

**AFR**  
**Court No. 48**  
**Reserved on: 27.09.2019**  
**Delivered on: 14.11.2019**

**CRIMINAL APPEAL No. 3574 of 2015**

1. Binnu Srivastava @ Pawan Srivastava  
 2. Pawan Srivastava @ Prakash --Appellants  
 Vs  
 State of Uttar Pradesh --Respondent  
 WITH

**CRIMINAL APPEAL No. 4045 of 2015**

Santosh Kumar Yadav @ Kariya ----Appellant  
 Vs  
 State of Uttar Pradesh ----Respondent  
 WITH

**CRIMINAL APPEAL No. 4046 of 2015**

Santosh Kumar Yadav @ Kariya ----Appellant  
 Vs  
 State of Uttar Pradesh ----Respondent  
 WITH

**CRIMINAL APPEAL No. 3657 of 2015**

1. Raj Nath Yadav.  
 2. Atul Kumar Yadav.  
 3. Prashant Yadav.  
 4. Rahul Rawat.  
 5. Sandeep Rawat @ Rinku. ----Appellants  
 Vs  
 State of Uttar Pradesh ----Respondent

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For Appellants : Sri V.P. Srivastava, Senior Advocate,  
 assisted by Sri Lav Srivastava, Advocate

For Respondent/State : Sri J.K. Upadhyaya, learned AGA.

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**Hon'ble Pritinker Diwaker, J.**  
**Hon'ble Raj Beer Singh, J.Per:**

**Per: Raj Beer Singh,J**

1. All these appeals arise out of a common judgment and order dated 18.08.2015 passed by the learned Additional Sessions Judge/Fast Track, Bhadoi-Gyanpur in Session Trial No.106 of 2008 (State Vs. Binnu Srivastava @ Pawan Srivastava and 7 others), under Sections 147, 302, 149 of I.P.C., and S.T. No. 07/09, under Section 25 Arms Act, both P.S. Gyanpur, District Bhadohi, whereby accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Santosh Kumar Yadav @ Kariya, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav have been convicted under Section 147 and 302/149 of I.P.C. and were sentenced to imprisonment for life along with fine of Rs. 25,000/- each under Section 302/149 of I.P.C. and two years rigorous imprisonment along with fine of Rs. 2000/- under Section 147 of I.P.C. Accused-appellant Santosh Kumar Yadav @ Kariya was further convicted under Section 25 of Arms Act and was sentenced to 5 years rigorous imprisonment along with fine of Rs. 5000/-. In default of payment of fine, accused-appellants were sentenced to different period of imprisonment.

2. Prosecution version is that on 20.06.2008 at around 12.00 noon, deceased Raj Kumar, who was brother of complainant Manoj Kumar Yadav, has left his home for going to Gyanpur by motorcycle and when he reached near veterinary hospital, accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Santosh Kumar Yadav @ Kariya and Sandeep Rawat @ Rinku, riding on two motorcycles, stopped deceased Raj Kumar. Accused-appellants Rahul Rawat and Prashant Yadav were already present there. All these accused persons made exhortation to kill Raj Kumar and consequently accused-

appellant Santosh Kumar Yadav @ Kariya shot a bullet at the head of deceased Raj Kumar from country made pistol. Resultantly, Raj Kumar died on spot. This incident was witnessed by complainant (PW-1) Manoj Kumar Yadav, (PW-2) Bhola and by several other persons.

3. (PW-1) Manoj Kumar Yadav reported the matter to police by submitting a written complaint Ex.Ka-1 and on that basis, case was registered against all the 8 accused-appellants on 20.06.2008 at 12.30 P.M. under Sections 147, 149, 302 of I.P.C. vide Ex.Ka-4.

4. The inquest proceedings were conducted by S.I. Biri Singh under the supervision of Inspector Umesh Pratap Singh. The dead body of deceased was sent for postmortem, which was conducted on 20.06.2008 by (PW-4) Dr. Rajeev Kumar. Following injuries were found on the body of the deceased:

(i) Wound of entry 1.5 cm. x 0.5 cm. in longitudinal place. 15 cm. above vertically from lat. end and left eyebrow and 7 cm. up and med form. Tragus over lat. half and (L) frontal area. bleeding and shout particle implemented over skin around wound in 5 cm. X 6 cm. diameter upper (L) eye and blackening C carbon particle (L) eye brow. Lat. 2/3 hair show seizing 3 cm. x 3 cm. area around wound show searching blood present. margins and wound inverted.

