

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND
DHARMADHIKARI**

&

HON'BLE SHRI JUSTICE DEVNARAYAN MISHRA

CRIMINAL APPEAL No. 932 of 2013

BETWEEN:-

ARUN S/O DARIYAV SINGH, AGED ABOUT 25 YEARS,
1. OCCUPATION: AGRICULTURE VISHWAS NAGAR
CHOPATI KISHANGANJ TEH. MHOW, DISTT INDORE
(MADHYA PRADESH)

RADHESHYAM S/O MOHAN SINGH , AGED ABOUT 25
2. YEARS, OCCUPATION: MILK VENDOR VILL
BHATKHEDI TEH. MHOW (MADHYA PRADESH)

NARENDRA S/O ANTAR SINGH , AGED ABOUT 24
3. YEARS, OCCUPATION: AGRICULTURIST VILL
BHATKHEDI TEH. MHOW (MADHYA PRADESH)

ABHAY SINGH S/O RAMAYAN , AGED ABOUT 22
4. YEARS, OCCUPATION: STUDENT VISHWAS NAGAR
CHOPATI KISHANGANJ TEH. MHOW (MADHYA
PRADESH)

RAMLAL S/O DEVAJI , AGED ABOUT 47 YEARS,
5. OCCUPATION: AGRICULTURIST VILL BHATKHEDI
TEH. MHOW (MADHYA PRADESH)

.....APPELLANTS

(BY SHRI ASIF WARSI, ADVOCATE FOR APPELLANTS NO.1 TO 4)

(BY SHRI VIVEK SINGH, ADVOCATE FOR APPELLANT NO.5)

AND

**THE STATE OF MADHYA PRADESH GOVT. THRU P.S.
KISHANGANJ TEH. MHOW, INDORE (MADHYA
PRADESH)**

.....RESPONDENT

(BY SHRI K.K. TIWARI, GOVERNMENT ADVOCATE)

RESERVED ON : 09.01.2024

PRONOUNCED ON : 25.01.2024

*This Criminal Appeal having been heard and reserved for order/judgment, coming on for pronouncement this day, **Justice Devnarayan Mishra** passed the following:*

JUDGMENT

Appellants have filed this appeal under Section 374 of the Code of Criminal Procedure, being aggrieved by the judgment dated 27.06.2013, passed by Second Additional Session Judge, Mhow, District Indore in Session Trial No.213/2010 whereby learned trial Court convicted the appellants under Sections 302/34, 120(B) of the IPC and sentenced each of them to undergo imprisonment for life with fine of Rs.1,000/- each, appellant no.1 Arun also convicted under Section 25 (1-b)(a) and 27 of Arms Act and sentenced 2 years R.I. & 3 years R.I. with fine of Rs.200/- and Rs.1,000/- respectively with default stipulation.

02. The prosecution story, in a nutshell is that on 06.11.2009 in the evening, the complainant Devi Singh (PW-1), Madhubala (PW-4), Mehar Singh (PW-6), Gopal (PW-8) and Abhay Singh Patel (PW-11) were working on their field situated at village Bhaatkheri and they were constructing a *Dhaba*. At around 05:00 pm, deceased Mohan Singh's friend Vijay Dongre (PW-5) came there to visit him. After staying for a while, Vijay Dongre (PW-5) requested to deceased Mohan Singh to

drop him at *Choupati* by his motorcycle. The deceased brother's son Abhay Singh Patel was also present there and he had to get a hair cut, so on motorcycle Vijay Dongre, Abhay Singh and deceased went towards *Choupati*. After dropping Vijay Dongre at *Choupati*, deceased Mohan Singh got make haircut of his brother's son Abhay Singh at saloon situated near *Choupati* and was returning to his field. At that time, Madhubala (PW-4) with his brother-in-law Gopal (PW-8) went towards the spot because she was having doubt that the appellants/accused persons went toward that direction. At that time, Abhay Singh Patel (PW-11) came running towards Madhubala crying & screaming and informed that some persons are assaulting the deceased. On that, Madhubala (PW-4) went on the spot and saw the incident. At that time, Devi Singh (PW-1), Mehar Singh (PW-6) and Gopal (PW-8) also reached on the spot.

03. On that, Devi Singh (PW-1) lodged an F.I.R. and merg intimation and on that basis Crime No.458/2009 under Section 302/34 of the IPC was registered at Police Station Kishanganj. In that report, complainant Devi Singh (PW-1) has stated that appellant no.5 Ramlal and one other person in a suit boot was running from the spot. Someone via telephone also informed about the said incident to police station Kishanganj. On that information, Exhibit-P/38 (*Rojnamcha*) was recorded. Merg intimation under Section 174 of the Cr.P.C. was recorded as Exhibit-P/42.

