bench of the Supreme Court in the case of Bachan Singh v. State, AIR 1980 SC 898 : (1980 Cri LJ 636), while upholding the constitutional validity of the extreme penalty of death voiced that as a legal principle death sentence is still awardable but only in rarest of rare case when alternative option of lesser sentence is unequivocally foreclosed. In the case of Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220 : (1995 AIR SCW 510) it was held that imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should pass punishment befitting the crime so that courts reflect public abhorrence of the crime.

54. It is well settled that Courts are expected to exhibit sensitiveness in the matter of awarding of sentence particularly the sentence of death because life once lost cannot be brought back. It has been emphasized more than once that for determining appropriate sentence in such cases the courts should take into account not only the aggravating circumstances but also the mitigating circumstances and should not over look or ignore them. In the cases of offences punishable with death sentence, this exercise assumes much greater importance.

55. The question whether any standard or norms for categorizing the cases justifying imposition of death penalty can be laid down or prescribed, has been considered by the Apex Court in a number of decisions. In *Jagmohan Singh v. State of U.P.*, AIR 1973 SC 947 : (1973 Cri LJ 370), the view taken by the Apex Court was that any such standardization is well nigh impossible. Though in *Bachan Singh's case* (supra) the Supreme Court pointed out some aggravating and mitigating circumstances which should weigh the judge when he takes up the task of judging the appropriate sentence but at the same time gave a word of caution that generalization in such matter cannot be made and judges have to decide cases as they come before them, mindful of the need to keep patience and prejudices out of their decisions.

56. In the case of *Machchi Singh v. State of Punjab*, (1983) 4 SCC 470 : (AIR 1983 SC 957 : 1983 Cri LJ 1457), the Apex Court culling out the guide- lines indicated in *Bachan Singh's case* (supra) laid down following proposition for consideration in each case where the question of imposition of death sentence arises. They are :--

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) Before opting for the death penalty the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime;

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime and provided, any only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

57. It was further emphasized that in order to apply these guidelines inter alia the following questions may be asked and answered :

(a) Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and call for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

58. In the case of *Dalbir Singh v. State of Punjab*, (1979 Cri LJ 1058 : AIR 1979 SC 1384) it was held that counting the casualties is not the main criterion for sentencing to death, not recklessness in the act of murder. In the case of *Rajendra Prasad v. State of U.P.*, (1979 Cri LJ 792 : AIR 1979 SC 916) it was observed as below :--

'It is not the number of deaths caused nor the situs of the stabs that is telling on that decision to validate the non application of its ratio. It is a mechanistic art which counts the cadavers to sharpen the sentence oblivious of other crucial criteria shaping a dynamic realistic policy of punishment.

59. Three deaths are regrettable, indeed terrible. But it is no social solution to add one more life lost to the list. In this view, we are satisfied that the appellant has not received reasonable consideration on the question of the appropriate sentence. The criteria we have laid down are clear enough to point to the softening of the sentence to one of life imprisonment. A family feud, an altercation, a sudden passion although attended with extraordinary cruelty, young and malleable age, reasonable prospect of reformation and absence of any conclusive circumstances that the assailant is a habitual murderer or given to chronic violence. These catena of circumstances bearing on the offender call for the lesser sentence.'

60. In the case of *Arshad v. State of Karnataka* (1994) 4 SCC 381, it was observed that the number of persons murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of 'rarest of rare cases'. The Court must keep in view of the nature of the crime and

the brutality with which it was committed, the antecedents of the criminal the weapons used etc.

61. The learned Sessions Judge while awarding death penalty had also relied on the Apex Court decision in the case of A.S. Joshi v. State of Maharashtra, AIR 1994 SC 2582 and S.C. Bahri v. State of Bihar, 1994 Cri LJ 3271 : AIR 1994 SC 2420.

62. In the instant case though it is alleged that there was enmity between Bichari Singh and the appellants, but the evidence on record and facts and circumstances of the case reveal that the above enmity was not sole motive for murder of three persons. It has also come in the evidence of Smt. Manju Singh (P.W. 5) and Smt. Kaushalya (P.W. 6) that half an hour before the occurrence of this case Toofani Singh elder brother of appellant Sharada Singh was murdered and the appellants attacked on the family of Sita Ram Singh as a retaliation of the above murder only within half an hour. This show that there was no preplanning and the murder of three deceased was not cold blooded but was committed by way of retaliation. Thus, it is clear that it was not a preplanned and cold blooded murder committed with a view to eliminate the entire family of Sita Ram Singh deceased.

