

Reserved**AFR****Court No. - 45****Case :-** CRIMINAL APPEAL No. - 5100 of 2004**Appellant :-** Guddu Pandey**Respondent :-** State Of U.P.**Counsel for Appellant :-** Jagdish Singh Sengar,A.K. Rai,D.K.

Singh,I.K.Chaturvedi,I.M. Khan,Jai Singh,K.K.Singh,Lav

Srivastava,Pradeep Chauhan,R.C. Gupta,R.P. Singh,Rajesh Kumar

Dubey,Rakesh Kumar Pandey,S.K. Pal,Samit Gopal

Counsel for Respondent :- Govt. Advocate,Samit Gopal**With****Case :-** CRIMINAL APPEAL No. - 5195 of 2004**Appellant :-** Ram Narain Singh**Respondent :-** State Of U.P.**Counsel for Appellant :-** S.K. Dwivedi**Counsel for Respondent :-** Govt. Advocate,Rajesh Kumar

Dubey,Samit Gopal

With**Case :-** CRIMINAL APPEAL No. - 5493 of 2004**Appellant :-** Yogendra Singh**Respondent :-** State Of U.P.**Counsel for Appellant :-** Jagdish Singh Sengar,A.K. Awasthi,C.B.

Dhar Dubey,I.K. Chaturvedi,Manish Tiwary

Counsel for Respondent :- Govt. Advocate,Rajesh Kumar

Dubey,Samit Gopal

With**Case :-** CRIMINAL APPEAL No. - 5494 of 2004**Appellant :-** Ram Vinod Singh And Others**Respondent :-** State Of U.P.**Counsel for Appellant :-** Jagdish Singh Sengar,A.K.

Awasthi,Amresh Tripathi,C.B. Dhar Dubey,Dilip Kumar,G.P.

Srivastava,Manish Tiwary,Pradeep Chauhan,Pramod Shukla

Counsel for Respondent :- Govt. Advocate,Rajesh Kumar

Dubey,Samit Gopal

With**Case :-** CRIMINAL REVISION No. - 4060 of 2004**Revisionist :-** Vishnu Pati Tiwari**Opposite Party :-** State Of U.P. And Others**Counsel for Revisionist :-** Samit Gopal**Counsel for Opposite Party :-** Govt. Advocate,J.S. Sengar,Rajesh

Kumar Dubey

With

Case :- CRIMINAL REVISION No. - 4061 of 2004
Revisionist :- Vishnu Pati Tiwari
Opposite Party :- State Of U.P. And Others
Counsel for Revisionist :- Samit Gopal
Counsel for Opposite Party :- Govt. Advocate, J.S. Sengar, Rajesh Kumar Dubey

With

Case :- GOVERNMENT APPEAL No. - 5898 of 2004
Appellant :- State Of U.P.
Respondent :- Yogendra Singh And Others
Counsel for Appellant :- Govt. Advocate
Counsel for Respondent :- Samit Gopal, Rajesh Kumar Dubey, Samit Gopal, V.S. Misra

With

Case :- GOVERNMENT APPEAL No. - 6189 of 2004
Appellant :- State Of U.P.
Respondent :- Jitendra Singh And Others
Counsel for Appellant :- Govt. Advocate
Counsel for Respondent :- Apul Misra, Rajesh Kumar Dubey, Samit Gopal

Hon'ble B. Amit Sthalekar, J.

Hon'ble Ali Zamin, J.

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. **Criminal Appeal No. 5100 of 2004** has been filed by the appellant Guddu Pandey against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge/FTC No. 4, Deoria in S.T. 261 of 1999 whereby he was convicted for offence under Section 302/149 I.P.C. and sentenced to imprisonment for life and to pay a fine of Rs.15000/- and on failure to pay fine, to suffer further one year rigorous imprisonment, under Section 307/149 I.P.C. for rigorous imprisonment of ten years and a fine of

Rs.5000/- and on failure to pay fine, to suffer further six months rigorous imprisonment and under Section 148 I.P.C. for 2 years rigorous imprisonment.

2. **Criminal Appeal No. 5195 of 2004** has been filed by the appellant Ram Narain Singh against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge//FTC No. 4, Deoria in S.T. 319 of 1999 (State vs. Yogendra Singh & others) whereby the appellant Ram Narain has been convicted for offence under Section 302/149 I.P.C. and sentenced to imprisonment for life with a fine of Rs.15000/- and in default of payment of fine, further one year rigorous imprisonment, under Section 307/149 I.P.C. for rigorous imprisonment of ten years and a fine of Rs.5000/- and on failure to pay fine, to suffer further six months rigorous imprisonment and under Section 148 I.P.C. for 2 years rigorous imprisonment.
3. **Criminal Appeal No. 5493 of 2004** has been filed by the appellant Yogendra Singh against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge//FTC No. 4, Deoria in S.T. 319 of 1999 (State vs. Yogendra Singh & others) whereby he was convicted for offence under Section 302/149 I.P.C. and sentenced to imprisonment for life and to pay a fine of Rs.15000/- and on failure to pay fine, to suffer further one year rigorous imprisonment, under Section 307/149 I.P.C. for rigorous imprisonment of ten years and a fine of Rs.5000/- and on failure to pay fine, to suffer further six months rigorous imprisonment and under Section 148 I.P.C. for 2 years rigorous imprisonment.
4. **Criminal Appeal No.5494 of 2004** has been filed by the appellant Ram Vinod Singh and others against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge//FTC No. 4, Deoria in S.T. 317 of 1999 (State vs. Jitendra & others) whereby they were convicted for offence under Section

302/149 I.P.C. and sentenced to imprisonment for life and and to pay a fine of Rs.15000/- and on failure to pay fine, to suffer further one year rigorous imprisonment, under Section 307/149 I.P.C. for rigorous imprisonment of ten years and a fine of Rs.5000/- and on failure to pay fine, to suffer further six months rigorous imprisonment and under Section 148 I.P.C. for 2 years rigorous imprisonment.

5. **Criminal Revision No. 4060 of 2004** has been filed by revisionist Vishnu Pati Tiwari against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge/FTC No. 4, Deoria in S.T. 261 of 1999 for setting aside the order of acquittal passed by the trial court acquitting the respondents no. 2 to 7.
6. **Criminal Revision No. 4061 of 2004** has been filed by revisionist Vishnu Pati Tiwari against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge/FTC No. 4, Deoria in S.T. No. 261 of 1999 for enhancement of sentence awarded by the trial court to respondents no. 2 to 9 from life imprisonment to death.
7. **Government Appeal No.5898 of 2004** has been filed by the State against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge/FTC No. 4, Deoria in S.T. Nos. 317 of 1998, 318 of 1998 and 261 of 1999 for enhancement of sentence awarded by the trial court to respondents no. 1 to 8.
8. **Government Appeal No. 6189 of 2004** has been filed by the State against the judgement and order dated 28.8.2004 passed by the Additional Sessions Judge/FTC No. 4, Deoria in S.T. Nos. 317 of 1998, 318 of 1998, 319 of 1998 and 261 of 1999 for setting aside the order of acquittal passed by the trial court acquitting the respondents no. 1 to 6.
9. All these cases arise out of the common judgment and order of the

trial court dated 28.8.2004, hence, they are being decided by this common judgement.

10. Heard Sri V.P. Srivastava, learned Senior Counsel assisted by Sri Rajesh Kumar Dubey and Sri J.P.N. Singh holding brief of Sri Pradeep Shukla, learned counsel for the appellants, Sri Gopal Chaturvedi, learned Senior Counsel alongwith Sri Samit Gopal, learned Senior Counsel assisted by Ms. Saumya Chaturvedi and Sri Anuj Srivastava, learned counsel for the informant and the learned A.G.A. for the State.
11. The genesis of the case is that in the previous evening (i.e. on 27.07.1998) when herdsman Bauka of the informant Manbhawati Devi was grazing cattle some buffaloes entered into the field of Suresh Singh, one of the accused. Suresh Singh assaulted Bauka upon which her family member had gone to the house of the accused to complain, because of which on 28.07.1998 at about 6.30 A.M. when the informant Manbhawati Devi wife of Radhey Shyam Tiwari was sitting at the door of her house brushing her teeth (datoon) alongwith some other family members the accused persons namely, (1) Yogendra Singh s/o Prayag Singh, (2) Rajbanshi s/o Prayag Singh, (3) Suresh Singh s/o Prayag Singh, (4) Vinod Singh s/o Rajbanshi Singh, (5) Sanjay Singh s/o Suresh Singh, (6) Ram Narain Singh s/o Govind Singh, (7) Om Prakash Singh s/o Ramdas Singh, (8) Jitendra Singh s/o Ram Das Singh, (9) Satya Prakash Singh s/o Ramdas Singh, (10) Indrajeet Pandey s/o Ramprit Pandey, (11) Guddu Pandey s/o Ramprit Pandey, (12) Jitendra s/o Rajnath Singh, (13) Jagdish Singh s/o Musafir Singh and (14) Balwant Singh s/o Ramdas Singh came to their house armed with guns, countrymade pistols and bombs with common intention to kill and opened fired at her house. Her husband Radhey Shyam Tiwari s/o Murat Tiwari, Brahma Tiwari s/o Radhey Shyam Tiwari, Brijesh s/o Radhey Shyam Tiwari and

Vishnu and Bhola her sons alongwith her brother-in-law Ghanshyam Tiwari and his son Pintu alias Arun ran inside the Palani in order to save themselves. Yogendra Singh, Vinod Singh and Jitendra Singh s/o Rajnath Singh, Jitendra s/o Ramdas Singh and Indrajeet s/o Ramprit Pandey armed with weapons fired at Radhey Shyam Tiwari, Brahma and Brijesh and killed them. Whereas the other accused persons climb the verandah and fired indiscriminately in which her sons Vishnu and Bhola, her brother-in-law Ghanshyam Tiwari and his son Pintu alias Arun were seriously injured. After hearing the sound of firing the villagers ran to the spot but the accused in order to strike terror in the hearts of the villagers started firing in the air and threw bombs and abused the villagers, who chased them. The villagers being threatened ran into their houses and after this the accused ran away firing in the air.

12. According to the informant- Manbhavati Devi the assailants were armed with following weapons:

1. Yogendra Singh- armed with gun
2. Jitendra Singh s/o Ramdas Singh- armed with double barrel gun
3. Jitendra Singh s/o Rajnath Singh- armed with gun
4. Vinod Singh- armed with gun
5. Jagdeesh Singh- armed with gun
6. Balwant Singh- armed with Katta (country made pistol)
7. Indrajeet Pandey- armed with Katta (country made pistol)
8. Guddu Pandey- armed with Katta (countrymade pistol)
9. Ram Narain Singh- armed with Katta (countrymade pistol)
10. Suresh Singh- armed with bombs
11. Sanjay Singh- armed with bombs

12. Rajvanshi Singh-armed with bombs

13. Satya Prakash- armed with bombs

14. Om Prakash- armed with bombs

13. There are four deceased persons, namely;

1. Dharmendra Tiwari

2. Radhey Shyam Tiwari

3. Brahma Tiwari

4. Brijesh Tiwari

Three persons received injuries, namely;

1. Arun Tiwari, P.W.1

2. Ghanshyam Tiwari, P.W.3

3. Vishnu Pati Tiwari, P.W.4

14. On the basis of written report Ext. Ka-1 a Case Crime No.377/1998, under Sections 147, 148, 149, 307, 302, 504 IPC under Chik FIR Ext. Ka-16 prepared and entry was recorded in G.D. Ext. Ka-17. Investigation of the case was entrusted to Sri Prakash Singh, who observing necessary formalities dispatched the dead bodies for post mortem. Injured were taken to the hospital. One injured Dharmendra Tiwari died on the way and on information after observing the formalities post mortem of the dead body of Dharmendra Tiwari was also conducted and report Ext. Ka-2 was prepared according to which following ante mortem injuries were found:

(i). Gun shot wounds as entry wounds multiple lacerated in nature, shape oval to round inverted margin wound hole with abrasion, colour and surrounding skin red, total in area of mainly 60 cm. vertically x 30 cm. Horizontally, upper limit epigastricplane to just above both knee joint. Size of wound is ranging from 2.0 mm. x 4.0 mm. distributed mainly on the left lateral aspect of thigh and left side of abdomen. Few wound present on the

right side of abdomen and front of the right thigh and front of the right elbow joint and posterior lateral aspect of the right elbow joint. Direction of wounds is posteriorly. No burning of skin. No blackening and no tattooing of skin. No singeing of hairs. By exploration-Ante mortem nature confirmed. Bleeding in underneath. Tissues passed and few pellets (metallic recovered and preserved. (Depth skin deep).

