
(2017) 02 MP CK 0156
In the Madhya Pradesh High Court
Case No : 801 of 2004

ROHIT JAGWANI

APPELLANT

Vs

UNION OF INDIA AND ORS

RESPONDENT

Date of Decision : 03-02-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 141](#),
[Section 302](#), [Section 201](#), [Section 147](#),
[Section 323](#), [Section 148](#)

Citation : (2017) 02 MP CK 0156

Hon'ble Judges : S C Sharma, Rajeev Kumar Dubey

Bench : Division Bench

Advocate : Sharmila Sharma, Milind Phadke

Judgement

1. This appeal has been filed against the judgment dated 16.7.2004 passed by Addl.Sessions Judge, Shujalpur, District Shajapur in S.T.No.169/2003, whereby learned Judge found appellants guilty and convicted under Sections 148, 302/149, 364/149, 201, 323/149 of IPC and sentenced to undergo one year RI u/s 148 IPC, Life Imprisonment with fine of Rs.1,000/- u/s 302/149 IPC, five years RI with fine of Rs.500/-, u/s 364/149 IPC, one year RI u/s 323/149 IPC, and one year RI with fine of Rs..500 u/ s 201 IPC with default stipulation.

2. Brief facts of the case are that on the night of 25.2.2003 at 11.00 PM when complainant Devisingh (PW-6) was sleeping in front of his house situated in the field at village Nimkhedi, his son Tarachand (PW-10) and Bharat (PW-11) came there and told that accused Chhunnilal and his son repeatedly demanded the money of Natra. One year ago Devisingh did Natra of his son Tarachand with Babli the daughter of Sampatbai, who was earlier wife of respondent Ramprasad. Panchayat of his community decided Rs 80000(Eighty Thousand) as Jhagada which had to be given by Devisingh to Ramprasad. On that Devisingh told him that he would solve the dispute on Wednesday. Thereupon Devi Singh's younger brother Kalu and his wife Leelabai (PW-7) also came there. At that time appellant

Phool Singh and co accused Rai Singh came there on motorcycle alongwith co-accused Sampatbai. Sampatbai quarreled with Leelabai and asked her as to why she was not giving

money of Jhagada and asked Rai Singh and Phool Singh to beat Leelabai. Then Rai Singh assaulted Leelabai by a stick. Thereupon accused Bapu Seth came on tractor along with appellants Ramprasad, Chhunnilal, Ghanshyam, Dule Singh, Mangu and co accused Jagdish armed with Lathis. Ramprasad asked other companions to take Devisingh and Kalu to Himalayshwar. Ramprasad, Chhunnilal, Jagdish, Ghanshyam, Bapu Seth, Dule Singh forcibly tried to take the complainant Devi Singh and his brother Kalu and when they resisted they all beat them with sticks, tied them with rope and brought them from spot to Devli Talab, where Dule Singh said "kill them today". Then all accused persons beat Devi Singh and deceased Kalu with Lathis. and took them to Chhunnilal's field. Thereafter they took them to Chhunnilal's house situated at Himalayshwar, where appellants and other co-accused again beat him, due to which Kalu died. thereafter except Ramprasad, Chhunnilal all other accused had gone then Chhunnilal prepared Bullock cart Ramprasad and his brother Gokul brought them to Anokhelal's field by that bullock cart and threw them there.

3. In the morning of 26/05/04 when Kishore singh son of Anokhi Lal (PW-16), Babulal (PW-11), Mahaveer (PW-15) the then Sarpanch Gram Panchayat Khatsur and other persons reached there, they saw dead kalu and injured Devisingh lying in there. Devi Singh narrated the incident to them. Mahavir informed A.K.Shesha (PW-17) the then A.S.I. Police Chowki Polaykhan, P.S. Avantipur Badodia on phone. On receipt of telephonic information, A.K.Shesha reached on the spot. Injured Devisingh also narrated the incident to him. He reduced the information into writing (Dehati Nalishi) Ex.P/10 and sent it to P.S., Avantipur Badodia District Shajapur through constable Kelash Tiwari where, on that report, Crime No.85/2003 Ex.P/31 was registered by head Constable Abdul Gaffar against appellants Ramprasad, Chhunnilal, Ghanshyam, Phool Singh, Dule Singh and other co-accused Jagdish, Bapu Seth, Rai Singh and Sampatbai for the offence punishable under Section 147, 148, 323, 364, 302, 201 of IPC . A.K.Shesha prepared spot map Ex.P/11, Enquest Panchnama of the dead body of Kalu Ex.P/29, sent Devisingh for medical examination and treatment and the dead body of Kalu for postmortem and recorded case diary statement of Devi Singh Ex.D/1, Babulal Ex.P/13, Mahaveer Ex.P/26, Lad singh, Kishor Singh Ex.P/27 and Bherulal.

