
(2011) 03 RAJ CK 0044
In the Rajasthan High Court
Case No : Criminal Appeal No. 129 of 2000

Jhabarmal and Others

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 10-03-2011

Acts Referred:

Criminal Law (Amendment) Act, 1913 — Section 120A, 120B
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313, 428, 437A
Evidence Act, 1872 — Section 10, 32
Penal Code, 1860 (IPC) — Section 120B, 121A, 141, 147, 148

Citation : (2011) 3 RLW 2294

Hon'ble Judges : Meena V. Gomber, J; Dalip Singh, J

Bench : Division Bench

Judgement

Meena V. Gomber, J.—Above mentioned two appeals have been preferred by 13 accused persons in all (12+1) against two judgments dated 13.3.2000 and 15.1.2002 passed in Sessions case Nos. 3/1999 and 36/2001 respectively by the Court of Addl. District Judge No. 1, Sikar, arising out of Ex.P/7 written report lodged at P.S. Kotwali, Sikar on 12.9.1998 at 10.30 am for the incident allegedly occurred at 10.00 am on the same day in the business market place of Janki Nath Market where deceased Bhebharam's shop was situated.

APPEAL No. 129/2000

2. Accused Jhabar Mal, Jagdish Prasad @ J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, Kishan Singh, Madan Lal & Rohitash Kumar @ Sanjeev Kumar had been set up for trial in the first instance.

3. Vide judgment dated 13.3.2000, the accused persons (Appellants No. 1 to 9 & 12) except accused Kishan Singh and Madan Lal (Appellants No. 10 & 11) had been convicted for the offence punishable under Sections 147, 148, 302/149, 307/149, 326/149, 325/149, 324/149, 323/149, 427, 450 & 364 of the IPC. They had been sentenced to undergo rigorous imprisonment for six months for

offence punishable u/s 147 of the IPC; R.I. for two years for the offence punishable u/s 148 of the IPC; R.I. for one year for the offence punishable u/s 452 of the IPC; R.I. for two years for the offence punishable u/s 450 of the IPC; R.I. for ten years for the offence punishable u/s 364 of the IPC; Life imprisonment for the offence punishable u/s 302/149 of the IPC; R.I. for ten years for the offence punishable u/s 307/149 of the IPC; R.I. for five years for the offence punishable u/s 326/149 of the IPC; R.I. for two years for the offence punishable u/s 325/149 of the IPC; R.I. for six months for the offence punishable u/s 324/149 of the IPC; Simple imprisonment for six months for the offence punishable u/s 323/149 of the IPC whereas accused Kishan & Madan Lal (Appellants No. 10 & 11 of D.B. Cr. Appeal No. 129/2000) were convicted & sentenced to ten years" for the offence u/s 120B of the IPC.

APPEAL No. 84/2002

4. Appellant Rajendra @ Raju @ Rajendra Prasad (Appellant of D.B. Cr. Appeal No. 84/2002) had been convicted vide judgment dated 15.1.2002 for offences under Sections 148, 450, 302/149, 307/149, 326/149, 325/149, 324/149, 323, 427 and 364 of the IPC and was awarded rigorous imprisonment of two years for the offence punishable u/s 148 of the IPC. Life imprisonment along with a fine of Rs. 5000/- in default whereof to further undergo simple imprisonment for six months for offence u/s 302 read with Section 149 IPC; Ten years R.I. with fine of Rs. 2000/- in default whereof to further undergo simple imprisonment for three months for offence punishable u/s 307 read with 149 IPC; Five years R.I. with fine of Rs. 1000/- in default whereof to further undergo S.I. for three months for offence punishable u/s 326 read with 149 IPC; Two years" R.I. with fine of Rs. 100/- in default whereof to further undergo one month"s S.I.; Six months rigorous imprisonment for offence punishable u/s 324 read with 149 IPC; Six months" rigorous imprisonment for offence punishable u/s 323 IPC; One years rigorous imprisonment for offence punishable u/s 427 IPC; Two years rigorous imprisonment with fine of Rs. 100/- in default whereof to further undergo one month Simple imprisonment for offence punishable u/s 450 IPC; and Ten years rigorous imprisonment with a fine of Rs. 200/- in default whereof to further undergo one month simple imprisonment for offence punishable u/s 364 IPC.

5. The facts as culled out by the prosecution are that on 12.9.98 at about 10.30 am, PW-5 Banwari Lal lodged a written report Ex.P/7 in the police Station Kotwali Sikar to the effect that after opening their shop in Jankinath Market near Salasar Stand, he and his brothers Bhebharam and Omprakash were sitting in the shop. Sanwar Mal, Mohan Singh & Tara Chand joined them and the neighbouring shop owner Mangi Lal also opened his shop in a while.

6. At about 10.00 am, when Omprakash walked few steps near Janki Nath market Gate to order tea, he was assaulted by 10-15 persons near the market gate and on his alarm, the informant Banwari, Sanwar Mal (PW-2), Mohan Lal(PW-21) and MangiLal (PW-22) came out of the shop saw 10-15 persons beating Omprakash with Lathi, sword, Farsi & Sariyas. 11 named persons along

with 10-15 unnamed persons forming an unlawful assembly armed with deadly weapons came in two jeeps to the shop of deceased situated in Janki Nath Market and launched a murderous attack on Bhebharam & Omprakash. 10-12 persons of the assembly forcefully entered and ransacked the shop, disrupted telephone connection and smashed the shop counter. Thereafter they dragged Bhebharam from inside the cabin and after putting him on the counter, Kesar gave a farsi blow so as to kill him whereas others gave beatings by lathi Sariya, farsi and sword on account of previous enmity. The complainant, when interfered to save, was also injured.

