

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

ON THE 24TH DAY OF JANUARY, 2023

CRIMINAL APPEAL No. 854 of 2012

BETWEEN:-

**ADITYARAJ SINGH S/O BRAJRAJ SINGH
AGED ABOUT 22 YEARS
VILLAGE BHOPALPURA, P.S. KARANVAS
DISTRICT RAJGARH (BIAORA) (MADHYA PRADESH)**

.....APPELLANT

**(SHRI VINAY SARAF, SR. ADVOCATE WITH MS. SHRADDHA DIXIT,
ADVOCATE)**

AND

**THE STATE OF MADHYA PRADESH
THROUGH P.S. KARANVAS
DISTRICT RAJGARH (BIAORA) (MADHYA PRADESH)**

.....RESPONDENT/STATE

(SHRI AAKASH SHARMA, GOVERNMENT ADVOCATE)

CRIMINAL APPEAL No. 819 of 2012

BETWEEN:-

**MAHENDRA SINGH S/O KESHARSINGH
AGED ABOUT 29 YEARS, OCCUPATION: AGRICULTURE
VILLAGE BHOPALPURA,**

**P.S. KARANVAS
DISTRICT RAJGARH (MADHYA PRADESH)**

.....APPELLANT

(SHRI RAMESH C. GANGARE, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH
THROUGH P.S. KARANVAS
DISTRICT RAJGARH (MADHYA PRADESH)**

.....RESPONDENT/STATE

(SHRI AAKASH SHARMA, GOVERNMENT ADVOCATE)

Reserved on : 11.01.2023

Pronounced on : 24.01.2023

This appeal having been heard and reserved for judgement, coming on for pronouncement this day, Hon'ble Shri Prakash Chandra Gupta pronounced the following:

J U D G E M E N T

This judgement will dispose of Criminal Appeal No.854/2012 and Criminal Appeal No.819/2012, which are arising out of the common judgement dated 06.07.2012. On the joint request of the parties, these appeals were analogously heard and decided by this common judgement.

2. Both the appellants/accused have filed these appeals under Section 374 of the Code of Criminal Procedure (*hereinafter referred to as "the Cr.P.C."*) being aggrieved by the judgement dated 06.07.2012 passed by the Sessions Judge, Rajgarh in S.T. No.165/2011, whereby learned Trial Court, has convicted and sentenced the appellants as under :-

S. No.	Conviction	Sentence		
		Imprisonment	Fine amount	Additional imprisonment in default of payment of fine
Appellant – Adityaraj Singh				
1	302 of IPC	Life imprisonment	Rs.20,000/-	RI for 03 years
2	25 (1B)(a) of Arms Act	RI for 03 years	Rs.5,000/-	RI for 06 months
Appellant – Mahendra Singh				
1	324 of IPC	RI for 01 year	Rs.5,000/-	RI for 06 months

3. Prosecution story, in nutshell is that there was a program of “Ausar” at the residence of Bhagwan Singh in village Bhopalpura, a day prior to the date of incident. Yashpal Singh (PW-2), son of Surendra Singh (PW-1) was serving food in the program. At the same time, mother of the appellant Adityaraj Singh scolded Yashpal Singh (PW-2) and told him to stay away from her. Yashpal Singh (PW-2) came home from there and complained about the incident to his family members. On the date of incident i.e. on 31.03.2011, Surendra Singh (PW-1) alongwith his sons Yashpal Singh (PW-2) and Bhemendra/deceased went to home of co-accused Shyamraj Singh and Surendra Singh (PW-1) and asked Shyamraj Singh that why his mother insulted Yashpal Singh (PW-2). Co-accused Shyamraj Singh answered to him that he will admonish her. Thereafter on the same day in the afternoon, when Yashpal Singh (PW-2) was helping in loading of tractor with tent house accessories, appellant Adityaraj Singh abused and assaulted him, this latter incident was reported (Ex.P/5) by them in the police station.

4. After lodging of report (Ex.P/5), Surendra Singh (PW-1), Yashpal Singh (PW-2) and deceased Bhemendra Singh came back to the village at about 08:00 PM, appellant Adityaraj Singh armed with gun, Mahendra Singh with farsi, co-accused Dharendra Singh alias Bablu with lathi and co-accused persons Jitendra Singh, Rajendra Singh, Brajraj Singh, Keshar Singh and Shyamraj Singh were sitting on the platform near the temple. When complainant party reached the platform near the temple, then appellants and co-accused persons attacked with their weapons and piece of stones. Appellant Adityaraj Singh with an intent to cause death of Bhemendra Singh fired shot with 12 bore gun on his neck. Appellant Mahendra Singh and co-accused Bablu physically assaulted Yashpal Singh (PW-2) on his head and left hand by means of *farsi* and *lathi* respectively. Other co-accused persons physically assaulted Surendra Singh (PW-1) on his right wrist and back by means of piece of stones. Injured Bhemendra Singh was taken to the hospital Biaora for treatment where he had died. Police also came to the hospital and lodged a Dehati Nalasi (Ex.P/1) on the same day at 08:50 PM at Biaora hospital on the basis of information given by Surendra Singh (PW-1) against the appellants and co-accused persons. On the basis of Dehati Nalasi, Head Constable Sita Ram (PW-15) lodged an FIR (Ex.P/34) and also lodged a merg intimation report (Ex.P/35).