(ii) Exit wound 2 cm. x 1 cm over Rt. Temporal area just above the superior attachment of Rt Pinna to scalp and 6 cm Horizontally back from lat eye of Rt. eye brow, margin ever feet, bleeding occur.

Cause of death of deceased is shock and hemorrhage, as a result of ante-mortem injury caused by firearm.

5. Investigation was taken up by (PW-6) Inspector Umesh Pratap Singh. Samples of blood stained and simple Gitti and Kankar were collected from the spot vide memo Ex.Ka-7. It was alleged that after the incident, stampede has taken at the spot and six pairs of sleeper were seized from the spot. During investigation, on 21.10.2008, while being on police custody remand, accused-appellant Santosh Kumar

Yadav @ Kariya got recovered country made pistol of 315 Bore, which was used in the incident, and it was taken into possession vide recovery memo Ex.Ka-15. After completion of the investigation, charge sheet was filed against all the accused-appellants.

6. Learned trial court framed charge under Section 147, 302/149 of I.P.C. against all the accused-appellants and accused-appellant Santosh Kumar Yadav @ Kariya was further charged under Section 25 of the Arms Act. They pleaded not guilty and claimed trial.

7. In order to bring home guilt of accused-appellants, prosecution has examined 10 witnesses. Accused persons were examined under Section 313 of Cr.P.C., wherein they have denied the prosecution evidence and claimed false implication. In defence, one Rakesh Maurya was examined as (DW-1).

8. After hearing and analyzing the evidence on record, all the accused persons were convicted under Sections 147, 302/149 of I.P.C. and accused-appellant Santosh Kumar Yadav @ Kariya was further convicted under Section 25 of Arms Act vide impugned judgment and order dated 18.08.2015 and they were sentenced, as stated in paragraph no.1 of this judgment.

9. Being aggrieved by the impugned judgment and order of the trial court, appellants Binnu Srivastava @ Pawan Srivastava and Pawan Srivastava @ Prakash have preferred Criminal Appeal No. 3574 of 2015, accused-appellant Santosh Kumar Yadav @ Kariya has preferred Criminal Appeal Nos. 4045 of 2015 and 4046 of 2015, and appellants Raj Nath Yadav, Atul Kumar Yadav, Prashant Yadav, Rahul Rawat and Sandeep Rawat @ Rinku have preferred Criminal Appeal No. 3657 of 2015. As all these appeals have been preferred against common judgment and order thus, these appeals are being decided by this common order.

10. Heard Sri V.P. Srivastava, Learned senior Advocate, assisted by

Sri Lav Srivastava, Advocate, learned counsel for the appellants and Sri J.K. Upadhaya, learned A.G.A. for the State and perused the record.

**11.** Learned Senior counsel for the appellants submits:

- (i) that presence of (PW-1) Manoj Kumar Yadav, (PW-2) Bhola and (PW-3) Amit Kumar Rawat at the alleged spot is doubtful. In the FIR there is no such version that how (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have reached at the spot and it was not clarified that where were they going. Further the name of (PW-3) Amit Kumar Rawat does not find place in the FIR.
- (ii) that all the alleged eye witnesses (PW-1) Manoj Kumar Yadav, (PW-2) Bhola and (PW-3) Amit Kumar Rawat are interested and inimical witnesses. (PW-1) Manoj Kumar Yadav is brother of deceased Raj Kumar while (PW-2) Bhola is uncle of deceased and that all these three witnesses were accused in an earlier incident of murder of the father of accused-appellant Santosh Kumar Yadav. It is also stated that statement of (PW-2) Bhola and (PW-3) Amit Kumar Rawat under Section 161 CrPC, were recorded with undue delay, which has not been explained.
- (iii) that spot of the alleged incident could not be established. As per FIR, the incident took place near veterinary Hospital, while in site plan, the alleged hospital has not been shown and the spot of the incident has been shown in front of the shop of Anoop Electrical. It was stated that (PW-1) Manoj Kumar Yadav has categorically stated that alleged incident took place near veterinary hospital, while as per the Investigating Officer, the veterinary Hospital is situated at quite long distance from the spot of the incident as shown in the site plan. It is further pointed out that in his cross examination (PW-2) Bhola had stated that deceased was stopped and fired near Home Guard

Commandant Office.