4. Then he reached Neem Khedi where he also prepared spot map Ex.P/30 on the information of Injured Leela Bai. He also recorded the case diary statement of injured Leela Bai Ex.D/2 and sent her for medical examination. Dr.M.L.Garg (PW-14) conducted Postmortem of dead body of deceased Kalu Singh and medical examination of injured Devi Singh and Lilabai and gave PM report Ex.P/22 and MLC report Ex.P/23 and Ex.P/25. On 28.5.2003. A.S.I., A.K. Shesha arrested the appellants Ramprasad and Chhunnilal and prepared arrest memo

Ex.P/33 Ex.P/34. They were interrogated soon after their arrest. Appellant Ramprasad and Chhunnilal made their disclosure statement Ex.P/18 and Ex.P/19. In consequence of the disclosure statement made by appellant Ramprasad, a rope and Lathi and on disclosure statement made by appellant Chhunnilal a stick was recovered from their possession and seizure memo Ex.P/4 and Ex.P/5 were prepared.

5. Further investigation was conducted by Daud Ahmad (Pw-18) and S.K.S.Tomar (PW-19). Daud Ahmad arrested Bapulal and Dule Singh @ Dolat Singh and arrest memo Ex.P/33, Ex.P/34 were prepared. A Tractor was recovered from the possession of BapuLal and a Stick from Gokul Singh and seizure memo Ex.P/35 and Ex.P/ 36 were prepared. S.K.S.Tomar (PW-19) arrested Jagdish, Rai Singh, Phool Singh, Ghanshyam and prepared arrest memo Ex.P/37, E.P/20, Ex.P/8 and Ex.P/9 respectively after their arrest. Lathis were seized from the possession of Rai Singh and Ghanshyam and a bike from Phool Singh and prepared seizure memo Ex.P/21, Ex.P/6 and Ex.P/7. Head Constable Vijay Shukla arrested Gokul and prepared arrest memo Ex.P/38. The police, after investigation, filed charge-sheet against the Applicants and other co accused before J.M.F.C. Shujalpur who then committed the case to the court of Sessions judge Shajapur Where S.T. No.169/03 was registered.

6. Learned A.S.J., Shujalpur tried the case. He framed charges against the appellant Ramprasad, Chhunnilal, Ghanshyam, Phool Singh, Dule Singh, Gokul and other co-accused Sampatbai, Bapu Lal, Jagdish and Rai Singh under Sections 148, 302/149, 364/149, 323/149 (two counts), 201 of IPC and recorded the evidence. Although, appellants took defence that they are innocent and have falsely been implicated in the case and also appellant Dolat Singh took defence that he is not the same Dolat Singh, who was involved in the incident and in this regard he also produced Hemraj (DW-1)

and Ranglal (DW-2) in his defence but after trial the trial judge only acquitted the accused Sampatbai, Rai Singh, Jagdish and Bapulal from all the charges. But the appellants were found guilty under Sections 148, 302/149, 364/149, 323/149 (two counts), 201 of IPC and were sentenced as indicated above. Being aggrieved from that judgment applicants filed this appeal.

