



Reserved
AFR

GOVERNMENT APPEAL NO. 310 of 1982

State of U.P.....Appellant

Versus

Sri Radhey Shyam and others.....Respondents

Hon'ble Vinod Prasad, J.
Hon'ble Karuna Nand Bajpayee, J.

(Delivered by Hon'ble Vinod Prasad J.)

This appeal against acquittal by appellant State is directed against the impugned judgement and order dated 31.10.1981 by 5th Additional Sessions Judge, Meerut, recorded in S.T. No. 39 of 1978, State Vs. Sri Ram and others, relating to P.S. Pilana, district Meerut, by which learned trial Judge has acquitted all the accused respondents herein namely Radhey Shyam (A1), SriRam (A2), Anand (A3) (all sons of Gendey Lal), Mohan Lal (A4), Nidan (A5) and Rajveer (A6) of charges under Sections 302/149 and 307/149 IPC.

Rebooting necessary background facts from the prosecution allegations narrated during the investigation and in the trial by the prosecution witnesses it emerges that one Gendey Lal r/o village Budsaini, P.S. Pilana, District Bulandshahr had seven sons Pashupati Nath, Rajendra, Vishwadutt, Krishnadutt, Anand A3, Radhey Shyam A1 and Sri Ram A2. Pashupati Nath had two sons Billu and Tikaram. Sukhiram informant/PW1 is the son of Tikaram. Hari Shankar (deceased), Rishi Ram, Ram Kumar PW5, and Suraj Bali (F/O injured Jagmohan PW2) all were Ss'/o Sukhiram and were real sibling brothers. They also had three sisters, with Shakuntala being the youngest and she was married 1 ½ years prior to the present incident of murder. Thus PW1, 2,5 and deceased Hari Shankar, all belonged to the family of Sukhiram who was their common ancestor.

Similarly Tota Ram and Sundar Lal, both residents of adjoining village Madanat Nagar under the same police station and district were real sibling

brothers. A4 is the son of Tota Ram, whereas A5 & A6 are the sons of Sundar Lal and they were real and cousin brothers.

It further transpires that Pashupati Nath along with his family had shifted to Modi Nagar since last 7/8 years and there his sons and daughters were educated. Because of shifting of Pashupati Nath his estate was grabbed by his sibling brothers and they were not ready to part it away with Billu S/O Pashupati Nath, who had a rightful claim of inheritance over 1/21st portion of that estate. Billu had come to reside in village Budsaini since last a year of the present incident. This partition dispute and lust for immovable property was the apple of discord between uncles and nephew. Causa causans of the current incident had occurred some 15-20 days prior, when A1 and A2 had assaulted Billu and had thrown him out of the family property regarding which a summit was convened at the house of A1 at 10/11 A.M. in which ten or twelve persons including many villagers, informant and A1 had participated. In that summit, because informant and deceased had espoused the cause of Billu, therefore heated exchange of words had ensued between the informant and A1. This had rankled the accused against the informant and the deceased and had further aggravated their already possessed revengeful hostile grouse. However informant had tried to pacify the tension by sending back Billu to his mother and brother at Modi Nagar.

On the festive Diwali day 10.11.77, Hari Shankar illuminated his house with electric bulbs and along with his nephew Jagmohan(injured) went outside and stood at the terrace/ erected platform (*Chabutara*) of adjoining house of Dipu Bhagat in the south to enjoy the lighting and the pageant to be performed by Billu which was to start at 10 P.M. Witnesses named in the FIR were also present on the said terrace/ erected platform (*Chabutara*) and 5/6 children were displaying fireworks on the brick road in front of the terrace. At that time informant/ PW1 and his second son Ram Kumar P.W.5 were lighting terracotta bowl lamps (*Deepak*) at their terrace (*Chabutara*), when at 8.30 P.M., motivated by the aforementioned reason all the accused respondents A1 to A6, out of them A2, A4 and A6 gripping revolvers in their hands and rest of the three empty handed arrived from the south in front of terrace of Deepu Bhagat. A1 & A3 accosted Hari Shankar(deceased) and

Jagmohan (injured) to teach them a lesson and bear the consequences for siding with Billu. A5 exhorted his associates to murder both of them and A1 and A3, called the others not to spare them and immediately thereafter A2, A4 & A6 opened fires at Hari Shankar (deceased) and Jagmohan (injured), and they both sustaining grievous injuries fell down on Billu's terrace. This shooting spree was witnessed by Hari Singh PW4, Mahipal, Gopi Chand PW3, Ram Kumar PW5 and many others. Informant PW1 and his son Ram Kumar PW5 rushed towards the accused challenging them, on which assailants escaped in the same direction from where they had arrived. Ram Kumar PW5 arranged for a gig, dumped both the injured into it and rushed them to the hospital. Informant PW1 on his part came inside his house where he slated his FIR Ext. Ka1, travelled a distance of 5 miles north to the police station Pilana and lodged the FIR same day at 11.05 P.M.

Both the injured Hari Shankar and Jag Mohan were medically examined on 11.11.1977 at 2 and 2.20 P.M. at P.L. Sharma Hospital, Meerut in emergency by Dr. Dharamveer Zindal (P.W.8) and their medical examination reports were prepared vide Ext. Ka-16 and Ext.ka-17. On the person of Hari Shankar, PW8 had found following gunshot injuries:-

"(1) Gunshot wound of entry 1cm x 1cm on outer and lower part of left upper arm.

(2) Wound of exit 1.2cm x 1.2cm inner side of left upper arm lower part. Injury no. 1 communicated with injury no. 2.

(3) Wound of entry 1.5cm x 1cm on left side chest outer side at the level of injury nos. 1 & 2.

(4) Wound of entry 1.2cm x 1.2cm on right side chest outer side.

(5) Abrasion 2cm x 2cm at right arm lower part. No blackening or charring seen."

In the injury of Hari Shankar, there was no blackening and charring present. All the injuries were kept under observation and X-ray was advised. These injuries were fresh in duration. General condition of Hari Shankar was poor, pulse was 140 per minutes and respiration was 28 per minutes. His B.P. was 80. Doctor had informed the police as FIR was not produced before him at the time of medical examinations of both the injured. It is noted by the doctor in the medical examination report of Hari Shankar Ext. Ka-16 that the condition of the patient was not fit for recording of dying declaration at the time of admission.

Similarly on the person of another injured Jag Mohan PW2, vide his medical examination report Ext. Ka-17, doctor had found following injuries:-

- "(1) Ecchymosis with traumatic swelling of both the eyes.*
- (2) Multiple gunshot wounds of entry in an area of 13cm x 10cm involving forehead, right side face and nose.*
- (3) Gunshot wound of entry on right middle finger."*

In the medical examination report of this injured Jag Mohan, PW8 had noted that his general condition was also poor, his pulse was 120 per minutes and respiration was 30. His B.P. was 100/70. All the injuries of this injured were kept under observation and X-ray was advised. His condition was also not fit for recording of the dying declaration.

Injured Hari Shankar lost his life in P.L. Sharma Hospital on 11.11.1977 at 9.55 A.M. Autopsy on his cadaver, therefore, was performed on 12.11.1977 at 3.30 P.M. vide his post mortem examination report Ext. Ka-18. Autopsy doctor had found him having an average built body and rigor mortis was present all over it. There was no decomposition on the cadaver of the deceased. Surgical dressings were present all around the chest and left arm and right hand. According to the doctor, deceased had sustained following ante mortem injuries:-

- "(1) Gunshot wound of entry 1.5cm x 1cm deep on the outer part of left upper margins contused, inverted no blackening and charring present.*
- (2) Gunshot wound of exit 2cm x 1.5cm inner part of left upper arm lower part everted communicating to injury no. 1.*
- (3) Gunshot wound of entry 1.75cm x abdominal cavity deep in between 8th and 9th ribs (between the ribs), 13cm below left nipple O'clock position. Margins are contused inverted blackening and charring present.*
- (4) Gunshot wound of exit 2cm x 1.5cm outer part of right side chest 9cm below right nipple in between 8 O'clock position in between 6th and the 7th ribs enter margins are lacerated everted.*
- (5) Contusion 8cm x 6cm on the back of right*
- (6) Abrasion 2cm x 1cm on the right over arm"*

Internal examination of the deceased revealed that right side heart had contained clotted blood 220 grams, peritoneum was lacerated 400 CC blood was accumulated in the cavity and the stomach contained watery fluid and was lacerated and perforated through and through. Small intestine had

gases and large intestine had faecal matters. Gall bladder was lacerated perforated through and through. Bladder of the deceased was empty. From his dead body, doctor had taken out one shirt, one banyan and one necklace and had handed it over to the constable Jagan Pal. Cause of deceased death was shock and haemorrhage produced by above to referred ante mortem injuries.