(v) that there are contradictions and inconsistencies in the statements of witnesses. As per prosecution version, deceased was going on motorcycle, but his motorcycle was not found on the spot. As per prosecution version, deceased has died on the spot but when the police reached at the spot, his body was lying in Hospital.

(vi) that there is no evidence that all the accused-appellants were having common intention to commit murder of deceased.

It was submitted that there is absolutely nothing to indicate that accused-appellants were aware that deceased would pass from the way, where allegedly incident took place. Further, even as per prosecution version, accused-appellants Rahul Rawat and Prashant Yadav were already present at the spot, but there is nothing even to remotely indicate that these accused persons were aware that deceased would pass from there. It is submitted that there is absolutely no evidence that all the accused persons have any pre-arranged plan to commit murder of the deceased. Version of the prosecution that all the accused persons have made exhortation is quite vague. Even, it has not been clarified that what specific exhortation was made by each of the accused persons. It was submitted that in view of all these facts, it is clear that it is not a case, where all the accused-appellants have common intention to commit murder of deceased.

**12.** Per contra, it has been submitted by the learned A.G.A. that all the eye witnesses have made clear and cogent statements regarding the incident. The testimony of these witnesses can not be doubted on the ground that they are related to deceased or that they were earlier accused in the murder of the father of accused-appellant Santosh Kumar Yadav @ Kariya. Enmity is double edged weapon and thus, alleged enmity may be motive to commit murder of deceased. (PW-1) Manoj Kumar Yadav has lodged prompt first information report

naming all the accused-appellants and his version finds ample corroboration from (PW-2) Bhola and (PW-3) Amit Kumar Rawat. It was submitted that substantially there is no change in the spot of incident. If a person refers that incident took near some well known place, it does not mean that he intended to say that incident has taken place just at that point but his reference would cover entire vicinity of that place. Regarding common object, it was argued that there is evidence that all accused-appellants have made exhortation to kill deceased and as a consequence of the same, accused-appellant Santosh Kumar Yadav @ Kariya has fired a bullet at deceased and thus murder of deceased was committed in furtherance of common intention of all accused-appellants.

**13.** We have considered the rival contentions of of both the parties and perused record.

**14.** In evidence, (PW-1) Manoj Kumar Yadav stated that the incident took place on 20.06.2008 at 12.00 noon. There was property dispute between his family and of accused-appellant Santosh Yadav. Earlier in 2005 the family members of Santosh Yadav have given beatings to his family in which his brother Raj Kumar was injured and in that regard a case was pending in court. On 20.06.2008 his brother Raj Kumar (deceased) was going to Gyanpur by motorcycle while (PW-1) Manoj Kumar Yadav and his brother Rakesh were going to Gyanpur on foot. Accused-appellants Binnu Srivastava, Pawan Srivastava and Raj Nath Yadav on one motorcycle and accused-appellant Atul Kumar Yadav, Santosh Kumar Yadav and Sandeep Rawat @ Rinku on another motorcycle, were also going towards Gyanpur. Near veterinary hospital, accused-appellants encircled motorcycle of deceased Raj Kumar and made exhortation to kill Raj Kumar and consequently accused-appellant Santosh Kumar Yadav fired a bullet from country made pistol, which hit at the head of deceased Raj Kumar. Thereafter an atmosphere of stampede has prevailed. The incident was witnessed by him (PW-1), his brother Rakesh, one Bholanath Yadav and by many

others. Raj Kumar has died at spot. (PW-1) Manoj Kumar Yadav further stated that accused-appellants Rahul Rawat and Prashant Yadav were already present at spot and they have stopped the deceased and also exhorted to kill the deceased.

**15.** (PW-2) Bhola stated that on account of land dispute between family of deceased and of accused-appellant Santosh Yadav, in 2005 an scuffle has taken place and in that regard a case was pending in court. On 20.06.2008 at 12.00 noon when he (PW-2) was going to market, near home guard office, he saw that deceased Rajkumar was going towards market on motorcycle. Deceased was stopped by Rahul and Prasant and at the same time accused Binnu, Raj Nath Yadav and Pawan came on one motorcycle, while accused Rinku, Atul and Santosh came on another motorcycle and they all made exhortation to kill Raj Kumar and consequently accused Santosh Kumar Yadav @ Kariya fired from country made pistol by touching it at the head of deceased Raj Kumar. Raj Kumar fell down and an stampede took place. Manoj, Rakesh and others ran to save the deceased but accused threatened to kill them. After that all accused persons ran away.

