
(2018) 04 MP CK 0097

In the Madhya Pradesh High Court

Case No : Criminal Appeal No.930 OF 2006

Mehrab Khan @ Kallu S/O Mohd. Muneer & Others

APPELLANT

Vs

State Of Madhya Prades

RESPONDENT

Date of Decision : 20-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 49, 147, 148, 149, 294, 302, 452, 506
Arms Act, 1959 — Section 25(1B), 25(1B)(a)
Code Of Criminal Procedure, 1973 — Section 174

Citation : (2018) 04 MP CK 0097

Hon'ble Judges : P.K. JAISWAL, J;VIRENDER SINGH, J

Bench : Division Bench

Advocate : Vivek Singh, Avinash Sirpurkar, Yogesh Gupta, Mukesh Parwal, V. Saraf

Final Decision : Dismissed

Judgement

The appellants have preferred this appeal against judgment and order dated 18th August, 2006 passed in Sessions Trial No.67/2005 by the First

Additional Sessions Judge, Dhar; whereby the learned Trial Court held the appellants guilty for the offence punishable under Sections 148, 452 &

302/49 of IPC and in addition to that appellant Vasil is further held guilty for the offence punishable under Sections 25(1B)(a) of the Arms Act, 1959

and they are awarded punishment for the offence punishable under Section 148 of IPC rigorous imprisonment of one year each, for the offence

punishable under Section 452 of IPC rigorous imprisonment of three years each and fine of Rs.1,000/- for the offence under Sections 302/149 of IPC

life imprisonment and fine of Rs.1,000/- each in default of payment of fine, further to undergo rigorous imprisonment for six months each. Appellant

Vasil is also awarded rigorous imprisonment for two years and fine of Rs.1,000/-,

in default further to undergo six months rigorous imprisonment for the offence punishable under Section 25(1B)(a) of the Arms Act.

2. The facts that on the date of incident, i.e. on 25.12.2004, a meeting of congress party was convened in respect of ensuing election of Sarpanch

Gram Panchayat, Banjari at Modi Garden at 2-2:30 p.m. Seat of Sarpanch was reserved for Schedule Tribe. Appellant Mehrab Khan has admitted

that he and appellant Yusuf and deceased Asraf Patel, Nasir, Musabbir and complainant Afsar Patel were present in the meeting. Appellant

Mohammad Yusuf has admitted that in that meeting his brother was also present. The appellants have also admitted their arrest in this case.

3. Background facts sans unnecessary details are that the seat of Sarpanch of Gram Panchayat, Banjari was reserved for Schedule Tribe for ensuing

election. The deceased Asraf Patel was backing Sardar Bhil for that seat, while appellant Kallu Thekedar @ Mehrab Khan was backing Sitaram Bhil.

A meeting was convened on 25.12.2004, at Modi Garden, Mhow to explore possibility of amicable solution. Appellant Kallu Thekedar, Yusuf, Afsar

Patel, Musabbir and Asraf Patel were present in the meeting. Meeting run for almost two hours but no solution could be arrived at. During discussion

controversy between both the groups could not be resolved. After hot discussion between the rival groups, appellant Kallu Thekedar and deceased

Asraf Patel got entangled in a heated exchange of words. Both the groups left the venue at about 3:30 p.m. Afsar Patel was also contesting election

of Janpad Pratinidhi. In this regard, about 5:30 p.m., a discussion was going on at the shop of Babbu situated at Housing Chouraha (square). The

complainant Afsar Patel, his father deceased Asraf Patel, Babbu (PW-2), Gullu Bhai (PW-4) and Malik Moulana (PW-5) were present there and

were discussing with each other. At that time; appellants Kallu Thekedar @ Mehrab Khan, Yusuf, Anwar @ Rubab, Akhtar, Vasil and Tammu

@Tameem came and barged into the shop. Kallu Thekedar abused them and asked his companions to kill them. On his instigation; Vasil took out

revolver and fired on Asraf Patel, which caused injuries on his chest and neck and Tammu @ Tameem assaulted by sword on his head and right eye

with intent to kill him and they all fled from the spot. Malik Moulana, Gullu Bhai, Babbu Bhai and Afsar immediately took him to the Get Well Hospital,

Mhow, where he was declared brought dead.