7. During trial the prosecution examined 19 witnesses, out of which Ram Singh (PW-1), Mangilal (PW-2), Kanchanbhai (PW-8), who are the eyewitnesses of the incident as per the prosecution story, have not supported the prosecution story and denied to have seen the incident. Tarachand (PW-10) and Bharat (PW-11) who according to prosecution story were present on the spot at the time of incident only deposed that in the intervening night when he was talking with Devisingh some persons came there and beated Devaji and Kallu Ji. They denied from the fact that appellants beated them. Likewise as per prosecution story Babulal (PW-9), Mahaveer Singh (PW-15), Kishore Singh (PW-16) saw Devi Singh lying in the field in injured state and Kalu Singh in dead state and Devi Singh narrated the incident for the first time to them. But they also did not

support the prosecution story and denied the fact that Devi singh had told them names of the persons who beat them. Rai Singh (PW-1), Bherulal (PW-3), Dinesh (PW-4), Ghasiram @ Ghasu (PW-5), Jagannath (PW-12), Ranglal (PW-13) who were the independent witness of arrest and seizure memo also did not support the prosecution story.

8. The trial court on the basis of statement of injured Devi Singh (PW-6), Leelabai (PW-7) which was corroborated by medical evidence and also by the statement of investigating officer AK Shesha (PW-17), Dawood ahmed (PW-18) and S.K.S.Tomar (PW-19) convicted the appellants.

9. The appellants in appeal memo assailed that judgment on the ground that the conviction is based on the testimony of Devi Singh (PW-6) and Leelabai (PW-7), who are brother and wife of deceased Kalu and these witnesses are interested witnesses and are inimical towards the accused persons and have reasons to falsely implicate the appellants. Their statement is wholly unreliable. The witnesses have adopted the theory of pick and choose and are unreliable. Even Devi Singh (PW-6) admitted in his statement that when he was sleeping about 4-5 persons assaulted him and his face was covered with Bed Sheet and he could not see the persons

who assaulted him and he became unconscious, which showed that Devi Singh did not see the assailant. The learned trial Court committed mistake in not allowing defence to put relevant important questions which caused great prejudice to the appellants. The statement of Leelabai (PW-7) is also not reliable. From her crossexamination it is apparent that Leelabai was not on the spot at the time of incident. She was not knowing accused Ramprasad Gokul and Daulat singh. It also appears from Leelabai's statement that there was no artificial source of light to identify the accused. There are inconsistencies between ocular and medical evidence. Therefore, learned trial court committed mistake in convicting the respondent.

10. On the other hand counsel for the state opposed the prayer and submitted that trial court rightly convicted the accused.

11. We perused the record and arguments putforth by the parties. Devi Singh (PW-6) deposed that on the night of 25.2.2003 at 10.00 PM he was in field alongwith his brother Kalu Singh and Leelabai wife of Kalu Singh. His house is also situated there. Thereupon Tarachand and Bharat singh came and asked about "Jhagada" money regarding Tara Chand's wife. At that time appellants Ramprasad, Chhunnilal, Ghanshyam, Dolat Singh and Phool singh and five to six persons also came there tied his and Kalu singh's hands and legs with rope, beat them and dragged them to Devli tank and then took them to Himlaeshwar while beating them. At Himleshwar, they beat kalu with a lathi as a result of which he died. Then they brought them to Anokhilal's field in bullock cart and threw there. Next morning when Anokhi lal saw them, he called the then Sarpanch Mahaveer. Mahaveer informed the police about the incident on

which police came on the spot and he himself narrated the incident. His statement is also corroborated from FIR Ex.P/10 which is also proved by A.K.Sesha (PW-17) and by the statement of injured Leelabai (PW-7). She also deposed that on the night of incident when she was sleeping on tube well along with her husband Kalu, appellant and Sampatbai came there. Sampatbai abused her and applicant beat his husband Kalu and Devi Singh, Phool Singh, Ghanshyam also beat her by stick, then applicant forcibly took Kalu and Devi Singh to Himleshwar.

12. The statements of Devisingh and Leela Bai are also corroborated by medical evidence. Dr.M.L.Garg (PW-14), who examined injured Devi Singh and Leelabai also deposed that he

examined Devisingh on 26.05.04 at 1:45 am and found following injuries on the body of Devi Singh:- (i) swelling with tenderness on right shoulder region.

