
(2002) 04 RAJ CK 0086
In the Rajasthan High Court
Case No : Criminal Appeal No. 429 of 1996

Moti Lal and Others

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 02-04-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 323, 324

Citation : (2003) 1 RLW 42

Hon'ble Judges : Shiv Kumar Sharma, J;F.C. Bansal, J

Bench : Division Bench

Advocate : S.R. Bajwa and V.P. Bisnoi, S.R. Surana, for the Appellant; R. Yadav, Public Prosecutor, for the Respondent

Judgement

Sharma, J.—As many as 8 accused were put up on trial before the learned Additional Sessions Judge Sambhar Lake, Jaipur Distt. in Sessions Case No. 18/94. The learned trial judge, acquitted one accused Suraj Mal but convicted and sentenced the seven appellants vide its judgment dated July 18, 1996 as under:-

1.

Phool Chand

U/s. 302/149 IPC

Life Imprisonment with fine of Rs. 20,000/- in default to further undergo six months SI.

2.

Moti Lal

U/s. 148 IPC.

One Year RI with fine of Rs. 2000/- in default to further undergo one month SI.

U/s. 324 IPC

Six months RI with fine of Rs. 2000/- in default to further undergo one month SI.

U/s. 323/149 IPC

Three months RI with fine of Rs. 1000 in default to further undergo 15 days SI.

U/s. 341 IPC

15 days RI with fine of Rs. 500/- in default to further undergo 7 days SI

3.

Nanda @ Nand Kishore

U/s. 302/149 IPC

Life Imprisonment with fine of Rs. 10,000/- in default to further undergo four months SI

U/s. 148 IPC.

One Year RI with fine of Rs. 2000/- in default to further undergo one month SI.

U/s. 324 IPC

Six months RI with fine of Rs. 2000/- in default to further undergo one month SI.

U/s. 323/149 IPC

Three months RI with fine of Rs. 1000 in default to further undergo 15 days SI.

U/s. 341 IPC

15 days RI with fine of Rs. 500/- in default to further undergo 7 days SI

4.

Sua Lal

U/s. 302/149 IPC

Life Imprisonment with fine of Rs. 10,000/- in default to further undergo four months SI

5.

Anna Ram

6.

Nanuram

7.

Om Prakash

U/s. 148 IPC.

One Year RI with fine of Rs. 2000/- in default to further undergo one month SI.

U/s. 324/149 IPC

Six months RI with fine of Rs. 2000/- in default to further undergo one month SI.

U/s. 323/149 IPC

Three months RI with fine of Rs. 1000 in default to further undergo 15 days SI.

U/s. 341 IPC

15 days RI with fine of Rs. 500/- in default to further undergo 7 days SI.

2. The said judgment has been assailed by the appellants in the instant appeal. During the pendency of the appeal, the Superintendent Central Jail, Jaipur vide letter dated May 29, 1998 intimated that the appellant Sua Lal son of Narain died on May 24, 1998. In view of the said intimation the appeal of Sua Lal stands abated and proceedings against accused Sua Lal are ordered to be dropped.

3. The State of Rajasthan has also preferred D.B. Cr. Appeal No. 68/97 against the impugned judgment in so far as it relates the acquittal of Suraj Mal is concerned.

4. Kalu Ram, the father of the deceased Gyan Chand has filed Criminal Revision No. 508/1996 seeking enhancement of the sentence.

5. The prosecution case as pictured during trial may be summarised thus-

(i) Complainant Ram Chandra PW.13 submitted a written report to the SHO Police Station Jobner on November 11, 1993 around 11.00 a.m. with the averments that when he was going to poll his vote alongwith Gyan Chand and Ram Kishore he found Phool Chand son of Nandaram, Moti son of Nandaram, Sua Lal son of Narain, Nanu son of Bilala, Anna son of Onkar, Nanda son of Jagdish, and Om Prakash son of Balu Ram near the underbridge coming from opposite side and all of sudden Phool Chand gave knife blow over left thigh of Gyan Chand and Nanda inflicted knife blow on the left shoulder of the complainant. When they ran towards Bus Stand, they were followed by the assailants who caught hold of them near Pareek Clinic and there Phool Chand and Moti Meena continuously inflicted knife blows on the back of Gyan as a result of which he fell down but even thereafter Phool Chand did inflict knife blows on the person of Gyan Prakash. Ram Kishore when made attempt to rescue Gyan all the assailants inflicted injuries with knives and lathies On his person mercilessly. Gyan was taken to the Hospital where he was declared dead. The police registered a case under Sections 148, 302, 302/149, 323, 323/149, 341, 324, 324/149, 307, 307/149 IPC and investigation commenced. Site inspections memo were drawn. Autopsy on the dead body of Gyan was conducted. Statements of witnesses u/s 161 Cr.P.C. were recorded. The appellants were arrested and at their instance weapons were recovered. After conclusion of the investigation the challan was