7. Shyama of village Bidoli (not before us) gave farsi blow on the head of Omprakash so as to kill him, which he took on his left hand resulting in complete chopping and falling of his left hand middle finger on the ground. Thereafter said eleven named & 10-15 unnamed persons abducted both the injured namely Bhebharam & Omprakash in their two jeeps and also drove the complainant party's jeep parked outside the shop.

8. It is not out of place to mention that before the lodging of said written report at 10.30 am, a telephonic information had been received by Kotwali Police at 10.25 am with regard to the assault and kidnapping of two persons from Jankinath Market shop, the entry whereof was made in Roznamcha exhibited as Ex.D/10.

9. On this report, FIR No. 438/98 for offences under Sections 147, 148, 323, 427, 395, 364, 307, 450 and 149 IPC was registered and the police machinery came in motion. The site plan Ex.P/6 of place of occurrence was prepared, chopped middle finger of Omprakash was recovered vide Ex.P/2, the blood stained earth as well as damaged telephone were recovered. Bhebharam and Omprakash were found in injured condition near gaushala in Dataramgarh and were brought to Sikar Hospital where both were medically examined & X-Rayed.

Statements of injured Bhebharam and Omprakash were recorded u/s 161 of the Code of Criminal Procedure (for short "the Code"). On account of Bhebharam becoming serious, he was referred to SMS Hospital, Jaipur where he died the next day at 12.30 noon while admitted in Neurosurgery ward and offence u/s 302 was also added.

10. After investigation of the case the police initially submitted charge-sheet against 12 persons.

11. On committal the learned Trial Judge read over the charges to the ten accused namely Jhabar Mal, Jagdish Prasad @ J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, & Rohitash Kumar @ Sanjeev Kumar except Kishan and Madan for offences punishable under Sections 147, 148, 450, 302, 302/149, 327, 307/149, 326, 326/149, 325, 325/149, 324, 324/149, 323, 427 and 364 IPC whereas accused Kishan and Madanlal were read over the charge u/s 120B IPC for conspiracy. The accused denied the charges and claimed trial.

12. The prosecution, besides examining 29 witnesses, also exhibited documentary evidence Ex.P/1 to Ex.P/81. The accused were examined u/s 313 of "the Code" and all incriminating evidence and circumstances were put to them. They alleged false implication and examined one witness in defence and also produced documentary evidence.

13. The learned Trial Court recorded a finding of conviction of accused persons and sentenced in the manner mentioned herein before.

14. Appellant of appeal No. 84/02 alongwith his co-accused Balbir @ Birbal Singh (not before us-since acquitted) who was absconding and for whom the investigation had been kept pending, was arrested later. Hence his trial was conducted separately and vide judgment dated 15.1.2002 he was also convicted and sentenced in the manner mentioned hereinabove.

15. The impugned judgments were assailed on various grounds:

A. The first submission advanced by counsel for Appellants Kishan & Madan was that the charge levelled against them for commission of offence u/s 120B of IPC for committing conspiracy cannot be said to have been proved beyond reasonable doubt.

B. The second submission advanced by the learned Counsel for the Appellants pertained to the genesis of occurrence. It was argued that the true genesis of occurrence has been suppressed which is evident from the Panchnama and Post mortem report. According to the Appellants, the incident cannot be said to have occurred in the manner it is stated to have occurred and that though the place of occurrence was a thickly populated market area yet no person from the locality was examined by the prosecution, which circumstance lends credence to the defence of the Appellants that the police contrived evidence against the Appellants and falsely implicated them. Reliance was placed upon the decision of Supreme Court reported as State of U.P. Vs. Madan Mohan and Others, State of Haryana v. Ram Singh 2001 Cri.L.J.987; Megha Singh v. State of Haryana (1996) 17 SCC 709 and State of Punjab v. Sarup Singh 1998 SCC 711.

C. Third submission advanced by the learned Counsel for the Appellants was that there is glaring conflict in the number of injuries shown in the injury report of Bhebharam (deceased) and his post mortem report. Only 11 injuries have been shown in the injury report as against 30 given in the Post mortem report and there is no injury mentioned on the vital part of the body of Bhebharam in the injury report.

D. The fourth submission advanced by the learned Counsel for the Appellants was predicated upon there being no motive of the Appellants for murdering the deceased. It was urged that the prosecution is blissfully silent about the motive of the crime and no motivating force or earthly reason which impelled the accused persons to form an unlawful assembly has been assigned.

E. Fifth submission advanced by the learned Counsel for the Appellants was that

the names of Appellants Jagdish @ J.P, Mahendra, Bajrang, Hari Ram, Raju @ Rajesh, Kishan and Madan Lal did not find mention in the FIR lodged by PW-5 Banwari who, besides being an injured eye witness, was also the brother of deceased Bhebharam and also of injured Omprakash. This fact raises a big question mark on truthfulness of PW-5 Banwari. According to him this also lends credence to the defence of the Appellants that due to enmity large number of accused have been falsely implicated.

F. Next submission advanced was that the prosecution has given omnibus version of the alleged assault and they have not assigned particular role to specific accused about the beating or dragging from the shop etc which shows that they tried to falsely implicate the accused persons. Further that those who were assigned specific acts have already been acquitted by the courts below. As against which no appeal had been filed.

16. Per contra, the learned Public Prosecutor strongly supported the impugned judgment stating that the accused persons 11 named along with 15 unnamed persons formed an unlawful assembly and in prosecution of common object of the assembly to commit murder of Bhebharam and Omprakash armed with deadly weapons ransacked their shop, assaulted them, caused injuries on the persons of Omprakash and Bhebharam, kidnapped them from their shop in broad day light in three jeeps and near Gaushala Dataramgarh, other co-accused Kesar Jat, Shayamlal Jat, Rajendra Jat Dedh, Sanjay @ Rohitash, Raju Mandeta & Shravan Khud also members of unlawful assembly inflicted injuries in pursuance of common object of the assembly to kill Bhebharam and Omprakash.

