

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

&

HON'BLE SHRI JUSTICE MILIND RAMESH PHADKE

ON THE 01st OF NOVEMBER, 2022

CRIMINAL APPEAL No. 497 OF 2012

Between:-

1. JANDEL SINGH, SON OF MADHO SINGH, AGED 45 YEARS;
2. KALU @ RANVEER, SON OF JANDEL SINGH KUSHWAHA, AGED 20 YEARS;
3. GAUTAM SINGH, SON OF MADHO SINGH KUSHWAHA, AGED 20 YEARS;

(ALL RESIDENTS OF VILLAGE PURI,
POLICE STATION ANTRI, DISTT.
GWALIOR)

.....APPELLANT

(BY SHRI V.D. SHARMA - ADVOCATE)

AND

STATE OF MADHYA PRADESH,
THROUGH POLICE STATION
ANTRI, DISTT. GWALIOR (M.P.)

.....RESPONDENT

(BY SHRI C.P. SINGH – ADVOCATE)

CRIMINAL APPEAL No. 494 OF 2012

Between:-

- 1. LAXMAN SINGH SON OF BABULAL KUSHWAHA, AGED ABOUT 45 YEARS (DEAD);**
- 2. DILIP SINGH, SON OF DEVI SINGH KUSHWAHA, AGED 38 YEARS ;**
- 3. HAKIM SINGH, SON OF DILIP SINGH KUSHWAHA, AGED 20 YEARS;**

**(ALL RESIDENTS OF VILLAGE PURI,
POLICE STATION ANTRI, DISTT.
GWALIOR)**

.....APPELLANT

(BY SHRI R.K. SHRIVASTAVA - ADVOCATE)

AND

**STATE OF MADHYA PRADESH,
THROUGH POLICE STATION
ANTRI, DISTT. GWALIOR (M.P.)**

.....RESPONDENT

(BY SHRI C.P. SINGH – ADVOCATE)

CRIMINAL APPEAL No. 500 OF 2012

Between:-

- 1. VIJAY SINGH SON OF DHANIRAM KUSHWAHA, AGED 55 YEARS;**
- 2. HAKIM SINGH SON OF NATHURAM KUSHWAHA, AGED 31 YEARS;**
- 3. DEVI SINGH S/O DHANIRAM KUSHWAH AGED 59 YEARS;**

4. LAXMAN SINGH S/O BABULAL KUSHWAH AGED 45 YEARS;
 5. DILEEP SINGH S/O DEVI SINGH KUSHWAH AGED 38 YEARS;
 6. JANDEL SINGH S/O MADHO SINGH KUSHWAH AGED 45 YEARS;
 7. KALU @ RANVEER S/O JANDEL SINGH KUSHWAH AGED 20 YEARS;
 8. HAKIM SINGH S/O DILEEP SINGH KUSHWAH AGED 20 YEARS;
 9. GAUTAM SINGH S/O MADHOSINGH KUSHWAH AGED 28 YEARS;
- (NUMBER 3 TO 9 DELETED AS PER COURT'S ORDER)
(ALL RESIDENTS OF VILLAGE PURI, POLICE STATION ANTRI, DISTRICT GWALIOR, MADHYA PRADESH)

(ALL RESIDENTS OF VILLAGE PURI, POLICE STATION ANTRI, DISTT. GWALIOR)

.....APPELLANTS

(BY SHRI SANJAY GUPTA - ADVOCATE)

AND

STATE OF MADHYA PRADESH,
THROUGH POLICE STATION
ANTRI, DISTT. GWALIOR (M.P.)

.....RESPONDENT

(BY SHRI C.P. SINGH – ADVOCATE)

Delivered on : 01st of Nov. 2022

*This criminal appeal coming on for hearing this day, **Hon'ble Shri Justice G.S. Ahluwalia**, passed the following:*

JUDGEMENT

1. All the three Criminal Appeals have been filed against the judgment and sentence dated 27-4-2012 passed by 1st Additional Sessions Judge, Dabra, Distt. Gwalior in S.T. No. 295/2011 by which the Appellants have been convicted and sentenced for the following offences :

S. No.	Appellant	Conviction under Section	Sentence
1	Gautam Singh	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307/149 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.
		323/149 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.
		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.
2	Jandel Singh	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302/149 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.

		323/149 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.
		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.
		25(1-B)(a) of Arms Act	3 years R.I. and fine of Rs. 1,000/- in default 6 months R.I.
		27 of Arms Act	3 years R.I. and fine of Rs. 1,000/- in default 6 months R.I.
3	Vijay Singh	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302/149 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.
		323/149 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.
		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.
4	Dilip Singh	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302/149 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.
		323/149 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.
		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.

5	Hakim Singh son of Dilip Singh	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302/149 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307/149 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.
		323 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.
		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.
6	Kalu Ranveer @	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302/149 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307/149 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.
		323 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.
		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.
7	Hakim son of Nathu Singh	148 of IPC	1 year R.I. and fine of Rs. 1,000/- in default 3 months R.I.
		302/149 of IPC	Life Imprisonment and fine of Rs.5,000/- in default 2 years R.I.
		307/149 of IPC	7 years R.I. and fine of Rs. 1000/- in default 1 year R.I.
		323 of IPC	6 months R.I. and fine of Rs. 750/- in default 1 month R.I.

		336 of IPC	1 month R.I. and fine of Rs. 250/- in default 7 days R.I.
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All sentences shall run concurrently. Out of fine amount, compensation of Rs. 25,000/- be paid to the family members of deceased Jeetu and Rs. 2,000/- be paid to Sarro bai.

2. The facts necessary for disposal of present appeal in short are that on 21-3-2011, the complainant Moti Khan lodged a Dehati Nalishi that at about 15:00, a group of *Holi Ke Hurriyare* were passing through. When they came in front of the house of the complainant, they started playing indecent songs which was objected by deceased Jeetu. On this, *Holi Ke Huriyare* went away after extending a threat. There after at about 15:30, Gautam with his *Pachera gun*, Dilip Singh, Jandel Singh, Devi Singh and Vijay Singh with their .12 bore guns and Laxman, Hakim, Kalu, and Hakim came there with lathis and surrounded his house. They were also abusing them. The accused persons started pelting stones in a reckless manner. His wife Sarro bai was thrown on the ground by Hakim son of Nathu and Laxman and Hakim assaulted her by lathis, as a result she sustained injuries. His son Jeetu, went to the roof in order to see his mother. Gautam fired a gun shot which hit on the head of the deceased as a result he died on the spot. When the complainant tried to go to the roof, then Dilip Singh, Jandel Singh, Devi Singh and Vijay Singh fired at him from their .12 bore gun. However, he escaped unhurt. His sons Sakir, Sabu and Shakeel who had come on the festival of Holi, have witnessed the incident. Accordingly, FIR was registered.

3. Spot map was prepared. Safina form was issued and *Naksha Panchayatnama* was prepared. Requisition for post-mortem was sent. The post-mortem of the dead body of the deceased was got done. The

mobile unit of scene of crime also submitted its report. The injured Sarro bai was sent for medical examination and her MLC was obtained. The statements of Moti Khan, Sarro bai, Shakeel Khan, Ballu and Mani ram were recorded. The accused persons were arrested. .12 bore gun was seized from Devi Singh, One lathi was seized from Laxman, .12 bore gun was seized from Dilip Singh, .12 bore gun was seized from Jandel Singh, lathi was seized from Kalu, one lathi was seized from Hakim Singh, .12 bore gun was seized from Vijay Singh, one Lathi was seized from Hakim Singh son of Nathu. .315 bore gun was seized from Gautam Singh. Sanction to prosecute Jandel Singh was obtained. The blood stained cement, pieces of earthen tile, four rounds of empty cartridges were seized from the spot. One fired bullet was lateron seized on production of the same by Shakeel Khan. FSL report was obtained. Police after completing the investigation, filed the charge sheet for offence under Sections 302,307,147,148,149,336,324,201 of IPC and under Section 25, 27 and 30 of Arms Act.

4. The Trial Court by order dated 13-9-2011 framed charges under Sections 148/149, 302, 307, 336, 323 or in the alternative 323/149 of IPC against Gautam Singh. Charges under Sections 148/149, 302/149, 307/149, 336, 323 or in the alternative 323/149 of IPC were framed against Hakim son of Dilip, Kalu @ Ranveer, Laxman, Hakim son of Nathuram, Devi Singh, Vijay Singh, and Dilip Singh son of Devi Singh. Charges were framed under Sections 148/149, 302/149, 307/149, 336, 323 or in the alternative 323/149 of IPC, under Section 25(1-B)(a) and 27 of Arms Act against Jandel Singh.