4. Receptionist of Getwell Hospital Sunil Jain (PW-13) sent a written intimation Ex.P/12 regarding death of Ashraf to the Police Station Mhow. Acting on that intimation, Sub Inspector D.S. Bilwal (PW-20) registered merg No.0/04 under Section 174 of Cr.P.C. at Police Station, Mhow and rushed towards the hospital. He issued notice (Ex.P/2) to the witnesses and prepared memo of corpse Ex.P/3 in their presence and sent the dead body with requisition Ex.P/28 to the Civil Hospital, Mhow for postmortem. Later, merg was registered at No.62/04 at Police Station, Mhow.
5. On receiving information, Station In-charge, Police Station Pithampur Hemraj Jaat also reached at the Get Well Hospital, where he scribed Dehati Nalishi (Ex.P/19) on the narration of complainant Afsar Patel and started investigation. He visited the spot, prepared spot map Ex.P/5 and seized empty cartridges, blood stained paper, blood stained tiles, pistol, empty magazine, live cartridges, blood stained slippers from the spot vide seizure memo Ex.P/6.
6. Dr. Mahesh Mahobia (PW-16) along with Doctor P.C. Pandit performed postmortem and submitted report Ex.P/15. He found gunshot injury on the deceased along with incised wound on parieto occipital region and right fronto parietal region of the head. In the opinion of Dr. Mahobia all injuries were antemortem and caused within six hours of the postmortem and cause of death was haemorrhage shock, which was caused due to injuries found on the body of the deceased.
7. S.H.O. Police Station Pithampur Hemraj Jat (PW-19) further investigated the case. He arrested and interrogated accused Tammu @ Tameem and Mohd. Vasil and prepared memo Ex.P/8 & 9 and on their information seized sword and pistol respectively from their possession. He sent the pistol for inspection. Harikrishna Baxi (PW-18) examined it and opined that the pistol was operational (Ex.P/19). S.H.O. further sent pistol and sword and other articles seized during investigation for chemical analysis to Forensic Science Laboratory, Sagar and received report Ex.P/26 & Ex.P/27. According to the FSL report, the cartridges and bullet recovered from the spot can be used by the pistol recovered from the appellant Vasil and that the seized articles were having stains of human blood.
8. Sub Inspector Ramprakash Prajapati of Police Station Pithampur registered merg No.62/04 under Section 174 of Cr.P.C. and on the basis of Dehati

Nalishi, registered Crime No.421/2004 under Sections 147, 148, 149, 452, 294, 506 and 302 of IPC against the appellants and charge-sheeted the appellants.

9. All the appellants were charged under Section 148, 452, 302/149, in alternate 302 of IPC. Vasil was also charged under Section 25(1B) (a) of the Arms Act, 1959. They abjured their guilt and claimed for trial. They were tried and held guilty for the offence and awarded punishment as stated in

Para 1 above.

10. The appellants have preferred this appeal on the ground that the judgment of learned Trial Court is contrary to the law and facts on record.

Learned Trial Court failed to appreciate material omissions and contradictions appeared in the statement of prosecution witnesses and also in

discarding defence version. Findings of the learned trial Court are erroneous in the eyes of law. Learned trial Court did not consider that the

prosecution could not produce convincing evidence. Presence of the witnesses on the spot is doubtful. Investigation is biased. Even after taking note

of faulty investigation, the learned trial Court has drawn unwarranted inferences. Therefore, the judgment is neither legal nor proper or correct. They

have prayed to quash the impugned judgement.

11. Per contra, learned Public Prosecutor has opposed the prayer and supported the impugned judgment. He submitted that five eye witnesses have

depicted the incident before the Court. Their statements are corroborated by the Dr. Mahesh Mahobia, who performed autopsy and also by

Investigating Officer and they are corroborated by the documents prepared during investigation and well proved by the concerned witnesses in their

statements. On all material points, statements of the witnesses remained intact, therefore, learned Trial Court has rightly convicted the accused

persons and the present appeal deserves to be dismissed.