On the strength of Ext. Ka-1, constable 875 Prahlad Singh PW7 had registered the crime the same day at 11.05 P.M. as crime no. 179 of 1977, under sections 147, 148, 307 I.P.C. by preparing chik FIR Ext. Ka-14 and GD Entry No. 24 being Ext. Ka-15.

S.O. Badan Singh Tewatiya (P.W.6) set out the investigation into the crime as the same was registered in his presence. Informant Sukhi Ram P.W.1 and Constable PW7 were interrogated by the I.O. and their statements were slated. Next day morning, I.O. came to the murder spot, conducted spot inspection and prepared site plan Ext. Ka-20. From the place of the incident blood stained and plain earth Ext. Ka-11 were collected in two containers and their seal impressions were prepared. These containers are material Exhibits 5 and 6 and seal impression/recovery memo is Exhibit Ka-11. I.O. also collected two wads and prepared its recovery memo Ext. Ka-12. The wads were sealed in a container Exhibit 7. Inquest memo and other papers prepared during investigation are Exhibits Ka-4 to Ka-9. I.O. has also proved the chik report Exhibit Ka-14 prepared by P.W.7, and recovery memo Exhibit Ka-3 of blood stained shirt (Exhibit 8) of the injured Jag Mohan. He has also collected four electric bulbs, Exhibits 1 to 4, and had prepared their recovery memo Exhibit Ka-2 and thereafter had handed over the same to the informant/PW1. I.O. had recorded statements of the injured and other witnesses on 12.11.1977 and 5.12.1977 and closing investigation has charge sheeted all the accused on 24.12.1977 vide Exhibit Ka-13.

On the strength of charge sheet Ext. Ka-13 criminal case was registered in the Court of Judicial Magistrate First, Meerut, as Case No.10 of 1978, State Vs. Radhey Shyam and others. Finding the disclosed offences triable exclusively by Court of Sessions, Committal Magistrate committed the case to the Sessions Court on 31.10.1978. Before the sessions court, the

case was registered as S.T. No. 39 of 1978, State Vs. Mohan and others.

Vth Additional Sessions Judge, to whom the Sessions trial was transferred, charged all the accused with offences u/s 302/149 and 307/149 I.P.C. Three accused A-1, A-4 and A-6 were also charged u/s 148 IPC while rest were charged u/s 147 I.P.C. on 18.1.1980. All the charges were read out and explained to the accused who, after understanding the same, denied those charges, pleaded not guilty and claimed to be tried and hence, to establish their guilt by observing sessions trial procedure, their trial commenced.

In the trial prosecution examined in all eight witnesses out of whom informant Sukhi Ram P.W.1, injured Jag Mohan P.W.2, eye witnesses Gopi Chand P.W.3, Hari Singh P.W.4 and Ram Kumar P.W.5 were the fact witnesses. Investigating Officer Badan Singh P.W.6, constable Prahlad Singh P.W.7 and Dr. Dharamveer PW8 were three formal witnesses. Noted here is the fact that the accused has dispensed with the genuineness of the autopsy report Exhibit Ka-18 and has dispensed with it's formal proof.

While testifying in the trial informant Sukhi Ram P.W.1, besides repeating his F.I.R. allegations had deposed that at the time of the incident four bulbs of 100-100 watts were lighting above his erected pedestal on his roof and the deceased and the injured were standing at the pedestal of Dipu Bhagat to enjoying the lighting and the pageant. Three of the accused A-2, A-4 and A-6 were armed with revolvers but he had not noticed the weapons of three others. He had reiterated his FIR allegations respecting actual incident and witnesses who had seen the incident. Informant further disclosed that he had penned down Exhibit Ka-1 at his house in electric light and had lodged it at P.S. Pilana and I.O. had handed over four bulbs to him after four days and Ext. Ka- 2 was also inked the same day and the date mentioned on it as 11.11.77 is incorrect. Informant had also denied his earlier 161 Cr.P.C. statement recorded by the I.O. Regarding motive, P.W.1 had evidenced those very facts which have already been mentioned herein before and had further stated that he had pleaded Billu's case as genealogically he was Billu's grandfather. PW1 further disclosed that in front of his erected pedestal/terrace outside his house a brick lane (*kharanja*) runs north-south and towards north of PW1's house, in a progressive

manner, lies dilapidated ruined house of Ujagar Singh, which was in his possession since many decades and he used it as a cow shed, and then lies the house of Keshav Ram. Thereafter, the brick lane turns toward east and at the turning are the houses of Chaman Singh, Nanne Singh, Hoshiyar carpenter and Lakhpat carpenter. It will be appropriate to mention here that albeit informant PW1 had expressed his complete ignorance regarding the place and the side from which electricity was being extracted by the deceased to illuminate his house on the incident night, but from the evidences it is conspicuous that the same was being extracted from the house of Lakhpat carpenter as only his house had an electricity connection in the vicinity. House of Lakhpat was forty yards away from the house of PW1. Narrating southward topography of his house PW1 had testified that adjacent to his house is the house of Deepu Bhagat thereafter were houses of Ratan Lal, Sahib Ram, Har Lal and other blacksmiths and thereafter there was a lane and ahead of it is an open space with no electric connection although an electric pole is fixed over it. All the above residences were within the periphery of village Budsaini. Village Madanat Nagar was an adjoining village. A5 & A6 were the residents of Madanat Nagar and their houses were at distances of 100/125yards from the informant's house. A3 was a resident of village Dhanaura, whereas rest of the three accused A1, A2 and A4 were co villagers of PW1. Houses of A1, A2 and A3 were 200 yards away from the house of the informant. Informant also deposed that A3 was a teacher in a primary school in village Dhanaura and he had built a house and also had agricultural fields and he used to reside there. Simultaneously, PW1 also tendered that A3 had a house and agricultural fields in village Budsaini also and he used to visit village Budsaini as well. PW1 further admitted that A2 was a compounder in village Dikauli and resided there since last three years but he used to visit Budsaini in connection with his medical practice. He confirmed Gendey Lal's pedigree mentioned herein above and admitted that in his property, 1/21st share was the legal entitlement of Billu as a grandson and successor of Pashupati Nath, who had shifted to Modi Nagar since last seven/eight years. While refuting defence suggestion that during days of the incident Billu was a graduate student of B.com., PW1 stated that he was 10th fail and was employed and

