

A.F.R.

Reserved on 08.08.2019

Delivered on 11.09.2019

Court No. - 42

Case :- CRIMINAL APPEAL No. - 826 of 1991

**Appellant :-** Rajveer Singh And Others

**Respondent :-** State

**Counsel for Appellant :-** Ravindra Singh, Dinesh Kumar Bhaskar,  
Pawan Singh

**Counsel for Respondent :-** A.G.A.

Hon'ble Manoj Misra, J.

Hon'ble Virendra Kumar Srivastava, J.

***(Delivered by Hon'ble Virendra Kumar Srivastava, J.)***

1. The instant appeal has been filed under Section 374 of Code of Criminal Procedure, 1973 (*hereinafter referred to as "Code"*) against the judgment and order dated 23.4.1991 passed by Special Judge, Moradabad in Session Trial No. 586 of 1988 (State vs. Rajveer Singh and others), P.S. Naugawa Sadat, District Moradabad, U.P., whereby, appellants Rajveer Singh and Jagat Veer Singh have been convicted and sentenced to imprisonment for life, whereas, appellants Suresh, Viresh and Teeka Ram have been convicted and sentenced to undergo 7 years rigorous imprisonment for offence under Section 307 read with Section 149 and all the appellants have further been convicted for offence under Section 148 IPC and sentenced to undergo rigorous imprisonment for a term of 2 years. All the sentences have been directed to run concurrently.

2. The brief facts of the prosecution case are that appellants Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram;

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PW-1, Hari Raj Singh; PW-4, Dinesh Kumar and PW-5, Dushyant are residents of Village Jamuna Khas, P.S. Naugawa Sadat, District Moradabad. Appellants, namely, Rajveer Singh and Jagat Veer Singh, are real brothers. Appellants Suresh and Viresh are also real brothers. PW-2, Shoorveer Singh is brother-in-law of PW-1, Hari Raj Singh.

3. It is the prosecution case that while, on 29.1.1984, PW-1, Hari Raj Singh was irrigating his field by a diesel pump set of PW-4, Dinesh Kumar, at about 10:00 p.m., PW-2, Shoorveer Singh came there and told that appellants Rajveer, Jagat Veer, Suresh and Viresh armed with guns, whereas, appellant Teeka Ram armed with sword, were coming from the *Haveli* of appellant Suresh towards him ( Hari Raj Singh). PW-1, Hari Raj Singh told him not to worry as appellants Viresh and Suresh were also with them. As a result, both of them sat under the bullock cart with lantern, emitting light, hanging at its back. At about 11:00 p.m., all the appellants reached the place of occurrence, where PW-1, Hari Raj Singh, PW-2, Shoorveer Singh and PW-4, Dinesh were sitting. Seeing them, PW-1, Hari Raj Singh came out from under the bullock cart. Whereafter, appellant Jagat Veer fired at PW-2, Shoorveer Singh which hit his hands; PW-1, Hari Raj Singh caught appellant Jagat Veer Singh by his arms and bit his shoulder. Upon which, appellant Rajveer Singh exhorted appellant Teeka Ram to attack him with sword. As appellant Teeka Ram was about to attack Hari Raj Singh (PW-1), he released appellant Jagat Veer Singh and as soon as PW-1, Hari Raj released him, appellant Rajveer fired at PW-1, Hari Raj Singh which hit his left hand, whereby, he fell down. After the firing, appellants came near PW-2, Shoorveer, to verify whether PW-2, Shoorveer was alive or not. Upon information from Suresh that he was about to

die, upon sensing that on alarm raised by PW-1, Hari Raj Singh and PW-2, Shoorveer Singh, persons present at a crusher nearby were coming, the appellants ran away. In the night, PW-1, Hari Raj Singh sent PW-5, Dushyant along with one Subhash and Ravindra to P.S. Naugawa Sadat to lodge First Information Report (*hereinafter referred to as "F.I.R."*), but the same was not lodged as Station Officer of P.S. Naugawa Shadat advised them to arrange for treatment of injured first instead of bothering to lodge an F.I.R. Next day, in the morning, PW-1, Hari Raj and PW-2, Shoorveer Singh were taken to Combined Health Centre (CHC), Amroha by tractor of PW-5, Dushyant.