5. During investigation on 01.04.2011, SI Ghasi Ram (PW-13) after giving notice (Ex.P/2) prepared a lash panchnama (Ex.P/3) and sent the body of deceased for post-mortem through Head Constable Shahzad Khan (PW/12). SHO Virendra Singh Chouhan (PW-16) inspected the

place of incident and prepared a spot map (Ex.P/6) at the instance of Yashpal Singh (PW-2). He seized blood stained soil, simple soil and two pieces of fired cartridge from the spot vide seizure memo (Ex.P/18). He also sent injured persons Surendra Singh (PW-1) and Yashpal Singh (PW-2) for their MLC. Dr. Sharad Sahu (PW-3) examined both the injured persons and gave MLC report (Ex.P/7 and P/8). Dr. Saurin Datta (PW-7), Dr. Rakesh Gupta and Dr. Sharad Sahu conducted post-mortem of deceased and gave post-mortem report (Ex.P/19). During internal examination, 3 gun pellets were found in the wound of neck, which were preserved and sealed for further examination. Clothes of deceased were also taken and sealed. Aforementioned sealed packets were handed over to the concerning head constable. ASI Sitaram (PW-14) seized the two sealed packet produced by head constable Shahzad Khan (PW-12) from the hospital and prepared seizure memo (Ex.P/32).

6. On 01.04.2011, SHO Virendra Singh Chouhan (PW-16) arrested the appellant/accused Adityaraj Singh vide arrest memo (Ex.P/12). During interrogation, appellant Adityaraj Singh disclosed that he kept his gun behind the *Godrej almira* in his room at his house vide disclosure memo (Ex.P/14). He seized a 12 bore gun, a live cartridge and a licence (Ex.P/37) of gun vide seizure memo (Ex.P/17). SHO Virendra Singh Chouhan (PW-16) arrested co-accused Brajraj Singh and Dharendra Singh vide arrest memo (Ex.P/13 and P/38, respectively). He recovered a lathi vide seizure memo (Ex.P/16) at the instance of co-accused Dharendra Singh Chouhan. On 07.04.2011, he arrested appellant/accused Mahendra Singh vide arrest memo (Ex.P/9). He prepared disclosure

memo (Ex.P/10) on the basis of statement given by accused Mahendra Singh and he recovered a farsi at the instance of appellant Mahendra Singh vide seizure memo (Ex.P/11).

7. On 07.04.2011, he arrested co-accused persons Shyamraj Singh, Jitendra Singh, Rajendra Singh and on 19.05.2011, he arrested accused Kesar Singh vide arrest memo (Ex.P/29, P/30, P/31 and P/39, respectively). On 13.04.2011, Armorar Lakhani Singh (PW-9) examined the seized gun and gave a report (Ex.P/26). Prosecution sanction (Ex.P/27) against the appellant Adityaraj Singh was taken from District Magistrate, Rajgarh on 13.05.2011. Information about licence of gun (Ex.P/28) was also received from District Magistrate, Rajgarh. Halka Patwari Shailendra Bhati (PW-8) also inspected the place of incident and gave a revenue map (Ex.P/25) and Khasra (Ex.P/24). Seized articles were sent to FSL Sagar for chemical examination through letter (Ex.P/40) of the Superintendent of Police, Rajgarh, wherefrom FSL report (Ex.P/41) was received. After completion of investigation, charge-sheet was filed before concerning Judicial Magistrate. The offence was triable by the Court of Sessions, therefore, the case was committed to the Court of Sessions, Rajgarh (Biaora).

8. Charges were framed by the learned Trial Court. The accused persons abjured the guilt and claimed to be tried. In turn, prosecution in order to prove its case examined 16 witnesses. After recording of statement of prosecution witnesses, accused persons were examined u/S 313 of Cr.P.C. They pleaded that they have been falsely implicated in the case due to animosity. In order to lead defence evidence, the accused

persons examined Dr. S. Yadu (DW-3), accused Adityaraj Singh examined Bhagwan Singh son of Shivnath Singh (DW-2) and Bhagwan Singh son of Bane Singh (DW-4), co-accused Shyamraj Singh examined Sardar Singh (DW-1).

9. The learned Trial Court, after hearing the parties acquitted co-accused persons from all the charges against them and convicted and sentenced the appellants for the offence as mentioned above.

10. Challenging the impugned judgement, it is contended on the behalf of appellant Adityaraj Singh that the judgement of conviction and sentence passed against him is arbitrary and suffers from improper evaluation of evidence. Alleged eye-witnesses, Giriraj Vyas (PW-4) and Shailendra Yadav (PW- 5) have not seen the incident. Their name has not been mentioned in the FIR and they have falsely been made the eye-witnesses at the latter stage. Their case diary statement was also recorded after 6 days of the incident meanwhile they did not tell anyone about the incident, therefore, their statement is not reliable as eye-witnesses.

11. Learned counsel for the appellant further submitted that the appellant has not fired gun on the deceased, at the time of incident, actually at the time of incident Surendra Singh (PW-1), Yashpal Singh (PW-2) and deceased had come in the house of appellant and they caught hold the co-accused Dhirendra Singh alias Bablu and dragged him out of the house. The complainant party has physically assaulted the co-accused Dhirendra Singh alias Bablu. Yashpal Singh (PW-2) gave blows to Dhirendra Singh with farsi on his head. At that time, Brajraj Singh was returning to home with his gun, then deceased attacked Brajraj and got

his gun and he was about to fire on Brajraj Singh, then appellant Adityaraj Singh tried to take gun from him, in that encounter the gun fired, due to which the deceased sustained injury. The appellant Adityaraj Singh did not intentionally fired the gun. On the basis of the report of co-accused Dharendra Singh alias Bablu, an FIR (Ex.D/5) was lodged against Yashpal Singh (PW-2) and deceased Bhemendra Singh. In the incident, co-accused Dharendra Singh sustained grievous injuries. The complainant party was the aggressor of the incident, but the learned Trial Court has not considered the aforementioned evidence properly.

12. Learned counsel for the appellant Adityaraj Singh has placed reliance on the judgement of *Kumar V State Represented by Inspector of Police [(2018) SCC 536]*; *Arvind Kumar alias Nemi Chand and Ors. V State of Rajasthan [2021 SCC Online SC 1099]* and *Suresh Singh and Ors. V State of Haryana [AIR 1999 SC 1773]*.