laid. In due course the case came up for trial before the learned Additional Sessions Judge Sambhar Lake, Charges under Sections 148, 302, 302/149, 323, 323/149, 341, 324, 324/149, 307, 307/149 IPC were framed against the appellants, who denied the charges and claimed trial.

6. The prosecution examined as many as 24 witnesses and produced 44 documents in support of its case. The appellants in their statements u/s 313 Cr.P.C. claimed innocence and stated that they have been falsely implicated on account of political rivalry. Five witnesses however were examined in defence by the accused. The learned trial judge on hearing final submissions convicted and sentenced the appellants as indicated hereinabove.

7. From the postmortem report Ex. P.20, it is revealed that deceased Gyan sustained following 19 injuries and he died on account of hemorrhagic and traumatic shock due to cumulative effect of the said injuries:

1. Antemortem abrasion 6cm. x 4 cm. left palm red colour.
2. Stab wound 2.5 cm. x .8 cm. x muscle deep (4 cm.) 13 cm. below and lateral to left anterior superior iliac spinal (antemortem).
3. Antemortem stab wound 2.5 cm. x .7 cm. x muscle deep (4 cm.) from skin) 13 cm. below injury No. 2 (Antemortem).
4. Antemortem stab wound 2.5 cm. x .7 cm. x muscle deep (5cm. from skin) middle of left thigh lateral aspect.
5. Antemortem abrasion 3cm. x 5cm. left patella- red colour.
6. Antemortem abrasion 1 cm. x 1 cm. left tibial tuberosity (Red).
7. Antemortem laceration 1 cm. x 1 cm. x SCT deep, 4 cm. below injury No. 6.
8. Antemortem laceration 2cm. x 1/2 cm. x CCT deep, 10 cm. below injury No. 7.
9. Antemortem abrasion 1 cm. x 1 cm. Rt parietal (Red colour).
10. Antemortem laceration 2cm. x 1/2 cm. x SCT deep, Rt. tibial tuberosity.
11. Stab wound (Antemortem) 1/2 cm. x 7 cm. x ms. deep, Antero (1/2 cm. from skin lateral, aspect Right leg 6 cm. below and outward from injury No. 10.
12. Antemortem abrasion 5cm. x 3 cm. Right palm.
13. Stab wound (Antemortem) 2.5 cm. x 7 mm. x muscle deep (5cm. from skin) on upper 1/3 of Back of left thigh.
14. Antemortem abrasion 2cmx 1cm. lateral aspect upper 1/3 of Lt. leg.
15. Antemortem stab wound 2.5 cm. x 7 mm. x muscle deep (3cm. from skin) outer aspect, upper and left fore arm.

Injuries 16 to 19 are described, after internal examination and external

examination and are elliptical, directed left up and outwards.

16. Antemortem stab wound 2.5 cm, x 7mm. and cutting the thorax wall through and through, cutting pleurae and then puncturing left lung upto depth of 4cm. On left back 1 cm. to left of 78 spinal. The intercostal vessels also cut.

17. Antemortem stab wound 2.5 cm. x 7 mm. x cutting the Post thoracic wall. Intercostal vessels and plura and left lung upto depth of 3 cm. This injury is 5 cm. below and left to injury No. 16.

18. Antemortem stab wound 2 cm. x 7 mm. x cutting post thoracic wall. Intracoastal vessels and left plura. It is 5 cm. below and left to injury No. 17.

19. Antemortem stab wound 2.5cm x 7 mm. & cutting post thoracic wall and Intracoastal vessels and it. plura. It is 7 cm. to left of injury No. 17.