04. During investigation, spot map (Exhibit-P/23) was prepared and from the spot motorcycle of the deceased, 1 empty (used) cartridge of . 12 bore, blood stained stone, earthen soil & blood stained soil were recovered. The autopsy was conducted on the dead body of the

deceased. During investigation, accused persons were arrested and on the instance of appellant no.1 Arun and appellant no.2 Radheshyam motorcycles were recovered and on the instance of appellant no.1 Arun Gurjar, one 12 bore country made pistol, an empty cartridge and his blood stained clothes were recovered.

05. The incriminating articles i.e. firearm - two empty cartridges, piece of stone, earthen soil, blood stained soil and the clothes of the appellant no.1 Arun and deceased Mohan Singh was recovered from the body of deceased were send for FSL.

06. After investigation, the charge-sheet was submitted before Judicial Magistrate First Class, Mhow, District Indore and after commitment of the case, the case was submitted for the trial before the Second Additional Session Judge, Mhow, District – Indore.

07. The trial Court framed the charges under Sections 120-B, 302, 201 of the IPC and against Arun 25(1-a)(b) and 27 of the Arms Act. The charges read over to the appellants, who pleaded their innocence and abjured the guilt and prayed for trial.

08. The trial Court recorded the evidence of the prosecution and examined the appellants under Section 313 of the Cr.P.C. The appellants had not examined any witness in their defense. After hearing both the parties the trial Court has passed the impugned judgment by which the appellants have been convicted and sentenced as stated in paragraph no.1 of the judgment.

09. Shri Asif Warsi, learned counsel for the appellants no.1 to 4 have argued that the appellants have falsely been implicated in the case. The trial Court has seriously erred in ignoring the testimony of Dr. L.S. Verma (PW-2) as this witness has clearly stated that the injury no.1

found on the body of the deceased is stab wound and that was caused by some piercing object and it was not a gunshot injury. The trial Court has wrongly held that it was a gun shot injury. Dr. L.S. Verma (PW-2) has also not mentioned which type of weapon was used in the crime and no pellets & bullets were found in the body of deceased in postmortem, hence, the trial Court has committed the grave error in holding that the firearm was used in the case.

10. The learned counsel for the appellants has further argued that complainant Devi Singh (PW-1) and the appellants are of the same village and Devi Singh has not named any person as an accused in F.I.R. (Exhibit-P/1). He has only stated that appellant no.5 Ramlal and one other person in a suit boot was running from the spot and in the Court, Devi Singh (PW-1) has stated that he has saw all the appellants on the spot causing injury to his son but this fact has not been mentioned in the F.I.R. as well as in Exhibit-D/1 that are the police statement recorded under Section 161 of the Cr.P.C. The trial Court has relied upon the evidence of Madhubala (PW-4) while the witness Mukesh (PW-18) has stated that Madhubala was not present when he went to the field of the deceased. The statement of Madhubala was recorded under Section 161 of the Cr.P.C. after 17 days of the incident and the statement of Madhubala is full of contradictions, omissions and exaggeration and the story narrated in the examination-in-chief does not find place in the statement recorded by the police officer under Section 161 of the Cr.P.C. (Exhibit-D/2), thus, the statements of Madhubala (PW-4) cannot be relied.

11. The witness Abhay Singh (PW-11) i.e. a child of 7 years has also improved his statements and statement of this witness in the Court

are full of the contradictions, omissions & exaggeration and this witness in examination-in-chief stated the story that does not find any place in Exhibit-D/5. Thus, on the statement of this witness, no conviction can be maintained. The prosecution witnesses, who supported the prosecution story is related to each other and they were having enmity with the appellants and their family, so they cannot be relied without the corroboration from the independent source. The trial Court has also not recognized the fact that on 6th November, 2009 at 06:30 pm it become dark and this fact is admitted by Vijay Dongre (PW-5) in para no.7 of his statement, so it is observed that the incident cannot be seen from the distant place.

12. The Investigating Officer, D.S. Parmar (PW-20) in his examination has stated that he has investigated the spot and has admitted that he found no pellet or bullet from the spot. The police officer has also stated that he has sealed and seized the country made *katta* and cartridge for sending to FSL on 09.12.2009 and was received by FSL on 13.01.2010 and same was received on FSL on 10.02.2010 then how it is possible that armorer (PW-20) tested the *katta* and cartridge on 19.12.2009. Under these circumstances, the seizure of *katta* and cartridge and sending it for FSL examination became highly doubtful and on that the FSL report cannot be relied.