There was clear material that they formed unlawful assembly to kill Omprakash and Bhebharam and the incident of assault at the shop, the kidnapping and second assault are not separate incidents but part of the same transaction of the same incident. It was urged that in incidents like the present where about 25 persons were assailants, it cannot be possible for the lodger of FIR to give each and every name in the First Information Report and then there is no reason to disbelieve the statements of Omprakash PW-6 who is himself an injured eye witness. What could be the earthly reason for him to falsely implicate those who did not assault on him. Then during cross-examination, nothing of the sort with regard to the identify of the unnamed accused has been brought forward by the accused. The parties know each other as the names of accused along with the names of their respective villages, they belonged to, have been given by the witnesses including the injured eye witnesses and during their searching cross-examination, no question with regard to their identity was put to the witnesses.

17. Regarding the discrepancy in lieu of injuries being 11 in Injury report as against 30 in Post mortem report, argument of learned Public Prosecutor was that the doctor has explained number of injuries observed on the person of Bhebharam while performing the post mortem seen on dis-section of the body which could not have been seen on outwardly examination by PW-16.

18. Considered the rival arguments. As mentioned herein before, according to FIR, 11 persons named and 15 others unnamed participated in the crime. The motive for the commission of crime is stated to be old enmity. Out of all the accused persons, only 13 (present 13 Appellants - 12 of appeal No. 129/2000 arising out of sessions case No. 2/1999 decided on 13.3.2000 and 01 of appeal No. 84/2002 arising out of sessions case No. 36/2001 decided on 15.1.2002) have been convicted whereas rest all stood acquitted vide judgment dated 23.10.2002 in Sessions Case No. 10/2002, vide judgment dated 7.5.2003 in Sessions case No. 36/02, vide judgment dated 15.7.2003 in Sessions Case No. 19/2003; and vide judgment dated 13.10.2003 in Sessions Case No. 34/2003 . As against them no appeal has been filed by the State.

19. For the purpose of present two appeals before us, we are concerned only with the cases of these 13 Appellants. Making reference to any of the other co-accused at this stage would not serve any purpose as no appeals against acquittal of those accused have been filed by the State, hence those judgments remained unassailed and have attained finality.

20. It was vehemently argued by the learned Counsel for Appellants that there is no evidence on record to prove the criminal conspiracy against the accused Kishan and Madan Lal. According to him, it was necessary for the prosecution to prove the said charge by way of positive evidence.

21. Learned Sessions Judge relying on the statements of PW-3 Prahlad, PW-4 Mukanda and PW-8 Ladu Ram concluded that the charge of criminal conspiracy against the accused Kishan & Madan Lal stood proved.

22. Before we advert to the evidence relied upon by the learned Trial Judge, we first advert to the law of conspiracy-its definition essential features & proof as it is the primary charge against the accused Kishan & Madan.

23. Section 120A defines "criminal conspiracy" as under:

Definition of criminal conspiracy- When two or more person agree to do, or cause to be done, (1)An illegal act, or (2)An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

24. It is clear from the above noted definition of "criminal conspiracy" that the three essential elements of offence of conspiracy are (a) a criminal object, which may be either the ultimate aim of the agreement, or may constitute the means, or one of the means by which that aim is to be accomplished; (b) a plan or scheme embodying means to accomplish that object; (c) an agreement or

understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means. Thus the gist of offence of criminal conspiracy is an agreement to break the law.

25. Sections 120A and 120B were brought on the statute book by way of Criminal Law Amendment Act, 1913. Earlier to the introduction of Sections 120A and 120B, conspiracy per se was not an offence under the Indian Penal Code except in respect of the offence mentioned in Section 121A. In the Objects and Reasons to the Amendment Bill, it was explicitly stated that the new provisions (120A & B) were "designed to assimilate the provisions of the Indian Penal Code to those of the English Law..." Thus, Sections 120A and 120B made conspiracy a substantive offence and rendered the mere agreement to commit an offence punishable.

26. Proof of a criminal conspiracy by direct evidence is not easy to get and probably for this reason Section 10 of the Indian Evidence Act was enacted. It reads as under:

10. Things said or done by conspirator in reference to common design:

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

27. Thus, the substantive section of the IPC i.e. Section 120A adumbrated thereon Section 10 of the Indian Evidence Act give us the legislative provisions applicable to conspiracy and its proof.

28. Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the acts done by one are admissible against the co-conspirators. In short, the section can be analyzed as follows:

(i) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy;

(ii) If the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other;

(iii) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them.

29. PW-3 Prahlad deposed in his examination in chief that he and Mukanda Ram (PW-4) were tenants of Ladu Ram. According to him at about 7-8 pm on 11.9.98, he and PW-4 Mukanda Ram saw accused persons Jhabarmal, Madanlal and Kishan in the room of Mangilal, Raju and Raju Mandeta which was adjacent to

the room of the witness. He heard Jhabar, Madan & Kishan talking to Mangilal, Raju and Raju Mandeta and planning to take revenge from Omprakash and Bhebharam by killing and causing disappearance of their bodies.

During his cross-examination, he claims to be a tenant in PW/9 Laduram's home since 1.7.98 but admits to have not executed any rent note nor can he show any rent receipt. Further he admitted that even after the incident he did not inform anybody about the said conspiracy to any one or the police. However, he claimed to have informed the father of deceased Bhebharam 2-3 days after the incident. He admitted that his statements were recorded by the police after 3 1/2 months and that during those 3 1/2 months he did not disclose this fact to anybody not even to the landlord Laduram or to police and his explanation was that police did not ask him.

