

State of Rajasthan Vs. Gopal

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Court : Rajasthan

Decided On : May-01-2001

Reported in : 2001(4)WLN517

Judge : Shiv Kumar Sharma and; Khem Chand Sharma, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 366 and 368; [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 149, 302 and 436

Appeal No. : D.B. Criminal Death Reference No. 1 of 2000

Appellant : State of Rajasthan

Respondent : Gopal

Advocate for Def. : Jagdeep Dhankar, Sr. Adv.,; D.V. Tholia,; D.S. Dhariwal

Advocate for Pet/Ap. : S.R. Bajwa, Sr. Adv.,; V.R. Bajwa,; Biri Singh,;

Disposition : Appeals partly allowed

Judgement :

Sharma, J.

1. The appellants were the accused on the file of the learned Additional Session Judge Sambhar Lake, Distt. Jaipur bearing Sessions Case No. 45 of 1992. They were found guilty, convicted and sentenced as under:

1. Gopal

u/Sec.147 IPC

Two years R.I, Sentence of death 10years R.I. and fine of Rs. 10,000 (in default to further undergo one year R.I.

u/Sec. 302IPC

u/S.436/149 IPC

u/Sec. 323IPC

One year R.I.

u/S. 324/149 IPC

Two years R.I.

u/Sec. 449*IPC

Rigorous Life Imprisonment and fine Rs. 10,000 in default to undergo one year R.i.

u/Sec. 395IPC

10 year RI and fine of Rs.10,000/- (in default to undergo one year R.I.

2. Mool Chand@ Murli

u/Sec.147 IPC

Two Year R.I. Rigorous Life Imprisonment 10 years R.I. and fine of Rs. 10,000 (in default to further undergo one year R.I.

3. Sagar S/o Rekhatam

u/S.302/149 IPC

4. Rameshar S/o Bhuvana

u/S. 436/149 IPC

5. Nivan Ram

6. Molak Ram

7. Rameshwar S/o MariaRam

u/Sec. 323IPC

One year R.I.

u/S. 324/149 IPC

Two years R.I.

8. Bholu Ram

9. Jodha Ram

u/Sec. 449IPC

RigorousLife Imprisonment and and Fine Rs. 10,000 in default to undergo one year R.I.

10. Sheo Ram

11. Babulal

12. HiraLal

13. ChhittarMal

14. Ram Chandra

u/Sec. 395IPC

10 years R.I. and fine of rs.10,000/- (in default to undergo one year R.I.

15. Banna Ram

16. Nathu Ram

17. BhanwarLal

18. Dana Ram

19. Surja Ram

20. Prahlad

21. Nanu Ram

22. Sagar S/o Murll

23. Mohan

24. Asha Ram

25.Jagdish

All the sentences were directed to run concurrently but the sentences passed in default of making payment of fine were ordered to run one after the other. Accused Khinva Ram and Ladu Ram had died during the trial, therefore, proceedings against them were dropped. Proceedings against accused Sunda Ram being juvenile, were also dropped. Accused Rekha Ram, and Murli son of Sukhdev were acquitted of all the charges.

2. Learned Additional Sessions Judge Sambharlake made reference (bearing Death Reference No. 1/2000) under Section 366 Cr.P.C. for confirmation of death sentence awarded to accused appellant Gopal, who also assailed the findings of the learned Judge by preferring two appeals under Section 374(2) Cr.P.C. bearing Nos. D.B. Cr. Jail Appeal No. 200/2000 and D.B. Cr. Appeal No.186/2000. Other 24 appellants also preferred appeals bearing Nos. D.B. Criminal Appeal No. 187/2000 and 182/2000. Bhoma Ram S/o Ramu Ram who was appellant No. 5 in D.B. Criminal Appeal No.187/2000 died on July 9, 2000 during the pendency of the appeal. Learned counsel Shri Biri Singh made an application to this effect along with the death certificate of Bhola Ram on March 28, 2001. We are satisfied that accused appellant Bhoma Ram son of Ramu Ram is dead, therefore, we drop the proceedings against him.

3. It is well settled that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of Sections 366 and 368 Cr.P.C. The High Court must not only to see that the order passed by the Sessions Court is correct but also to examine the entire evidence itself independently of the Sessions Court's appraisal and assessment of that evidence.

4. Bearing in mind the above principle we may straight-away proceed to state, with brevity, the case of the prosecution presented for our scrutiny. Written report (Ex.P.1) came to be lodged by informant Nand Lal (PW.5) with the Police Station Renewal at 3.45 p.m. on Jan. 16, 1991 stating therein that as many as 60 persons armed with Pharsies attacked the house of his brother Dhanna Lal son of Narain Lal Jat of Basdi Khurd. They gave beating to Dhannalal, undressed the ladies, lit fire to the house and robbed his ornaments and property. An immediate intervention of the police was prayed for by the informant. Police Station Renewal registered a case bearing FIR No. 18/91 Under Sections 147, 148, 149, 436 393/323 1PC and investigation commenced. Head Constable No. 355 Gopal Sharma proceeded towards the place of occurrence. A look at the Inquest Report (Ex.P.3) occurrence. A look at the Inquest Report (Ex.P.3) demonstrates that Head Constable gopal Sharrna alongwith constables Tulsi Ram and Bhim Singh when reached at the spot, they found the dead body of Dhanna Lal son of Narain.