13. Learned counsel for the appellant Mahendra Singh argued only that the appellant was convicted u/S 324 of IPC to cause injury to Yashpal Singh (PW-2) by farsi and sentenced to RI of 01 year with fine of Rs. 5,000/-. The appellant has already undergone imprisonment for 07 months i.e. since 07.04.2011 to 05.11.2011, therefore, the appellant may be punished for the period for which he has already served in jail.

14. On the other hand, learned counsel for the State supported the impugned judgement and submitted that prosecution case is supported by the eye-witnesses. Statement of eye-witnesses is fully supported by medical evidences and MLC of injured witnesses. Therefore, there is no infirmity in the judgement of conviction and sentence passed by the

learned Trial Court. Learned Trial Court has not committed any error in convicting and sentencing the appellants for the offence as indicated above. Learned counsel has relied on the judgement passed on 29.04.2022 by a Coordinate Bench of this Court in ***Satish alias Vikram Jatav V State of M.P. [CRA 174 of 2011]***.

15. We have heard learned counsels for the parties and perused the record.

16. Alleged offence is of a murder and causing injury to the injured person. Therefore, an important question arises for consideration of appeals that whether death of deceased Bhemendra Singh was homicidal in nature? And whether injured Yashpal Singh (PW-2) has received injury with sharp cutting weapon?

17. Dr Saurin Dutta (PW-7) in his evidence deposed that on 01.04.2011, he and Dr. Sharad Sahu (PW-3) and Dr. Rakesh Gupta conducted the post-mortem of deceased Bhemendra Singh and found that there were multiple entering and punctured wounds of pellets, with blackening and tattooing, varying depths in skin, muscles, bones and cavities that all are over the face, neck and upper chest extending from below the nose up to both Ist intercostal space. He further said that he found 55 pellets injuries of which most of them were oval in shape and were of 0.75 cm in size. 3 injuries were found in the left sub-mandibular region and over the chin, respectively, measuring 4.5cm x 3.5cm x 1cm and 2.5cm x 1cm. Margins of wound were blackening and the direction of the wounds were anterior to posterior over the under region of chin. Lacerated wound penetrating injury through and through 3cm x 1cm

with 3 holes, margins were irregular and blackened and missing of central and bilateral incisor teeth of lower jaw and the root of the teeth were broken and were stuck in the jaw. There was blackening around the wound.

18. Dr Saurin Dutta (PW-7) further stated that there was lacerated and punctured wound, 6cm horizontal x 4.5cm vertical in between clavicle bone, skin was missing. Muscles were torn up, blackening of margins of wound, edging inwards, inconsistent and inverted. Wound was cherry-red in colour, black particles embodied on the midline and midway to chin and suprasternal notch in the chin. This witness also stated that in internal examination, he found that there were 2 palette injuries penetrating in the chest embodied in the thoracic cavity in the upper part of the right lung. 250 ml blood clotted in right hemothorax. Food pipe, larynx and the region around, arteries near the front of neck were shattered. Several palettes were embodied in the cervical bone. Fracture in the ramus of the left mandible. The witness stated that the holes similar to the wounds on the chest of deceased was found on the clothes of the deceased. During post-mortem, he found 3 palettes in the wound, he took and preserved and sealed them. He also took shirt, pant, baniyan and underwear of the deceased and sealed them. He handed over the sealed packets to the concerning head constable.

19. Dr. Saurin Dutta (PW-7) opined that death of deceased is due to neck injury caused by gun shot. Cause of death was homicidal in nature. Range of gun shot is not distant. Death of deceased was within 12-24

hours of post-mortem. He proved post-mortem report (Ex.P/19) and also proved X-ray plates (Ex.P/21 – P/23) of chest and head of the deceased as well as X-ray report (Ex.P/20). No amount of cross-examination could cause scratch on the statement of the witness.

20. Therefore, the statement of Dr. Saurin Datta (PW-7) is reliable and it appears that the death of deceased was homicidal in nature.

21. Dr. Sharad Sahu (PW-3) has stated that on 31.03.2011, he was posted as Medical Officer at Civil Hospital, Biaora. On the said date, he examined injured Yashpal Singh (PW-2) and following injuries were found :-

- i. Incised wound 3.5cm x 0.5cm x muscle deep on middle of skull, vertical in direction.*
- ii. Abrasion 1.2cm x 0.5cm, on the left wrist joint anteriorly.*

The witness opined that injury No.i was caused by hard and sharp object and injury No.ii by hard and blunt object. Duration was within 2 hours of examination. He advised X-ray for injury No.i. The witness proved the MLC (Ex.P/7).

22. Statement of this witness is reliable and appears that Yashpal Singh (PW-2) has sustained injury with sharp cutting weapon as well as by hard and blunt object.

23. From the statement of Dr. Sharad Sahu (PW-3) it also appears that on 31.03.2011, he also examined Surendra Singh (PW-1) and found a swelling 2cm x 1cm on his right shoulder and an abrasion 1cm x 0.5cm

on right wrist joint which were caused by hard and blunt object within 2 hours of examination. Both the injuries were simple in nature. The witness proved MLC (Ex.P/8).

24. Hence, it is found proved that death of deceased Bhemendra Singh was homicidal in nature, and injured Yashpal Singh (PW-2) has received injury with sharp cutting weapon.

25. Now, question arises that whether the appellant/accused Adityaraj Singh had inflicted the gun shot injury to the deceased and appellant/accused Mahendra Singh had inflicted injury to Yashpal Singh (PW-2) by means of farsi?

26. From the statement of SHO Virendra Singh Chouhan (PW-16), it appears that he has written statement of Giriraj Vyas (PW-4) and Shailendra Yadav alias Shantilal (PW-5) after 6 days of incident i.e. on 06.04.2011.

