

(2015) 04 AHC CK 0241
In the Allahabad High Court
Case No : Criminal Appeal No. 527 of 1986

Bhim Sen and Others

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2015) 6 ALJ 89 : (2015) 90 ALLCC 454

Hon'ble Judges : Arvind Kumar Tripathi, J; Pramod Kumar Srivastava, J

Bench : Division Bench

Advocate : R.S. Tripathi, A.P. Tewari, Keshav Sahai and Roopak Chaubey (AC),
for the Appellant; Chandrajeet Yadav, A.G.A., Advocates for the Respondent

Final Decision : Dismissed

Judgement

Arvind Kumar Tripathi, J—The present Criminal Appeal has been filed against the judgment and order of conviction dated 12.2.1986 passed by learned Special Judge, Budaun in S.T. No. 359/84 convicting and sentencing the appellants Bhimsen and Bharosey to undergo three year's R.I. under section 148 I.P.C. and sentencing to life imprisonment under section 302/149 I.P.C. The accused-appellant Chandrapal was convicted and sentenced to undergo three years" R.I. and life imprisonment under section 302 I.P.C. and under section 302 read with section 149 I.P.C. The appellant Prakash, Jodha, Mangali and Sundraj were convicted and sentenced to undergo two years" R.I. under section 147 I.P.C. and life imprisonment under section 302 I.P.C. read with section 149 I.P.C. Shri R.S. Tripathi, learned Advocate appeared on behalf of the appellants No. 1, 2, 6 and 7.

Shri Roopak Chaubey Advocate (Amicus Curiae) appeared on behalf of the appellant No. 3 Bharosey.

2. In respect of the appellant Nos. 4 and 5 this appeal stands abated vide order dated 23.2.2015. Shri Chandrajit Yadav, learned A.G.A. appeared on behalf of the State of U.P.

3. This appeal was heard and judgment was reserved on 7.4.2015.

4. The prosecution case in brief is that the first informant Babu Ram, son of Udho, r/o Risauli, PS Bilsa, District Budaun filed the First Information Report on 30.3.1984 at about 7.40 A.M. with the allegation that one year ago a dispute took place for construction of Nali for flow of water and for Hand-pipe, hence there was strained relation in between Udho and appellant Bhimsen and Chandrapal though they were related. Bhagwan Das who is son of the accused Bhimsen beaten Ramesh, the nephew of the informant PW-1 Babu Ram. There had been altercation in between Babu Ram and son of the deceased Udho and accused-appellant Bhimsen. The deceased Udho and deceased Ramesh had gone to his agricultural field, where crop of potatoes were harvested and stored, for supervision and protection of the same. After providing food to them, informant, his wife alongwith her children were sleeping in the house. Smt. Bhagwan Devi (sister of the informant) was sleeping in Osara as in those days she was in her Maiyaka. During mid night someone knocked the door and after some hours his wife woke up and in the meantime door was opened. The informant ran to the corner of the house and four persons entered into the house. One of the persons Chandrapal said that he had done to death two persons at the field and he came there in search of the informant. They fired at his wife Ramrati causing firearm injury. After hearing cry he raised alarm on which his cousin Ram-pal came there, then he also saw the appellant Bhimsen, Chandrapal, Bharosey, Prakash, Mangali, and Sundraj, son-in-law of Bhimsen and one another unknown person. Subsequently some other persons reached there. Thereafter the informant alongwith Rampal, Surajpal, Sukhi and Tirmal went to the agricultural field where Udho, father of the informant and his nephew Ramesh were lying dead who had received firearm injuries. Thereafter with the help of the villagers he arranged bullock cart and took injured wife Ramrati for Bilsa. However, in the way near brick-clin of Satish she succumbed to her injuries. Thereafter he returned to the village and left the dead body of his wife on the bullock cart". He proceeded to the police station Bilsa situated at a distance of 9 km. Thereafter the matter was reported to the police and the First Information Report was lodged and registered at 7.40 A.M. on 30.3.1994 by Babu Ram. Chick report was prepared by head constable Lal Singh, Ext. Ka-1.