also had a shop at Modi Nagar and the same year he(Billu) had returned to village Budsaini. Concerning the brawl between Billu and the accused no report was lodged nor any application was moved nor any complaint was filed but only a summit was convened at the house of A1 at 10/11 A.M. in which informant, A1 and ten/twelve persons had participated and in the summit verbal duel were exchanged between informant and A1. No witness of the present incident nor village pradhan had participated in the said summit. The verbal dual with A1 was the only motive for committing the incident and informant had no other animus against the accused respondents. When cross examined regarding electricity connection,PW1 testified that he had an electric connection since last 10/ 12 years but before the incident he had got it snapped but electricity fitting in his house were present while admitting that no electricity connection stood in his name and surrounding houses also had no electricity connection. On further being tested, in paragraph 20, informant disclosed that on the incident date, it was Hari Shankar(deceased), who had brought electricity connection and had lighted the bulbs at the roof and he was not aware from where and from which side deceased had extracted the electric current. He further disclosed that the bulbs were hanging at the height of three and half meters with the help of a bamboo stick tied with the plank of a bamboo cot on the roof. The bamboo cot was kept horizontally with the help of two legs (*pawas*). In paragraph 22 informant had denied his previous 161 Cr.P.C. statement. In para 23 PW1 had testified that after giving the report at the P.S. he had left for Meerut and had returned back to his village on the following day in the afternoon at 1-2 p.m. and he had no knowledge about visiting of the I.O. to his village and noticing the electricity fittings. After his return to his village PW1 had not gone to the P.S. again and he had gone back to Meerut the same evening. Informant/PW1 categorically deposed that it was on the fourth day that he met the I.O. and it was on that day that the bulbs were handed over to him and recovery memo Ext. Ka-2 was slated. He emphatically stated that the date mention on Ext. Ka-2 is incorrect. He also denied having informed the I.O. the places where he, the two injured and the accused were present during the incident and has admitted that the spot inspection was conducted in his absence. When

questioned about Deepu Bhagat's terrace PW1 evidenced that it was four/ five yards long having two yards width. Informant further evidenced that eastern wall of his house is 1 ½ yards away from the eastern wall of Deepu Bhagat's house and at the time of the incident they (informant and his son Ram Kumar) were lighting the terracotta lamp in the south of Deepu Bhagat's house just 12 feet away and accused were only 8 feet away from them on the brick lane when they had fired at the injured. At that moment seven or eight persons, besides the injured were standing on the terrace and people were also egressing and ingrossing Deepu Bhagat's house. Regarding the pageant informant evidenced that it was yet to start at 10 P.M. but for enjoying it and the lights that the injured and other persons were standing on the Deepu Bhagat's terrace. On questioned by the court informant explained that 5/6 children were exploding the crackers and that amusement was going on when the incident occurred. Regarding presence of eye witnesses, informant named all the witnesses examined during the trial to be the eye witnesses of the incident. He had further stated that accused had stayed for four or five minutes at the incident scene and he had spotted them immediately on their arrival. PW1 further evidenced that he and Ram Kumar were not fired upon. Concerning omissions and contradictions in his previous statements made to the I.O. informant was unable to offer any explanation for their penning down by the I.O. He further disclosed that immediately after the incident he had arranged for a gig, dispatched both the injured along with Ram Kumar PW5 to the hospital within half an hour and thereafter had scribed Ext. Ka-1 at his house in the electric light and then had marched to the P.S. along with Ram Kishan with a bag containing his report. Some previous enmity and facts regarding earlier trials were put to this witness, most of which he has denied. Informant has flatly refuted defence suggestions that both the injured were inflicted with injuries after 10 P.M. by unknown assailants and he had not seen the incident and he has lodged a false report on the following day nailing falsely all the accused respondents. He further deposed that he was lighting the lamps at half past eight (8.30) P.M. as that was the auspicious time (*muhoort*). He also deposed that accused had not veiled their identities and were bare faced. PW1 further rejected defence suggestion that he had

framed in accused respondent Nidan due to enmity.

The sole injured eyewitness Jagmohan PW2 corroborated his uncle/ informant PW1 on all significant and pivotal pre, contemporary and post, aspects of the incident without wavering, vacillating and contradicting him even the slightest and repeated informant's/ PW1 statements regarding date, time, place of the incident, presence of electric lights at his house, extracting current from Lakhpat's house and presence of witnesses during the incident. He also assigned role of shooting to A2, A4 & A6 and confirmed that rest of three assailants were bare handed. Reiterating same genesis of the incident he also testified that the incident had happened because informant and the deceased had sided with Billu which had rankled the accused who all belonged to one family and group. Therefore for the sake of convenience we eschew repeating his depositions in extenso but take stock of some of his important revelations. PW2 had further deposed that he had fainted and fell down immediately after sustaining gunshot injury and had regained his consciousness in P.L. Sharma hospital next day in the evening. I.O had collected his clothes (*Bushirt and Tahmad*) which he was wearing at the time of the incident. He further confirmed that informant and Ram Kumar/PW5 had arrived at the incident spot from their terrace and electric light was illuminating the incident area on the incident day but he also could not tell from where that light was being extracted. PW2 further stated that he and the deceased came to stand at Deepu Bhagat's terrace 15/20 minutes prior to the incident and they had not entered into his house. They both (deceased and PW2) were standing at a distance of 15/16 feet from the southern wall of the informant's house. PW2 further narrated that shooting started all of a sudden from front of Deepu Bhagat's terrace from a distance of 7/8 feet, but he(injured) failed to recollect number of fired shots or whose shot had hit him. PW2 emphatically denied defence suggestion that he was inflicted with injury after 10 P.M. by unknown assailants and he had named the accused respondents at the instructions of his uncle PW1. PW2 also testified that I.O. had penned down his statement in the hospital. Some insignificant omissions regarding bulbs etc. were asked from him for which this witness had expressed his ignorance. PW2 had also disclosed that children were exploding crackers on the brick road.

For the sake brevity, we deal with next two eye witnesses Gopi Chand PW3, and Hari Singh PW4 simultaneously. They both were r/o adjoining village Madanat Nagar and are named in the FIR. In their examination-in-chiefs, they had lend credence to the depositions of their earlier two predecessors PW 1& 2 and had testified same very facts regarding the incident, date, time, place of the incident, presence of the informant, deceased, injured and the witnesses including them during the incident, three of the assailants being the main shooter and rest of the three being bare handed, incident day being a Diwali festive day and informant and Ram Kumar lighting the earthen lamps at their terrace at 8.30 P.M. when the incident had happened. However from the very beginning of their cross examinations they turned out to be vicious enemies of the accused respondents and they had criminal proclivities. They were involved in many crimes. PW3 was involved even in a murder incident and both of them were facing trials during their deposition days. Their houses were more than 200/350 yards (For PW3) and/or 300/400 yards(for PW4) away from the place of the incident in another village, though adjoining, and in between lied 60/70 and/or 150 other residential abodes. In their earliest examinations by the I.O. they had assigned the roles of carrying revolvers and firing during the incident to all the accused which are in sharp contrast to the versions by both PW 1 & 2. They both had not told to the I.O. regarding illumination of electric bulbs at the roof of the informant and they had no idea about the place from where and which side electricity was being extracted by the deceased. Their presence at the spot during the relevant time seems to be suspicious. They, however, confirmed that house of Lakhpat was 30 yards away from the house of the informant. PW4 also had no idea about the size of the terrace of Deepu Bhagat and he was interrogated by the I.O. after an inordinate delay of 20-22 days. Since these witnesses seems to be persons of a very dubious character, and on some major aspects about the incident they had omitted to inform the I.O. and since their depositions are incongruent regarding actual incident and participation by all or some of the accused that we find it unsafe to rely on their testimonies, which do not inspire any confidence, therefore adopting a very cautious approach, we treat them as unreliable witnesses.

