
(2000) 01 MP CK 0076
In the Madhya Pradesh High Court
Case No : Death Ref. No. 1 of 1999

State of M.P.

APPELLANT

Vs

Sarnamsingh

RESPONDENT

Date of Decision : 25-01-2000

Acts Referred:

Citation : (2000) 01 MP CK 0076

Hon'ble Judges : Shambhoo Singh, J.; J.G. Chitre, J.

Bench : Division Bench

Final Decision : Dismissed

Judgement

J.G. Chitre, J.—The Death Reference along with above appeals are decided by a common judgment.

2. Learned Sessions Judge, Dewas has made a death reference in view of provisions of Criminal Procedure Code, 1973 (hereinafter referred to as Code for convenience). Accused Sarnamsingh, Shivrajsingh and Tikaram have preferred appeal assailing their conviction and sentence for offences punishable under provisions of Sections 302 read with 149, 395 read with 397, 396, 307 read with 149 of Indian Penal Code. They have also appealed against the sentence inflicted on them for the offences mentioned above for which they have been held guilty by the learned Sessions Judge, Dewas. The prosecution the State of M.P. has appealed to this Court for enhancing the sentence inflicted on accused Tikaram. In context with the appeals preferred by Sarnamsingh, Shivarajsingh and Tikaram. It is the contention of these accused that learned trial Judge has committed the error of recording the finding of guilt against them and convicting them for the offences mentioned above and inflicting various terms of sentences against them in context with said finding of their guilt. The prosecution has appealed to this Court with a prayer that the sentence inflicted on accused Tikaram be enhanced to hanging by neck till death by inflicting a capital sentence. A notice in that context has been served on said accused Tikaram.

3. Prosecution case in brief can be stated as mentioned hereunder: Deceased Madansingh was a lawyer practicing at Tarana but residing at village Sumarakhedi along with his sons Surendrasingh, Devendrasingh and Mahendrasingh. Out of them Surendrasingh was a practicing lawyer. Deceased Mahendrasingh was engaged with Sangita, the daughter of Sarnamsingh some days prior to 1-7-1990 when the said murders took place, in one house which is the subject matter of these appeals and reference and the prosecution, which these accused along with the accused acquitted, faced before Sessions Judge, Dewas. As per prosecution case the said engagement was broken by Sarnamsingh on the ground that Madansingh and his family members were of the lower grade of the same caste. It appears from the prosecution case that after engagement Mahendrasingh and Sangita started loving each other. Deceased Mahendrasingh had contacted accused Sarnamsingh some days prior to the incident in question and there was hot exchange of words between them which resulted in Sarnamsingh slapping Mahendrasingh. Some days after that. Mahendrasingh went to the school where Sangita was studying and he took away Sangita from the school and after eloping, they married each other in a temple named "Trikeswar Temple". After such elopement and marriage between Mahendra and Sangita. the minds of both families were brought together by friends and wellwishers of both the families and as a result of that two functions were celebrated, one at the parental place of the bride and one at the place of in-laws of bride Sangita. Those functions were termed as "ASHIRWAD" and "SWAGAT" ceremonies. The object behind arranging these functions was to patch up the differences between these two families and family members and relatives, if any caused on account of such brave steps taken by both Mahendra and Sangita. After both the ceremonies were over, Sangita started residing in inlaws house with her husband Mahendrasingh in village Sumarakheda, in the said unfortunate house where these seven murders took place on 1-7-1990.

4. Another aspect of the matter which has been indicated by the prosecution case is that the relations were again strained a day prior to 1-7-1990 when accused Jitendra (absconding) the brother of P.W. Sangita along with Shivrajsingh, had visited the house of Madansingh for inviting Sangita to parental home as a matter of traditional return of the bride to parental home after marriage. It seems that the said request was turned down by the in-laws of Sangita. It is the prosecution case that said request was turned down by deceased Madansingh on unwillingness shown by PW Sangita. However, it is the contention of the defence that Sangita was not unwilling to go to her parental house. After the said rejection of the request made by Jitendra and Shivraj on 1-7-1990. accused Parmalsingh (absconding), Sarnamsingh. Shivrajsingh, Jitendra, Tikaram visited the said house and again a request was made by Parmalsingh the eldest one from the said family group, to Madansingh by calling him to his office. The said request was also rejected An attempt seems to have been made by accused Jitendra who by taking the advantage of his age had got the entry in the kitchen and nearness to the mother-in-law of PW Sangita for the

purpose of changing her mind and getting the permission to take back Sangita to parental home. It seems that mother-in-law of Sangita did not also succumb to the convincing attempt made by Jitendra. The request made by these persons were turned down. The atmosphere got worsened and guns emitted fire and seven persons lost their lives. The bride around whom the entire story revolved fell lying down injured in the kitchen seeing helplessly her newly wedded groom dying by succumbing to the injuries caused by the fire arms which according to the prosecution case were the result of the assault from her kith and kins from parental family. That resulted in prosecution in which the accused persons mentioned above along with absconding accused faced, the charge of committing conspiracy for committing these crimes was turned down by the trial Court and the prosecution has not also challenged that. In view of that, this Court does not focus its attention towards it so far as decision of the matters which are being decided, is concerned.

