

State of U.P. Vs. Kishanpal and ors.

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SooperKanoon Citation : sooperkanoon.com/677949

Court : Supreme Court of India

Decided On : Aug-08-2008

Reported in : JT2008(8)SC650; 2008(11)SCALE233; 2008AIRSCW6322

Judge : R.V. Raveendran and; P. Sathasivam, JJ.

Acts : Indian Penal Code (IPC) - Sections 120, 148, 149, 300, 302, 304, 307 and 392; Code of Criminal Procedure (CrPC) - Sections 161 and 235(2); [Constitution of India](#) - Article 136

Appeal No. : Criminal Appeal No. 936 of 2003

Appellant : State of U.P.

Respondent : Kishanpal and ors.

Advocate for Def. : Arvind Singh, ; Indra Raghuvarshi, ; Vinod Jindal and ;

Advocate for Pet/Ap. : Pramod Swarup,; Vandana Mishra,; Alka Sinha and;

Disposition : Appeal allowed

Prior history : From the Judgment and final Order dated 19.9.2002 of the High Court of Judicature at Allahabad in CrI. Appeal No. 812 of 1980

Judgement :

P. Sathasivam, J.

1. Challenging the order of the High Court of Judicature at Allahabad dated 19.9.2002 in Criminal Appeal No. 812 of 1980 acquitting Kishanpal Singh, Suresh Singh, Mahendra Singh @ Neksey Singh, Jaivir Singh, Sheodan Singh and Bahar Singh (Accused Nos. 2, 4, 7, 8, 9 & 10), the State of Uttar Pradesh has filed this appeal.

2. The case of the prosecution is as follows:

On 21.6.1978 at 3.30 p.m., the sixteen accused persons gathered at the door of Gyan Singh and made a criminal conspiracy for killing Kaptan Singh and Raj Mahesh as they were harassing them unnecessarily. At about 4.00 P.M., Onkar Singh, Kishanpal Singh, Vijaipal Singh, Suresh Singh, Naresh Singh, Daulat Singh, Mahendra Singh @ Neksey Singh, Jaivir Singh, Sheodan Singh and Bahar Singh (Accused Nos. 1 to 10) reached at the place of occurrence with firearms. Onkar Singh (Accused No. 1), Naresh Singh (Accused No. 5), Daulat Singh (Accused No. 6) and Sheodan Singh (Accused No. 9) had guns while others had country-made pistols. When they reached the place of occurrence, Suraj Pal Singh, Kaptan Singh and Raj Mahesh were preparing fodder in the cattle troughs for their cattle in front of their chaupal. Suraj Pal Singh's sister Smt. Maya Devi and mother Smt. Resham Devi were also present there. The aforesaid accused persons challenged Raj Mahesh and Kaptan Singh while Onkar Singh and Naresh Singh shouted that they will be killed and the entire family be finished. Onkar Singh fired at Raj Mahesh while Naresh Singh fired at Kaptan Singh. When the accused persons opened fire, Suraj Pal Singh ran inside the Jhonpari to save his life and witnessed the incident. Maya Devi and Resham Devi rushed to save Kaptan Singh, Daulat Singh fired upon Maya Devi. Ram Autar, brother of Kaptan Singh and Ishwari Devi came there to save Kaptan Singh and Raj Mahesh. Resham Devi, Ram Autar and Ishwari Devi were also fired at and received injuries when they tried to save Kaptan Singh and Raj Mahesh. On seeing the people arriving, the accused persons ran away from the spot. Suraj Pal Singh came out of Jhonpari and found Raj Mahesh and Maya Devi dead. Kaptan Singh was breathing his last while Resham Devi, Ishwari Devi and Ram Autar were lying injured. Kaptan Singh died on the way to hospital. Suraj Pal Singh did not receive any injury. Suraj Pal Singh (PW-1) sent Brajaue Singh to call Natthu Singh, who

arrived soon from his village, for escorting the injured as he had a licence for rifle. After the arrival of Natthu Singh, all the four injured were taken to police station, Sidhpura in a bullock-cart. Natthu Singh also accompanied them. Natthu Singh wrote the report at the dictation of Suraj Pal Singh. The said report was filed at 9.30 p.m. at the police station, Sidhpura. The case was registered and the injured persons were sent for medical examination. Dr. S. P. Dikshit, PW-11, examined the injured persons and prepared their injury reports. Dr. R.P. Yadav, PW-6, conducted the postmortem examination on the dead body of Smt. Maya Devi, Kaptan Singh and Raj Mahesh on 22.6.1978 and prepared the report. Mr. K.P. Sharma, S.I., PW-12, took up the investigation and completed most of the investigation. Thereafter the investigation was continued by his successor and charge sheet was submitted against the accused.

3. The State filed the case in the Court of VI Additional Sessions Judge, Etah, against the accused persons. The trial Court, after examining the evidence and other materials on record and after hearing the parties, held that accused Gyan Singh, Harbir Singh, Rampal Singh, Gopal Singh, Sher Singh and Yudhishter Singh (Accused Nos. 11 to 16), who were charged under Section 120B I.P.C. were found not guilty and accordingly acquitted them. The trial Court held that the prosecution had proved its case beyond all reasonable doubt against all the other accused persons (accused Nos. 1 to 10) and held them guilty under Section 148 I.P.C. for committing offence of rioting after forming an unlawful assembly as they were armed with firearms, and under Section 302/149 I.P.C. for committing the murder of Raj Mahesh, Kaptan Singh and Smt. Maya Devi and under Section 307/149 I.P.C. for causing firearm injuries on the person of Ram Autar, Resham Devi and Smt. Ishwari Devi. After hearing on the question of sentence as provided under Section 235(2) Cr.P.C., Onkar Singh, Kishanpal Singh, Vijaipal Singh, Suresh Singh, Naresh Singh, Daulat Singh, Mahendra Singh, Jaivir Singh, Sheodan Singh and Bahar Singh were sentenced to undergo R.I. for two years under Section 148 I.P.C., five years R.I. under Section 307/149 I.P.C. and imprisonment for life under Section 302/149 I.P.C. All the sentences were to run concurrently.

