State of Rajasthan Vs. Moti and ors.

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Court : Rajasthan

Decided On : Sep-05-2000

Reported in : 2000CriLJ4817; 2001(1)WLC230; 2001(4)WLN533

Judge : G.L. Gupta and; J.C. Verma, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 147, 148, 149, 174, 302, 307 and 447; Code of Criminal Procedure (CrPC) - Sections 161, 313, 464 and 465

Appeal No. : D.B. Cr. Death Reference No. 5 of 97 and two Appeals

Appellant : State of Rajasthan

Respondent : Moti and ors.

Advocate for Def. : N.C. Choudhary, Adv.

Advocate for Pet/Ap. : A.K. Gupta, Adv.; R.P. Meena, Public Prosecutor

Disposition : Appeal partly allowed

Judgement :

Hon'ble Gupta, J.

(1). The above mentioned appeals and the death reference arise out of the judgment dated 18th of November 1997, of the learned Sessions Judge, Jaipur District, Jaipur. By the impugned judgment appellants Moti and Chittar were

convicted under Section 302, 307 and 148 I.P.C. and were sentenced to death for the first offence and five years rigorous imprisonment and a fine of Rs. 2000/- for the second; in default of payment of fine, six months simple imprisonment. They were not sentenced separately Under Section 148 I.P.C. Remaining five accused appellants were convicted under Section 302 read with 149 I.P.C. 307 read with 149 and 148 I.P.C. and sentenced to imprisonment for life and a fine of Rs. 5,000/- under the first count and four years rigorous imprisonment and a fine of Rs. 1,000/- under the second count. They were also not separately sentenced Under Section 148 I.P.C.

(2). The prosecution case relates to an occurrence which took place in the night intervening 27th and 28th of April 1989 in village Joshian Ki Dhani, in which two persons Bhura and Ram Narain lost their lives and Lal Chand P.W. 1 suffered multiple Injuries. The prosecution case, as disclosed in the first information report Ex.P. 1 lodged by P.W. 5, Bhenru, was that at about 10 or 11 p.m. when Bhura, Ram Narain and Lal Chand were lying on the cots in their house, Ramsi, Moti, Ratan, Lala, Chhagan, Jaggu and 2-3 other persons armed with axes, Tarsies' and swords went there and caused injuries to them. The motive for the crime, disclosed in the F.I.R., was enmity between the parties. On this report, a case under Section 147, 148, 149, 302, 307 and 447 I.P.C. was registered at No. 139/89 at Police Station Sanganer. The police held the inquest, inspected the site, interrogated the witnesses and arrested the accused persons. It recovered blood stained clothes and weapons of the offence at the instance of the accused persons and sent them for examination by the F.S.L. The autopsy on the body of Bhura and Ram Narain was conducted by Dr. Nirmal Kumar Sharma P.W. 18 and Dr. H.C. Bairwa P.W. 14. The injuries of Lal Chand were examined by Dr. B.C. Temani P.W. 15, who prepared the injury report Ex.P. 26. After the completion of the investigation, the police submitted a challan against Moti and Chittar only.

(3). The case was committed to the court of Sessions where vide order dated 22.7.1991, charges Under Section 302 in the alternative 302/34 IPC and 307 in the alternative 307/34 IPC were framed. Both the accused pleaded not guilty. After the prosecution examined seven, witnesses, an application was moved by the Public Prosecutor on 25.2.1992, requesting the impleadment of the accused

persons who had been named in the F.I.R. but not challaned by the police. The learned Sessions Judge vide order dated 30.3.1992, allowed the application and ordered the summoning of Ramsi, Ratan, Chhagan, Jaggu and Lala by bailable warrants for the offences Under Section 302/149, 307/149 and 148 I.P.C.

(4). After the newly added accused appeared, charges were framed against the accused persons, including Moti and Chhittar Under Section 302/149, 307/149 and 148 I.P.C. vide order dated 18.6.1992. The accused pleaded not guilty. The prosecution examined P.W. 1 Lal Chand, P.W.2 Bhanwar Lal, P.W.3 Chhittar, P.W. 4 Ramjiwan, P.W.5 Bhenru, P.W.6 Kesra, P.W.7 Hanuman, P.W.8 Nanagram, P.W.9 Teeja, P.W.10 Ramesh Kumar, P.W.11 Raghuvir, PW.12 Ram Niwas, P.W.13, Madholal, P.W.14 Dr. H.L. Bairwa, P.W. 15 Dr. B.C. Temani, P.W. 16 Gajraj Singh, P.W.17 Mohan Lal, P.W.18 Dr. Nirmal Kumar Sharma and P.W. 19 Himmat Singh. The accused in their statements Under Section 313 Cr.P.C. denied the correctness of the prosecution version. The plea of Ramsi, Lala, Moti, Ratan and Chhittar was that they have been falsely implicated in the case and that there was no light in their village. Chhagan and Jaggu came out with a plea of alibi. Their version was that they were not in the village and had gone elsewhere on the date of occurrence. The accused did not examine any witness in defence.