5. Investigation of the case was taken up by S.I.D.P. Juyal, PW-6, the then S.H.O. PS. Bilsa. He proceeded to the place of occurrence. He found the dead body of Ramrati on bullock cart. The inquest report was prepared in presence of Ramesh Singh, Suraj Pal, Rajpal, Ram Chandra Bharti and Man-galiram. The dead body was sent after completing formalities, to the district hospital for post-mortem examination. Thereafter inquest report of the deceased Udho and Ramesh were prepared and both the dead bodies were sealed and sent to the district hospital for post-mortem examination. He interrogated the informant, Smt. Baghwan Devi. He inspected the place of occurrence and prepared the site plan Ext. Ka 25. Blood stained and plain earth were taken in possession, exhibited as Ext. Ka. 15 and 16. Blood stained cloths were also taken in

possession. The sample of blood stained bed was also taken. Apart from other sample he had also taken ash Ext. Ka. 20 from near body of the deceased Ramesh. Thereafter the Investigating Officer came to the house of Babu Ram and after spot inspection, site plan Ext. Ka. 30 was prepared. Sample of blood stained KHES Ext. Ka 21 was also taken and sealed. One empty cartridges Ext. Ka. 22 was recovered from the room where Chandrapal shot fire upon the deceased Smt. Ramrati. "Broken Kunda" of the room was also recovered. Torch of Rampal was also recovered and given in supurdigi.

6. Post-mortem examination was conducted by Dr. S.R. Gupta PW-3 on 31.3.1984. He found following ante mortem injuries on the respective persons of the deceased:

ANTI-MORTEM INJURIES OF DECEASED RAMRATI

1. Gun shot wound of entry blackening and tattooing present over the upper part of abdomen measuring 2 c.m. x 1.5 x cavity deep .7 c.m. above umbilicus at 12 O" clock position. Wound directing inward, slightly laterally and slightly downward. On opening clotted blood present under the muscle tissue of wound stomach lacerated at two places, upper and posterior transverse and muscles, lacerated. Loop of small bowel lacerated at places (two). Mesentery lacerated. Kidney left side lacerated. All shots (pellets and cork pieces present underneath the skin over left side of back of abdomen. 1 c.m. below the 12th rib. One pint clotted blood present in the abdominal cavity. 49 small pellets and one cork piece one tickle were recovered from the body.

ANTI-MORTEM INJURIES OF RAMESH

"Gun shot wound of entry with blackening and tattooing present over the left side of back of abdomen 10 cm above the posterior superior iliac spin 6 cm lateral to middle line. Wound measuring 2 c.m. x 1.5 c.m. x cavity deep. On opening clotted blood present in the muscle and skin. Mesentery lacerated loop of bowels lacerated. Aorta lacerated 3rd lumber vertebral fractured. One cork piece and one tickle recovered. 23 pellets were recovered from the body at the side of spinal cord. One pint clotted blood present in the peritoneum cavity.

ANTE-MORTEM INJURIES OF UDHO

"Gun shot wound of entry present over the right side of abdomen with blackening and tattooing present around the wound measuring 2 c.m. x 1.5. c.m. x cavity deep 4.5 cm lateral to umbilicus at 10 O'clock position. Wound directing inward slightly medially on opening clotted blood present under the muscle tissue. Pericardium lacerated. Transverse and mesocolon, lacerated, loop of intestine lacerated at places. Aorta inferior vena cova lacerated. One tickle and one cork piece 8 pellets slightly big in size, were recovered from the body at adjacent to spinal cord. 1-1/2 pint clotted blood present in the peritoneal cavity."

7. The post-mortem of three deceased are Ext. Ka. 2, Ext. Ka 3 and Ext. Ka. 4. The cause of death was haemorrhage as a result of anti-mortem injuries.

Subsequently the investigation was handed over to Sub-Inspector CR. Sharma, PW-7 who took over the charge as S.H.O. at Bilsa. He arrested the accused appellant Jodha, Prakash and Mangli and interrogated. The accused appellant Sundraj was arrested by Sub-Inspector K.C. Tiwari on 15.8.1984. The accused appellant Bhimsen, Chandrapal and Bharosey surrendered in the Court on 13.9.1984. After completion of investigation charge-sheet Ext. Ka. 4 was submitted. The charges were framed. The accused pleaded guilty and claimed to be tried. According to them, they were falsely implicated on account of enmity. However, no evidence was produced in defence.