(ii). Gun shot wound as entry wound multiple in number. Lacerated in nature. Shape oval to circular in shape, margins inverted with abrasion colour and reddened surrounding skin in area of total mainly 20.0 cm. Vertically x 15 cm. horizontally area in the mid back region mainly on right side. Size of wound 2.0 mm. to 4.0 mm. Direction of wound anteriorly. No burning, blackening and no tattooing of skin. No singeing present. Ante mortem nature. On exploration confirmed. Clotted blood in muscular tissue and abdominal cavity present.

Internal examination:- No.3 and No.4 vertebrae fractured and spinal cord in corresponding area lacerated. 100 ml. semi solid contents present in the stomach was found. Gases and faecal matter present in intestines. Liver lacerated. Right Kidney lacerated.

15. The ante mortem injuries (Ext. Ka-3) of deceased Radhey Shyam Tiwari reads as under:

(i) Gun shot punctured wounds of 5.0 x 4.0 cm x cavity deep, just above the left ear. Upper 1/3 of the left ear pinna was missing. Brain tissue protruding out of wound. No blackening, Tattooing signing of hairs present. On exploration ante mortem nature of injury confirmed. The brain tissue had been badly lacerated and haematoma present. On exploration foreign material (metallic pellets with cap) found. Handed over to constable. (Left frontal and parietal bone fractured).

(ii) Punctured gun shot wound of entry of 6.0 x 3.0 cm present on the right thigh medial aspect, 7.0 cm on below the right pubic symphysis wound. Wound is bone deep. On exploration foreign material, pellets and cap found. Ante mortem nature of injury confirmed. No blackening, tattooing, signing of hair present.

(iii) Punctured gun shot wound of entry of 8.0 x 7.0 cm x cavity deep present on the right side of abdomen just above the right anterior superior iliac spine. No blackening, Tattooing, signing of hair present. On exploration

wadding cap and metallic cap found.

Total metallic pellets round to oval in shape, 28 in number, size 0.2 mm to 0.4 mm round to oval in shape was found. On exploration six pieces of wadding caps were found in the wound, and handed over to constable concerned.

On internal examination left frontal and parietal bone was found fractured. Right side of peritoneum and muscles were lacerated. Stomach contents 200 mls semi solid fluid in liquid form. Gases and faecal matters were found in the intestines.

16. The ante mortem injuries (Ext. Ka-4) of deceased Brahma Tiwari reads as under:

(i) Multiple wound of gun shot injury present over the face lower half and neck and front of chest, round to oval in shape, size from 3.0 mm to 4.0 mm. Greasy color present. No tattooing, blackening and signing of hair present. Margins of wound echomysed. Depth was cavity deep over chest; On exploration of wound ante mortem nature confirmed. The both lungs were found punctured about 100 ml. clotted blood was found present in both the cavities. The heart was found empty. On exploration of all wounds 12 rounded metallic pellets were found and given to concerned Constable in a sealed pack.

(ii) Multiple gun-shot wounds of entry on the on the middle part of antero medial aspect of the left thigh 7.5 cm. below the left knee, oval to rounded in shape, 3.0 mm to 4.0 mm in size, greasy colour present. No signing of hairs, blackening, tattooing present. On exploration the ante mortem nature of injury confirmed. The wound is muscle deep and haematoma present. All the metalli pellets were 12 in number and sealed and given to constable concerned.

On internal examination membranes were found congested .200mls. Semi solid fluid was found in stomach. Gases and faecal materials were found present in the intestines. Walls, ribs cartilages were found punctured. Wounds (multiple) present. Pleura was punctured. Both the lungs were punctured. Clotted blood present. Heart was found empty.

17. The ante mortem injuries (Ext. Ka-5) of deceased Brijesh Tiwari reads as under:

(i) Gun shot wound of entry, multiple in number rounded to oval in shape present over the face and front of chest and right upper limbs and left upper limb and moving towards right side, size 3.0 mm to 4 mm cavity deep, greasy colour present. No tattooing, scorching and signing of hair, blackening present. On exploration-ante mortem in nature of injury confirmed. Both the lungs were punctured and clotted blood about 500 mls. present in both the cavities. Multiple metallic pellets present ten in number, sealed and handed over to the constable concerned.

On internal examination about 200 mls semi solid fluid present in the stomach. Gases and faecal materials present in the intestines.

18. The injury report (Ext. Ka-18) of Arun Tiwari (injured person) is as under:-

Fire arm wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth on the left forehead, 2 cm above eyebrow. (conscious).

19. The injury report (Ext. Ka-19) of Ghanshyam Tiwari is as under:-

(i) *multiple firearm injuries about 30 in number in the outer left abdomen, side and back of left hip and thigh in an area of about 45 cm. x 25 cm. size of the wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm depth. Margins inverted, bleeding present. X-Ray was advised.*

(ii) *multiple fire arm injuries about 8 in number in an area of about 30 cm x 10 cm on the front, outer & back of left arm, elbow and forearm. Size of the wounds $\frac{1}{4}$ cm x $\frac{1}{4}$ cm depth. Margins inverted, bleeding present. X-ray was advised. (conscious)*

20. The injury report (Ext. Ka-20) of Vishnu Pati Tiwari is as under:-

(i). *Fire arm wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth on the right face, 2 $\frac{1}{2}$ cm. below lateral to outer canthus of right eye.*

(ii). *Fire arm wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth on the right side of neck, 11 cm. below right ear.*

(iii). *Fire arm wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth in the right front of chest, 9 cm. below right nipple.*

(iv). *Fire arm wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth on the left nipple.*

(v). *Fire arm wound $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth on the left chest, 11 cm below medial to the left nipple.*

(vi). *Fire arm wounds, two in number, on the front of left abdomen, 3 cm. apart, 1 cm. lateral to umbilicus. Size $\frac{1}{4}$ cm x $\frac{1}{4}$ cm x depth.*

(vii). *Fire arm wound $\frac{1}{4}$ cm. x $\frac{1}{4}$ cm. x depth, 3 cm. below medial to interior, superior iliac spine.*

(viii). *Lacerated wound $\frac{1}{4}$ cm. x $\frac{1}{4}$ cm. x depth on the front of left elbow and fore arm in an area of 10 cm. x 8 cm. (Conscious)*

21. The statement of injured persons Vishnu Pati Tiwari and

Ghanshyam Tiwari were recorded on 29.07.1998 as dying declaration and marked as Ext. Kha-1 and Kha-2 respectively.

22. P.W.3, Ghanshyam Tiwari s/o Ram Murat Tiwari, aged about 45 years, who was injured in the incident has recorded his dying declaration in which he has stated that on 28.07.1998 at about 6.00 A.M. in the morning Yogendra Singh, Ram Narain Singh, Balwant Singh, Ram Vinod Singh, Jagdish Singh, Jitendra Singh came to their house armed with guns, Indrajeet Pandey, Suresh Singh, Rajvanshi Singh, Sanjay Singh, Satya Prakash Singh armed with bombs and Guddu Singh, Pappu Singh armed with Katta (countrymade pistol). These people indiscriminately fired at their house, threw bombs and entered into the house through the door and fired upon Radhey Shyam Tiwari, Brahma Tiwari, Dharmendra Tiwari alias Bhola and Brajesh Tiwari, who died, whereas he alongwith Ghanshaym Tiwari, Vishnupati Tiwari and Arun ran towards the verandah where also firing was going on and they received serious injuries. In the dying declaration of Ghanshaym Tiwari it was also mentioned that there was no old enmity between the deceased and the accused persons but one day previous to the incident Suresh Singh had beaten up their servant and Brahma Tiwari had gone to the house of Suresh Singh to make inquiries from Suresh Singh and as a result thereof this attack was committed on the very next day at about 6.00 A.M. in the morning by the accused persons. The dying declaration of P.W.3 reads as under:

“श्री घनश्याम तिवारी पुत्र स्व० श्री मूरत तिवारी उम्र लगभग 45 वर्ष नि०ग्रा०पैना थाना बरहज जनपद देवरिया। बहलफ बयान किया कि दिनांक 28.7.98 को प्रातः 6 बजे योगेन्द्र सिंह, रामनारायन सिंह, बलवन्त सिंह, राम विनोद सिंह, जगदीश सिंह, जितेन्द्र सिंह, बन्दूक लिए हुए, इन्द्रजीत पाण्डेय, सुरेश सिंह, राजवंशी सिंह, संजय सिंह, सत्य प्रकाश सिंह बम लिए तथा गुड्डू सिंह पप्पू सिंह कट्टा लिए अन्धाधुन्ध गोली चलाते हुए व बम फोड़ते हुए दरवाजे पर चढ़ आये व छप्पर के अन्दर बैठे राधेश्याम तिवारी, ब्रहमा तिवारी धर्मेन्द्र तिवारी उर्फ भोला, ब्रजेश तिवारी पर फायर किए जो मर गये हम लोग बरामदे में थे कि वहाँ भी गोली चलाये जिससे हम घनश्याम तिवारी, विष्णुपति तिवारी व अरूण घायल हो गये। उपरोक्त लोगों से हम लोगों की

कोई पुरानी रंजिश नहीं थी बल्कि एक दिन पूर्व सुरेश सिंह ने मेरे नौकर को मारा था जिस सम्बन्ध में उसी दिन शाम को श्री ब्रहमा तिवारी सुरेश सिंह से पूछने गये थे लेकिन कोई खास बात नहीं हुई थी उसी के दूसरे दिन प्रातः 6 बजे उपरोक्त घटना घटी। बयान सुनकर तस्दीक किया।”

23. P.W.4, Vishnu Pati Tiwari s/o Radhey Shyam Tiwari, resident of village Paina, Police Station- Barhaj, District Deoria, who was aged about 24 years recorded his dying declaration in which he has stated that on 28.07.1998 at about 6.00 A.M. in the morning Yogendra Singh, Ram Narain Singh armed with guns and Katta, Balwant Singh, Ram Vinod Singh, Jagdish Singh and Jitendra Singh armed with guns, Guddu Singh, Sanjay Singh and Pappu Singh armed with Katta, Suresh Singh, Indrajeet Pandey and Rajvanshi Singh and Satya Prakash Singh armed with bombs came to their door and started firing indiscriminately and also threw bombs and came inside the house. His father Radhey Shyam Tiwari, brother Brahma Tiwari, Dharmendra Tiwari alias Bhola and Brijesh Tiwari died. The deceased Vishnu Pati Tiwari ran into the verandah where Ghanshyam Tiwari and Arun received injuries. The deceased in his dying declaration has also stated that there was no old enmity between the appellants and the deceased but that one day previous to the incident (i.e. on 27.07.1998) Suresh Singh had beaten up their servant and in the night his brother Brahma Tiwari had gone to Suresh Singh to make inquiries and otherwise there was no serious matter and the incident occurred very next day in the morning at 6.00A.M. The dying declaration of P.W.3 reads as under.