(5). The learned Sessions Judge held that Bhura and Ram Narain had met homicidal death. He further held that they died because of the injuries suffered in the occurrence which took place on the night intervening 28th and 29th of April 1989. He also held that Lal Chand had suffered multiple injuries in that occurrence. Holding that the fatal injuries to Bhura and Ram Narain had been caused by Moti and Chhittar, he convicted them under Section 302 I.P.C. He convicted the other accused persons Under Section 302 I.P.C. with the aid of Section 149 I.P.C. observing that they were the members of unlawful assembly. Moti and Chhittar were also convicted under Section 307 I.P.C. for the injuries of Lal Chand, and other accused persons under Section 307/149 I.P.C. All the appellants were further convicted under Section 148 I.P.C.

(6). The contention of Mr. Gupta, learned counsel for the appellants, was that the trial Court has erred in relying on the prosecution evidence. The reasons

canvassed by him were :-

(i) All the prosecution witnesses are inter related and are interested in the success of the case and therefore, their testimony should not be accepted.

(ii) The conduct of the witnesses was far from natural.

(iii) There could not be motive for the accused to have caused the death of Bhura and Ram Narain and make murderous assault on Lal Chand.

(iv) There was no artificial light available at the place or occurrence, and hence the witnesses could not identify the assailants.

(v) The inquest report Ex.P. 4 does not contain the names of the assailants and in the inquest report Ex.P.3 the name of Moti does not find place and that the F.I.R. number was not recorded on the first page of the inquest report Ex.P. 3 which indicates that the F.I.R. is post investigation document and further that the F.I.R. Ex.P. 1 was not sent to the Magistrate forthwith.

(7). Mr. Gupta cited some cases in support of his contentions which shall be referred to at the appropriate place.

(8). On the other hand, the contentions of the learned Public Prosecutor were that the evidence of the eye-witnesses should not be discarded on the mere ground that they are related to the deceased persons or that they did not intervene in the occurrence. It was canvassed that the non-mentioning of the names of the witnesses or of the accused in the inquest report is of no significance and prosecution case should not be doubted. As to the omission of the factum of existence of artificial light in the F.I.R. It was argued that every thing is not required to be mentioned in the F.I.R. He urged that the existence of the artificial light was stated in the site inspection memo Ex.P.2 and if the investigating officer did not inquire from the witnesses about the existence of the artificial light, it can not be a ground to reject the testimony of the witnesses.

(9). We have given the arguments our thoughtful consideration.

(10). It was not disputed before us that Bhura and Ram Narain had met homicidal death and Lalchand had sustained multiple injuries in the night of occurrence.

By the testimony of Dr. Nirmal Kumar P.W. 18, it is established that Ram Narain had suffered incised wound of the size of 20 x 5 x 5 cm on the right side of upper part of neck from anterior angle of right ramus of mandible to middle part of left ramus of mandible. Dr. Sharma has opined that the cause of death of Ramnarain was neuro-genic and hypovolumic shock due to incised wound on the neck. By the medical evidence, it is amply proved that Ram Narain had suffered incised wound on his neck and he had died of that injury.

As regards the death of Bhura, Dr. H.L. Bairwa, P.W. 14 deposes that there was incised wound 11 x 5 cm over the right mandibular region cutting the mandibular bone cartoid artery and juglar veins. He says that this injury was sufficient in the ordinary course of nature to cause death. There is no cross-examination of the witness as regards his expert opinion that Bhura had died of the injury suffered by him on his neck. It is thus established that Bhura had also met homicidal death.

(11). As regards the injuries of Lalchand, Dr. B.C. Temani, P.W. 15 deposed that Lal Chand had the following injuries on his person which were of 24 hours duration al 1.25 p.m. on 28.4.1989 :-

(1) Incised wound (U-Shaped) size 7cm x 3cm x muscle deep on rt. zygomatic process with clotted blood around wound - or x ray and healing - sharp cut bone chip with muscle cut present.

(2) Incised wound 6cm x 2 cm x skin muscle (issue deep on right upper lip from mid of lip towards mouth angle attacked with skin flape, tator healling-sharp.

(3) Incised wound (S-shaped) size 7 cm in all x 4 cm x muscle deep From center of chin going upto right side lower lip marginor/healing-sharp.

(4) Incised wound 5 and half cm x 1 cm x bone deep oblique on rt. side clevicle upper border upto infra elevicular region, where the wound is narrow and two cm. lateral to mid-line, the clevicle bone is seen cut.

(5) Incised wound (V. shaped) size 15 cm x 6 cm x muscle deep on left arm posterior, middle and lateral aspects with the upper end of the wound attached with muscle towards the shoulder sides. The wound is placed lower two third of arm.

(6) Incised wound 7 cm x 3 cm x skin muscle flope (slashing) placed transversally left fore arm upper one third posteriorlly, fresh clotted blood simple-sharp.