5. Undoubted facts which can be taken from the submissions advanced by the rival litigants in these matters can be marshalled out for convenience as mentioned hereunder

(1) Deceased Mahendrasingh was engaged with Sangita by consent of the members of family of Madansingh as well as family members of Sarnamsingh.

(2) The said engagement was broken at the behest of members of Sarnamsingh's family.

(3) Mahendrasingh eloped with Sangita by taking her from school and thereafter both of them married with each other in Triakeshwar Temple.

(4) After said marriage Sangita started residing in in-laws house peacefully and two functions were celebrated by both the families one at Sangita's parental house and second at her inlaw's house

(5) A request was made for taking Sangita back to parental house as per custom, which was turned down by the deceased Madansingh and his family members.

6. Though it was agitated at the time of trial, it smells from submission advanced on behalf of the accused that the accused abandoned their attempts of challenging the deaths of deceased persons and the weapons as cause of deaths of deceased persons, of course, a rider has been put to it by submitting that the fire arms which have been kept before the Court at the time of trial, were not fire arms killing those seven persons, the point around which the-entire case revolves. An attempt has been made to dent the identification parade and the evidence in respect of that. So also a criticism has been levelled against the investigation and the infirmities in the investigation.

7. Shri Rajendra Singh, sr. counsel who argued for the Appellants pin pointed his submissions mainly on following grounds:

(1) The prosecution failed to establish that any of the accused was responsible for causing the death of deceased Madansingh, Surendrasingh, Devendrasingh, Manoramabai, Ushadevi, Narendrasingh and Mahendrasingh. None of the accused caused bodily injuries to prosecution witness Sangita. For substantiating his submission on this point, he criticised the prosecution evidence on all fringes and aspects, which would be dealt with in detail in later portion of the judgment.

(2) The incidents are disconnected with each other and, therefore, prosecution failed to prove that the accused before this Court and other accused had formed an unlawful assembly the common object of which was to commit the murders of above mentioned deceased persons for achieving the return of P.W. Sangita to parental house as a customary visit in Hindu persons after the marriage of bride. The accused before the Court or any of the accused did not have a previous meeting of the minds, they were not sharing the common intention and, therefore, none of the accused committed any act in furtherance of common intention. The accused were responsible for their individual act. While pushing forward the submission on this point Shri Rajendra Singh submitted that even for taking the case worst against the accused Sarnamsingh. the prosecution has not proved that he committed murder of either three persons or two persons or even one person. For pushing forward the submission on this point, Shri Rajendra Singh criticised the investigation and prosecution evidence.

8. Keeping in view the provisions of Sections 149 and 34 Indian Penal Code, what should be the liability of each of the accused who are before this Court qua provisions of Indian Penal Code which are relevant in these matters. Coupled with that, he submitted that this Court will have to think very seriously whether the accused or any of them should be punished with the capital sentence. He pointed out that if this Court is convinced that the guilt has been brought home to these accused, it will have to be decided carefully whether they are to be punished by sentencing them with capital sentence or whether keeping in view the extenuating circumstance indicated by the evidence on record whether they are to be punished with lessor sentence.

9. Countering to that, Shri Prakash Verma, Dy. G.A. assisted by Mrs. Dipti Chopra, P.L., submitted that the prosecution has unequivocally established the guilt of accused who are before this Court so far as the order of conviction is concerned. He submitted that the prosecution evidence on record is above board and deserving to be accepted without any doubt for coming to the conclusion that the order of conviction passed against these accused is correct, proper and legal.

10. Shri Prakash Verma, Dy. G.A. submitted that the accused who are before this Court were the members of unlawful assembly and was formed for the purpose of taking back Sangita from in-law's house at any cost and the members of said unlawful assembly did commit the murders of as many as seven persons. He submitted that the act of each is well covered by provisions of Section 149 of Indian Penal Code and every member of said unlawful assembly is guilty of

committing seven murders and is responsible for inviting the sentence which has been passed against them by the trial Judge.