4. Aggrieved by the said judgment, the accused Nos. 1 to 10, namely, Onkar Singh, Kishanpal Singh, Vijaypal Singh, Suresh Singh, Naresh Singh, Daulat Singh, Mahendra Singh, Jaivir Singh, Sheodan Singh and Bahar Singh filed Criminal Appeal No. 812 of 1980 in the High Court. Accused Nos. 3, 5 and 6 (Vijaipal Singh, Naresh Singh and Daulat Singh) died during the pendency of the appeal and the appeal abated against them. By judgment dated 19.9.2002, the High Court dismissed the appeal of Onkar Singh (Accused No. 1) and maintained his conviction and sentence under Sections 302/149 I.P.C., 148 I.P.C. and 307/149 I.P.C. and allowed the appeal in respect of all other accused (Kishanpal Singh, Suresh Singh, Mahendra Singh, Jaivir Singh, Sheodan Singh and Bahar Singh) and acquitted them. Against the order of the High Court acquitting Kishanpal singh, Suresh Singh, Mahendra Singh, Jaivir Singh, Sheodan Singh, and Bahar Singh, the State of U.P. has preferred this appeal by way of special leave.

5. We heard Mr. Pramod Swarup, learned Counsel for the appellant-State of U.P. and Mr. Arvind Singh, learned Counsel for the respondents/accused.

6. The High Court though relied on the eye-witnesses P.W.1 - Surajpal Singh, P.W.5 - Jagdish Singh, P.W.7 - Ranbir Singh, P.W.9 - Resham Devi (injured witness) and C.W.1 Ujagar Singh and other materials confirmed the conviction only in respect of Onkar Singh and acquitted other accused. The main reason for acquitting the other accused is that even those related eye-witnesses did not speak about the specific overt act in respect of each accused in the commission of offence. It also observed that some of the statements made before the Court were not stated by them when they were enquired by the Investigating Officer under Section 161 Cr.PC. Though the High Court relied on the evidence of very same persons and materials placed by the prosecution to convict Onkar Singh, it refused to apply the same in the case of other accused and acquitted them in respect of the charges leveled against them ignoring the implication of charge under Section 149 I.P.C. In those circumstances, we have to consider (i) whether the evidence of close relatives P.Ws.1, 5, 7, and 9 are acceptable and reliable in respect of all the respondents/accused (ii) whether the High Court is right in discarding their evidence in the light of the corroborative evidence of C.W.1 and medical evidence

of Dr. R.P. Yadav - P.W.6, Postmortem Doctor and Dr. S. P. Dikshit - P.W.11, who examined the injured persons and Exh. Ka 19, 20 and 21 (post mortem reports) and Exh. Ka 22, 23 and 24 (injury reports).

7. It was urged that the eye-witnesses relied on by the prosecution are related to the deceased and injured Suraj Pal Singh, PW-1 is the brother of the deceased Kaptan Singh and Maya Devi. Resham Devi (PW-9) is their mother. Jagdish, PW-5 and Ranveer Singh (PW-7) and deceased Raj Mahesh were cousins of PW-1. Ishwari Devi, injured, is the sister of Jagdish (PW-5). Thus PW-5 is related to Suraj Pal Singh, PW-1. Even Ujagar Singh (CW-1) is related to Suraj Pal Singh, PW-1, from his maternal side.

8. As observed earlier, though the High Court accepted the testimony of PWs 1, 5, 7 and 9 while confirming the conviction and sentences of Onkar Singh has not given due credence to their testimonies in respect of other accused. This Court has repeatedly held that if the testimony of prosecution witnesses was cogent, reliable and confidence inspiring, it cannot be discarded merely on the ground that the witness happened to be relative of the deceased. The plea 'interested witness' 'related witness' has been succinctly explained by this Court in *State of Rajasthan v. Smt. Kalki and Anr.* : 1981 CriLJ1012 . The following conclusion in paragraph 7 is relevant:

7. As mentioned above the High Court has declined to rely on the evidence of PW 1 on two grounds: (1) she was a 'highly interested' witness because she 'is the wife of the deceased', and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be

said to be 'interested'.

9. From the above it is clear that 'related' is not equivalent to 'interested'. The witness may be called 'interested' only when he or she has derived some benefit from the result of a litigation in the decree in a civil case, or in seeing an accused person punished. A witness, who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be 'interested'.

10. The plea of defence that it would not be safe to accept the evidence of the eye witnesses who are the close relatives of the deceased, has not been accepted by this Court. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of the surrounding circumstances and probabilities of the case to be true, it can provide a good and sound basis for conviction of the accused. Where it is shown that there is enmity and the witnesses are near relatives too, the Court has a duty to scrutinize their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. The testimony of related witnesses, if after deep scrutiny, found to be credible cannot be discarded. It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness, if otherwise the same is found credible. The witness could be a relative but that does not mean his statement should be rejected. In such a case, it is the duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested witness. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal

actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse the evidence to find out whether it is cogent and credible. Vide State of A.P. v. Veddula Veera Reddy and Ors. : 1998 CriLJ1623 , Ram Anup Singh and Ors. v. State of Bihar : 2002 CriLJ3927 , Harijana Narayana and Ors. v. State of A.P. : 2003 CriLJ3727 , Anil Sharma and Ors. v. State of Jharkhand : 2004 CriLJ2527 , Seeman @ Veeranam v. State, By Inspector of Police : 2005 CriLJ2618 , Salim Sahab v. State of M.P. : 2006(13)SCALE228 , Kapildeo Mandal and Ors. v. State of Bihar : 2008 CriLJ730 , D. Sailu v. State of A.P. : 2008 CriLJ686 .

11. In Kulesh Mondal v. State of West Bengal : 2008 CriLJ325 , this Court considered the reliability of interested/related witnesses and has reiterated the earlier rulings and it is worthwhile to refer the same which reads as under:

11. 10. We may also observe that the ground that the [witnesses being close relatives and consequently being partisan witnesses,] should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh v. State of Punjab : [1954]1SCR145 in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in Rameshwar v. State of Rajasthan : 1952 CriLJ547 . We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.11. Again in Masalti v. State of U.P. : [1964]8SCR133 this Court observed: (AIR pp. 209-10, para 14)

14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct. 12. To the same effect is the decision in *State of Punjab v. Jagir Singh* : 1973 CriLJ1589 , *Lehna v. State of Haryana* : [2002]1SCR377 As observed by this Court in *State of Rajasthan v. Kalki* : 1981 CriLJ1012 , normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi v. State of Bihar* : 2002 CriLJ2645 .