(ii) swelling with tenderness on right upper arm.

(iii) swelling with tenderness on back side of whole thoracic and lumbar region.

(iv) swelling with tenderness on right hip region.

(v) swelling with tenderness on left hip region.

(vi) swelling with tenderness on back side of right thigh.

(vii) swelling with tenderness on back side of left right thigh.

13. All injuries were reddish in colour and caused by hard and blunt object. Duration of injuries was about 18 to 30 hours before the examination.

14. He further stated that he also examined Leelabai on 26.05.04 at 2:30 pm on examination of Leelabai he found following injuries on her body. (i) Huge swelling with tenderness on left elbow region with reddish in colour.

15. The injury was caused by hard and blunt object. Duration of injury was 16 to 30 hours before the examination. The incident is said to have occurred on 25.05.04 at 10 pm and Dr.M.L.Garg examined Devi Singh and Leela Bai on 26/05/04 between 1:45 PM to 2:30 pm and opined that the Duration of injuries found on the body of Devi Singh and Leela Bai was about 18 to 30 hours back Which shows that the injuries found by Dr.M.L.Garg on the body of Devi Singh and Leela Bai were sustained by them in the incident by lathi.

16. Dr.M.L.Garg, also deposed that he conducted postmortem of deceased Kalu on 26.5.2003 at 3pm and found following injuries on the dead body of Kalu:- (i) Multiple irregular contusion back side of thoracic region

(ii) Multiple irregular contusion on back side of lumber region.

(iii) Multiple irregular contusion on both hip

(iv) Multiple irregular contusion on back side of both thighs

- (v) Multiple irregular contusion on right Shoulder and right upper arms,
- (vi) Multiple irregular contusion on Left forearm
- (vii) Multiple irregular contusion on Left side
of the chest and upper Abdomen,
- (x) Multiple Fracture in thoracic and lumbar Vertebrae.
- (xi) Spinal cord was injured and lacerated at thoracic and lumbar region.
- (xii) Fractures in ribs of left side of chest and back of thoracic region
- (xiii) spleen was ruptured and lacerated .
- (xiii) fracture in Ulna and radius bone of left hand
- (xiv) fracture in humerus bone of right hand.
- (xv) In his opinion Kalu died due to excess bleeding, hemorrhagic and neurogenic shock. Injury to spinal cord and rupture of spleen. Mode of death may be homicidal or accidental. Duration of death 24 to 30 hours before the examination.

17. So from the statement of Dr.M.L.Garg (PW-14) it is proved that Kalu Singh died due to injury caused by hard and blunt object like Lathi, which received by him at the time of incident.

18. A.K.Shesha (PW-17) deposed that on the information that Devi Singh was lying injured in the field, he went there and wrote Dehati Nalishi Ex.P/10. During investigation, he prepared spot map Ex.P/11. Then he called the witnesses to make inquest and for that he issued notice Ex.P/28. Thereafter, he prepared inquest Panchnama of the dead body of deceased Kalu Ex.P/29 and sent his body for postmortem along with application Ex.P/23-A and he also recorded the case diary statements of Devi Singh, Mahaveer Singh, Babulal, Leelabai, Kishore Singh. Then he reached on the spot, where Leelabai resides and prepared spot map of that site Ex.P/30 and recorded the statement of Leelabai and arrested accused Ramprasad, Chhunnilal and prepared arrest memo Ex.P/16 and Ex.P/17. On the information of Ramprasad he seized one stick and one rope from possession of Ramprasad and prepared memorandum Ex.P/18 and seizure memo Ex.P/5. On the information of Chhunnilal he also seized one stick and prepared memorandum Ex.P/8 and seizure memo Ex.P/5.

19. Dawood Ahmed (PW-18) deposed that he arrested accused Bapulal, Dule Singh and prepared arrest memo Ex.P/33, Ex.P/34 and seized one tractor from the possession of Bapulal and prepared seizure memo Ex.P/35 and also seized one stick from the possession of Dule Singh and prepared seizure memo Ex.P/36.