4. PW-3, Dr. A.K. Mehrotra, Medical Officer, Combined Health Centre, Amroha, examined the injuries of PW-1, Hari Raj Singh and PW-2, Shoorveer Singh on 30.1.1984. The injuries noticed were as follows:

**(a) Injuries on PW-1, Hari Raj Singh.**

*(i) fire arm wound of entry, size 3.2 cm x 3.2 cm through and through on inner side of left upper arm, 4 cm above from the left elbow joint, margins everted, bleeding present after cleaning of wound.*

*(ii) fire arm exit wound, size 15.0 cm x 13.0 cm through and through on the injury no. 1; interior portion of left upper arm, left elbow joint and upper portion of left forearm, margins everted, bleeding present after cleaning the wound.*

*(iii) lacerated wound size 3 cm x 3 cm x muscle deep on the inner portion of left upper arm 2 cm below the injury no. 1, bleeding present, after cleaning of wound.*

**(b) Injuries on PW-2, Shoorveer Singh.**

*(i) fire arm wound of entry, size 3 cm x 3 cm through and through on the back of right elbow*

*joint, inner side and margin everted, bleeding was present after cleaning. Blackening is present.*

*(ii) fire arm wound exit size 4.5 cm x 4.0 cm through and through to the injury no. 1 right in the arm, inner side. Margin everted 8 cm below the right elbow joint. Bleeding after cleaning the wound was present. Injuries was surrounded by swelling size 20.0 cm x 15.0 cm on the right upper arm and right forearm.*

5. After medical examination, on the dictation of PW-1, Hari Raj Singh, written report Ex ka1 was prepared by Satyaveer Singh. After putting his thumb impression on it, PW-1, Hari Raj Singh, sent Satyaveer Singh to P.S. Naugawa Sadat to lodge the same. Whereafter, FIR (Ex.ka.4) was lodged at 12:30 on 30.1.1984.

6. Investigation was taken over by Hukum Singh Yadav, Inspector, P.S. Naugawa, (*hereinafter referred to as 'I.O.'*) who inspected the place of occurrence and took sample of blood stained and plain earth, blood stained bed sheet, empty cartridges from the place of occurrence and prepared recovery memo (Ex.Ka.14 and Ex.Ka.16); he also inspected the lantern, took it into his custody and prepared its recovery memo (Ex.Ka.17). During investigation, two persons, namely, Ram Singh and Om Pal Singh, were arrested and, it appears, from their possession, country made pistols were recovered which were sent for forensic science laboratory, Lucknow, along with empty cartridges found at the place of occurrence. On the application of Hari Raj Singh (PW-1), as he was not satisfied with investigation, investigation was transferred to CBCID, Lucknow and entrusted to PW-8, Sri Krishna Srivastava, Inspector in CBCID, Lucknow who inspected the place of occurrence, prepared site plan (Ex.Ka.9) and recorded the statement of witnesses. Meanwhile, PW-8, Sri Krishna Srivastava was transferred and investigation was handed over to

another investigating officer. Thereafter, charge-sheet Ex.Ka.10 and Ex.Ka.11 u/s 147,148, 149 and 307 IPC, was filed against the appellants upon which cognizance was taken by the concerned Magistrate and since the offences were exclusively triable by a Court of Session, after providing copies of necessary documents, as required u/s 207 of the Code, to the appellants, committed the case for trial to Court of Session, Moradabad.

7. Charges u/s 307 and 148 IPC were framed against appellants Jagatveer Singh and Rajveer Singh whereas u/s 148 and 307 read with 149 IPC were framed against appellants Suresh, Viresh and Teeka Ram, which were read over to the appellants. The appellants denied the charges and claimed for trial.

8. The prosecution examined eight witnesses, out of whom PW-1, Hari Raj Singh, PW-2, Shoorveer Singh and PW-4, Dinesh Kumar are witnesses of fact and rest are formal witnesses. PW-3, Dr. A.K. Mehrotra had examined the injuries of PW-1 Hari Raj Singh and PW-2, Shoorveer Singh; PW-5, Dushyant is a formal witness, who was sent after the occurrence to inform the police and on whose tractor the injured were sent next day to the hospital.

9. PW-6, Const. Ibrahim Khan is a witness who has registered the chick F.I.R. and made entry of the occurrence in General Diary. PW-7, Hareram Singh is recordkeeper Safadarjang Hospital, New Delhi and PW-8, Sri Krishna Srivastava is investigating officer of the case.

10. After closure of prosecution evidence, appellants were examined under Section 313 of the Code. They denied the prosecution version and stated that they are innocent and have falsely been implicated. They had further stated that during

investigation, Ram Singh and Om Pal Singh were arrested by the Investigating Officer who had confessed their guilt.