Turning to last fact witness Ram Kumar PW5, he has adjucted and countenanced the prosecution version in it's entirety and has completely supported the informant and the injured. He had carried both the injured to the hospital in the gig of Ram Bhajan, which fact is verified affirmatively by the medical examination reports of both the injured Ext. Ka-16 and Ka-17. He is named in the FIR and his activity of lighting the earthen lamps when the incident occurred is proved beyond any shadow of doubt. Albeit related and partisan, he had no reason to spare the real assailants and nail-in accused respondents responsible for the murder of his real sibling brother. His presence at his house on the festive day is most natural and probable and is confirmed by the two medical examination reports. Since injured whose presence at the spot cannot be doubted, also named him as an eye witness of the incident, there remains little doubt regarding his presence at the spot during the incident. Relating to the actual shooting he also assigned shooters role to A2, A4 and A6. He had disclosed attires of both the injured that Hari Shankar was wearing *bushirt, payjama, banyan* and underwear whereas injured Jagmohan PW2 was wearing *bushirt, tahmad, underwear and banyan*. Drapers of injured were seized by the police in his presence vide Ext. Ka-3. In the gig of Ram Bhajan PW5 was accompanied with Ganga Das, Sultan, Ram Kishan, and 2/4 other persons to Sarop and from there both the injured were carried to P.L.Sharma hospital, Meerut in a taxi/car reaching there at about quarter to 2 A.M.(1.45 A.M.). Both the injured were shown to the doctor and next day morning at about 9 A.M. Hari Shankar had lost the battle of his life in the hospital. Respecting motive PW5 also disclosed that since his father and deceased had espoused the cause of Billu therefore in retaliation that the incident had occurred. He admitted that he worked as an electrician and resides in Mawana while adding that he used to visit village Budsaini weekly or fortnightly. He had arrived in Budsaini on Diwali day. He also disclosed that verbal duel concerning Billu and summit had occurred in his presence in the house of A1, in which his father, deceased, injured, A1 and his family members had participated. He also stated that Rishi Ram is his another brother and they have three sisters, the youngest one being Shakuntala, who had solemnised her marriage 1-1 ½ years ago. House of A2 was adjoining the house of

PW2, hundred yards away from the house of the informant. Though he deposed that no electricity connection was sanctioned at his house but admitted that bulbs were lighting at his roof since prior to his arrival and since he had arrived in Budsaini at 7 ½ P.M. on incident day itself therefore he could not state from where and which direction electricity connected was taken. He had disclosed to the I.O. also regarding lighting of electric bulbs at his house. He had also deposed that he had witnessed the entire incident from the arrival of the assailants till they had retreated. At the time of actual shooting accused were 8 feet away from him. Injured and the deceased were on the terrace whereas accused were at the brick lane. Three fires were made within close quarters. PW5 also admitted that spot inspection was conducted by the I.O. in his presence but since I.O. had not asked him he had not informed him the place where he was standing. This witness had emphatically rejected defence claim that he had not seen the incident which was executed after 10 P.M. by unknown assailants and he has falsely implicated the accused respondents.

The three formal witnesses described in detail already slated facts herein above and for the sake of convenience we eschew their repetition. However what is significant to note is that defence has not been able to get elicited from them any damaging evidence which may cast even the slightest doubt on the authenticity of the prosecution case and reliability of its witnesses qua three main shooters. Both the medical examination reports and autopsy report lend credence to the prosecution story and recovery of blood and the wads convincingly fixes the place of the incident. Defence has not been able to shatter all these aspects and has failed to offer any alternative case which may even be true on preponderance of probability. Scanning of depositions by the I.O. it is revealed that alongwith the informant he had started for the place of the incident at 6 A.M. arriving there at 7.30 or 8 A.M. He had seized blood stained attires of the injured PW2 vide Ext Ka-3 and had also recovered four bulbs (Ext. 1 to 4) glowing at the roof of the informant's house vide Ext. Ka-2. I.O. further found that electric connection was a temporary connection taken from the south from the house of Lakhpat, but I.O. did not recover wires, switches and plugs. While refuting defence suggestion that the recovery memo Ext. Ka-2 was

penned down subsequently, I.O. evidenced that on the following day, 11.11.77, he had slated the said recovery memo.

I.O. was cross-examined regarding the site plan drawn by him and in respect of the topography about the place but nothing material could be get elicited from him. I.O. deposed that the place from where fires were made was 2-2 ½ paces from the door of Deepu Bhagat. The places where informant and other witnesses Gopi, Mahipal and Hari Singh were standing and had witnessed the incident were also depicted in the site plan. In paragraph-22, I.O. has categorically stated that he had found pellet marks in an area of 2 and 2 1/2 feet on the terrace of Deepu Bhagat but the pellets could not be recovered. Investigating Officer P.W.6 did not consider it necessary to interrogate Billu nor he had recorded the statements of other persons whose names finds place in paragraph-29 of his deposition. From the sealed bundle of attires some ladies garments were also taken out in the Court regarding which, I.O. could not offer any explanation. P.W.6 has further evidenced that the case was converted under Section 302 I.P.C. on 12.11.1977 at 8.30 p.m. He was also questioned regarding mentioning of 302 I.P.C. on Exhibits Ka-5, Ka-6 and Ka-7. Some omissions and contradictions have been put to this witness which he has denied. I.O. had emphatically stated that he has not falsely implicated accused respondents in connivance with the informant Sukhi Ram P.W.1.

So far as Head Constable Prahlad Singh P.W.7 is concerned, from his cross-examination, except the suggestion, no material evidence has been brought-forth by the accused and this witness has categorically stated that the Chik F.I.R. and G.D. Entry were prepared by him at the time alleged by the prosecution.

Doctor Dharam Vir Jindal P.W.8 had proved the injury reports of both the injured persons as Exhibits Ka-16 and Ka-17. In the estimation of the doctor both the injured had sustained firearm injuries. He however has admitted unconscious mistake of mentioning 2 p.m. instead of 2 a.m. in Exhibit Ka-16.

In their statements under Section 313 Cr.P.C., all the accused denied incriminating circumstances put to them. A1, A2 and A6 pleaded their false implication due to enmity. A3 stated that he has been falsely implicated

because of enmity and also because of the reason that informant wanted to keep him as a witness in a case to which he had denied. A4 stated that he looked after agriculture of A5 and because his farming is joint with A5, therefore, he has been falsely implicated because of enmity with A5.

As has been stated in the opening paragraph, learned trial Judge disbelieved the prosecution story and acquitted all the accused respondents of the framed charges, which judgment of acquittal is now under challenge in the instant appeal.

We put on record that initially, the appeal was heard and was partly allowed by our predecessor Bench vide judgment and order dated 12.7.2005. Through that judgment, three of the accused respondents A2, A4 and A6 were adjudged guilty of offences under Section 302/34 and 307/34 IPC for committing murder of Hari Shankar and for attempting to commit murder of Jag Mohan P.W.2 and therefore, those three accused were convicted for life imprisonment for the former charge and five years R.I. for the later charge with the direction that both the sentences shall run concurrently. It was also observed that appeal of A-3 stood abated as he is dead. Acquittal of two accused A1 and A5 was affirmed and the State Appeal in their respect was dismissed.

The convicted accused, took up the matter before the Apex Court in a S.L.P., which, after grant of leave was admitted as Criminal Appeal No.1219 of 2005, Rajvir and others Vs. State of U.P. The aforesaid appeal was allowed by the Apex Court vide it's order dated 8.12.2010. By the aforesaid decision, Hon'ble Supreme Court held "*hence we are of the opinion that the matter be remanded to the High Court for a fresh decision in accordance with law, in which the High Court should consider the reasons recorded by the trial Court. We order accordingly.*"

After the remand by the Apex Court, the matter has come up to us for a fresh decision.

In the above background facts, we have heard Sri Rama Shankar Yadav, learned AGA for the State-appellant and Sri I.K. Chaturvedi, learned counsel for the accused-respondents.

Ab initio, learned State counsel urged that since the Apex Court has set aside the entire order passed by this Court dated 12.7.2005, which also

included affirmation of acquittal of two accused A-1 and A-5 therefore, this Court should consider their cases as well. It was contended that while setting aside the aforesaid decision, the Apex Court has not observed that the acquittal of two accused-respondents shall remain unaffected and, therefore, the case of those accused should also be considered along with the rest of the surviving accused. Learned AGA urged before us that so far as accused-respondent Anand A3 is concerned this Appeal has already been abated but in view of the order passed by the Apex Court the appeal of rest of all the surviving accused should be considered.

The aforesaid contention by learned AGA however was hotly contested by the defence counsel Sri I.K. Chaturvedi, who submitted that since Apex Court was considering the appeals of only convicted accused and no State Appeal was filed against the acquitted accused A-1 and A-5 therefore their case should not be re-opened but Sri Chaturvedi fairly conceded that while passing the order dated 8.12.2010 Apex Court has not said that the acquittal of the two accused-respondents shall remain unaffected. He articulated his submissions by urging that Apex Court order should not be taken to re-open acquittal of accused which has attained finality vide judgment and order dated 12.7.2005 passed by this Court. He therefore urged that the case of the two acquitted accused should be considered to have been closed and attained finality by the aforementioned order passed by this Court.