(7) Incised wound 3cm x 1 cm x muscle deep with tailing laterally, oblique on left fore-arm middle one third, postero- medially-simple-sharp;

(8) Incised wound 1 cm x 1/2 cm x muscle deep on postero- medially left wrist, oblique-simple-sharp;

(9) Traumatic amuptation in an area of 12cm x 4 cm x cut bones (metacarpals rounded clear cut) chopping from 2 cm above first joint. Little and finger missing out of the left hand with incised wound 3 cm x 2 cm x muscle deep on postero-medial part of middle finger;

(10) Incised wound 2 cm x I cm x muscle deep on left hand first I.P. joint of thump, posteriority oblique (slashing);

(11) Incised wound 2 cm x I cm x skin muscle deep on root of II. index finger postero laterally oblique;

(12) Incised wound 9 cm x 3 half-cm x muscle bone deep, oblique on right shoulder top and lateral aspect :

(13) Incised wound 8 cm x 1 cm x muscle deep vertically oblique on rt. deltoid region laterally towards elbow 2cm long;

(14) Bruise 5cm x 2 cm oblique, reddish on right arm postero laterally lower one third-simple-blunt;

(15) Two incised wounds size 3 cm x leniar skin cut deep transverse another 2 cm x leniar skin cut deep oblique and verticle on rt. arm upper one third laterally - simple- sharp;

(16) Incised wound 6 cm x 1/2 cm x skin muscle bone deep (slashing) transversally oblique on rt. hand dorsally, from third metacarple going laterally upto right hand thumb metacarple area with narrowing of the wound;

(17) Incised wound (V shaped) 4 and half cm x half cm x muscle bone deep on postero-medial and lateral aspect of proxymal and terminal phalynx covering anterior aspect of thumb;

(18) deep incised wound 13 cm x 5 cm x skin x muscle x bone deep oblique, transverse from antero lateral aspect of rt. thigh upper one third;

(19) Incised wound 2 and half cm x half cm x muscle deep, vertically oblique on rt. supra scapular region on outer half par! - simple - sharp;

(20) Incised wound 18 cm x 5 cm x skin, scalp with flape and chip of bone seen cut on rt. occipital region, the whole cut flape is attached with six cm ;. healthy skin and the wound is inverted;

(21) Incised wound 6 cm x 1/2 cm x skin deep transversally oblique with tailing laterally on left supra scalp;

(22) incised wound 4 cm x 1/2 cm x skin deep, vertically oblique, left supra scapular outer part with tailing towards shoulder-simple-sharp;

(23) Incised wound 2 cm x 1/4 cm x skin deep-vertically oblique tailing towards shoulder, 1 cm, lateral to injury No. 22- simple-sharp;

(24) Abrasion 3/4 cm x 1/4 cm left pattella upper border reddish in colour-simple-blunt;

According to Dr. Temani, injuries Nos. 9 and 17 were of grievous nature. He deposes that the injuries had been caused by a heavy long sharp edged weapon. He proves the injury report Ex.P. 26.

P.W. 1 Lalchand deposes that he had suffered injuries by sword on his hands, head and face in the occurrence. It is thus fully established that Lalchand had suffered multiple injuries in the occurrence and they were caused by sharp edged

weapons.

(12). The question that calls for our consideration is whether the testimony of the prosecution witnesses that all the six accused appellants were the members of an unlawful assembly and they had participated in the occurrence.

(13). First informant Bhenru P.W. 5 claims to have witnessed the occurrence. He deposes that at about 10 or 11 p.m. he had gone alongwith Bhanwar, his cousin, to see him off and when they were going, they halted at the house of Ramjiwan in order to smoke, and when they were smoking they heard noise from the side of his house and therefore, he rushed to his house, and was followed by Bhanwar. He then says that when he reached his house, he saw Moti and Chhitar Inflicting injuries to Lal Chand and Chhagan, Jaggu, Ramsi, Ratan and Lala surrounding him. He states that the accused had caused injuries to his father Bhura and brother Ram Narain also. He deposes that when he cried for help Ramjeewan, Hanuman, Kesra and Chhittar reached there but by that time, the assailants ran away. He proves that F.I.R. Ex.P.1.

(14). There is merit in the contention of Mr. Gupta that Bhenru himself had not seen the occurrence. The reasons to follow:

(i) According to Bhenru, PW 5, Ramjiwan, Kesra, Hanuman and Chhittar had reached the place of occurrence hearing his cries but a reading of the statements of these witnesses shows that they had not seen Bhenru at the place of occurrence.

Hanuman P.W. 7 no where says that he had gone to the place of occurrence hearing the cries of Bherru he also does not say that he had seen Bhenru at the place of occurrence. So also Ramjiwan P.W. 4 does not say that when he reached the place of occurrence, Bhenru was there, Ramjiwan P.W. 4, though says that Bhenru was smoking in his house, yet does not say that Bhenru had rushed to the place of occurrence and he had reached earlier to him. The same is true for Chhittar P.W. 3. He deposes that on hearing cries, he rushed to the place of occurrence but he does not say that Bhenru was also there, much less that Bhenru had reached the place of occurrence before his arrival. So also Bhanwar

Lal P.W. 2, who according to Bhenru was with him at the house of Ramjiwan, does not say that Bhenru had rushed to the place of occurrence and he had followed him. It is different thing that the evidence shows that Bhanwarlals version that he had reached that place of occurrence on hearing the cries, is also not correct. P.W. 6 Kesra deposes that he was also smoking at the house of Ramjiwan, where he heard the cries, and whereupon he rushed to the place of occurrence. In this connection it is note-worthy that Bhenru no where says that Kesra was present at the house of Ramjiwan when he had stopped there for smoking. Even Ramjiwan P.W. 4 does not say that Kesra was at his house when Bhenru and Bhura had hailed at his house to smoke lobacco.