**16.** (PW-3) Amit Kumar Rawat has stated that his alias name is Anil Kumar and he runs an auto parts shop at Gyanpur – Gopiganj road and it is situated at a distance of 300-400 yards from veterinary hospital. On 20.06.2008 at around 12.00 noon while he was sitting outside his shop, he saw Raj Kumar (deceased) was going towards Gyanpur by motorcycle. On two motorcycles, six accused persons came from behind. Accused-appellants Pawan, Binnu and Rajnath Yadav were on one motorcycle and accused-appellants Sandeep, Atul and Santosh Kumar were on another motorcycle and they all followed Rajkumar. As Raj Kumar started moving towards Gyanpur, accused Prashant and Rahul, who were already standing there, stopped Raj Kumar from front side while remaining six accused-appellants came from behind and they exhorted to kill Raj Kumar. Accused-appellant Santosh Kumar Yadav @ Kariya took out a country made pistol and fired a bullet at

head of Raj Kumar. Some persons ran to save deceased but accused-appellants threatened to kill them too. Raj Kuar has died of fire arm injury.

17. (PW-4) Dr Rajiv Kumar has conducted postmortem on dead body of deceased and has duly proved the postmortem report Ex.ka-3.

18. (PW-5) Constable Radhey Shyam Bharti has recorded first information report.

19. (PW-6) Inspector Umesh Pratap Singh has conducted initial investigation while further investigation was conducted by (PW-7) SHO Ram Manorath Thapa.

20. (PW-8) H.M. Kedar Nath Tiwari has recorded FIR of Arms Act and deposed regarding recovery of country made pistol from accused-appellant Santosh Kumar. (PW-9) S.I. Ramchandra Tiwari has conducted investigation of case under Arms Act against accused-appellant Santosh Kumar. (PW-10) S.I. Ram Krishna Rastogi has conducted part investigation of case under Arms Act.

21. So far as the contention, that (PW-1) Manoj Kumar Yadav and (PW-2) Bhola are interested witnesses or that these witnesses have not explained that how they reached at spot, is concerned, it is well settled position that a natural witness may not be labelled as interested witness. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case, the circumstances reveal that a witness was present on the scene of occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim. Generally close relations of the victim are unlikely to falsely implicate anyone. Relationship is not sufficient to discredit a witness unless there is motive to give false evidence to spare the real culprit and falsely implicate an innocent person is alleged and proved. A witness is interested only if he derives benefit from the result of the case or as hostility to the accused. In case of *State of Punjab Vs Hardam Singh, 2005, S.C.C. (Cr.) 834*, it has been held by the Apex Court that ordinarily the mere relations of the deceased would not

depose falsely against innocent persons so as to allow the real culprit to escape unpunished, rather the witness would always try to secure conviction of real culprit. In the case of *Dilip Singh Vs State of Punjab*, A.I.R. 1953, S.C. 364, it was held by the Supreme Court that normally a witness is considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless witness has cause, such as enmity against accused to which to implicate falsely. Similar view has been taken by the Supreme Court in *Harbans Kaur V State of Haryana*, 2005, S.C.C. (Crl.) 1213; and in *State of U.P. vs. Kishan Chandra and others*, 2004 (7), S.C.C. 629. The contention about branding the witnesses as 'interested witness' and credibility of close relationship of witnesses has been examined by Apex Court in number of cases. A close relative, who is a very natural witness in the circumstances of a case, cannot be regarded as an 'interested witness', as held by the Supreme Court in *Dalbir Kaur v. State of Punjab*, AIR 1977 SC 472. The mere fact that the witnesses were relations or interested would not by itself be sufficient to discard their evidence straight way unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court. Similar view was taken in case of **State of Gujarat v. Naginbhai Dhulabhai Patel**, AIR 1983 SC 839. Similarly in *Ramashish Rai Vs. Jagdish Singh*, (2005) 10 SCC 498, the following observations were made by the Apex Court:

*"The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double- edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."*

Similarly, in **Piara Singh and Ors. Vs. State of Punjab** [AIR

**1977 SC 2274 = (1977) 4 SCC 452],** the Court held:

*"It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence."*

In ***Hari Obula Reddy and Ors. Vs. The State of Andhra Pradesh, (1981) 3 SCC 675***, a three-judge Bench of Apex Court observed:

*".. it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."*

A survey of the judicial pronouncements of Apex Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors.,

(2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52)."'