27. The question of delay in examining a witness during investigation is material only if it indicates and suggests some unfair practice by the investigating agency for the purpose of introducing a got up witness to falsely support the prosecution case. But in the instant case, SHO Virendra Singh Chouhan (PW-16) explained for the delay in recording statement u/S 161 of Cr.P.C. of witnesses in his cross-examination that Giriraj Vyas (PW-4) and Shailendra Yadav alias Shantilal (PW-5) met him on 06.04.2011, then he recorded their statement. He further explained that Choukidar Ram Singh (PW-11) told the name of both the eye-witness, thereafter he wrote their statement. It also appears that name

of eye-witnesses is not mentioned in Dehati Nalisi (Ex.P/1) but their name is mentioned in (Ex.D/2) statement u/S 161 Cr.P.C. of Yashpal Singh (PW-2), which was recorded on the next to the incident i.e. 01.04.2011. Alongwith it is a well settled law that delay in recording of the statement of witnesses does not necessarily discredit their testimony. If the testimony of such witnesses is credible and cogent, alongwith the delay is well explained, then the Court can rely upon them. In the instant case, delay of recording of statement of eye-witnesses is well explained by SHO Virendra Singh Chouhan (PW-16), therefore, solely on the ground of delay in recording of statement u/S 161 of Cr.P.C., the statement of both the eye-witnesses cannot be discarded.

28. In respect of incident, Yashpal Singh (PW-2) stated that on 30.03.2011, he was serving food in the program of '*Ausar*' in the house of Bhagwan Singh, thereafter, he sat at the courtyard of appellant Adityaraj Singh, then this appellant's mother scolded him. This witness felt insulted and complained to co-accused Shyamraj Singh on 31.03.2011. Thereafter on the same day at about 02:00 – 03:00 PM, when this witness was getting the tent materials loaded on the tractor, the appellant Adityaraj Singh verbally abused him and ran to beat him. The witness complained to his parents and went to police station to report the matter alongwith his father Surendra Singh (PW-1). After reporting the matter, Surendra Singh (PW-1), this witness and deceased returned and parked their vehicle in front of their home then appellant Adityaraj Singh carrying gun and Mahendra Singh carrying *farsi* alongwith other co-

accused persons came there and Adityaraj Singh fired a 12 bore gun on the neck of the deceased and Mahendra Singh gave blow on the head of this witness by means of *farsi*. Co-accused Bablu gave blow by *lathi* on left wrist of this witness. Other co-accused persons also assaulted Surendra Singh (PW-1) by means of piece of stones. The deceased was taken to the Civil Hospital, Biaora, but the doctor declared him dead. Statement of this witness is supported by Surendra Singh (PW-1), Giriraj Vyas (PW-4) and Shailendra Yadav alias Shantilal (PW-5).

29. ASI Ghasi Ram (PW-13) stated that on 31.03.2011 at 08:50 PM, he wrote Dehati Nalisi (Ex.P/1) on the basis of intimation given by Surendra Singh (PW/1) at Civil Hospital, Biaora. Surendra Singh (PW-1) also supported the statement of this witness. Therefore, statement of this witness is reliable. Head Constable Sita Ram (PW-14) deposed that on 01.04.2011, he wrote an FIR (Ex.P/34) on the basis of Dehati Nalisi (Ex.P/1) and sent counter copy of FIR to the Judicial Magistrate First Class, Rajgarh. In this respect, receiving is (Ex.P/36). It appears from the receiving (Ex.P/36) that counter copy of FIR was received on 01.04.2011 by the concerning Magistrate.

30. On perusal of Dehati Nalisi (Ex.P/1), it appears that the incident had occurred on 21.03.2011 at 08:00 PM and Dehati Nalisi was recorded on the same day at 08:50 PM. Statement of Surendra Singh (PW-1) is supported by Dehati Nalisi (Ex.P/1). His statement is also supported by injured witness Yashpal Singh (PW-2) and eye-witnesses Giriraj Vyas (PW-4) and Shailendra Yadav (PW-5). Statement of aforementioned

witnesses is further supported by Dr. Saurin Datta (PW-7), who conducted post-mortem of deceased and Dr. Sharad Sahu (PW-3) who examined the injured Surendra Singh (PW-1) and Yashpal Singh (PW-2). There is no material omission and contradiction in the statement of witnesses regarding appellant Adityaraj Singh has fired gun shot on the neck of the deceased and appellant Mahendra Singh gave blow by farsi to Yashpal Singh (PW-2) on the mid of his skull. Therefore, statement of aforementioned witnesses is reliable and trustworthy.

31. Head constable Sita Ram (PW-14) stated that on 01.04.2011, he seized 2 sealed packets from constable Shahzad Khan (PW-12) produced by him from hospital. Constable Shahzad Khan (PW-12) also stated that he received sealed packet of clothes of deceased and sealed packet of palettes found in the body of the deceased from Biaora hospital and produced the same at police station. Head constable Sita Ram (PW-14) seized them and prepared seizure memo (Ex.P/32). Therefore, it is clear that statement of Shahzad Khan (PW-12) and Sita Ram (PW-14) is supported by seizure memo (Ex.P/32), hence, their statement is reliable.

32. SHO Virendra Singh Chouhan (PW-16) stated that during investigation, he prepared a spot map (Ex.P/6). Yashpal Singh (PW-2) stated that the police has prepared spot map (Ex.P/6) at his instance. Statement of both the witnesses is supported by spot map (Ex.P/6), hence their statement is reliable.