12. We have considered the rival contentions of the parties and have perused the record.

13. It is the case of the prosecution that on 25.12.2004 at about 6:00 in the evening on the shop of Babbu situated at Housing Sqare, Pithamput, Distt.

Dhar Ashraf Patel was died due to gunshot and other injuries inflicted by hard and sharp object on vital parts of the body and his death was homicidal

in nature. We have gone through the statements of the witnesses regarding

injuries sustained by the deceased, statement of Dr. Mahesh Mahobia, who performed autopsy and the police officials, who were involved in the investigation regarding death of the deceased, perused the relevant documents and also the opinion of Dr. Mahesh Mahobia, which is not challenged during his cross- examination. The Trial Court has considered all this evidence in Para 15 to 20 of the impugned judgment in detail and we are in agreement with the finding of the learned Trial Court and we hold that the deceased was died on the date, time and place of the alleged incident and his death was homicidal in nature.

14. The prosecution has examined as many as five eye witnesses namely Afsar Patel (PW-1), Babbu (PW-2), Gullu @ Gulam Mohammad (PW-4), Malik Moulana (PW-5) and Nanuram (PW-6), to prove its case. Out of these, presence of Nanuram on spot is doubtful. Reasons for such doubts have been discussed by the learned Trial Court in Para 39 to 43 of the judgment and we are satisfy with those reasons.

15. All remaining four witnesses namely Afsar, Babbu, Gullu and Malik Moulana have narrated the incident before the Trial Court. They have stated that when they all were sitting in the shop of Babbu, all six assailants came there. The appellant Kallu @ Mehrab Khan abused them. He asked his companions to kill them. On his instigation Vasil took out pistol from his pocket and fired on the deceased Ashraf twice. Bullets hit on his chest and neck. Tammu @ Tameem assaulted with sword on the head and neck. The deceased succumbed to the injuries and all the assaulters fled from the scene.

16. When we analyze these statements, we find that they are not fully trustworthy. Tendency of implicating whole family appears in their statements, as accused Kallu @ Mehrab Khan and Yusuf are real brothers, accused Akhtar and Anwar are sons of Kallu and accused Vasil is son of Yusuf. There was rivalry on the ensuing election of Sarpanch as Kallu was not agreed to back candidature of the person backed or nominated by the deceased, while lodging Dehati Nalishi the son of the deceased has implicated entire family, particularly all male members of the family of Mohammad Munir i.e. his two sons Kallu and Yusuf and three grandsons Akhtar, Anwar and Vasil. Therefore, the statements of the witnesses need very careful and close scrutiny.

17. In his cross-examination Babbu has admitted that at the time of the incident Kallu and Yusuf both were not in his shop and he is not aware of their presence outside of his shop (PW-2 Para 36). This makes the statements of remaining three witnesses Afsar, Gullu and Malik Moulana that at the time of the incident alongwith the other co-accused persons, they both also barged into the shop and Kallu hurled abuses and asked his companions to kill the deceased, doubtful. Therefore, these witnesses so far as their statements are related to Kallu and Yusuf cannot be relied upon.

18. (i) In his statement Afsar Patel (PW-1) has stated that at the time of the incident Kallu has stated in a filthy language as to what bullshit are you doing here? (Yahan Kya Maan Chuda Rahe Ho). He shouted kill them bastered (Maar Dalo Saalon Ko).

(ii) Babbu (PW-2) has stated that all the accused persons have stated as to what bullshit are you doing here? (Yahan Kya Maan Chuda Rahe Ho).

After hurling abuses they all shouted, Ashraf Patel is a main person; kill him (Ashraf Patel Khas Hai Isko Mar Dalo).

(iii) Gullu @ Gulam Mohammad (PW-4) has stated that all the accused persons hurled abuses. Kallu shouted that Ashraf Patel is sitting here, kill him.