8. As per the injury report Ex.P.27 Ram Kishore (PW.4) sustained as many as 7 injuries thus-

1. Stab wound 2.5 cm. x 1/2 cm. x ? cavity deep placed transversely 9 cm. lateral on it. side in same place tenting medially it. side abdomen with fresh clotted blood.

2. Stab wound 1 cm. x 1/4 cm. x ? cavity deep medial to it. ant. supra illiac spine 7 cm. below injury No. 1 with fresh clotted blood.

3. Stab wound 2 cm. x 1/2 cm. x ? muscle deep on it. hip joint 7 cm. below injury No. 2 1 cm. lateral to it with fresh clotted blood.

4. Incised wound 2 cm. x 1/2 cm x ? muscle deep placed obliquely on top of it, shoulder.

5. Incised wound 3.5 cm. x 1cm. x ? muscle deep placed obliquely on lateral aspect of it. arm middle 1/3.

6. Stab wound 2cm. x 1/2 cm. x ? muscle deep on Rt. infra scapular region placed obliquely and vertical tenting downwards.

7. Lacerated wound 2cm. x 1/2 cm. x ? muscle deep on Rt. tibial shin middle 1/3.

9. Vide injury report Ex. P. 19 Ram Chandra (PW. 13) sustained following three injuries:

1. Incised wound 2 cm. x 1/2 cm. x SCT deep left scapular area.

2. Incised wound 2 cm. x 1/2 cm. x SCT deep 4 cm. medial to injury No. 1.

3. Laceration 1/2 cm. x 1/2 cm. x SCT deep Right lip.

10. To substantiate the charges levelled against the appellants, the prosecution relied primarily upon the ocular version of Ram Kishore PW.4, Chandra Shekhar PW.5, Jagdish Prasad PW.6, Madan Lal PW.7, Ram Chandra PW.13 and Sharwan Lal PW. 14. Besides the prosecution placed reliance upon the evidence of Smt.

Babudi PW.3, (mother of the deceased Gyan) given in support of dying declaration of Gyan.

11. The trial judge discussed in detail the evidence adduced by the prosecution and the defence at length and on appreciation thereof held that the charges levelled against the appellants stood conclusively proved.

12. After having heard the rival submissions we now proceed to consider the ocular testimony and other material on record.

13. In his deposition complainant Ram Chandra PW. 13 who has been examined as an injured eye witness by the prosecution, stated that on November 11, 1993 around 10.00 a.m. when he accompanied by Gyan and Ramkishore was going to Jobner High School to cast his vote he found Phool Chand, Moti, Nanu, Sualal, Om Prakash, Anna and Nanda near the bridge of the School. All these persons had enmity with him and Gyan. Phool Chand had earlier threatened him and Gyan to kill. On seeing them Phool Chand instigated other accused persons to assault and Phool Chand inflicted knife blow on the left thigh of Gyan. Nanda inflicted knife blow on his (Ram Chandra) left shoulder. They ran but the assailants followed them. Phool Chand caught hold of Gyan near Pareek Clinic and Phool Chand Moti inflicted knife blows on his back. Even after Gyan fell down, Phool Chand and Moti continued to inflict blows with knives on his person. When Ram, Kishore made attempt to intervene Moti caught hold of him and Nanda inflicted knife blows on his back and shoulder. Sualal inflicted lathi blow on his (Ramchandra) face. Surja, Sua, Anna, Nanu and Omla also gave lathi and sariya blows on Gyan and Ramkishore. Finding Gyan dead the assailants left and in the meanwhile police arrived. Gyan was taken to the Hospital there he died.

14. Ram Kishore (PW.4) who according to prosecution sustained injuries during the incident, almost repeated the eye witness account as narrated by Ram Chandra (PW.13). Chandra Shekhar (PW.5) Jagdish Prasad (PW.6) and Sharwan Lal (PW.14) also corroborated the prosecution story and deposed against the appellants. Madan Lal (PW.7) however did not support the prosecution case and was declared hostile. Babudi (PW.3) in her deposition stated that on hearing about the incident when she reached near her injured son Gyan, who was lying in a pool of blood in front of the house of Madan Jogi, Gyan told her twice that Phoola and Moti had beaten him.