8. The prosecution in support of its case examined seven witnesses. PW-1 Babu Ram, the informant, PW-2 Smt. Bhagwan Devi, sister of the informant, P.W. 3 Dr. S.R. Gupta who conducted the post-mortem report on the persons of three deceased and he proved the postmortem reports and according to his opinion, to all the three deceased, injuries might have been caused by firearm. PW-4 Ram Pal, cousin of the informant, PW-5 Constable Lal Singh, PS. Bilsa who proved the chick report. PW-7 D.P. Juyal, Inspector Ante Corruption, C.I.D. (Ist), the then Investigating Officer, S.H.O. PS. Bilsa who was the first Investigating Officer, PW-7 C.L. Sharma, S.H.O. Bilsa, the second Investigating Officer who submitted the charge-sheet. Thereafter the statement of the accused were recorded under section 313 Cr.P.C. They stated that they were falsely implicated but in defence no witnesses were adduced.

9. Shri Roopak Chaubey, learned Counsel (Amicus Curiae) appearing on behalf of the appellant No. 3 Bharosey, submitted that it is a false implication of appellants. It was a dark night and no source of light was mentioned in the First Information Report and site Plan. Subsequently there was improvement in the prosecution story and in the statement of witness torch was introduced. Hence it appears that no one has seen incident. Apart from that, there was no recovery of blood either from the room or from Gadda on which Ram Rati was sleeping, hence in view of the judgment of Apex Court in the case of Vijay Kumar Vs. State of Rajasthan, (2014) AIRSCW 1364 : (2014) 3 JT 121 : (2014) 2 SCALE 387 : (2014) 3 SCC 412 . The prosecution case and witnesses do not inspire confidence there was material improvement.--

"Para (13). PW 10 Jaswant Singh is the brother-in-law of Keshar Bai and in his examination-in-chief he has stated that Keshar Bai kept her ornaments in the locker of a bank and Atma Ram told her that the income-tax people could raid the bank and seize her ornaments and hence Keshar Bai took the ornaments with her. PW 10 has further stated that Keshar Bai used to tell him that accused Radha demanded ornaments from her for wearing and would dance after wearing the same. In the cross examination PW 10 Jaswant Singh has stated that he did not tell in his statement to the police during investigation about the threat made by A1-Atma Ram to Keshar Bai regarding the possibility of an income-tax raid and seizure of ornaments and also the demand of ornaments made by accused Radha to Keshar Bai and her wearing the same. This Court has to form its

opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"Para (14). This witness PW 10 Jaswant Singh was admittedly examined by Investigation Officer during investigation and in that statement he has not stated the facts which he now for the first time stated before the Trial Court. This raises a serious doubt as to the veracity of the said facts [See Khalil Khan Vs. State of Madhya Pradesh, AIR 2003 SC 4670 : (2003) CriLJ 5046 : (2003) 2 JT 548 Supp : (2003) 8 SCALE 337 : (2003) 11 SCC 19 : (2003) AIRSCW 5104 : (2003) 7 Supreme 276]. In other words this witness has made material improvement while deposing in the Court and such evidence cannot be safe to rely upon. Thus the evidence adduced by the prosecution to prove the circumstances 2 and 3 does not pass the test of credibility and is liable for rejection."