“श्री विष्णुपति तिवारी पुत्र स्व० राधेश्याम तिवारी उम्र लगभग 24 वर्ष नि० ग्राम पैना थाना वरहज जनपद देवरिया। बहलफ बयान किया कि दिनांक 28.7.98 को प्रातः 6 बजे योगेन्द्र सिंह, रामनारायन सिंह कमशः बन्दूक व कट्टा लिए तथा इनके साथ बलवन्त सिंह, राम विनोद सिंह, जगदीश सिंह, जितेन्द्र सिंह बन्दूक लिए इन्द्रजीत पाण्डेय बम लिए, गुड्डू सिंह कट्टा लिए, सुरेश सिंह बम लिए, राजवंशी सिंह बम लिए संजय सिंह, पप्पू सिंह कट्टा लिए व सत्य प्रकाश सिंह बम लिए हमारे दरवाजे पर चढ़ आये तथा अन्धाधुन्ध गोली चलाते हुए व बम फोड़ते हुए दरवाजे पर छप्पर में घुसे गये जहाँ मेरे पिता जी श्री राधेश्याम तिवारी तथा भाई ब्रहमा तिवारी, धर्मन्द्र तिवारी उर्फ भोला व ब्रजेश

तिवारी मर गये तथा हम लोग भाग कर बरामदे में चले गये जिससे हम विष्णुपति तिवारी व घनश्याम तिवारी व अरुण घायल हो गये थे। इन लोगों से हम लोगों की कोई पुरानी रंजिश नहीं थी बल्कि एक दिन पूर्व सुरेश सिंह ने मेरे नौकर को मारा था तथा उसी सम्बन्ध में उस दिन रात में मेरे भाई ब्रह्मा तिवारी सुरेश सिंह से पूछने गये थे और कोई खास बात नहीं थी उसी के दूसरे दिन प्रातः 6 बजे उपरोक्त घटना घटी। बयान सुनकर तस्दीक किया।”

24. At the outset it may be relevant to note that Smt. Manbhavati Devi the informant died sometime in July, 1999 whereas the trial commenced on 08.05.2000 with the recording of evidence of witnesses and therefore, the testimony of Smt. Manbhavati Devi with regard to the First Information Report could not be recorded. After completing the investigation, Investigating Officer submitted a chargesheet against the accused persons.

25. The prosecution examined the 17 witnesses in support of its case. In defence 5 witnesses were also produced.

26. After hearing the parties and perusal of the records, the learned sessions judge passed the impugned judgment and order convicting Yogendra Singh, Ram Vinod Singh, Jitendra Singh s/o Raj Nath Singh, Indrajeet Pandey, Ram Narain Singh, Guddu Pandey, Jagdish Singh and Balwant Singh under Sections 148, 302/149, 307/149 IPC and sentenced them to imprisonment for life and to pay a fine of Rs.15000/- and on failure to pay fine, to suffer further one year rigorous imprisonment, under Section 307/149 I.P.C. for rigorous imprisonment of ten years and a fine of Rs.5000/- and on failure to pay fine, to suffer further six months rigorous imprisonment and under Section 148 I.P.C. for 2 years rigorous imprisonment. The learned trial court has acquitted the accused Raj Bansi Singh, Suresh Singh, Satya Prakash Sigh, Sanjay Singh and Om Prakash Singh under Sections 148, 302/149, 307/149, 428 IPC. Accused Jitendra Singh s/o Ram Das Singh was also acquitted by the trial court under Sections 148, 302/149, 307/149 IPC.

27. Hence these appeals.

28. Sri V.P. Srivastava, learned Senior Counsel submitted that the incident occurred sometime in the night and not at 6.00-6.30 A.M. The basis of the submission was the post mortem report of the deceased persons wherein semi solid/fluid contents were found present in the stomach of the deceased. His submission is that it takes at least 3 to 4 hours for food to be digested after its consumption by a human being and since the witness P.W.1 Arun Tiwari has stated that the deceased had consumed food around 9.00 o'clock in the previous night, therefore the incident would have occurred sometime between 12.30 to 1.30 A.M. during the night hours.

29. Learned Senior Counsel next submitted that there was a long drawn enmity between the family of the deceased and the injured and the assailants which has emerged from the testimony of Ghanshyam Singh- P.W.2 which has referred to some old enmity relating to election and other matters but it was so remote in point of time that it could not be said to be the motive which precipitated the assault alleged.

30. Learned Senior Counsel next submitted that there is a conflict between the medical report of injuries and the post mortem report as no bomb injury was mentioned in the post-mortem report. There was no mention of even a splinter injury being caused to any of the deceased or the injured witnesses or any of the animals by bombs. The accused Yogendra Singh, Ram Vinod Singh, Jitendra Singh s/o Ramnath, Jitendra Singh s/o Ramdas, Indrajeet Pandey are stated to have fired at the deceased Brahma Tiwari, Brijesh Tiwari and Radhey Shyam Tiwari killing them on the spot. Jagdish Singh and Balwant Singh are stated to have fired on all the three injured persons as well as on Dharmendra Tiwari, who later died in hospital.

31. The counsel also submitted that the First Information Report was not dictated by Smt. Manbhavati Devi but was written by P.W.2- Ghanshyam Singh without her consent at the police station and not at the spot of the incidence.
32. Learned Senior Counsel has referred to Exhibit Ka-1 which is the First Information Report and submitted that there is a difference in spacing and gaps in the first two pages as compared with the third and fourth pages and that there is also a difference in handwriting. He further submitted that in the First Information Report Manbhavati Devi has stated that she came running to the police station to lodge the FIR whereas the scribe of the First Information report namely Ghanshyam Singh-P.W.2 in his testimony has stated that the First Information Report was dictated by Manbhavati Devi in two leaflets and after it was written down by him she desired that it be read out to her and he accordingly read out the contents of the First Information Report to her and thereafter when she was satisfied, she put her thumb impression on it by using a Kajrauta, which is commonly used in Indian homes for preparing kajal (kohl).
33. Sri V.P. Srivastava, Senior Counsel referring to the statement of P.W.2 Ghanshyam Singh has further stated that when the question was put to him as to whether he came to the police station he stated that he did not come to the police station, learned counsel, therefore, submitted that the contents of the First Information Report are absolutely false since the First Information Report was written by Ghanshyam Singh at the place of incidence itself and Manbhavati Devi never came running to the police station to lodge the First Information Report.
34. Learned Senior Counsel then referred to the post mortem report of the deceased Dharmendra Tiwari (Exhibit Ka-2) and submitted that the post mortem was conducted on 28.07.1998 at about 4.05 P.M.

which mentions;

Stomach and its contents-100 ml. semi solid contents present.

Small Intestine and its contents- gases and faeces present.

Large intestine and its contents-gases and faecal is present.

35. Similarly he referred to the post mortem report of deceased Radhey Shyam Tiwari (Exhibit Ka-3) which was conducted on 28.07.1998 at 9.00 P.M. which mentions;

Stomach and its contents-200 ml. semi solid fluid present.

Small Intestine and its contents- gases and fluids (faecal)

Large intestine and its contents-material present.

36. Learned counsel for the appellants next referred to the post mortem report of deceased Brahma Tiwari (Exhibit Ka-4) which was conducted on 28.07.1998 at 10.00 P.M. where the contents of stomach were mentioned as;

Stomach and its contents- 200 ml. semi solid fluid present.

Small Intestine and its contents-gases and faecal material present.

Large Intestine and its contents- gases and faecal materiel present.

37. Learned counsel for the appellants next referred to the post mortem report of deceased Brijesh Tiwari (Exhibit Ka-5) which was conducted on 28.07.1998 at 10.30 P.M. where the contents of stomach were mentioned as;

Stomach and its contents- 200 ml. semi solid fluid present.

Small Intestine and its contents and large intestine and its contents were mentioned as; Gases -faecal materiel present.

He, therefore, submitted that the presence of semi solid fluid in the stomach and presence of faecal material in the small and large intestine corroborates the statement of P.W.1- Arun Tiwari that the deceased had consumed their last meal at 9.00 P.M. in the previous night and therefore, the incident could not have occurred at 6.30 A.M. on 28.07.1998 as alleged since food requires 3 to 4 hours to be digested and therefore, the incident must have occurred in the previous night on 27.07.1998 itself or immediately thereafter during the night hour but certainly not in the early

morning of 28.07.1998.

38. The law in this regard as settled by the Supreme Court is as under:

39. The Supreme Court in *Masji Tato Rawool and Others Vs. State of Maharashtra* reported in (1971) 3 SCC 416 has held that the contents of the stomach found at the time of post-mortem are not a safe guide to determine a time of incident because that would be a matter of speculation in the absence of reliable evidence on the question as to when the deceased had his last meal and what that meal consisted of.

40. In *Sheo Darshan Vs. State of U.P.* reported in (1972) 3 SCC 74 the Supreme Court has held that the presence of faecal matter in the intestines was not a conclusive as the deceased might be suffering from constipation. It was also held that where there is a positive direct evidence about the time of occurrence it is wrong to make conjectures about the time of occurrence by the the presence of faecal matter in the intestine. Paragraphs 6, 7, 8, 9 and 10 of the said judgment read as under:

“6. With regard to the exact time of occurrence as deposed to by the witnesses, the High Court observed that undoubtedly there were some statements which could place the occurrence at about 10 a.m. But the High Court noted that it was a matter of common experience that the time given by witnesses and specially in the villages is often by guess and not very accurate. The discrepancy did not go to show that the prosecution case about the occurrence having taken place at 8 a.m. was incorrect. If the incident had taken place at 10 p.m. report thereof could not have been made at 11 a.m. at a police station eight miles away. The High Court discountenanced the suggestion that the boy and his mother could have gone to the field to cut fodder at 3 or 4 a.m. in the month of November. The presence of the scythe and the load of fodder near the dead body of the boy negated the suggestion on behalf of the defence that the occurrence had taken place in the field round about 4 in the morning. The High Court found the evidence of Ram Kumari quite convincing wherein she had said that it was some time after she was brought to the hospital that she came to know about the death of her son. According to the High Court as she had become unconscious as a result of the injuries inflicted on her, she could not know that her son had died and what she had seen was only that her son had been assaulted and had been fell down. The doubt expressed by the Sessions Judge with regard to the presence of Mathura, the father, at the spot at the time of the commission of the crime was found by the High Court to be without any substance. According to the

High Court the Sessions Judge had misread a portion of the evidence of Mathura and has read "ghanta" as "gharr". Mathura had said at one place of his testimony that he was at a distance of about 150 paces from the place where his son was murdered when he heard the alarm and saw for the first time the bundle of karbi on the head of his son and at another place in his evidence he had said that he was at a distance of about 140 paces from the deceased when the first kanta blow was given by the appellant to the deceased. How the Sessions Judge could pick up this as an important variance in testimony passes one's comprehension. The farther heard the alarm raised by the son and ran towards him. Was it possible for him to measure or remember with any exactitude the number of paces between him and his boy? Further, the High Court held that there was no discrepancy between the medical evidence about the nature of the injuries and the weapon allegedly used to inflict them. In the case of the boy the major injuries were incised wounds and the abraded contusion could well have been caused by the fall of the boy on the ground or by the lathi portion of the kanta.

7. The High Court further held that there was no valid reason for rejecting the evidence as to the hour of the occurrence being 8 a.m. and not 4am. The Sessions Judge relied mostly on the fact of the presence of faecal matter in the lower intestines and from that came to the conclusion that the boy had not evacuated early in the morning which normally he would have done soon after sunrise. The High Court took the view that the presence of faecal matter in the intestines was not conclusive on the point because the boy might have been suffering from constipation. In the face of positive evidence of the father that the boy had gone to the field in the morning before he had evacuated the Sessions Judge should not have speculated.

8. The High Court meticulously examined the evidence of all the witnesses and all the circumstances of the case and came to the conclusion that the assault was pre-planned, that the appellant was hiding himself in the field of Ram Lal and had come out of it armed with a kanta as soon as he noticed the boy approaching.