In rebuttal, learned AGA submitted that since the entire judgment passed by this Court dated 12.7.2005 has been set aside, the case of the acquitted accused has to be re-opened for a fresh decision.

We have pondered over rival contentions and we are of the view that a priori, the above raised contention should not vex our mind which we propose to deal and deliberate subsequently in the later part of this judgment..

Assailing the impugned judgment of acquittal and castigating the findings recorded by the learned trial Judge, learned AGA submitted that all the fact witnesses were reliable, worthy of credence and learned trial Judge instead of analysing the prosecution version on the core significant and important issues has concentrated on insignificant laconically trivial aspects

to record acquittal of accused, although their guilt were proved beyond any shadow of doubt, both by oral and documentary evidences. There was no enmity between the witnesses and the accused of such a nature and magnitude so as to prompt them to fabricate a version against the accused pertaining to an incident in which their most dear one had lost his life. Incident occurred on the festive Diwali day, which is known as the festival of lights and, therefore, there must have been sufficient light at the spot to recognize the assailants who were co-villagers and were very well known since before. All the accused and the witnesses were residents of the same and/or neighbouring village, and in fact, were collaterals and their associates, therefore, there was no difficulty in recognizing them even in a quick span of time. Prosecution version that four electric bulbs were hanging through a wooden pole at the roof of the informant with the help of a cot is a convincing narration and defence has miserably failed to obliterate it by bringing on record credible material to disbelieve the said story and those bulbs of 100 watts each had illuminated the entire vicinity with full light glow facilitating identification of the accused without any hindrance. Merely because witnesses could not recollect from which direction the electric wires were drawn and electric current was being extracted is no reason to discard otherwise convincing prosecution case. Doubtless consistent testimonies of all the fact witnesses are that the electric bulb lights was illuminating the scene when the incident took place. Prosecution has offered an explanation for its inability to explain the direction and the source of extraction as electricity connection was fixed by the deceased and the witnesses had no idea about fixing of such a connection. Absence of any attempt by the witnesses to overcome this short coming by expatiating their case during the trial, is indicative of witnesses being truthful, creditworthy and reliable adding credence to the prosecution version. I.O. had seized the bulbs and had given them in the custody of the informant on the following day of the incident and it is his statement that when he had arrived at the place of the incident, the bulbs were glowing. These bulbs were produced and exhibited during the trial which further lends truthfulness to the prosecution allegations. The meagre contradiction between statement of the informant and the I.O. regarding seizure of bulbs and preparation of Ext.

Ka-2 can very well be explained on the frail capacity of an old man in recollecting entire episode and reproducing it photographically by rewinding entire background facts. Informant P.W.1 was 65 years of age and his examination-in-chief had started after three years and one month. For an old man of his age, fading of memory and haziness of recollection is a most natural phenomenon and therefore no capital of such an inconsequential contradiction could have been made.

It was further contended that presence of all the fact witnesses during the incident is established convincingly and in fact PW2, being an injured witness, his presence at the incident spot cannot be doubted nor the accused has challenged it. Resultantly there was total absence of any viable reason to discard his testimonies. Accused have also admitted his presence during the incident as their defence plea itself is that he and the deceased were shot at the same time and place and hence learned trial Judge committed an ex facie error in discarding prosecution case. PW2 is supported convincingly both by PW1 and 5 and when their depositions are considered together it becomes quite evident that prosecution has established its case beyond any shadow of reasonable doubt. Defence has miserably failed to dislodge evidences of all the eye witnesses and to create a dent in the prosecution story. Medical evidences are consistent and corroborative of ocular version. Since defence has not challenged the contents of the autopsy report hence it is true to say that the deceased had died due to fire arm injuries. Defence has lend a helping hand to the prosecution as its defence plea itself is that both, the deceased and injured, were shot at and hence use of fire arms and shooting at the two injured is a credible prosecution version. Investigation into the crime may not be above board as was expected of the I.O. but it is also not that perfunctory so as to cast a doubt on the entire prosecution version. Some mistakes have been committed by the I.O. but they singularly or jointly are not enough to reject the entire prosecution case. These mistakes in fact can be convincingly explained. Blood and wads with pellet marks found at the terrace of Deepu Bhagat fixes place of the incident without admitting any other alternative place of the incident. While rejecting prosecution case learned trial Judge has not recorded any convincing and appealing reason

and by prolixing petty issues he has acquitted the accused which approach by the learned trial Judge is wholly perverse and illegal requiring immediate correctional order. FIR was lodged promptly and there was enough motive for the accused to commit the murder. Otherwise also in case of an eye witness account motive relegated into the background is the settled trite law and hence discarding prosecution version on insufficiency of motive by the learned trial Judge was wholly illegal and against plethora of apex court decisions. Wrapping up his contentions it was submitted by learned AGA that prosecution has established its case to the hilt clear of all reasonable doubts and there was no scope for the learned trial Judge to return a finding of acquittal and hence State appeal be allowed and impugned judgement be set aside and respondents accused be convicted suitably.

Snipping appellant's contentions and arguing conversely accused counsel Sri I.K.Chaturvedi submitted that the view by the learned trial judge is neither perverse nor illegal and he had slated good reasons to record acquittal of accused respondents. Prosecution has miserably failed to establish existence of any electricity connection and there is no creditworthy evidence on that score. None of the prosecution witnesses are trustworthy and reliable. They have stated contradictory facts. Their presence during the incident has not been established convincingly and hence trial court committed no mistake in discarding their evidences. FIR was the outcome of deliberations and was registered ante timed. PW5 was not present at the spot and he was summoned and was made a witness in the case. Investigation into the crime was shoddy, perfunctory and manipulated and therefore no reliance can be placed on the prosecution version which cannot be attached with any credence. Because of their criminal involvement and large battery of enemies both, the injured and the deceased, were inflicted with injuries in the darkness after 10 P.M. and because of enmity respondents have been falsely implicated. Besides above contentions, learned counsel reverberated those very reasons which have been slated in the impugned judgement and order. Concludingly it is urged that State appeal be dismissed and impugned judgement and order be affirmed.

We have given our anxious consideration to the rival submissions and have carefully perused the entire record ourselves. First and for-most we

take up the question of light as according to both the sides incident had occurred in the night. In that connection when oral evidences of fact witnesses are vetted it becomes more than obvious that all of them have countenanced the prosecution allegation that electric light was glowing at the roof of informant's house at the time of the incident. Since only Lakhpat had electricity connection at his house amongst the houses in the vicinity, therefore, deceased had extracted electric connection from his house. All the fact witnesses could not be dislodged on the said aspect and inspite of lengthy and searching cross examinations defence had failed to create any dent and doubt in that version. I.O. had taken bulbs in his custody and they were exhibited during the trial. Although accused castigated recovery memo of recovery of bulbs Ext. Ka-2 for the reason that section 302 I.P.C. was also mentioned therein and P.W.1 contradicts the I.O. by stating that it was prepared four days after and learned trial court also treated it to be a very damaging aspect, but on deeper analysis the said criticism is devoid of any substance. According to the I.O. he had arrived at the incident scene at 7.30/8 A.M. and had commenced the investigation after that and deceased had lost his life at 9 A.M. and hence by the time I.O. had penned down Ext. ka- 2 he must have received the information about demise of the deceased and resultantly mentioning of 302 I.P.C. in Ext. Ka-2 is of no consequence. Furthermore in view of unimpeachable nature of testimonies of fact witnesses, the said insignificant aspect does not in any way cast even the slightest doubt in the prosecution version. Attaching unwarranted importance to such a fact and making mountain out of mole was totally illegal and perverse approach adopted by the learned trial Judge. In our view the entire approach and way of examination of evidences by the learned trial Judge was with a view to cull out undeserved reasons to confer benefit of doubt on the accused instead of dispassionately examining the evidences. Otherwise also to recognise and identify known accused in a quick span of time, numerous earthen lamp lights at each houses of the locality with sufficient glow illuminating the entire area would have been enough. Defence has not taken a chance to question all the fact witnesses specifically regarding glow of earthen lamps lights during the incident and hence accused cannot gain any benefit even if, for the argument sake, we