11. Appellants were afforded opportunity to lead evidence in their defence. DW-1 Basdev Prasad Sharma, Head Const. Sadar Malkhana, Moradabad was produced by the appellants in their defence.

12. After hearing counsel for the parties, Trial Court found accused-appellants guilty of the charge under Sections 307 read with Section 149 and Section 148 I.P.C. and, accordingly, convicted and sentenced them as above. Aggrieved by the impugned judgment and order, appellants have preferred this appeal.

13. At the very outset, it is pertinent to note that during the pendency of this appeal, appellants nos. 1, 2, 3 and 5 namely Rajveer Singh, Jagat Veer Singh, Suresh and Teeka Ram had died and appeal in regard to them had been abated vide order dated 1.7.2019. Therefore, the appeal of only Viresh survives.

14. We have heard Sri Pawan Singh Pundir, learned counsel for the appellant (Viresh) and learned A.G.A. for the State.

15. Learned counsel for the appellant Viresh has submitted that he is innocent and has been falsely implicated. He was not a member of any unlawful assembly; from the evidence on record, it has not been proved as to whether he had a common object or had knowledge regarding any such object; no evidence has been produced by the prosecution in this regard. Learned counsel has further submitted that F.I.R. was lodged after a delay of more than 13 hours of the occurrence without any satisfactory and plausible explanation. Medical evidence is also not corroborated with ocular evidence. All the prosecution witnesses are interested witness.

Conduct of injured witnesses is neither natural nor trustworthy. Appellant has no motive either to commit any offence or to be a member of any unlawful assembly. The impugned judgment and order passed by the Trial Court is against the settled principle of law and liable to be set aside. Appellant is entitled for acquittal. He has placed reliance on **Nagesar Vs. State of Chhatisgarh (2014) CrLJ 2948**.

16. Per-contra, learned A.G.A. , vehemently opposing the submission advanced by the learned counsel for the appellant, has submitted that alleged offence has been caused in the prosecution of a common object of member of unlawful assembly. Presence of appellant Viresh at the place of occurrence with deadly weapon has been proved by the prosecution beyond reasonable doubt. Learned A.G.A. further submitted that though the remaining appellants, who played active role in causing grievous injuries as also attempt to take the life of injured witnesses, have died, but appellant (Viresh) cannot be given any benefit on that score as he was part of the unlawful assembly. He has further submitted that the statement of injured witnesses supported with medical evidence cannot be disbelieved only on the ground of delay in F.I.R. because delay has been explained and is not fatal to the prosecution case.

17. We have considered rival submission of the learned counsel for the parties and have gone through the entire record.

18. PW-1, Hari Raj Singh has stated that accused-appellants, Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram are residents of his village and he knew them very well; appellants Raj Veer Singh and Jagat Veer Singh are real brothers; Suresh and Viresh are also real brothers who were his real nephews. He stated that at the time of occurrence, he had hired an engine of Dinesh

(PW-4) to irrigate his field and when he was irrigating his field, Dinesh (PW-4) and his servant Khem Singh was present at his field. He stated that on the fateful day, irrigation started at 2:00 p.m. At about 8:00 p.m., his brother-in-law Shoorveer Singh (PW-2) and Balbeer Singh, (father of PW-4) brought their dinner at the tube well. After dinner, Balbeer Singh and Shoorveer Singh (PW-2) returned back. He stated that at about 10:00 p.m., Shoorveer Singh (PW-2) came and told him that appellants Rajveer Singh, Jagatveer Singh, Suresh, Viresh armed with gun and Teekaram armed with sword had emerged from the house of appellant Suresh and were coming towards him. On hearing that he told Shoorveer Singh (PW-2) that as his nephews were there with appellant Rajveer Singh, he does not apprehend any danger and therefore he sat under the bullock cart with Shoorveer Singh (PW-2) and Dinesh (PW-4). At that point in time a lantern was hanging from the rear side of bullock cart and was emitting light. At about 11:00 p.m., all the five appellants appeared there. Seeing them, he (PW-1) came out from under the bullock cart. Whereafter, appellant Jagat Veer Singh fired from his gun at PW-2, Shoorveer Singh thereby causing injury to him (PW-2). PW-1 stated that he caught hold appellant Jagatveer Singh and bit his shoulder. Consequently, appellant Jagat Veer Singh cried. Seeing that appellant Rajveer Singh asked appellant Teeka Ram to attack PW-1 with sword. As appellant Teeka Ram raised his sword towards him, he (PW-1) released appellant Jagat Veer Singh and let him move away. Thereafter, appellant Rajveer Singh fired at him (PW-1) from his gun which hit PW-1 on his left arm. As a result, he fell down. Thereafter, appellants went to PW-2, Shoorveer Singh. Appellant Jagat Veer Singh asked appellant Suresh to verify whether Shoorveer Singh was alive. Whereupon ,

he replied that although PW-2 was still breathing but was almost dead. Whereafter, appellants ran away from the place of occurrence towards west.