In view of the aforesaid exposition of law, this Court would only be required to carefully scrutinize and appreciate the evidence of closely related witnesses before arriving at any conclusion. However, their evidence cannot be disbelieved only on the ground that these witnesses are related to each other or to the deceased and when the evidence has a ring of truth as being cogent, credible and trustworthy, as has already been discussed herein above.

In the present case, it is correct that (PW-1) Manoj Kumar Yadav is brother of deceased and (PW-2) Bhola is uncle of deceased, but these witnesses have consistently deposed about their presence at spot. As per (PW-1) Manoj Kumar Yadav, at the time of incident, he was going to Gyanpur on foot. As per (PW-2) Bhola, he was going to market and in the way he witnessed the incident. It was day time. They have been subjected to cross-examination, and so far as their presence at spot is concerned, no such adverse effect could emerge, so as to make the presence of these witnesses at the scene of offence, doubtful. Version of (PW-1) Manoj Kumar Yadav has been amply corroborated by (PW-2) Bhola. One of the important aspect is that (PW-1) Manoj Kumar Yadav has lodged first information report without any undue delay. In view of all these facts, it can not be said that (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have not explained as to how they reached at spot. Thus, the contention of learned counsel for the accused-appellants has no force.

It is correct that there was enmity between the parties on account of murder of father of accused Santosh Kumar Yadav, however, it is well repeated remark in criminal matters that enmity is a double edged weapon and it cuts both ways. On the one hand, it may be a reason for false implication while on the other hand, it may also provide a motive for commission of offence. Thus, the requirement in such matters is

that evidence must be scrutinized carefully in order to ascertain whether there is any possibility of false implication on account of enmity. It would be pertinent to mention here that in ordinary course a close relative of deceased would not implicate an innocent person, sparing the actual assailants.

22. In the instant case, scrutiny of evidence shows that so far as accused-appellant Santosh Kumar Yadav is concerned, specific role of firing at deceased has been assigned to him. (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have consistently deposed that it was the accused-appellant Santosh Kumar Yadav, who has fired at the deceased. Regarding his role, no major contradiction or inconsistency could be pointed out in statement of (PW-1) Manoj Kumar Yadav. His statement is consistent with the medical evidence and corroborated by (PW-2) Bhola. First information report was lodged by (PW-1) Manoj Kumar Yadav without any delay, wherein specific role of firing was assigned to accused-appellant Santosh Kumar Yadav. No doubt there was delay in recording statement of (PW-2) Bhola and (PW-3) Amit Kumar Rawat under Section 161 CrPC, but so far as (PW-2) Bhola is concerned, his name figures in first information report as witness, which was lodged without any delay. Further the investigating officer was not asked about reasons of delay in recording his statement. Once in the first information report, (PW-2) Bhola was shown as witness, it was duty of investigating officer to record his statement promptly. There is no such material on record that after the incident this witness was not available for his statement. In view of these facts, testimony of (PW-2) Bhola can not be doubted on ground of delay in recording his statement. Mere delay in recording statement of witness does not necessarily discredit testimony. The Court may rely on such testimony if they are cogent and credible and the delay is explained to the satisfaction of the Court. [See Ganeshlal v. State of Maharashtra (1992) 3 SCC 106; Mohd. Khalid v. State of W.B. (2002) 7 SCC 334; Prithvi (Minor) v. Mam Raj (2004) 13 SCC 279 and Sidhartha Vashisht @

Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1]. However, so far (PW-3) Amit Kumar Rawat is concerned, his statement was recorded with much delay on 13.07.2008 and he was not shown as witness in the first information report and thus, it does not appear safe to rely on his testimony. Except the fact that it would not be safe to rely on the testimony of (PW-3) Amit Kumar Rawat, we do not find any force in contentions raised by learned senior counsel.