They sent wireless message to higher officials and added Section 302 IPC. At 9.00 p.m. Nathmal Pareek SHO (PW.9) reached there and he put his signatures on the Inquest Report, it appears that Head Constable Gopal Sharma reached at the place of occurrence at 5 p.m. Post Mortem of the dead body of Dhanna Lal was conducted on January 17, 1991 at 8 a.m. by Dr. Keshav Behari (PW.6) and Dr.R.S. Shekhawat (PW. 15). According to the Post-Mortem Report (Ex.P.7) deceased Dhanna Lal had sustained as many as 15 injuries out of which two lacerated wounds on left parietal region and right side of forehead, five lacerated wounds on lower lip, left thigh, left forearm, right leg and post aspect 1/3 of left arm, multiple abrasions on left leg, scapular region to sacrum and bruised areas. Bruises on left thigh and left arm. All these injuries were anti-mortem. Deceased also sustained post mortem burn injuries on right forearm, right thigh and complete right leg on postero lateral aspect and anterior aspect of right foot (dorsal surface). The cause of death was shock due to fracture of left parietal bone and laceration of the brain tissue and adjoining vessels of the brain.

5. Site was inspected and Memo of site plan w is drawn with description. Injury report of Narain Lal (PW. 1) the father of deceased is E x.P.8. The accused were arrested and recovery memos of weapons at the instance of the accused persons were drawn. Golden Murkis alleged to have been snatched from the ears of Narain Lal were also recovered. The Forensic Science Laboratory Report is Ex.P.104. On conclusion of investigation the charge sheet was filed against the appellants and other co-accused persons.

6. In due course the case came up for trial before the learned Additional Sessions Judge Sambharlake. The trial Court framed charges under Sections 147, 302/149, 436/149, 395/149, 324/149 and 460 IPC against the appellants who denied charges and claimed trial. The prosecution examined as many as 18 witnesses. Thereafter explanation of the accused appellants under Section 313 Cr.P.C. was recorded. The accused denied the allegations and claimed innocence. Evidence in defence was wasted by the accused appellants. The learned trial Court after hearing the final submissions convicted and sentenced the accused appellants as indicated hereinabove.

7. Before dealing with the submissions advanced by the learned counsel for the appellants we would like to indicate the nature of the evidence led by the prosecution in support of the case. To begin with there is a central evidence consisting of six eyewitnesses, Narain (PW.1) Bhura (PW.2) Smt. Santosh (PW.3), Manohar (PW.4), Nand Lal (PW.5) and Smt. Bhagli (PW. 14), who were allegedly present near the place of occurrence. This evidence is sought to be corroborated by SHO Nath Mal Pareek (PW.9) who recovered the weapons of offence at the instance of the accused appellants. Bhiwa Ram (PW.7) Bholu Ram (PW.8) and Sukh Ram (PW.12) are motbirs of recoveries. Dharam Singh ACJM (PW.7) conducted test identification parade of Golden Murkies.

8. Let us now scan the credibility of the prosecution witnesses through whom the prosecution has to establish that the case against the appellants has been proved beyond reasonable doubt. Coming to the testimony of Narain (PW. 1) it is to be noticed that he is the father of deceased Dhanna. His injury report is Ex.P.8 according to which he sustained as many as eleven injuries out of which one is incised wound on right leg, four lacerated wounds on left leg, left thigh, left ear lobule and left forehead region. He also sustained four abrasions on left leg, left thumbs and right leg and a bruise on both sides of back. In this deposition he stated that in the early hours of morning when he, Dhanna, Dhanna's wife, Manna, Manna's wife and Bhura were at their house, about 35 persons armed with lathies, axe, Gainli and Sariya came over there and stationed at the well belonging to Aslya. Thereafter three police persons Bheeva, Talchha and Gopal had a talk with those persons at the well and reached near his house and asked Dhanna about the gun. They searched the house but did not find any gun. When they came out of the house at about 11 a.m. Dhanna told him that he had apprehension of his death from the persons assembled at the well, therefore, he needed protection of police but police persons refused to extend any help to him and went towards the village. All those persons then encircled the house of Dhanna and started pelting stones, Dhanna's wife and Manna entered inside the house and he (Narain) and Bhura remained outside. Manna's wife entered into kitchen. Accused Kheenva lifted Pula (Bundle of dry grass) and ignited fire and threw it on the chhappar (shed) of the kitchen. Finding the kitchen in the flames of fire when Manna's wife came out of the kitchen, accused Nathu son of Rekha inflicted lathi blow on her

person and Bhonraya son of Asia snatched her golden neckless. Thereafter, Danya son of Mana and Sagrya son of Murlya with the help of gainti, started demolishing the house of Dhanna. Accused Bhanwar and Gopal instigated to dig the roof of the house. Thirteen stone patties (slabs) were thereafter removed. Pulas were ignited with fire by Bhonrya son of Asia and they were thrown inside the roofless structure. Thereafter, they said 'Dhanna is dead' and they extinguished fire with the help of water. Bhanwarya, Gopalya, Sagrya, Jivan Nath, Mohnya, Rameshwarya, Natye, Sagrya son of Rekha, Danya, Ramshwarya son of Manya Prahlad broke open the door and entered inside the house and dragged the body of Dhanna out of the house. Dhanna was alive at that time. Gopalya, Bhonrya and Mulya inflicted Gainti blows on the person of Dhanna. Gopalya inflicted Gainti blow on temporal region of Dhanna. Bhanwarya inflicted Sariya blow, Natiya son of Rekhla inflicted lathi blow on the head. Rameshwar son of Marya inflicted Sariya blow on his forehead. When he (Narain) made hue and cry Jagdish inflicted axe blow on his forehead, Natya son of Rekhla also gave beating. Sagrya son of Rekhla snatched golden Murki, (earring) from his ear. On being instigated by Gopalya Asia, Kheenwla, Bhurya and Gopala entered inside the house, broke open the box and left.