5. The Appellants abjured their guilt.

6. The prosecution examined Moti Khan (P.W.1), Sarro bai (P.W.2), Shakeel Khan (P.W.3), Ballu Singh (P.W.4), Kalu Singh Thakur (P.W.5), Akhilesh Bhargav (P.W.6), Dr. B.S. Yadav (P.W.7), Bhura Khan (P.W.8), Harprasad Sharma (P.W.9), Harnam Singh (P.W.10), Rajendra Singh (P.W.11), Maniram (P.W.12), Kallan Khan (P.W.13), Gopal Agrawal (P.W.14), Ramhet Singh (P.W. 15), and R.M. Bhadoria (P.W.16).

7. The Appellants did not examine any witness in their defence.

8. The Trial Court by the impugned judgment, convicted and sentenced the Appellants for the above mentioned offences.

9. It is not out of place to mention here that the Appellants Devi Singh and Laxman died during the pendency of this appeal, and their appeals have been dismissed as abated.

10. Challenging the judgment and sentence passed by the Court below, it is submitted by the Counsel for the Appellants that Ballu Singh (P.W. 4) is not a reliable witness. The second incident is alleged to have taken place in three parts i.e., when all the accused persons came back, then Hakim son of Dilip Singh, Hakim son of Nathu Singh, Laxman and Kalu are alleged to have assaulted Sarro bai. It is submitted that this incident took place at a different place. Thereafter, it is alleged that Gautam fired a gun shot, thereby blowing away the head of deceased Jeetu. The said gun shot was allegedly fired from the roof of Ram Janki Temple. Thereafter, it is alleged that Dilip Singh, Jandel, Devi Singh and Vijay Singh fired gun shots at Moti Khan from Ganesh Temple. Thus, Hakim Singh, Hakim Singh, Kalu and Laxman were not aware of the fact that Gautam Singh would fire gun shot, thereby killing Jeetu. Similarly, Dilip Singh, Jandel Singh, Devi Singh and Vijay Singh were not aware of the

fact that Gautam Singh may shoot the deceased Jeetu. Thus, it is claimed that the prosecution has failed to prove that the appellants were sharing any common object to kill Jeetu or to make an attempt on the life of Moti Khan. It is further submitted that in fact the prosecution has failed to prove that any gun shot was fired by Dilip Singh, Jandel Singh, Devi Singh and Vijay Singh. Further, the place from where the gun shot was allegedly fired by Gautam Singh has been changed as per the convenience of the witnesses.

11. Per contra, the Counsel for the State has supported the prosecution case. By referring to the stand taken by Gautam Singh in his statement under Section 313 of Cr.P.C., it is submitted that in fact Gautam Singh has almost accepted the entire incident.

12. Heard the learned Counsel for the parties.

13. Before advertng to the facts of the case, this Court would like to consider as to whether the deceased Jeetu died a homicidal death or not?

14. Dr. B.S. Yadav (P.W.7) has conducted the post-mortem of the dead body of Jeetu and found following injuries :

Entry Wound right side of frontal, right parietal and right maxillary region and right temporal area 10x10 cm size, margin of the wound blackening and inverted wound margins.

Missing of pieces of the right frontal, right parietal, right temporal, right maxillary and right occipital bone and brain matter (illegible) and came out in pieces from the brain cavity.

Fracture of the left parito-occipital sutur line. Direction of wound anterior to posterior right side of skull.

Cause of death is hemorrhagic shock due to rupture of

the brain matter and right side skull due to fire arm injury. Ante-mortem in nature. Time since death 12 to 36 hours and homicidal in nature. The post-mortem report is Ex. P.23.

15. This witness was cross-examined. In cross-examination, he admitted that the copy of FIR or any other documents were not sent along with the dead body. It is true that gun shot was fired within the range of 4-5 ft.s. He admitted that liquor would dissolve within ½ hour but its foul odor would remain for 5-6 hours.

16. Thus, it is clear that the death of Jeetu was homicidal in nature.

17. The next question for consideration is that whether the Appellants are the author of the offence or not?

18. The Prosecution has examined Moti Khan (P.W.1), Sarro bai (P.W.2), Shakeel Khan (P.W.3) and Ballu Singh (P.W.4) as Eye-witnesses who have supported the prosecution case, whereas Maniram (P.W.12) has turned hostile and did not support the prosecution case.

19. Moti Khan (P.W.1) is the father of the deceased and is also the complainant. He has stated that the Appellants as well as Devi Singh and Laxman are known to him as they are the residents of same village. Deceased Jeetu was his son. On 21-3-2011 at about 3 P.M., the Procession of *Holi Ke Huriyare* (a group of persons playing Holi) was going on. They came in front of the house of this witness and started playing band very loudly and also started dancing. They removed their cloths and started showing their body. It was objected by Jeetu and this witness that they should not behave in such a manner because ladies are also there in the family. The appellants extended a threat that they would see them and went away. At about 3:30 P.M., i.e., after half an hour, the

Appellants came back along with their weapons. Gautam was having Pachpera gun, Dilip Singh, Jandel Singh were having .12 bore single barrel gun, whereas Devi Singh and Vijay Singh were having .12 bore double barrel guns. Laxman, Hakim another Hakim son of Nathu were having lathis whereas Kalu was having *Lathi-Luhangi*. They recklessly started pelting stones and were also abusing them. His wife Sarro bai (P.W.2) came out of the house. Hakim son of Nathu dragged her as a result she fell down on the ground. Hakim son of Dilip and Laxman assaulted her by lathi as a result She sustained injuries on her head and temporal region. They dragged her towards the street. She raised an alarm, therefore, this witness saw from the window and came back to his house. On query by his son, he informed that the appellants have taken away his mother and accordingly, his son Jeetu went to the roof to see his mother and requested them not to beat her. The accused persons were pelting stones. Thereafter, all the eight accused persons exhorted the co-accused Gautam to kill Jeetu and accordingly, Gautam by standing on the wall constructed over the platform, fired a gun shot, thereby blowing away the head of his son who died on the spot. Thereafter, the Appellants Devi Singh, Vijay Singh, Dilip Singh and Jandel Singh fired gun shots on this witness, but he escaped unhurt. His son Sakir Khan, Sabu Khan, his nephew Sakeel Khan were hiding behind the staircase. These witnesses had come to the house to celebrate Holi. The incident took place on account of old election enmity. The appellants had requested them to cast their votes in favor of Gautam Sarpanch, but as they did not vote him therefore, the appellants had a grudge against the family of the complainant. The police had investigated the matter on the

spot. Dehati Nalishi, Ex. P.1 was lodged by him. Other investigations were also done by the police and had obtained his thumb impressions. The dead body was sent for post-mortem. The statements of this witness, Sarro bai, Sakir, Sabu and Shakeel Khan and others were recorded and Sarro bai (P.W.2) was sent for medical examination.

20. This witness was cross-examined. In cross-examination, he admitted that co-accused Gautam Singh is Sarpanch of his village. Gautam, Jandel, Kalu, Dilip and his son Hakim belong to one family. Kalu is son of Jandel. Dilip is uncle of Gautam. Laxman is also a member of same family and is uncle of Gautam. He also admitted that Devi Singh is also distantly related and Vijay is brother of Devi Singh. Hakim son of Nathu is also member of same family and belongs to same caste. This witness has three sons i.e., Sakir, Sabu and Jeetu who has expired. Shakeel is his nephew. He denied that Sakir and Sabu resides in Gwalior and have their business but claimed that they also reside in the village and have agricultural fields. Shakeel is resident of Dabra and is son of his brother Imam Khan. He admitted that Sakir and Sabu resides in Bahodapur, Gwalior and their children study in Gwalior but claimed that they also come to his house on festivals. He denied that on the date of incident, Sakir and Sabu were in Gwalior. He claimed that since, the crop was standing as well as due to festival, they had come to village. He admitted that he is residing in the village from his birth. The Appellants are also the resident of same village. He denied that 300-400 families reside in the village, but claimed that the village has 30-40 houses. There are about 400 voters in the village. The election had taken place about 1 year back. It is true that Gautam was elected as Sarpanch

for the first time but claimed that earlier his mother was Sarpanch. He admitted that he and his family had voted in the said election and denied that elections were boycotted by him and his family. He also admitted that about 4-5 Muslim families are residing in the village. He admitted that earlier there was no dispute between Hindu and Muslim. He admitted that the incident took place because of indecent dance as well as abusive language by *Holi Ke Huriyare*. He admitted that Jeetu had licensed gun and the same was kept in the house. There must be around 10-12 licensed guns in the village. It is true that there are two rooms in front of his house and has an open courtyard behind the rooms. He clarified that rooms are small and courtyard is also small. He denied that there is only one door to come out of the rooms, but claimed that there are different doors. It is true that the house of Ballu Kushwah is about 10 ft. towards left side of his house. It is true that Ram Janaki Temple is situated on the back side of his house. It has one platform. The same may be called as courtyard or platform. It is incorrect that rooms donot have doors towards the street but claimed that rooms have windows. *Huriyare* had come in front of his house. He did not give any information to police and could not explain as to how the police came on the spot. The Dehati Nalishi, Ex. P.1 was read over to him and he had not objected to it. In his FIR and police statement, Ex. D.1, he had disclosed that the *Holi Ke Huriyare* were playing band very loudly, but could not explain as to why this fact is not mentioned. He had put his thumb impression on 4-5 papers including spot map and others. He in his Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and merg intimation Ex. D.2, had disclosed that apart from playing band, the