13. It is further argued that the Investigating Officer not has produced the *Malkhana* register and entries made therein by that it can be ensured that the seized articles were kept intact in the *Malkhana* of the police station and the fire arm & cartridge were not tempered. The recovery memo from the appellants has not been supported by the prosecution witnesses but the trial Court has relied on the recoveries

made by the Police Officer.

14. Learned counsel has further argued and placed reliance on the judgment of *Pratap Singh and another vs. State of Madhya Pradesh* reported in *1970 MPLJ 978* in which it has been held that accused seen running away soon after the occurrence – this act cannot lead to the conclusion that the murder was committed by the accused. The running away of the accused could be due to fear of being implicated in the crime.

15. He has also placed reliance upon the various judgments passed by the Apex Court in the case of *Shivaji Dayandu Patil vs. State of Maharashtra* reported in *1989 SCC (Cri) 621*, *Darshan Singh vs. State of Punjab and Another* reported in *(2010) 2 SCC 333*, *Jagdishchandra and another vs. State of M.P.* reported in *1998 (1) J LJ 217*, *State of M.P. vs. Deoki Nandan* reported in *1987 Cri.L.J 1016*, *Ramkumar Pandey vs. State of Madhya Pradesh* reported in *1975 SCC (Cri) 225*, *Ganesh Bhavan Patel and Another vs. State of Maharashtra* reported in *(1978) 4 SCC 371* and argued that the principles laid down in the above cases are applicable in this case also and on that basis the appellants have wrongly been convicted by the trial Court. Hence, the appeal be allowed and the appellants be acquitted from the charges.

16. Shri Vivek Singh, learned counsel for the appellant no.5 Ramlal has argued that no overt act of Ramlal has been stated by the prosecution in F.I.R. as well as in merger intimation and he on the basis of judgment i.e. *(Teni Yadav @ Rajiv Kumar and Others vs. State of Bihar, 2023 Legal Eagle (PAT) 296 : 2023 Gojuris (PAT) 296)* argued that no bullets and pellets have been recovered from the body of the deceased and statement of expert that is not substantial evidence nor the

ballistic expert report is a substantial evidence, though it is a relevant but without scientific data it cannot be relied upon and argued that the appellant Ramlal has been falsely implicated on the basis of previous enmity between the parties. No eye-witness has been examined by the prosecution agency and the statement of the family members of the deceased are full of contradictions, omissions and exaggerations. So, on that basis, the conviction cannot be sustained, hence, the appellant no.5 Ramlal be acquitted from all the charges.

17. Shri K.K. Tiwari, learned Government Advocate for the respondent/State has submitted that the trial Court has gone through the entire record and after due appreciation of the ocular as well as documentary evidence have recorded, the conviction and sentence that is based on the due appreciation, therefore, no interference can be made in the impugned judgment and sentence. Hence, the appeal be dismissed.

We have heard the learned counsel for the parties and perused the record.

18. On the point of the spot of incident and presence of the witnesses, it is mentioned that as per FIR in the prosecution case deceased with his family members was constructing a house for *Dhaba* in village Bhatkhedi. At that time, deceased's friend Vijay Dongre (PW-5) came there and after talking for a while deceased Mohan Singh said to his father Devi Singh (PW-1) that he had to drop Vijay Dongre (PW-5) at *Choupati* and hair of Abhay Singh (PW-11) has to be cut, so the Abhay Singh (PW-11), Vijay Dongre (PW-5) and deceased went on motorcycle to *Choupati* and after dropping his friend Vijay Dongre (PW-5), deceased Mohan Singh got his brother's son haircut and after

haircut when he was returning to his field at that time the incident took place near Choupati.

19. On this point, the independent witness Vijay Dongre (PW-5) has stated that on the date of incident between 05:30 to 06:00 PM he went to visit his friend deceased Mohan Singh on his field near four-lane road in village Bhatkhedi. On their field, deceased's father, elder brother, younger brother and nephew were present. After visiting the deceased, deceased Mohan Singh dropped him by his motorcycle at *Chopati*. His nephew have to make hair cut, therefore, the deceased left his friend at *Chopati* and went with his nephew in hair cutting saloon and after that he returned his home.

20. In the statement of this witness, only this fact had been contradicted that the wife of the deceased Madhubala (PW-4) was not present on the spot. On the rest of the facts this witness has supported the case.

21. The complainant Devi Singh (PW-1), father of the deceased, Madhubala (PW-4), wife of the deceased, Gopal (PW-8) brother of the deceased, Hemraj (PW-10) and Abhya Singh (PW-11) have stated that on the date of incident, in the evening time, all of them were present on their field situated at village Bhatkhedi. They were constructing the house by erecting wooden polls to operate a *dhaba* on their field that was near four-lane road connecting i.e. Agra-Bombay road and the deceased Mohan Singh went to drop his friend Vijay Dongre (PW-5) at *chopati* with Abhay Singh (PW-11) as Abhay Singh's hair had to be cut in the saloon.