12. Keeping the above principles in mind, let us examine the evidence of eye witnesses projected by the prosecution.

13. Let us scan the first witness to the occurrence PW-1, Suraj Pal Singh. In his evidence, he explained the motive for the occurrence. When he was examined as PW-1, he identified all the accused who were present in the Court. According to him, accused Onkar Singh, Sheodan Singh, Naresh Singh and Daulat Singh had been carrying guns, in their hands, while the remaining six accused, had been carrying country made pistols. However, the initial firing had been done by Onkar Singh and Naresh Singh. He also asserted that the remaining accused had fired indiscriminately, upon them in order to finish off Rajmahesh, Kaptan Singh, himself and others. He also deposed that Rajmahesh, Kaptan Singh, Maya Devi, Resham Devi, Ram Autar and Ishwari Devi were injured on account of the indiscriminate firing resorted to by all the accused. According to him, Raj Mahesh and Maya Devi died at the very spot on account of being shot at. The remaining four had become

injured on account of sustaining gun shots. He also mentioned that Jagdish Singh, PW-5, Murari Singh, Ram Bahadur, his father Megh Singh, Dev Singh, Baleshwar Singh and others witnessed the occurrence. It is clear from his evidence that the victims and prosecution witnesses were not armed and out of fear he went and took shelter in Jhonpari. After all the accused sped away from the scene of occurrence, he called Natthu Singh from Bhogupura, happens to be the uncle of Rajmahesh as he has a licence of rifle, in order to escort the injured persons to the police station and thereafter to the hospital. On arrival of Natthu Singh, PW-1 and others arranged for a bullock cart and taken all the four injured to the police station, Sidhpura. PW-1 had narrated all the events to Natthu Singh and he accordingly written down the same. On Natthu Singh reading the contents of the said report, PW- 1, signed and the same was filed in the police station. The said report is exhibited as KA-1. It was PW-1 who took the injured to the hospital. He was also present when the sub-inspector recovered one empty cartridge shell from the wide mouthed earthen pot and the blood stained soil as also plain soil from the spot where the bodies of Raj Mahesh and Maya Devi were lying. It is clear from the evidence of PW-1 that he witnessed the occurrence, after the accused ran away from spot he took the injured persons in a bullock-cart, reached the police station, made a complaint Exh. Ka 1 and then went to the hospital and from there returned to the village at about 5.00 hrs. in the morning. It further shows that again he had gone to the Rajmau hospital. It is also clear from his evidence that at the time of the occurrence there had been no chowkidar of their village present at the said spot. This shows that except the accused, the deceased, injured and other family members, none others present. Though he had taken shelter behind the Jhonpari due to fear, he asserted that he had witnessed the entire occurrence. He also denied the suggestion of the defence to the effect that the gang belonging to Bhagwana Kachi village had committed dacoity at the said spot of occurrence. Though he has not explained the specific overt act in respect of all the ten accused, the reading of his entire evidence clearly show that he was present on the spot at the relevant time, witnessed the incident from the 'Jhonpari', after the accused ran away he came out of Jhonpari, laid a complaint to the police and took injured persons to the hospital. He fully supports the prosecution case.

14. Now let us consider the evidence of PW-5, Jagdish Singh. According to him, when he arrived at the doorstep of the house of Gyan Singh along with others at about 3.30 P.M., he noticed all the ten accused possessing guns and pistols with them. He specifically noted that all the accused, had been since averring, to the effect that 'Raj Mahesh and Kaptan Singh ought to be finished off today'. At the relevant point of time, Raj Mahesh, Suraj Pal and Kaptan Singh were present at the open built up space used for knotting down cattle of Suraj Pal. He heard that accused Onkar Singh stated to others to the effect that, these persons have made our life miserable, we should kill them from here. At the very moment, he had stood up and at the same moment Onkar Singh had opened fire upon him. The said gun shot had landed on Raj Mahesh. At that very same time Naresh Singh had opened fire which gunshot had landed upon Kaptan Singh. At that time, Maya Devi, Resham Devi, Ram Autar, Dev Singh and Megh Singh had arrived rushing from the chaupal. No sooner Maya Devi got down from the chaupal Daulat Singh had opened fire which gunshot had landed upon her. Then all these accused had resorted to indiscriminate firing from both the directions. Ishwari Devi had arrived from the house of Raj Mahesh, she too had sustained gunshot bullets. Raj Mahesh and Ram Autar had sustained resultant pellets from the gun shot firing of the accused. At that time, Suraj Pal Singh had taken refuge and shelter on his platform used for keeping vigil on the crops (Madhiya). In categorical terms, P.W.5 asserted that he had witnessed the entire occurrence by taking shelter behind a stack of bricks having been since piled up near the platform. Besides himself Ranvir Singh, Ujagar Singh, Janey Raj Singh had witnessed the said occurrence from the same spot. It is his claim that the occurrence had taken place at about 4.00 O'Clock. He mentioned that Kaptan Singh too had consequently died. He further deposed that corpses had been lying at the very spot where they had been shot at for the entire night. Even in the cross-examination, he once again reiterated that Maya Devi had sustained the gunshot, having been since fired by Daulat Singh. Raj Mahesh had sustained the gun shot fired by Onkar Singh, while Kaptan Singh had sustained the gun shot by Naresh Singh. As rightly pointed out by counsel for the State, P.W.5 - Jagdish Singh was a person who actually witnessed the incident at the spot, identified all the accused, disclosed the motive for the incident and the indiscriminate firing by all the accused. There is no reason

to disbelieve his version including unlawful assembly and the subsequent indiscriminate firing killing three persons and causing firearm injuries to another three persons.