Appellants were also hurling abuses and were dancing, however, he could not explain as to why this fact is not mentioned. He claimed that he was in shock. He admitted that he has engaged a lawyer in his defence. He denied that he has been tutored by his lawyer. He claimed that since the incident took place in front of him, therefore, he is giving his evidence accordingly. He also claimed that he had disclosed in his Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and Merg intimation, Ex. D.2 that the appellants after removing their cloths were showing their body, but could not explain as to why this fact is not mentioned. In the house, apart from his wife, the wife of deceased Rijwana was also in the family, who had gone in her neighborhood. He denied that he and the deceased had objected to playing band. The police had come after 1 hour of incident. The Appellants are his neighbors. He was present on the spot along with the dead body till the police arrived at the spot. The spot map was prepared on his instructions. When his wife went outside the house, then She was dragged in the street and was beaten. He denied that his wife had sustained pellet injury. He admitted that his wife went outside the house, only after the appellants started hurling abuses. He stated that he had disclosed that Hakim son of Nathu had dragged his wife, but could not explain as to why this fact is not mentioned in Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and Merg Intimation, Ex. D.2. He stated that his wife was thrown on the ground in the side street. She was thrown about 2 ft.s away from the rooms. His son Jeetu did not come out of the house. He did not try to save his wife as he was afraid. He admitted that no stones were pelted at the place where his wife was thrown. He denied that they (this witness and deceased Jeetu) had

pelted stones and had fired at *Holi Ke Huriyare*. He claimed that he did not try to take out his gun when *Holi Ke Huriyare* were creating ruckus. He also claimed that he had disclosed to the police that his wife was dragged towards the street, but could not explain as to why this fact is not mentioned in Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and Merg intimation, Ex. D.2. He had seen drag marks on the body of his wife. He also claimed that he had disclosed to the police that all the eight accused persons had exhorted Gautam to kill Jeetu, but could not explain as to why this fact is not mentioned in his Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and Merg intimation, Ex. D.2. He further claimed that in his Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and Merg intimation Ex. D.2, he had disclosed to the police that Gautam had fired by standing on the wall constructed over Platform, but could not explain as to why this fact is not mentioned. Platform is behind his house. The wall of platform is adjoining to his house. The platform is also adjoining to his house. The gun shot was fired from a distance of 2 ft.s from his room situated on the back side of his house. The assailant was at a distance of 2 ft.s from his son. He denied that the temple situated on the back side of his house, doesnot have any platform or separate wall. Ganesh temple is situated in a street and has staircase. Ganesh temple is about 50 ft.s away from his house. He claimed that Ram Janki Temple is adjoining to his house. The other Appellants had fired gun shots from Ganesh Temple. The remaining accused persons had fired gun shots after Jeetu was killed by Gautam. He also claimed that he had disclosed to the police that gun shots were fired from Ganesh Temple, but could not explain as to why this fact is not mentioned in

Dehati Nalishi, Ex. P.1, Police Statement, Ex. D.1 and Merg intimation, Ex. D.2. No one was present in the neighboring houses. He denied that since, the offence was not committed by appellants, therefore, he is not claiming that neighborers had also seen the incident. He denied the suggestion that since, there was an election enmity between the parties, therefore, the incident took place, but claimed that the accused party had grudge against him. He denied that the Appellants were not the *Holi Ke Huriyare*. He denied that when procession was going on, his son was pelting stones after consuming liquor. He denied that after pelting stones, his son brought his licensed gun and had fired in air. He denied that some one amongst the group which was singing holi song had fired and his son accidentally sustained the gun shot injury. He claimed that his house is in densely populated area of village. He denied that 100-50 persons had gathered after hearing noises.

21. Sarro bai (P.W.2) has stated that the Appellants are known to her. She has three children. Sakir and Sabu are residing in Gwalior whereas Jitendra was residing with them. *Holi Ke Huriyare* had come and they were signing and stopped in front of her house. They started using abusive language and removed their cloths and started doing nude dance. Her son Jeetu came out and requested the Appellants not to use abusive language because his mother, wife and sister are also residing in the house. Thereafter, the appellants went away after extending a threat. After about half an hour, the Appellants came back along with weapons and surrounded her house. Five accused persons were having guns whereas 4 were having lathis. Gautam, Jandel, Dilip, Vijay, and Devi Singh were having guns whereas others were having lathis. The

Appellants started pelting stones and also started hurling abuses. This witness came out of her house and requested the Appellants with folded hands and that they should leave the place. However, Hakim son of Nathu pulled her and threw her on the ground. Laxman and Hakim son of Dilip assaulted her by lathi as a result she sustained injuries on her head. Kalu also assaulted her by lathi. She was screaming. Her son Jeetu went to the roof and asked the Appellants as to why they are assaulting her mother and she should be spared. Then all the accused persons challenged by saying that they would kill him and accordingly, Devi Singh, Vijay, Jandel and Dilip exhorted Gautam to kill him. Gautam fired a gun shot hitting on the head of Jeetu as a result he died on the spot. Her husband Moti Khan also followed her. Thereafter, the four appellants Devi Singh, Vijay Singh, Jandel and Dilip challenged them also and fired gun shots, however, they fortunately survived unhurt. There was an election enmity therefore, the incident took place. She was cross-examined.

22. In cross-examination, she stated that Ram Janaki Temple is adjoining to her house. The gun shot was not fired from the roof of the temple but it was fired from the wall which is adjoining to platform. The wall has been constructed on the platform which is adjoining to her house. She denied that no one had caused injuries to her by lathi. She further denied that at the time of incident, She was inside the house and could not see the incident of firing. She denied that no one had fired on his husband. The election had taken place about 1 year prior to incident. It is true that Hakim son of Nathu, Vijay Singh and Dhaniram had not contested the election. The house of Hakim son of Nathu is slightly far

away from the house of Gautam. When the accused persons went away after killing her son, then She went to the place of incident. She saw that her son was lying dead. Her son had licensed gun. The said gun was kept in the house in a locked box. Only deceased Jeetu was aware of the key. She denied that they had not objected to playing of band by *Holi Ke Huriyare*. She denied that her son had also celebrated Holi and had consumed alcohol. The police had noticed the stones which were pelted by the Appellants. She denied that her son had pelted stones and had fired in air in order to frighten the *Holi Ke Huriyare*. She also claimed that She had disclosed in her police statement, Ex. D.3, that when playing of band was objected, then the Appellants had extended threat. She further stated that She had disclosed that after hearing abusive language, She came out of her house and requested the Appellants not to behave I that manner, but could not explain as to why this fact is not mentioned in police statement, Ex. D.3. Immediately after She was dragged, lathi blow was given to her. She was screaming for help. She admitted that no family member tried to save her. She further stated that since, the Appellants were having firearm, therefore, Jeetu went to the roof. He did not pelt stones in order to save her. She further claimed that Devi Singh, Vijay, Jandel and Dilip had exhorted Gautam to kill, but could not explain as to why this fact is not mentioned in her police statement, Ex. D.3. She never disclosed to the police that She had sustained pellet injuries on her forehead and temporal region. She further claimed that She had disclosed to the police that Jeetu had objected to nude dance and abusive language but could not explain as to why this fact is not mentioned in her police statement, Ex. D.3. Her sons had come on the

date of incident (Douj) and not on the day of Holi. The wife of the deceased was in the house. They had not given vote to Gautam in the election. It is true that the house of Ballu Kushwaha is on left side of her house. It is true that Ram Janki Temple is behind the house of Ballu Kushwaha. The dead body of her son was about 2-3 ft.s away from the platform.