22. Thus, above witnesses were present on their field i.e. around 1 - 1.15 kms. away from the spot. In this case, the appellants have

challenged the findings of the trial Court that no firearm was used in the incident as no pellets/bullets were recovered from the body of the deceased and the medical expert L.S. Verma (PW-2) has clearly admitted that the injury found on the back part of the body of the deceased was punctured wound and caused by the sharpened edge weapon.

23. On this argument, we have gone through the material document (Exhibit-P/38) and found that an unknown person by a telephonic call informed to the Police Station Kishanganj that in village Bhatkhedi near four-lane road, deceased Mohan Singh Patel has been shot dead. The said intimation was recorded by Head Constable - Aadesh Choudhary on 06.11.2009 at 20.01 pm in Daily Diary Entry No.324(A) and on that information, Sub-Inspector D.S. Parmar (PW-20) alongwith Nandramm (Head Constable), Sanjay (Constable) and another Constable went towards the spot.

24. This is the first point in the postmortem report, Dr. L.S. Verma (PW-2) has stated that he conducted the postmortem on the dead body of the deceased Mohan Singh Patel on 07.11.2009 and he has found the various injuries i.e. stab wound at renal angle (back side) that was entrance wound of 1" x 1", cavity deep round in shape piercing the lower lobe of liver and other injuries were also found. Dr. L.S. Verma (PW-2) has further stated that a non-metallic hard piece measuring 1" long and ½" broad was recovered on an opening of an abdomen of the deceased.

25. On this point, Dr. L.S. Verma (PW-2) has stated that the clothes of the deceased and this non-metallic hard piece was sealed and was handed over to the police. Constable Shrikrishna (PW-15) has

supported that after postmortem examination, the viscera and in a sealed packet the clothes of the deceased brought by him and handed over to Head Constable Siyaram (PW-16) and Siyaram (PW-16) has also supported that he has received the same in a sealed condition and prepared seizure memo (Ex.P/25). Yogesh Patil (PW-14) has also supported that the sealed packet was brought by constable Shrikrishna and was deposited in Police Station Kishanganj and seizure memo (Ex.P/25) was prepared before him.

26. The witness D.S. Parmar (PW-20), the Investigation Officer has stated in para no.8 of his statement that the sealed materials were sent for the FSL to State Forensic Science Laboratory, Sagar and the ballistic expert by his report Exhibit-P/36 has opined that the non—metallic hard piece was marked as **W-1** and has opined that this was disfigured part of the cushion wedge of 12 bore cartridge.

27. On the examination of the clothes of deceased Mohan Singh, the ballistic expert found a cut of 2' x 2.5' with blackening and on chemical examination Lead (Pb) and Nitrate (NO₃) were found on the half sleeves t-shirt, one hole measuring 4' x 3' inches in the same place as t-shirt was found on the sando vest (*sando baniyan*) and in this also the test of nitrate and lead was found positive. Thus, in the clothes of deceased gun shot hole and gun powder was found.

28. The trial Court has discussed the above evidence and if the medical expert had not conducted the x-ray examination of the dead body, prosecution cannot be blamed for that. If, the x-ray examination has been conducted, surely, the pellets/bullets has been recovered from the dead body of the deceased as the part of the cartridge was recovered from the abdomen of the deceased. From the above discussion, it is

clear that the deceased was murdered by the gun shot and the injury sustained on the head and frontal part of the face and deceased died on the spot due to those injuries. Thus, the incident occurred on 06.11.2009 near the field of the deceased on four-lane near about 06-6:30 pm at village Bhatakhedi and he was murdered by gun-shot.

29. In this case, the prosecution witness Akram (PW-7) has not supported the prosecution case. In the same way, no other independent witness has supported the incident.

30. Devi Singh (PW-1), father of the deceased has stated that he with deceased Mohan Singh, Madhubala (PW-4), Mehar Singh (PW-6), Gopal (PW-8) and Abhay Singh (PW-11) were working on the field and at that time deceased's friend Vijay Dongre (PW-5) came there and deceased went to drop his friend Vijay Dongre at *Choupati*, at that time incident happened. He has further stated that the appellants' field was near their field and appellants Arun, Radheshyam, Narendra, Abhay Singh s/o Ramayan and Ramlal passed through his field. His daughter-in-law Madhubala (PW-4) saw the appellants and having doubt that they may quarrel with her husband (deceased-Mohan Singh). On that, she went towards the place of incident and she also followed them and 10 feet ahead from the place of incident, Abhay Singh (PW-11) met her and told her that 4-5 persons are assaulting the deceased and blood oozing from the abdomen of the deceased and when she reached on the spot, the appellants were assaulting her son and on seeing her, appellants ran away from the spot. This witness has also stated that he has lodged the FIR.