9. Although the High Court and the Sessions Court dealt at some length on the question of motive, there can be little doubt that there was enmity between the appellant and Mathura because of the latter siding with his brother Bulaqi and the appellant espousing the cause of his friend.

10. In our view, the High Court came to the correct conclusion while the judgment of the Sessions Judge was based on conjectures and minor variances in the evidence adduced. The commission of the two crimes by the appellant, to our mind, was established beyond any doubt. The appellant had not only taken the life of a young boy who had done him no harm but he was about to kill his mother merely because he was inimically disposed towards the father. The High Court had rightly held that there was no extenuating circumstance and the penalty of death was the proper penalty with which the appellant should be visited. The appeal therefore fails and the conviction is maintained."

327 the Supreme Court in paragraphs 7 and 11 has held as under:

“7. The main contention of the learned Counsel for the appellant is that the occurrence took place in the night of about 9 or 10 p.m. on 10.5.1972; that some unidentified miscreants had fired causing these deaths and that the appellant has been falsely implicated on account of suspicion. In support of this contention, reference was made to the cross examination of Dr. V.B. Sahai, wherein he had stated that there could be possibility of the death in case of the deceased having taken place at about 8 or 9 P.M., if he taken the semi-digested food found in his stomach, between 12 and 1 O'clock.

.....

11. The main stay of the prosecution case was the ocular account given by the two injured persons, namely, Smt. Deorji and Anangpal Singh. They had gun shot injuries which were the hall-marks of their presence at the scene of occurrence. True, they were interested witnesses, related to the deceased. Far from undermining in the circumstances of the case, it guarantee the truth of their testimony. Being relations, they would be the least disposed to falsely implicate the appellant, or substitute him in place of the real culprit. In short, the murder charges had been proved to the hilt against the appellant.”

42. In ***Pattipati Venkaiah Vs. State of Andhra Pradesh*** reported in (1985) 4 SCC 80 it was held that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerized or mathematical fashion so as to be accurate to the last second. Paragraph 10 of the judgment reads as under:

“10. Another circumstance stressed by Mr. Garg was that according to the medical evidence the deceased must have died by about 5.30 a.m. on 2.7.75 and no reasonable explanation has been given by the prosecution as to why the dead body was taken to the hospital at about 10.55 a.m. after about five hours when the hospital was quite near. Here, the learned counsel as also the trial court have committed a serious error in the appreciation of evidence. A perusal of the evidence of the doctor does not conclusively show that the deceased must have died at about 5-6 a.m. Medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second. Moreover, the trial court as also the counsel for the appellant have not properly interpreted the evidence of medical officers (PWs 20 and 21). To begin with, Dr. Padmanabharao (PW 20) had stated that "the injuries could have been caused by a sharp weapon like a spear" and that "the injuries were aged about an hour or so". In cross-examination, however, the Doctor has stated that "the margin of time of the causing of the injuries in Ex.p.-17 could not have been 5 or 6 hours". But, later on, he (PW 20) corrected himself by saying that the injured must have died one hour prior to his examination. The doctor has made a clear admission in the following words;

I cannot pinpoint the time of the causing of the injuries; it may be 5 to 6 hours prior to my examination.”

43. In **(2004) 10 SCC 598 (Ram Bali Vs. State of U.P.)** it was held that evidentiary value of ocular evidence cannot be diluted if it is credible and cogent by relying on medical evidence to the contrary which is based on hypothetical answers given to hypothetical questions. Paragraph 10 of the judgment reads as under:

“10. Even otherwise, the plea that the medical evidence is contrary to the ocular evidence has also no substance. It is merely based on the purported opinion expressed by an author. Hypothetical answers given to hypothetical questions, and mere hypothetical and abstract opinions by textbook writers, on assumed facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent. The time taken normally for digesting of food would also depend upon the quality and quantity of food as well, besides others. It was required to be factually proved as to the quantum of food that was taken, atmospheric conditions and such other relevant factors to throw doubt about the correctness of time of occurrence as stated by the witnesses. Only when the ocular evidence is wholly inconsistent with the medical evidence the Court has to consider the effect thereof. This Court in [Pattipati Venkaiah v. State of Andhra Pradesh](#) (AIR 1985 SC 1715) observed that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second. The state of the contents of the stomach found at the time of medical examination is not a safe guide for determining the time of occurrence because that would be a matter of speculation, in the absence of reliable evidence on the question as to when exactly the deceased had his last meal and what that meal consisted of. In [Nihal Singh and Ors. v. The State of Punjab](#) (AIR 1965 SC 26), it was indicated that the time required for digestion may depend upon the nature of the food. The time also varies according to the digestive capacity. The process of digestion is not uniform and varies from individual to individual and the health of a person at a particular time and so many other varying factors.”

44. Sri V.P. Srivastava, learned Senior Counsel next submitted that the FIR version as well as the statement of the injured witnesses mentioned that the accused used all the weapons indiscriminately but neither of the witnesses has identified the individual role of the accused and therefore, it is not clear as to whose bullet hit whom.
45. Learned Senior Counsel for the appellants referring to the

testimony of Arun Tiwari, injured witness submitted that the witness had stated that at the time of incident at about 6.30 A.M. on 28.07.1998 he alongwith his uncle Radhey Shyam Tiwari his cousin brother Brahma Tiwari, Brijesh Tiwari, Bhola @ Dharmendra Tiwari, Vishnu Pati Tiwari and Ghanshyam Tiwari standing on the Sahan (courtyard) and were brushing their teeth with datoon. Ladies were inside the house. All of a sudden at the same time the accused rushed towards their door and started firing indiscriminately and throwing bombs. Learned Senior Counsel, therefore, submitted that Manbhavati Devi could not have seen the incident as she must have been inside the house and therefore, the entire story narrated by her in her first information report was a false story.

46. In his cross examination the P.W.1, Arun Tiwari (injured witness), however, has stated that on the date of the incidence he had got up at about 5.00 A.M. in the morning and by that time he has done his datoon (brushing of teeth).

47. Referring to the testimony of Ghanshyam Singh-P.W.-2, informal eye witness, the learned Senior Counsel submitted that the witness has stated that at about 6.30 A.M. on 28.07.1998 which was also Naag Panchami he was walking outside the house of Radhey Shyam Tiwari in front of the door of the house of one Abdul Rashid Hakeem and was doing his datoon when the accused rushed upon the place and started firing indiscriminately and throwing bombs.

48. Referring to the testimony of Ghanshyam Tiwari, PW.3, injured witness, the learned Senior Counsel submitted that this witness in his statement made on oath has stated that at about 6.30 A.M. on 28.7.1998 he alongwith Vishnu Pati Tiwari-P.W.4 were standing in the Sehan (courtyard) of his house, his brother Radhey Shyam Tiwari, nephew Brahma Tiwari, Brijesh Tiwari and Dharmendra

Tiwari @ Bholu were sitting in front of the Sehan having tea and nasta (snacks), his son Pinto @ Arun Tiwari was also there, some people were doing datoon when the accused suddenly attacked them and started firing indiscriminately. In his cross examination also he has reiterated the same statement made by him earlier. Upon recall, this witness has stated that at the time of the incidence Radhey Shyam Tiwari, Brahma Tiwari, Brijesh Tiwari, Dharmendra Tiwari @ Bholu Tiwari were not doing datoon, all of them were having nasta (snacks). He also stated that these people were sitting on a bench (chawki) near the Pakad tree and having tea and nasta which consisted of roasted grams and rice and they were having tea which had been brought from inside the house but when the incident happened everybody ran away leaving the cups and nasta.

49. Referring to the statement on oath of P.W.4, Vishnu Pati Tiwari, the injured witness, the learned Senior Counsel pointed out that he has stated that on 28.07.1998 at about 6.00 A.M. which was also Naag Panchami he alongwith Ghanshyam Tiwari was standing outside the door of the house doing datoon, his father Radhey Shyam Tiwari, Brahma Tiwari, Dharmendra Tiwari @ Bholu were sitting in the Sahan outside his brother's house were having tea and doing datoon.
50. Learned Senior counsel then submitted that in his statement on oath upon recall this witness has stated that at the time and date of incident these persons were not doing datoon but were having tea and some of them were doing datoon.
51. Learned Counsel therefore sought to submit that there was inconsistency in the statement of P.W.-1, P.W.2, P.W.3 and P.W.4 as to whether the deceased persons and injured persons were doing 'datoon' and also having tea and snacks or whether they did not have snacks or that they were not doing 'datoon' at all and therefore

he submitted that this inconsistency shows that the incident happened sometime in the middle hours of the night and certainly not at 6.00-6.30 A.M. on 28.07.1998 and therefore the whole story of some persons having snacks ought to be discarded and if semi solid fluid was found in the stomach of the deceased then it would co-relate with the time, i.e. 9.P.M. as stated by Arun Tiwari-P.W-1 that deceased had dinner and therefore the incident happened in the darkness of night.

52. According to the prosecution in the incident Arun Tiwari, Ghanshyam Tiwari and Vishnu Pati Tiwari also received fire arm injuries as mentioned in Ext. Ka-18, 19 and 20 respectively proved by P.W.5, Dr. N.P. Gupta and injuries of the injured persons have also not been disputed by the defence. It is not the prosecution version that the incident with the deceased occurred at one time and incident with the injured persons occurred at the other time. As per Ext. Ka-18, 19 & 20 medical examination of Arun Tiwari, Ghanshyam Tiwari and Vishnupati Tiwari was conducted on 28.07.1998 at 10.15 am., 9.55 am., and 9.35 am. respectively. and P.W.5-Dr. N.P. Gupta has opined that duration of the injury fresh approximately which also corroborates the testimony of injured witnesses that the incident occurred at 6.30 am. Fire arm injuries to the injured persons are hall-marks of their presence at the scene of occurrence and it guarantee the truth of their testimony as held by Hon'ble Supreme Court in ***Gopal Singh Vs. State of U.P. (supra)***.

53.P.W1-Arun Tiwari, P.W.3-Ghanshyam Tiwari and P.W.4-Vishnu Pati Tiwari had stated that the deceased were consuming tea with Laai Chana at the time of incident and the P.W.5-Dr. N.P. Gupta has stated that if any of the deceased had eaten Laai Chana with milk/tea then Laai Chana would be immediately converted into semi solid fluid, therefore in view of the opinion expressed by the

doctor on the basis of semi digested food found in the stomach it cannot be said that the incident occurred sometime in the night. Therefore we find that the contention of the learned counsel for the appellant is misconceived having no substance.

54. In view of the above referred case of ***Maqsoodan and Others Vs. State of U.P. (supra)*** we may note here that the Ext. Kha-1 and Ext. Kha-2 which have been referred to as dying declaration of Ghanshyam Tiwari and Vishnu Pati Tiwari recorded in the B.R.D. Medical College, Gorakhpur in anticipation of death though cannot be treated as dying declaration under Section 32 of the Evidence Act, 1872 (hereinafter referred to as the 'Act, 1872') but would be treated as evidence under Section 157 of the Act, 1872 and when read with their subsequent testimony we have no reason to doubt that there is consistency and corroboration of Exhibit Kha-1 and Kha-2 by the statement given by Ghanshyam Tiwari-P.W.3 and Vishnu Pati Tiwari-P.W.4 during trial. We have also noted that documents Exhibit Kha-1 and Exhibit Kha-2 have been proved by the defence through their own witnesses D.W.1 and D.W.2 and therefore, in our opinion, Exhibit Kha-1 and Exhibit Kha-2 cannot be ignored or discarded. However, on going through the records we find that with regard to presence of injured persons and deceased there is consistency in the statements of independent witness Ghanshyam Singh, P.W.2 and the statement of injured witnesses P.W.1, Arun Tiwari, P.W.3-Ghanshyam Tiwari and P.W.4, Vishnu Pati Tiwari as well as Exhibit. Kha-1 and Exhibit. Kha-2.
55. The Supreme Court in ***Maqsoodan and Others Vs. State of U.P.*** reported in ***1983 (1) SCC 2018*** in paragraph 7 has held as under:

“7. Exts. Ka-22 and Ka-23 have been wrongly called dying declarations. The statement written or verbal, of relevant facts made by a person who is dead, is called a dying declaration; it is relevant

under [Section 32](#) of the Evidence Act, when the statement is made by the person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case, in which that person's death comes into question.