23. Shakeel Khan (P.W.3) has also supported the prosecution case and has re-iterated the story in the same manner. He further stated that Gautam fired a gun shot in a very negligent and reckless manner as a result, Jeetu suffered gun shot injury on his head, therefore, his scalp bone was broken in pieces. Thereafter, Devi Singh, Jandel, Vijay Singh and Dilip Singh fired at Moti Khan (P.W.1) but he survived unhurt. On 29-3-2011, Devi Singh was arrested by arrest memo Ex. P. 2. His memorandum Ex. P.3 was recorded and .12 bore gun was seized vide seizure memo Ex. P.4.

24. This witness was cross-examined and in cross-examination also, nothing could be elicited which may make his evidence untrustworthy. He was also cross-examined with regard to the distance between the place of incident and his village Barotha. He claimed that by cycle, it takes 1 – 1 ½ hour to reach to the place of incident, however, one can come within half an hour by motor cycle. He denied that he was not present on the spot. He did not pick up the deceased from the spot. After the police came to the spot, he had picked up the deceased from his legs, therefore, his cloths did not get stained with blood. It is true that people in group sing and dance on the festival of Holi. They had objected as the Appellants were singing indecent songs. He further stated that they had

not taken out the licensed gun as they were not apprehending any incident. He denied for want of knowledge as to whether Jeetu was in habit of consuming liquor or not? The gun shot was not fired from the roof of the Ram Janaki Temple, but it was fired from the wall. He is describing the platform as roof of the temple. He denied that there is no platform in Ram Janaki Temple. He denied that the dead body was lying about 15-20 ft.s away from Ram Janaki Temple, but claimed that it was lying about 4 ft.s away from the Temple. He further claimed that he had disclosed to the police that all the eight accused persons had exhorted Gautam to kill Jeetu, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He further claimed that he had informed the police that Gautam had fired recklessly, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He denied that no one had fired at Moti Khan.

25. Ballu Singh (P.W.4) is an independent witness. He has also supported the prosecution case and has narrated the same story. He stated that the incident took place on the day of *Dooj*. It was around 3 P.M., and he was standing in front of door of his house. The Appellants were singing Holi songs and were passing in front of the house of the deceased. They started singing indecent songs in front of the house of the deceased. Jeetu objected to it. The appellants thereafter went away after extending a threat that they would see him. Thereafter, this witness went towards his old house. After some times, the Appellants came back. Gautam, Devi Singh, Vijay Singh, Jandel and Dilip were carrying guns whereas Laxman, Kalu, Hakim son of Dilip and Hakim son of Nathu were carrying lathis. They surrounded the house of the deceased and

started hurling abuses. Sarro bai (P.W.2) came out of her house. Hakim son of Nathu pulled her and all the four accused persons started assaulting her. Sarro bai (P.W.2) started screaming. Thereafter, her son Jeetu went to the roof, then Gautam fired a gun shot from the roof of the temple as a result, Jeetu died on the spot as he had sustained gun shot on his head. Other Appellants also fired at Moti Khan but he survived unhurt. The police had seized blood stained stones lying at different places, 4 rounds were seized from the back side of the house of the deceased out of which two were of double barrel gun and 2 were of single barrel gun. This witness was cross-examined and nothing could be elicited which may make his evidence suspicious.

26. However, it is submitted by the Counsel for the Appellants that since, the name of Ballu Singh Kushwaha (P.W.4) has not been mentioned in Dehati Nalishi, Ex. P.1 and even the witnesses have not claimed that Ballu Singh Kushwaha (P.W.4) had seen the incident, therefore, it is clear that he is not a reliable witness.

27. Considered the submissions made by the Counsel for the Appellants.

28. The evidence of a witness cannot be discarded merely on the ground that he was not mentioned as a witness in the FIR. There is no requirement of law to mention the names of all the witnesses in the FIR. The Supreme Court in the case of **Bhagwan Singh v. State of M.P.**, reported in **(2002) 4 SCC 85** has held as under :

13. We also do not find any substance in the submission of the learned counsel for the appellants that statement of Kiran (PW 7) should not be given any weight because her name is not mentioned in the FIR. There is no requirement of law for mentioning the names of all the witnesses in the FIR, the object

of which is only to set the criminal law in motion.....

29. The Supreme Court in the case of *State of M.P. v. Mansingh*, reported in (2003) 10 SCC 414 has held as under :

11. It is nobody's case that PW 8 was an eyewitness. The High Court failed to notice that the evidence of PWs 4 and 7 was to the effect that they left the deceased in an injured condition and rushed to the police station. The arrival of PW 8 near the deceased, according to the prosecution, was thereafter. His presence could not have been noted by PW 4 who lodged the FIR and, therefore, non-mention of his name in the FIR is the natural consequence. The High Court has completely misread the evidence in this regard.

30. Further, Ballu Singh Kushwaha (P.W.4) has specifically stated that he had witnessed the incident from his house. Admittedly, the house of Ballu Singh Kushwaha (P.W.4) was about 10 ft.s away from the house of the complainant. It was not expected from the complainant and others to find out that who were witnessing the incident, specifically when gun shots were being fired. Thus, non-mention of name of Ballu Singh Kushwaha (P.W.4) in Dehati Nalishi, Ex. P.1 as well as in the evidence and police statements of witnesses would not make his evidence untrustworthy, on the contrary, it is clear that he is an independent witness having no grudge against the Appellants.

31. R.M. Bhadoria (P.W. 16) is the investigating officer. He stated that he received a telephonic information that some dispute has taken place in village Puri and accordingly he went to village Puri. He reached there at 4 P.M. He recorded the Dehati Nalishi, Ex. P.1. He prepared the spot map on the information given by Moti Khan, Ex. P.44. The blood stained cement, plain cement, pieces of earthen tiles, 2 fired cartridges of .12 bore and 2 fired cartridges of .315 bore were seized. The seizure memo

is Ex. P. 45. Safina form, Ex. P. 46 was issued and dead body Panchnama, Ex. P. 47 was prepared. The dead body was sent for post-mortem along with requisition, Ex. P. 48. Akhilesh Bhargava and his team of mobile unit of scene of crime, carried out the inspection of the spot. On 23-3-2011, Shakeel Khan produced one fired bullet of .315 bore which was seized by seizure memo Ex. P.49. The Appellant Vijay Singh was arrested by arrest memo Ex. P.24 and his memorandum is Ex. P.26 and .12 bore gun was seized vide seizure memo 28. Similarly Hakim Singh was arrested vide arrest memo Ex. P.25 and his memorandum is Ex. P. 27 and lathi was seized vide seizure memo Ex. P.29. On 29-3-2011, the Appellant Devi Singh was arrested by arrest memo Ex. P.2 and his memorandum is Ex. P.3 and .12 bore gun was seized vide seizure memo 4. On 17-4-2011, the Appellant Laxman Singh was arrested vide arrest memo Ex. P.5 and his memorandum is Ex. P. 6 and lathi was seized vide seizure memo Ex. P.7. The Appellant Dilip Singh was arrested by arrest memo Ex. P.8 and his memorandum is Ex. P.9 and .12 bore gun was seized vide seizure memo 10. The Appellant Jandel Singh was arrested by arrest memo Ex. P.11 and his memorandum is Ex. P.12 and .12 bore gun, two fired cartridges and one live round were seized vide seizure memo 13. The Appellant Kalu was arrested by arrest memo Ex. P.17 and his memorandum is Ex. P.18 and lathi was seized vide seizure memo 19. The Appellant Gautam Singh was arrested on 2-6-2011 by arrest memo Ex. P.40 and his memorandum is Ex. P.41 and .315 bore gun and live cartridge was seized vide seizure memo 42. This witness was cross-examined.