31. On this point, the Madhubala (PW-4) has also stated that the accused persons were having previous enmity with her husband and on

the date of incident the appellants/accused persons were gathered near their field and when the deceased went to drop his friend Vijay Dongre, the appellants Arun, Ramlal, Radheshyam and Narendra and one more lad boy went towards *Choupati*, so on doubt, she informed about it to Devi Singh (PW-1) and Gopal (PW-8), she went in the four-lane direction.

32. Madhubala (PW-4), the wife of the deceased has supported the version of Devi Singh (PW-1) and has stated that her husband departed to drop his friend Vijay Dongre (PW-5) towards the *choupati*. She saw the movement of the appellants and they were having previous enmity with her husband, so she followed the appellants and before she reached near four-lane road, Abhay Singh (PW-11) came running towards her crying & screaming and informed that some persons are assaulting the deceased and after that she heard the sound of fire and she saw that Ramlal was beating her husband by stone. Appellant Arun was having a country-made pistol and he was also assaulting the deceased with stone. Appellants Radheshyam and Narendra were also assaulting him with stone and when she reached on the spot, all the accused persons ran away.

33. In the same way, Mehar Singh (PW-6) and Gopal (PW-8) have supported the statement of Madhubala (PW-4).

34. The prosecution witness Abhay Singh (PW-11) has also stated that he went with the deceased and deceased's friend Vijay Dongre on motorcycle. Deceased dropped the Vijay Dongre at *Choupati* and after that he went with the deceased in hair cutting saloon where he got his haircut and after that he was returning with deceased. On the way of their returning, when they reached near the place of incident, some

persons on the bikes came and dashed the bike of the deceased but even after the collision, deceased Mohan Singh and Abhay Singh (PW-11) were sitting on the bike. Appellant No.1 Arun fired on the deceased in his abdomen and appellants Arun, Radheshyam, Narendra, Abhay Singh and Ramlal assaulted the deceased with stone on his face and thereafter, he ran away from the spot and on seeing his elder mother (*badi mummy*), he narrated the whole story to her.

35. To ascertain the presence of the witness Devi Singh (PW-1), Madhubala (PW-4), Mehar Singh (PW-6), Gopal Singh (PW-8) and Abhay Singh (PW-11) are concerned in the FIR (Exhibit-P/1) Devi Singh (PW-1) has stated that Vijay Dongre (PW-5) came on their field and the deceased went to drop him and on the same time he also took the Abhay Singh (PW-11) to cut the hair and in FIR it is also mentioned that her daughter-in-law reached on the spot before him.

36. The witness Madhubala (PW-4) has clearly stated that when she reached on the spot she heard the fire of a gun and Ramlal, Arun Radheshyam, Narendra and one more lad (boy) who were hitting the deceased with stones.

37. In the same way, witness Abhay Singh Patel (PW-11) has stated that when he was returning with deceased Mohan Singh, on the way, appellants Arun, Radheshyam, Narendra, Ramlal and Abhay Singh hit them by their motorcycle and after that appellant Arun shot on abdomen of the deceased. The appellants Arun, Radheshyam, Narendra and Abhay and Ramlal hit the face of the deceased with stones. He ran away from the spot. On the way Madhubala met him and he narrated the fact to her.

38. The witness Madhubala (PW-4) in her cross-examination admitted that when she reached on the spot the assailants ran away from the spot.

On the point that the accused Ramlal, Narendra and another lad (boy) were hitting the deceased with stones and appellant Arun was having pistol in his hand.

39. It was asked whether she has told this fact to Police Officer during the statement recorded under Section 161 of the Cr.P.C. and this witness said yes and the police officer D.S. Parmar (PW-20) in para no.19 has admitted that the Madhubala (PW-4) in her statement (Exhibit-D/2) has not stated to him that Ramlal was hitting the deceased by stones. Appellant no.1 Arun was having a pistol and he was also hitting the deceased with stones and in the same way one more lad (boy) was hitting the deceased with stones, thus, Exhibit-D/2, the statement of this witness recorded under Section 161 of the Cr.P.C. are proved, and in that statement this fact is missing that the accused persons were hitting the deceased with stones but instead the names of the appellants Arun, Ramlal, Narendra, and Radheshyam are mentioned and lad (boy) is also stated, thus on this point the witness has improved her statement and as per the statement before the Court and to Police Officer as per Exhibit-D/2 she stated the name of four accused persons and a lad, thus she has not disclosed the name of Abhay Singh Gurjar.