33. SHO Virendra Singh Chouhan (PW-16) stated that on 01.04.2011, he arrested the appellant Adityaraj Singh vide arrest memo (Ex.P/12), he

further stated that during interrogation appellant Adityaraj Singh disclosed that he hid a licenced gun behind almirah in his house vide disclosure memo (Ex.P/14) and the gun (Article-A) was seized alongwith a live cartridge (Article-B) and licence of gun (Ex.P/37) vide seizure memo (Ex.P/17) at the instance of appellant Adityaraj Singh. Bhanwar Singh (PW-6) and Ram Singh (PW-11) have admitted their signature on arrest memo (Ex.P/12), disclosure memo (Ex.P/14) and seizure memo (Ex.P/17) but have not supported the case of prosecution, hence, prosecution declared hostile and cross-examined them. There is nothing in cross-examination of SHO Virendra Singh Chouhan (PW-16) to show that this witness is interested to falsely implicate the appellant in the offence. His statement is supported by arrest memo (Ex.P/12), disclosure memo (Ex.P/14) and seizure memo (Ex.P/17). Bhanwar Singh (PW-6) and Ram Singh (PW-11) have also admitted their signature on arrest memo (Ex.P/12), disclosure memo (Ex.P/14) and seizure memo (Ex.P/17), therefore, alone statement of SHO Virendra Singh Chouhan (PW-16) is reliable. It appears from licence (Ex.P/37) that it was issued in favour of Brajraj Singh, father of appellant Adityaraj Singh therefore, it also appears that he was possessing the gun without having valid licence.

34. SHO Virendra Singh Chouhan (PW-16) deposed that on 07.04.2011, he arrested accused Mahendra Singh vide arrest memo (Ex.P/9). Accused Mahendra Singh disclosed that he hid a farsi at the roof of his house vide disclosure memo (Ex.P/10), and the same was

recovered by him at the instance of accused Mahendra Singh vide seizure memo (Ex.P/11). Statement of this witness is supported by Giriraj Vyas (PW-4). Ram Singh (PW-11) stated that the police has arrested accused Mahendra Singh before this witness and prepared arrest memo (Ex.P/9) but has not supported disclosure statement and seizure from accused Mahendra Singh, though he admitted his signature on the disclosure memo (Ex.P/10) and seizure memo (Ex.P/11). The prosecution has declared this witness hostile but during cross-examination also has not supported the case of prosecution. Therefore, it is clear that aforementioned statement of SHO Virendra Singh Chouhan (PW-16) is supported by Giriraj Vyas (PW-4). Ram Singh (PW-11) also admitted his signature on disclosure memo (Ex.P/10) and seizure memo (Ex.P/11). He also supported the statement of SHO Virendra Singh Chouhan (PW-16) in respect of arrest of accused Mahendra Singh. No amount of cross-examination could cause dent on the statement of SHO Virendra Singh Chouhan (PW-16) and Giriraj Vyas (PW-4). Hence, their statement is reliable and it appears that a *farsi* was recovered from the accused Mahendra Singh.

35. SHO Virendra Singh Chouhan (PW-16) stated that he seized blood stained soil, simple soil and two pieces of fired cartridge vide seizure memo (Ex.P/18). Bhanwar Singh (PW-6) and Ram Singh (PW-11) have admitted their signature on seizure memo (Ex.P/18) but have not supported the seizure of articles from the spot. The statement of SHO Virendra Singh Chouhan (PW-16) is supported by seizure memo

(Ex.P/18), both the witnesses also admitted their signature on (Ex.P/18), hence, statement of SHO Virendra Singh Chouhan (PW-16) is reliable.

36. Halka Patwari Shailendra Bhati (PW-8) stated that on the direction of Tehsildar, he issued a copy of khasra (Ex.P/24) and revenue map (Ex.P/25) of abadi land situated at village Bhopalpura. He further stated that he showed the place of incident in the revenue map with plus sign (+) in red ink. But this witness has not stated clearly that who told him the place of incident. Therefore, the statement of this witness does not support the case of prosecution.

37. Constable Lakhan Singh (PW-9) stated that on 13.04.2011, he received the sealed packet of seized gun and sealed packet of cartridge from Police Station Karanvas. He examined them and found that the gun was 12 bore, single barrel made up of Japanese steel, bearing number 387-1997 on its body. This gun was able to fire. A sealed packet was opened by him and found an empty cartridge of 12 bore which was broken. Another sealed packet was opened by him and found that there was a live cartridge of 12 bore, which was able to be fired. Therefore, it appears that this witness has examined the gun and found that the gun was in working condition. As per examination, he issued report (Ex.P/26).

38. SHO Virendra Singh Chouhan (PW-16) stated that he sent the seized article to FSL Sagar for chemical examination vide letter of S.P. Rajgarh (Ex.P/40). He further stated that after examination, FSL report (Ex.P/41) was received. As per FSL report (Ex.P/41) after examination,

it was opined that seized 12 bore gun is a single barrel gun. It is in working condition. There is residue found in the gun which shows that it was used. It is further opined that two pieces of a broken empty cartridge recovered from the spot (Ex.P/EC-1) was fired from the gun seized from the accused Adityaraj Singh. 3 palettes recovered from the body of the deceased could be a part of empty cartridge recovered from the spot. Gun shot holes were present on shirt and baniyan recovered from the body of the deceased which could have been caused by any laid projectile as palettes recovered from the body of the deceased. It is further opined that the distance of firing ranges about 6 yards. Therefore, it appears that the statement of eye-witnesses is also supported by FSL report (Ex.P/41). Therefore, statement of injured witnesses and eye-witnesses is reliable and it is clear that the appellant/ accused Adityaraj Singh had inflicted the gun shot injury to the deceased and appellant/accused Mahendra Singh has inflicted injury to Yashpal Singh (PW-2) by means of *farsi*.

39. Next question arises for consideration that whether the appellant Adityaraj Singh intentionally inflicted injuries on the body of the deceased to cause his death and whether the appellant Mahendra Singh voluntarily caused injury to Yashpal Singh (PW-2)?