15. Mr. S.R. Bajwa, learned Senior Counsel appearing for the appellants vociferously canvassed that charges levelled against the appellants could not have been established beyond reasonable doubt from the material on record. The first limb of contention of the learned counsel is that the FIR (Ex.P.23) being post investigative document, is hit by Section 162 Cr.P.C. Elaborating his submissions Mr. Bajwa invited our attention to the Inquest report (Ex. P. 18) according to which the investigation commenced at 10.30 A.M. whereas written report was handed over to Kailash Chand Sharma ASI at Jobner Hospital by Ram Chandra (PW.13) at 10.50 a.m. The FIR, according to the learned counsel is antitimed.

The investigation commenced even without registering the FIR and after due deliberations false case was concocted against the appellants and it is because of this reason that the FIR could reach to the Ilaqa Magistrate on November 16 i.e. after five days of the occurrence. Learned counsel placed reliance on State of A.P. v. Punati Ramulu (1), and Meharaj Singh v. State of U.P. (2), wherein their Lordships of the Supreme Court indicated that the complaint registered as FIR by the Investigation Officer after reaching the spot could not be treated as FIR. It would be a statement made during investigation and hit by Section 162 Cr.P.C. If the FIR is received by the Ilaqa Magistrate late it can give rise to any inference that the FIR was not lodged at the time it is alleged to have been recorded unless satisfactory explanation for delay is offered.

16. Bench of Hon''ble three Judges of the Supreme Court in Pala Singh v. State of Punjab (3), propounded that the relevant provisions contained in Section 157 Cr.P.C. regarding forthwith despatch of the FIR are really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction u/s 159 Cr.P.C. and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable.

17. Shiv Ram v. State of U.P. (4), was the case wherein the Hon''ble Supreme Court observed that delay in sending the FIR to the Ilaqa Magistrate would not demolish the other positive and credible evidence on record. This would only show how in such a serious crime the investigating agency was not careful and prompt as it ought to be.

18. In Madru Singh v. State of M.P. (5), three Judge Bench of Hon''ble Supreme Court indicated that delay in receiving the FIR by the Ilaqa Magistrate is not ipso facto a proof of the FIR being belated. Moreso when the witness had asserted to have seen the entire evidence and despite searching cross examination the defence had failed to elicit any omission or contradiction in the statement.

19. In the instant case as already noticed the prosecution examined two injured eye witnesses viz. Ram Chandra (PW. 13) and Ram Kishore (PW. 4). We have closely scrutinised their testimony. They were subjected to searching cross examination. Mr. Bajwa learned Senior Counsel contended that these witnesses did not receive the injuries in the incident occurred with the deceased Gyan. Duration of injuries sustained by them does not match with the duration of the injuries received by the deceased Gyan. It is established from their testimony that they do not normally live in Jobner and are close relatives of the deceased. Learned counsel on the basis of the contradictions from their previous statements made an attempt to impair the credit of these witnesses. It is further contended that Babudi (PW. 3) in her deposition did not state that Ram Chandra and Ram Kishore were present near injured Gyan. She completely ruled out the

presence of these witnesses at the place of occurrence. The incident although had been occurred in the broad day light but no independent witness was produced by the prosecution. Nobody from Pareek Clinic was examined. Learned counsel therefore persuaded us to draw an adverse inference u/s 114 of the Evidence Act.

20. It is next contended by the learned counsel that blood smeared soil recovered from the first place of incident i.e. near the small bridge was kept in packet "B" whereas blood smeared soil from the second place of incident i.e. near Pareek Clinic was kept in packet "D". In the FSL report Ex.C-1 blood smeared soil of packet "B" was found stained with human blood however no blood group could be discerned as it was disintegrated. Blood smeared soil contained in packet "D" was not found sufficient for test. In view of this an argument was advanced that when according to prosecution case deceased Gyan was lying in a pool of blood near Pareek Clinic why the soil recovered from that place did not contain sufficient blood? The reason according to the testimony of defence witnesses was that the incident had not occurred near Pareek Clinic as shown by the prosecution but it actually had happened inside Pareek Clinic. Gyan had thrown the tent of BJP in to the well and he was attacked by the public at large inside Pareek Clinic. As the place of incident has been changed by the Investigation officer the appellants could not be convicted on the basis of tainted investigation. Reliance is placed on *Bhimappa v. State of Karnataka* (6).