11. Shri Verma submitted that considering the heinous crime committed by these accused they deserve no lessor sentence but the capital one which has been awarded by the trial Judge. He prayed for not only confirming that sentence of hanging but submitted that accused Tikaram who has been punished with lessor sentence also deserves to be awarded a capital sentence. For substantiating his submission on this point he made reference to evidence on record. The counsel appearing for the accused in later portion of hearing of this appeal, Shri H.S. Oberai made reference to number of judgments of Supreme Court in addition to the judgments to which Shri Rajendra Singh, Senior Advocate has referred to. The same thing was done by Shri P. Verma, for the purpose of justifying his submission for getting a verdict against the accused. All these judgments would be referred to during the course of the judgment.

12. When a death reference is being considered, when this Court is considering whether capital sentence awarded to accused Sarnamsingh and Shivraj should be confirmed, when this Court is considering prayer made by the prosecution whether lesser sentence awarded to accused Tikaram should be converted into capital sentence, as a matter of prudence and expected by the provisions of law and traditions as well, and process of criminal jurisprudence, this Court is bound to examine the evidence on record minutely. For that purpose, the evidence will have to be examined carefully and cautiously. Prosecution has examined eye witnesses namely Gulabsingh, Kundan, Jwalasingh, Sangita Kavita, Ajay alias Mirchu Chacha and Sheela. The medical witnesses namely Dr. Goyal, Dr. B.L. Nidhan and Dr. Joshi have been examined for the purpose of proving the medical aspect of the prosecution case. Nayab Tahsildar Meena and Anil Patwa have been examined for proving the prosecution case so far as identification parade process is concerned. The witnesses have been examined for the purpose of proving the seizure of fire arms from concerned accused. Investigation Officers like Prempalsingh, K.K. Singh, Prakash Singh have been examined. The assessment of the prosecution evidence so far as guilt or innocence of the accused would be revolving mainly on the evidence of these persons. While doing so, the accommodation available in the said house, its nature will have to be kept in mind because that is necessary for the purpose of assessing prosecution evidence so also for understanding the criticism levelled by defence against it.

13. The said unfortunate house is having a room which was being used by deceased Madansingh advocate, as his office at first floor (a floor which is above the ground floor). A staircase is installed mainly for climbing for the entry in the office where Madansingh, Surendra, Devendra were murdered and initial talk between Parmalsingh and Madansingh ensued which was followed by number of incidents which are subject matter of the trial which ended in conviction against the present accused and acquittal in favour of one of the accused who was also charged for the offence of committing criminal conspiracy. By the side of that,

towards south, there is a temple of Lord Ram. The wall of this temple received a bullet which was seized during the course of investigation for the purpose of proving that the accused while leaving the said house also fired for the purpose of ensuring that they were not chased by the on lookers. May be, for the purpose of proving that during such incidents something took place near the said temple also which amounts to search by the accused for victims. May be, for the purpose of proving that the son-in-law of the priest of that temple Haridas had the occasion to see some part of the incident. To the northern side of the said staircase the house is having a verandah and to the Northern side of that, Kitchen is housed. Said Kitchen witnessed the killing of Mahendra, the husband of Sangita in the presence of his newly wedded wife victim Sangita, prosecution witness, as per prosecution case. To the Eastern side of that Kitchen, there is a small well normally used by the family members for the purpose of drawing the water from it for domestic use. To the Eastern side of said well there is a cattle shed and in front of that cattle shed towards Northern side of the said well, the house is having another cattle shed. To South-Eastern corner, the said house is having a room where prosecution witnesses Kavita, Sangita, Kundan were viewing T.V. and were witnessing popular serial at that time known as "Mahabharat" unmindful of recent future that after that, there would be another episode similar to that one. A lane abutts to said house to the Western side and that allows the entry to the said house from the Western side and that allows the entry to the said house from Western side. If a person enters into said house, he is supposed to go to the open space which is near the staircase leading towards the office of advocate Madansingh. The map shows that there are two rooms to the Western side of the said house which are tilting towards its Northern portion. Unfortunately, no evidence has been elicited either by the prosecution or by the defence for the purpose of bringing it on record that those and their rooms are having other ways of access also. It is a matter of experience that as practice that in such houses to have entrance and access other ways are also kept. As experience tells, the staircase cannot be the only way of access to the upper portion rooms of the said house. The Court will have to depend on such practice which is being followed in villages in respect of such big houses owned by big persons or at least significant persons like lawyer Madansingh who is having number of persons as family members in said house residing together. The house of Gulab, real brother of Madansingh is adjacent to the house of Madansingh. The evidence on record shows that this family was also possessing fire arms which indicates that this family must be rich and of good social status. In view of that also, it would be matter of experience that such rooms would be having other ways of access also which would facilitate the appreciation of evidence and the criticism levelled by defence as well as justification put forth by the prosecution.