He further stated that, hearing the sound of fire, persons present at the crusher in village Dakhawada raised alarm but nobody came there. As a result, he called Dinesh (PW-4) to take him out of the water. Some how, he got up and sent Dinesh to the crusher with instruction to call persons present there to carry him from there. He narrated in detail as to how he and PW-2, Shoorveer Singh reached their house and from there he sent Ravindra @ Munne, Subhash and PW-5, Dushyant to lodge F.I.R. but at the police station, Station Officer Hari Raj Singh Tyagi told them that they should take injured for treatment and refused to lodge F.I.R. He further stated that they (PW-5, Dushyant and others) returned and told him about refusal to register the F.I.R. Thereafter, he and Shoorveer (PW-2) went to Amroha Hospital by tractor of Dushyant (PW-5) where they were medically examined. He dictated the F.I.R. (Ex.Ka.1) to Satyaveer Singh, who read it over to him and after putting his thumb impression on it; he sent Satyaveer, with medical report, to police station to lodge the F.I.R.. According to him, they were referred to District Hospital, Moradabad for treatment and thereafter to Safadarjung Hospital, New Delhi. During treatment, his left hand and right hand of PW-2, Shoorveer Singh were amputated. It was further stated by PW-1 that there is a pond in the village for *Sigharha* of which there was dispute between appellant Rajveer Singh and one Vikram Singh. In respect of which, PW-1 stood as surety for Vikram Singh and that once appellant Rajveer Singh had prevented him from irrigating from the canal. Stating that Hari Raj Singh Tyagi (I.O.) was favouring the appellants as he was married in the family

where sister of appellant Rajveer Singh was married, he had given an application for transfer of investigation, whereupon, investigation was transferred to CID, he has stated that at the time of incident, lantern (Material Ex.Ka.1) emitting light at the place of occurrence was taken by the I.O. and returned to him.

19. In cross-examination, he stated that he had moved from his house for Amroha at 8:00 a.m. and had reached there at 11:00 a.m., whereafter he was medically examined there. He specifically stated in cross-examination that after medical examination, he got the report written and sent to Police Station . He also stated that in the night of occurrence, he had sent Ravindra @ Munne, Subhash and Dushyant (PW-5) to police station with direction to inform the police that he and Shoorveer had received fire arm injuries. He stated that he could not assign any reason as to why he did not send any written report to police station then.

20. PW-2, Shoorveer Singh, stating that he knows all the appellants Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram; and that PW-1, Hari Raj Singh is his brother-in-law and appellants Suresh and Viresh are cousin of PW-1, Hari Raj Singh, narrated the same story, as stated by PW-1, Hari Raj Singh. In cross-examination, he has stated that after the occurrence, Ravindra, Dushyant (PW-5) and Subhash were sent by motorcycle to P.S. Naugawa Sadat. He stated that report which was prepared at Amroha was prepared in his presence and he was aware that no report had been lodged at P.S. Naugawa Sadat in the night. He has specifically stated that he had said to his brother-in-law (PW-1), Hari Raj Singh to mention the fact in report that three persons were sent to Naugawa Sadat for lodging the report, but it was not lodged.

21. PW-3, Dr. A.K. Mehrotra is a medical officer who has inspected the injuries of PW-1, Hari Raj Singh and PW-2, Shoorveer Singh and prepared injury report (Ex.Ka.2 and Ex.Ka.3) (*details of injuries of these witnesses have already been mentioned in preceding paras of this judgment*). He has stated that the injuries of both the witnesses may be caused on 29.1.1984 at about 11:00 p.m. According to him, injury no. 1 and 2 of P.W.1, Hari Raj Singh and all the injuries of PW-2, Shoorveer Singh were caused by fire arm, whereas, injury no. 3 of PW-1 could have been caused by a blunt object.