21. It is further urged by the learned counsel that although injuries from the blunt weapons were attributed to appellants Anna Ram, Om Prakash and Nanu Ram but from the Inquest report (Ex. P.18) it is evident that the deceased Gyan had only sustained injuries caused by sharp edged weapons, no injury by blunt weapon was found on his dead body. Vide recovery memos Ex.P.4 and P.11 lathies had been allegedly recovered at the instance of Anna Ram and Om Prakash but they were not found stained with blood therefore the I.O. did not choose to send the lathies to the FSL. Nothing had been recovered from Nanu Ram. In view of this learned counsel contended that participation of Om Prakash, Anna Ram and Nanu Ram could not be established beyond reasonable doubt. Question of forming unlawful assembly also did not arise as it was a poll day, police was already there and if persons assembled on a busy road without any proximate cause or common object it cannot be said that they had formed unlawful assembly.

22. So far as alleged recovery of knives at the instance of appellants Phool Chand, Moti Lal and Nanda is concerned, learned counsel canvassed that it is fake. No blood was found on knives and they were not sent to FSL. Thus it could not be proved that the said knives were used in commission of offence. According to learned counsel the defence introduced by the appellants appears more plausible and the defence witnesses examined by the appellants ought to have been relied upon by the learned trial judge. In the considering the testimony of the defence witnesses Ram Gopal Jogi (DW.1) Narain (DW.2) Ram

Singh (DW.3), Chhitar Mal (DW.4) and Mohan Lal (DW.5) learned trial judge committed illegality in view of ratio indicated in *State of U.P. v. Babu Ram* (7) and *Dudh Nath Pandey v. State of U.P.* (8), wherein it was held that defence witnesses are entitled to equal treatment with those of the prosecution. According to Mr. Bajwa learned counsel the persons working in Pareek Clinic were very important and material witnesses and ought to have been examined by the prosecution. In their absence the testimony of alleged eye witnesses produced by the prosecution lacks credence. The prosecution case thus suffers from the vice of suppression veri on material point and creates doubt about the genuineness of investigating agency. Reliance is placed on *Omwati v. Mahandra Singh* (9), *Kanhai Mishra v. State of Bihar* (10), and *State of Haryana v. Ashok Kumar* (11).

23. Their Lordships of the Supreme Court in *State of U.P. v. Abdul* (12) and *Dr. Krishna Pal v. State of U.P.* (13), observed that it is not necessary to record the details of the incident in the Inquest report. Merely because the I.O. had not been diligent enough in drawing the Inquest report it would not be proper to discard reliable and clinching evidence adduced by the eye witnesses. In *Paras Yadav v. State of Bihar* (14), it was held that the lapse on the part of the investigating officer should not be taken in favour of the accused. The prosecution evidence is required to be examined *dehors* such omissions to find out whether the said evidence is reliable or not.

24. In *Baboolal v. State of U.P.* (15), their Lordships of the Supreme Court propounded that mere fact that investigating officer did not notice blood at the spot on the next evening is not sufficient to conclude that the incident did not happen at that spot at all when testimony of eye witnesses showing that the incident had occurred at that place. In *Shiv Nath Singh v. State of U.P.* (16), it was held that failure of investigating officer to collect blood stains from the site by itself is not an infirmity. Similar view was expressed in *Ram Swaroop v. State of U.P.* (17).

25. In *Buta Singh v. State of Punjab* (18), on which reliance is placed by the learned counsel for the appellants the finding of blood near the tube well supported the defence story narrated by the defence witness Dileep Singh (DW.1), who though named as prosecution witness, was dropped without proper explanation. Even after searching cross examination nothing could be brought out. As per recovery memo blood stained earth was picked up from near the tube well that stood corroborated by the evidence of Bal Mukund I.O. No blood was found from the field where the occurrence is stated by the prosecution to have occurred. Under these circumstances Hon"ble Supreme Court observed that if the incident had taken place in the field some traces of the incident would certainly have been from the field. The prosecution had not explained the presence of blood near the tube well and the absence thereof in the field. The defence version, therefore stood corroborated from the objective evidence.

26. *Surjit Singh v. State of Punjab* (19), was the case wherein it was indicated that First Information Report is not an encyclopedia of the entire case and even

not a substantive piece of evidence. It has value, no doubt, but only for the purpose of corroborating or contradicting the maker. The two eye witnesses of the occurrence one being the young wife who would normally be in the company of the husband at 10.30 p.m. on a summer night and the other is nephew of the deceased who had suffered grievous injuries in the occurrence were natural and stamped witnesses.