10. He further contended that in view of the improvement regarding torch light is inadmissible. The presence of the witnesses are doubtful and it appears that incident took place somewhere else. In cross-examination, according to informant Babu Ram, he was seen by Chandrapal when came along-with other accused-appellants. Hence it was seen then Babu Ram, would have not been spared. There was no reason and occasion to shot dead his wife. He further submitted that the specific case of the prosecution was that the accused Chandrapal fired causing firearm injuries to the deceased Ram Rati but no overt-act has been assigned to any other accused-appellant. Even there was no strong motive against the appellant No. 3 Bharosey. Only one fire injury was found on the person of the deceased. In view of the statement of the witnesses of fact no one has seen the incident which occurred in the agricultural field where murder of Udho and Ramesh took place. He also submitted that so far as PW-2 Smt. Bhagwan Devi is concerned, she was a chance witness who is married sister of the informant and was expected to be present in his matrimonial house. In view of the site plan the alleged witness Ram Pal, cousin of the informant PW-4 could not see the occurrence because there was wall in between the door of the informant and Ram Pal and from his door of the room, he could not see the persons at the door of informant Babu Ram. It was also unnatural that the informant leaving his wife who was alive unattended her and went to agricultural field to see the condition of his father Udho and cousin Ramesh. He also contended that though the First Information Report is not material evidence but is vital material on fact and there are certain facts which were mentioned in the First Information Report. Subsequently there was improvement in the statement. Hence the case of prosecution is doubtful in view of the judgment of Apex Court in the case of Sujoy Sen @ Sujoy Kr. Sen Vs. The State of West Bengal, (2007) 104 CLT 806 : (2007) CriLJ 3727 : (2007) 6 JT 465 : (2007) 6 SCALE 560 : (2007) 6 SCC 32 : (2007) 7 SCR 112 . Relevant paragraphs are quoted herein below:

"(Para) 11-Learned Counsel for the respondent has relied upon a decision of this Court in Manoj @ Bhan and others v. State of Maharashtra 1999 (38) ACC 767

(SC), where it has been stated that FIR need not be an encyclopaedia. That may be true, but an FIR is a very vital material as it is the first information about the incident and has less chances of altering the version and improvement."

11. Regarding unnatural conduct of the informant that he left his injured wife unattended, he relied the paragraphs 21, 26, 27 of judgment of the Apex Court report in the case of Lahu Kamlakar Patil and Another Vs. State of Maharashtra, (2013) 1 ABR 633 : (2013) 1 AD 464 : (2013) CriLJ 603 : (2013) 1 Crimes 386 : (2012) 12 JT 607 : (2013) 1 RCR(Criminal) 393 : (2012) 12 SCALE 710 : (2013) 6 SCC 417 : (2013) AIRSCW 26 .

"(Para) 21. The attack is based on the grounds, namely, that the said witness ran away from the spot; that he did not intimate the police about the incident but, on the contrary, hide himself behind the pipes near a canal till early morning of the next day; that though he claimed to be eye-witness, yet he did not come to the spot when the police arrived and was there for more than three hours; that contrary to normal human behavior he went to Pune without informing about the incident to his wife and stayed for one day; that though the police station was hardly one furlong away yet he did not approach the police; that he chose not even to inform the police on the telephone though he arrived at home; that after he came from Pune and learnt from his wife that the police had come on 21.2.1988, he went to the police station; and that in the backdrop of such conduct, his version does not inspire confidence and deserves to be ignored in toto.

"(Para) 26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a Court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behavior allowing of variations, then his testimony becomes questionable and is likely to be discarded.

"Para 27. Keeping in mind the aforesaid, we shall proceed to scrutinize the evidence of PW-2. As is invincible from his deposition, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune. He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to contact the police from his residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed

that the police had come and that Bhau, who had accompanied him, was dead. It is interesting to note that in the statement under section 161 of the Code, he had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that Bhau was dead was also not mentioned. One thing is clear from his testimony that seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any family member and leaving for Pune and not telling anyone there defies normal human behavior. He has also not stated anywhere that he was so scared that even after he reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion Bhau had died, he went to the police station. We are not oblivious of the fact that certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed. But in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. The learned Trial Court as well as the High Court has made an endeavor to connect the links and inject theories like fear, behavioral pattern, tallying of injuries inflicted on the deceased with the postmortem report and convicted the appellants. In the absence of any kind of clinching evidence to connect the appellants with the crime, we are disposed to think that it would not be appropriate to sustain the conviction."

12. Mr. Roopak Chaubey, learned Advocated further submitted that since there was no overt-act assigned to the appellant Bharosey and others, the section 149 I.P.C. would also be not applicable and there was no unlawful assembly. In support of his argument, he relied the judgment of the Apex Court reported in the case of Brijpal Singh and others Vs. State of U.P. and others, AIR 1994 SC 1624 : (1994) CriLJ 2082 : (1993) 1 Crimes 1116 : (1993) 2 JT 574 : (1993) 2 SCALE 338 : (1994) 1 SCC 566 Supp .