15. The other eye-witness heavily relied on by the prosecution is P.W.7 Ranvir Singh. In his evidence he has stated that at about 3.30 P.M. when he had been proceeding to his fields, Jagdish Singh, Ujagar Singh and Janey Raj Singh had accompanied him. When they had arrived at the door steps of the house of Gyan Singh, they had seen 16 accused persons sitting there. He also identified all the accused when he deposed before the Court. By mentioning specific names, he pointed out that some of them had been possessing guns and country made pistols at the relevant time. Similar to P.W.5, he also informed the Court that all these accused had been since averring to the effect that Raj Mahesh and Kaptan Singh had made their lives miserable and they ought to be got finished off today. On hearing the statement from the accused Onkar Singh, Naresh Singh and Daulat Singh had started firing. Raj Mahesh had sustained the gun shot having been fired by Onkar Singh, Kaptan Singh had sustained gun shot fired by Naresh Singh. He asserted that the remaining accused too had started firing. Maya Devi and Resham Devi had arrived from the sitting room (baithak) of surai house of Raj Mahesh in order to save them. However, due to the gun shot of Daulat Singh, Megh Singh @ Megh Raj Singh and Maya Devi had sustained injuries, the gun shot injuries had been caused to Resham Devi, Ram Autar, Ishwari Devi. Raj Mahesh and Maya Devi had died at the spot. He asserted that he had witnessed the said occurrence from near the stack of bricks, having been piled up. He also informed the Court that Jagdish Singh P.W.5, Ujagar Singh and Janey Ram Singh had witnessed the said occurrence besides himself from the same spot. Like others, he also reiterated that he had not seen anybody else in the scene of occurrence at the relevant point of time except the accused, the injured and other witnesses. Though he had not gone to the Police Station or to the Hospital, when the Sub-inspector arrived, he made all arrangements for enquiry. He also mentioned about the motive of the occurrence. There is no valid reason to disown his claim and the prosecution story about the incident.

16. The other important eye witness is P.W.9 Smt. Resham Devi. She is an injured witness. Her husband is Megh Singh and resident of village Khajura. She explained that at the time of the accident, it was approximately 4 O'Clock in the day. She had been cleaning Moong pulse stalks, at their open assembly venue (chaupal). Her daughter Maya Devi too had been present there along with her. Her son Kaptan Singh and Suraj Pal had been busy in mixing fodder for the cattle. She noticed that accused Nos. 1, 5, 6 and 9 - Onkar Singh, Naresh Singh, Daulat Singh and Sheodan Singh had been carrying guns with them while six others (Accused Nos. 2, 3, 4, 7, 8 and 10) had been in possession of a country-made pistol. She also identified all the 10 accused in the Court. Like P.Ws.1, 5 and 7, she also reiterated that Onkar Singh and Naresh Singh declared that they have to kill all of them along with their kith and kin. By saying so, they fired upon Kaptan Singh. At that very moment, her daughter rushed in order to save Kaptan Singh. Her son Ram Autar had also rushed in order to save Kaptan Singh while Ishwari Devi rushed in order to save Raj Mahesh. At the very moment, Daulat Singh had opened fire upon Maya Devi, thereafter all the aforesaid ten accused had started indiscriminate firing due to which Resham Devi, Ishwari Devi and Ram Autar sustained gun shot injuries. Both Maya Devi as well as Raj Mahesh had died at the very spot as a result of gun shots. Thereafter, all the aforesaid ten accused had escaped from the spot. She also mentioned the presence of Jagdish Singh, P.W.5 and Ranvir Singh, P.W.7. She had then gone to Police Station Sidhpura along with Suraj Pal Singh, P.W.1. She also deposed that due to sustaining of injuries, she had become hard of hearing, pellets had landed on her neck. According to her, pellets are still present within her body. In respect of a question posed to her, she asserted that she had not felt scared of sustaining gun shot fire since her daughter had already sustained gun shot fire. She being injured witness (the details regarding her injuries and the evidence of doctor will be discussed at the later point of time) and she was one among the victims suffered at the hands of accused, there is no reason to believe her version only to convict Onkar Singh though her evidence clearly implicates other nine accused also.

17. Apart from the evidence of P.Ws. 1, 5, 7 and 9, on the direction of the Court one Ujagar Singh was examined as C.W.1. According to him, while he was returning after purchasing tobacco around 3.00 P.M. and when he reached Gyan's

house, he noticed presence of 16 men. He mentioned all the names. He also referred to the statement of Onkar Singh that 'these people were harassing us, let us kill them today' and the statement of Naresh Singh accused 'let us finish their family.' Immediately, Naresh Singh shot at Kaptan Singh. Onkar Singh shot at Raj Mahesh. When Maya Devi, sister of Kaptan Singh reached the scene of occurrence, Daulat Singh shot at her. On hearing the commotion, Resham Devi, mother of Kaptan Singh and brother of Ram Autar reached there and Ishwari Devi, sister of Jagdish Singh also arrived there. Then all the ten accused fired at them indiscriminately. Thereafter, all the accused ran away towards east. When he and others reached the verandah, they found that Maya Devi and Raj Mahesh had died and Kaptan Singh, Resham Devi, Ishwari Devi and Ram Autar were lying injured. He also stated that the said incident took place around 3.00 P.M. He also confirmed the presence of other witnesses including P.W.5 and P.W.7 in the scene of occurrence. He specified that out of ten men involved in the shooting, four were armed with guns and remaining six with pistols. Though he did not go with the injured persons to the hospital after the incident, however, according to him, he reached the hospital around 9 `O'clock in the morning. He also disclosed that at the time of incident particularly when the shots were fired, he did hide behind brick kiln. It is seen from his evidence that his field is about one furlong away from his house and his house is around 16 paces from the incident and two houses are between them. As stated earlier, C.W.1 though resident of the same village is not related to the other eye witnesses, deceased and injured persons. The trial Court heavily relied on his evidence. On going through the same, there is no reason to disbelieve his version.