**23.** It was next argued that spot of the alleged incident could not be established. As per FIR, the incident took place near veterinary Hospital, while in site plan, the alleged hospital has not been shown and the spot of the incident has been shown in front of the shop of Anoop Electrical. It was stated that (PW-3) Amit Kumar Rawat has categorically stated that alleged incident took place near veterinary hospital, while as per Investigating Officer, the veterinary Hospital is situated at quite long distance from spot of the incident as shown in the site plan. It was further pointed out that in his cross examination (PW-2), Bhola has stated that deceased was stopped and fired near Home Guard Commandant Office.

**24.** Regarding these contentions it may be seen that as per version in first information report, the incident took place near veterinary hospital. It does not mean that incident took place just in front of that hospital. Purport of using word 'near' may vary person to person in terms of distance. As per site plan, spot of incident has been shown opposite to shop of Anoop Electrical but investigating officer (PW-6) Umesh Pratap Singh has stated that veterinary hospital is situated in north side from point 'A' shown in site plan Exhibit Ka-19. It is correct that veterinary hospital was not shown in site plan but there is evidence to show that it is situated nearby. It is correct that (PW-6) Umesh Pratap Singh has stated that incident took place opposite to Home guard office but this statement does not match with the site plan prepared by him, as in the site plan, place of incident has been shown opposite to shop of Anoop Electrical and home guard office is situated at some steps from

there, however these are minor contradictions. It is correct that (PW-2) Bhola stated that deceased was stopped near home guard office and this fact is also supported by investigating officer while as per (PW-3) Amit Kumar Rawat, incident took place near veterinary hospital but it is also a minor inconsistency. Fact remains that all alleged points like veterinary hospital, home guard office and Anoop Electrical are situated in same vicinity. In normal parlance, a witness may state that incident to be happened near veterinary hospital while another witness may say that it took place near Anoop Electrical or near any other shop/office situated nearby. Such inconsistencies are quite common. Situation may have been different, had some witnesses would have spoken altogether some distant place as spot of incident, but it is not so in this case. Considering all facts and evidence, it can not be said that alleged inconsistencies are of such nature so as to create any doubt about position of spot or about presence of (PW-1) Manoj Kumar Yadav and (PW-2) Bhola or to affect their testimony adversely. We find no substance in the argument of learned senior counsel.

25. Learned Senior counsel has pointed out certain contradictions and inconsistencies in the statements of witnesses. It was stated that as per prosecution version, deceased was going on motorcycle, but his motorcycle was not found on the spot and that as per prosecution version, deceased has died on the spot but when the police reached at the spot, his body was lying in Hospital. In this regard, it may be observed that such contradictions and inconsistencies do not affect pith and substance of testimony of (PW-1) Manoj Kumar and (PW-2) Bhola. It is correct that there is nothing to indicate that after incident, who has taken away motorcycle of deceased but it is not such a factor so as to affect prosecution version. So far as dead body of deceased is concerned, there is evidence of (PW-1) Manoj Kumar Yadav and (PW-2) Bhola that after incident, deceased was taken to hospital. Though deceased has died at spot, but it is not uncommon to take him to hospital in hope that he may be surviving. It is well settled in law that

the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See Rammi @ Rameshwar Vs. State of M.P., (1999) 8 SCC 649; Leela Ram (dead) through Duli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796).

**26.** Having considered entire evidence carefully, so far the involvement of accused-appellant Santosh Kumar Yadav is concerned, there is clear and cogent evidence against him. In this regard, no major contradiction or infirmity could be pointed out in testimony of (PW-1) Manoj Kumar Yadav. Version of (PW-1) Manoj Kumar Yadav is quite consistent that it was the accused-appellant Santosh Kumar Yadav, who fired shot at the deceased. His version is consistent with first information report and is supported by medical evidence. Statement of (PW-1) Manoj Kumar is corroborated by (PW-2) Bhola in material

particulars. Both these witnesses have subjected to cross-examination, but they remained stick to their version and no such fact could be elicited, which may cause any dent against their credibility. Regarding involvement of accused-appellant Santosh Kumar Yadav we find testimony of (PW-1) Manoj Kumar Yadav and (PW-2) Bhola coupled with other evidence on record quite impeccable and reliable.