(iv) Malik Moulana (PW-5) has stated that all the accused persons came at the shop of Babbu. Kallu hurled filthy abuses. He also abused in the name of mother and spoke that Ashraf Patel is the key person, kill him bastard.

19. Thus, Afsar and Malik Moulana has stated that only Kallu hurled abuses and asked his companions to kill Ashraf Patel while Babbu and Gullu have stated that all the accused persons hurled abuses, but this fact is not mentioned in their police statements and this is an improvement before the court. Afsar, Malik Moulana and Gullu have stated that Kallu asked his companion to kill Ashraf, while Babbu has stated that they all shouted to kill the Ashraf. If we do not take the variations regarding words uttered by Kallu or about the fact as to who asked whom to kill Ashraf seriously even then their statements are not reliable as presence of Kallu on the spot is seriously doubtful as we have discussed in Para 17 above.

20. The law with regard to the common object or intention is well settled. In paragraph 10 of Jai Bhagwan case (Jai Bhagwan and Ors. v. State of Haryana AIR 1999 SC 1083), the Honâ??ble Supreme Court has stated that:-

10. To apply Section 34 IPC apart from the fact that there should be two or more

accused, two factors must be established: (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.

21. It is reiterated in para 11 of *Surendra Chauhan Vs. State of M.P.* AIR 2000 SC 1436, which reads thus:

“11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who

in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of

Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can

be developed at the spot and thereby intended by all of them. (*Ramaswami Aythangar v. State of Tamil Nadu*, (1976) 3 SCC 779 : (AIR 1976 SC 2027

: 1976 Cri LJ 1563). The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties.

No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence

need not be proved in all cases. The common intention can develop even during the course of an occurrence (*Rajesh Govind Jagesha v. State of*

Maharashtra, (1999) 8 SCC 428 : (1999 AIR SCW 4246 : AIR 2000 SC 160 : 2000 Cri LJ 380). To apply Section 34, IPC apart from the fact that

there should be two or more accused, two factors must be established : (i) common intention and (ii) participation of the accused in the commission of

an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves

vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked, in every

case, it is not possible to have direct evidence of a common intention. It has to

be inferred from the facts and circumstances of each case.â??

22. Whether the crime is committed in furtherance of common intention or not, is a question of fact and is to be ascertained from the evidence brought

on record and the appreciation thereof in proper perspective. Facts of two cases cannot be regarded as similar. Common intention can be gathered

from the circumstances that are brought on record by the prosecution.

23. In this regard we are supported by the judgement of the Honâ??ble Apex Court passed in Goudappa and Ors v. State of Karnataka AIR 2013

SC 1595. Relevant part of para 16 of the judgement reads thus:

â??16. â?|â?|.. The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before

and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the

nature and injury caused by one or some of them.

Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the

totality of circumstances must be taken into consideration.â??

24. Now we will consider complicity of the appellants Anwar and Akhtar. All the four witnesses Afsar, Babbu, Gullu and Malik Moulana have stated

that all the accused persons came together with intent to kill Ashraf Patel in furtherance of their common object but they have not stated that at the

time of the assault, any of the accused persons/appellants except Vasil and Tammu was having any arm in their hands or particularly Anwar or

Akhtar were having any arm. They have not stated that the accused persons except the accused Vasil and Tammu, particularly the accused Anwar

and Akhtar have participated in the incident in any manner or they had done any act in furtherance of the alleged common object or intention. No role

or act is ascribed to them. No part played by them. Nothing is recovered from them. Nothing is attributed to them except, according to the prosecution

case they were with the co-accused persons. There is no material from the side of the prosecution to show that they had any common intention to

eliminate the deceased because the only thing to associate them is that they were present there. On this factual score, the statements of the witnesses

showing their involvement in the incident appear doubtful. In that case, we are hesitant with a conscious mind to hold them (Anwar and Akhtar) guilty

with the aid of Section 34 IPC for the offence they are charged with.