32. In cross-examination, he stated that Dehati Nalishi, Ex. P.1 was

written on the information given by Moti Khan. For registration of FIR, the constable Sengar had gone to police station. He further stated that at the time of preparation of spot map, Ex. P.44, he had made arrangements for controlling the mob. He stated that he had seen that the fired cartridges were lying on the spot, but did not mention the same in the spot map, Ex. P.44. He further stated that so long as he recollects the fact, 2 cartridges were recovered from Ram Janki Temple and 2 cartridges were recovered from Ganesh Temple. He further stated that he had given information to Akhilesh Bhargava (P.W.6), who had prepared the report, Ex. P.20 on the information given by this witness as well as after personally inspecting the spot. He admitted that merely on the basis of report of Akhilesh Bhargava, Ex. P.20, he is claiming that gun shot was fired by Gautam from a distance of 33 ft.s. He admitted that the platform of Ram Janaki temple is about 2-3 ft. high. However, this fact is not mentioned in spot map, Ex. P.44. He admitted that he has not produced any document to show that the seized ammunition were kept in the Malkhana in safe custody. The omissions and contradictions in the evidence of the witnesses were also put to this witness. He further admitted that in the spot map, Ex. P.44 the distance from which gun shot was fired is not mentioned. When the spot was being inspected by Akhilesh Bhargava (P.W.6), he had shown the spot on the basis of his personal information but thereafter he clarified that as per the information of Moti Khan.

33. Thus, it is clear that a mob of lot of persons had gathered, therefore, the police was also involved in maintenance of law and order apart from making investigation.

34. Akhilesh Bhargava (P.W.6) is the Senior Scientific Officer posted in Mobile unit of Scene of Crime. He has stated that on the information given by S.H.O. Bhadoria, he had inspected the spot and his report is Ex. P.20. In cross-examination, he admitted that the report was prepared on the next day on the basis of his short notes, but fairly conceded that short notes were not placed on record. Thus, there are two reasons for disbelieving the evidence of Akhilesh Bhargava (P.W.6) i.e., 1st that he had not inspected the spot on the information given by complainant Moti Khan (P.W.1) and S.H.O. Bhargava was merely a hearsay witness and 2nd the short note on the basis of which report, Ex. P.20 was prepared was not proved. Thus, it is clear that Akhilesh Bhargava (P.W.6) had merely acted on the information given by a hearsay witness and not on the information given by an eye-witnesses.

Whether All the Appellants were members of Unlawful Assembly and were sharing common object to kill Jeetu, as well as to make an attempt on the life of Moti Khan and to assault Sarrobai or not?

35. The entire incident can be bifurcated in two parts : 1st, *Holi Ke Huriyare* were singing indecent songs in front of the house of the deceased, which was objected by Jeetu and thereafter, all the Appellants went back after extending a threat and 2nd that after half an hour, all the accused persons came back and Gautam, Devi Singh, Jandel Singh, Dilip and Vijay Singh were having Guns, wheres Kalu, Hakim son of Dilip, Hakim son of Nathu and Laxman were carrying lathis.

36. It is alleged that all the Appellants started hurling abuses and pelting stones in reckless manner. Sarro bai (P.W.2) came out of her house and requested to calm down. Thereafter, Hakim son of Nathu,

dragged Sarro bai (P.W.2) and She was assaulted by Hakim son of Dilip and Laxman. Although Sarro bai (P.W.2) has claimed that even Kalu had also assaulted her, but no other witness has alleged assault by Kalu. As per the M.L.C. report, following injuries were found on the body of Sarro bai (P.W.2):

1. Incised wound right parito frontal region size 5x2x2 cm caused by hard and sharp object. Duration within 10 hours. Nature : advice x-ray head. Final opinion after x-ray report
2. Contusion right pre auricular region 5 x 4 cm caused by hard and blunt object. Duration within 10 hours. Nature simple.

The M.L.C. is Ex. P.21

37. No bony injury was found in x-ray and x-ray report is Ex. P.22.

38. It is submitted by the Counsel for the Appellants that none of the four Appellants namely Hakim son of Dilip, Hakim son of Nathu, Laxman and Kalu were armed with sharp weapon, therefore, the medical evidence doesnot corroborate the ocular evidence.

39. Considered the submissions made by the Counsel for the Appellants.

40. It is true that an incised wound was found on Parito-frontal region, but in chapter 29 of Modi's Jurisprudence under the heading **Regional Injuries**, it has been mentioned that a scalp wound by a blunt weapon may resemble an incised wound, hence the edges and ends of wound must be carefully seen....”

41. Therefore, it cannot be said that the discrepancy in the Medical evidence and Ocular evidence is such, where medical evidence should be given preference over Ocular evidence. In case if there is a variance in ocular evidence and medical evidence, then ocular evidence has to be

given preference over medical evidence, unless and until, the medical evidence completely rules out the ocular evidence.

42. The Supreme Court in the case of **Bhajan Singh v. State of Haryana**, reported in (2011) 7 SCC 421 has held as under :

38. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. (*Vide Abdul Sayeed.*)

43. The Supreme Court in the case of **CBI v. Mohd. Parvez Abdul Kayyum**, reported in (2019) 12 SCC 1 has held as under :

65. Even otherwise as submitted on behalf of the prosecution that in case of any discrepancy between the ocular or medical evidence, the ocular evidence shall prevail, as observed in *Yogesh Singh v. Mahabeer Singh*: (SCC pp. 217-18, para 43)

“43. The learned counsel appearing for the respondents has then tried to create a dent in the prosecution story by pointing out inconsistencies between the ocular evidence and the medical evidence. However, we are not persuaded with this submission since both the courts below have categorically ruled that the medical evidence was consistent with the ocular evidence and we can safely say that to that extent, it corroborated the direct evidence proffered by the eyewitnesses. We hold that there is no material discrepancy in the medical and ocular evidence and there is no reason to interfere with the judgments of the courts below on this ground. In any event, it has been consistently held by this Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the

former is to be preferred unless the medical evidence completely rules out the oral evidence. [See *Solanki Chimanbhai Ukabhai v. State of Gujarat*, *Mani Ram v. State of Rajasthan*, *State of U.P. v. Krishna Gopal*, *State of Haryana v. Bhagirath*, *Dhirajbhai Gorakhbhai Nayak v. State of Gujarat*, *Thaman Kumar v. State (UT of Chandigarh)*, *Krishnan v. State*, *Khambam Raja Reddy v. Public Prosecutor, State of U.P. v. Dinesh*, *State of U.P. v. Hari Chand*, *Abdul Sayeed v. State of M.P.* and *Bhajan Singh v. State of Haryana.*.]”

66. The ocular evidence to prevail has also been observed in *Sunil Kundu v. State of Jharkhand* thus: (SCC p. 432, para 24)

“24. In *Kapildeo Mandal v. State of Bihar*, all the eyewitnesses had categorically stated that the deceased was injured by the use of firearm, whereas the medical evidence specifically indicated that no firearm injury was found on the deceased. *This Court held that while appreciating variance between medical evidence and ocular evidence, oral evidence of eyewitnesses has to get priority as medical evidence is basically opinionative.* But, when the evidence of the eyewitnesses is totally inconsistent with the evidence given by the medical experts then evidence is appreciated in a different perspective by the courts. It was observed that when medical evidence specifically rules out the injury claimed to have been inflicted as per the eyewitnesses’ version, then the court can draw adverse inference that the prosecution version is not trustworthy. This judgment is clearly attracted to the present case.”

(emphasis supplied)

67. Similarly, in *Bastiram v. State of Rajasthan*, it was observed: (SCC pp. 407 & 408, paras 33 & 36)

“33. *The question before us, therefore, is whether the “medical evidence” should be believed or whether the testimony of the eyewitnesses should be preferred? There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence. This principle has more recently been accepted in Gangabhavani v. Rayapati Venkat Reddy.*

* * *

36. Similarly, a fact stated by a doctor in a post-mortem report could be rejected by a court relying on eyewitness testimony, though this would be quite infrequent. In *Dayal Singh v. State of Uttaranchal*, the post-mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased. This Court rejected the “medical evidence” and upheld the view of the trial court (and the High Court) that the testimony of the eyewitnesses supported by other evidence would prevail over the post-mortem report and testimony of the doctor. It was held: (SCC p. 286, para 41)

‘41. ... [T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court.’”

(emphasis supplied)

44. Since, the medical evidence doesnot completely rule out the ocular evidence, therefore, it cannot be said that ocular evidence is not

corroborated by medical evidence.

45. It is next contended by Counsel for the Appellants that since, only two injuries were found on the body of Sarro bai, therefore, it is clear that allegation of assault against Kalu is false.

46. Heard the learned Counsel for the Appellants.

47. Moti Khan (P.W.1) has not alleged that Kalu had also assaulted Sarro bai. He had alleged that Hakim son of Nathu Khan pulled her and threw her on the ground whereas Hakim son of Dilip and Laxman assaulted her by lathi. Two injuries were found on the body of Sarro bai. Thus, it is clear that the allegation against Kalu of assaulting Sarro bai (P.W.2) is not reliable, but one thing is clear that Kalu also came along with other co-accused persons and it was alleged that he too was abusing and pelting stones. Therefore, his participation in the offence is clearly established.