40. Learned counsels for the appellants argued that the complainant party was the aggressor of the incident. Yashpal Singh alias Gabbar (PW-2), deceased Bhemendra Singh and other persons had entered into the house of Brajraj Singh and due to prior animosity started giving blows

by means of *lathi*, piece of stone and *farsi*. Yashpal Singh (PW-2) gave blow on the head of co-accused Dharendra Singh alias Bablu by means of *farsi*. He also received injuries on other parts of his body. He started to cry, then accused Mahendra Singh etc. intervened, co-accused Brajraj Singh came from his agricultural land alongwith his licenced gun. The complainant party snatched the gun from Brajraj Singh and the complainant party was about to fire the gun on the accused party. Appellant Adityaraj Singh tried to free the gun, meanwhile the tussle, the gun fired on deceased Bhemendra Singh. Appellant Adityaraj Singh has not fired the gun on the deceased but due to animosity the appellants and other co-accused parties have been falsely implicated in the crime.

41. In the case of *Kumar (Supra)* in para-29, the following has been held:-

“29. Another point put forth by the learned counsel on behalf of the accused—appellant is that the prosecution has not explained the injuries suffered by the accused and hence prosecution case should not be believed. At the outset, it would be relevant to note the settled principles of law on this aspect. Generally failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true [See : [Mohar Rai and Bharath Rai v. The State of Bihar, 1968 CriLJ 1479](#)].

42. The Apex Court in the case of *Arvind Kumar @ Nemi Chand and Ors. (Supra)* in para-48, has opined as under:-

“48. The omission on the part of the prosecution to explain

the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. In the instant case, when it is held, as it must be, that the appellant Dasrath Singh received serious injuries which have not been explained by the prosecution, then it will be difficult for the court to rely on the evidence of PWs 1 to 4 and 6, more particularly, when some of these witnesses have lied by stating that they did not see any injuries on the person of the accused. Thus neither the Sessions Judge nor the High Court appears to have given due consideration to this important lacuna or infirmity appearing in the prosecution case. We must hasten to add that as held by this Court in [State of Gujarat v. Bai Fatima](#) [(1975) 2 SCC 7] there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises. Falsus in Uno-Falsus in Omnibus”

43. The Apex Court in the case of **Suresh Singh and Ors. (Supra)** has held as under:-

“6. Having considered the rival submissions at the bar and having scrutinised the impugned Judgment of the High Court and the findings recorded thereon, there is ample force in the submission of Mr. Lalit, appearing for the appellants. It was possible for the prosecution to argue that the conviction can be sustained on the evidence which have not been relied upon by

the High Court but such a step has not been taken and Mr. Malhotra has not advanced any argument on that score. But at the same time, we cannot lose sight of the fact that some of the findings arrived at by the High Court on the face of it, is wholly unsustainable. But we are not examining the same in depth as there has been no appeal against the acquittal recorded by the High Court even as against the appellants of all other charges. This being the position, we have ourselves examined the evidence of the eye witnesses to find out whether the role ascribed by them to these three appellants of having given blows on the deceased can at all be accepted or the entire evidence has to be discarded as contended by Mr. Lalit. Having scrutinised the same with utmost care and bearing in mind the medical evidence as unfolded through the doctor who has conducted the post-mortem examination on the dead body of the deceased Mahipal, which in our view corroborates the ocular statements of the three eye witnesses, we are unable to persuade ourselves to agree with the submission of Mr. Lalit that the entire evidence should be discarded notwithstanding the fact that the role ascribed as against other accused persons have not believed and seven accused persons have been acquitted and even the motive alleged by them has not been believed. In our considered opinion, therefore, the ocular statement of the eye witnesses ascribing a particular role to the appellants in the matter of giving blows on the deceased by different weapons can be accepted and we find no infirmity in the impugned Judgment of the High Court in accepting the same. The question, further remains for consideration is whether the accused can claim a right of private defence of person when their case has been believed by the High Court that while Rameshwar was being chased by Mahipal, the appellants who happened to be related to Rameshwar, came to the spot on hearing the Hullah, gave the three blows in question. In appreciating this contention one thing must be borne in mind that the theory of chasing may not have much significance in view of the distance between the house of Mahipal and the accused persons, which is hardly 56 paces,

but all the same the positive finding of the High Court that the occurrence did not take place in front of the house of Mahipal as alleged by the prosecution witnesses cannot be lost sight of. As has been stated earlier, the injuries found on the person of the accused persons were not that serious though the injury on Mohinder was an incised wound and could not have been lost sight of by the prosecution witnesses. However for non explanation of such injuries on accused persons the entire prosecution case cannot be thrown out.

7. The deceased, on the other hand had five incised wounds on his person on the front to parietal, temporal and temporo occipital region of the skull and two abrasions and a bruise. Even if we accept the finding of the High Court that the accused appellants assaulted the deceased while being chased by the deceased Mahipal but in consideration of the injuries on the deceased, the conclusion is inescapable that the accused persons exceeded their right of private defence while giving the blows on the deceased. Having taken into consideration of all the aforesaid circumstances and the infirmities noted earlier, we are of the opinion that the conviction of the appellants Suresh and Mohinder under [Section 302](#) IPC cannot be sustained. We, accordingly, acquit them of the charge under [Section 302](#) IPC and instead convict them under [Section 304 Part I, IPC](#). The conviction of the accused appellant Chander Pal under [Section 304 Part I](#) is maintained and for such conviction, we sentence all of them to undergo rigorous imprisonment for seven years. This appeal is allowed to the extent indicated above.”

44. In the case of *Satish alias Vikram Singh Jatav (Supra)*, the Coordinate Bench of this Court in para-42 has held as under:-

*“42. Regarding scope and limitations of right of private defence, Hon'ble Apex Court has emphasized in detail in the matter of **Kashi Ram & Others vs. State of Rajasthan**,*

reported in (2008) 3 SCC 55 as under:-

"33. The right of private defence is codified in sections 97 to 106 of the Indian Penal Code and all these sections will have to be read together to ascertain whether in the facts and circumstances the accused appellants are entitled to right of private defence or they exceeded the right of private defence. Only when all these sections are read together, we get comprehensive view of the scope and limitation of that right. The position of law is well-settled for over a century both in England and India.