40. In the same way, Abhay Singh Patel (PW-11) was contradicted by his statement under Section 161 of the Cr.P.C. that he has told the names of accused persons but the witness D.S. Parmar (PW-20) in his cross-examination para no.23 has stated that appellant Arun Singh shot the deceased in the abdomen and this witness Abhay has also not stated in his statement to him that appellants Arun, Radheshyam, Narendra, Ramlal and Abhay Singh were hitting on the face of the deceased by stones.

41. Thus, the witness Abhay Singh (PW-11) has improved his

statement and he has stated in the Court the name of other four persons whereas in the police statement (Exhibit-D/5) this witness has stated that Arun or three others persons were there and they were assaulting the deceased when standing towards the roadside.

42. From the above, it is clear that both of the witnesses in the police statements have not disclosed the name of Abhay Singh Gurjar, otherwise, they would have stated the name of this accused in their statement before the Police Officer.

43. Thus, the presence of appellants Ramlal, Arun, Narendra and Radheshyam on the spot is proved beyond the reasonable doubt.

44. Against the appellant No.1 Arun this fact has been also brought on the record that the Arun was arrested from 08.11.2009 and the Investigation Officer, D.S. Parmar (PW-20) has stated that he was interrogated and on his disclosure memorandum Exhibit-P/16 was prepared in the presence of witness Amar Singh (PW-12). The witness Amar Singh (PW-12) has stated that the accused persons were arrested but on the rest of the points he has not supported the prosecution case but he has admitted his signature (Ex.-P/16). The witness Mukesh (PW-18) has also not supported the prosecution case but has admitted his signature in (Exhibit-P/16) and Police Officer D.S. Parmar (PW-20) has stated that after the memorandum, appellant Arun has make recovered a country made pistol from his Stackyard (*Khaliyan*) and seizure memo was prepared (Exhibit-P/20). As per Exhibit-P/20, one country-made pistol and an empty (used cartridge) of .12 bore was seized.

45. The Police Officer D.S. Parmar (PW-20) has further stated that on the disclosure of the accused on 11.11.2009, he has seized the clothes of this accused and stones from the well situated in the field of Daryav Singh.

46. This witness has admitted that he recovered the firearm and seizure slip was pasted on the firearm.

47. On that basis, learned counsel for the appellants have argued that the firearm was not properly sealed and in the evidence *Malkhana* register has not been produced and thus the firearm was not kept in the proper custody in the sealed condition and on 09.12.2023 the draft of Exhibit-P/34 was prepared by Bhim Bahadur (PW-3) and he has stated that he inspected the firearm on 19.12.2009 and the firearm was in operational condition. He has also examined the cartridge and found that if the firearm was made by that cartridge it may cause causalities and this witness has proved the report Exhibit-P/4.

From that point, We have perused the record.

48. In this case, though, the independent witnesses has not supported the prosecution case but as per the Investigation Officer on 06.11.2009 an empty cartridge was recovered from the spot and recovery memo (Exhibit-P/10) was prepared and the cartridge and pistol were recovered from the possession of appellant no.1 Arun and sent for ballistic examination through Exhibit-P/34.

49. As per the Exhibit-P/35, the seized articles were received in FSL on 13.01.2010, so the firearm was examined by Bhim Singh (PW-3) on 19.12.2023. Nothing adverse can be inferred. And the witness Bhim Singh was also stated that the firearm was in a sealed condition and hesealed and returned to the concerned police station.

50. The ballistic report (Exhibit-P/36) is relevant and proved under Section 293 (i)(iv)(a) of the Cr.P.C. without formal proof. The test fire was conducted and after test fire the percussioned cap of empty cartridge that was recovered from the spot and seized from the appellant Arun's

possession were compared through microscope and it was found that in the cap, the mark of firing pin were similar and on that basis the ballistic expert has opined that the cartridge recovered from spot was fired from the pistol that was recovered from the possession of the appellant Arun.

51. Thus, against the appellant Arun it is also proved that the weapon used in the offence was recovered from his possession.

52. As per the Police Officer and the report of FSL (Exhibit-P/37), the blood stains were found on the clothes recovered from the spot though the prosecution failed to prove that it was of the same group that of deceased and as per the FSL report (Ex.P/37) in the clothes of the deceased blood of 'O' group was found but nothing has stated regarding the group of Rh factor of the blood found on the clothes of the accused.

53. Thus, against the Arun except the statement of eye-witnesses it is also proved that the firearm was used in the offence was recovered from the possession of him and he has not explained how this came in his possession.