27. In *Sardul Singh v. State of Punjab* (20), it was held that the presence of witnesses who received injuries during course of incident cannot be doubted. Where there are number of injuries on the deceased and the witnesses have given some details about the manner in which they were inflicted each witness cannot be expected to note the details in seriatim.

28. Hon"ble Supreme Court in *Bonkya v. State of Maharashtra* (21), observed that presence of the injured witnesses at the scene of occurrence can not be doubted and being victim themselves they would not leave out real assailants and substitute them with innocent persons.

29. The salient features as noticed by us on a close scrutiny of the material on record, may be summarised thus-

(i) Written report was submitted by Ram Chandra (PW. 13) at 10.50 A.M. to SHO Police Station Jobner in the Hospital on Nov. 11, 1993 but it was received by the Ilaga Magistrate on November 16, 1993.

(ii) According to Inquest Report investigation commenced on November 11, 1993 at 10.30 A.M. Reference of only those injuries was made in the Inquest Report which were received by the deceased by sharp edged weapons. No injury caused by blunt weapons was found on the person of deceased.

(iii) Blood smeared soil was recovered from two places-(a) near the small bridge and (b) near Pareek Clinic. From the FSL report soil recovered from the place near the bridge was found stained with human blood, but blood group could not be discerned as the blood was disintegrated. However soil recovered from the place near Pareek Clinic contained negligible blood that was not found sufficient for test.

(iv) The appellants were arrested alter about four months of the occurrence and the weapons allegedly recovered at the instance of appellants were not stained with blood.

(v) The prosecution examined injured eye witnesses Ram Kishore (PW.4) and Ram Chandra (PW.13) to substantiate the charge levelled against the appellants. As per medical injury reports Ram Kishore sustained four stab wounds two incised wound and one lacerated wound whereas Ram Chandra received two incised wounds and one lacerated wound.

(vi) As per the prosecution case, at the first place of incident i.e. near the small bridge appellants Phool Chand inflicted knife blow on the left thigh of the

deceased and appellant Nanda gave knife blow on the left shoulder of Ram Chandra. At the second place Of incident i.e. near Pareek Clinic Phool Chand and Moti inflicted knife blows on the back of deceased Gyan and continued to inflict knife blows even after Gyan fell down. Moti caught hold of Ram Kishore and Nanda inflicted knife blows on the person of Ram Kishore. Sua Lal gave lathi blow on the face of Ram Chandra. Surja, Sua, Anna, Nanu and Omla also gave lathi ad sariya blows on Gyan and Ram Kishore.

(vii) As per the defence version introduced by the five defence witnesses the incident had actually occurred inside Pareek Clinic. Deceased Gyan had thrown the tent of BJP into the well therefore he was attacked by public at large inside Pareek Clinic. The appellants were falsely implicated on account of political enmity.

30. A conjoint look at the testimony of Ram Kishore (PW.4) goes to show that appellants Phool Chand and Moti inflicted injuries on the person of deceased Gyan. Appellant Nanda gave knife blow on the left shoulder of Ram Chandra near the small bridge and gave knife blows to Ram Kishore near Pareek Clinic. The allegations against the appellants Om Prakash, Anna Ram and Nanu Ram are that after Gyan sustained injuries with knives, they inflicted lathi and sariya blows on his person and also gave beating to Rarn Kishore. We have therefore to see whether in the facts and circumstances of the case the appellants had formed unlawful assembly? Raghuveer (PW.21) the Investigating Officer in his cross examination deposed that the incident had been initiated from the place where the tents of Congress and BJP were installed thereafter it flared up and injuries were caused within a radius of 200 yards. As per the deposition of Ram Kishore (PW.4), he himself, deceased Gyan and appellant Phool Chand were the history sheetors and proceedings u/s 110 Cr.P.C. were initiated by the Police against them. Overall look at the material on record reveals that many people had gathered near the place of incident as it was a poll day. In *Musa Khan v. State of Maharashtra* (22), Hon"ble Supreme Court propounded that mere presence in an assembly of person does not make the accused a member of an unlawful assembly. It must be proved that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all the stages.