18. Regarding the motive, according to the prosecution, the accused persons had enmity with the complainant's party including the deceased persons and their family members. There was an ancestral land of Surajpal Singh, Raghubir Singh and Jograj Singh. A sheesham tree was standing therein. The Chak of Daulat Singh - accused is adjacent to the said land. Daulat Singh and Yudhishtir Singh wanted to cut the said tree but they were not permitted and Raghubir Singh lodged a report against Daulat Singh, Yudhishtir Singh, Onkar Singh, Kishanpal, Naresh Singh, Suresh Singh, Gyan Singh, Sher Singh, Mahendra and Amol Singh. The said report dated 9.3.1978 has been marked as Ex. KA-15. Thereafter Naresh

Singh and Onkar Singh got a false report lodged by Tok Singh under Section 392 IPC against Ranvir Singh, Balbir Singh and Rambir Singh on 6.5.1978. Onkar Singh and Daulat Singh, accused persons in the case on hand, were cited as prosecution witnesses. This is evident from Ex. KA-17. The police, however, submitted final report which infuriated Daulat Singh and Onkar Singh. Further two days prior to the present occurrence when Raj Mahesh and Kaptan Singh were going in front of the shop of Onkar Singh, the latter extended threat to them of dire consequences. Though it was pointed out that for such a serious crime, the said motive was highly insufficient, as rightly observed by the trial Judge, the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime. The motive may be considered as circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one. It is also settled law that the motive loses all its importance in a case where direct evidence of eye-witnesses is available, because even if there may be a very strong motive for the accused persons to commit a particular crime, they cannot be convicted if the evidence of eye-witnesses is not convincing. In the same way, even if there may not be an apparent motive but if the evidence of eye-witnesses is clear and reliable, the absence or inadequacy of motive cannot stand in the way of conviction. As pointed out, even the accused persons have stated that they have been falsely implicated due to previous enmity, in such circumstances, it cannot be said that the accused persons had no motive to commit the crime in question. In fact, the prosecution witnesses have specifically adverted to this without any contradiction and all of them denied the suggestion that the alleged incident was due to attack by the dacoits and the accused persons have nothing to do with it.

19. The analysis of evidence of P.Ws 1, 5, 7, 9 and C.W.1 clearly show the motive behind the incident, place of occurrence, participation of all the accused carrying guns and pistols, indiscriminate firing killing three and causing firearm injuries to other three, complaining to the police without any delay i.e. at 9.30 P.M. which is reasonable considering the distance of Police Station, i.e. 10 kms. from the place of occurrence and taking all the injured immediately to the hospital.

20. Now, let us consider the medical evidence in respect of three deaths and three injured persons and how it corroborate the statement of eye-witnesses. Dr.R.P. Yadav, who conducted the Post Mortem examination upon the dead body of Smt. Maya Devi, noted the following Ante Mortem injuries:

1. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X flesh deep, on the forehead 3 Cms. Above the left brow.
2. 4 Gun shot wounds of entry, in an area admeasuring 5= Cms. X 4= Cms., on the left side of face. All the wounds had been = Cms. To $\frac{1}{3}$ Cms., skin deep, to flesh deep. 1 wound had been present, on the lip, 1 had been under the eye, and 1 had been present, in front of the left ear and one over middle of the cheek.
3. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X skin deep on the scalp, on the left hand side of skull 8 Cms. above the ear.
4. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X flesh deep, at the back of, the left ear.
5. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X skin deep, on the left lower portion of, the neck.
6. 4 Gun shot wounds of entry, in an area admeasuring 8 Cms. X 6 Cms. X flesh deep had been present, on the upper portion of back. One wound had been = Cms. X $\frac{1}{3}$ Cms. X skin deep to flesh deep.
7. 4 Gun shot wounds of entry, in an area admeasuring 10 Cms. X 8 Cms., had been present, on the left side of back below wounds, had been = Cms. X $\frac{1}{3}$ Cms flesh deep.
8. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X flesh deep, on the left side, at the back of waist.
9. 2 Gun shot wound of entry, on the left side of chest near the area of the left arm-pit = Cms. X $\frac{1}{3}$ Cms. X flesh deep.

The edges of all the aforesaid wounds had, been swollen up and had been inverted and protruding, inwards. No blackening and tattooing however had been present, on the same. All the aforesaid wounds had, been caused, on account of fire-arm.

Internal Examination

3 pellets had, been recovered from under injury No. 6 from under the left shoulder bone. Upon opening wound No. 7 it however had, been revealed, to the effect that, the bullet while the left portion of the heart and had stopped within the left side of the chest. However, 3 pellets had, been recovered from within the said spot. The direction of this wound had been, from the rear, to the front going a little bit, in the upward direction. The direction of injury Nos. 1 to 5 had been from the left, to the right and sideways. 1 pellet had, been recovered, from under injury No. 1, while two pellets had, been accordingly recovered from under injury No. 2. One pellet had been recovered, under injury No. 9, while the direction thereof had, been from the left, to the right. Left lung and left portion of the heart, under injury No. 7, stood lacerated, while blood had been accordingly present, in the cavity of chest, on the left side, thereof.

The stomach had, been empty. The peritoneum had, been OK. The small intestine had been empty, while faecal matter had, been present, in the large intestine.

In my opinion the death of the deceased had as a result of Ante Mortem fire-arm injuries, having since caused, on her person.

21. He also conducted the Post Mortem examination upon the dead body of the deceased Kaptan Singh and noted the following Ante Mortem injuries:

1. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X flesh deep, on the upper eye-lid of, the left eye.
2. 3 Gun shot wounds of entry, each admeasuring = Cms. X $\frac{1}{3}$ Cms. X through and through, on the upper portion of, left lip. The incisor teeth, on broken, while blood stood deposited, in the buccal cavity therein.

3. 4 Gun shot wounds of entry, each admeasuring = Cms. X $\frac{1}{3}$ Cms. X flesh deep, in an area of 7 Cms. X 5 Cms., on the left side of neck.
4. 3 Gun shot wounds of entry, each admeasuring = Cms. X $\frac{1}{3}$ Cms. X skin deep, in an area admeasuring 6 Cms. X 4 Cms., on the left front side of chest, pointing outwards, from the right nipple.
5. 2 Gun shot wounds of entry $\frac{1}{3}$ Cms. X $\frac{1}{3}$ Cms. X skin deep, on the outer side of the left arm, pointing outwards, thereof.
6. Gun shot wound of entry = Cms. X $\frac{1}{3}$ Cms. X skin deep, on the front lumbar region of, stomach.
7. 2 Gun shot wounds of exit > Cms. X = Cms. X on the inner side of, the left arm. These wounds had been the exit wounds of, injury No. 5.