27. However, examining the entire evidence carefully, it appears that evidence regarding common object of unlawful assembly comprising all the accused-appellants to commit murder of deceased, is quite vague. In fact, there is no categorical and cogent evidence that all the accused-appellants were present at the spot and thus, the very existence of unlawful assembly appears doubtful. Provisions of Section 149 of IPC provide that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The first part of Section 149 IPC states about the commission of an offence in prosecution of the common object of the assembly whereas the second part takes within its fold knowledge of likelihood of the commission of that offence in prosecution of the common object. Scope of two parts of Section 149 IPC has been explained in **Rajendra Shantaram Todankar v. State of Maharashtra and Ors.** [JT 2003 (2) SC 95], the Apex Court has explained Section 149 and held as under:

*"14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful*

*assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 — either clause — is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act..... "*

The same principles have been reiterated in **State of Punjab v. Sanjiv Kumar alias Sanju and Ors.** [JT 2007 (9) SC 274]. Creation of vicarious liability under Section 149 IPC is well elucidated in **Allauddin Mian and Others, Sharif Mian and Anr. v. State of Bihar** [JT 1989 (2) SC 171], the Apex Court held:

*"8. ....Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly....."*

The same principles were reiterated in paras (26) and (27) in *Daya Kishan v. State of Haryana* [JT 2010 (4) SC 325] and also in *Kuldip Yadav and Ors. v. State of Bihar* [JT 2011 (4) SC 436]. Whether the members of the unlawful assembly really had the common object to cause the murder of the deceased has to be decided in the facts and circumstances of each case, nature of weapons used by such members, the manner and sequence of attack made by those members on the deceased and the circumstances under which the occurrence took place. It is an inference to be deduced from the facts and circumstances of each case. (vide *Lalji and Ors. v. State of U.P.* [JT 1989 (1) SC 109]; *Ranbir Yadav v. State of Bihar* [JT 1995 (3) SC 228]; *Rachamreddy Chenna Reddy and Ors. v. State of A.P.* [JT 1999 (1) SC 412]).

In prosecution of 'common object' means 'in order to attain the common object'. Effect of section 149 may be different on different

members of the same assembly. Common object is determined keeping in view nature of the assembly, arms carried by members and behaviour of members at or near the scene of incident. It is not necessary in all cases that the same must be translated into action or be successful. It is well settled that the expression "in prosecution of common object" has to be strictly construed as equivalent to 'in order to attain the common object.' The word 'knew' used in the second part of section 149 IPC implies something more than possibility and it cannot bear the sense of 'might have known'. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. Members of an unlawful assembly may have community of object upto a certain point. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances.

**28.** Coming to the facts of present case perusal of evidence shows that the accused-appellant Santosh Kumar Yadav has caused single fire arm injury to deceased. It is not the case of prosecution that any of the other accused has also caused any injury to deceased. The post-mortem report of deceased also does not indicate that he was assaulted by all the accused persons, who were eight in number. (PW-1) Manoj Kumar Yadav and (PW-2) Bhola have also not attributed any specific role to the other accused persons except that of Santosh Kumar Yadav, in causing injuries to deceased. The role assigned to the accused-appellants, except that of Santosh Kumar Yadav, is that they made exhortation to kill the deceased. It has not been specified that what words were used by these accused persons while making alleged exhortation rather only general allegation has been made that all the accused-appellants made exhortation to kill the deceased and consequently accused-appellant Santosh Kumar Yadav fired a single

shot at the deceased. As per prosecution version, six accused persons have reached at spot on two motorcycles while two accused namely, Rahul and Prashant Kumar were already present there. There is nothing to indicate that how all these accused were aware that deceased would pass from that point and at that particular time. It is not the case of prosecution that deceased used to pass that way every day. All these facts not only create doubt about common object of alleged unlawful assembly but also about the existence of any such unlawful assembly. There is doubt whether all the accused persons were present at the spot. The role assigned to the accused-appellants, except that of Santosh Kumar Yadav, is that they made exhortation to kill the deceased. It is not specified that what words were used by these accused persons while making alleged exhortation rather only general allegation has been made that all the accused-appellants made exhortation to kill the deceased and consequently accused-appellant Santosh Kumar Yadav fired a single shot at the deceased. All these facts not only create doubt about common object of alleged unlawful assembly but also about the very existence of any such unlawful assembly. It appears that it was the individual act of accused appellant Santosh Kumar Yadav, which is responsible for causing sole fatal injury to the deceased. Evidence on record is not cogent and categorical regarding common object of alleged unlawful assembly. As stated earlier, it could not be established beyond doubt that there was any such unlawful assembly. In view of all these facts, conviction of accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav with aid of Section 149 of IPC is not in accordance with law and thus they deserve acquittal.