31. We have closely scrutinised the evidence of injured eye witnesses Ram Kishore (PW.4) and Ram Chandra (PW.13) and also the testimony of Babudi (PW. 3) and we find that the prosecution has failed to establish that appellants Nanda, Om Prakash, Anna Ram and Nanu Ram were the members of the unlawful assembly and shared the common object of the assembly at all the crucial stages and charges under Sections 148 and 149 IPC against them do not stand proved.

32. Ram Kishore (PW.4) as earlier noticed, sustained serious injuries including stab and incised wounds. This fact helps us to agree that he was able fo see Phool Chand and Moti who attacked him and the deceased Gyan. Presence of Ram Chandra (PW.13) who sustained injuries with the hands of Nanda also can

not be ruled out. Although there are some discrepancies in the testimony of these witnesses but the said discrepancies are in our opinion, due to normal errors of observation, due to normal errors of memory and due to mental disposition, such as shock and horror at the time of occurrence. Testing their testimony from the point of view of the trustworthiness we find that they had not spoken untruth and their testimony had not been polluted. If independent witness is not associated by the Investigation officer it hardly makes any difference in the facts and circumstances of this case.

33. We are unable to persuade ourselves to agree with the submissions, advanced by Mr. Bajwa learned Senior Counsel. The delay in sending FIR to the Ilaqa Magistrate in our opinion would not demolish the credible testimony of Ram Kishore (PW.4) and Ram Chandra (PW. 13). We also find that in the instant case the investigating agency was not careful in drawing the Inquest Report. In the Inquest Report itself it was stated that the report of the incident was handed over at 10.50 A.M. in the Hospital therefore in the column of "commencement of investigation" if time 10.30 a.m. was shown, it does not make the FIR a post investigative document. It only shows the negligence on the part of the investigating agency. In so far as non mentioning of the blunt injuries on the dead body of the deceased is concerned, it cannot be pitted against the medical evidence given in court as is held in *Surjan v. State of Rajasthan* (23). If negligible blood was found near Pareek Clinic, it is not sufficient to conclude that the incident did not happen at that spot at all in view of the testimony of Ram Kishore and Ram Chandra. Case of *Buta Singh v. State of Punjab* (supra) is distinguishable. After giving equal treatment to the testimony of the defence witnesses with those of the prosecution we find that their testimony is of no help to the appellants. These witnesses although deposed that public at large inflicted injuries on the person of the deceased but they could not name any person who participated in the attack. So far as the recovery of weapons not stained with blood at the instance of the appellants is concerned, it is hardly of any consequence as the appellants were arrested after four months of the incident.

34. In so far as D.B. Criminal Appeal No. 68/97 preferred by the State of Rajasthan and D.B. Criminal Revision No. 508/1996 filed by Kalu Ram are concerned, we are of the view that the learned trial judge has not committed any illegality in acquitting Suraj Mal and question of enhancement of sentence does not arise in the facts and circumstances of this case.

35. In view of what we have discussed hereinabove we dispose of the instant matters in the following terms:

(i) D.B. Criminal Appeal No. 68/1997 and D.B. Criminal Revision No. 508/1996 stand dismissed.

(ii) While dismissing the appeal of appellants Phool Chand and Moti Lal, we convert their conviction from Sections 302/149 IPC to Sections 302/34 IPC and sentence them to suffer imprisonment for life and fine of Rs. 1000/- in default to

further suffer one year R.I. We also confirm their conviction under Sections 324 and 341 IPC, but acquit them from charges under Sections 148, 323/149 IPC.

(iii) Appeal of appellant Nand Kishore @ Nandason of Jagdish stands partly allowed and he is acquitted from the charges under Sections 302/149, 149, 323/149 IPC. His conviction u/s 324 and 341 IPC however stands confirmed Appellant Nand Kishore @ Nanda had already suffered sentences awarded to him under Sections 324 and 341 IPC. He shall be released forthwith if not required in any other case.

(iv) We allow the appeal of appellants Anna Ram, Nanuram and Om Prakash and set aside their conviction under Sections 302/149, 148, 324/149, 323/149 and 341 IPC, we acquit them from the said charges, The appellants Anna Ram, Nanuram and Om Prakash are in jail they shall be released forthwith if not required in any other case.