When a person who has made a Statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under [Section 32](#) of the Evidence Act. In the instant case, the makers of the statements Ex. Ka-22 and Ka-23, are not only alive but they deposed in the case. Their statements, therefore,, are not admissible under [Section 32](#); but their statements however are admissible under [Section 157](#) of the Evidence Act as former statements made by them in order to corroborate their testimony in the Court. In the instant case, Ex. Ka-22 and Ka-23 respectively corroborate the testimony in Court of P.W. 3 and C.W. 1 respectively.”

56. Reference may also be made to the judgment of the Supreme Court in *(1995) 4 SCC 430 (Shamshul Kanwar Vs. State of U.P.)* wherein in a case of indiscriminate firing by several persons, the Court has in para 24 held as under:

“24.This takes us to the next question as to whether all the accused challenged and tried were members of the unlawful assembly. Right from the stage of F.I.R. their names have been mentioned and in the evidence the eye- witnesses have particularly deposed that they were present at the scene of occurrence duly armed and specific overt acts also are attributed to at least six of them. In an occurrence of this magnitude where several persons have participated it would not be possible for the witnesses to specify the part played by each of them. It is clear from the facts and circumstances and from the evidence that such of those accused who came to the scene of occurrence armed with lethal weapons in a group and proceeded to participate in the attack, shared the common object of the unlawful assembly namely to attack and kill the members of the opposite party. Consequently they would be liable under [Sections 302/149 I.P.C.](#)”

57. Therefore, in view of the judicial pronouncement in *Masji Tato Rawool , Sheo Darshan, Gopal Singh, P. Venkaiah, Ram Bali* we have no reason to disbelieve the overwhelming ocular evidence of witnesses as regards the presence of the accused and their role in perpetration of the crime.
58. The learned Senior Counsel next referred to the dying declaration of Vishnu Pati Tiwari and Ghanshyam Tiwari Exhibit Kha-1 and Kha-2 respectively and submitted that both the witnesses in their dying declaration have referred to one of the assailants as Guddu

Singh whereas in the First Information Report and in the testimony given before the court the assailant is mentioned as Guddu Pandey, which shows that Guddu Pandey was never involved in the incident and his identity was never clarified. He next submitted that there were two persons both named Jitendra Singh, namely Jitendra Singh s/o Ramdas Singh and another Jitendra Singh s/o Rajnath and since in the dying declaration recorded on 29.07.1998 it has not been clarified as to which Jitendra Singh was carrying gun therefore Jitendra Singh s/o Rajnath could not have been held to be the accused person.

59. We have already held above that Ext. Kha-1 and Ext. Kha-2 cannot be treated as dying declaration under Section 32 of the Act, 1872. However, the Ext. Kha-1 and Ext. Kha-2 may be proved for corroboration of testimony under Section 157 of the Act, 1872.
60. We may note here that Ghanshyam Tiwari-P.W.3 in his statement on oath has clearly stated that Jitendra Singh s/o Ramdas Singh was carrying a gun in his hand and Jitendra Singh s/o Rajnath Singh was also carrying gun in his hand though the witness in his cross examination has stated that he does not know on the next day of the incident when he was in the Medical College, Gorakhpur whether any Magistrate has recorded his statement or not as he was not conscious. He has stated that he was not conscious as he had received injuries.
61. Vishnu Pati Tiwari, the injured witness, P.W.4 in his testimony on oath has also clearly stated that Jitendra Singh s/o Ramdas Singh was carrying a double barrel gun whereas Jitendra Singh s/o Rajnath Singh was carrying gun. In his cross examination he has also stated that he does not remember whether his statement was recorded in the Medical College as he had become unconscious upon receiving bullet wound and therefore he does not remember whether any statement of his was recorded by the Magistrate in the

Hospital.

62. At this stage, it would be relevant to mention that the document Exhibit Kha-1 and Kha-2 were proved by the defence itself by recording of statement of D.W.1-Mithilesh Tiwari, the then S.D.M. Azamgarh then posted as Special Land Execution Officer and D.W.2, Dr. B.K.D. Tripathi, doctor in the B.R.D. Medical College, Gorakhpur.
63. In this view of the matter when the two 'dying declarations' Exhibit Kha-1 and Kha-2 have been proved in evidence by the own witnesses of the defence, namely, D.W.1 and D.W.2 we have absolutely no valid reason to question the same even if the Ghanshyam Tiwari, P.W.3 and Vishnu Pati Tiwari, P.W.4 later stated that they were unconscious and they do not know whether their statements were recorded by any Magistrate in the Medical College. We may refer to the Exhibit Kha-1 and Kha-2 and it will be found that D.W.2, Dr. B.K.D. Tripathi has certified that the two witnesses were fully conscious and competent to make a statement.
64. There is another aspect of the matter, the two 'dying declarations' were recorded in the presence of the Magistrate and therefore that would also be treated as statement made under Section 164 Cr.P.C. and the same having been proved in the testimony of D.W.1 and D.W.2 we have no reason to doubt the version mentioned therein, and we do not find any discrepancy or inconsistency in the statement of P.W.3, Ghanshyam Tiwari and P.W.4, Vishnu Pati Tiwari and the testimony of P.W.2, Ghanshyam Singh and the testimony of injured witness P.W.1, Arun Tiwari if in Exhibit. Kha-1 and Kha-2 it is only mentioned 'Jitendra Singh' without referring to the parentage as it is established from the records that both Jitendra Singh were present at the time of the incident and both were carrying fire arms and had fired indiscriminately at the deceased as well as at the injured persons. Moreover, it may be that

the P.W.3 and P.W.4 only mentioned Jitendra Singh in Exhibit Kha-1 and Kha-2 without mentioning parentage as both Jitendra Singh were carrying gun/double barrel gun as such statement was recorded in anticipation of death and there was also no occasion to cross examine these witnesses at that stage. Even otherwise no question was put to these witnesses during trial to clarify the issue. We may refer to the judgment of the Supreme Court in (2013) 7 SCC 278, Ganga Singh Vs. State of Madhya Pradesh.

65. It may also be noted here that P.W.-1 injured witness, Arun Tiwari, in his testimony has stated that Jitendra Singh S/o Raj Nath Singh was carrying a gun whereas Jitendra Singh S/o Ramdas Singh was also carrying a gun. P.W.-2 independent witness, Ghanshyam Singh has stated that Jitendra Singh S/o Raj Nath Singh was carrying a gun whereas Jitendra Singh S/o Ramdas Singh was carrying a double barrel gun. P.W.-3, injured witness, Ghanshyam Tiwari has also stated that Jitendra Singh S/o Ramdas Singh was carrying a gun and Jitendra Singh S/o Raj Nath Singh was also carrying a gun. P.W.-4 Vishnupati Tiwari, injured witness has also stated that Jitendra Singh S/o Ramdas Singh was carrying a double barrel gun whereas Jitendra Singh S/o Raj Nath Singh was carrying a gun. The trial court has, therefore, held that since in the Exbt. Kha-1 and Kha-2, which are evidence under Section 157 of the Evidence Act, 1872, it has not been clarified as to which Jitendra Singh was present, therefore, he has held that there is a contradiction in the statements of P.W.-1, 2, 3 and 4 but there is a consistency, so far as identity of Jitendra Singh S/o Raj Nath Singh carrying a gun, therefore, he has convicted Jitendra Singh S/o Raj Nath Singh but has acquitted Jitendra Singh S/o Ramdas Singh on the ground that his presence at the spot becomes doubtful.
66. We have already held earlier that Ext. Kha-1 and Kha-2 were recorded as dying declaration in anticipation of death of P.W.-3 and

4 and it is quite possible that they only mentioned Jitendra Singh without mentioning parentage simply for the reason that both Jitendra Singh were present on the spot. Secondly, if it is accepted that in Ext. Kha-1 and Kha-2 they were only referring to one Jitendra Singh then the distinction on the basis of statement of the witnesses with regard to Jitendra Singh S/o Ramdas Singh carrying a gun/double barrel gun is not such as to draw inference that Jitendra Singh S/o Ramdas Singh was not present at the time of incident. P.W.-1,2,3 and 4 have confirmed his presence at the spot and identified his parentage. We, therefore, come to the conclusion that the distinction drawn by the learned trial court while acquitting Jitendra Singh S/o Ramdas Singh absolutely perverse. Since with regard to his presence and commission of offence alongwith co-accused prosecution evidence is consistent and corroborated to each other so we hold him also guilty for the commission of offence under Section 302/149 and 307/149 IPC alongwith the co-accused. Accordingly, **Government Appeal no. 6189 of 2004 (State of U.P. vs. Jitendra Singh S/o Ramdas Singh & others)** is **partly allowed** in so far as it relates to the respondent no.1, Jitendra Singh S/o Ramdas Singh. We convict him under Section 302 I.P.C. read with Section 149 I.P.C. and sentence him to imprisonment of life and to pay Rs.15000/- by way of fine and on failure to pay fine, to suffer further one year rigorous imprisonment. We also convict him under Section 307/149 IPC and sentence him to undergo rigorous imprisonment of ten years with fine of Rs.5000/- and on failure to pay fine, to undergo further six months rigorous imprisonment. Both the sentences shall run concurrently. The Chief Judicial Magistrate, Deoria shall take the respondent no.1 Jitendra Singh S/o Ramdas Singh into custody forthwith and send him to jail to serve out the sentence, awarded as above.

67. So far as the accused respondents no. 2 to 6 namely, Rajbanshi Singh S/o Prayag Singh, Suresh Singh S/o Prayag Singh, Satya Prakash Singh S/o Ramdas Singh, Sanjay Singh S/o Suresh Singh, Om Prakash Singh S/o Ramdas Singh are concerned, it was stated in the F.I.R. that these persons were armed with bombs. The P.W.-1, 2, 3 and 4 have also in their testimony stated that these persons were carrying bombs. In Exhibit Kha-1 and Kha-2 also it has been stated by P.W.-3 and 4 that Suresh Singh, Sanjay Singh, Rajbhansi and Satyaprakash were carrying bombs. P.W.-1 in his testimony has named Suresh Singh, Sanjay Singh, Rajbhansi and Satya Prakash as carrying bombs. P.W.-2 Ghanshyam Singh, independent witness, in his testimony has mentioned Rajbhansi Singh, Suresh Singh, Sanjay Singh, Om Prakash Singh and Satya Prakash Singh as carrying bombs. The P.W.-3 Ghanshyam Tiwari, injured witness, has mentioned Rajbhansi, Suresh Singh, Sanjay Singh, Om Prakash Singh and Satya Prakash Singh as carrying bombs. P.W.-4 Vishnupati Tiwari has also mentioned Suresh Singh, Sanjay Singh, Rajbhansi Singh, Satyaprakash Singh and Om Prakash Singh as carrying bombs. However, the postmortem as well as the injury report does not show any bomb injuries having been received by any of the deceased or any of the injured persons. P.W.-6 Veterinary doctor, Dr. Ashok Kumar Srivastava, District Kushinagar in his injury reports regarding the injuries suffered by the cattle has mentioned two animals having received scratch injuries which may have been caused by a hard object which can also be iron and that such injury could not have been caused by brick or wood. We may, however, also note that though the recovery memo Exhibit Ka-64 shows recovery of piece of bombs and strings (*sutli*) and pellets but these articles were never sent to the forensic laboratory for testing and confirmation and, therefore, in the absence of any FSL report with regard to presence of bomb pieces, the presence of Suresh Singh, Rajbanshi, Satya Prakash,

Om Prakash Singh and Sanjay Singh on the spot becomes doubtful. The trial court has rightly acquitted them. The **Government Appeal no. 6189 of 2004**, is devoid of merit and is accordingly **dismissed** in so far as it relates to respondents no. 2 to 6 namely, Rajbanshi Singh, Suresh Singh, Satya Prakash Singh, Sanjay Singh and Om Prakash Singh.