"(Para) 8-However, in a case of this nature where the witnesses are interested, by way of rule of caution we think it would be safe to convict only such of those accused to whom specific overt acts have been attributed. As spoken to by all these witnesses, the definite case that emerges is that on the day of occurrence some minor altercation took place at about 4 p.m. when the Holi festival offerings were going to be made. According to these witnesses Kalyan Singh (since dead) and Deep Singh, A-4 armed with lathis, Prem Pal Singh, A-5 armed with a gun and rest armed with country-made pistols came there. The only overt

act attributed to Kalyan Singh and Deep Singh, A-4 is that they pointed towards Sikdar, PW 1 and said that his family members should not be left out. Thereafter Prem Pal Singh, A-5 fired at Sripal, deceased and the remaining accused fired with their country made pistols towards members of the family of Sikdar. It can thus be seen that Deep Singh, A-4 has not played any active role in the occurrence. No doubt any form of instigation also would make him liable constructively. Since we are dealing with interested witnesses, it would be safe to convict only such of those accused who participated in the occurrence and caused injuries. When the witnesses are highly interested and when the circumstances also go to show that several people gathered at the place of occurrence watching the Holi festival, perhaps it becomes all the more necessary to scrutinise the evidence of these interested witnesses with great care and caution. With a View to avoid any danger of convicting a person who could have been simply present or at any rate who had not played any active role which in those special circumstances may throw a doubt about his being A member of the unlawful assembly, we think the safe test is to see whether overt acts were attributed. In this view of the matter we think it is a fit case where Deep Singh, A-4 should be given benefit of doubt but by this we are not in any manner doubting the veracity of the three eye-witnesses. Accordingly the convictions and sentences awarded against Deep Singh, A-4 are set aside and he is acquitted of all the charges. If he is on bail, his bail bonds shall be cancelled. The convictions and sentences awarded against the remaining accused are confirmed."

13. He submitted that in view of the fact the prosecution failed to prove the case beyond reasonable doubt. Hence the appeal in respect of the appellant No. 3 is liable to be allowed setting aside the judgment and order of conviction and sentence.

14. Shri R.S. Tripathi, learned Advocate appeared on behalf of the other appellants adopted argument of Mr. Roopak Chaubey. However, he further submitted that there was no documentary evidence regarding alleged motive. There was no such strong motive for triple murder. Even according to prosecution case there was no motive to commit murder of the deceased Ram Rati, wife of the informant Babu Ram, especially when Babu Ram was present in the room. He was seen by the appellant Chandrapal and others in torch light, then he might have been searched and killed, if motive was to kill him. He also submitted that PW-4 reached at the place of incident subsequently and neither he saw occurrence nor the appellants at the place of occurrence. Since the prosecution failed to prove its case beyond reasonable doubt and as such the judgment and order of conviction and sentence are liable to be quashed. There was no direct substantial evidence regarding murder of Udho and Ramesh at the agricultural field except alleged extra judicial confession of the appellant Chandrapal. Apart from that all the witnesses are interested witnesses and no independent witnesses have been examined.

15. Learned A.G.A. opposed the aforesaid prayer and submitted that the enmity

and motive was clear from the statement of the witnesses. Two persons of the family members were killed in the agricultural field and appellants reached at the house of PW-1 Baburam in the mid night of 29/30.3.2014 with an intention to kill him. Since his wife failed to tell about him regarding his whereabouts, hence she was shot dead. Apart from that, when reliable witnesses are there, then motive would be irrelevant. It is clear that there was dispute regarding construction of drainage (Nali) and further there was dispute between the children of both the families in which hot talk took place in between the elder members of both the families. The witnesses have disclosed the fact whatever they have seen. All the appellants after committing the murder of two persons, father and nephew of the informant reached there with an intention to kill him, hence it cannot be said that there was no motive or they were not member of unlawful assembly. There was no material improvement in the prosecution story. There was no contradiction in the version of the First Information Report and the statement recorded before the Trial Court. The use of torch light during dark night was natural conduct. Since the prosecution succeeded to prove the case beyond reasonable doubt and rightly the conviction and sentence was awarded by the Trial Court, hence the present appeal is liable to be dismissed.