22. PW-4, Dinesh Kumar has stated that he was present with PW-1, Hari Raj Singh and PW-2, Shoorveer Singh at the time of occurrence. Stating that at the time of occurrence he was sitting under the bullock cart and saw the whole occurrence from that place he narrated the whole incident as narrated by PW-1, Hari Raj Singh. He further stated that during investigation, police of P.S. Naugawa Sadat had forcibly taken his signature on plain paper and thereafter appellants kidnapped him and took his photographs forcibly and got his affidavit in their favour. According to him, a report had been lodged by his brother in this regard. In cross-examination he stated that he could not tell as to after how many days his affidavit was prepared and photographs taken. During cross-examination, he admitted his photo and signature on affidavit (Ex.Kha.1) and (Ex.Kha.2) but stated that the paper pertaining to affidavit was a plain paper on which he had put his signatures.

23. PW-5, Dushyant has stated that, in 1982, Mohd. Ali, Baburam Jatav and 2-3 other persons of his village had contested election of Village Pradhan. He supported Baburam, whereas, appellants supported Mohd. Ali. Mohd. Ali won the election. In

1983, Village Pradhan Mohd. Ali had auctioned a village pond in favour of the appellants against which he had filed a suit before court. According to him, due to above mentioned incident, appellants were inimical towards him and a proceeding under Section 107/117 of the Code was initiated against him, wherein, Hari Raj Singh had submitted a surety bond for him; due to which, appellants Rajveer and others were also inimical to PW-1, Hari Raj Singh and had obstructed him from irrigating his field from that canal. On how he got information of occurrence, he stated that the said occurrence was narrated to him by PW-1, Hari Raj Singh and on his request, he, Ravindra and Subhash had gone to P.S. Naugawa Sadat at 3:30 a.m. where Station Officer Hari Raj Singh Tyagi and Head Constable (Diwan) had advised him to carry the injured to Hospital for treatment and report could be lodged at any time. According to him, he returned thereafter to his village and told PW-1, Hari Raj Singh that report could not be lodged. He has stated that Satyaveer had written the report at Hospital on the dictation of PW-1, Hari Raj Singh who put his thumb impression on it. In cross-examination, he admitted that he had not requested police to lodge F.I.R. According to him, at Naugawa Sadat, there was a post office and also facility of telephone but he had made no attempt to inform any police officer telephonically or through radiogram.

24. PW-6, Const. 587 Ibrahim Khan has stated that on 30.1.1984, he was posted at P.S. Naugawa Sadat as Head Moharrir and had lodged the Chick F.I.R. (Ex.Ka.4) on the basis of written report and entered the same in General Diary (Ex.Ka.5).

25. PW-7, Hareram Singh, Medical Record Technician at Safdarganj Hospital, New Delhi, has proved the bed head ticket

and other medical treatment documents (Ex.Ka.6 and Ex.Ka.7) of PW-2, Shoorveer Singh and PW-1, Hari Ram Singh.

26. PW-8, Sri Krishna Srivastava, Inspector in C.I.D., Lucknow has stated that on 4.6.1985, he was posted as Inspector CID, Lucknow and has investigated this case; that he recorded the statement of witnesses; and inspected the place of occurrence and prepared (Ex.Ka.9) site plan. According to him, investigation was transferred to another Inspector of CBCID and thereafter to D.S.P, B.C. Saxena who had filed charge-sheet (Ex.Ka.10 and Ex.Ka.11) against the appellants.

27. DW-1, Basdev Prasad Sharma, Head Const. 55 (Sadar Malkhana Muarir), Moradabad has been produced by appellants to prove that during investigation, a country-made pistol of 12 bore and 2 cartridges in Case Crime No. 49/1984 under Section 25 Arms Act, (State vs. Ram Singh), recovered by Investigating Officer, was filed in Sadar Malkhana. According to him, said country-made pistol was sent for examination to Forensic Science Laboratory, Lucknow along with empty cartridges; and blood stained bed sheet pertaining to Case Crime No. 12/1984 under Section 147/148/307/394 I.P.C. (State vs. Jagveer Singh and others) was filed.