9. Bhura (PW.2) deposed that he had gone to the house of Dhanna two days after the 'Sankranti'. As many as thirty persons gathered at the well near his house. They were abusing and threatening Dhanna to kill. In the afternoon three police persons came and enquired about gun from Dhanna and searched his house. Dhanna told that he did not have a gun but only possess a Gajgundi (hand made blasting instrument used to frighten animals). Dhanna then said that his life was in danger and requested police persons to help him bill they did not pay and heed and left. Thereafter, the persons who had gathered at the well, surrounded Dhanna's house and started pelting stones. Dhanna rushed inside his house. Accused Bhanwra and Gopal bolted the house from outside. They gave beating to Narain who remained out. Munna's wife entered in the kitchen. Bhanwara, Aasa, Khema and Gopal lit Fire on the kitchen. Munna's wife came out. They inflicted lathi blows on her person. Thereafter, Bhanwara, Gopal, Nathu, Sagar and two three other accused climbed on the roof and started demolishing it. After the roof completely broken Kherma and Aasha handed over 'Pulas' to Bhanwar and Gopal,

who ignited fire. Moola Ram and Aasha then asked him (Bhura) to fled. In the meantime some body inflicted lathi blow on his left leg and he then ran away from that place. This witness could only recognise Khemaram, Aasha, Rekha, Jeevan, Sagar, Murli, Gopal, Bhanwar and Nathu in the trial Court.

10. Smt. Santosh wife of Manohar (PW.3) in her deposition stated that about thirty to thirty five persons armed with lathies, Gainli, axe and Jailies gathered at the well near their house and started abusing them. In the afternoon Renwal Police came and inquired about the gun. Her father-in-law Dhanna then showed Gajgundi. When police proceeded back, Dhanna requested to protect his life but the police declined the request and left. Thereafter, the persons who had gathered at the well came near to their house and surrounded it. They started pelting stones. Dhanna entered in the house. She rushed to the kitchen. They put fire in the kitchen and she had to come out. Nathu inflicted lathi blow on her person. Sagar Murli, Jagdish and Bhanwar torn her clothes. Bhanwar snatched her golden neckless. Thereafter, Gopal, Bhanwar, Jeewan, Molak, Nathu, Sagar son Rekhe, Dana, Rameshwar, Sagar son of Murli and Prahlad climbed over the roof. Sagar and Dana started demolishing roof and after removing the roof they put fire in the house. Dhanna prayed for his life. They extinguished fire and jumped inside the house and gave beating to Dhanna who made hue and cry. They dragged Dhanna out and Gopal inflicted Gainti blow on his temporal region. Bhanwar inflicted Sariya blow on the temporal region. Nathu inflicted lathi blow on his head. Rameshwar also inflicted lathi blow on his head. Taking Dhanna dead, Gopal and Bhanwar instigated to burn the body and then they put fire on the body. Her grand father-in-law (Narain) when shouted, Bhanwar inflicted Sariya blow on his forehead, Nathu inflicted lathi blow on his head and Jagdish inflicted axe blow on his forehead. Sagar snatched his golden Murkies (earrings). Thereafter, Gopa], Bhanwar, Khema and Aasha entered the house, broke open the box and took away ornaments and valuable clothes.

11. Manohar (PW.4) and Smt. Bhagli (PW.14) almost repeated the aforesaid version and corroborated the testimony of Narain, Bhura and Smt. Santosh. Nand Lal (PW.5) is the informant who lodged the FIR with the police station. According to his statement under Section 161 Cr.P.C. (Ex.D.4) he is not an eye witness but

he made improvement in his testimony recorded by the trial Court.

12. Dr. Keshar Behari (PW.6) deposed that on January 17, 1991 he alongwith Dr.R.S. Shekhawat (PW.15) conducted post-mortem of the dead body of Dhanna. He found as many as 15 injuries on the body, out of which injuries No. 1 to 11 were antimortem and and burn injuries No.12 to 15 were caused after the death of Dhanna. He also examined the injuries of Narain, that were eleven in number out of which injury No. 1 on right leg was caused by sharp edged weapon. Dr. R.S. Shekhawat (PW. 15) also exhibited the post- mortem report (Ex.P.7) and proved his signatures.

13. Gopal Lal (PW.16) in his deposition stated that on January 16, 1991 he was posted as Head Constable at Police Station Renwal. When the FIR Ex.P. 1 was produced before him he was incharge of Thana. SHO Nathmal was not present at the police Station. He reached at the place of occurrence which was 5 km. away from the Police Station after an hour and sent wireless message to the higher officials. He also admitted to have one to village Basdi in connection with the investigation of another case.