**29.** Now question arises whether an accused charged under section 302/149 IPC could be convicted under section 302 simplicitor in the absence any substantial charge under section 302 IPC. [In Nallabothu Venkaiah vs. State of A.P](#) reported as (2002) 7 SCC 117, the Supreme

Court was faced with two questions of law. Firstly, whether the appellant could be convicted under **Section 302** IPC without the aid of **Section 149** IPC, in the absence of any substantive charge under **Section 302** IPC. Secondly, whether the appellant could be convicted under **Sections 302/149** IPC on selfsame evidence on the basis of which other accused were acquitted. After analyzing a catena of earlier decisions on the above aspect, the law was distilled in the following words:-

*"24. On an analytical reading of a catena of decisions of this Court, the following broad proposition of law clearly emerges: (a) the conviction under **Section 302** simpliciter without aid of **Section 149** is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence; (b) wrongful acquittal recorded by the High Court, even if it stood, that circumstances would not impede the conviction of the appellant under **Section 302** read with **Section 149** IPC; (c) charge under **Section 302** with the aid of **Section 149** could be converted into one under **Section 302** read with **Section 34** if the criminal act done by several persons less than five in number in furtherance of common intention is proved."*

Thus, it is explicit that the conviction under **Section 302** simpliciter without aid of **Section 149** is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature to cause the death of the deceased and is supported by medical evidence.

In the instant case, as discussed above, evidence shows that the accused-appellant Santosh Kumar Yadav @ Kariya has fired a single bullet at deceased, which resulted to the death of deceased. Any of the other accused has not caused any injury what so ever to deceased. Both eye witnesses (PW-3) Amit Kumar Rawat and (PW-2) Bhola have also not attributed any specific role to the accused persons except that of Santosh Kumar Yadav @ Kariya, in causing injuries to deceased.

Alleged exhortation attributed to these accused persons is quite vague. There is no cogent and categorical evidence to prove alleged exhortation. Only general allegation has been made that all the accused-appellants made exhortation to kill the deceased and consequently accused-appellant Santosh Kumar Yadav @ Kariya fired a single shot at the deceased. It is quite apparent from evidence that the act of firing at deceased, attributed to the accused-appellant Santosh Kumar Yadav @ Kariya, resulting in the fatal injury, is independently sufficient in the ordinary course of nature to cause death of the deceased. Medical evidence shows that the bullet fired by accused-appellant Santosh Kumar Yadav @ Kariya was sufficient to cause death of deceased. Considering entire evidence, accused-appellant Santosh Kumar Yadav @ Kariya could be convicted under Section 302 IPC. Thus, so far as accused appellant Santosh Kumar Yadav @ Kariya is concerned, he is liable to be convicted under section 302 IPC. Similarly conviction of accused-appellant Santosh Kumar Yadav @ Kariya under Section 25 Arms Act is based on evidence and calls for no interference.

**30.** In view of aforesaid, conviction of accused-appellant Santosh Kumar Yadav @ Kariya under Section 302/149 IPC is altered to under Section 302 IPC and sentence of life imprisonment along with fine is maintained. Conviction and sentence of accused-appellant Santosh Kumar Yadav @ Kariya under Section 25 Arms Act is also affirmed but sentence of five years rigorous imprisonment is reduced to three years. However his conviction and sentence under Section 147 IPC is set aside. Conviction and sentence of accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav under Section 302/149 and 147 of IPC is set aside. These accused-appellants are stated on bail and thus, no further order is required in their respect. Accused-appellant Santosh Kumar Yadav @ Kariya is stated in judicial custody, he shall serve out

remaining sentence.

**31.** Appeals of accused-appellants Binnu Srivastava @ Pawan Srivastava, Pawan Srivastava @ Prakash, Raj Nath Yadav, Atul Kumar Yadav @ Bhunwar, Sandeep Rawat @ Rinku, Rahul Rawat and Prashant Yadav are allowed. Appeal of accused-appellant Santosh Kumar Yadav @ Kariya is partly allowed in above terms.

**32.** A copy of this order be sent to trial court for compliance.

(Raj Beer Singh,J) (Pritinker Diwaker,J)

**Order Date:- 14.11.2019**

**T.S.**