According to him, when the accused persons were talking about the planning to kill Bhebharam and Omprakash, door of their room was open. He could not tell as to whether Laduram's house was constructed in Abadi land or not. He reiterated that he did not write any rent note nor was he given any rent receipt by Laduram.

30. The other witness is PW-4 Mukanda, who also claims to be a tenant alongwith Prahlad in Laduram's house. His statements are exactly same as that of PW-3 to the effect that Mangilal, Raju and Raju Mandeta were also tenants of Laduram in the adjacent room. He also claims to have heard Jhabarmal, Madan and Kishan talking to Mangilal, Rajendra and Raju Mandeta that they had to take revenge of Kesar's assault from Omprakash and Bhebharam. He claims to have heard them saying that they would kill Bhebharam and Omprakash and cause disappearance of their bodies.

During his cross-examination, he also admitted that he was resident of Diboli village and was neither real brother of PW-3 Prahlad nor was he from the same caste or community. He also admitted to have not been given any rent receipt by Laduram. He claims to have informed the father of deceased 3-4 days after the incident. However, he did not inform about this conspiracy to the police or to PW-8 Laduram alleged landlord who lived as close as 100 meters even after the incident. He also admitted that his statements were recorded by the police after 3 months on 8.12.1998.

He was cross-examined at length with regard to the area where he claims to be a tenant but could not answer satisfactorily.

31. Third witness in this regard is PW-8 Laduram who denies having rented his house to Mukanda and Prahlad or to Mangilal, Rajendra and Raju Mandeta. He was confronted with his previous statement Ex.P/12 which he denied having made.

During his cross-examination, he admitted that about 17-18 years ago, on account of a dispute between Meena community and the Sarpanch Jagan Singh,

said building was taken into possession by the Government and police Chowki was established there. He denied even knowing Prahlad and Mukanda or accused persons Mangilal, Rajendra or Raju Mandeta.

32. The evidence discussed hereinabove does not inspire confidence.

The only evidence with regard to criminal conspiracy against accused Kishan and Madan is that of PW-3 Prahlad, PW-4 Mukandaram and PW-8 Laduram.

We advert to the evidence in little detail so as to find out whether there is a prima facie evidence for the court to reasonably believe that they were members of conspiracy. Admittedly, there is no rent note showing hiring of room by PW-3 and PW-4 from PW-8 Laduram and according to the owner of the room, he never rented the room in the said building to PW-3 or PW-4. Nor did he even rent out his home to accused Rajendra, Raju Mandeta or Mangilal. Moreover it is quite an unnatural conduct of a person who despite knowing the family of deceased to not inform about the conspiracy even after the incident. His explanation, that he had thought of informing about the conspiracy the next morning, may to some extent, sound reasonable but his not disclosing this fact, even after the murder of Bhebharam, raises a serious doubt on their testimony, specially when he claims to have attended the funeral of Bhebharam. Any person of reasonable prudence would have immediately informed the family or the police about said conspiracy. Moreover their claim that the accused were conspiring to kill the deceased and his brother with their room door open is also unbelievable. Their keeping quiet for 3 1/2 months, casts a serious doubt and can be stated to be an after thought concoction. Therefore, I am in agreement with the learned Counsel for the Appellants that the fact of criminal conspiracy by accused Kishan and Madan cannot be said to have been proved beyond reasonable doubt.

33. The second submission advanced by learned Counsel for the Appellants was predicated to the suppression of true genesis of occurrence. His argument was that the prosecution has tried to shift the place of occurrence so as to falsely implicate the accused persons with the incident whereas, according to the prosecution's own documents i.e. Ex.P/10 Panchnama & Ex.P/1 Post Mortem Report, Bhebharam died on account of injuries sustained by him in some other dispute which allegedly took place in the village.

Said argument of learned Counsel for Appellants is also not sustainable as there was hardly anytime to concoct a false case. The circumstances of the case clearly show that even before Ex.P/7 was lodged by Banwari, a telephonic information had been received by the Police at about 10.25 am with regard to some assault and abduction of 2 persons from Jankinath Market shop and said information was recorded in Rojnamcha as Ex.D/10 which has been proved by PW-26 Daularam Keelka.

34. PW-7 Mali Ram who prepared the inquest report, and PW-23 Sola Ram, the real brother of deceased who received the dead body on Supurdgi do not claim to have made any such statement that Bhebharam died in a dispute in village. The

logic that PW-12 Photographer did not find blood stains is also not sustainable because Photographs were taken after about 11-12 hours of the occurrence and it was quite likely to have not found the blood stains after so many hours of incident.

Admittedly, immediately after the occurrence the police reached the place of occurrence and recovered blood stained earth, seized the chopped middle finger lying on the ground and also seized disrupted telephone. This all shows that within no time, the police, after getting the case registered, started the investigation by reaching at the place of occurrence. The ocular evidence of PW-2, PW-5, PW-6, PW-8, and PW-22 even of Mangilal and who, although was declared hostile, clearly goes on to establish that the incident took place at the shop situated in Jankinath Market. Those witnesses had been subjected to searching cross-examination however nothing of the sort has come on record which may prove otherwise than the prosecution story. So far as the argument with regard to non-examination of witnesses from the vicinity is concerned, it is common knowledge that in cases like this where there is assault and abduction by as many as 25 persons laced with deadly weapon in broad day light people try to avoid to be witnesses. Therefore, non-examination of vicinity people cannot be said to go to the root of the case.

In these circumstances, this argument of learned Counsel for the Appellants also has no merit and is, therefore, rejected.