All the aforesaid wounds had, been caused, on account of, fire-arm.

Internal Examination

Two large size pellets had, been recovered from the skin, under injury No. 7. Upon probing injury No. 4 it had been so revealed, to the effect that, the bullet had, since lacerated the skin and had made an entry, on the left side of chest and while puncturing the left lung and the surrounding membranes had ultimately stooped, within the left chest cavity. 3 pallets had, been recovered, from the said relevant spot. = pound of blood had, been present, in the left chest cavity. The direction of injury No. 2 too, had been from the left, to the right. 2 Ozs. Of blood had, been present, in the stomach cavity. The stomach had been empty and the peritoneum had, been alright. The small intestine had, been empty, while faecal matter had, been present, in the large intestine. However, the large intestine stood cut and segregated, below injury No. 6.

In my opinion, the death of the deceased had occurred, on account of shock and haemorrhage as a result of Ante Mortem fire-arm injuries, having since caused, on his person.

22. He also conducted the Post Mortem examination upon which dead body of deceased Raj Mahesh and noted the following Ante Mortem injuries:

1. 2 Gun shot wounds of entry, on the front left side of, chest. One wound had, been O'clock position, from the nipple thereof. Both the said wounds had been, at an inter-alia distance of 5 Cms., from each other. Each of the said wound had, been admeasuring > Cms. X = Cms. X chest cavity deep.
2. 2 Gun shot wounds of entry, on the front left side of stomach, near the umbilicus, each of them admeasuring > Cms. X = Cms. X stomach cavity deep.
3. Gun shot wound of entry, on the lower portion of, left side of stomach, situated at a distance of 10 Cms., from the umbilicus admeasuring > Cms. X = Cms. X stomach cavity deep.
4. Gun shot wound of entry admeasuring Cms. X = Cms. X bone deep, on the front of, the left elbow. The humerus bone stood, fractured.
5. Gun shot wound of exit admeasuring = Cms. X 1 Cm. on the left side of back, in the waist area, thereof.

All the aforesaid wounds had, been caused, on account of, fire-arm.

Internal Examination

Upon opening injury No. 1 it had been so revealed, to the effect that, the bullet had entered lacerating the skin of the chest, while it had punctured through and through, the left lung within the chest cavity, the membrane thereof, as well as, the heart and had consequently, stopped within the flesh, in the left central portion of the back, while 2 pellets had, been recovered, from the said relevant part of the body of, the said corpse. The direction of the said bullet had, been from the front, towards the back and had been almost, in a straight line. One large size pellet, had been accordingly recovered, from under injury No. 4. The entry pellet of injury No. 3 had protruding a little bit, towards the top. The pellet of injury No. 2 had, been strangled somewhere, in the small intestine and however, the same could not be recovered even upon probing for the same.

The stomach had, been empty. Blood had, been present, in the left lung cavity and the stomach cavity. The small intestine stood lacerated, at several places. Faecal matter had been present, in the large intestine.

In my opinion, the death of the deceased had occurred, on account of shock and haemorrhage, as a result of Ante Mortem fire-arm injuries, having since caused, on his person.

23. It is also relevant to mention the evidence of P.W.11 Dr. S. P. Dikshit who treated the three injured persons and his evidence about the injuries sustained by them.

1. On 21.06.1968 I had, been the Medical Officer Incharge, at Sidhpura and I continue, to remain, as such. This hospital remains situated, within the ambit of the boundaries of, village Rajmau. Resham Devi, wife of Megh Singh, resident of village Khajura, Police Station Sidhpura, District Etah. I had detected the following injuries, upon her person:

1. Punctured wound 2 Cms., below the right ear and 10 Cms. From the right hand corner, towards the mouth admeasuring 1 Cm. X 2 Cms. X 0.2 Cm. Small amount of blood oozing had, been present therein.

2. Punctured wound 4 Cms., away from the right ear, on the neck, at a distance of 4 Cms., from the Medieval angle, pointing downwards admeasuring 1 Cm. X 2 Cms. X 0.2 Cm. Small amount of blood oozing had, been present therein. The aforesaid injuries, had been simple in nature, while the same had been caused by some fire-arm. The duration of the said injuries, at the time of Medical Examination had, been about day old.

On that day, at 11= O'clock, in the night, I had examined the injuries, on the person of Smt. Ishwari Devi, wife of Chandra Pal Singh, resident of village Khajura, Police Station Sidhpura, District Etah. I had detected the following injuries, upon her person:

1. Punctured wound, on the right cheek 5 Cms., away from the nose and 6 Cms., above the Medieval end, admeasuring 1 Cm. X 2 Cms. X 0.2 Cm. Small amount of

blood oozing had, been present therein.

2. Punctured wound 1 Cm, below the lower eye-lid of the right eye and at a distance of 4 Cms., from the nose, 1 Cm. X 2 Cms. X 0.2 Cm. in an area admeasuring 3 Cms. X 3 Cms. Swelling had, since been present therein. Small amount of blood oozing had, been present therein.

3. All the aforesaid injuries had, been duration of the said injuries, at the time of Medical Examination had, been about day old.

On that day, at 11.55 PM, in the night, I had examined the injuries, on the person of, Shri Ram Autar, son of Megh Singh, resident of village Khajura, Police Station Sidhpura, District Etah. I had detected the following injuries, upon his person:

1. Punctured wound 0.2 Cm X 0.2 Cm on the right side of stomach 10 Cms, away from the Elite Crest 10 Cms., towards the top and 10 Cms., away from the Meridian line. Small amount of blood stood oozing, from therein.

2. Punctured wound 0.2 Cm X 0.2 Cm., on the front side of left forearm [fire-arm] 6 Cms., away and towards the top of the writ joint. Small amount of blood stood oozing, from therein.

3. Punctured wound 0.2 Cm X 0.2 Cm., on the front side of left elbow joint, in the middle thereof. Small amount of blood stood oozing, from therein.

4. Punctured wound 0.2 Cm X 0.2 Cm., on the back of left elbow joint, on the outer side thereof. Small amount of blood stood oozing, from therein.