48. Now the question for consideration is that whether Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu were also sharing common object with other co-accused persons or not?

49. As already noted, the incident took place in two parts i.e., firstly, when singing of indecent songs by *Holi ke Huriyare* (Appellants) was objected by deceased Jeetu and the Appellants went away after extending threat and secondly all the accused persons came back to the spot and were armed with guns and lathis. It is true that Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu were armed with lathi, but since, they allegedly came along with other co-accused persons who were carrying guns, then prima facie it appears that they were sharing common object. However, if the background of the incident is considered, then it

is clear that some dispute arose on signing indecent songs in front of the house of the deceased and thereafter, all the accused persons came back and were armed with lathi and guns. Thus, there was some religious emotion behind the incident. Therefore, apparently all the nine accused persons came with an object of settling the score, but the question is that whether the common object was to kill Jeetu or to fire at Moti Khan or not?

50. The fact that five accused persons were carrying gun, should have given an impression in the minds of Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu, that co-accused persons may commit an offence, thus prima facie it can be presumed that the above mentioned four persons were sharing common object. But there is one more aspect of the matter. Undisputedly, the deceased Jeetu was having licensed gun and every body must be knowing that fact because according to Moti Khan (P.W.1) himself, the village has 40-50 houses only. Therefore, it is possible that Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu, might be having an impression, that the co-accused persons are carrying guns for their self protection. Therefore, the conduct of Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu, in the entire incident has to be considered very minutely.

51. From the spot map, Ex. P.44, it is clear that all the three subsequent events i.e., assault on Sarro bai (P.W.2), firing on deceased Jeetu and firing on Moti Khan (P.W.1) took place from three different places. According to the prosecution itself, Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu dragged Sarro bai (P.W.2) and assaulted her by lathis. Thereafter, no overtact is attributed to Hakim son of Nathu,

Hakim son of Dilip, Laxman and Kalu.

52. It is true that Moti Khan (P.W.1), Sarro bai (P.W.2) and Shakeel Khan (P.W.3) in their Court evidence have claimed that all the eight accused persons including Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu, had exhorted Gautam to kill Jeetu, but it is a major omission and this allegation doesnot find place either in Dehati Nalishi, Ex. P.1 or in the police statement, Ex. D.1 of Moti Khan (P.W.1), Sarro bai, Ex. D.3 and police statement, Ex. D.4 of Shakeel Khan, (P.W.3). The attention of these witnesses were drawn towards the said omission and they could not explain as to why the above mentioned fact is not mentioned in their police statements, Ex. D.1, D.3 and D.4 respectively. Even this omission was put to R.M. Bhadoria (P.W.16), the investigating officer. Thus, it is held that exhortation by eight accused persons including Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu for killing Jeetu is a clear improvement, therefore, it cannot be believed.

53. Furthermore, according to the prosecution, Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu had assaulted Sarro bai (P.W.2) at the very beginning of the incident. Thereafter, it appears that co-accused Gautam Singh went towards the back side of the house of the deceased and fired from the roof of the Ram Janaki Temple, whereas the other four co-accused persons namely Devi Singh, Vijay Singh, Jandel Singh and Dilip Singh went towards Ganesh Temple and allegedly fired at Moti Khan (P.W.1).

54. There is no allegation of any overtact against Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu, after their assault on Sarro bai. Under these circumstances, it is held that although initially Hakim son of

Nathu, Hakim son of Dilip, Laxman and Kalu were the members of Unlawful Assembly for teaching a lesson to the deceased, but because Sarro bai (P.W.2) came out of her house and requested the Appellants, therefore, Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu assaulted the injured Sarro bai (P.W.2) at a different place and the incident of firing took place subsequent thereto from different places. Therefore, it appears that initial common object of Unlawful Assembly of 9 accused persons was not to kill Jeetu and to make an attempt on the life of Moti Khan (P.W.1) and the Assembly disbursed to different places during the course of assault on Sarro bai (P.W.2).

55. It is well established principle of law that Common object may also develop at the spur of moment and therefore, the conduct of the accused prior, during and after the incident is one of the relevant factor. The Supreme Court in the case of **Manjit Singh v. State of Punjab**, reported in (2019) 8 SCC 529 has held as under :

Unlawful assembly and rioting with deadly weapons

14. It has been vehemently argued on behalf of both the appellants that the essential ingredients of Section 141 IPC for the formation of unlawful assembly with the common object having not been established, the conviction of the appellants with the aid of Section 149 IPC is not justified.

14.1. The relevant part of Section 141 IPC could be usefully extracted as under:

“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—

* * *

Third.—To commit any mischief or criminal trespass, or other offence; or

* * *

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.”

14.2. Section 149, rendering every member of unlawful assembly guilty of offence committed in prosecution of common object reads as under:

“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.”

14.3. We may also take note of the principles enunciated and explained by this Court as regards the ingredients of an unlawful assembly and the vicarious/constructive liability of every member of such an assembly. In *Sikandar Singh*, this Court observed as under: (SCC pp. 483-85, paras 15 & 17-18)

“15. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly, and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

17. A “common object” does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly 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. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. 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.

18. In *Masalti v. State of U.P.* a Constitution Bench of this Court had observed that: (AIR p. 211, para 17)

‘17. ... Section 149 makes it clear 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; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.’”

14.4. In *Subal Ghorai*, this Court, after a survey of leading cases, summed up the principles as follows: (SCC pp. 632-33,

paras 52-53)

“52. The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines “unlawful assembly” to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses “First”, “Second”, “Third”, “Fourth” and “Fifth” of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of

liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.”

14.5. We need not expand on the other cited decisions because the basic principles remain that the important ingredients of an unlawful assembly are the number of persons forming it i.e. five; and their common object. Common object of the persons composing that assembly could be formed on the spur of the moment and does not require prior deliberations. The course of conduct adopted by the members of such assembly; their

behaviour before, during, and after the incident; and the arms carried by them are a few basic and relevant factors to determine the common object.

56. The Supreme Court in the case of **Sukhan Raut v. State of Bihar**, reported in **(2001) 10 SCC 284** has held as under :

6. Section 149 of the Code makes the members of an unlawful assembly vicariously liable where it is proved that the offence is committed in pursuance of the common object of the unlawful assembly which the members of the unlawful assembly knew that such offence was likely to be committed in prosecution of the object of the unlawful assembly. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act for the purposes of incurring the vicarious liability for the offence committed by a member of such unlawful assembly. Under this section the liability of the other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Common object has to be distinguished from the common intention. There is no question of common intention in Section 149 of the Code. Where no injury is inflicted pursuant to the common object to kill the deceased, but caused only when provoked by one of the witnesses, the members of the unlawful assembly cannot be held guilty for the commission of the offence of murder.

57. Thus, from the facts established by the prosecution, it is held that the initial common object was to teach lesson to the deceased Jeetu and to Moti Khan (P.W.1). Since, Sarro bai (P.W.2) came out of the house, therefore, She was beaten by Hakim son of Nathu, Hakim son of Dilip, Laxman and Kalu. Thereafter, there is no overtact on the part of the above mentioned four Appellants. It is also the case of the prosecution,

that gun shot was fired by Gautam from a different place, whereas gun shots were fired by co-Appellants Vijay Singh, Jandel Singh, Devi Singh and Dilip Singh from different places, whereas Sarro bai (P.W.2) was assaulted at third place. Thus, under the facts and circumstances of the case, this Court is of the considered opinion, that Hakim son of Nathu, Hakim son of Dilip Singh, Laxman and Kalu had not acted in furtherance of common object of killing Jeetu or making an attempt on the life of Moti Khan (P.W.1), therefore, they are held to be liable for their own acts only.

Role of Gautam Singh

58. The allegation against Appellant Gautam Singh is that he fired a gun shot from the roof of Ram Janaki Temple, which resulted in instantaneous death of Jeetu. The Post-mortem report has already been discussed in previous paragraphs, which clearly show that the skull of the deceased had shattered into pieces.