68. So far as mention of the name of Guddu Singh in the 'dying declaration' is concerned, we find that P.W.3-Ghanshyam Tiwari in his statement on oath has clearly stated that one of the assailants Guddu Pandey was carrying Katta (countrymade pistol) in his hand. He has also clearly stated that after Ram Narain Singh, one of the accused had shot Bhola @ Dharmendra Tiwari with his Katta, Guddu Pandey also fired and shot Bhola @ Dharmendra Tiwari from his Katta.

69. P.W.1, Arun Tiwari, injured witness in his testimony has clearly stated that Guddu Pandey was carrying Katta (countrymade pistol) in his hand and that he alongwith other persons indiscriminately fired upon the deceased and the injured witnesses.

70. Ghanshyam Singh, P.W.2, who is an independent and informal witness, in his testimony has also stated that Guddu Pandey was carrying Katta in his hand and alongwith the others fired indiscriminately at the deceased and injured persons.

71. Thus the presence of Guddu Pandey, accused having been proved by the testimony of injured witness P.W.1, Arun Tiwari, independent witness, P.W.2, Ghanshyam Singh and the statement of two other injured witnesses P.W.3, Ghanshyam Tiwari and P.W.4, Vishnu Pati Tiwari, in our opinion, the testimony of injured witnesses and informal witness cannot be ignored or discarded merely because in the 'dying declaration' the P.W.3 and P.W.4 have referred to accused Guddu Pandey, as Guddu Singh.

72. Sri V.P. Srivastava, learned Senior Counsel for the appellant then submitted that there has been inordinate delay in recording the statement of witnesses under section 161 Cr.P.C. and by the time the statement was recorded the post mortem report was also available and therefore the statement recorded under Section 161 Cr.P.C. would be of little consequence to corroborate the facts.

73. Referring to the statement of the injured witness P.W.3-Ghanshyam Tiwari, learned Senior Counsel submitted that the testimony of this witness as per his own admission was recorded 20-21 days after the incident. The statement of P.W.4, Vishnu Pati Tiwari, injured witness was recorded 14-15 days after the incident. The statement of P.W.16, Sri Shiv Babu, S.S.I. was recorded on 06.08.1998 as prior to that according to him the statement of witnesses was not recorded because the relatives had gone for funeral rites of the deceased persons and on 07.08.1998 the statement of Santosh Kumar Singh, Satpal Singh, Rakesh Singh, Kamlesh was recorded. P.W.16, Sri Shiv Babu has also recorded the statement of Vishnu Pati Tiwari, P.W.4 on 12.08.1998 and Arun Tiwari, P.W.1 on 12.08.1998 under Section 161 Cr.P.C. The statement under Section 161 Cr.P.C. of P.W.2, Ghanshyam Singh was recorded on 13.09.1998.

74. Learned Senior Counsel, therefore, submits that the statement of witnesses having been recorded after considerable delay, the contents of such delayed testimony got colored and influenced by the facts already on record and thereby could not be relied on.

75. Reliance has been placed on the following judgments:

***(1) Bijoy Singh and Another Vs. State of Bihar
(2002 9 SCC 147)***

***(2) Jagjit Singh alias Jagga Vs. State of Punjab
[(2005) 3 SCC 689]***

***(3) Harbeer Singh Vs. Sheeshpal and Others
[(2016) 16 SCC 418]***

76. We have considered the submission of learned Senior Counsel and also gone through the said judgments which in our respectful opinion have no application to the facts of the present case. We find that the testimony of Ghanshyam Tiwari, P.W.3 and Vishnu Pati Tiwari, P.W.4, the two injured witnesses was recorded on 29.07.1998 in the form of 'dying declaration' on the very next day of the incident in the B.R.D. Medical College, Gorakhpur and this testimony has also been proved by the defence itself through the evidence of D.W.1-Mithilesh Tiwari, the then S.D.M. Azamgarh then posted as Special Land Execution Officer, and D.W.2, Dr. B.K.D. Tripathi, doctor in the B.R.D. Medical College, Gorakhpur and the facts stated therein were later corroborated by the testimony of P.W.3 and P.W.4 as well as the testimony of P.W.1-Arun Tiwari given during trial and therefore delay in recording of statement under Section 161 Cr.P.C., in our opinion, would not vitiate the trial since the facts disclosed in the 'dying declaration' Ext. Kha-1 and Kha-2 of P.W.3 and P.W.4 stood corroborated under Section 157 of the Act, 1872 by their subsequent testimony in court.

77. Learned Senior Counsel for the appellant referred to the testimony of Dr. N.P. Gupta, P.W.5, who conducted the post mortem of all the deceased persons and submitted that if as stated by witnesses the deceased had Laai Chana (roasted grams and rice) at the time of the incidence at 6.30 A.M. then the doctor who conducted the post mortem would have mentioned the presence of Laai Chana in his post mortem report but the doctor has only mentioned semi digested fluid present in the stomach of the deceased, therefore the story set up by the witnesses that the deceased were having Laai-Chana and tea in the morning of the incidence is falsified.

78. The learned counsel for the appellant then submitted that the statements of P.W.2, P.W.3 and P.W.4 suffered from the vice of

“improvement” in fact and reliance on such testimony by the Trial Court vitiated the trial. Reliance has been placed on the following judgments:-

(1). State of Rajasthan Vs. Rajendra Singh [(2009) 11 SCC 106]

(2).Mahendra Pratap Singh Vs. State of U.P. [(2009) 11 SCC 334]

(3).Sunil Kumar Sambhudayal Gupta and Others Vs. State of Maharashtra [(2010) 13 SCC 657]

(4). Geeta Vs. State of U.P. and Others [(2010) 13 SCC 678]

(5). Mahavir Singh Vs. State of Madhya Pradesh [(2016) 10 SCC 220]

79. We may refer to the statement of P.W.5, Dr. N.P. Gupta wherein in his testimony he has confirmed that in the stomach of all the deceased persons semi solid fluids were present. P.W.5 has also stated that if any of the deceased had eaten Laai-Chana then the same would be digested after 3-4 hours and become semi solid fluid but if the deceased chewed his food properly then it would convert into semi solid fluid immediately. He also stated that if the deceased person also consumes milk/tea then the Laai-Chana would immediately convert into semi solid fluid. Therefore, from the statement of Dr. N.P. Gupta, P.W.5 we have no reason to doubt or disbelieve the testimony of P.W.1-Arun Tiwari, P.W.2-Ghanshyam Singh, P.W.3-Ghanshyam Tiwari and P.W.4-Vishnu Pati Tiwari. that the deceased were consuming tea or tea with Laai-Chana at the time of the incidence and we have no reason to believe that the P.W.3-Ghanshyam Tiwari and P.W.4-Vishnu Pati Tiwari were trying to improve or embellish their statement made earlier in their examination in chief and the judgments relied on by the appellants have no application to the facts of the present case. We may refer here the judgment of the Supreme Court in **(2015) 3 SCC 138 (Vinod Kumar Vs. State of Haryana.** Paragraph 24 of the said judgment reads as under:

“24. The next facet relates to the discrepancies in the evidence of the witnesses. The learned trial Judge has found discrepancies with regard to the handing of letter by Santosh to Manphul; the discrepancies relating to the place and time pertaining to various aspects stated by witnesses and the identity of the accused at the time of arrest. The discrepancies which have been noted are absolutely minor. The High Court has correctly observed that the minor discrepancies like who met whom, at what time and who was dropped and at whose place and at what time, etc. have been given unnecessary emphasis. It is well settled in law that minor discrepancies on trivial matters not touching the core of the case or not going to the root of the matter could not result in rejection of the evidence as a whole. It is also well accepted principle that no true witness can possibly escape from making some discrepant details, but the 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 it would be justified in jettisoning his evidence. It is expected of the Courts to ignore the discrepancies which do not shed the basic version of the prosecution, for the Court has to call into aid its vast experience of men and matters in different cases to evaluate the entire material on record. [See *State of U.P. V. M.K. Anthony*, (1985) 1 SCC 505, *Rammi v. State of M.P.* (1999) 8 SCC 649 and *Appabhai V. State of Gujarat* (1988) Supp SCC 241.]”

80. We have already noted above that there is absolutely no inconsistency in the testimony of P.W.1, P.W.2, P.W.3 and P.W.4 as to the core incident which happened on 28.07.1998 at 6.00-6.30 A.M. and minor discrepancies as to what the victims were eating or whether they were doing datoon or had finished datoon does not go to the root of the incident and must therefore not be allowed to outright discard the overwhelming ocular evidence on record.

81. In ***(2013) 4 SCC 122 (Subodh Nath and Another Vs. State of Tripura)*** the Supreme Court in paragraph 16 has held as under:

“16. Once we find that the eye witness account of PW-13 is corroborated by material particulars and is reliable, we cannot discard his evidence only on the ground that there are some discrepancies in the evidence of PW-1, PW- 2, PW-13 and PW-19. As has been held by this Court in *State of Rajasthan v. Smt. Kalki and Another* [(1981) 2 SCC 752], in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like. Unless, therefore, the discrepancies are “material discrepancies” so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses. Learned counsel for the appellants is right that the prosecution has not been able to

establish the motive of the appellant no.1 to kill the deceased but as there is direct evidence of the accused having committed the offence, motive becomes irrelevant. Motive becomes relevant as an additional circumstance in a case where prosecution seeks to prove the guilt by circumstantial evidence only.

82. In **(2018) 7 SCC 429 (Khurshid Ahmad Vs. State of Jammu and Kashmir)** the Supreme Court in paragraph 35 has held as under:

“35. When analyzing the evidence available on record, Court should not adopt hyper technical approach but should look at the broader probabilities of the case. Basing on the minor contradictions, the Court should not reject the evidence in its entirety. Sometimes, even in the evidence of truthful witness, there may appear certain contradictions basing on their capacity to remember and reproduce the minute details. Particularly in the criminal cases, from the date of incident till the day they give evidence in the Court, there may be gap of years. Hence the Courts have to take all these aspects into consideration and weigh the evidence. The discrepancies and contradictions which do not go to the root of the matter, credence shall not be given to them. In any event, the paramount consideration of the Court must be to do substantial justice. We feel that the trial Court has adopted an hyper technical approach which resulted in the acquittal of the accused.”

83. In **(1985) 1 SCC 505 (State of U.P. Vs. M.K. Antony)** the Apex Court in paragraph 10 has held as under:

“10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may

differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer. Having examined the evidence of this witness, a friend and well-wisher of the family carefully giving due weight to the comments made by the learned Counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial court, we have no hesitation in holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible.”

84. The judgment in the case of **Subodh Nath, Khurshid Ahmad, and M.K. Antony** (supra) support the view we have taken.
85. The learned Senior Counsel for the appellant next submitted that the prosecution has failed to prove the motive for the commission of the crime and that motive relating to past relations between some of the accused and the family members of the deceased arising out of litigation was far too remote in time to give a cause for commission of the crime. He further submitted that the allegation of the cattle being grazed by deaf and dumb servant Bauka of the deceased straying into the field of Suresh Singh was not such a big incident as would have led to such a massive retaliatory murderous assault as actually happened and even otherwise there was no enmity so far as the other accused persons were concerned except Suresh Singh and even otherwise the role assigned to Suresh Singh was only of carrying countrymade bombs which also never hit any of the deceased or the cattle.
86. Arun Tiwari- P.W.1 in his testimony has stated that prior to this incident there was an old rivalry between his family and the accused persons. He has at one place stated that in the murder of one Udai Bhan Singh he had heard that his grandfather/great grandfather Ram Murat Tiwari was possibly a witness and the accused in that case was awarded life sentence but that the accused had completed their sentence and come out of jail. He also stated that he is not aware whether prior to the commission of crime

Bhushan and others had assaulted one Sri Ram Gaderi or whether his father Ghanshyam Tiwari was witness in that case of assault.