(ii) There is yet another cause to discard the testimony of Bhenru as eye witness. In the F.I.R. Ex.P. I Bhenru did not disclose the name of Chhittar as one of the assailants. It is not the case of Bhenru in his statement that he did not know Chittar from before, rather his explanation is that he had spoken the name of Chhittar also to the police but the police might not have written his name. The omission of the name of Chhittar by Bhenru in the F.I.R., who was said to be the main culpril, goes to show that he himself had not seen any pan of the occurrence.

(iii) Apart from that P.W. 12 Ramniwas deposes that Bhenru and Chhittar had approached him at about 12 and asked for the tractor to take the injured persons to the hospital. His statement does not indicate that Bhenru had told him that the accused were the assailants. The non-mentioning of the names of assailants by Bhenru to Ramniwas, whom he had approached for the tractor, goes to show that he had not seen the occurrence.

(iv) Bhenru admits in his cross examination that the assailants did not cause any injury to him. Bhenru is none else than the son of deceased Bhura and brother of deceased Ramnarain. If the assailantshad reason to inflict fatal injuries to his father and brother and alsoto his brother-in-law, there could not be any cause for them not toharm Bhenru, more so, when he had seen them committing theoffence. The very fact that no injury was caused to Bhenru, goes toshow that he had not reached the place of occurrence at the time theoccurrence was taking place.

(v) Then there are discrepancies in the statement of Bhenru during the trial and F.I.R. as also his police statement Ex.D.1. In the court statement, Bhenru says that he had seen Moll and Chhittar causing injuries to Bhura and Ramnarain and the other accused persons surrounding the victims but both these important facts neither find place in the F.I.R. Ex.P.1 nor in the statement Ex.D 1. There is thus clearly an improvement made by Bhenru for the obvious purpose of becoming an eye-witness of the occurrence.

In view of the facts which have appeared in the cross-examination of Bhenru and the attending circumstances of the case, we are of the definite view that Bhenru had not witnessed the occurrence. It seems that he had reached the place of occurrence after the assailants had made their escape good.

(15). The prosecution version was that Bhenru was the person first to reach the place of occurrence, and thereafter Bhanwar, Ramjiwan, Kesra, Hanuman and Chhittar had reached. If Bhenru had not seen the occurrence, there could not be any possibility of these persons witnessing the occurrence. However, Hanuman and Chhittar claim to have seen the accused persons fleeing from the place of occurrence.

P.W. 7 Hanuman deposes that when he was rushing to the place of occurrence, he had seen Moti, Chhittar, Ramsi, Ratan, Jagga and Chhagan and one or two persons fleeing from the place of occurrence. This part of statement of Hanuman can not be believed for the simple reason that he had not stated this fact in his statement Ex. D.4 recorded under Section 161 Cr.P.C. The explanation of the witness that he had stated this fact to the police but the police might not have written, can not be accepted in view of the categorical statement, of P.W. 19, Himmat Singh who says that he had not left out any part of the statement of the witnesses.

The same is true for P.W. 3 Chhittar. He says that while rushing to the house of Bhura on hearing cries, he had seen the accused running on which he asked them as to why they were running but they did not reply. This part of statement of Chhittar can not be believed for the same reason that he had not disclosed these facts in his statement Ex.D. 6 recorded under Section 161 Cr.P.C.

(16). The other set of the witnesses claim that when they reached the place of occurrence, Lalchand had told them that the accused were the assailants. P.W. 7 Hanuman, P.W. 4 Ram Jeewan, P.W. 8 Nanagram depose that when they reached the place of occurrence and asked Lalchand as to what happened, he told them that Moti, Chhittar, Ramsi, Ratan, Jagga and Chhagan had inflicted injuries to them. P.W. 3 Chhittar says that on his asking Lal Chand had told him that Moti Chhitter and Jaggu had caused injuries to them.

Hanuman and Nanagram had not disclosed this fact in their statements Ex.D. 4 and Ex.D. 11 recorded Under Section 161Cr.P.C. The omission of such an important fact in their statements amounts to contradiction and there is no hesitation in saying that they have made improvements in their statements. This renders their testimony unworthy of credence.

P.W. 4 Ramjiwan had not stated before the police the names of Chhagan, Jagdish, Ratan and Ramsi as the assailants whose names were disclosed by Lalchand. In his police statement Ex. D. 5, the names of Moti and Chhittar only appear. On the basis of testimony of Ramjiwan, it can certainly be said that Lalchand, if, at all, had disclosed the names of the assailants, he had not named Chhagan, Jagdish, Ratan, and Ramsi accused.

According to P.W. 3 Chhittar, Lalchand had disclosed the names of three persons as the assailants i.e. Moti, Chhittar and Jaggu but he had not stated this fact in his statement Ex.D.6 recorded by the police.

It is significant to point out that P.W.1 Lalchand in his statement nowhere says that he had disclosed the names of the assailants to the persons who had collected at the place of occurrence. In our opinion, P.W.4 Ram Jeewan, P.W.7 Hanuman, P.W.8 Nanagram and P.W.3 Chhittar have given false statements that Lalchand had disclosed to them the names of the accused persons as the assailants.