25. The defence has pointed out some defaults and discrepancies appeared in the investigation. They have questioned that first intimation given by the

receptionist of Getwell Hospital mentions that the deceased had sustained injuries by bullet and "knife". Merg registered at Police Station Mhow

also mentions the same fact. In memo of corpse Ex.P/3 it is mentioned that the deceased had sustained injuries by "some sharp object" but

particulars of this sharp object have not been given. The spot map Ex.P/5 and seizure memo Ex.P/6 of seizure of several articles from the spot

particularly live and empty cartridges and magazine of pistol are ante dated. They referred para 33 to 37 of the impugned judgement in this regard. It

is further stated that presence of the witnesses as well as of the accused persons so also the articles seized is not shown in the spot map Ex.P/5.

Witnesses Afsar, Babbu, Gullu and Malik Moulana have stated that immediate after the incident Malik Moulana picked the deceased up. His clothes

drenched with the blood but these clothes were not seized during investigation. On these grounds the learned counsels for the defence have expressed

their concern about fairness of the investigation and they also targeted the credibility and veracity of the witnesses and also the prosecution case

based on the statements of these witnesses.

26. It is pertinent to mention here that the intimation Ex.P/12 was not given by the receptionist on the information of the complainant or any other

witness examined by the prosecution. It appears from the evidence that the deceased was a well known figure in the society and as the news of the

incident goes viral, the people gathered at the hospital and the receptionist gathered information from someone present there and immediately informed

the police to discharge their legal obligation. No PM report or any expert opinion was received by that time and it cannot be expected from a common

man to state precisely about the specific arm used in causing any particular injury. It would be apt to consider that the intimation was given by the

receptionist of the Get Well Hospital at 19:00 hours. By that time, the Police of Police Station Pithampur, having jurisdiction over the place of the

incident, reached there and before receiving any expert opinion or information, which could be used for manipulation, scribed Dehati Nalishi on the

narration of the complainant Afsar at 19:10 hours. In this Dehati Nalishi it is

clearly mentioned that the injury to the deceased was caused by a sword and not by a knife or any other weapon. Otherwise also, it does not make any difference as nothing was there to achieve by changing the knife with the sword. Therefore, this variation is insignificant and does not affect the veracity of the case of the prosecution.

27. Memo of corpse is used to prepare only for the purpose of recording observation of the physical status of the dead body as seen by the common man/layman available on the spot, where the dead body was found or recovered. It is not purported to contain opinion of any expert. It is just to see as to what the condition was, when the dead body was first seen by the witnesses and by the Investigating Officer. It is neither FIR nor statement of witness. It does not require containing all the contents as of the FIR or of the statement. The police is required to prepare many documents during the course of the investigation. Each document is prepared with a different and distinct purpose. Broadly the facts commensurate with the purpose of the document are required to be mentioned in the document. It needs not to mention all minute details collected or revealed during investigation in each and every document. Any such document should be interpreted in its context. Out of context interpretation may lead to an interpretation, which may not be correct, just or legal. In similar type of situation, the Hon'ble Supreme Court in *Ashok and others V/s. State of M.P.* reported in ILR [2008] MP 2997 has held that primary duty of the doctor is to treat the patient and not to find out by whom the injury was caused, therefore, non-disclosure of names to Doctor is of no consequence.

28. Keeping in view the purpose and object to prepare this document (Ex.P/3), when we analyze it, we find that it is mentioned in this document on the basis of general assessment of the witnesses, who were not the experts, that in their opinion the cause of death was injuries on skull and right side of eyebrow and nose caused by sharp object and on chest and neck caused by bullet. Therefore, non-mentioning of arm by which the injury was caused to the deceased is not fatal to the prosecution case. On the contrary, this document sufficiently corroborates the case of the prosecution.

29. The finding of the learned trial Court regarding Ex.P/5&6 is mainly based on the observation that all the eye witnesses including Babbu have

admitted that since the incident took place in the evening, Babbu remained with them with the dead body till its burial at about 1-1:30 p.m. on the next day, while the documents purported to be prepared on the date of incident i.e. 25.12.2004 bear signatures of Babbu. Babbu has admitted in his cross-examination that Ex.P/5 & 6 were prepared on the next day i.e. on 26.12.2004 at about 10:30 a.m. It was also observed that the time of preparation of these documents is also not mentioned in the relevant columns.