doubt existence of electric light. It is also to be noted that it is unchallenged statement of the informant PW1 that he had penned down his FIR in electric light and when the I.O. had arrived at the incident scene bulbs were already glowing. This establishes presence of sufficient light for the witnesses to recognize the accused and we discard accused refuting of prosecution case for that reason. At this juncture, we would like to advert to another contentious issue that the prosecution case is infallible because it has intentionally withheld Lakhpat from testifying in the trial and hence allegation of existence of electricity is not established. No doubt Lakhpat could not be examined in the trial since he was won over by the accused but that could not have been a reason to throw out entire prosecution case over board. It is a matter of common knowledge that seldom neighbours involve themselves in feud between collaterals and are extremely reluctant to join one faction or the other. The core question before the trial Judge was the reliability of three fact witnesses and therefore ancillary fact of Lakhpat not being examined in the trial was of no consequence. Moreover defence also took no chance to examine Lakhpat as a defence witness, it seems for the reason that they were conscious of their fallacious defence. Even if assuming that electric light was not available during the incident even then no adverse effect is cast on the prosecution version as lights emanating from the earthen lamps (*Diya*) would have been enough to recognize known assailants. We don't find any substance in accused argument also because of the reason that in the adjacent house of Deepu Bhagat entertainment show was organized and therefore his entrance door must have been illuminated with sufficient lights to facilitate to and fro of spectators and bystanders. Display of entertainment programme is not a contentious issue which remains unchallenged by the accused. Examined in proper context the unmerited platitude contention of insufficiency of light was harangued by the accused only to be repelled as a substance-less submission and we conclude as such.

Now turning towards the presence of the informant and the witnesses during the incident, it emerges from the evidences that all the witnesses have clearly deposed that informant/ P.W.1, injured PW2 and Raj KumarPW5 were present at the adjoining terraces of the informant and

Deepu Bhagat. While deceased and injured were relishing the lighting, PW1 and 5 were lighting earthen lamps at their terrace. None of the three fact witnesses PW1, 2 & 5 could be dislodged by the defence, who miserably failed to crack their credibility. Since PW2 is an injured witness and his presence during the incident is doubtless and has not been challenged by the accused through their suggestions and since P.W.2 also affirms the presence of rest of the two witnesses at the time of the occurrence, no scope is left for doubting the presence of all the three fact witnesses during the incident. Even from their cross examinations nothing could be elicited to dub them as absent witnesses. P.W.5 had taken the injured to the hospital immediately after the incident in the gig of Ram Bhajan and his presence in the village at the time of the incident too is well cemented corroborated even by medical examination reports of both the injured. He has also stated the entire incident with crystal clear clarity and has been corroborated and supported convincingly both by P.W.1 and P.W.2. Their entire evidences, considered jointly makes it evident that the narration of the incident spelt out by them is well knit without any suspicious circumstance and evidence and therefore we conclude that all these three fact witnesses PW1, 2 & 5 are the eye witnesses of the incident and their presence during happening of the incident cannot be doubted at all. At this point we would like to emphasize that the learned trial Judge, instead of examining the credibility of these witnesses had tried to run down their statements by contradicting them by pointing out insignificant mistakes committed by the I.O. during the investigation. In our view, the said approach by the learned trial Judge is totally erroneous and misdirected which cannot be countenanced. On an overall scanning and vetting of testimonies of all the above three fact witnesses, we are of the opinion that they are creditworthy, reliable and truthful witnesses and their evidences inspires confidence and, therefore, their evidences cannot and/or could not have been discarded to perorate to the country.

Turning towards the medical evidences, we have already noted that Exhibits Ka-16 and Ka-17 coupled with admitted post mortem examination report of deceased Hari Shankar fully corroborates the prosecution allegations sans any doubt. Both the injured, had sustained firearm injuries

as alleged by the prosecution. From the cross examination of the doctor nothing could be surfaced to snip ocular versions. Since formal proof of autopsy report has been dispensed with by the accused, therefore its contents can be read in evidence and, singularly, the said document, confirms the prosecution allegation of the deceased being shot dead cannot be doubted. It is noticeable that the defence plea itself is that the deceased and the injured were shot at, though at different time and place. In such a view, the medical consistency with the ocular version lends authentic credence to the prosecution story and learned trial Judge, committed glaring mistakes in discarding the prosecution case qua main shooters.

The blood and the wads found at the spot coupled with pellets marks at the terrace of Deepu Bhagat fixes the place of the incident without any other conceivable alternative. Defence plea of incident spot being at some other place is too gibberish and unconvincing to be given a serious thought to it except to mention it and we say no more. A hollow suggestion without any convincing material is of no avail to the accused persons. Thus place of the incident is also well demarcated as alleged by the prosecution.

Now considering the entire picture what is culled out is that prosecution has successfully anointed guilt of the three main shooters and there is nothing on record to confer benefit of doubt on them even on preponderance of probabilities. Opining as aforesaid we resolve that acquittal of those three main assailants Sri Ram A2, Mohan Lal A4 & Rajveer A6 are unsustainable and infallible and has to be upturned. Learned trial Judge had illegally and undeservedly acquitted them through the impugned judgment and order.

Before parting with this judgement we would like to deal with those aspects which weighed so heavily with the learned trial Judge that he even discarded evidences of an injured witness of an unimpeachable character. Hon'ble Apex Court had also observed that many reasons slated by the learned trial Judge has not been considered by our predecessor Bench while deciding the appeal on the earlier occasion. In this respect, accused counsel failed to assist us and he only reiterated what has already been slated in the impugned judgement and therefore, we now examine the reasons recorded in the impugned judgement as far as possible in the same seriatim.

The first reason which had prompted learned trial Judge to discard the prosecution case, starting from page 7, is that "*hence the motive is not at all proved in this case.*" For recording such an opinion, learned trial Judge has mentioned that there was no evidence regarding the summit(*panchayat*) alleged to have been convened at the house of A1. Secondly that if in the said *panchayat*, A1 had quarrelled with P.W.1, why no attempt was made to do away with P.W.1 and instead, deceased and the injured were fired upon who had not participated in the summit(*panchayat*). Articulating his opinion learned trial Judge also held that A4, A5 and A6 had no motive to commit the crime and there is no link evidence also that they were compatriots of rest of the accused. A4, A5 and A6 belonged to another community of a different village was an additional factor to disbelieve the motive alleged by the prosecution and consequently trial court held that motive alleged by the accused is a "*lame excuse.*" Learned trial Judge also held that actual motive alleged by the prosecution is "*absurd and in convincing.*" For this opinion, learned trial Judge calculated the value of the real estate which could have fallen in the share of Billu and had concluded that since the value of the said share was only Rs. 100/- or Rs. 200/- and since Billu was residing with his father at Modi Nagar since last 20 years, therefore, it was "*most absurd to think that either there was any dispute about the land of Billu and this motive is totally incorrect that as Sukhi Ram etc. we're siding Billu hence this murder of Hari Shankar was committed and an attempt was made to commit the murder of Jag Mohan.*" We respectfully disagree with all the above opinions. First of all, we note here that the above opinions are totally absurd and puerile. In case of an eye witness account, the motive relegated into the background is the trite law too well propounded to be unsettled. Presence of Jag Mohan/ PW2 during the incident has not been challenged by the defence and from his testimonies defence has not been able to dislodge the motive alleged by the prosecution and, therefore, singularly his evidence was sufficient to nail in the main shooters. Learned trial Judge, therefore, committed blatant error in vetting and summing the prosecution evidences. Moreover, concerning *panchayat*, the evidences of all the witnesses was without any contradiction or embellishment. All of them had said that the summit was convened at