20. S.K.S.Tomar (PW-19) deposed that he also investigated Crime No.85/2003 and during investigation he arrested accused

Jagdish on 31.5.2003 and prepared arrest memo Ex.P/37. On 4.6.2003 he arrested Raisingh and prepared arrest memo Ex.P/20. He also seized one stick from his possession and prepared seizure memo Ex.P/21. On 11.6.2003 he arrested Phool Singh and Ghanshyam and prepared arrest memo Ex.P/8 and Ex.P/9 respectively. He also seized one motorcycle bearing registration No.MP-42-B-4129 from the possession of Phool Singh and prepared seizure memo Ex.P/6 and one stick from the possession of accused Ghanshyam and prepared seizure memo Ex.P/7 and recorded the statement of Kanchibai, Mangilal, Bharat Singh, Ramsingh and Tarachand. Head Constable Vijay Shukla arrested Gokul on 17.8.2003 and prepared arrest memo Ex.P/38.

21. Learned counsel of appellants submitted that Devi Singh (PW-6) and Leelabai (PW-7), are brother and wife of the deceased Kalu and these witnesses are interested witnesses and are inimical towards the accused persons and have reasons to falsely implicate the appellants. The statements of other independent witness Ramsingh (PW-1), Mangilal (PW-2), Kanchan Bai (PW-9), do not support the prosecution story and they have clearly denied to having seen the incident. Even Tarachand (PW-10), who is son of injured Devaji and his friend Bharat Singh (PW-11) also did not support the prosecution story. So Statement of Devi Sing and Leela Bai cannot be believed. Otherwise also, many contradictions and omissions have been found in their statements. They adopted the theory of pick and choose. In the F.I.R. logged by Devi Singh (PW-6) it was mentioned that apart from the respondents other accused Sampatbai, Rai Singh, Jagdish and Bapulal were also involved in the incident. But Devi Singh (PW-6) in his court statement denied to the fact that Sampatbai, Rai Singh, Jagdish and Bapulal were also involved in the incident and that he had mentioned their names in FIR Ex.P/10 and case diary statement Ex.D/1. Devi Singh (PW-6) also admitted in his cross examination that when he was sleeping, about 4-5 persons assaulted him and his face was covered with Bed Sheet and he could not see the persons who assaulted him and he became unconscious, which showed that Devi Singh did not see the assailant. The learned trial Court also committed mistake in not allowing defence to put relevant important questions which adversely affected the accused. The statement of Leelabai (PW-7) is also not reliable. From her cross-examination it is apparent that Leelabai was not on the spot at the time of incident. She was not

knowing accused Ramprasad and Gokul. Therefore , learned trial court committed mistake in convicting the respondent.

22. Although, eye-witness of the incident Ramsingh (PW-1), Mangilal (PW-2), Kanchibai (PW-9), did not support the prosecution story and clearly denied to have seen the incident and gave case diary statement to the Police in this regard. Tarachand (PW-10), son of injured Devi Singh and his friend Bharat Singh (PW-11) who according to prosecution story were present on the spot when the incident first occurred also did not support the prosecution story and denied to the fact that the respondent was involved in the incident . Even Babulal (PW-9),

Mahaveer Singh (PW-15), Kishore Singh (PW-16) who according to prosecution story saw Devi Singh lying in the field in injured state and Kalu Singh in dead state and at that time Devi Singh narrated the incident for the first time to them also did not support the prosecution story and denied the fact that Devi Singh had narrated the names of the persons who beat them. But only on that ground the statement of Devi Singh (PW-6) and Leelabai (PW-7) who is injured witness cannot be disbelieved.

23. Hon"ble apex court in the case of State Tr P.S. Lodhi Colony New Delhi v. Sanjeev Nanda, reported in (2012). 8 SCC 450, held : If a witness turns hostile to subvert the judicial process, the courts should not stand as mute spectators and every effort should be made to bring home the truth ? Criminal judicial system cannot be overturned by the gullible witnesses who act under pressure, inducement and intimidation.