35. Third argument was with regard to conflict between the injuries noticed in Ex.P/1 Post Mortem Report and Ex.P/16 Injury report of Bhebharam. As per the Autopsy report Ex.P-1 dated 13.9.98 of deceased Bhebharam prepared by Dr. Ashok Kumar Mathur (PW-1), following external injuries were noticed:

1. Lacerated wound 3 cm x 1 cm, scalp tissue deep placed on Rt occipito parietal region of scalp with dark red clotted blood.
2. Lacerated wound on mid parietal region 2 cm x 1 1/2 cm with dark red clotted blood; with Left eye black. On opening the skull the injuries seen as already mentioned.
3. Lacerated wound over Rt forearm on anterior aspect 1 cm x 1 1/2 cm size with dark red clotted blood.
4. Lacerated wound on dorsum of Rt elbow, muscle deep 1 1/2 cm x 1/4 cm in size with dark red clotted blood.
5. Lacerated wound on dorsum of Rt arm 1 cm x 1/2 cm with dark red clotted blood. On further dissection there is fracture of upper side of ulna and middle 1/4 of radius seen in Rt forearm, with Dark red ante mortem haemattoma around fractured site of about 200 ml.
6. Lacerated wound on anterior aspect of Lt arm upper 1/3 1 cm x 1 1/2 cm with dark red clotted blood.

7. Incised wound on lateral aspect of Lt arm middle 1/3 2 cm x 1/2 cm with dark red clotted blood, muscle deep.
8. Irregular Bruise, reddish blue in colour of size 6 cm x 4 cm on antro medial aspect of Lt arm.
9. Abrasion on Lateral aspect Lt arm U/3; 1 cm x 1/2 cm dark red in colour.
10. Abrasion on lateral aspect Lt elbow, 3 cm x 2 cm, dark red in colour.
11. Incised wound on Lt cubital fossa, muscle deep 1 cm x 1/2 cm with dark red clotted blood.
12. Incised wound 1 cm x 1/2 cm on dorsum of Lt forearm, muscle deep cut with dark red clotted blood.
13. Incised would 1 cm x 1/2 cm on dorsum of Lt forearm distal muscle deep.
14. Faint bruise of size 4 cm x 3 cm on dorsum of Lt forearm, reddish blue in colour.
15. Abrasion 2 cm x 1 cm dark red on distal 1/3 of dorsum of Lt forearm 16. Abrasion 1/2 cm x 1/2 cm on dorsum of left index finger dark red 17. Abrasion 1/2 cm x 1/2 cm on lateral aspect of Lt little finger dark red. On dissection there is fracture of shaft of femur humerus bone seen with dark red haematoma. On dissection of Lt forearm, there is fracture of of radius seen with dark red ante mortem haemotama.
18. Abrasion 2 cm x 1 cm on lateral aspect of ... dark red in colour.
19. Abrasion 1/2 x 1/2 cm on Rt subclavicular region red in colour.
20. Abrasions 3 in number, of size 1/2 cm x 1 cm to 1x1 cm on lower back, dark red in colour.
21. Abrasion 3 cm mark of size 1/2x 1/2 cm to 1x1 cm on ant aspect lower 1/3 Rt thigh, dark red in colour.
22. Incised wound of size 2 cm x 1/2 cm each, parallel to each other, muscle deep with dark red clotted blood placed on lateral aspect Rt knee.
23. Abrasion two in numbers of size 2 cm x 1 cm each on Rt tibiae shin, dark red in colour.
24. Stitched wound 3 cm on just above Rt medial ..
25. Faint bruise 4 cm x 3 cm on Rt leg antro lateral middle 1/3 part, reddish blue in colour. On dissection there is fracture of upper 1/3 part of Rt leg bones with dark red ante mortem haematoma around fractured site.
26. Incised wound 1 cm x 1/2 cm muscle deep, just above Lt knee with dark red clotted blood.

27. Irregular bruise of size 6 cm x 4 cm, reddish blue in colour above the Lt knee. On further dissection, there is fracture of supracondyle of Lt femur with dark red ante mortem haematoma.

28. Abrasions 4 in number of size 1x1 cm to 2x1 cm the on tibial shin of Lt leg lower middle 1/3 dark red in colour

29. Abrasion 3 in number 1x1 cm each and over lower and medial side of Lt ankle, dark red in colour. On further dissection there is fracture of shaft of fibula Lt leg and lower part of Lt tibia with dark red ante mortem haematoma around fracture site.

30. Stitched wound 3 cm on Rt Inguinal region transversely placed.

All above mentioned injuries were ante mortem in nature and of about 1 to 2 days" duration.

36. PW-1 Dr. Mathur on examination of scalp, skull & vertebra found (i) sub scalp haematoma dark in colour, present on right parieto occipital area of scalp; (ii) Membranes: subdural haematoma dark red on right parietal occipital temporal area seen; (iii) Brain and Spinal cord: contusion with laceration 1/2 cm x 1/2 cm on right parietal region, contusion over right lobe of cerebellum on posterior part dark red in colour with intra cerebral haemorrhage seen. On examination of Abdomen, found large intestines and their contents showed contusion with small haematoma on the outer wall of ascending colone.

37. In the opinion of the doctor the cause of death was comma brought about as a result of ante mortem injuries to the brain with cumulative effect of other multiple injuries which were sufficient to cause death in ordinary course of nature.

38. It is not out of place to mention here that before his death Bhebharam had also been medically examined by Dr. G.R. Tanwar (PW-16) in injured condition on 12.9.98 at about 2.15 pm at S.K. Hospital, Sikar and the injuries as mentioned in Injury Report Ex.P/35, were noticed:

1. Diffused swelling with deformity at left leg lower & ankle joint
2. Lacerated wound 2cmx1cm bone deep at right leg with swelling and blood clotted upper 1/3.
3. Incised wound 4cmx1cm bone deep at right leg with swelling near ankle joint.
4. Abrasion 3cmx2cm at right thigh
5. Diffused swelling deformity at left thigh
6. Lacerated wound 3cmx1cm bone deep at left arm
7. Incised wound 1cmx1cm bone deep at left forearm
8. Incised wound 1cmx1cm bone deep at left forearm at middle

9. Incised wound 2cmx1/2cm at left side of face

10. Diffused swelling at right forearm with deformity 11. Diffused swelling at right elbow"

39. Out of 11 injuries noticed on the person of Bhebharam, injuries No. 1,2,4,5,6 & 11 were caused by blunt weapon and were 6 to 8 hours old. On receipt of his X-Ray report Ex.P/38, he opined the injuries 1,2,3,5,6,7,8,10 as grievous. Out of which injuries 3,7,8 & 10 were by sharp weapon. Injury No. 9 was simple caused by sharp weapons and injuries No. 4 & 11 were simple caused by blunt weapon.