16. Considered the submissions made by Counsel for the parties. So far as the argument that no blood was found on the cot or on the Gadda is concerned, from the recovery memo of KHES by which she was found covered on the bullock cart, it is clear that KHES was blood stained. The "KHES" is kind of thick Chadar used as bed-sheet as well as bed cover as well as dulace and if cloths and KHES have soaked the blood of Ramrati, then if there was no recovery of blood on the Gadda and on the floor, will not create any suspicion regarding prosecution story. Sample of blood stained (kites) was taken and sealed as Ext. Ka. 21. Blood stained cloths were taken in possession. Presence of PW-1 in the room alongwith his deceased Ramrati is not doubtful rather the same is natural. There was no evidence that he was not present at the house during night of 29/30.3.1984. Apart from that eyewitness sister Bhagwan Devi and his cousin Rampal were natural witness. Appellants went there to kill Babu Ram, the informant after committing murder of his father Udho and cousin Ramesh in the agricultural field where they had gone for supervision of potatoes harvested. According to prosecution case and spot inspection the deceased informant Babu Ram and his wife, deceased Ramrati were sleeping on separate cot. The door was bolted from inside, hence the appellants knocked the door in the mid night and pushed the door. Since the chain was weak, hence the same was broken. Chandrapal himself disclosed the fact that Udho and Ramesh were shot dead at the field and he had come in search of the informant Babu Ram to kill him. The informant Babu Ram immediately left his cot and took shelter behind "Kothi" (which is a big earthen container used for storing the grains) and "kothi" was for about 4-6 hands in height. He asked about Babu Ram as he was being searched to kill him. However, when his wife Ram Rati expressed her ignorance regarding whereabouts of Babu Ram, then she was shot at by the appellant Chandrapal. Smt. Bhagwan Devi was

sleeping in Varandah before room of the informant and deceased. She has also supported the prosecution case. There was one pond and Rampal was living in the adjacent house. After hearing noise he came out with torch and he saw the appellants though source of light had not been mentioned in the First Information Report, it is not unnatural, if witnesses came out with torch otherwise it was not possible to move in the dark night or to inquire what has happened. When the accused were flashing torch light, then in that light as well as hearing that voice they were identified. There was specific allegation against the appellant Chandrapal that he shot at Ramrati, wife the informant who died while she was in the way to hospital and police station by the bullock cart. Smt. Bhagwan Devi, PW-2 had also seen the appellants when she was in varandah and was sleeping. Hence it cannot be said that there was no opportunity of recognising of accused appellant who were going to inside the room and saw that she had raised alarm. Accused were recognised not only in the light of torch but also by their voice. Hence even if there was omission in mentioning the light of torch in the First Information Report, subsequently when this fact was disclosed, there was no material improvement. After hearing fire and alarm raised by Smt. Bhagwan Devi, even PW-4 came out of his room with torch and he had seen the accused appellants. The accused-appellants also warned the witness Rampal to stop flashing the torch, hence the witness had opportunity to see and recognise the accused-appellants. Though specific assigned role of firing was assigned to accused appellant Chandrapal but unless there was motive and common object. There was no reason or occasion to accompany Chandrapal in the mid night to knock the door further before that incident two persons had already been killed. Hence if there was no overt act assigned to others it cannot be said that they were not member of unlawful assembly. After hearing firing and alarm raised by Smt. Bhagwan Devi, when witnesses and other persons woke up and reached to the place of incident, then the appellants without wasting their time to search Babu Ram, and even there was no resistance from side of Babu Ram and Rampal and as such without using their respective arms, they run away from the place of occurrence. There was common object which is clear from the facts and circumstances of the case that after killing two persons common object was to trace out Babu Ram and to kill him though there are no eye-witness of account, regarding murder of Udho and Ramesh. The circumstances shows that the appellants after committing murder as disclosed by Chandrapal, they reached at the house of Babu Ram to kill him. Apart from that there are eye-witness with regard to the murder of Ramrati, Wife of the informant, when she did tell regarding whereabouts of her husband. If witnesses are reliable, the accused has to be convicted for life imprisonment.