14. Nathmal Pareek SHO (PW.9) stated that on January 16, 1991 he was posted as SHO Police Station Renwal but had gone to Jaipur in connection with the officialduly. In his absence Gopal Sharma Head Constable was incharge of Thana. When at 9 p.m. he came back to Renwal he found a case bearing No. 18/91 registered, therefore, he proceeded to the place of occurrence at village Basdi. Head Constable had already reached there. He had drawn site plan and Inquest Report. Dead body of Dhanna was identified by Nand Lal. After post-mortem, the dead body was handed over the Nand Lal. He also got medically examined the injured Narain Lal and recorded the statements of Nandlal, Narain Lal, Manohar Lal, Smt. Bhagli, Smt. Santosh, and Shrawan on January 18, 1991, He had also drawn recovery memo of blood stained clothes of the deceased Dhanna. He also recovered blood stained soil from the spot and had drawn recovery memo. He arrested the appellants and had recovered the weapons of offence at their instance. He also recovered golden earrings of Narain at the instance of ' appellants Sagar and Moolchand @ Murli and had drawn recovery memos and

after completion of investigation filed charge-sheet.

15. Bhiwa Ram (PW.7) Bholu Ram (PW.8) and Sukh Ram (PW.12) are the Motbirs of recoveries affected by the SHO Nathmal Pareek and Shri Dharam Singh ACJM conducted the identification parade of golden earrings. Om Prakash (PW.10) is the constable who deposited 25 sealed packets with the FSL. Rameshwar (PW.13) is the photographer who exhibit the photographs of the deceased and place of occurrence. Girdhari Singh (PW.18) is the incharge Malkhana who handed over 25 sealed packets to Om Prakash (PW.10) for depositing at F.S.I.

16. Mr. S.R. Bajwa, learned Senior Counsel for the appellants canvassed that the genesis and the origin of the present occurrence appears to be shrouded in deep mystery. The dramatic manner in which the assault is said to have started and the appearance of the accused persons without any rhyme or reason and their assault on persons against whom they had neither any concern or animus introduces an element of inherent improbability in the case. There is no evidence to show that there was bad blood between the deceased Dhanna and the accused persons. It is impossible to believe that thirty persons would join hands in the nefarious plan to kill Dhanna without any provocation, without any earthly reason and without any pertinent occasion. Learned counsel, therefore, contended that in this view of the matter, the prosecution case itself becomes wholly improbable.

17. It is next urged by the learned counsel that FIR (Ex.P.1) is cryptic. Nand Lal (PW.5) who has narrated the eye-witness account of the incident in his statement, did not even name the accused persons in the FIR. Even the fact in regard to murder of Dhanna did not find place in it. This act of informant Nand Lal further wrapped the origin of the incident in the sheet of darkness. The alleged eye-witnesses were not examined on the day of the incident, though they were available in the village and SHO Nath Mal Pareek had reached there at 9 p.m. The SHO Nathmal Pareek planted the recoveries of weapons and Golden earrings. The articles were not produced in the trial Court. There were no particular marks over the golden earrings that could suggest that they belonged to Narayan. No corresponding injuries were found on the ear lobes of Narain. Unless ear lobe is torn earrings cannot be snatched. The earrings were not stained with blood and

recovery of earrings is take.

18. It is further contended by the learned counsel that Head Constable Gopal (PW.16) did not say about the earlier incident and concealed the memo of search of the house of deceased Dhanna which he conducted just before the occurrence. In the presence of the police persons how could the incident take place? Presence of three police persons at the scene of occurrence is a very important link which is conspicuously missing in the prosecution story.

19. Learned counsel also submitted that on the day of the incident from 5 p.m. to 10.30 p.m. identity of the accused persons were not known as is evident from the Inquest Report. The investigating Officer made no attempt to associate independent witness of the incident. All the alleged eye witnesses narrated tutored version. There are material contradictions in their statements. Narain is an old man who neither can see properly nor hear. He admits this fact in his cross-examination. Bhura is a relative of the deceased and a chance witness. His presence at the time of incident is doubtful. Though he sustained lathi blow but there is no medical report to support his version. Testimony of Smt. Santosh is quite laconic. She disowned ever her statement recorded during trial by the learned trial Court. She did not identify the accused but narrated their names which is strange and unusual. Statements of Smt. Bhagli and Manohar are self contradictory and no reliance can be placed on them. It is also improbable that after finding a violent group at the nearby well Dhanna did not make any attempt for safety. Who prevented Dhanna from running away from his house though ample opportunity was there. The prosecution also failed to explain post death burns found on the dead body. There was a gap of one hour between the death and the burns. Though according to the version of the witnesses the assailants were more than thirty but the deceased Dhanna and injured Narain sustained less injuries. If the group of assailant was violent then why they left Narain alive? The prosecution also failed to explain as to what was the common object of the assailants. If the assailants gathered to kill Dhanna then who prevented them from using sharp edged weapons? Why Dhanna did not receive any injury by sharp edged weapon? Why the police did not recover the torn clothes of Smt. Santosh? Why half burnt stocks of Juwar or ash were not recovered from the broken house

of Dhanna? Why broken door and window were not seized? Why Gainti alleged to have been used by the assailants was not recovered? Why broken stone slabs were not recovered? Graphic description of the incident as narrated by the witnesses, was not possible. Many new theories were introduced by the witnesses during the trial. Theories of breaking the roof and snatching away earrings were narrated for the first time before the trial Court. Site plan of well where the assailants assembled was not prepared. Witnesses were also assaulted by the accused but the trial Court did not frame charge for this act. The accused were only charged under Section 147 IPC which means that they were not armed with lethal weapons. Why charge under Section 148 IPC was not framed. This is a case of gross over implication of the accused persons. The prosecution has placed all chaff and no grain and, therefore, all the appellants deserve to be acquitted. Reliance is placed on various judicial pronouncement.