63. The learned Trial Court has also adopted a criteria for awarding death penalty to those appellants who were assigned role of causing injuries with Pharsa, Ramma and country made pistol as Sita Ram Singh deceased had sustained Pharsa and Ramm injuries while Surendra Singh and Jai Govind Singh has sustained gun shot injuries. The medical evidence show that Sita Ram Singh deceased had sustained four incised wounds, Surendra Singh had sustained one gunshot wound and Jai Govind had sustained one gun shot wound. The incised wound could be caused either by Pharsa or Ramm or by both and gun shot wounds would have been caused either by Katta or by gun or by both. Three persons namely appellants Moti Lal, Surendra Singh and Virendra Singh have assigned Kattas, Amar Singh was assigned Pharsa and Dhunnan Singh was assigned Ramm, it is not specified as to which particular accused or both the persons having Pharsa and Ramm caused injuries to Sita Ram Singh and any of three persons having Katta caused gun shot injuries to Surendra Singh and Jai

Govind Singh, Anil Singh was also assigned gun but he was not awarded death penalty. None of the appellant was charged with the offence punishable under Section 302 I.P.C. simplicitor but the five appellants who have been awarded extreme penalties have been convicted under Section 302 with the aid of Section 149, I.P.C. The above mitigating circumstances were not taken into consideration by the Trial Court and only number of casualties figured in the mind of the Trial Court while awarding the death penalties to five appellants. On evaluating the aggravating and mitigating circumstances, we find that it is not a rarest of rare case and therefore, death penalties to the five appellants was not proper and thus five appellants ought to have been awarded with sentence of imprisonment for life.

64. For the reasons given above, we reduce the death sentence imposed on appellants Moti Lal, Surendra Singh, Virendra Singh, Amar Singh and Dhunnan Singh under Section 302 read with Section 149, I.P.C. to one of life imprisonment. Their conviction and sentence under Sections 148, 307 read with 149, 452 and 427, I.P.C. are maintained . With the above modification in sentence the appeal preferred on behalf of above appellants Moti Lal, Surendra Singh, Virendra Singh, Amar Singh and Dhunnan Singh are dismissed. The reference made by learned Sessions Judge for confirmation of death sentence is, accordingly, rejected. All the above appellants are in jail and shall be kept there to serve out their sentences as modified by this Court.

65. The conviction of appellant Sharda Singh under Section 148, I.P.C. is altered under Section 147, I.P.C. With this modification the appeal preferred by appellant Sharda Singh is dismissed. The appeal preferred by appellants Miyadi alias Ram Miyadi and Anil Singh is also dismissed.

66. Appellants Sharda Singh, Miyadi alias Ram Miyadi and Anil Singh are on bail. They shall surrender before the C.J.M. Deoria to serve out their sentences. The C.J.M. Deoria is directed to issue non bailable warrants against the appellants Sharda Singh, Miyadi alias Ram Miyadi and Anil Singh to procure their arrest and sending them to jail.

67. The office is directed to send the copy of this order to the C.J.M. Deoria for compliance and report within one month.

V.N. Singh, J.

68. I agree with the view of brother Hon. U.S. Tripathi, J., but want to add following paras in judgment :--

Following circumstances, are material and relevant in awarding the sentence :--

- (i) Appellants entered into the house by breaking the door.
- (ii) Appellants caused injuries to defencies Pawan Kumar child of 11/2 years.
- (iii) Appellants caused injuries to defencies ladies Smt. Manju, and Kaushalya.
- (iii-a) Appellants came shouting that '(Vernacular matter omitted)'
- (iv) Caused injuries to all deceased and other injured persons, who were sleeping.
- (v) Caused injuries when deceased Surendra Singh and Jai Govind were trying to run away.
- (vi) Trying to cause injuries by fire on Smt. Kaushlya Devi, although she tried to conceal in the room, which was bolted by her which is clear from the shot found in the bolted room.
- (vii) Use of the licensed gun of Toofani for murder.
- (viii) Entering into the house by appellants armed with weapons which shows preplanning.
- (ix) Murder of Sita Ram, Surendra Singh and Jai Govind
- (x) Causing injuries to Smt. Manju, Smt. Kaushlya Devi, Smt. Vijai Laxmi Smt. Bela, Child Pawan Kumar and Ram Lakhan, although there was enmity with Bichari Singh husband of Smt. Kaushalya and not with deceased and injured persons.
- (xi) Putting motor cycle on fire.

(xii) Causing total 17 injuries, two on Maju Singh, one on Pawan Kumar three on Smt. Vijai Laxmi, six on Smt. Bela and five on Ram Lakhan besides injuries to three deceased Sita Ram Singh, Surendra Singh and Jai Govind.

69. However, it is clear from the evidence of Smt. Kaushalya Devi P.W. 6 that, appellants Dhunnan Singh armed with Ramma and Amar Singh armed with Pharsa caused injuries to the deceased Sita Ram Singh due to which he died and deceased Surendra Singh, who tried to run away towards the field died due to the fire of appellant Surendra Singh. When Jai Govind tried to run away inside the court yard, appellant Anil Singh fired on him by gun, due to which Jai Govind died.

70. It is clear from the record that, appellants Moti Lal and Birendra Singh took secondary part and did not take principal part in committing the murders.

71. Appellant Anil Singh has not been sentenced to death by the learned trial Court and no appeal has been filed by the State against finding of learned trial Court .

72. Appellants Moti Lal, Surendra Singh Birendra Singh, Amar Singh and Dhunnan Singh were charged under Section 302 read with Section 149, I.P.C. In spite of the statement of Smt. Kaushalya Devi charge was not amended under Section 302, I.P.C. simplicitor against appellants Surendra Singh, Amar Singh, Dhunnan Singh and Anil Singh.