the house of A1 and in that summit A1 and his family members had participated from the accused side where as PW1, deceased and some others had participated from the informant's side. When we look to the 313 Cr.P.C. statement of Radhey Shyam A1, he has not specifically refuted convening of summit at his house. Since, it was a family conclave of close friends and relatives convened all of a sudden at the house of A1, there could not have been any other evidence except the oral testimonies of the witnesses. This important aspect completely escaped the notice of the learned trial Judge. Defence has also failed to rebut and prove otherwise. The next reason that informant Sukhi Ram, who had participated in the summit was spared and not assaulted or fired upon but instead Hari Shankar and Jag Mohan, who had not participated in the summit were caused fire arm injuries, we find the said conclusion most preposterous contrary to the evidences on record. Firstly, why accused opted out for the deceased and the injured it was for them to explain. Secondly it is the prosecution case that no sooner their arrival at the incident scene A1 and A3 accosted both Hari Shankar (deceased) and Jagmohan (injured) that they proxy for Billu and brazen themselves very much and therefore they will face the result for the same. This clearly indicated the revengeful animosity which the accused had harboured against the deceased and the injured. Moreover it is the statement of P.W.1 *"I am Billu's ancestral grandfather. I and Hari Shankar had taken his side and had pacified him and had sent him to his mother at Modi Nagar. Because of aforesaid reason, Radhey Shyam, Sri Ram, Anand harboured enmity with us"*. Considering the relationships between informant ,deceased and the injured it is quite likely that both the deceased and injured sided with the informant and therefore there was equal animosity against them as that with PW1 and therefore shooting at them is not a very surreal conduct. PW5 has also deposed in paragraph 6 of his examination-in-chief that *"15 or 20 days prior to the incident Radhey Shyam, Sri Ram and Billu had quarrelled because of partition. Billu is the nephew of these people. My father and Hari Shankar had sided with Billu. Because of aforesaid reason Radhey Shyam and Sri Ram nurtured animus against him."* This statement of P.W.5 was further authenticated in his cross-examination wherein he has evidenced *" the said*

verbal onslaught concerning Billu happened in my presence and a summit had also taken place. The tiradic altercation had occurred earlier and summit had taken place later on. In that summit I had not participated. During tiradic altercation I, my father and Jagmohan and Hari Shankar and 1-2 persons of my house were present and amongst the accused Radhey Shyam and his family members were present." Thus, it becomes more than evident that deceased was one of the participant in the verbal dual and in the summit. Inviting our attention to the cross-examination of the informant P.W.1, learned counsel for the accused had harangued that the informant had stated that in the summit only he had participated and nobody else, including injured and the deceased and, therefore, the opinion by the learned trial Judge is well founded. We find ourselves unable to subscribe to such an opinion because espousing the cause of Billu by the deceased and the injured and accosting of both of them by the accused immediately after their arrival at the incident scene establishes to the contrary than what the respondent accused suggests. Learned trial Judge completely ignored this aspect of the matter and unnecessarily aggrandized the motive aspect to confer unwarranted benefit of doubt on the accused. Thus the castigation that there was no reason to annihilate the deceased and cause injury to the injured when PW1 was present is perverse and is hereby repelled.

Another reason which weighed with the learned trial Judge was that three of the accused belonged to different village and caste and consequently they had no motive to commit the murder. Such a conclusion may be true but then it required examining the case of rest of three accused which has not been done at all. Prosecution witnesses had no reason to falsely implicate main shooters without any rhyme or reason. It was the duty of the learned trial Judge to fathom out the truth and separate the grain from the chaff. This required a dispassionate analysis and examination of evidences cross courts, which he had failed to observe and therefore, his conclusions suffers from the vices of favoured and defective opinions. Turning towards the value of the property which Billu would have inherited, which is one of the reasons to castigate the prosecution story, we find the opinion by the learned trial Judge to be purely conjectural and

hypothetical being based on no evidence at all. No question pertaining to the value of the property was asked from any of the witness and on what basis the learned trial judge had recorded his opinion at internal page 9 of the impugned judgment is not comprehensible. We find his conclusions to be totally irrelevant and out of context. Our heuristic experiences informs us that it is not too uncommon that murders are committed for very small and paltry amount and here is the case where landed property is involved. It depends upon the proclivity of the accused and his rapacious psyche more than anything else. We therefore disapprove rejection of prosecution case by the learned trial Judge.

Learned trial Court had further held that there was no immediate motive to commit the murder of the deceased and whatever motive was stated was not at all convincing. Such conclusions deserves to be repelled as it depends upon person to person as what fact situation prompts him to act in a particular manner. The lust of property had seen mythological war of *Mahabharat* between collaterals, where even Lord Krishna had also participated. Here is a case which deals with *Kaljugi* human beings full of vices and rapacity. Wealth, wine and woman are the three recognised vices and lust for them snatches away all saner senses even of most wise men and makes them blind. The same thing seems to have happened with the main shooters whose saner senses had capitulated to the sinner thoughts of rapacious greed for property and, it seems that, it had over powered them so much that they even forgot their blood relationships with Billu and executed the present crime. Verbal onslaught seems to have acted as an impetuous and a catalyst in their nefarious design. More over sufficiency or insufficiency of motive was wholly irrelevant so long as there existed a motive to commit the crime and discarding the entire prosecution case for that reason by the trial court was wholly unwarranted.

Another reason which was attached with undue importance by the learned trial court is that all the fact witnesses were near relations inter se and were inimical to the accused and therefore, the evidences of those highly interested witnesses cannot be relied upon in absence of examination of any independent witnesses who were present at the time of the occurrence. Trial court held that interested, partisan, related witnesses can

be relied upon only when independent witnesses are not available and when independent witnesses are available their non-examination is fatal to the prosecution case as has happened in the present case. Firstly, we are of the opinion that it is the quality of evidence which is material and not the relationships and interestedness of witnesses. Non-examination of independent witness is no reason to discard convincing testimonies of it's witnesses and thereby of the prosecution version which the defence had failed to shatter. Secondly, as observed above, independent persons are reluctant to enter into the witness box in family tussle between close collaterals. Instead of considering worthiness of depositions of the fact witnesses, learned trial Judge had adopted an unconvincing and a very weird approach of prolixing trivialities committed by the I.O. to confer undesirable acquittal on the accused respondents. Merely because independent witnesses did not countenance the prosecution version is no reason to disbelieve convincing reliable testimonies of related witnesses, who had no grouse against the accused respondents and will be the last persons to spare the real assailants. The decisions which have been relied upon by the learned trial Judge in support of his conclusions were rendered in altogether different fact scenario than the present case. Each case has to be viewed in the light of the peculiar facts and circumstances surrounding it and engulfing the incident. In the present case, there was nothing to disbelieve the three fact witnesses P.W.1, P.W.2 and P.W.5.

Learned trial Judge has also given undue importance to the non-examination of Billu, Lakhpat and Deepu Bhagat. No doubt prosecution would have done well to produce them in the Court in support of their allegations but merely because they have not been examined is no ground to reject the evidences of reliable witnesses including an injured whose presence at the spot cannot be doubted. Deepu Bhagat and Lakhpat were neighbours of both the sides and, therefore, they would not have preferred to champion the cause of the prosecution. Billu again was an inimical person with whom the accused had a property dispute and therefore, his non-examination would not have countenanced prosecution allegation as the criticism of his being inimical and interested witnesses would have been easily harangued. In this connection, learned trial Judge has wrongly placed

reliance on those apex court decisions which were rendered in altogether different fact situations with no commonality with the present incident. We would like to observe that learned trial Judge was not expected to be a mute spectator and a silent recipient of evidences. It was his solemn duty to get the truth elicited. If he was of the opinion that evidences of the above three witnesses were essential for a just decision of the case he could have wielded his wholesome power u/s 311 Cr.P.C. which is entered in the Statute book to be utilised at an opportune moment to do justice. Learned trial Judge should have also acted as a live participant in the trial procedure and would have resorted to the provision of Section 165 Evidence Act as well to question the witnesses to get the truth elicited. We further find that the prosecution had offered a thin reason for non- production of Lakhpat as it was stated by the prosecutor that he had been won over by the accused person. In view of the facts and circumstances we find that non examination of above three persons by the prosecution does not in any way create any doubt in the prosecution story, which is proved convincingly and authentically.