Learned counsel Sarva Shri Biri Singh, N.A. Naqvi and S.C. Gupta almost adopted the submissions advanced by Shri S.R. Bajwa.

20. Per contra Mr. R.S. Agarwal learned Public Prosecutor for the State of Rajasthan and Mr. Jagdeep Dhankar learned Senior Advocate for the complainant contended that the appellants acted in calculate manner to eliminate Dhanna. They formed unlawful assembly with this object and assembled at the well near the house of Dhanna. But it appears from the testimony of the witnesses that they were under the apprehension that Dhanna might possess a gun, therefore, they called the police for conducting the search of Dhanna's house and when they found that he only had 'Gajgundi' an instrument used to frighten the animals, they waited police to go and thereafter, surrounded the house of Dhanna and killed him in a brutal manner. Nathmal Pareek SHO in his deposition stated that the accused on the said day instituted a report of theft which was registered as case No. 17. Gopal Sharma Head Constable also deposed that he had gone to village Basdi to investigate another case. Thus the version of the eye- witnesses stood corroborated by Nathmal Pareek and Gopal Sharma and inconsistency between the ocular and medical testimony is not material. The witnesses who are the illiterate villagers were subjected to very lengthy cross-examination that continued for days together and under these circumstances, the contradictions in their

statement are not material. The testimony of the eyewitnesses, if appreciated from the point of view of trustworthiness, they are reliable. It is further contended that it is not necessary to name the accused persons in the Inquest Report. The FIR is not cryptic, it was lodged to secure police assistance and no prejudice was caused to the accused if charge under Section 148 IPC was not framed. The infirmities shown by the learned counsel for the accused are not material in the facts and circumstances of this case. Reliance is placed on the various authorities, that shall be dealt with at appropriate juncture.

21. After closely scrutinising the material or record we noticed the following salient features in the prosecution evidence-

(i) The FIR No. 18/91 was lodged at 3.45 p.m. on January 16, 1991 by the informant Nand Lal (PW.5) the brother of the deceased Dhanna and none of the accused was named in it. Only reference of 60 unnamed assailants armed with 'Pharsies' was given.

(ii) On January 16, 1991 a report of theft bearing No.17 was also lodged by the accused.

(iii) SHO Nath Mal Pareek (PW.9) put his signatures on the Inquest Report (Ex.P.3) on January 16, 1991 at 10.30p.m. Inquest Report took about five and half hours in its completion. Head Constable Gopal Sharma (PW.16) proceeded to draw it from 5 p.m. Inquest Report does not bear the names of the assailants.

(iv) Statements under Section 161 Cr.P.C. of witnesses Narain (Ex.D.1), Nand Lal (Ex.D.4), Manohar Lal (Ex.D.5) and Smt. Bhagli (Ex.D.6) were recorded by the SHO Nathmal Pareek on January 16, 1991. Whereas the statements of Smt. Santosh (Ex.D.2) and Bhura CEx.D.3) were respectively recorded on January 17,1991 and January 18,1991.

(v) According to Post Mortem Report (Ex.P.7) deceased Dhanna sustained as many as 11 antimortem injuries as under-

(1) Lacerated wound - 3-1/4' x 3/4' x - bone underneath also left parietal region. The brain matter ruptured and there is presence of clothed blood.

- (2) Lacerated wound - 2' x 1/2' x 1/4' Rt. side forehead region upto bone deep.
- (3) Lacerated wound - 2' x 1/2' x 1/8' left side of lower lip.
- (4) Lacerated wound - 2-1/2' x 1/2' x 1/4' lower 1/3 Lat. aspect of left thigh.
- (5) Lacerated wound - 1-1/4' x 1/2' x 1/4' Antero lateral aspect of left thigh.
- (6) Lacerated wound - 2' x 1/2' x 1/4' middle 1/3 ant. surface of Rt. leg.
- (7) Lacerated wound --1-1/2' x 1/2' x 1.4' post aspect lower 1/3 of Lt. arm.
- (8) Abrasion 3' x 1/2' lower 1/3 lat. aspect of left leg.
- (9) Multiple abrasions extending from scapular region to sacrum and bruised areas.
- (10) Bruise 6' x 3' post aspect of left thigh lower 1/3.
- (11) Bruise areas 7-1/2' x 3-1/4' post aspect of left arm. Deceased Dhanna also sustained following post-mortem burn injuries-

- (1) Right forearm and palmar aspect on the right forearm complete and palmar aspect of Rt. hand.
- (2) Burn Injuries-present lower 1/2 and knee on post asp. of right thigh and knee of right.
- (3) Burn injuries-present complete right leg on postero lateral aspect of right leg.
- (4) Burn Injury anterior asp. of right-foot (dorsal surface).

The cause of death was shock due to fracture of left parietal bone and laceration of the brain tissue and adjoining vessels of the brain.