17. So far as the conduct of the informant Baburam that he left his injured wife and reached to the agricultural field is concerned, it cannot be said that conduct was unnatural. There would be different reaction in different circumstances by different person. Reaction differs from person to person. There cannot be uniformity in human reaction. However, if the conduct of the witness is so

unnatural contrary to normal human behavior, and not expected, then his testimony become doubtful and can be discarded. When the appellant Chandrapal disclosed this fact that Udho and Ramesh had already been killed and they came there to search informant Baburam to kill him, then it was natural conduct to rush towards agricultural field to condition of father and cousin where they were sleeping for supervision of potato, which was harvested and kept there. Subsequently he returned. Immediately he arranged bullock cart and proceeded onwards police station. However, in the way his wife succumbed to her injuries and as such he returned to his house and thereafter went to police station for lodging of the First Information Report.

18. In the case of Lahu Kamlakar Patil (supra) the witnesses ran away from the spot. He did not intimate the police about the incident and hide behind the pipes till early morning of the next day and he did not come to the spot, when the police arrived and was there for more than three hours. Further contrary to normal human behavior he went to Pune without informing about the incident to his wife. Hence it was held by the Apex Court that the conduct of the witness was unnatural and was not in accord with respective human behavior allowing variation, then his testimony becomes questionable and is likely to be discarded and it appears that he had not seen the incident, his conversation is doubtful and his evidence cannot be treated as trust worthy and unmistakable for conviction. Hence that judgment is not applicable in the present case.

19. It was also argued that when the informant Babu Ram was seen by the accused-appellant Chandrapal and others, then why he was spared though they went there to commit his murder. In cross-examination it was stated by the informant Baburam that he was seen by accused appellants but it was his feeling that he was seen by the accused-appellants. However, they could not see him otherwise he might have been shot dead. Merely on this ground his presence would not be doubtful.

20. PW-2 Bhagwan Devi was present in the house of her brother, and it cannot be presumed that she was a chance witness. When the witnesses and other villagers reached there, it appears that she was very much present there. It is well settled that the First Information Report is not an encyclopaedia of the prosecution and there might be some discrepancy or some facts might have not been mentioned in details. The First Information Report is not material evidence but vital material fact, hence if there is major discrepancy and material improvement, only then that might be fatal to the prosecution case.

21. In the case of Snjoy Sen @ Sujoy Kr. Sat (supra) Had the first informant seen the accused entering into the house at the time of incident, then this fact must have been mentioned in the First Information Report, hence that discrepancy was found major and it was held by Apex Court that the prosecution failed to prove the chain of circumstances linking to the accused to the crime beyond reasonable doubt. In the present case in the First Information Report torch light was not mentioned but it cannot be said that when use of torch was

shown in the statement, then it was material improvement because it is natural that during night after hearing the voice of any fire and alarm raised by Bhagwan Devi, in the dark night, the witnesses will come out from room and house with torch or any other light. Hence in view of the fact of the present case, the judgment of the Apex Court will not be applicable in the circumstances of the present case. During night coming out with light is natural conduct and coming without light in an exception. Hence there was no material improvement.

22. In the case of Baladin (*supra*) the fact of the case is that 12-13 refugee families from West Punjab were rehabilitated in village Goram, which is about 10 miles from the Orai town by the direct kachha" route and about 20 miles of the proper road. The State Government provided to those displaced families with lands for cultivation and sites in village "abadi" for residential purposes, as also loans for helping them to settle there. But unfortunately the new comers were not welcomed by the old residents of the village because they were looked upon his competitors for house sites and culturable lands of the village. The result was a great deal of tension between the old residents on the one side and new settlers on the other. Some incident of minor nature, like cattle grazing disputes and simple assaults took place. There was allegation of harassment on both sides and complaints to the public authorities.