24. Hon"ble apex court in the case of State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360, held that:- "It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted." In the case of C. Muniappan v. State of T.N., (2010) 9 SCC 567, the Supreme Court has similarly held that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

25. So the evidence of the hostile witness cannot be rejected merely because he has been declared hostile, and that the evidence of such a person does not become effaced from the record. The relevant portions of the evidence of a hostile witness

can still be made use of in appropriate situations, at least to corroborate the evidence of other independent witnesses in material particulars, as held by the apex court.

26. Tarachand (PW-10), and Bharat Singh (PW-11) deposed that at the time of incident they went to meet Devi Singh regarding the money of Jhagada and when they were talking with Devi Singh five to six persons came on the spot and beat Kalu Singh and Devi Singh. At that time Lia Bai was also present. This supports the statement of Devi Singh and Leelabai up to the extent that at the time of incident Jhagada money was due on Devi Singh which had to be paid by Devi Singh to respondent Chhunni Lal, Ramprasad and that, five or six persons came on the spot and beat Kalu Singh and Devi Singh. Babulal (PW-9), Mahaveer Singh (PW-15), Kishore Singh (PW-16) admitted in their statements that they saw Devi Singh lying in the field in an injured state and Kalu Singh in dead state and Devi Singh told them that some persons had beat them.

27. Although Devisingh (PW-6) and Leebai (PW-7) are relatives of deceased Kalu Singh but that also is not a ground to discard their evidence. They sustained

injuries in the incident which also shows that they were present at the time of the incident. Hon''ble apex court in the case of Brahm Swaroop & Anr. v. State of U.P. reported in (2011)6 SCC 288 held Related witness ? Evidentiary value of ? Held: Relationship of the witness with the deceased is not a factor which affects his credibility ? However, in such cases the court has to adopt a careful approach and analyze the evidence so as to find out its credibility Merely because the witnesses were close relatives of the deceased, that cannot be a ground to discard their evidence. Their relationship to one of the parties is not a factor that affects the credibility of a witness, more so, a relation would not conceal the actual culprit and make allegations against an innocent person. A party has to lay down a factual foundation and prove by leading impeccable evidence in respect of its false implication. Injured witness ? Evidentiary value of ? Held: Generally such witness is considered to be reliable ? Convincing evidence is required to discredit an injured witness. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailants in order to falsely

implicate someone. "Convincing evidence is required to discredit an injured witness." While appellants did not produced any evidence in defence to discredit their statements.

28. Although, Devi Singh (PW-6) in his FIR mentioned that at the time of incident apart from appellants other co-accused persons namely Sampatbai, Rai Singh, Jagdish and Bapulal also came there and took part in the incident. But in the Court statement Devi Singh denied from the fact and stated that only Chhunnilal, Ramprasad, Ghanshyam, Phool Singh, Daulat Singh. and Gokul came to his house. He in his cross-examination also denied to the fact that he mentioned the names of Sampat Bhai, Rai Singh, Jagdish and Bapulal in FIR Ex.P/10 and case diary statement Ex.D/1. Even Leelabai (PW-7) also denied from the fact that apart from appellants and Sampatbai other accused persons Rai Singh, Jagdish, Bapulal also came on the spot at the time of incident which shows that either they had earlier wrongly informed the police that Rai Singh, Jagdish, Babulal, Sampatbai were involved in the incident or they were trying to save them before the court. But only on that ground the statement of Devi Singh (PW-6) and Leelabai (PW-7) regarding appellants cannot be discarded.

29. Hon''ble apex court in the case of Dalveer V. State of Haryana reported in AIR 2008 SC 2389, held even if major portion of evidence is found to be deficient, residue is sufficient to prove guilt of an accused, notwithstanding acquittal of large number of other co-accused persons, his conviction can be maintained. However, where large number of other persons are accused, the Court has to carefully screen the evidence. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be

deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar.

30. So only on the ground that Devi Singh and Leelabai are relatives of Kalu and their statements are also not corroborated by the independent witnesses and they also saved some accused, their whole statements cannot be discarded but in these circumstances their statements should be examined minutely and some corroboration should be sought for relying on their

statements.