54. Regarding the accused Ramlal from the very beginning this fact brought that he was present on the place of incident and the prosecution witness Devi Singh (PW-1) and Madhubala (PW-4) have clearly stated that he was on the place of incident. At that time he was present with the other co-accused persons and he has not explained the reason why he was present there and the offence was being committed in the ordinary course, it will be presumed that he was present to commit the crime and on this point the judgment relied by the appellant of *Pratap Singh and another* (supra) with the above facts does not help the appellants due to factual difference.

55. In this case the police has seized motorcycle from appellant

Radheshyam as per the Exhibit-P/20 and from Arun Exhibit-P/21 and the documents of that registration of that motorcycle MP-09-MD-7239 from Daryav Singh as per Ex.P/26 but on that basis no conclusion can be drawn neither in FIR nor in the statement of witnesses, the number of the motorcycle were mentioned, so on that basis nothing can be drawn.

56. Regarding the presence of the appellants Narendra, Radheshyam, Arun and Ramlal there is a clear evidence of Devi Singh (PW-1), Madhubala (PW-4), Abhay Singh (PW-11) and on that basis as the trial Court has also discussed the point that witnesses Madhubala (PW-4) and Abhay Singh (PW-11) has identified the accused persons but in this case all the accused persons except Abhay are of the same village and somewhat related to each other. But, from the fact brought on the record as stated above the presence of the appellants Narendra, Radheshyam, Arun and Ramlal is proved and they were present on the spot and actively participated in the crime.

57. Regarding the presence of Abhay Singh (appellant no.4) in the statement of Madhubala (PW-4) though she has identified all the accused persons on the spot in paragraph no.2 of her examination-in-chief she has not stated his name nor stated that the accused Abhay present in the Court was also accompanied the other accused persons. In the same way, she has stated that a lad was also hitting his husband by stones but she has also not disclosed his name nor he has identified that the accused present in the Court named Abhay was also on the spot and hitting her husband.

58. In the same way, in the statement of witness Abhay Singh Patel (PW-11) though he has stated the name but as discussed above he has improved his statement and in his statement the Police Officer (Ex.D/4) the name of this appellant is missing and he has stated that appellant Arun was

residing behind his home and other three persons of his *Gali* (a narrow passageway between two buildings) were hitting the deceased.

59. Nothing incriminating has been recovered from the accused Abhay Singh. No test identification parade was conducted regarding to that person.

60. Thus, against this appellant Abhay Singh, the prosecution case has become doubtful.

61. On the point of Section 25 and 27 of Arms Act, Dinesh Dubey, Reader to ADM (PW-17) has proved that when he was posted as Reader to ADM, Indore and in Crime No.458/2009, the case diary, Armorer Report and a country made pistol of .12 bore was produced before the ADM, Indore and on that basis the ADM Indore under Section 39 of the Arms Act has granted the sanction to prosecute the accused Arun and proved the sanction order (Exhibit-P/26) and this witness has identified the signature of ADM Shri Patidar on the sanction order and has clearly stated that on the dictation of ADM, Indore he has prepared the sanction order.

62. Thus, the sanction under Section 39 of the Arms Act has been proved by the prosecution.

63. Thus, from the above discussion, it is proved that the appellants except Abhay Singh s/o Ramayan were present on the spot and appellant no.1 Arun shot the deceased by country made pistol of .12 bore and rest of the accused persons have assaulted the deceased via piece of stones and crushed the face and fractured the head of the deceased. Due to these injuries, deceased died due to Hemorrhage shock and the prosecution has also been successful to prove beyond reasonable doubt the offense of 25 Arms Act against the appellant Arun and the illegal firearm was used in the commission of the crime. Thus, the offence punishable under Section 27 of

the Arms Act is also beyond reasonable doubt.

64. As discussed above, regarding the presence of appellant Abhay Singh is doubtful and nothing incriminating has been recovered from the possession and other circumstances has been brought against the Abhay Singh, he is entitled to get the benefit of the doubt but the trial Court has not considered this point and convicted the appellant.

65. I have perused the case law of **Shivaji Dayandu Patel** (supra) in that case the conduct of the witness who was the wife of the deceased and on that basis her conduct was found highly unnatural and on that basis her statement was not believed.

66. In this case, the facts are totally different and the presence of witness Madhubala (PW-4) is fully supported by the witnesses and presence on the spot was natural, so on that basis nothing can be drawn.

67. In the case of **Darshan Singh** (supra) as cited above, the accused fired .12 bore gun which has number of pellets and pellets were not recovered from the body of the injured and on that basis the Apex Court has held that if in the firearm of .12 bore gun no pellets were recovered, the injury of firearm cannot be proved. In the present case, as discussed above, due to not a proper examination of the deceased pellets were not found. So on that basis the appellants are not entitled to get the benefit of this law held by the Apex Court.