30. All three witnesses concerned with this document namely IO Hemraj Jat (PW-19), Mohammad Akram Qurraishi (PW-3) and Soheli (PW-11)

have supported its creation in the night of the incident itself. Their statements could not be shattered in short cross examination. IO Hemraj has stated

that after receiving the information of the incident, he reached on the spot, where he came to know that the injured is been taken to the Mhow. He

rushed to Mhow leaving behind 2-3 constables on the spot and after completing the proceedings at Getwell Hospital, Mhow, he returned to the place

of the incident about 10-10:30 in the night, prepared the memo Ex.P/6 and seized the articles mentioned therein. Both the witnesses Mohammad

Akram Qurraishi (PW-3) and Soheli (PW-11) have stated that the police prepared these documents in their presence in the night at about 10:30-11:00

pm. They both have denied suggestions of the defence that they were with the dead body at Mhow in the night or that the document was prepared at

the Police Station and got signed by them later. Nothing contrary could be brought on record.

31. Thus, two contrary to each other sets of evidence are available on record. On the one hand; Mohammad Akram, Soheli and IO Hemraj have

stated that Ex.P/5 & 6 were prepared in the night of the date of the incident and on the other hand; Babbu has stated that these documents were

prepared on the next day of the incident.

32. It is undisputed that presence of the witnesses as well as of the accused persons is not shown in the spot map and also that the clothes drenched

with the blood were not seized during investigation.

33. But all these are lapses on the part of the Investigating Officer for which the witnesses, who have deposed on oath before the court cannot be

blamed or disbelieved. In this regard we can refer the judgments passed in Yogesh Singh V/s. Mahabeer Singh & others reported in AIR 2016 SC

5160, Sanjeev Kumar Gupta V/s. State of Uttar Pradesh (now State of Uttarakhand){Cr.A.No.507/13}, Saurabh V/s. State of Uttar Pradesh (now State of Uttarakhand) {Cr.A.No.508/13}, Nitin @ Vippu V/s. State of Uttar Pradesh (now State of Uttarakhand) {Cr.A.No.509/13}, Dheeraj Kalra V/s. State of Uttar Pradesh (now State of Uttarakhand) {Cr.A.No.510/13}, Bhagat Singh V/s. State of Uttar Pradesh (now State of Uttarakhand) {Cr.A.No.511/13}, Som Prakash V/s. State of Uttar Pradesh (now State of Uttarakhand) {Cr.A.No.512/13} reported in (2015) 11 SCC 69 and Naval Kishore V/s. State of Maharashtra reported in (2015) 11 SCC 383 cited by the objector/prosecution; where it is held that the statement of witnesses cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. The lapses in investigation should not be treated as fatal to the prosecution case. Looking to the availability of unimpeachable direct evidence, these lapses are not sufficient to dent the case of the prosecution.

34. It is also argued that the witnesses have not specifically mentioned as to which fire arm like pistol, revolver or country made katta was used in the incident but difference in this regard appeared in the statement of the witnesses is only due to way of expression. The substantial fact is that the fire arm was used in this incident; therefore, not giving particulars of the fire arm is not fatal to the prosecution case.

35. Distance of gunshot is also questioned by the defence. Gullu and Nanuram have stated that the bullet was fired by putting pistol on the body, while Dr. Mahobia has stated that gunshot injury found on the body of the deceased was not a contact wound because he did not find gun powder inside the wound but this fact again does not affect the prosecution case adversely as this is a way of expression when someone fires gunshot from a close distance then some people may say that the gun was fired by putting the gun on the body and in this case there is no doubt that the gun was fired from the close distance.

36. Absence of motive is also taken as a defence but the prosecution has come forward with a case that there were differences between the two groups regarding candidature of Sarpanch for ensuing Gram Panchayat election. Each group was backing a different person and both were attempting to get the person of their choice nominated or selected for candidature.