45. Private defence can be used only to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention as held by this court in *Bishnas v. State of W. B.* (2005) 12 SCC 657. In the said judgment the relevant portion of *Kennys Outlines of Criminal Law and Criminal Law by J.C. Smith and Brian Hogan* have been quoted. We deem it appropriate to reproduce the same.

"89. It is natural that a man who is attacked should resist, and his resistance, as such, will not be unlawful. It is not necessary that he should wait to be actually struck, before striking in self-defence. If one party raises up a threatening hand, then the other may strike. Nor is the right of defence limited to the particular person assailed; it includes all who are under any obligation, even though merely social and not legal, to protect him. The old authorities exemplify this by the cases of a husband defending his wife, a child his parent, a master his servant, or a servant his master (and perhaps the courts would now take a still more general view of this duty of the strong to protect the weak).

90. The learned author further stated that self defence, however, is not extended to unlawful force:

'But the justification covers only blows struck in sheer self-defence and not in revenge. Accordingly

if, when all the danger is over and no more blows are really needed for defence, the defender nevertheless strikes one, he commits an assault and battery. The numerous decisions that have been given as to the kind of weapons that may lawfully be used to repel an assailant, are merely applications of this simple principle. Thus, as we have already seen, where a person is attacked in such a way that his life is in danger he is justified in even killing his assailant to prevent the felony. But an ordinary assault must not be thus met by the use of firearms or other deadly weapons...."

91. In *Browne* 1973 NI 96 (NI at p. 107] Lowry, L.C.J. with regard to self-defence stated:

The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need.

92. As regards self-defence and prevention of crime in *Criminal Law* by J.C. Smith & Brian Hogan, it is stated:

"Since self-defence may afford a defence to murder, obviously it may do so to lesser offences against the person and subject to similar conditions. The matter is now regulated by Section 3 of the Criminal Law Act, 1967. An attack which would not justify D in killing might justify him in the use of some less degree of force, and so afford a defence to a charge of wounding, or, a fortiori, common assault. But the use of greater force than is reasonable to repel the attack will result in liability to conviction for common assault, or whatever offence the degree of harm caused and intended warrants. Reasonable force may be used in defence of property so that D was not guilty of an assault when he struck a bailiff who was unlawfully using force to enter D's home.

Similar principles apply to force used in the prevention of crime."

45. In the instant case, Dr. S. Yadu (DW-3) examined the co-accused Dhirendra Singh alias Bablu on 01.04.2011 on request of SHO Police Station Karanvas. This witness stated that Constable Shakeer Khan brought the co-accused Dhirendra Singh alias Bablu. He found following injuries on his body:-

- i. Lacerated wound 8cm x 2cm skin deep on top of scalp.*
- ii. Lacerated wound 2cm x 1cm skin deep on second metacarpal of left hand.*
- iii. Abrasion 3cm x 2cm on lower part of right arm.*
- iv. Abrasion 3cm x 2cm on left leg.*
- v. Abrasion 2cm x 1cm in middle of right arm.*
- vi. Contusion 6cm x 2cm on right side of back over scapula.*

This witness has opined that all injuries were caused by hard and blunt object within 6 hours of examination. All injuries were simple in nature except injury No.ii. Injured was admitted in hospital for further treatment. He proved the MLC (Ex.D/8C).

46. Dr. S. Yadu (DW-3) further stated that X-ray of left hand of the injured Dhirendra Singh alias Bablu was done on the same day. He examined the X-ray plate and found that there was a fracture in second metacarpal bone. He proved the X-ray report (Ex.D/7). The prosecution has not opted to cross-examine this witness, therefore, there is no reason to disbelieve this witness. It appears from MLC (Ex.D/6) that on

31.03.2011, the co-accused Dhirendra Singh alias Bablu was sent for MLC by SHO Police Station Karanvas and on 01.04.2011 at night 01:05 AM, he was examined by Dr. S. Yadu (DW-3). It also appears from the statement of Dr. S. Yadu (DW-3) that there were six injuries on the body of the injured and one of them, injury No.ii, was grievous in nature. It also appears that co-accused Dhirendra Singh received injuries in the same incident.

47. Bhagwan Singh (DW-2), who is resident of Odupur, District Rajgarh stated that he goes to Bhopalpura for 8-15 times a day but he does not know Bhagwan Singh (DW-2). In the month of March, 2011, he went to the house of Bane Singh in the program of *Ausar*. He had taken food at 05:00 PM there, and then he returned from Bhopalpura at about 08:00 PM, then he saw that Sooraj Singh and 2 other persons pulled out a child from a house, aforementioned two other persons were son of alleged Sooraj Singh. Those 3 persons were beating the child, at that time, Brajraj Singh was returning from forest bearing a gun on his shoulder. Aforementioned 3 persons snatched gun from Brajraj Singh, thereafter a son of Brajraj Singh was trying to snatch the gun which resulted into a tussle between them. Considering the statement of this witness, it is not clear that who is Sooraj Singh and what was the name of sons of Sooraj Singh. Apart from that this witness has not stated anything about the act of complainant party. The story presented by this witness is quite vague, uncertain and does not resemble to the facts of the case. Therefore, the statement of this witness is not reliable.

48. From the statement of Bhagwan Singh (DW-4), it appears that there was *Ausar* program at his home on 31.03.2011, due to death of his mother Anokhi Bai and the program ended at 04:00 PM on the same day. Therefore, statement of this witness also does not support the defence of the appellants.