(vi) Narain (PW.1) sustained as many as 11 injuries as per Injury Report (Ex.P.8) as under-

- (1) Incised wound regular 1-1/4' x 1/4' x 1/4' Middle 1/3 ant. asp. of Rt. leg margin clotted blood.
 - (2) Abrasion 2' x 1' just above injury No. 1.
 - (3) Lacerated wound 3/4' x 1/4' x 1/4' lowerirregular margin 1/3 ant. asp.clotted blood of left leg.
 - (4) Abrasion 1-1/2' x 3/4' just above injury No.3.
 - (5) Lacerated wound 3/4' x 1/2' x 1/4' Lat. asp.irregular margin Mid. 1/3 ofclotted blood left thigh.
 - (6) Swelling 3' x 1-1/2' Around the injury No.5 tenderness.
 - (7) Abrasion 1' x 1/2' on left thumb.
 - (8) Abrasion 2' x 1/4' Lower Ant. Asp. of Rt. Leg.
 - (9) Lacerated of lobule 1/4' x 1/8' Left ear lobule left.
 - (10) Lacerated wound 1' x 1/2' x 1/4' Left forehead region.
 - (11) Bruise red 10' x 2' Horizontal on both side of in colour back
- (vii) Seizure memos (Ex.P.27) and (Ex.P.28) of blood smeared soil recovered from the place of occurrence were drawn on January 16, 1991 and 9.30 p.m.
- (viii) Seizure memos of ash (Ex.P.29) recovered from (he place where the dead body of Dhanna was lying, was drawn on January 16, 1991 at 9.45 p.m.
- (ix) Golden Murki (earring was recovered at the instance of accused Mool Chand @ Murli on January 22, 1991 vide seizure memo Ex.P. 16.
- (x) Another Golden Murki (earring) was recovered at the instance of accused Jeevan on January 22, 1991 vide seizure memo (Ex.P. 17).
- (xi) Iron Khuwadiya, bamboo stick, Phanti (slick), Lathi, wooden handle gandasi, wooden pestle (Moosal) Bumboo lathi, Teekar lathi, Jaili, Iron Jaili, Wooden Jur,

Iron Sariya, Kunj lathi, and Jhadi were recovered at the instance of accused Baboolal, Sheo Ram, Sunda Ram, Rakha Ram, Heera Lal, Ladu Ram, Jodha Ram, Mool Chand @ Murli, Jeewan, Khinwa, Rameshwar, Molak, Rameshwar son of Mana Ram, Sagar and Bhola vide Ex.P.9 to Ex.P.15 and Ex.P.18 to Ex.P.25.

(xii) Report of Forensic Science Laboratory, Jaipur (Ex.P. 104) reveals that soil recovered vide Ex.27 was found stained with human blood.

22. We now proceed to consider the submissions advanced before us. As already stated, none of the assailant has been named in the FIR. Even the fact of Dhanna's death has not been incorporated in it. An attempt was made by the teamed counsel for the appellants to establish that as the FIR does not record details about the part played by each accused it is cryptic and the prosecution story is an after thought. We do not find any substance in this submission. The FIR was lodged by Nand Lal who is not an eye witness of the occurrence as per his statement (Ex.D.4) recorded under Section 161 Cr.P.C. Though he made embellishments in his testimony before the trial Court but we hold that he did not see the occurrence from his eyes. He lodged the FIR to secure police assistance and under these circumstances no details could be expected to be incorporated in the FIR. In *Manoj v. State of Maharashtra* (1) it was indicated by their Lordships of the Supreme Court that the First Information Report need not be an encyclopedia of the evidence and what is required to be stated is the basic prosecution case. In *Mohan Singh v. State of M.P.* (2) it was observed by the Hon'ble Supreme Court that objection against FIR is not sustainable where the informant who lodged the FIR was not an eye-witness.

23. The argument advanced in respect of Inquest Report is also devoid of merit. In *Eqbal Baig v. State of A.P.* (3) their Lordships of the Supreme Court observed that 'It could not be said that the inquest report is the statement of any person wherein all the names ought to be mentioned.' In *Surjan v. State of Rajasthan* (4) it was indicated by the Hon'ble Supreme Court that 'A statement in the inquest report by itself and it certainly can not be pitted against the essence of the medical witness given in court.'

24. When we turn to the evidence of the eye witnesses Narain, Smt. Santosh, Smt. Bhagli, Manohar and Bhura we find that when the assailants came armed with weapons and made attack, deceased Dhanna, Smt. Bhagli Smt. Santosh and Manohar rushed to take shelter in the house, only Narain and Bhura remained out. In view of this fact situation we have to analyse their testimony. Even if we exclude the testimony of Bhura who is a resident of other village we find the presence of Narain, Smt. Santosh, Manohar and Smt. Bhagli quite natural at the scene of occurrence. Learned counsel Mr. Bajwa look us to (their entire statements. It appears from their statements that all of them are illiterate villagers and they were subjected to very lengthy cross examination that continued for days together. Four learned counsel cross examined Narain (PW.1) for two full days on July 7, 1992 and July 12, 1992. Smt. Santosh Bai (PW.3) was cross examined on July 12, 1993 and August 3, 1993 in such a manner by four learned counsel that she started crying and weeping in the Court and her demeanour was noted by the learned trial Judge at the end of her statement. We would like to incorporate the question that was asked by the learned counsel from Smt. Santosh Bai in her cross-examination. It reads thus-

'(English Translation)

Question - You have just stated that accused were 30 in number and you had counted them before they started beating but in your police statement Ex.D-2 you stated that accused were 30 to 40 in number and in your Court statement dated 12.7.93 you stated that they were 30 to 35 in number. Why did you not record the correct numbers of the accused persons in your statement before the police and statement before the Court?