It has come in the statement of P.W. 8 Nanagram that Hanuman and Inder Kumar had informed him that Moti, Chhittar, Ramsi, Ratan, Lala, Chaggan and Jagdish had. committed murder of Ram Narain and Bhura and they had caused-injuries to Lalchand. But this fact was not stated by Nanagram in his police statement Ex.D.

11. More- over P.W. 7 Hanuman no where says that he had told the names of assailants to Nanagram. Inder Kumar has not been examined by the prosecution.

(17). The above discussion of the evidence leads to an irresistible conclusion that neither Bhenru nor any other witness had seen the occurrence while the assailants are alleged to have run from the place of occurrence. It is also not established that the names of the assailants were disclosed by Lalchand to the persons who had collected at the place of occurrence.

(18). Hanuman P.W. 7 gives yet another reason to pin point accused Moti as one of the assailants. He says that Lalchand was crying 'Motiya ne mar diya, Motiya ne mar diya' i.e. Moti had killed, but this important fact was not disclosed by Hanuman in his police statement Ex.P. 4 There is an obvious improvement by Hanuman which renders his testimony unworthy or credence.

(19). Now remains the testimony of Lalchand P.W. 1 the injured eye witness. Lalchand deposed that at about 10 or 10.30 p.m. he was sleeping at the house of his father-in-law Bhura and on hearing sound of a 'thali' he woke up and saw Moti causing injuries by a sword on his brother-in-law Ramnarain and Chhittar causing injuries on his father-in-law Bhura by a sword. He then says that Moti and Chhittar both inflicted sword blows to him also and as a result of the injuries, his hand was chocked off. According to him, he sustained injuries on his head, hands and leg. He says that Chhagan, Jaggu, Ramsi and Lala were also with Moti and Chhittar and they were having axes and 'Farsics' in their hands. He deposes that all the six accused had caused injuries to him. He states that electric bulb was glowing at the place of occurrence.

In his cross-examination, the witness admits in unequivocal terms hat in his police statement he had not stated that Chhagan, Jaggu, Ramsi, Lala and Ratan had given beatings to him or to his father-in-law or brother-in-law. As a matter of fact, in that statement the witness had not even stated that those accused had come alongwith Moti and Chhittar.

What he had stated against them was that when Moti and Chhittar were going from the place of occurrence he had seen Chhagan, Ramsi and Lala standing by

the side of a wall near 'Babul' tree. It is relevant to point out that in that statement Ex.D. 2, the names of Jaggu and Ratan accused had not been stated by the witness. In the court statement, Lal Chand wants to say that these five accused persons had also come alongwith Moti and Chhittar and had taken part in the beatings. This clearly is an improvement in his statement.

It may be that the witness had seen the three accused persons Chhagan, Ramsi and Lala standing at some distance near 'Babul' tree which was some 60 yards from the place of occurrence but that can not be a circumstances on which it can be held that they and Moti and Chhittar had formed an unlawful assembly. It is significant to point out that in his police statement Lalchand had not stated that they were armed with weapons or they had taken part in occurrence. There is, therefore, nothing on record to hold that they were the members of unlawful assembly. The possibility that Chhagan, Ramsi and Lala if they were seen by Lal Chand were only the spectators, is not ruled out. It is pertinent to note that Lala has already been acquitted by the trial Court.

It is relevant to point out that these accused persons are the residents of the same village and therefore the possibility of their standing there innocently can not be ruled out. The witness has obviously given false statement in the court that they had also taken part in the beatings of Bhura, Ramnarain and himself. Of course, the names of these persons were mentioned in the F.I.R. Ex.P. 1 but in view of our finding that Bhenru, the first informant had not seen the occurrence, it can not be found that Chhagan, Ramsi, Lala, Ratan and Jaggu were the members of unlawful assembly and they had taken part in the occurrence.

(20). As a result of the foregoing discussion, we have no hesitation in holding that Ramsi, Lalchand, Chhagan, Jaggu and Ratan were neither the members of unlawful assembly, nor did they take part in the beatings of Bhura, Ramnarain and Lal Chand.

(21). Now we switch over to the case against Moti and Chhittar. As already stated, Lalchand deposes that both Moti and Chhittar accused had caused injuries to him by swords. He also claims to have seen both Moti and Chhittar causing injuries by swords to Bhura and Ramnarain.

(22). The following two questions need to be decided:-

(i) Whether accused Moti and Chhitlar had been identified by Lal Chand as his assailants?

(ii) Whether Lal Chand had an occasion to see the author of injuries of Bhura and Ram Narain?

(23). Pointing out that the witnesses had not stated in their police statements that there was a bulb glowing at the site at the time of occurrence and this fact had not been stated in the F.I.R. Mr. Gupta argued that it should be presumed that there was no artificial light available at the site and Lal Chand was not in a position to identify the assailants. He canvassed that the fact that Lal Chand had woke up on hearing the sound of a 'thali', was not stated during the Investigation of the case and this is clearly an improvement.