59. It is submitted by the Counsel for the Appellants that minute details were not mentioned in the spot map, Ex. P.44. Report of Akhilesh Bhargava, Ex. P.20 clearly shows that gun shot was fired from the roof of house of Ballu Singh Kushwaha (P.W.4) and not from the roof of the temple. As per the report of Akhilesh Bhargava (P.W.6), the distance of the place from where gun shot was fired was 33 ft.s whereas blackening was found around the wound which clearly indicates that the gun shot was fired from a very close range. Even otherwise, according to Moti Khan (P.W.1), gun shot was fired from the distance of 4-5 ft.s. Further more, the witnesses in their Court evidence have claimed that the gun shot was fired from a wall constructed over Platform, whereas in spot

map, Ex. P.44, no platform was shown in the Ram Janaki Temple and R.M. Bhadoria (P.W.16) has also stated that he had not seen any platform in Ram Janaki Temple, otherwise, he would have certainly shown the same in the spot map, Ex. P.44.

60. In reply it is submitted by the Counsel for the State that Gautam Singh, in his statement under Section 313 of Cr.P.C. has stated “that he is the Sarpanch of the village. On the day of dooj, people were singing Holi songs. He along with others had gone to offer prayer in Ram Janaki Temple. The deceased was standing on the roof of his house and was pelting stones and was under the influence of alcohol. The deceased also started firing in air from his licensed gun. Being the Sarpanch of the village, he tried to persuade the deceased and thereafter went back to his house and started singing and enjoying Holi along with his friends. At about 3-3:30 P.M., he came to know that gun shot has been fired near Temple and Jeetu has expired. He was not present on the spot at the time of incident. Being the Sarpanch of the village, he and his family members have been falsely implicated.” It is submitted that thus, Gautam in his statement under Section 313 of Cr.P.C. has not only admitted his presence in Ram Janaki Temple, but also has admitted that there was some dispute and he indulged in conversation with the deceased Jeetu. Gautam has also admitted that gun shot was fired some time in between 3-3:30 P.M., which clearly means that almost the entire incident has been accepted, except his presence on the spot at the time of incident and firing gun shot.

61. Heard the learned Counsel for the parties.

62. It is true that Moti Khan (P.W.1), Sarro bai (P.W.2), Shakeel Khan

(P.W.3) and Ballu Singh (P.W.4) have alleged that the gun shot was fired from the roof of the temple, but Moti Khan (P.W.1) and Sarro bai (P.W.2) have stated that the gun shot was fired by Gautam from the wall constructed over the platform situated within the premises of Ram Janaki Temple and is adjacent to the house of the complainant. It is true that R.M. Bhadoria (P.W.16), who is the investigating officer, in para 18 of his cross-examination has stated that had there been any platform in the Ram Janaki Temple, then he would have certainly shown the same in the spot map, Ex. P.44, but in para 30 of his cross-examination, he admitted that the Courtyard of the Ram Janaki Temple is about 2-3 ft. high, but it was not mentioned in the spot map, Ex. P.44. Thus, the investigating officer has not prepared the spot map, Ex. P.44 properly. This lapse on the part of the investigating officer R.M. Bhadoriya (P.W. 16) cannot be said to be a deliberate act on his part. In para 17 of his cross-examination, he has specifically stated that while preparing spot map, Ex. P.44, he was also involved in controlling the mob. Thus, it is clear that after the incident, a law and order situation had arisen because of involvement of group of two different religions. Further, it is clear from the requisition for post-mortem, Ex. P. 48, the following note was appended :

नोट : लॉ एण्ड आर्डर की स्थिति को देखते हुए मृतक का PM अभी करने का कष्ट करें। PM पेनल द्वारा किया जाये।

63. No question has been put to R.M. Bhadoriya (P.W.16) regarding this note in the requisition for post-mortem, Ex. P.48. This Court by Judgment **dated 23-July-2021** passed in the case of **In Ref (Suo Moto) Vs. Manoj in CRRFC No. 8 of 2019** has held as under :

58. Under these facts and circumstances of the case, this Court is of the considered opinion that since, the investigating officer was required to maintain the law and order situation apart from doing investigation, therefore, the non-seizure of school bag and bottle of the deceased cannot be said to be even a faulty investigation.

64. Further, it is well established principle of law that faulty investigation by itself, would not result in overthrowing the trustworthy evidence of witnesses. In the present case, due to law and order situation, where the investigating officer was not only required to maintain the law and order and was also doing investigation, then it cannot be said that investigating officer had deliberately conducted the faulty investigation.

65. It is not out of place to mention here that Gautam was arrested on 2-6-2011 vide arrest memo Ex. P.40. Thus, it is clear that Gautam was arrested almost 3 months after the incident. A .315 bore gun was seized from the possession of Gautam. As per the FSL report, Ex. P. 51, the firing pin of the gun seized from the possession of Appellant Gautam was found to be cut and therefore, it was not reaching to the percussion cap of the cartridge. Why the firing pin of the gun was cut, has not been explained by the Appellant Gautam. Since, the Appellant Gautam had sufficient time to cut the firing pin of the gun, therefore, this act of Gautam clearly indicates his guilty mind and the firing pin of the gun was deliberately cut, in order to show that it was not in working condition.

66. Further as per F.S.L. report, Ex. P.51, presence of Nitrate was found in the barrel of the gun which was seized from the possession of Gautam.

67. Furthermore, the Appellant Gautam has not explained as to why he absconded after the incident. He was the Sarpanch of the village and if he was an innocent person, then he should have stayed back and should have co-operated in the investigation but that was not done. It is true that abscondence after the incident by itself is not indicative of guilty mind of a person, but if other circumstances are proved against the accused, then abscondence after the incident would become a relevant factor. The Supreme Court in the case of **Kundula Bala Subrahmanyam v. State of A.P.**, reported in (1993) 2 SCC 684 has held as under :

22. Prosecution has also relied upon the circumstances of the absconding of the appellants to prove its case.

23. A closer link with the conduct of the appellants both at the time of the occurrence and immediately thereafter is also the circumstance relating to their absconding. Md. Baduruddin PW 15, the investigating officer, deposed that he had taken up the investigation of the case and having examined PWs 1-4 had caused search to be made for the accused but they were not found in the village and despite search, they could not be traced. Appellant 1 surrendered before the court on November 10, 1981 while appellant 2 surrendered in the court on December 7, 1981. No explanation, worth the name, much less a satisfactory explanation has been furnished by the appellants about their absence from the village till they surrendered in the court in the face of such a gruesome 'tragedy'. Indeed, absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in a criminal case and arrested by the police, but coupled with the other circumstances which we have discussed above, the absconding of the appellants assumes importance and significance. The prosecution has successfully established this circumstance also to connect the appellants with the crime.

68. The Supreme Court in the case of **Amrik Singh v. State of Rajasthan**, reported in (1994) 1 SCC 563 has held as under :

9. The prosecution placed strong reliance during the trial of Amrik Singh on his absconding. Indeed absconding by itself may not be of any conclusive evidentiary value but it is a circumstance which cannot be ignored while considering other evidence connecting the accused with the crime. Where the other evidence is convincing and reliable, absconding assumes some importance.....

69. In the Dehati Nalishi, Ex. P.1, as well as in the police statement, Ex. D.1 of Moti Khan (P.W.1), Police Statement, Ex. D.3 of Sarro bai (P.W.2), Police Statement, Ex. D.4 of Shakeel Khan (P.W.3) and Police Statement, Ex. D.5 of Ballu Singh Kushwaha (P.W.4), as well as in the Court evidence, specific allegations have been made that the gun shot fired by Gautam had resulted in death of Jeetu and the gun shot was fired from a close range.

70. Thus, this Court is of the considered opinion, that the prosecution has successfully established the guilt of the Appellant of committing murder of Jeetu.

Role of Dilip Singh, Jandel Singh, Vijay Singh and Devi Singh (died during pendency of appeal)

71. It is the case of the prosecution that after the deceased Jeetu was shot, the Appellants Dilip Singh, Jandel Singh, Vijay Singh and Devi Singh (died during the pendency of appeal) fired gun shots at Moti Khan (P.W.1), but fortunately he escaped unhurt.

72. Thus, the first question for consideration would be that whether any gun shots were fired by these four Appellants or not?

73. It is submitted by the Counsel for the Appellants that as per the

FSL report, Ex. P.51, the use of the weapons seized from the possession of the Appellants could not be established. Further, the place from where fired cartridges were seized has also not been shown in the spot map, Ex. P.44. Further more, Ballu Singh Kushwaha (P.W.4) has stated that all the four fired cartridges were recovered from the back side of the house of the complainant, therefore, the prosecution has failed to prove the guilt of the four Appellants beyond reasonable doubt.