Answer - (witness was repeatedly asked this question but she kept mum 10 minutes and did not reply.)'

25. It is unfortunate that the learned trial Judge permitted such irrelevant questions to be asked in the cross-examination of an illiterate lady. When she stated that the accused were 30 in number, there was no occasion to contradict her from her previous statements where she stated that the accused were 30 to 35 & 30 to 40 in number. Reference of the observations of Hon'ble Supreme court in Rammi v.

State of M.P. (5) appears necessary at this juncture. It was indicated thus - (Paras 24, 25, 26 & 27)

'24. When an eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can necessarily make his testimony totally non-discrepant. But Court should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is unrealistic approach for judicial scrutiny.

25. It is a common practical in trial Courts to make out contradictions from the previous statement of witness for confronting him during cross examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness.

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be 'contradicted' would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross examiner to use any former statement of the witness, but it cautions that if it is intended to contradict the witness the cross examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to 'contradict' the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict the witness.'

26. In a fact situation where the accused attacked the victims, who rushed to take shelter in the house, their Lordships of the Supreme Court in *State of Haryana v. Tek Singh* (6) indicated thus-

'..... In such a fact situation, some contradiction as to who assaulted whom, with what weapon and whether it was by the sharp edge or blunt side of the *gandasa* are bound to be there, particularly when the blows are given in quick succession, it would be against the ground reality to expect the witness to depose exactly on which part of the body the blow landed. In these circumstances even if there is some exaggeration with regard to the infliction of blows, it would hardly be a ground for rejecting their testimony.'

It was further held that where investigating officer was not asked as to whether Investigating Officer was not asked as to whether he had put questions to the eye-witnesses regarding details of the injuries inflicted or of persons who had caused the injuries, omission of such details in the testimony of the eye witness would not render his/her testimony unreliable particularly when the Courts below believed the testimony of that witness and the omission were not contradictions in the peculiar content.

27. In the instant cases as earlier noticed, the deceased Dhanna, Smt. Santosh, Manohar and Smt. Bhagli rushed to take shelter in the house, thereafter, the accused set fire to the shed of kitchen and demolished the roof. Then they jumped inside the house gave beating to Dhanna, dragged him out and made attempt to burn his body, Narain, Smt. Santosh, Manohar and Smt. Bhagli are near relatives of the deceased who were residing with the deceased at the time of occurrence in that very house. Narain is an injured eye witness and his presence along with Smt. Santosh, Smt. Bhagli and Manohar at the time of occurrence is quite natural. Narain and Smt. Santosh were subjected to very lengthy cross examination. Their statements could not be completed in one day and when cross examination resumed after so many days, it appears, the witnesses were confronted with their earlier statements made before the trial Court. It was an unequal duel between the illiterate villagers and the refined lawyers. We have closely scanned the testimony of Narain, Smt. Santosh, Manohar and Smt. Bhagli and we find consistency in

their statements in so far as the part assigned to the accused appellants Gopal, Mool Chand @ Murli, Sagar S/o Rekha Ram, Jivan Ram, Rameshwar son of Bhuwan, Rameshwar son of Manaram, Nalhu Ram, Bhanwar Lai, Dana Ram, Prahlad, Sagar son of Murli and Mohan, Asha Ram and Jagdish is concerned. In so far as accused appellants Molak Ram, Jodha Ram, Sheo Ram, Babulal, Hiralal, Chhittar Mal, Ram Chandra, Banna Ram, Surja Ram and Nanu Ram are concerned, injured eye-witness Narain (PW.1) did not even name these persons in his examination of chief. A close look at the statements of eye-witnesses reveals that these persons were not the members of unlawful assembly and no overt act has been attributed to them, therefore, we are of the view that the prosecution has failed to establish the charges against them beyond reasonable doubt. Learned court below did not properly scan the testimony of witnesses in respect of Molak Ram, Jodha Ram, Sheo Ram, Babulal, Hira Lal, Chhittar Mal, Ram Chandra, Banna Ram, Surja Ram and Nanu Ram and convicted them casually.

28. We do not agree with the submissions of Mr. Bajwa learned counsel that the genesis and the origin of the occurrence is shrouded in deep mystery and the assault appears to be started in a dramatic manner. As we already noticed that the accused, prior to the occurrence lodged a report of theft bearing No. 17 with the police station Renwal. Head constable Gopal Sharma alongwith two other constables came to the village Basdi Khurd in connection with the said report and made a search of deceased Dhanna's house. These police persons had a talk with Dhanna about the gun in the presence of the accused. Having found that Dhanna did not possess gun, the accused waited police to go and thereafter committed the offence. Injured eye witness Narain named all the three police persons in his statement. From the evidence on record we are of the view that the accused acted in calculate manner to eliminate Dhanna. They were under the apprehension that Dhanna might possess a gun, therefore, they lodged the report, called the police and when they found that Dhanna did not have a gun they became fearless and committed the offence. The accused formed unlawful assembly and gathered at the well near the house of Dhanna. They waited to act until the police arrived. The manner in which accused planned to eliminate Dhanna speaks that there was some earthly reason behind all this.