40. The argument of learned Counsel for the Appellants that there is a glaring conflict in the number of injuries shown in Ex.P/35 Injury report and Ex.P/1 the Post Mortem Report of deceased Bhebharam, has no force because if the injuries found in Post mortem report Ex.P-34 are seen in the light of injuries mentioned in Ex.P-35, the injury report, it is clear that the injuries found on the person of deceased Bhebharam in Injury Report Ex.P-35 and Post mortem report Ex.P-1 are more or less same except that the injuries noticed by the doctor performing autopsy are more elaborately described as they were seen on dissection whereas in injury report, only the outwardly appearing injuries could be noticed.

41. In nutshell the injuries Nos. 3 to 30 in Post mortem report show mainly injuries on left arm, right arm, right thigh, right leg, right tibial shin and lower back, that means all over the body. There were 3 lacerations with 2 fractures on right arm; 2 lacerations, 5 abrasions 2 bruises, 3 incised wounds and 2 fractures on left arm. Then the injuries on lower back include 3 abrasions; 3 abrasions on right thigh, right knee, right tibial shin; one bruise, one stitched wound and one fracture on right leg. 2 abrasions, 1 bruise, 2 fractures on left leg; and 1 incised and 1 stitched wound on right inguinal region.

42. PW-1 Dr. Ashok Kumar Mathur, in his cross-examination admitted that injuries No. 9,10,14,15,16,17 & 18 could be sustained while moving in the vehicle. Bhebharam was moved from S.K. Hospital, Sikar to SMS Hospital, Jaipur after the medical examination on 12.9.98 i.e. after preparation of Ex.P/35.

43. He admitted that haematoma in injuries No. 17,25 & 29 was seen after the dissection. He clarified that it is not necessary to have swelling on the fractured part. There can be a fracture even without outward swelling.

44. Moreover, in our considered view it is a matter of personal perception of the doctor examining the patient or conducting the post mortem. Difference in number of injuries was noticed by two doctors on the body of the deceased/injured is a trifle matter and is not a significant aspect to exculpate the accused from the criminality.

45. All the eye witnesses i.e. PW-2 Sanwar Mal, PW-5 Banwari, PW-6 Omprakash and PW-9 Mohan Singh have categorically stated that Bhebharam sustained injuries on both legs, both arms, body and head. They have assigned specific overtact to Kesar (not before us-since acquitted) saying that with intention to kill

Bhebharam, he inflicted injury by Farsa and thereafter all others inflicted injuries on his person by Farsi, Sword, Lathi and Sarias all over his body including both arms, both legs and head. These statements are consistent to that extent.

46. The testimony of the eye witnesses had been subjected to searching cross examination but nothing could be brought on record to discredit the statement of either of the eye witnesses. PW-6 Omprakash is an injured eye witness who has categorically stated that the accused persons after abducting him and Bhebharam, drove towards Dataramgarh and threw them from jeep before reaching Dataramgarh and all of them caused beatings and broke their arms and legs and thinking them to be dead, threw them near Gaushala from where they were taken to the hospital at Sikar and Bhebharam was referred to SMS Hospital, Jaipur where he died next day.

47. The testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. There does not appear to be any strong ground for rejecting the evidence of PW-6 Omprakash as his evidence is consistent and does not suffer from the defect of contradictions or discrepancies therein.

48. The testimony of the eye witnesses also cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence unless the medical evidence goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses.

49. Besides the statements of four eye witnesses PW-1, PW-2, PW-5 and PW-6, there is also a statement Ex.P-79 of deceased Bhebharam, recorded before his death by the Police Officer on 12.9.98 i.e. immediately after the incident. The Investigating Officer PW-23 has deposed that he recorded the statement Ex.P/79 after obtaining the certificate from the doctor to the effect that Bhebharam (since deceased) was fit to make statement. Learned Counsel placed reliance on Ramawati Devi Vs. State of Bihar, whereby Apex Court observed as follows:

7. ... These decisions do not lay down, as they cannot possibly lay down, that a dying declaration which is not made before a Magistrate, cannot be used in evidence. A statement, written or oral, made by a person who is dead as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, becomes admissible u/s 32 of the Evidence Act. Such statement made by the deceased is commonly termed as dying declaration. There is no requirement of law that such a statement must necessarily be made to a Magistrate. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstance of each particular case. In a proper case, it may be permissible to convict a person only

on the basis of a dying declaration in the light of the facts and circumstance of the case.

50. In *Laxman Vs. State of Maharashtra*, it was observed as follows:

3. ... In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police Officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

51. It was held by Apex Court in *Laxman's* case (*supra*) that Rajasthan Police Rules, 1964 are at most a set of procedural guidelines. That cannot take away the effect of Section 32 of the Indian Evidence Act.