(24). We have gone through the evidence on record. It is true that in the F.I.R. Ex.P. 1, it was not stated that there was artificial light available at the spot. It is also true that in his police statement Ex. D. 2 Lalchand had not stated that there was a bulb glowing at the spot. However, in our opinion, on the basis of these omissions in the F.I.R. or in the statement Ex.D. 2, it can not be found that there was no artificial light available at the spot at the time of occurrence. It is significant to point out that the police had inspected the site on 28.4.1989. It has been recorded in the site inspection memo Ex.P. 2 at point 'G' that there was an electric bulb infront of the gate of the 'Kachha' house. This site inspection memo is proved by Himmat Singh P.W. 19. Bhanwer Lal, P.W. 3 motbir of the memo also deposes that the police had inspected the site in his presence and had prepared the site inspection memo Ex.P. 2, which bears his signatures. No question, challenging to the narration of fact at point 'G' was asked on behalf of the accused in the cross-examination of Himmat Singh. Once Himmat Singh had stated that he had seen the site and had prepared the site inspection memo Ex.P. 2 correctly, it was for the accused to put questions in the cross-examination of the witness if he/they wanted to question the correctness of any fact stated therein. In our opinion, the trial court has rightly observed that the facts stated in the site inspection memo Ex.P. 2 go to prove that there was an electric bulb fixed out side the gate of 'Kachha' house

where the occurrence had taken place.

(25). In our opinion, it was not required to be stated in the F.I.R. Ex.P. 1 that there was bulb glowing near the place of occurrence. The F.I.R. is not the encyclopedia of the case. The purpose of the F.I.R. is only to set the criminal law in motion. We have held that the F.I.R. was not lodged by an eye witness and, therefore, non-mentioning of the fact of the light at the spot in the F.I.R. is not fatal to the prosecution case. So also, the fact, that Lal Chand had not stated about the existence of the artificial light in his statement Ex.D. 2, does not render his testimony unworthy or credence. In the statement Under Section 161Cr.P.C., only those facts are stated by the witnesses which are asked by the I.O. It is significant to point out that Lal Chand, when interrogated, was in precarious condition as he had suffered multiple injuries on his body. It could not be expected that he would state certain facts suo moto on which questions were not put by the I.O. In the circumstances of the case, omission of the fact in the statement Ex.D. 2 does not render the testimony of Lal Chand unreliable.

In the case of Kaki Ramesh v. State of A.P. (1), on the contention that the factum of light was not stated in the F.I.R. and the statements under Section 161 Cr.P.C. their Lordships at para 4 of the report observed as under:-

'We do not think if in the F.I.R this was required to be done, or, for that matter, the prosecution witness was required to state about it to the I.O., nor was the I.O. required to ask about it.'

(26). It seems that the I.O. did not think it necessary to put question, regarding the light, to the witnesses as this fact had already appeared to his notice at the time of the inspection of the site that there was electric light near the place of occurrence. Even on assuming that it was the duly of the I.O. to verify this fact from the witnesses and he, failed in his duty, the prosecution case regarding the existence of the light can not be doubted and the accused is not entitled to acquittal on that count. The mistakes committed by the I.O. during the investigation of a case cannot entitle an accused to an acquittal. If it is accepted that for the mistakes committed by the I.O. the accused should be acquitted, then it would mean that the justice is in the hands of the police than of the Court.

The Supreme Court in the case of Krishna Pal and Anr. v. State of U.P. (2) and also in the case of Karnel Singh v. State of M.P. (3), has observed that if the benefit of the mistakes is given to the accused then justice would tantamount to playing in the hands of I.O.

In our opinion, on the ground that it did not come in the statement of Lalchand recorded Under Section 161 Cr.P.C. that there was artificial light, his testimony that there was a bulb glowing, can not be disbelieved.

(27). The accused have led evidence to establish that there was no road light in the village during the days the occurrence had taken place and also that the deceased had not taken connection of the light. The accused have examined D.W. 2 H.M. Meena and D.W. 3 Nathulal. H.M. Meena was Junior Engineer, R.S.E.B. Valika from 1.5.1995. He deposes that there was no private connection in the Joshian Wali Dhani. In cross-examination, Mr. Meena admits that he had not seen the record of the consumers before the year 1995. Mr. Meena was the Junior Engineer from the year 1995. Therefore, his statement is of no help to the accused.

Nathulal D.W. 3 deposed that he was Sarpanch of Lakhana Gram Panchayat from 1978 to 1991 and Joshian Wali Dhani was in his jurisdiction. According to him, there was no light point near the house of Bhenru and there was no electric pole upto the distance of 200-300 metres. The evidence of Nathulal is not based on any record. He admits that he does not know that at what place the electric poles were fixed. He also admits that there were electric poles in the village Joshian Wali Dhani. He further says that if any one wants to commit theft of electricity, he can do so by using 200-300 metres of wire.

In our opinion, by the defence evidence it is not at all established that there was no electric light at the gate of 'Kachha' house.

(28). Lal Chand deposes that he had identified Moti and Chhittar when they had inflicted injuries to him by swords. We find no cause to jettison this evidence of the injured. This part of the evidence of Lal Chand that injuries were caused to him by Moti and Chhittar, can not be rejected on the ground of omission of certain facts in

his police statement or that his evidence has not been believed by us against four other accused. Since the injuries to him were caused by Moti and Chhittar by standing near his cot Lal Chand had enough opportunity to identify them.