23. On the date of incident one Vir Singh alias Lodhi was alleged to have secured the services of one Shambhu Lodhi, resident of district Hamirpur, who is alleged to be notorious character. It is admitted by both the parties that an incident took place between Diwan Singe and Mangal Singh, two of the displaced refugee persons on the one side, and Vir Singh Lodhi and Shambhu Lodhi on other, in which grievous hurt was said to have been caused to Shambu Lodhi and simple injury to the displaced persons, leading to the lodging of the counter informations at the police station. Villagers are said to have assembled at the house of Parichhat Lodi, adjacent to the house of Mangal Singh, one of the refugees, after having come to know that most of the male members of refugee families had gone to the district headquarters to take steps against them. Villagers are said to have resolved to kill all the male members of the refugee families so as to put an end to what they thought was recurring trouble. Six ill-fated persons returned to the villages to rescue their families. They were taken out of the room assaulted with axes, sword and fired a number of shots. The four appellants had not been assigned to any particular part in the occurrence nor overt act has been attributed to them, hence it was held by the Apex Court that they might possibly have been expectator who got motorcycle mixed up in the crowd. Hence they would be given benefit of doubt and therefore they were acquitted.

24. In the present case all the appellants went in the mid-night at the house of the deceased knocked the door, hence it cannot be said that they went without any common object and there was no opportunity for unlawful assembly.

25. In view of the fact it is clear that they went with common object to commit

murder of the informant Babu Ram after murder of his father and nephew, hence this case also is not applicable in the present case.

26. In between the door of the informant and PW-4 a boundary wall was shown as argument was that there was no chance to see the occurrence or the accused-appellants from the door of the witness Rampal. It is not the case of the prosecution that Rampal saw killing of Ramrati, wife of the informant because after hearing fire and alarm raised: by Bhagwan Devi he came out at his room but it is clear that in the torch light he saw the accused-appellants. He woke up after hearing sound of knocking the door of the informant Baburam. He saw in the torch light the accused-appellants Chandrapal, Bharosey, Prakash Jodha, Bhimsen, Sundraj and Mangal and one unknown person who went inside the house of Baburam and after firing at Ramrati, they were coming out from the room. When he flashed torch on them, he was warned by the accused Chandrapal that he should stop flashing the torch, again, otherwise he would be shot dead. So it is clear that he heard the noise of knocking the door as well as alarm raised by Smt. Bhagwan Devi. His presence is also not doubtful and there was opportunity to see the accused appellants and recognise them. The alarm was raised by Bhagwan Devi, the sister of the informant when she saw the accused knocking the door and went inside the room of Baburam. There is no material contradiction in the statement of Baburam, Chandrapal and Bhagwan Devi. However, one injury was found on the person of each of the deceased Udho, Ramesh and Ramrati. After knocking the door when Chandrapal entered into the room, made an inquiry regarding whereabouts of Baburam, then Smt. Ramrati woke up and was virtually in sitting posture. The firing was from very close range, hence there was no dispersal. 49 pellets were recovered from abdomen of deceased Ramrati, hence merely if there was no recovery of pellets from the room, then that will not create doubt against the prosecution story. Blood was found on "KHES" used by Ramrati. It cannot be a case of hit and run away because the informant and the deceased Ramrati were inside the room and Bhagwan Devi was outside the room in osara. Hence there is no doubt either regarding presence of the witnesses or truthfulness of their statements. There was sufficient opportunity to recognise the accused appellants, who were known to the witnesses.

27. Hence in view of the aforesaid discussions, it is clear that the prosecution succeeded to prove its case beyond reasonable doubt. The Trial Court rightly convicted and sentenced. The impugned judgment and order of conviction and sentence dated 12.2.1988 passed by the Special Judge, Budaun in S.T. No. 359/84 is hereby affirmed and this appeal is accordingly dismissed.

28. The appellant Nos. 1, 2, 6 and 7 are on bail who are represented by learned Counsel Shri R.S. Tripathi.

29. Let a copy of this order be sent to concerned Chief Judicial Magistrate to ensure the arrest of the appellants No. 1, 2, 6 & 7 Bhimsen, Chandrapal, Mangali and Sundraj to serve out the sentence and submit the report to this Court to be

kept on record of this case. Further we feel necessary to record appreciation for the assistance provided by learned Advocate Shri Roopak Choubey, who appeared on behalf of the appellant Bharosey as amicus curiae. His able assistance shows his hard work. His appearance was not a mere formality but he argued at length like a competent defence Counsel on behalf of the appellant Bharosey. His assistance to the Court in the present case is really appreciable. Regarding payment of fee to him a separate order has been passed on the order-sheet.