68. In the judgment of **Jagdishchandra** (supra), this Court has held that when the accused persons are acquainted to the complainant and their name has not been disclosed in the FIR then the adverse inference be drawn and and when the seized material of firearm is not kept in the safe custody of *Malkhana* before sending to expert, the recoveries of no value.

69. As in the present case, I have discussed that though the Police

Officer has admitted in the cross-examination that after seizure he pasted the seizure slip on the firearm but it was not clarified to him that the firearm and cartridge were sealed and as per the statement of (PW-3) when the articles were sent for examination it was in the seized conditions and furthermore in this case the firearm was recovered from the possession of the accused/appellant Arun and from the ballistic report it is clear that the cartridge recovered from the spot was fired from the same weapon recovered from the accused.

70. The judgment of **Ramkumar Pandey** (supra) laid down the principles that there are serious infirmities in the FIR and the name of the eye -witnesses are not mentioned in the FIR.

71. As discussed above, in the case before this Court, the two persons as Devi Singh and name of Madhubala (PW-4) are clearly mentioned and from the independent witness the presence of other witnesses is also proved. So on that basis appellants are not entitled to get any benefit.

72. The other important judgment cited on the point **Ganesh Bhavan Patel** (supra) in this case it is held by the Apex Court that delay in examination of eye-witnesses by Investigating Officer on peculiar fact of a case amounts a serious infirmity to the prosecution case.

73. In this case, basically the statement of Madhubala (PW-4) and Abhay Singh (PW-11) were recorded on 23.11.2008 after 17 days of the incident but the Investigating Officer has clearly stated that she was in the state of sorrow so he has not recorded her statement and he has also admitted the fact that he cannot disclosed that this fact was in the case diary or not.

74. But, in this case, the statement of witness Devi Singh (PW-1) was recorded on the date of incident i.e. 06.11.2009 and Mehar Singh (PW-6)

and Gopal (PW-8) on 13.11.2009 only the statement of two witnesses Madhubala (PW-4) and Abhay Singh (PW-11) were recorded on 27.11.2023 and police officer has explained the reason, so on that basis no adverse effect can be drawn.

75. The judgment of Deoki Nandan (supra) was also cited but on the point that witnesses were not disclosed in the FIR, on that basis nothing adverse can be drawn as the presence of the witnesses on fired near the spot is proved beyond reasonable doubt. No witness is a chance witness.

76. Learned counsel appearing on behalf of appellant no.5 Ramlal has relied on the judgment of Teni Yadav @ Rajiv Kumar (supra), I have gone through the judgment and in that judgment the Patna High Court has discussed how to interpret the statements of witnesses regarding under section 161 of the Cr.P.C. and how the electronic evidence have to be proved, how the identity of the weapon have to be established.

77. In this case, the ballistic expert has clearly stated the ground on what basis the firearm was identified and the prosecution and defence has proved the previous statement of the accused persons as per Section 162 of the CrPC and 145 of the Evidence Act.

78. The learned counsel for the appellant no.5 Ramlal has further argued that due to enmity, the appellant has been falsely implicated in the case. On this point, the prosecution has also produce the evidence and has examined the witness Shripal Prajapati (PW-22) and Vijay Kumar Pandey (PW-23). The defense has also stated that they have been falsely implicated but the enmity between the parties is double-edged sword. On a one side it gives the motive for the offence and other side it may be the cause to falsely implicate the accused persons. In this case from the due-appreciation of evidence, the case of the false implication is not proved.

Hence, the benefit of this point cannot be granted to the appellant.

79. From the above discussion, the appeal regarding **appellant no.4 Abhay Singh** is *allowed* and he is acquitted from the charges of 302/34 and 120-B of the IPC. The conviction of the rest of the appellants under Sections 302/34 & 120-B of the IPC is confirmed and the conviction of appellant No.1 – Arun under Section 25 and 27 of the Arms Act is also confirmed. The sentence imposed by the trial Court is also affirmed.

80. Thus, the appeal regarding **appellant no.4 Abhay Singh** is *allowed* and for the rest of the appellants, appeal stands *dismissed*. Thus, the appeal is *disposed of* as above.

81. The bail bonds of the **appellant no.2 – Radheshyam, appellant no.3 - Narendra, appellant no.4 - Abhay Singh and appellant no.5 - Ramlal** are cancelled and appellants **Narendra, Radheshyam and Ramlal** shall surrender before the trial Court to undergo the rest of the sentence.

82. The order of the trial Court regarding the test properties is affirmed.

83. Registry is directed to send a copy of this judgment to the trial Court alongwith the record of the trial Court for compliance.

(S.A. DHARMADHIKARI)
JUDGE

(DEVNARAYAN MISHRA)
JUDGE

v s