(29). Coming to the cases relied on by Mr. Gupta, it may be stated that in the case of Prem Singh v. State of Punjab (4), the Apex Court had refused to uphold the conviction of accused Prem Singh on the ground that the evidence of the witnesses on whose evidence the conviction was recorded, was not believed against the acquitted accused. The observations of their lordships can not be interpreted to mean that if the evidence of a witness is rejected in part, it can not be acted upon in other respects. Special features of that case were that according to two witnesses, who had given evidence against Prem Singh and the acquitted accused, the injuries to the deceased had been caused by a spear but the medical evidence revealed that there were no such injuries. It was thus a case where the direct evidence of the eye-witnesses ran counter to the medical evidence. More over in that case the independent witnesses, though were available, had not been examined by the prosecution. It is in this fact situation that their Lordships refused to maintain the conviction of Prem Singh.

In the instant case the evidence of Lal Chand is fully corroborated by the medical evidence. Lal Chand says that multiple injuries had been caused to him by weapons like sword. The medical officer also found multiple incised wounds on his person. There is thus corroboration of the testimony of Lal Chand by the medical evidence. In this case, it is not the fact situation that independent persons had witnessed the occurrence and they have been with held by the prosecution. That being so, on the dictum of the case of 'Prem Singh' the testimony of Lal Chand can not be discarded against Moti and Chhittar so far as his injuries are concerned.

(30). In the case of Balaka Singh and Ors. v. The State of Punjab (5), their Lordships acquitted the accused on various grounds. One of the grounds was that the case against the convicted accused and acquitted accused was so mixed up that it was not possible to separate one from the other. Apart from that, the witnesses examined in the case were the partisan and interested in the prosecution case. In that case it was also noticed that the inquest report did not

find place the names of some of the assailants.

(31). We pause here to read the following observations of the Apex Court in the case of Redder Narain v. State of A.P. endorsed in the case of Khujji @ Surendra Tiwari v. State of Madhya Pradesh (6), regarding the requirement of mentioning the names of the assailants in the inquest report:

'A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he has assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report'.

Thus it is settled legal position that the names of the witnesses or of the assailants are not required to be mentioned in the Inquest memo, and no inference can be drawn by such omissions.

(32). In the case of Balaka Singh (supra) it has been clearly observed at para 8 of the report that attempt should be made by the Court to separate grain from chaff, i.e. the truth from the falsehood.

(33). In the instant case, we have tried to separate the truth from the falsehood and have come to the conclusion that Moti & Chhitar only had taken part in the beating of Lalchand. The trial Court has not erred when it was convicted Moti & Chhittar Under Section 307 I.P.C.

(34). Now it is to be seen whether the testimony of Lalchand that he had seen Moti and Chhittar causing injuries to Bhura and Ram Narain is believable.

(35). Lalchand deposes that on hearing the sound of 'Thali, he woke up and he saw that Moti was causing injuries by a sword to Ram Narain and Chhittar was causing injuries by a sword to Bhura and thereafter both of them caused injuries to

him by the swords and both the accused again inflicted injuries to Bhura and Ram Narain.

(36). Lal Chand says that he was asleep and on hearing the sound of 'Thali' he woke up, The fact that there was a sound of 'Thali', which was the cause of his awakening was of course not stated by Lal Chand in his police statement Ex.D. 2 but on the ground of that omission the testimony of Lalchand can not be discarded. It is common knowledge that the police statements are not written in details. Specific question as to what made Lalchand awake might not have been asked by the I.O. and hence the witness did not tell about the sound of Thali'. The omission of the fact in his statement Ex.D. 2 is not such which can be said to be a contradiction. By the evidence it is fully established that there was sound of 'Thali' before the accused assaulted the deceased and Lalchand and that was the cause of awakening of Lal Chand, who obviously had slept just before the incident and had not gone in sound sleep by that time.

(37). Moreover, according to Lalchand both Moti and Chhittar had inflicted some sword blows to Ramnarain and Bhura after injuries had been caused to him. Thus Lalchand had enough opportunity to see both the accused assaulting Bhura and Ram Narain.

(38). Apart from that, even on assuming that Lal Chand had woke up when injuries were inflicted on him after Bhura and Ram Narain had already suffered injuries, it can not be accepted that the two accused could not be convicted on the basis of evidence of Lal Chand because Lalchand, Bhura and Ramnarain had sustained injuries by swords at one and the same time and place. When Lalchand had seen the two accused causing injuries by sword to him, the only Inference that can be drawn in that the same two accused had inflicted injuries to Bhura and Ram Narain by swords.

(39). For the reasons aforesaid, the conviction of Moll and Chhittar under Section 302 I.P.C. can not be asserted. They have been rightly convicted Under Section 302 IPC. However, their conviction Under Section 148 IPC can not be sustained in view of the fact that we have come to the conclusion that only two persons Moti and Chhittar had participated in the occurrence. There cannot be an unlawful

assembly unless the assailants are atleast five in number. Thus the charges proved against Moti and Chhittar are under Section 307 IPC for making murderous assaults on Lal Chand and Under Section 302 IPC for committing murder of Bhura and Ram Narain with intention to cause their death.