31. Although, Devi Singh (PW-6) in his cross-examination stated that at the time of incident he was sleeping and About 4-5 persons assaulted him at that time his face was covered with bed sheet and he could not see the persons, who assaulted him and he became unconscious. But regarding incident the statement of Devi Singh must be read as a whole and Devi Singh (PW-6) in his examination-in- chief clearly stated that appellants Ramprasad, Ghanshyam, Chhunnilal, Phool Singh, Dule Singh came to his house and beat him and Kalu. He also mentioned their names as assailants in the FIR so on the basis of aforesaid contradictions it cannot be said that Devi Singh did not see the assailants. It is appeared from the record that appellants cross-examined Devi Singh (PW-6) at length so it is also not correct that trial Court did not give full opportunity to examine Devi Singh.

32. Dule Singh took the defence that he was not the same Dule Singh, who took part in the incident and he also produced Hemraj (DW-1) and Dolat Singh (DW-2) in this regard. They deposed that the applicant is Dolat Singh and not Dule Singh and his father's name is Man Singh and not Mangu Singh or Mangilal but Devi Singh (PW-6) clearly deposed in his examination-in-chief that Dolat Singh also came on the spot and also took part in the incident. Appellant did not challenge his statement in his cross-examination in this regard and also did not give any suggestion to him in this regard that appellant Dule Singh is not the same Dule Singh, who took part in the incident so defence of Dule Singh is not tenable.

33. Although, there are some contradictions and omissions in the statement of Leelabai (PW-7) but only on that basis it cannot be said that Leelabai was not present on the spot at the time of the incident because her presence at the time of incident is also proved from the statement of Tarachand (PW-10) and Bharat Singh (PW-11). While appreciating the evidence of a witness minor discrepancy of trivial nature, which do not affect the case of the prosecution should not be taken into consideration as they cannot form ground to reject the evidence as a whole.

34. Although, on the point of source of light on the spot there are some contradictions in the statement of Leelabai but it is clear from the statement of

Devi Singh (PW-6) and Leelabai (PW-7) that appellants Ramprasad, Chhunnilal, Dule Singh, Ghanshyam and Phool Singh beat Dev Singh, Kalu and Leelabai. The light in

which appellants can beat them, why could not Leelabai recognize them. Although, Leelabai (PW-7) deposed in her examination-in-chief that Ghanshyam assaulted her by stick but that fact is not mentioned in her case diary statement Ex.D/2 but it is mentioned in the case diary statement that Phool Singh and one other coaccused beat her. She in her cross-examination clearly stated that Phool Singh also beat her, which shows that in the incident Phool Singh caused injuries to Leelabai by stick.

35. Although, Leelabai also deposed that appellant Dule Singh and Gokul also came with other assailants on the spot and took part in the incident but this fact is not mentioned in her case diary statement Ex.D/2. So in this regard her statement appears to be after thought. But as far as appellant Dule Singh is concerned, from the statement of Devi Singh (PW-6) it is clearly established that appellant Dule Singh also involved in the incident. He came on the spot along with other appellants.

36. So there is no reason to disbelieve Devi Singh's statement regarding involvement of appellants Ramprasad, Chhunnilal, Ghanshyam, Dule Singh, Phool Singh, which is also corroborated by the statement of Leelabai, medical evidence and other evidence also.

37. But as far as appellant Gokul is concerned neither it is mentioned in the FIR that Gokul also came on the spot and took part in beating Dev Singh, Kalu and Leelabai nor Dev Singh deposed that fact before the Court. Although, in the FIR Ex.P/10 lodged by Dev Singh it is mentioned that after the incident Gokul and Ramprasad took Kalu and him in bullock cart and threw them in the field of Anokhilal, but Dev Singh did not depose in his statement before the Court that Gokul came on the spot and took part in beating them or Gokul threw them in the field.

38. Although, Leelabai in her statement also stated that Gokul also involved in the incident but this fact is not mentioned in her case diary statement Ex.D/2. So in this regard her statement appears to be after thought, which cannot be believed.

39. So there is no reliable evidence against Gokul which proves his involvement in the incident. Learned trial Court committed mistake in convicting appellant Gokul under Section 148, 302/149, 364/149, 201, 323/149 of IPC.