28. F.I.R. when lodged promptly or with justified delay, may lend credence to the prosecution case. Neither the Indian Evidence Act, 1872 nor the Code prescribes any time limit for lodging the F.I.R. But if it has been lodged after considerable delay without any justifiable cause, it may damage the prosecution case. In **Thulia Kali vs. State of Tamil Nadu AIR 1973 SC 501**, where delay in lodging F.I.R., was of 20 hours without any proper justification, Court, setting aside conviction of appellant, held:-

*“12. ....First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.....”*

29. Coming to the facts of this case, F.I.R. (Ex.Ka.1) has been lodged by one Satyaveer Singh, sent by PW-1, Hari Raj Singh. Satyaveer Singh has not been examined by prosecution. Prosecution has also not placed any justification as to why injured witnesses PW-1, Hari Raj Singh or PW-2, Shoorveer Singh has not gone to police station even on next day when they had visited the hospital situated at Amroha. According to PW-1, Hari Raj Singh, the incident occurred on 29.1.1984 at 11:00 p.m. and, after occurrence, he had sent Subhash, Munnesh and Dushyant (PW-5) to lodge F.I.R. but the police did not lodge the F.I.R. and suggested to Dushyant for treatment of the injured. Thereafter, Dushyant returned and told him (PW-1) about non registration of the F.I.R. According to him, he along with PW-2, Shoorveer Singh went on 30.1.1984 by tractor of Dushyant (PW-5) to Amroha Hospital where they were medically examined and, thereafter, F.I.R. was prepared on his dictation at hospital and was sent

through one Satyaveer Singh to police station. In examination-in-chief, neither PW-1, Hari Raj Singh nor PW-2, Shoorveer Singh have stated as to when they proceeded from their village for Hospital and when they reached the Hospital as also when their medical was conducted and when they sent Satyaveer Singh to police station to lodge the F.I.R. The Medico Legal Certificates (MLC) Ex.Ka.2 and Ex.Ka.3 of Hari Raj Singh (PW-1) and Shoorveer Singh (PW-2) reveals that they were medically examined on 30.1.1984 at 11:15 a.m. and 11:30 a.m. From perusal of Chick F.I.R. (Ex.Ka.4) and G.D. Report (Ex.Ka.5), it transpires that F.I.R. was lodged on 30.1.1984 at 12:30 O' clock. Thus, F.I.R. was lodged with a delay of 13:30 hours, whereas, the distance between the place of occurrence and police station has been shown as only nine kilometres in Ex.Ka-4, Chick FIR. According to prosecution case, grievous fire arm injuries were caused on the left arm of PW-1, Hari Raj Singh and right arm of PW-2, Shoorveer Singh. Neither PW-1, Hari Raj Singh nor PW-2, Shoorveer Singh have stated in their statement as to why they did not go to the hospital for medical treatment of their injuries till about noon next day. In same way, PW-1, Hari Raj Singh has also not stated as to why he had not approached the police station next day morning of 30.1.1984. In cross-examination, he has stated that he had proceeded from his house by tractor to Amroha at 8:00 a.m. on 30.1.1984 and reached at Amroha at 11:00 a.m. He further stated that after medical examination, he got the written report sent to police station. It means that he had not visited the P.S. Naugawa Sadat for lodging the F.I.R. It is normal human behaviour to either approach the police station to lodge the F.I.R. or to go to the hospital for medical treatment, particularly, when injury is grievous. In addition to above, PW-1, Hari Raj Singh has

also stated in cross examination that he had not sent any written information in the night with PW-5, Dusyant, Subhas and Munne rather had told them only to inform the police that fire arm injuries had been caused to them (PW-1, Hari Raj Singh and PW-2, Shoorbir Singh). Thus, non sending of written information and sending person with oral direction to inform the police regarding receipt of fire arm injuries without disclosing further details of the incident and lodging FIR next day after a delay of more than 13 hours, and approaching for medical treatment after 13 hours, creates a serious doubt about the prosecution case.

30. F.I.R. (Ex.Ka.1) states that at the time of occurrence, PW-1, Hari Raj Singh was irrigating his field where PW-2, Shoorveer Singh was also present along with Dinesh (PW-4) and all of them were sitting nearby a diesel engine pump set. At about 11:00 p.m., appellants Jagat Veer Singh and Rajveer Singh S/o Ghanshyam Singh, Suresh and Viresh S/o Om Prakash armed with their gun and appellant Teeka Ram S/o Babu Ram armed with sword appeared there, Jagat Veer Singh fired at PW-2, Shoorveer. Hari Raj Singh caught Jagat Veer Singh by his arms. Thereafter, appellant Rajveer Singh fired at Hari Raj Singh (PW-1). In the F.I.R., no active role of appellants Teeka Ram, Suresh and Viresh is mentioned. It has also not been mentioned that after the occurrence, on the direction of appellant, Jagat Veer Singh, appellant Suresh verified whether Shoorveer Singh (PW-2) is alive but in their statements they have added that Suresh verified whether Shoorveer Singh was alive. It appears that in order to justify the injury caused to Hari Raj Singh (PW-1) on his left arm, story of raising sword by appellant Teeka Ram, releasing of appellant Jagat Veer Singh by PW-1, Hari Raj Singh, moving of Jagatveer Singh away from Hari Raj Singh and then firing of shot