87. Be that as it may, this witness has nevertheless stated very candidly that one day previous to the incident i.e. on 27.07.1998 his cattle herder, Bauka who was deaf and dumb had taken buffaloes for grazing and that some buffaloes had entered the field of Suresh Singh who thereupon severely beat up Bauka who came back home and narrated the entire incidence upon which Brahma Tiwari went to Suresh Singh to make inquiries and threatened him.

88. P.W.2-Ghanshyam Singh has stated that he had lodged a first information report against one K.P. Singh in 1994 and a case crime no. 102 of 1994 had also been registered but he is not aware as to what happened in that case or whether any final report was filed. He has also stated that he possessed an old house in village Paina Bangur and with regard to this house he is not aware whether Yogendra Singh (one of the accused) had made a complaint before the District Magistrate, Deoria in 1995 or not. He has also stated that Ramdas Singh, father of the accused Jitendra Singh and Om Prakash had once contested the election of Village Pradhan against Chandrika Singh. He has also stated that one Smt. Premkanta wife of Ramdas Singh and Smt. Maina Devi wife of Chandrika Singh had contested the election against each other prior to this incident and Maina Devi had won that election. This witness has gone on to narrate some more incidents but we find that his consistent stand is that one day previous to the commission of the present crime, in the evening, there were some heated arguments between Brahma Tiwari and accused Suresh Singh regarding the servant Bauka and Suresh Singh had assaulted servant Bauka.

89. P.W.3, Ghanshyam Tiwari has also referred to killing of one Udai Bhan Singh much before the present incident but he is not aware whether anyone was awarded death sentence and others were given

life imprisonment; he does not know whether his father Ram Murat and Ram Naresh Singh father of Ghanshyam Singh were witnesses in that case. This witness has not said anything about the servant Bauka being assaulted by Suresh Singh.

90.P.W.4, Vishnu Pati Tiwari has stated that there was an old rivalry between his family and the accused persons but he has not mentioned anything about servant Bauka being assaulted by one of the accused Suresh Singh.

91.However, from the testimony of the prosecution witnesses what is clear is that the incident was a day light incident having occurred at 6.00- 6.30 A.M. on 28.07.1998. The injured witnesses P.W.1, Arun Tiwari, P.W.3 Ghanshyam Tiwar and P.W.4 Vishnu Pati Tiwari as well as P.W.2, Ghanshyam Singh, formal witness are consistent in their stand with regard to the role of the accused at the time of the incidence and the weapons being carried by the accused and therefore when there is direct ocular evidence motive becomes secondary.

92. In the case of *Shardul Singh Vs. State of Haryana (2002) 8 SCC 372*, it has been held that :-

“motive', which is not always capable of precise proof, if proved, may lead additional support to strengthen the probability of the commission of the offence by the person accused but the absence of motive does not ipso facto warrant an acquittal.”

93. Similarly, in the case of *Ravindra Kumar Vs. State of Punjab, (2001) 7 SCC 690* , the Apex Court has held that-

“It is generally an impossible task for the prosecution to prove what precisely would have impelled the murderers to kill a particular person. All that prosecution in many cases could point to is the possible mental element which could have been the cause for the murder. It is therefore not possible to change the tide on account of the inability of the prosecution to prove the motive aspect to the hilt.

94. Similarly in the case of ***State of U.P. Vs. Baburam (2000) 4 SCC 515*** it has been held that-

“It is not possible to accept the view that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eyewitnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would be weaken the prosecution to any would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it is generally in a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investigating officer would have succeeded in knowing it through interrogations that cannot be put in evidence by them due to the ban imposed by law. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of offender to such a degree as to impel him to commit the murder cannot be construed as a fatal weakness of the prosecution.”

95. Similarly, in the case ***Thaman Kumar Vs. State of Union Territory of Chandigarh, (2003) 6 SCC 380***, it has been held that-

“There is no such principle or rule of law that where the prosecution fails to prove the motive for commission of the crime, it must necessarily result in acquittal of the accused. Where the ocular evidence is found to be trustworthy and reliable and finds corroboration from the medical evidence, a finding of guilt can safely be recorded even if the motive for the commission of the crime has not been proved. Hence in the facts and circumstances of the case, the absence of any evidence on the point of motive cannot have any such impact so as to discard the other reliable evidence available on record which unerringly establishes the guilt of the accused.”

96. Similarly, in the case of ***Yunis alias Kariya Vs. State of M.P. (2003) 1 SCC 425***, it has been held that-

“Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is settled law that establishment of motive is not a sine qua non for proving the prosecution case.”

97. In ***(1973) 3 SCC 219 (Shivaji Genu Mohite Vs. The State of Maharashtra)*** the Supreme Court in paragraph 12 has

held as under:

“12. As stated earlier, the fact that the prosecution in a given case has been able to discover a sufficient motive or not cannot weigh against the testimony of any eye-witness. Evidence as to motive would, no doubt, go a long way in cases wholly dependent on circumstantial evidence. Such evidence would form one of the links in the chain of circumstantial evidence in such a case. But that would not be so in cases where there are eye-witnesses of credibility, though even in such case if a motive is properly proved such proof would strengthen the prosecution case and fortify the court in its ultimate conclusion. But that does not mean that if a motive is not established the evidence of any eye-witness is rendered untrustworthy.”

98. In ***(2017) 11 SCC 120 (Rajagopal Vs. Muthupandi alias Thavakkalai and Others)*** the Supreme Court in paragraph 14 has held as under:

“14. Equally, it is well established that motive does not have to be established where there is direct evidence. Given the brutal assault made on PW-1 by criminals, the fact that witnesses have turned hostile can also cut both ways, as is well known in criminal jurisprudence.”

99. Therefore, contention of the learned Senior Counsel for the appellant that the prosecution has failed to establish an immediate motive which might have led to a spontaneous reaction is thoroughly misconceived.

100. The learned Senior Counsel then submitted that Smt. Manbhavati Devi never came to the police station to lodge the FIR and that her version in the FIR that she came running to the police station to submit a report was absolutely false. He also submitted that the handwriting in the FIR Exhibit KA-1 is different and that in the last two pages spacing is greater. In support of his submission the learned Senior Counsel referred to the testimony of Ghanshyam Singh, P.W.2 wherein Ghanshyam Singh stated that the FIR was dictated to him by Manbhavati Devi at the place of the incidence and after he had noted it down it was read to her and only when she was satisfied she put her thumb impression on it using a Kajrauta and after that he came to the police station to

lodge the same.

101. We may, however, note that the testimony of P.W-2, Ghanshyam Singh or his cross-examination does not show that any question was ever put to him that if he had written the FIR at the place of the incidence how it was mentioned therein that Manbhavati Devi had come running to the police station to lodge the same when according to him he never came to the police station. We also find that no question was put to the P.W.2- Ghanshyam Singh that there was a difference in spacing between the first two pages and last two pages of the FIR and that it was in different handwriting.

102. In our opinion, unless it was brought to the notice of the witness that there was a discrepancy in his statement with that given by him earlier the witness could not have been expected to clarify the discrepancies.

103. The Supreme Court in **(2013) 7 SCC 278 (Ganga Singh Vs. State of Madhya Pradesh)** in paragraphs 12 and 13 has held as under:

“12. According to Mr. Mehrotra, however, PW-5 is not a reliable witness as she has made a significant omission in her evidence by not stating anything about the seizure of the blouse, dhoti and broken bangles which were made in her presence. But we find that no question has been put to PW-5 in cross-examination with regard to seizure of the blouse, dhoti and broken bangles in her presence. If the appellant’s case was that PW-5 cannot be believed because she made this significant omission in her evidence, a question in this regard should have been put to her during her cross- examination. To quote Lord Herschell, LC in Browne vs. Dunn [(1893) 6 R 67]:

“.....it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit.”

13. *Section 146* of the Indian Evidence Act also provides that when a witness is cross-examined, he may be asked any question which tend to test his veracity. Yet no question was put to PW-5 in cross-examination on the articles seized in her presence. In the absence of any question with regard to the seizure of the blouse, dhoti and broken bangles in presence of PW-5, omission of this fact from her evidence is no ground to doubt the veracity of her evidence.”

104. However, as already noted earlier Smt. Manbhavati Devi died sometime in July, 1999 whereas the trial in the present case commenced on 08.05.2000 and therefore her evidence could not be recorded to prove the contents of the First Information Report. However, we may note that the First Information Report is not substantive evidence; the lodging of a report only sets the law into motion for purposes of investigation.

105. In **1993 Supp (1) SCC 208, (Surjit Singh alias Gurmit Singh Vs. State of Punjab)** the Supreme Court in paragraph 8 has held as under:-

“8. The High Court turned down all the grounds. The High court termed the reasoning given by the Trial Judge as implausible. What weighed with the High Court was the presence of Surjit Singh in the village up to 13.5.78 till 4.00 p.m., whereafter he allegedly commenced his journey to join his unit. The High Court viewed that it was for the appellant to prove that he left the village at 4.00 p.m. on May 13, 1978 so as to be absent at the time of the occurrence and then having reached his unit on May 16, 1978. The appellant had cited one Naib Subedar Waryam Singh as defence witness but gave him up. The two defence witness cited by the defence were merely formal with regard to the sending of certain complaints in the office of Senior Superintendent of Police, Jullundur. The evidence of these defence witnesses did not even remotely touch the alibi of the appellant. With regard to the confusion about the name, the High Court observed that it would be uncommon and unreasonable for two brothers to be having the same name. The appellant does have a brother named as Gurmit Singh and yet strangely the appellant assumes his brother's name to be Gurmit Singh. Taljit Singh PW 2 had deposed that the appellant has read only up to 4th or 5th class whereas Gurmit Singh was a Matriculate and that when the appellant sought recruitment in the Army he gave his name as Gurmit Singh and utilised the matriculation certificate of his brother Gurmit Singh. He also deposed that later when papers for verification had come to the village the appellant had approached Mohinder Singh deceased that he should help him by telling the Enquiry Officer that his name was Gurmit Singh and he was a matriculate. This evidence was totally overlooked by the Trial Judge for reasons we cannot understand. The High Court used this evidence against the appellant. The High Court had gone on to observe, and in over view rightly, that the appellant was known as Surjit Singh and was known as such even for the purpose of Army records. He went with the assumed name Gurmit Singh, for the

reasons explained by the prosecution in the statement of Taljit Singh PW 2. It is noticeable that in the appeal against his acquittal, service of the appellant was effected in the name of Surjit Singh alias Gurmit Singh through the Military authorities. The High Court observed that this particular was suggestive that in the force as well he was known as Surjit Singh. The appellant having taken up a positive plea of alibi, he could prove it from his travel papers which have been checked and suitably endorsed upon by the railway authorities and/or the Army authorities on his joining his unit. The appellant miserably failed to discharge that burden. In this situation the aforesaid misdescription/omissions in the FIR about the number of shots fired and the absence of Taljit Singh's injuries or the appellant being not described as a military man become of lesser importance. First Information Report is not an encyclopedia of the entire case and is even not a substantive piece of evidence. It has value, no doubt, but only for the purpose of corroborating or contradicting the maker. Here the maker was a young woman who had lost her husband before her very eyes. The omission or misdescription of these details in the FIR which was recorded most promptly, within three hours of the occurrence, would not tell on the prosecution case or the statements of the eye-witnesses with regard to the participation of the appellant in the crime. He had taken a leading and prominent part in spearheading and committing it. For these reasons, we are of the view that the High Court was right in convicting the appellant on giving cogent reasons to demolish the reasoning of the Trial Judge and adding thereto reasons of its own."