49. On the other hand, SHO Virendra Singh Chouhan (PW-16) in paragraph-22 of cross-examination has admitted that on the basis of report of co-accused Dhirendra Singh alias Bablu offence bearing No.47/2011 was registered. There were injuries on the body of co-accused Dhirendra Singh. Therefore, he sent him for medical examination. After receiving X-ray report, crime was registered against Yashpal Singh alias Gabbar (PW-2), deceased Bhemendra Singh and others. From the statement of this witness, it appears that he was well acquainted with the fact that co-accused Dhirendra Singh sustained grievous injuries in the same incident but he has not filed his MLC and X-ray report in the case. He has not even tried to record the statement of co-accused Dhirendra Singh.

50. Surendra Singh (PW-1) in paragraph-19 and Yashpal Singh (PW-2) in paragraph-13 of the cross-examination though have denied the suggestion of accused persons about their defence and in paragraph-18 of the cross-examination, Surendra Singh (PW-1) stated that he does not know that Dhirendra Singh had received injuries in the same incident. While Yashpal Singh (PW-2) in paragraph-13 of cross-examination admitted that the co-accused Dhirendra Singh alias Bablu also sustained

injuries in the same incident and explained that deceased got injured by gun and even though the accused persons were beating him, hence, complainant party had intervened, which led to tussle between both the parties, in which Dharendra Singh alias Bablu sustained injuries. Therefore, it appears that in this point, Surendra Singh (PW-1) and Yashpal Singh (PW-2) are lying and their statement is contradictory amongst each of them in respect of injury caused to Dharendra Singh.

51. Apart from that, on perusal of spot map (Ex.P/6), it appears that blood was found on point No.1 which is just in front of the house, point No.6, of Bihari Lal and platform, point No.2, near the temple. Platform near the temple is situated just in front of the house of co-accused Braraj Singh but it is little away from the house of Surendra Singh (PW-1). Therefore, it appears that the incident occurred near the house of accused Brajraj Singh and in front of platform near the temple.

52. On the basis of forgoing discussion, it appears that the incident was witnessed by Surendra Singh (PW-1), Yashpal Singh (PW-2), Giriraj Vyas (PW-4) and Shailendra Yadav (PW-5). Surendra Singh (PW-1) and Yashpal Singh (PW-2) also received injuries in the incident and deceased received gun shot injury on his neck. Statement of eye-witnesses is also supported by medical evidences as well as FSL report. But co-accused Dharendra Singh also received serious injury in the same incident and the prosecution has not explained his injuries, therefore, it appears that the prosecution has hidden origin of the incident and in this respect, statement of Surendra Singh (PW-1) and Yashpal Singh (PW-2) is

contrary and consequently appears that both the witnesses are lying. Therefore, defence of appellants appears to be probable. In this situation, it appears that the offence is committed by the appellant Adityaraj Singh without pre-meditation in a sudden fight, in the heat of passion, upon a sudden quarrel, which comes under the Exception 4 of Section 300 of IPC and makes the case culpable homicide not amounting to murder and is punishable u/S 304 Part-I of the IPC.

53. It also appears from the statement of injured witnesses and eye-witnesses that the appellant Mahendra Singh voluntarily caused injury to the injured Yashpal Singh (PW-2) by means of farsi which is a sharp edged weapon and is punishable u/S 324 of the IPC.

54. From the statement of Arms Clerk, office of the District Magistrate, Rajgarh Prakash Singh Parmar (PW-10), it is clear that the District Magistrate, after considering the case diary and other documents, has properly accorded prosecution sanction (Ex.P/27) on 12.05.2011 against the appellant Adityaraj Singh, by exercising his power u/S 39 of the Arms Act to prosecute him for the offence u/S 25 of the Arms Act.

55. The appellant Adityaraj Singh possessed the gun, without having a valid licence in his favour as well as he used the gun by firing it on the deceased, which is punishable u/S 25 (1B)(a) and u/S 27(1) of the Arms Act, but learned Trial Court has convicted and sentenced the appellant Adityaraj Singh only u/S 25 (1B)(a) of the Arms Act and the prosecution has not filed appeal against the impugned judgement.

56. On the basis of aforementioned discussion, it appears that the

learned Trial Court has erred by convicting and sentencing the appellant Adityaraj Singh u/S 302 of IPC, but has properly assessed the evidence in respect of the appellant Mahendra Singh and has rightly convicted him u/S 324 of IPC. Learned Trial Court has rightly held the appellant Adityaraj Singh guilty u/S 25 (1B)(a) of the Arms Act. On perusal of the record, it appears that appellant Mahendra Singh has already served in jail for 7 months i.e. from 07.04.2011 – 05.11.2011. Looking to the fact and circumstances of the case, it appears that the custodial sentence of 7 months would meet the ends of justice.

57. It appears that appellant Adityaraj Singh has served the jail sentence since 01.04.2011 – 06.07.2012 and since the date of the judgement, i.e. 06.07.2012 till date, for almost 11 years and 9 months.

58. Resultantly, both the appeals are **partly allowed** and the impugned judgement of conviction and order of sentence in respect of appellant Adityaraj Singh for the offence under Section 302 of IPC is set aside and he is acquitted from the offence u/S 302 of IPC instead, he is convicted u/S 304 Part-I of IPC and sentenced to 10 years of rigorous imprisonment. Conviction and sentence u/S 25 (1B)(a) of the Arms Act against the appellant Adityaraj Singh is affirmed. Both the sentences will run concurrently. Conviction of appellant Mahendra Singh u/S 324 of IPC is also affirmed and he is sentenced to the period for which he has already served in custody. Fine imposed by the learned Trial Court is affirmed.

59. Appellant Adityaraj Singh has already served the jail sentence for

more than 10 years. Therefore, the appellants, Adityaraj Singh and Mahendra Singh shall be released forthwith, if they are not required in any other case. Their bail bonds, if any, shall stand discharged.

60. Accordingly, both the appeals stand disposed of.

61. Copy of this order alongwith record of the learned Trial Court be also sent back to the Trial Court for information and compliance.

Certified copy, as per Rules.

(S. A. DHARMADHIKARI)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

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