(40). Now it comes to be seen if both the accused could be convicted Under Section 302 and 307 IPC without the charges under those Sections. It was contended that as charges Under Section 302 or 307 I.P.C. simplicitor were not framed against Moti and Chhittar and they had been charged only with the aid of Section 149 IPC they can not be convicted for the substantive offence Under Section 302 or 307 I.P.C. Mr. Gupta cited the cases of Nanak Chand v. State of Punjab (7); Suraj Pal v. State of U.P. (8), Lakhan Mahto and Ors. v. State of Bihar (9) and Subran alias Subramanian and Ors. v. State of Kerala (10) in support of his contention.

(41). The contention of the learned Public Prosecutor and learned counsel for the first informant was that both the accused were aware from the very beginning as to what charges they were required to meet and, therefore, no prejudice has been caused to Moti and Chhittar because they were not charged Under Section 302 or 307 I.P.C. and were charged only with the aid of Section 149 I.P.C. They placed reliance on the case of State of A.P. etc. v. Thakkidiram Reddy and Ors. etc. (11).

(42). It is a fact that both the accused were not charged Under Section 302 or Section 307 IPC and were charged only Under Section 302/149 and 307/149 IPC. The legal position on the point which emerges in different rulings is stated hereunder.

The Apex Court in the cases of 'Nanakchand, 'Surajpal, 'Lakhan and 'Subran (supra) has observed that charges Under Section 302 and 302/149 IPC are separate and distinct and accused can not be convicted for the offence for which he was not specifically charged. The cases of Nanak Chand, Surajpal, and Subran (supra) were decided by Bench of three Hon. Judges and the case of Lakhan was decided by a Bench of two Hon'ble Judges. It is significant to point out that in the case of Subran (supra), though at para No. 11 of the report, their Lordships observed that if the accused was charged Under Section 302/149 I.P.C. and not

separately charged Under Section 302/149 I.P.C. his conviction Under Section 302 IPC was not permissible, yet their Lordships convicted the accused Under Section 304 Part 1 I.P.C. for the murder of same person. This shows that there is no legal impediment in recording conviction of a person, for the substantive offence even though he was not charged for that offence and was charged only with the aid of Section 149 I.P.C.

However, in the recent case of State of Andhra Pradesh etc. v. Thakkidiram Reddy and Ors. (supra), the Apex Court relying on the observations in the case of Willis William Slaney v. The State of Madhya Pradesh (12), decided by a bench of five Hon. Judges has held that even if separate charge is not framed against an accused, he can be convicted on the basis of the charge framed. Their Lordships after considering the provisions of Section 464 and 465 Cr.P.C. observed that no finding, sentence or order should be reversed or altered on account of the error, omission or irregularity in the proceedings, unless in the opinion of the court a failure of justice has in fact been occasioned. Their Lordships have reiterated the observations made in the case of Wlllis (William) (supra) that in Judging a question of prejudice, the courts must act With a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

(43). In view of the observations of the Apex Court In the case of William (supra) there can not be any hesitation in saying that conviction of a person can not be set-aside merely on the ground of non framing of a charge unless the prejudice is shown to have been caused to him.

(44). In the instant case, the charges were framed against the accused vide order dated 18th of June 1992. The charge of Moti and Chhittar Under Section 307/149 and 302/149 IPC read as under :-

igyk& fdvius vU; vfHk;qDrx.k ds lkFk feydj fnukad 27-4-89 dks jk=h ds 10&11 cts Bachan Singh v. State of Punjab (13), has laid down that for making the punishment of death sentence, special reasons are required to be recorded and

the normal rule is that sentence of life Imprisonment should be awarded.

In the case of Machhi Singh and Ors. v. State of Punjab (14), It was observed that the extreme penalty of death should be awarded in rarest of rare cases. Their Lordships laid down that the manner of commission of murder, motive for commission of murder, anti social or socially abhorrent nature of the crime, magnitude of crime, personality of victim of murder, are some of the points which should be kept in mind while awarding death sentence. Reiterating the principle enunicated in the case of Bachan Singh (supra), their Lordships observed that the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability and life imprisonment is the rule and death sentence is an exception. It was further observed that a balance sheet of aggravating and mitigating circumstances should be drawn up and then following two questions may be asked and answered;-

(a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls 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?

(50). We have taken into consideration all the circumstances appearing on recordin the light of the proposition rendered in the case of Machhi Singh (supra). Theaggravating circumstance against the accused persons is that they had committedmurder of two persons while they were asleep. The mitigating circumstances are thatboth the accused are in their young age and no motive for the commission of murderhas been proved by the prosecution. The further mitigating circumstance is that themurder can not be said to have been committed in an extremely brutal, grotesque,diabolical, revolting and dastardly manner. It is not the case where the accused aftercausing injuries cut the victims into pieces or an attempt was made to set the bodiesaflame.

Keeping all the facts and circumstances of the case, we are of considered opinion that the sentence of death was not required to be passed in this case. The

sentence of imprisonment of life will meet the ends of justice.

(51). Consequently,

(i) the appeals of Lala, Ramsi, Ratan, Chhagan and Jaggu are allowed. They are acquitted of all the offences charged with. They are on bail. They shall not surrender to the bail bonds, which stand cancelled.

(ii) the appeals of Moti and Chhitar are partly allowed. While maintaining their conviction Under Section 302 and 307 IPC, the sentence passed Under Section 307 is upheld. They are sentenced to undergo imprisonment for life for the offence under Section 302 IPC.

(iii) The reference for death sentence is rejected.