37. It is argued that Vasil was not present in the meeting convened at Modi Garden for finding an amicable solution, therefore, he was having no motive for murder but first thing is that the law is well settled that in case of murder absence of motive has no relevancy and in the present case rivalry between the two groups is established. Vasil is son of Yusuf, who was associated with one of the group; therefore, it cannot be said that Vasil was having no motive for committing the offence.

38. The defence has also raised the issue that all the witnesses in this case are either relative of the deceased or interested persons. The learned counsel has cited the judgement passed in M.C. Ali & another V/s. State of Kerala reported in 2010 Cr.L.J. 2791 (SC); wherein it is held that non-recording of statement of witnesses available on the spot and non-mentioning of name of accused persons in the inquest report, all the witnesses were interested, their evidence not independently corroborated, in that case, only one conclusion constant that guilt of accused was not possible. But both parties in this case are relative to each other. They have some close or distant relation. They both belong to the same party. Though they both were backing different candidates but they were trying to find out amicable solution. The meeting for which they gathered first at Modi Garden then at the shop of Babbu makes their presence natural; therefore, their statements cannot be discarded only on the ground that they are interested persons. Otherwise also the law is well settled that in the cases where all the eye-witnesses are related to the deceased or they are interested witnesses, their version requires scrutiny with care, caution and circumspection and when we scan their evidence with the said parameters, we find that it does withstand the said test. Therefore, their statements cannot be discarded only because they are interested or related witnesses.

39. Learned counsel for the objector along with learned Public Prosecutor has placed reliance on the judgment passed in Saddik @ Lalo Gulam Hussein Shaikh & others V/s. State of Gujrat reported in 2017 Cr.L.J. 149, Anuplal Yadav & another V/s. State of Bihar {Cr.A.No.775/07} and Surang Lal Yadav V/s. State of Bihar {Cr.A.No.1163/07} reported in (2014) 10 SCC 274 and Banwari Ram & others V/s. State of U.P. {Cr.A.No.8/1980} and Bans Narain Singh & others V/s. State of U.P. {Cr.A.No.579/1980} reported in (1998) 9 SCC 3; in which it is held that it is

not necessary that all the persons forming unlawful assembly must be shown to have committed some overt act. But situation in the case in hand is totally different.

40. In the present case presence of Kallu and Yusuf on the spot is seriously doubtful. Similarly statement of witnesses showing presence of Anwar and Akhtar are not trustworthy, therefore, question of constitution of unlawful assembly by the appellants does not arise. We have not taken the faulty investigation as a base to acquit any of the appellants; therefore, no conclusion can be drawn on the basis of the judgment pointed out by the learned Public Prosecutor or the objector.

41. Having regard to the aforesaid discussion, we are of the considered opinion that the presence of Kallu and Yusuf on the spot is seriously doubtful.

Statement of witnesses regarding presence of Anwar and Akhtar are also not reliable while the statement of the witnesses so far as they relates to the assault made or the offence committed by Vasil and Tammu remains reliable. They found independent support also and they are further

corroborated by the documents prepared during investigation. Fire arm was also recovered from the possession of Vasil for which he was not having

valid license and the prosecution for the charge under the Arms Act has been launched against him after obtaining requisite sanction from the District

Magistrate. Seizure of empty and live cartridges and bullets from the spot and FSL report also corroborates their statements, therefore, we find

substance in the case of the prosecution so far as it relates to the appellants Vasil and Tammu @ Tameem, but at the same time we find that the case

of the prosecution with regard to the appellants Kallu, Yusuf, Anwar and Akhtar is not safe to relied upon, therefore, the appeal filed by them is

allowed. They are acquitted from the charge under Section 302 of IPC. Their bail bond stands discharged. Fine amount, if deposited, be returned to

them. They be set at liberty forthwith, if not required in any other case. The appeal filed by the appellants Vasil and Tammu @ Tameem is dismissed.

We hold them guilty for committing murder of Ashraf Patel. We also uphold the sentence awarded to both of them by the learned Trial Court.

42. The order of the learned Trial Court with regard to the disposal of property is hereby confirmed.