29. Omission of not framing charge under Section 148 IPC is also not fatal as we are of the view that in not framing the said charge no prejudice is caused to the accused. Mr. Bajwa learned counsel also contended that the accused inflicted 'Gainti blows' on the temporal region of the deceased Dhanna yet not a single incised or pointed injury was found in the post mortem report. Therefore, the ocular testimony should not be believed. We do not find any merit in this submission also. Their Lordships of the Supreme Court in G.S. Walia v. State of Punjab (7) indicated that, 'Moreover, a blow given by an axe with its sharp side pointing towards the victim may not always result in causing an incised wound. What type of injury it will cause would depend upon various factors like the position of the assailant and the victim, angle at which it hits the body, the part of the body where it lands, the force with which it hits the body etc. To reject the evidence as untrue in such circumstances, considering it as inconsistent with medical evidence, without considering the relevant factors would mean mechanical appreciation of such evidence.'

The evidence of Narain discloses that the accused Gopal inflicted Gainli blow on temporal region of the deceased and Bhanwar Lal, nathu and Rameshwar S/o Mana inflicted blows with lathies and sariyas on the head and forehead. Corresponding lacerated wounds were found in the post mortem report. Under these circumstances, if the blow given with a 'Gainti' did not cause incised or pointed injury it cannot be said that in fact no blow was given with the 'Gainti'.

30. The ocular testimony of Narain finds support from the recovery of Golden Murkis (earrings) and corresponding injury on his left ear lobule. We do not agree with the contention of Mr. Bajwa, learned counsel that unless ear lob is teared earrings could not be snatched. Earrings which are loosely tied with the ears, may be snatched even without causing the injury, Narain may be an infirm person but he is not a liar if any independent witness is not associated, it does not render his testimony unreliable. We find his testimony honest and true.

31. The prosecution has fully explained the post death burns found on the dead body of Dhanna. Smt. Santosh categorically stated that taking Dhanna dead Gopal and Bhanwar instigated to burn his body and they put fire on his body. Ash and

soil from the spot was recovered instantly by the investigating officer and the soil was found stained with human blood by the F.S.L. Recoveries of weapons and Golden Murkis were effected at the instance of the accused. We do not see any new theory introduced during the trial. Narain, Manohar and Smt. Bhagli were examined under Section 161 Cr.P.C. on the date of the incident and they categorically stated about demolition of roof and snatching of Golden Murkis at the hands of the accused. The discrepancies in the statements of the witnesses shown to us by Mr. Bajwa learned counsel are in our view, due to normal errors of observation, normal errors of memory, due to lapse of time and due to mental disposition, such as shock and horror at the time of occurrence. We have considered the evidence of the eye-witnesses from the point of view of trustworthiness and we are satisfied that they had not spoken untruth and their testimony had not been polluted. It is no doubt true that some persons who could have supported the prosecution version as independent witnesses have not been associated. But the reason is not far to seek. The accused, if they could commit the ghastly crime for the type which they had with the deceased Dhanna and his family, no independently person could dare come and depose against them.

32. That takes us to the quantum of sentence. For deciding just and appropriate sentence to be awarded for an offence the aggravating and mitigating factors are to be delicately balanced in a dispassionate manner. It has been propounded in *Denis Lunde Megaulha v. State of California* (8) that 'no formula of a full proof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime of murder.' In *Bachan Singh v. State of Punjab* (9), their Lordships of the Supreme Court moved by compassionate sentiments of human feelings ruled that sentence of death should not be passed except the 'rarest of rare cases'. On the facts of the instant cases we are unable to persuade ourselves to make a distinction in the case of appellant Gopal and appellant Bhanwar Lal so far as the imposition of sentence is concerned. Since appellant Bhanwar Lal has been awarded life imprisonment we think that sentence of death imposed on appellant Gopal should not be confirmed by us. From the record it is established that all the five fingers of the right hand of appellant Gopal were amputated before the occurrence and by now he has been under the agony of the sentence of death

for a considerable time. Taking the totality of the circumstances we find that this case is not amongst the 'rarest of rare cases'. While confirming his conviction, we are constrained to commute the sentence of death passed on the appellant Gopal in to one for imprisonment for life. We answer then death reference accordingly.

33. In view of discussion made hereinabove we allow the appeal of appellants Molak Ram, Jodha Ram, Sheo Ram, Babulal, Hira Lal, Chhitarmal, Ram Chandra, Banna Ram, Surja Ram and Nanu Ram and set aside their conviction. They are exonerated from the charges under Sections 147, 302/149, 436/149, 323, 324/149, 449 and 395 IPC. They shall be set at liberty forthwith if not required in any other case.

Appeals of Mool Chand @ Murli, Sagar son of Rekha Ram, Rameshwar s/o Bhuvana, Jivan Ram, Rameshwar S/o Mana Ram, Nathu Ram, Bhanwar Lal, Dana Ram, Prahlad, Sagar S/o Murli and Mohan, Asha Ram and Jagdish shall stand dismissed and their conviction under Sections 147, 302/149, 436/149, 323, 324/149, 449 and 395 IPC stands confirmed.

The appeals of appellant Gopal are partly allowed as indicated hereinabove and death sentence awarded to him shall stand modified and instead he will have to undergo imprisonment for life. His conviction under Sections 302/149, 147, 436/149, 323, 324/149, 449 and 395 stands confirmed.

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