40. Although, Dr.M.L.Garg (PW-14) opined that mode of death of Kalu may be homicidal or accidental. But, from the statement of

Devisingh (PW-6) and Leelabai (PW-7) that corroborated partly from the statement of Tarachand (PW-10) and Bharat Singh (PW-11), it is clearly proved that Kalu sustained injuries in the incident. It is also proved from the

postmortem report Ex.P/22 and statement of Dr. M.L.Garg that Kalu sustained as many as eight injuries and six fractures on his body. His spleen was ruptured. Spinal cord was also injured. He died due to excessive bleeding and hemorrhagic and neurogenic shock caused due to injuries, which also shows that appellants Ramprasad, Chhunnilal, Ghanshyam, Phool Singh, Dule Singh beat Kalu with an intent to kill him.

41. The Hon'ble Apex Court in the case of Bhargavan v. State of Kerala, reported in (2004) 12 SCC 414, held:- "that it cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC." In Yunus @ Kariya and others Vs. State of M.P., reported in AIR 2003 SC 539, Apex Court also held "fact that accused was a member of unlawful assembly and his presence at the place of occurrence not been disputed is sufficient to hold him guilty even if no overt act is imputed to him.

42. It is also clear from the statement of Devi Singh (PW-6) and Leelabai (PW-7) that appellants came on the spot armed with Lathi and mercilessly beat Kalu because of that Kalu died, which shows there is similar intention. It is also proved that they gathered for doing illegal act. So it is also proved against them they formed unlawful assembly.

43. Although, Devi Singh (PW-6) deposed before the Court that after Kalu's death appellants Ramprasad, Chhunnilal, Ghanshyam, Phool Singh, Dule Singh brought them to Anokhilal's field and threw there and on that basis learned trial Court convicted all the appellants under Section 201 of IPC for hiding the evidence of murder of Kalu. But it is not mentioned in the FIR Ex.P/10 lodged by Devi Singh that all the appellants Ramprasad, Chhunnilal, Ghanshyam, Phool Singh, Dule Singh brought dead body of Kalu to Anokhilal's field. On the contrary it is mentioned in the FIR Ex.P/10 that after Kalu's death except Ramprasad and Chhunnilal all other appellants had gone. After that Chhunnilal prepared bullock cart and

Ramprasad and his brother appellant Gokul brought them to Anokhilal's field by bullock cart. So the statement becomes after thought, which cannot be relied on. Learned trial Court wrongly held that beside appellant Ramprasad other appellants Chhunnilal, Ghanshyam, Dule Singh, Phool Singh also took part in hiding evidence of Kalu's murder and wrongly convicted them under Section 201 of IPC.

44. So in the considered opinion of this it is clearly proved from the statement of Devi Singh (PW-6), which also corroborated by the statement of Leelabai, medical evidence and other evidence also that on the night of 25.2.2003 at 10.00 PM appellants Ramprasad, Ghanshyam, Chhunnilal, Phool Singh, Dule

Singh had unlawfully gathered armed with Lathi with an intent to kill Kalu and caused simple injuries to Devi Singh and Leelabai and in furtherance of their common object they beated Devi Singh and Leelabai and caused simple injuries to Devilal and Leelabai and they also abducted and murdered Kalu. So their conviction and sentence awarded by the trial court under Section 148, 302/149, 364/149, 323/149 of IPC is hereby affirmed. Against appellant Ramprasad it is also proved that for hiding the evidence of murder of Kalu, Ramprasad took Kalu's dead body on bullock cart and threw in the field of Anokhilal's field. So the conviction and sentence awarded by the trial Court under Section 201 of IPC is hereby confirmed but conviction and sentence of other appellants Chhunnilal, Ghanshyam, Dule Singh, Phool Singh under Section 201 of IPC is hereby set aside and appellant Gokul is acquitted from all the charges. He is on bail. So his bail bond stands discharged. All Jail sentence of appellants Ramprasad, Chhunnilal, Ghanshyam, Dule Singh, Phool Singh shall run concurrently. The period already undergone shall be set off from the period of substantive jail sentence. The appeal is disposed of accordingly.