by appellant Rajveer Singh on the hand of Hari Raj Singh (PW-1) was developed. Because as per F.I.R., appellant Rajveer Singh fired at Hari Raj Singh (PW-1) when he had caught hold appellant Jagat Veer Singh, which appeared improbable as appellant Jagat Veer Singh could also have sustained gun shot injury. Hence, the improvement in prosecution story appears to have been made to make the story appear more probable but this deliberate effort on the part of the prosecution casts a serious doubt on the prosecution story.

31. All the appellants have been convicted under Section 307 read with Section 149 and 148 I.P.C. Section 148 I.P.C. deals with the offence of rioting by any person armed with deadly weapons, whereas, Section 149 I.P.C. declares every member of unlawful assembly guilty of an offence committed by any member of an unlawful assembly in prosecution of common object. Section 141 and Section 146 of I.P.C. defines the unlawful assembly and offence of rioting respectively. Sections 141, 146, 148 and 149 are as under:-

**Section 141.** Unlawful assembly.—An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

**(First)** — To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

**(Second)** — To resist the execution of any law, or of any legal process; or

**(Third)** — To commit any mischief or criminal trespass, or other offence; or

**(Fourth)** — By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

**(Fifth)** — By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

**Section 146.** Rioting.—Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

**Section 148.** Rioting, armed with deadly weapons. — Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

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

32. To attract the applicability of Section 149 IPC there must be an unlawful assembly, accused must be a member of that assembly having knowledge of the common object of that assembly and that the offence has been committed by any member of that unlawful assembly in prosecution of the common object. Mere presence of any person at the place of occurrence like a mute spectator or as witness would not create any liability upon

him with aid of section 149 IPC unless it is proved or could be logically inferred from the facts of the case that he was part of that unlawful assembly and had knowledge that such an act would be committed or is likely to be committed in prosecution of the common object of the unlawful assembly.

33. At this very juncture, the law propounded by Hon'ble Supreme Court in land mark judgment of **Baladin and others vs. State of Uttar Pradesh AIR 1956 SC 181** may be noticed wherein Hon'ble Apex Court, while dismissing the appeal of the appellant who had played active role in the occurrence and allowing the appeal of appellant who had not played any active role, held as under:-

*“28. ....It remains to consider the cases of Thakur Das, Ishwari Prasad, Mulloo and Jagdish. These four appellants had not been assigned any particular part in the occurrence nor any overt act has been attributed to them. Of these, Thakur Das is a resident of another village in another police station, though he has cultivation in village Goran. They might possibly have been spectators who got mixed up in the crowd. They will, therefore, be given the benefit of the doubt and acquitted.....”*

34. In **Rajendra Shantaram Todankar v. State of Maharashtra and Others 2003 SCC (Cri) 506** Hon'ble Supreme Court while discussing the true scope and meaning of Section 149 observed that mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. The relevant portion of the judgment is extracted below:-

*“14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a*

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

35. Hon'ble Supreme Court in **Dani Singh vs. State of Bihar (2004) 13 SCC 203** while discussing the meaning of word common object in paras 11, 12 and 13 has held as under:-

*"11.....The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons,*

*who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.*

*12. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not*

*unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti.*

13. *Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident.....”*

36. Hon’ble Supreme Court in **Kuldip Yadav vs. State of Bihar (2011) 5 SCC 324**, while discussing the principle of constructive liability as laid down by Section 149 I.P.C. has held as under:-

*“.....It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly*

*liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.....”*

37. In **Nagesar vs. State of Chhatisgarh** (2014) Cr.LJ. 2948 Hon’ble Supreme Court while discussing the scope of Section 149 IPC has held as under:-