106. In **(2017) 6 SCC 1, Mukesh Vs. State (NCT of Delhi)** the Supreme Court in Paragraph 55 has held as under:

"55. As far as the argument that the FIR does not contain the names of all the accused persons is concerned, it has to be kept in mind that it is settled law that FIR is not an encyclopedia of facts and it is not expected from a victim to give details of the incident either in the FIR or in the brief history given to the doctors. FIR is not an encyclopedia which is expected to contain all the details of the prosecution case; it may be sufficient if the broad facts of the prosecution case alone appear. If any overt act is attributed to a particular accused among the assailants, it must be given greater assurance. In this context, reference to certain authorities would be fruitful."

107. There is another aspect of the matter. It is not disputed between the parties that Smt. Manbhavati Devi, the informant had died sometime in July, 1999 whereas the trial itself commenced on 8.05.2000, therefore, the FIR or its contents could not be proved, hence in the circumstances no reliance can be placed upon the FIR.

108. The Supreme Court in **(1997) 11 SCC 215, Harikirat Singh Vs State of Punjab**, in paragraph 4 has held as under:-

“4. In our considered view, the High Court was not justified in treating the statement allegedly made by Kharaiti Ram during inquest proceedings as substantive evidence in view of the embargo of Section 162 Cr.P.C. Equally unjustified was the High Court's reliance upon the contents of the F.I.R. lodged by Walaiti Ram who, as stated earlier, could not be examined during the trial as he had died in the meantime. The contents of the F.I.R. could have been used for the purpose of corroborating or contradicting Walaiti Ram if he had been examined but under no circumstances as a substantive piece of evidence. Having regard to the facts that except the evidence of the two eye witnesses there is no other legal evidence to connect the appellant with the offences for which he has been found guilty and that in view of the material contradictions the evidence of the two eye witnesses cannot be safely relied upon the appellant is entitled to the benefit of doubt. We, therefore allow this appeal and set aside the order of conviction and sentence recorded against the appellant. The appellant, who is on bail, is discharged from his bail bonds.”

109. However, we find that the narrative as mentioned in the FIR with regard to the accused, the weapons carried by them and the entire story of the manner in which the crime has been perpetrated, has been corroborated by the testimony of injured witnesses, P.W.1, Arun Tiwari, P.W.3, Ghanshyam Tiwari, P.W.4, Vishnu Pati Tiwari and the testimony of informal witness P.W.2, Ghanshyam Singh and contents of Exhibit Kha-1 and Kha-2 and, therefore, even after ignoring the FIR, we find that the prosecution has been successful in proving the guilt of the accused in the perpetration of the crime. We, therefore, **dismiss the Criminal Appeal No. 5100 of 2004.** The judgement and order dated 28.8.2004 of the trial court convicting and sentencing the appellant Guddu Pandey is affirmed. The appellant Guddu Pandey is in jail. He shall be kept there to serve out the sentence awarded by the trial court and affirmed by us.
110. As regards Criminal Appeal No. 5195 of 2004 (Ram Narain Singh Vs State of U.P.), this appeal has been filed by the appellant for setting aside his conviction under Section 302, 149 I.P.C. on the ground that the only role assigned to him in the crime was of exhortation. We find that in Exbt. Kha-1 and Kha-2 Ram Narain

Singh has been clearly named by the P.W.-4 and P.W.-3 respectively in their 'dying declaration' which subsequently became admissible under Section 157 of the Act, 1872 and they have also stated that Ram Narain Singh was carrying gun and *katta* (country made pistol). P.W.-1, injured witness Arun Tiwari has also in his testimony before the court stated that Ram Narain Singh, appellant was carrying *katta* (country made pistol). P.W.-2 independent witness Ghanshyam Singh in his testimony has mentioned Ram Narain Singh has carrying *katta* and he has also subsequently stated that Ram Narain Singh along with others fired indiscriminately at the deceased. In addition, he has also stated that Ram Narain Singh along with Guddu Pandey, another accused, shot Bhola @ Dharmendra Tiwari and Ghanshyam Tiwari. We may mention here that Dharmendra Tiwari died subsequently on way to hospital. P.W.-3 injured witness, Ghanshyam Tiwari and P.W.-4 Vishnupati Tiwari both have categorically stated that Ram Narain Singh and Guddu Pandey were carrying country made pistol in their hands and shot Bhola @Dharmendra Tiwari and Ghanshyam Tiwari. Therefore, we find that specific role of shooting Bhola@ Dharmendra Tiwari resulting in his subsequent death has been assigned by the witnesses to Ram Narain Singh using a country made pistol and therefore, it cannot be said that the only role assigned to the appellant Ram Narain Singh is of exhortation.

We, therefore, **dismiss** the **Criminal Appeal No. 5195 of 2004**. The judgement and order dated 28.8.2004 of the trial court convicting and sentencing the appellant Ram Narain Singh is affirmed. The appellant Ram Narain Singh is in jail. He shall be kept there to serve out the sentence awarded by the trial court and affirmed by us.

111. So far as Criminal Appeal no. 5493 of 2004 (Yogendra Singh Vs State of U.P) is concerned, this appeal has been filed by the appellant against his conviction under Section 302/149, 307/149 and 148 IPC.

112. The name of appellant Yogendra Singh has been mentioned in Exbt. Kha-1 and Kha-2 as carrying gun. P.W.-1 injured witness, Arun Tiwari in his testimony specifically mentioned Yogendra Singh as carrying a gun. P.W.-2 independent witness Ghanshyam Singh has also mentioned Yogendra Singh as carrying a gun. P.W.-3 injured witness Ghanshyam Tiwari and P.W.-4 Vishnupati Tiwari have also categorically stated that Yogendra Singh was carrying a gun and he along with other accused fired indiscriminately at the deceased. Therefore, we do not find any contradiction or discrepancy in the testimony of P.W.-1, 2, 3 and 4 and Exbt. Kha-1 and Kha-2 as to the specific role assigned to the appellant Yogendra Singh and, therefore, we **dismiss the Criminal Appeal No. 5493 of 2004**. The judgement and order dated 28.8.2004 of the trial court convicting and sentencing the appellant Yogendra Singh is affirmed. The appellant Yogendra Singh is in jail. He shall be kept there to serve out the sentence awarded by the trial court and affirmed by us.

113. So far as Criminal Appeal No. 5494 of 2004 (Ram Vinod Singh and Others Vs. State of U.P) is concerned, this appeal has been filed by the appellants against their conviction under Section

302/149, 307/149 and 148 IPC. However, on a conspectious of facts discussed above and the law laid down by the Supreme Court, we do not find any merit in this appeal.

114. The **Criminal Appeal No.5494 of 2004** is accordingly **dismissed**. The judgement and order dated 28.8.2004 of the trial court convicting and sentencing the appellants Ram Vinod Singh, Jitendra Singh s/o Rajnath Singh, Indrajeet Pandey, Ram Narain Singh, Jagdish Singh and Balwant Singh is affirmed. The appellants are in jail. They shall be kept there to serve out the sentence awarded by the trial court and affirmed by us.

115. Government Appeal no. 5898 of 2004 has been filed by the State for enhancement of the sentence awarded to the respondents no. 1 to 8, namely, Yogendra Singh, Ram Vinod Singh, Jitendra S/o Raj Nath Singh, Indrajeet Pandey, Guddu Pandey, Jagdish Singh, Balwant Singh and Ram Narain Singh.

116. Criminal Revision no. 4061 of 2004 (Vishnu Pati Tiwari Vs. State of U.P. and Others) has also been filed with the prayer that the sentence of life imprisonment awarded to the respondents no. 2 to 9, namely, Yogendra Singh, Ram Vinod Singh, Jitendra S/o Raj Nath Singh, Indrajeet Pandey, Ram Narain Singh, Guddu Pandey, Jagdish Singh, Balwant Singh be enhanced and converted into a sentence of death.

117. The submission of learned AGA as well as Sri Samit Gopal, learned Senior Counsel is that this was a case of mass murder care-

fully and expertly executed by the accused in a planned manner and, therefore, the accused persons deserved the ultimate sentence of death as four persons, namely, Dharmendra Tiwari, Radhey Shyam Tiwari, Brahma Tiwari and Brijesh had been shot and killed by them. They have placed reliance upon the judgment of the Supreme Court in ***Bachan Singh Vs State of Punjab, (1980) 2 SCC 684*** and ***Lehna Vs State of Haryana (2002) 3 SCC 76***.

118. The principle of law has been enunciated by the Supreme Court in the above cases, which are as under:-

“23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:-

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion.

For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

119. The submission of the learned counsel is that the principles enunciated by the Supreme Court in the above cases applies squarely to the present case as this was a crime of enormous proportion where large number of members of a family of a particular caste, namely, the Brahmin community were eliminated in cold blood over such a minor issue as an argument between the deceased and Suresh Singh with regard to the servant boy Bauka and some cattle entering the field of Suresh Singh on the evening previous to the date of the crime and that the murder was also committed in an extremely brutal and dastardly manner. The trial court has deliberated the issue and opted for the sentence of life imprisonment against the accused on the ground that the prosecution has led no evidence to establish that the crime had been executed in a planned manner but we find that, at the same time, the learned trial court has also held that brutality is involved in this crime but brutality by itself will not bring the case within the ambit of rarest of rare cases.

120. There were 14 accused persons, out of which eight were convicted of murder. The respondents no.1 to 8 in Government Appeal No.5898 of 2004 as well as respondents no.2 to 9 in Criminal Revision No.4061 of 2004 are same and they have been convicted of offences under Sections 148, 302/149, and 307/149 IPC. However, the order of the trial court also shows that the accused Yogendra Singh, Ram Vinod Singh, Ram Narain Singh, Jitendra Singh S/o Raj Nath Singh, Indrajeet Pandey, Guddu Pandey, Jagdish Singh, Balwant Singh were on bail during trial and after their conviction are at present serving out their sentence since 2004. We are now in 2019 and the accused have been in jail all this while, therefore, we are of the view, at this distance of time after 21 years of the date of crime, we are not inclined to enhance the sentence of life imprisonment into one of death.

The **Criminal Revision No.4061 of 2004** and the **Government Appeal No.5898 of 2004** are therefore **dismissed**.

121. **Criminal revision no. 4060 of 2004** has been filed by Vishnu Pati Tiwari to set aside the order of acquittal passed by the trial court against the respondents 2 to 7, namely, Jitendra Singh s/o Ram Das Singh, Rajbanshi Singh, Suresh Singh, Satya Prakash Singh, Sanjay Singh and Om Prakash Singh. The respondent no.2 is Jitendra Singh S/o Ramdas Singh and his case has already been considered by us herein above in Government Appeal No.6189 of 2004 and we have set aside the finding of the trial court against his acquittal. Therefore, this revision also stands **partly allowed** on the same terms as dealt with above in the Government Appeal no.6189 of 2004 in so far as it relates to respondent no.2-Jitendra Singh s/o Ramdas Singh.

122. So far as the other respondents no. 3 to 7 are concerned, we have already given our reasons herein above while dealing with the Government appeal no.6189 of 2004 and we find on the basis of our own appreciation of records and finding recorded by the trial court acquitting the respondents Rajbhansi, Suresh Singh, Satya Prakash Singh, Sanjay Singh and Om Prakash Singh to be absolutely correct and calls for no interference. This criminal revision is, therefore, **dismissed** in so far as it relates to respondents no. 3 to 7.

Order Date :-21.11.2019

N Tiwari