5. X-ray had been advised for all the injuries of this injured. All the said injuries had, been caused, by some fire-arm. The duration of the said injuries, at the time of Medical Examination had, been about day old.

6. I had prepared the respective Injury Reports pertaining, to all the respective injured, at the relevant points of time, while conducting their respective Medical Examinations. All the said Injury Reports are true and correct, having been since prepared, under my handwriting and bear my signatures, on each of them. All the said three Exbt. Ka-24 respectively. The same are however, true and correct.

7. Constable 272 Ram [sic], from Police Station Sidhpura had, brought all the said three injured for the purposes of conducting Medical Examination upon their respective persons, while he had, identified each of the respective injured as such.

8. All the aforesaid injuries of, all the respective injured might have been possibly caused, on 21.06.1978, at about 4 O'clock, in the day. The same are results, on account of gun shots resulting either, from a gun or a country made pistol.

In my opinion, the said injuries of, each of the respective injured, was only possible, on account of some fire-arm, because the edges of all of them had been, in circular shape, while the skin stood punctured. Even the depth of every injury was equal, in measurement. On account of the said reason I hereby state to the effect that, all the said respective injuries had, been a result of shots, having been since fired from some fire-arm. However, I had neither, mentioned that the respective shapes thereof had been circular in appearance and visibility.

Though the High Court has commented that the prosecution has not collected the pellets from the gun shots from the walls, the evidence of the two doctors prove that several pellets struck the three dead persons and three injured persons. The evidence of two doctors and Post Mortem certificates Ex Ka 19, 20 and 21, injury report Ex. Ka 22, 23 and 24 amply prove that not only Onkar Singh, Naresh Singh and Daulat Singh fired but also all the ten accused fired indiscriminately by using guns and pistols which resulted in three deaths and fire arm injuries to three persons. The evidence of PWs 1, 5, 7, 9 and CW-1 and the evidence of two doctors and their reports clearly support the case of the prosecution that all the accused had a role in the incident and rightly charged under Sections 148, 149, 307 and 302. The High Court lost sight in not concentrating the above relevant material evidence while acquitting all the accused except Onkar Singh.

24. Now let us consider the other relevant issue, namely, allegation of absence of evidence relating to the specific overt act or role attributed to each accused as well as the evidence of the prosecution in respect of a charge under Section 149 IPC. Before going into the merits of the above issue, it is useful to refer to Section 149 which reads thus:

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

25. It is well settled that once a membership of an unlawful assembly is established it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. In other words, mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in the prosecution of the common object of the unlawful assembly or such which the members of the unlawful assembly knew were likely to be committed.

26. In *Bhagwan Singh and Ors. v. State of M.P.* : 2002 CriLJ2024 , this Court while considering unlawful assembly/sharing of common object held as under:

9. Common object, as contemplated by Section 149 of the Indian Penal Code, does not require prior concert or meeting of minds before the attack. Generally no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons who attacked the victim had the common object for an offence which was known to be likely to be committed in prosecution of such an object. It is true that a mere innocent person, in an assembly of persons or being a bystander does not make such person a member of an unlawful assembly but where the persons forming the assembly are shown to be having identical interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful assembly.

The same principle has been stated in *State of A.P. v. Veddula Veera Reddy and Ors.* (supra) and *Sahdeo and Ors. v. State of U.P.* : AIR 2004 SC3508 .

27. In the case on hand, the accused persons have been proved to be in inimical terms with the complainant party, the accused persons who came on the spot are shown to have armed with deadly weapons i.e. guns and pistols. The facts and circumstances of the case unequivocally prove the existence of the common object of such persons forming the unlawful assembly who had come on the spot with weapons and attacked the complainant's party. In consequence of which three precious lives were lost and another three sustained firearm injuries.

28. In *State of Rajasthan v. Nathu and Ors.* : [2003]3SCR967 , this Court held:

If death had been caused in prosecution of the common object of an unlawful assembly, it is not necessary to record a definite and specific finding as to which particular accused out of the members of the unlawful assembly caused the fatal injury. Once an unlawful assembly has come into existence, each member of the assembly becomes vicariously liable for the criminal act of any other member of the assembly committed in prosecution of the common object of the assembly.

29. In *Rachamreddi Chenna Reddy and Ors. v. State of A.P.* : AIR 1999 SC994 , with reference to common object and how the same has to be interfered with, this Court held thus:

7. ...The question whether the group of persons can be made liable for having caused murder of one or two persons by virtue of Section 149 IPC depends upon the facts and circumstances under which the murder took place. Whether the members of an unlawful assembly really had the common object to cause the murder of the deceased has to be decided on the basis of the nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the settings and surroundings under which the occurrence took place.

9. In *Bolineedi* case 1994 Supp (3) SCC 732 this Court held that for arriving at a conclusion of constructive liability, what the courts have to see is whether they had the common object and members of the assembly knew it likely to be committed in prosecution of that object. In the aforesaid case, the fact that all the accused persons chased and surrounded the deceased and inflicted injuries with their

respective weapons was held to be sufficient to conclude that they had the common object to kill the deceased.

30. In the case on hand, the prosecution witnesses have clinchingly demonstrated how the accused persons formed an unlawful assembly at a particular spot with deadly weapons like guns and pistols and that all had fired at the injured and deceased. The number of injuries on the deceased as per the Post Mortem report as well as the firearm injuries sustained by the three injured persons clearly demonstrate the common object of accused Nos. 1 to 10 was to kill the complainant's party.

31. In *Yunis @ Kariya v. State of M.P.* : 2003 CriLJ817 , this Court held:

Even if no overt act is imputed to a particular person, when the charge is under Section 149 IPC, the presence of the accused as part of an unlawful assembly is sufficient for conviction. The fact that the accused was a member of the unlawful assembly is sufficient to hold him guilty.

Following the above principle, in *Jaishree Yadav v. State of U.P.* : (2005)9SCC788 , in an identical circumstance, this Court interfered with the acquittal of the High Court. It is relevant to refer to para 28 of the said decision.