52. In *Tellu and Another Vs. State*, Division Bench of Delhi High Court following catena of Apex Court's judgment while dealing with a matter where subsequent to the recording of his statements by Police Officer u/s 161 Cr.P.C., the injured died, said statement was not signed by the injured (deceased) Delhi High Court discussing the provisions of Section 162 Cr.P.C alongwith Section 32(1) of Indian Evidence Act held as under:

The plain reading of provisions of Section 162 Code of Criminal Procedure makes it abundantly clear that a statement made by person to police Officer is not to be signed by the maker thereof nor such a statement can be used for any purpose but it can be used if it falls within the provision of Cl.(1) of Section 32 of the Evidence Act. It is also a matter of wide knowledge that when statements of witnesses are recorded by the investigating police officer during investigation u/s 161 of the Code, they are recorded not in the presence of any Magistrate or any Doctor. It is only under peculiar circumstances that such a statement subsequently gets converted into a dying declaration under Sub-section (1) of Section 32 of the Evidence Act when the maker thereof who is the victim of the crime dies subsequently after the making of the statement to the police officer who did not record it as a dying declaration.

53. In the case in hand, the said statements of deceased Bhebaram are not the

sole evidence with regard to the circumstances in which he died but the injured Omprakash PW-6 who was all along with him till the second part of the incident, has also corroborated his statements.

54. There has been a recovery of four lathies at the instance of accused Jagdish @ J.P by Ex.P/45, of Mahendra by Ex.P/29, of Tara Chand vide Ex.P/47, of Mohan vide Ex.P/43 respectively and 2 Sarias at the instance of accused Appellant Raju @ Rajesh vide Ex.P/37 & of Shravan vide Ex.P/33. The peculiar circumstances of the case show that the investigation had to be kept pending as the co-accused were absconding , hence the recoveries of other weapons could not be made but for want of weapons the ocular and other evidence cannot be disbelieved.

55. PW-6 Omprakash and also the deceased Bhebharam named all the Appellants except Kishan and Madan including their co-accused (who are not before us) to be the assailants and the argument that just because some of the Appellants are not named in the FIR lodged by PW-5 Banwari, the testimony of injured eye witness Omprakash PW-6 and also the statement of deceased Bhebharam recorded immediately after the incident, cannot be disbelieved. It is common knowledge that whenever incident like this takes place, specially when there are 25 people as assailants attacking on the three brothers in a shop, PW-5 Banwari Lal being the real brother of the deceased Bhebharam and injured Omprakash, is bound to be perturbed and overawed by the situation. Just because the names of Jagdish, Mahendra Hariram, Bajrang and Raju @ Rajesh did not find place in the FIR, the entire evidence of injured eye witness cannot be thrown specially when they have been named with the names of their villages and there has not been any dispute with regard to their identity during the cross-examination of the witnesses. So the argument of the learned defence counsel that because their names did not find mention in the FIR, they should be given benefit of doubt, in the given circumstances is rejected.

56. In the light of discussion made hereinabove, we do not find any error committed by learned Trial Judge in relying on this piece of evidence.

57. From the above ocular, medical and link evidence, it is established that deceased Bhebharam's death was homicidal and he died on account of ante mortem injuries sustained by him in the said incident dated 12.9.98 & the injuries on other parts of body were cumulatively sufficient to cause death in the ordinary course of circumstances.

58. Learned Addl. Sessions Judge has recorded said finding after elaborate discussion of the evidence on record.

59. As regards other injured persons i.e. PW-6 Omprakash and PW-5 Banwari, they were also medically examined by Dr. G.R. Tanwar (PW-16) on 12.9.98 in the afternoon and as per injury report Ex.P-36 following 11 injuries were found on the person of Omprakash:

1. Incised wound with set clotted blood transverse 5cmx2cm bone deep at scalp;

2. Incised wound verticle 4cmx1cm bone deep at left upper 1/3 leg ankle;
3. Incised wound 3cmx1cm bone deep at left leg at middle ankle;
4. Lacerated wound 4cmx2cm bone deep at right leg lower 1/3;
5. Diffused swelling at right ankle joint;
6. Incised wound 2cmx1cmx1/2cm at thumb of left hand;
7. Incised wound 1cmx1cm at middle finger of left hand where upper part was missing;
8. Incised wound 2cmx1cmx1cm at ring finger of right hand.;
9. Diffused swelling at right forearm;
10. Abrasion 2cmx2cm at right leg medially;
11. Lacerated wound 2cmx1cmx1/2cm on left arm lower 1/3.

60. As per the X-Ray report Ex.P-39, 4 injuries were grievous (fractures). Out of said 11 injuries of Omprakash, 4 injuries (No. 1,2,6 & 7) were grievous caused by sharp weapon and one injury (No. 4) was grievous caused by blunt weapon whereas 2 injuries (Nos. 3 & 8) were simple caused by sharp weapon and 4 injuries (Nos. 5,9,10 & 11) were simple caused by blunt weapon. None of the injuries on the person of Omprakash was found sufficient to cause death in the ordinary course of nature.

61. On 13.9.98 at about 3.20 pm, PW-5 Banwari Lal was also medically examined by Dr. G.R. Tanwar (PW-16) who complained of pain on left side of chest and glutial region but there was no external mark of injury present as mentioned in Ex.P-37.

62. It is true that in written report Ex.P/7 so also in the statements of eye witnesses PW-5 Banwari, PW-6 Omprakash, PW-2 Sanwar Mal, PW-9 Mohan Singh and PW-22 Mangilal, specific overtacts of only two accused namely Kesar and Shyama (who are not before us-since acquitted) have been assigned whereas all are stated to have participated in the commission of crime after having been laced with lathies farsas Sariyas and swords. As discussed hereinabove, because of peculiar circumstances in which as many as six trials were conducted against separate accused persons on account of their absconding other weapons could not be recovered except 4 lathis and 2 sariyas.

63. The argument of learned Counsel for Appellants, that since the accused persons to whom specific overtact had been assigned, (i.e. Kesar & Shyama) have been acquitted, the Appellants should also be given benefit of doubt, does not hold water.