*“ It is settled law that mere presence or association with other members alone does not per se be sufficient to hold everyone of them criminally liable for the offences committed by the others unless there was sufficient evidence on record to show that one such also intended to or knew the likelihood of commission of such an offending act. ( K.M Ravi and others Vs. State of Karnataka (2009) 16 SCC 337). As already seen in this case there is no legally acceptable material to prove that the appellants acted as members of unlawful assembly to connect them with the murder of the deceased Korma Rao. At any rate in the absence of reliable evidence to prove that the appellants were either present on the spot or that they had committed any overt act that could show that they share the common object of the unlawful assembly it is not possible to support their conviction and benefit of doubt has to be given to them.”*

38. Coming to the facts of this case, no active role of surviving appellant (Viresh) in the occurrence has been alleged by any of the witnesses produced by the prosecution. From perusal of statement of PW-1, Hari Raj Singh, PW-2, Shoorveer Singh and PW-4, Dinesh Kumar, only allegation made against him (Viresh) is that he came with other accused persons at the place of occurrence. Appellant Viresh is nephew of injured Hari Raj Singh. On information given by PW-2, Shoorveer Singh, to PW-1, Hari Raj

Singh, that appellants Rajveer Singh, Jagat Veer Singh, Suresh, Viresh and Teeka Ram were coming towards him (PW-1), PW-1 responded by saying that there is nothing to worry as his own nephews (appellants- Suresh and Viresh) are with them. This shows that appellant Viresh was neither inimical to PW-1, Hari Raj Singh nor had any object / motive or intention to cause any injury to his own uncle (PW-1, Hari Raj Singh). It appears that due to that reason, he did not act as a culprit at the place of occurrence, inasmuch as he neither came near the injured person nor exhibited any conduct on the basis of which it could be inferred that he had shared the common object of the other appellants. In such a situation, it could be possible that he might have come at the place of occurrence only as spectator without being aware of common object of any of the accused-appellants.

39. From perusal of injury reports Ex.Ka.2 and Ex.Ka.3 of both the injured persons PW-1, Hari Raj Singh and PW-2, Shoorveer Singh it transpires that injury has not been caused on vital part of these witnesses. Though caused by fire arms the injuries are on inner portion of arms of both injured persons. PW-3, Dr. A.K. Mehrotra, in cross-examination has stated that injury no. 1 of PW-1, Hari Raj Singh was present on inner side of his upper arm and was not possible if, at the time of fire, he had caught hold any other person in his arms. PW-1, Hari Raj Singh, has, in examination-in-chief, stated that when appellant Jagatveer Singh fired at PW-2, Shoorveer Singh, from his gun, he had caught hold appellant Jagatveer Singh and had bit him on his shoulder; whereupon he raised alarm. As a result, appellant Jagatveer Singh asked appellant Teeka Ram to attack him (PW-1) with sword and as appellant Teeka Ram raised his sword towards him (PW-1), he released appellant Jagatveer Singh and when he (Jagatveer Singh)

moved away, appellant Rajveer Singh fired at PW-1. PW-2, Shoorveer Singh has also narrated in same way. Both these witnesses in cross-examination have stated that they had told the said fact in their statement to the Investigating Officer and if the said fact has not been noted in their statement by any Investigating Officer, they could assign no reason for that. PW-8, Sri Krishna Srivastava (Investigating Officer) has stated that neither PW-1, Hariraj Singh nor PW-2, Shoorveer or PW-4, Dinesh in their statement have disclosed to any of the Investigating Officer about the above mentioned fact. Thus, there is a serious contradiction between the evidence of Investigating Officer and both the injured witnesses (PW-1, Hari Raj Singh and PW-2, Shoorveer Singh) on the point that when injury to PW-1, Hari Raj Singh was caused, he had caught hold Jagatveer Singh.

40. Thus in view of the above discussion, we are of the considered opinion that the inordinate delay in lodging the F.I.R. as well as delay in medical examination; material contradiction between the statement of injured eye witnesses made during investigation and statement made during trial; reasonable doubt regarding sharing of common object by appellant Viresh as a member of unlawful assembly or having knowledge of any such common object, have created serious doubts in the prosecution case as against the sole surviving appellant which entitles the surviving appellant (Viresh) the benefit of doubt. He is therefore entitled to be acquitted of all the charges levelled against him. The judgment and order passed by the Special Judge, Moradabad in Session Trial No. 586 of 1988 is hereby set aside. Consequently, the appeal is **allowed**. The appellant, if on bail need not surrender.

41. Let a copy of this judgment be sent to Trial court for information and immediate compliance. Compliance report whereof be submitted within one month.

42. Lower court's record be also sent back along with a copy of this judgment.

**Order Date:-** 11.09.2019

Saurabh