28. In view of the above principle in law, since the trial court has found these respondent-accused guilty of being members of an unlawful assembly with the common object of causing the murder of the deceased, and the High Court having not differed from the said finding, it erred in acquitting these respondent-accused solely on the ground that there is no evidence to show that they had taken part in the actual assault. In our opinion, assuming that the High Court was correct in coming to the conclusion that these respondent-accused have not taken part in the attack even then they having come together with the other accused armed, and having been members of the unlawful assembly and having shared the common object, they will be guilty of an offence punishable under Section 302 read with Section 149 IPC.

32. In the earlier part of our discussion, we referred to the evidence of P.Ws. 1,5,7 and 9 and C.W.1 as well as the two Doctors and the Post Mortem Report Exh. Ka 19, 20 21 and Injury Report Exh. Ka 22, 23 and 24. As observed in the above decisions, even though specific overt act had been attributed only to accused Nos. 1, 5 and 6 and not to each of the other accused in view of the fact that there is ample evidence for the presence of all the accused as part of unlawful assembly and firing by all of them, all of them have to be held guilty of offence charged against them.

33. We are satisfied that the High Court has committed an error in acquitting all the accused except Onkar Singh only on the ground that specific overt act or involvement had not been highlighted by the prosecution witnesses. The High Court has observed that the testimony of PW-9, Resham Devi, inspires their confidence fully. PW-9 has given evidence of the unlawful assembly of ten accused and indiscriminate firing by the ten accused, apart from referring to the specific acts of accused Nos. 1, 5 and 6. Therefore, the High Court could not have acquitted accused Nos. 2, 4, 7, 8, 9 and 10. The observation of High Court that some of the witnesses stated all the relevant information before the Court, they did not inform the same to P.W.1 who made a complaint to the Police or to the Investigating Officer who visited the spot, on verification of the entire evidence, we are of the view that the observation may not be sound. In fact, P.Ws. 5, 7 and 9 explained that in view of the fact that the three persons died and three sustained firearm injuries either some went to the hospital along with the injured persons and others stayed back at the place of occurrence. The said explanation cannot be rejected as unacceptable particularly when they are illiterate villagers. It is also settled law that there is no need to inform everything either to the complainant or in the complaint. In such circumstances, we reject the reasoning of the High Court.

34. Inasmuch as the present appeal by the State is against an order of acquittal, learned Counsel for the respondents submitted that the appeal involved only appreciation of evidence and this Court may not interfere with the findings of facts resulting from appreciation of evidence. In *State of Rajasthan v. Smt. Kalki and Anr.* (supra), similar contention was raised before a three-Judge Bench of this Court. Rejecting the said contention, the Bench held: It is true that in an appeal

under Article 136 of the Constitution this Court normally does not interfere with findings of facts arrived at by the High Court. But when it appears that the findings of facts arrived at are bordering on perversity and result in miscarriage of justice, this Court will not decline to quash such findings to prevent the miscarriage of justice.

35. In our opinion, the guilt of the respondents has been established by the prosecution beyond reasonable doubt and their acquittal resulted in grave miscarriage of justice. The paramount consideration of the Court is to ensure that miscarriage of justice is avoided. The miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent.

36. In the light of the above discussion, we find that the High Court has not assigned any good reason for acquitting Kishan Pal Singh, Suresh Singh, Mahendra Singh @ Neksey Singh, Jaivir Singh, Sheodan Singh and Bahar Singh. Further, the materials placed by the prosecution clearly show that the acquitted-accused along with convict-accused Onkar Singh and three others (who died after the trial) have formed unlawful assembly and all came with fire arm and caused fire arm injuries on the deceased persons as well as on the injured persons and the case of the prosecution was fully corroborated by medical evidence. In our considered view, the trial Court rightly held that the accused persons had formed unlawful assembly and committed murders by going at the place of incident with fire arm and causing fire arm injuries. On the other hand, the High Court erred in acquitting those persons and the same deserves to be set aside.

37. In this regard, it is relevant to note that the incident occurred as early as on 21.06.1978, though the learned Trial Judge convicted these persons on 8.4.1980, the High Court set aside the conviction and acquitted them on 19.09.2002. We have to see whether the respondents/accused persons are to be awarded life sentence as imposed by the Trial Court. It is relevant to mention in *Virsa Singh v. State of Punjab* : 1958 CriLJ818 Vivian Bose, J speaking for the Court, explained the meaning and scope of Clause (3) of Section 300 I.P.C. It was observed that the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly'. First, it must establish quite objectively, that a bodily injury is

present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly, it must be proved that the inquiry of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

38. The ingredients of Clause 'thirdly' of Section 300 IPC were brought out by Bose, J. which reads as under:

12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly';

First, it must establish, quite objectively, that, a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

39. The learned Judge explained the third ingredient in the following words (at page 468):

The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion.

40. The test laid down by Virsa Singh case (supra) for the applicability of Clause 'thirdly' is now ingrained in our legal system and has become part of the rule of law. Under Clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted. Thus, according to the rule laid down in Virsa Singh case (supra) even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

41. The fact that the incident had occurred 30 years ago namely 1978, and of the fact that all the prosecution witnesses referred to gun shots and bullet injuries in general, when we consider all the factual scenario in the background of legal principles set out above, the inevitable conclusion is that the appropriate conviction in so far as the respondents herein would be under Section 304 Part I I.P.C. Custodial sentence of 10 years should meet the ends of justice.

42. In the result, the judgment of the High Court dated 19.09.2002 acquitting Kishan Pal Singh, Suresh Singh, Mahendra Singh @ Neksey Singh, Jaivir Singh, Sheodan Singh and Bahar Singh is set aside. Consequently each of the accused persons/respondents herein namely Kishan Pal Singh, Suresh Singh, Mahendra Singh @ Neksey Singh, Jaivir Singh, Sheodan Singh and Bahar Singh is sentenced to undergo RI for two years under Section 148, to five years RI under Section 307/149 I.P.C. and imprisonment for 10 years RI under Section 304 Part I I.P.C. All the sentences are to run concurrently. The respondents shall surrender to custody forthwith to serve the remaining period of sentence. The appeal filed by the State is allowed to this extent and the judgment of the High Court is set aside.

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