64. It is evident from the record that out of eleven named and 25 unnamed accused in the FIR, only 12 could be set for trial at the first instance who are the

Appellants of appeal No. 129/2000 wherein charge sheet was filed and kept pending for others. Thereafter the charge-sheet against the Appellant Rajendra Kumar, appeal No. 84/2002 along with his co-accused Balbir @ Birbal Singh, was filed, out of whom the charge against co-accused could not be proved. Other accused persons are Madanlal and Rampal (Sessions case No. 19/03), Mangilal, Shyama Jat (Sessions case No. 34/03), Rajendra and Raju Mandota (Sessions case No. 36/02) who all stood acquitted in later separate trials on account of dilution of evidence with the passage of time.

65. In cases where there are a large number of assailants, it can be difficult for a witness to identify each assailant and attribute a specific role to him. In *Masalti Vs. State of U.P.*, Supreme Court held as under:

Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants.

66. Now the question which arises before us is whether there was an unlawful assembly formed with an object and whether the Appellants acted in prosecution of common object of the assembly.

67. If facts of the case are seen in the light of legal provisions it is clear that the accused formed an unlawful assembly. Section 141 of IPC defines unlawful assembly to be an assembly of five or more persons. They must have a common object inter-alia to commit any mischief or criminal trespass or other offence.

68. Section 142 postulates that whoever, being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof.

69. Whether an assembly is unlawful one or not, would depend on various factors, the principal amongst them being a common object formed by the members thereof to commit an offence specified in one or the other causes contained in Section 141. If Court has before it, some material to form an opinion that the members had shared a common object, in that case the persons committing no overtact can also be held to be a part of an unlawful assembly and constructive liability can be fastened on a person on the ground of being a member of an unlawful assembly for an act of offence committed by one or more members of that assembly, if they had formed a common object.

70. In such a situation not only the acts but also the conduct and surrounding circumstances of the case become the guiding factor. It is the duty of prosecution to establish that the persons on whom constructive liability is sought to be fastened were (i) present and (ii) that they shared a common object. There has to be some material to form an opinion by the Court meaning thereby that something more than simply the persons concerned being cited as accused, is necessary.

71. In the case in hand, there is a consistent evidence that there has been previous enmity between the assailants and the victim and a group of persons who were more than five laced with weapons came in two jeeps and committed criminal trespass in the shop of deceased and his brother Omprakash caused multiple injuries to the deceased Bhebharam and his brother Omprakash and then abducted them in two jeeps brought by them besides driving down the victim's jeep parked outside the shop.

72. Thereafter the deceased Bhebharam in a severely injured condition and injured Omprakash were thrown near gaushala in Dataramgarh from where they were taken to S.K. Hospital, Sikar from where deceased was referred to SMS Jaipur where he died the next day.

73. There has been no delay in reporting the matter. Presence of injured eye witnesses cannot be doubted. Right from the lodging of report till the statements in court there is consistent evidence about the participation of Jhabar Mal, Jagdish Prasad @ J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, Rohitash Kumar @ Sanjeev Kumar & Rajendra Kumar @ Raju @ Rajendra Prasad in the commission of offence as members of unlawful assembly.

74. Motive is a relevant factor in all criminal cases whether based on the testimony of eye witnesses or circumstantial evidence. But that does not mean that if prosecution fails to prove motive the case can be thrown or that weakens the prosecution case. However as far as present case is concerned, from the time of lodging the FIR, it has been clearly mentioned that there was enmity on account of some earlier incident stated to have taken place between Kesar on one hand and deceased Bhebharam and his brother Omprakash on the other side.

75. On the basis of discussion made hereinabove, it can be concluded that there is consistent evidence on record against the present Appellants Jhabar Mal, Jagdish Prasad @ J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, & Rohitash Kumar @ Sanjeev Kumar and Rajendra @ Raju @ Rajendra Prasad and just because with the passage of time the evidence had been diluted with regard to other accused persons; it does not mean that the evidence of the case in hand should be ignored. Before parting we would like to observe that there appears to have not been made any effort by the public prosecutor to confront the witnesses with their on oath statements in the previous trials (i.e. the subject matter of these two appeals) or to proceed against the witnesses for falsely deposing on oath.

76. The end result of the journey undertaken by us is that the appeals filed by Jhabar Mal, Jagdish Prasad @ J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, Kishan Singh, Madan Lal & Rohitash Kumar @ Sanjeev Kumar (cr.appeal No. 129/2000) and Rajendra @ Raju @ Rajendra Prasad (cr.appeal No. 84/2002) deserve to be partly allowed.

(i)The conviction and sentence of Kishan & Madan for offence punishable u/s

120B IPC is set aside. They are stated to be on bail. Their bail bonds and surety bonds shall remain in force for a period of six months in accordance with Section 437A of the Code of Criminal Procedure.

(ii) The conviction and sentence of Appellants Jhabar Mal, Jagdish Prasad @

J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, Rohitash Kumar @ Sanjeev Kumar and Rajendra @ Raju @ Rajendra Prasad for offence u/s 307/149 IPC is set aside. They are acquitted of the said charge.

(iii) The conviction and sentence of Jhabar Mal, Jagdish Prasad @ J.P., Mahendra, Bajrang Lal, Hari Ram, Raju @ Rajesh Kumar, Sharwan Kumar, Tara Chand, Mohan, Rohitash Kumar @ Sanjeev Kumar and Rajendra @ Raju @ Rajendra Prasad for offences under Sections 147, 148, 302/149, 326/149, 325/149, 324/149, 323/149, 427, 450 & 364 IPC is upheld. The Appellants, named above, except Jagdish @ J.P are reported to be on bail. Their bail bonds and surety bonds are canceled. They shall surrender forthwith to suffer the remaining sentence.

Needless to say they will be given the benefit of Section 428 Code of Criminal Procedure