For very absurd and trivial reasons, learned trial Judge has disbelieved the testimonies of injured Jag Mohan at pages 13/14 of the impugned judgment. Incident had occurred all of a sudden at the spur of the moment and it is the categorical statement of the injured that immediately after sustaining gun fire injury he had fainted and thereafter had regained consciousness on the following day in the evening in the hospital. How much opportunity was left with this injured to recapitulate and recollect the entire episode in such fact situation can very well be imagined. Moreover, the statement of this injured started after a long gap of three years. Because of the lapse of time, it is quite natural for him to forget petty aspects of the entire episode so as to replay it during his cross examination. In our view, the entire approach of the learned trial Judge was faulty which no man of ordinary prudence would have adopted and observed. Unnecessary adherence to the rule of acquittal by extending undeserved benefit of each and every truncated insignificant fact is not the rule of discipline in scanning the testimonies of the witnesses. Natural intermittence of memory and recapitulation of an incident happen at the

spur of the moment is a relevant factor to be reckoned with which learned trial Judge completely failed to practise.

Concerning light, learned trial Judge, at page 15 of the impugned judgment, has recorded findings contrary to the material on record. He has misread the evidence and has also recorded those facts for which no questions were asked from the witnesses. His reason that the incident night was "*the darkest night of the year*" and/or that "*but firstly, this light must have ended by the time this incident took place and secondly, earthen lamp light was not sufficient in which a man could be recognized from a long distance*" are purely conjectural, hypothetical and undesirable conclusions based on misreading of evidences. In view of our analysis herein, the matter does not require any lengthy deliberation and we close the said aspect here.

Learned trial Judge considered some discrepancy in the statement of P.W.1 and the I.O. to conclude that the F.I.R. was prepared when the S.I. had reached at the spot and some manipulations were made in preparation of the documents, We do not find the reasons mention by the learned trial Judge to have any force to repel the testimony of an injured witness. Mentioning of sections 302 instead of 307 IPC in the recovery memo, unprolific contradictions regarding preparation of recovery memo Ext. Ka-2, which is the recovery memo of the bulbs etc. were such insignificant aspects which should not have weighed with the learned trial court at all to record an unmerited acquittal of a murder case with an injured witness. In our examination, we find the impugned judgment by the learned trial Judge illegal and uncalled for concerning the three main assailants and, therefore, are unable to subscribe the entire impugned judgment.

Now turning towards the question as to whether the prosecution version is to be believed against all the accused-respondents or only against some of them, we are of the opinion that three of the assailants, Radhey Shyam A1, Anand A3 and Nidan A5, were bare handed. No role has been assigned to them by the prosecution witnesses. Nothing has been said against them so as to indicate that they also had the same common object of causing death of the deceased and attempt to commit murder of the injured. They had not participated in the actual incident at all. From the

examination of witnesses, we find that there was enmity between both the factions and it might be possible, that these three accused A-1, A-3 and A-5 were present not as members of unlawful assembly but as spectators for the side show. Adopting an abundant cautious approach, we think that it will be prudent for us to stick to the golden rule of criminal jurisprudence of proving the guilt to the hilt beyond shadow of any reasonable doubt. When examined on the aforesaid touchstone, we find ourselves in dilemma in accepting the prosecution version concerning these three accused Radhey Shyam A1, Anand A3 and Nidan A5. It is difficult to conclude that they were the members of the same unlawful assembly sharing the same common object to annihilate the deceased and cause fatal injury to the injured. For their mere presence they cannot be imputed with the character of being members of an unlawful assembly with criminal intent harboured by rest of the three murders. Those also serve who stand and wait implies in it convincing role of participation and not mere passive presence. In our opinion, it will be quite reasonable and safe to confer benefit of doubt on them and, therefore, we find that the impugned judgment respecting these accused A-1, A-3 and A-5 is quite reasonable and does not suffer from any error nor it requires any interference by us. Respondent accused Anand A-3 is already dead. In his respect, this Government Appeal has already been abated, therefore acquittal of rest of the two accused respondents Radhey Shyam A1 and Nidan A5 has to be affirmed.

At this point, we would take up the left over aspect as to whether we should also consider the case of acquitted accused or not in view of the Apex Court decision as has already been mentioned by us in the earlier part of this Judgment and to that we are of the view that since we are also of the opinion that acquittal of these accused Radhey Shyam A1 and Nidan A5, is well merited, therefore we need not deliberate on the said aspect any further and it be treated to be closed.

For rest of the three accused Sri Ram (A2), Mohan Lal (A4), and Rajveer (A6), prosecution has successfully anointed their guilt for committing murder of Hari Shankar and for attempting to cause murder of Jagmohan and their acquittal for those crimes, through impugned judgment and order, is infallible and unmerited and has to be set aside.

Now coming to the question as to what offences have been committed by these three accused respondents Sri Ram (A2), Mohan Lal (A4), and Rajveer (A6), we hold that since there was no unlawful assembly in existence at any point of time, consequently their cases does not fall within the purview of section 149 I.P.C. and hence we take their cases out of the ambit of said section 149 I.P.C. and put it within the scope of section 34 I.P.C. These accused in furtherance of their common intention had committed the murder of Hari Shankar and had attempted to cause murder of Jagmohan/PW2 and hence they are held guilty for offences u/s 302/34 and 307/34 I.P.C. respectively.

Adverting to the sentences to be imposed on the above three accused respondents Sri Ram (A2), Mohan Lal (A4) and Rajveer (A6), we find their crime not falling within the parameters and category of rarest of rare case and, therefore, we are of the opinion that sentence of life imprisonment with fine of Rs. 20,000/- on each of them and 2 years further imprisonment in default of payment of fine u/s 302/34 I.P.C. and 7 years R.I. with a fine of Rs. 10,000/- each and in default of payment of fine to serve 1 year additional imprisonment u/s 307/34 IPC, with further direction that both the above sentences shall run concurrently shall meet the ends of justice.

The precipitated residue of our aforesaid discussions are that this State Appeal for the two accused respondents Radhey Shyam A1 and Nidan A5 is dismissed and their acquittal by the impugned judgement and order is hereby affirmed. These two accused respondents are on bail, they need not surrender, their personal and surety bonds are hereby cancelled and discharged.

For three of the accused respondents Sri Ram (A2), Mohan Lal (A4), and Rajveer (A6) this State Appeal is allowed and these accused respondents, Sri Ram (A2), Mohan Lal (A4), and Rajveer (A6), are held guilty for offences u/s 302/34 I.P.C. and 307/34 I.P.C. For offence u/s 302/34 I.P.C. each one of them is sentenced to life imprisonment with a fine of Rs. 20,000/- and in default of payment of fine to serve 2 years additional imprisonment. For offence u/s 307/34 I.P.C. each of these three accused Sri Ram (A2), Mohan Lal (A4), and Rajveer (A6), are sentenced to

7 years R.I. with a fine of Rs. 10,000/- and in default of payment of fine to serve 1 year additional imprisonment. Both the sentences of each of aforesaid convicted accused shall run concurrently. These accused-respondents are on bail, their personal and surety bonds are cancelled and / or discharged and they are directed to be taken into custody forthwith and be lodged in jail to serve out their sentences imposed as above.

This State Appeal already stands abated as against accused respondent Anand A3.

This Government Appeal is **allowed in part** as above.

Let a copy of this judgment be certified to the learned trial Judge forthwith for compliance.

Learned trial Judge is directed to report compliance of this order to this court within a period of a month from today.

Dt/3.9.2013

Rk/Tamang/Arvind