74. Considered the submissions made by the Counsel for the Appellants.

75. According to the prosecution case, Gautam Singh fired from the roof of Ram Janaki Temple, whereas these four appellants fired from Ganesh Temple. It is the prosecution case, the gun shots were fired by these four appellants, only after Jeetu was killed by Gautam. There is nothing on record to show that the appellants had any apprehension to their life. There is nothing on record to show that any attempt was made by any member of the complainant party including the deceased to fire at the accused party. Thus, it is clear that firing by these four appellants was without any instigation by the complainant party. It is also not the case of the appellants that at the time of the incident, the complainant party was also armed with fire arms.

76. According to the prosecution case, since, all the four accused persons opened fire only after Jeetu was killed by Gautam, therefore, it is clear that firing was done by the four appellants in furtherance of common object. It is well established principle of law that Common Object may develop at the spur of the moment. The Appellants were aware of the fact that Jeetu has been killed by Gautam, and even if they

opened fire at Moti Khan (P.W.1), then it is clear that they were sharing common object with Gautam to kill Jeetu as well as to make an attempt to kill Moti Khan (P.W.1). Section 142 of IPC reads as under :

142. Being member of unlawful assembly.—Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

77. Thus, it is clear that opening of firing after the death of Jeetu was clear indication of fact that all the four Appellants were acting in furtherance of common object.

78. So far as the evidence of Ballu Singh Kushwaha (P.W. 4) that four fired cartridges were seized from the back side of the house of the complainant is concerned, the said evidence, in fact, supports the prosecution case. From the spot map, Ex. P.4, it is clear that the front portion of the house of the complainant is just opposite to Ram Janaki Temple and Ganesh Temple, or in other words, it can be said that Ram Janaki Temple and Ganesh Temple are on the back side of the house of the complainant. Since, it is the case of the prosecution that firing took place from Ram Janaki Temple and Ganesh Temple, then it is clear that firing took place from the back side of the house of the complainant.

79. Although in the spot map, Ex. P.44, the investigating officer has not shown the place from where fired cartridges were seized, but he has stated out of his memory that most probably two fired cartridges were seized from the roof of Ram Janaki Temple and two cartridges were recovered from Ganesh Temple. This Court has already found that law and order situation had arisen and mob of people had gathered, therefore, some lapses while preparing spot map, Ex. P.44 cannot be said to be a

deliberate attempt on the part of the investigating officer for making faulty investigation.

80. It is submitted that 2 fired cartridges of .315 bore gun were seized and 2 fired cartridges of .12 bore were seized, whereas the allegations that four persons who were armed with .12 bore guns had fired, therefore, non recovery of 4 fired .12 bore cartridges clearly indicate that the allegations are false.

81. Considered the submissions made by the Counsel for the Appellants.

82. A fired cartridge would come out of the weapon only when the gun is reloaded or the weapon is an automatic one. It is not the case of the prosecution that any of the four appellants were carrying automatic gun. Thus, it is clear that after firing one gun shot, if an assailant donot make an attempt to reload it, then the fired cartridge would never come out of the weapon. Therefore, non-recovery of four .12 bore fired cartridges from the spot, would not make any difference.

83. It is submitted that the witnesses had made improvement and had claimed that these four Appellants had also instigated Gautam to kill Jeetu.

84. Considered the submissions made by the Counsel for the Appellants.

85. This Court has already held that the allegation of exhortation by all the eight accused persons is a major contradiction and cannot be relied upon. Thus, it is true that the allegation of exhortation by these four accused persons cannot be accepted, but firing at Moti Khan (P.W.1) after the death of Jeetu, is clear indicative of fact that these four

Appellants were also acting in furtherance of common object.

86. So far as the FSL report, Ex. P.51 is concerned, it is true that nothing could be collected to connect the weapons seized from the possession of the Appellants, with the offence, but mere non-recovery of weapon would not give any dent to the prosecution case. The Supreme Court in the case of **Rakesh Vs. State of U.P.** reported in (2021) 7 SCC 188 has held as under :

12. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the firearm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non.....

87. The Supreme Court in the case of **Gulab Vs. State of U.P.** by order dated 9-12-2021 passed in Cr.A. No. 81/2021 has held as under :

17. The deceased had sustained a gun-shot injury with a point of entry and exit. The non-recovery of the weapon of offences would therefore not discredit the case of the prosecution.....

88. The Supreme Court in the case of **Krishna Gope v. State of Bihar,** reported in (2003) 10 SCC 45 has held as under :

8. Learned counsel further pointed out that the country-made firearm alleged to have been used by the appellant was not recovered by the police and the same was not sent to the police station. The learned counsel submitted that the investigation was not properly done and that the appellant is entitled to the benefit of doubt. In our view, this plea is not tenable. The house of the appellant was searched immediately after the incident, but the police could not recover the weapon of offence from his

house. It appears that the appellant had succeeded in concealing the weapon before the police could search his house. In our opinion, the fact of non-recovery of the weapon from the house of the appellant does not enure to his benefit.

89. Thus, non-recovery of weapon of offence would not make the direct ocular evidence vulnerable.

90. It is next contended by the Counsel for the Appellants that in the merg intimation, Ex. D.2, there is no allegation of firing by the Appellants.

91. Considered the submissions made by the Counsel for the Appellants.

92. In the present case, the complainant Moti Khan (P.W.1) did not go to police station and in fact, after getting a telephonic information, the police itself came to the spot and recorded the Dehati Nalishi, Ex. P.1, which contains the names of the assailants also. Merg intimation was written at Police Station and it is a part of investigation where a police officer records the information regarding death of a person. Merg intimation in the present case, was not recorded on the information of the complainant Moti Khan (P.W.1) as Rajendra Singh (P.W. 11) has specifically stated in his cross-examination that Moti Khan (P.W.1) never came to Police Station to lodge FIR, whereas, it is clear from merg intimation, Ex. D.2 that it was written at 17:15 in the police station. Thus it is clear that if a part of incident was skipped in merg intimation, then it is a deliberate act of a police personal to show favor to these four Appellants. Thus, the Appellants would not get any advantage of faulty investigation which was not done in accordance with the information given by the Complainant/Moti Khan (P.W.1).

93. Thus, it is clear that Vijay Singh, Devi Singh, Jandel Singh and Dilip Singh were not only the members of Unlawful Assembly but they have acted in furtherance of common object with Gautam.

94. No other argument is advanced by the Counsel for the parties.

95. Considering the totality of the facts and circumstances of the case, the Appellants Hakim son of Nathu, Hakim son of Dilip Singh and Kalu are acquitted of charge under Sections 302/149, 307/149 & 148 of IPC. Their conviction under Section 323 and 336 of IPC is hereby maintained.

96. Similarly, Gautam, Vijay Singh, Jandel Singh, and Dilip Singh are acquitted of the charge under Section 323/149 of IPC, however, conviction of Gautam under Sections 302, 307/149 & 148 of IPC is hereby maintained. Similarly, the conviction of Jandel Singh, Dilip Singh and Vijay Singh is maintained for offence under Sections 302/149, 307 & 148 of IPC. Similarly, the conviction of Jandel Singh for offence under Section 25(1-B)(a) and 27 of Arms Act is also maintained. The conviction of Gautam, Vijay Singh, Jandel Singh and Dilip Singh for offence under Section 336 of IPC is also maintained.

97. So far as the question of sentence is concerned, this Court is of the considered opinion, that no interference is required in the sentence awarded by the Trial Court for the respective offences. All the Sentences shall run concurrently.

98. The Compensation awarded by the Trial Court be also paid accordingly.

99. Consequently, the judgment and sentence dated 27-4-2012 passed by 1st Additional Sessions Judge, Dabra, Distt. Gwalior in S.T. No. 295/2011 is hereby affirmed subject to aforesaid modifications.

100. The Appellants Jandel Singh, Dilip Singh, Vijay Singh, are on bail. There bail bonds are cancelled and they shall undergo the remaining jail sentence. Gautam is already in jail. He shall undergo the remaining jail sentence.

101. The Appellants Hakim son of Nathu Singh, Hakim son of Dilip Singh and Kalu @ Ranveer are also on bail. They have already undergone the entire jail sentence. Therefore, their bail bonds are discharged. They are no more required in the present case.

102. The copy of this judgment be provided immediately to the Appellants free of cost.

103. The record of the Trial Court be returned back immediately, along with a copy of this judgment for necessary information and compliance.

104. The Criminal Appeals No. 497 of 2012, 494 of 2012, and 500 of 2012 are **allowed in part, to the extent mentioned above.**

(G.S. AHLUWALIA)
JUDGE

(MILIND RAMESH PHADKE)
JUDGE