73. From the perusal of the record it is clear that no specific question was put to appellant Amar Singh that, he caused injuries by Pharasa to the deceased Sita Ram Singh and to the appellant Dhunnan Singh that, he caused injuries to the deceased Sita Ram Singh by Ramma and due to injuries caused by pharasa and Ramma the deceased Sita Ram Singh died.

74. No specific question was put to appellant Surendra Singh that due to his fire, deceased Surendra Singh died.

75. No specific question was put to appellant Anil Singh that due to fire of his gun deceased Jai Govind died.

76. Judgment of Hon'ble Supreme Court in the case of Suraj Pal v. State of U.P., referred in (1955 Cri LJ 1004 : AIR 1955 SC 419) is material and relevant in this case in awarding sentence. In that case, accused were charged by the Magistrate, under Sections 323/149, 307/149 and 302/149, I.P.C. There was no direct and individual charge against the accused for the specific offence under Sections 307 and 302, I.P.C.

77. It was held by Hon'ble Supreme Court in above mentioned case that,

'In course of these proceedings, one important fact which emerges is that there have been no direct and individual charges against the appellant for the specific offences under Sections 307 and 302, I.P.C. The question that arises is whether without such direct charges the conviction and sentences for those offences can be maintained. It appears to us quite clear that, a charge against a person as a member of an unlawful assembly in respect of an offence committed by one or other of the members of that assembly in prosecution of its common object is a substantially different one from a charge against any individual for an offence directly committed by him while being member of such assembly. The liability of a person in respect of the latter is only for acts directly committed by him, while in respect of the former, the liability is for acts which may have been done by any one of the other members of the unlawful assembly, provided that, it was in prosecution of the common object of the assembly or was such as the members knew to be likely to be so committed. A charge under Section 149, I.P.C. puts the person on notice only of two alleged facts viz. (i) that offence was committed by one or other of the members of the unlawful assembly of which he is one and (2) that the offence was committed in prosecution of the common object or is such that was known to be likely to be so committed.

Whether or not Section 149, I.P.C. creates a distinct offence (as regards which, there has been conflict of views in the High Courts) there can be no doubt that, it creates a distinct head of criminal liability, which has come to be known as 'constructive liability' a convenient phrase not used in the Indian Penal Code. There can, therefore, be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the

particular offence. Such a case is not covered by Sections. 236 and 237, Criminal P.C. The framing of specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefor. The absence, therefore, of specific charges against the appellant under Sections 307 and 302, I.P.C. in respect of which, he has been sentenced to transportation for life and to death respectively, is a very serious lacuna in the proceedings in so far as it concerns him. The question there which arises for consideration is whether or not this lacuna has prejudiced him in his trial.'

78. The Hon'ble Supreme Court further held that absence of specific charges against the accused under Sections 307 and 302, I.P.C. was a very serious lacuna in the proceeding and has materially prejudiced the accused. Hence conviction and sentence under Sections 307 and 302, I.P.C. could not be maintained against the accused.'

79. In this case, although specific question was put to the accused, even though, Hon'ble Supreme Court held in paragraph 4 of the judgment that 'the very fact that in spite of such questioning, the charges framed in the Magistrate's Court with their vagueness in so far as this feature therein is concerned has been maintained before the Sessions Court without any amendment is likely to have been misleading.'

80. In the present case also appellants Moti Lal, Surendra Singh, Birendra Singh, Amar Singh and Dhunнан Singh, who have been sentenced to death have not been charged under Section 302, I.P.C. simpliciter.

81. Moreover, no specific question was put to them in their statement recorded under Section 313, Cr.P.C. that due to injuries caused by them as per statement of Smt. Kaushlya deceased Sita Ram Singh, Surendra Singh and Jai Govind died.

82. Moreover, appellants Moti Lal and Birendra Singh took secondary part in committing the offence and did not take the principal part and are not individually able for the offence.

83. Moreover in the case of Pandurang v. State of Hyderabad, referred in AIR 1955 SC 216, it has been held by Hon'ble Supreme Court that,

'When appellate Judges, who agree on the question of guilt, differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons.'

84. In spite of the circumstances mentioned above showing the conduct of appellants material and relevant in awarding sentence as appellants Moti Lal Surendra Singh, Birendra Singh, Amar Singh and Dhunнан Singh, who have been sentenced to death, have not been charged under Section 302, I.P.C. simpliciter and in view of the fact that Moti Lal and Birendra Singh took only secondary part and are not individually liable for the offence under Section 302, I.P.C. and specific question regarding individual acts of appellants Surendra Singh, Amar Singh and Dhunнан Singh have not been put to them, I am of the view that appellant Moti Lal, Surendra Singh, Birendra Singh, Amar Singh and Dhunнан Singh cannot be sentenced to death, as serious prejudice will be caused to them and such death sentences imposed on five appellants Moti Lal Surendra Singh, Birendra Singh, Amar Singh and Dhunнан Singh is liable to be converted into life imprisonment.

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