14. The FIR which has been recorded as per information given by Gulabsingh starts the ball rolling so far as investigation is concerned. The said information seems to have been given by Gulabsingh after about three quarter of the hour after the incident. A criticism has been levelled by the defence qua evidence of

Gulab and said FIR. Shri Rajendra Singh has argued that this FIR which is earlier document recorded in this case does not mention the name of Shivraj though Gulab the informant was none else but the real brother of deceased Madansingh and had an opportunity of visiting the said house immediately after getting the information from PW Jwalasingh who had come to him running for the purpose of giving the information of the incident when PW Gulabsingh was proceeding towards railway station. Unfortunately, neither prosecution nor defence brought the distance between the said railway station and said house on record so as to give idea to this Court as to what was the distance between these two spots and upto what distance Gulabsingh had walked for the purpose of reaching railway station. There is no information on record to show as to exactly when Gulabsingh received the said information from Jwalasingh who told him that stranger guns were opening fire at their house. Though Jwalasingh happens to be son of Gulabsingh and not a person residing in the house where these murders took place, his association and nearness with the family of deceased Madansingh cannot be questioned. In village mostly the persons reside jointly or near each other so as to make them participate in maximum incidents of joy and sorrows. This is for the purpose of explaining the words used by PW Jwalasingh when he informed Gulabsingh by saying "APNE GHAR ME GOLLIYA CHAL RAHI HAI". After this information was given to Gulabsingh, Gulabsingh immediately returned to the said house of the incident and saw a person alighting from a staircase who was having "big body" as commonly spoken in local common parlance "DOHARE BADAN KA". According to the prosecution he was Shivraj, but the evidence tilts to show that he could be Sarnam. A question was asked to the witness to say whether Sarnam was the person having double built body or whether Shivraj was having that much of physique. Though it has come on record that Sarnam was having that structure of body, it cannot be ignored that on account of being in Jail. Shivraj possibly could have lost that feature. this Court is aware that when two inferences are cropping up. to infer in favour of the accused has to be preferred. Even then this aspect cannot be ignored because this aspect touches the credibility of criticised evidence. It is pertinent to note at this juncture that while answering this question asked by the defence, Gulab required some time and was required to answer in different way. When a person has been giving evidence in the Court after lapse of number of years, fallibility of human memory has to be given its due weightage.

15 it was argued by the defence that Gulab could not have any opportunity of seeing the assailant, much less the present accused, because he reached the house of incident after sometime. The prosecution contradicted this statement as Shri Prakash Verma. Dy. G.A. argued. Sumerakheda happens to be a village. No evidence is on record to show exact distance between railway station and house of incident. The way in which Jwalasingh ran for the purpose of giving information to Gulab showed that immediately after the incident started. Jwalasingh must have rushed to his father for the purpose of reporting about the reports of guns which he heard. It can be the report of first gun which started

the chain of incidents and took birth in the office of deceased Madansingh when all the attempts made by Parmalsingh for the purpose of bringing Sangita back to parental home failed. It is to be noted here that Parmalsingh requested deceased Madansingh for giving him opportunity of talking alone and independently with him and therefore, both Madansingh and Parmalsingh went to the house of Madansingh. As the arguments advanced on behalf of the both the litigants in these matters indicate that the families of both Sangita and Mahendra, seem to be orthodox families believing in customs, traditions, honours and insults. Therefore, senior most member of family of Sangita might have been chosen to speak about the visit of Sangita to parental home when earlier request was turned down by Madansingh which was made by Shivrajsingh, uncle of Sangita and Jitendra, her brother. Shri Rajendra Singh submitted that in the family of Rajputs to which both families belong, it is a tradition to send the brother of bride accompanied by senior member of the family of near relation for the purpose of bringing the bride to parental home immediately after the marriage as her first visit to parental home. He submitted that this visit is coupled with multifarious functions. The family members of the bride more particularly elder members and elderly women of the family want to know as to how the bride was treated in the family of in-laws after marriage. Many such things such senior members of family want to know from bride. And for that, as a matter of custom and tradition a visit of the bride immediately after the marriage is necessary, essential. As it has been indicated by submissions advanced by Shri Rajendra Singh, such visit becomes a matter of prestige of the family of a bride. Absence of such visit casts a social stigma on the family of bride and, therefore, male as well as female members of family of bride are very sensitive and touchy about that. Though Shri Rajendra Singh has made submission for the purpose of achieving his goal of indicating an extenuating circumstance, this could give the idea as to when first gun started opening the fire through mouth. Report of that gun must have been heard by Jwalasingh and getting panicky about it, he must have started running towards Gulab, his father for the purpose of reporting him about such reportable thing. It is pertinent to note at this juncture that this sound was mis-interpreted by PW Sheela and she said to her mother and Sangita that neighbouring people were celebrating the arrival of newly born male child by firing of guns. When that was the starting point of the incident and this chain of incidents started, it will have to be concluded that significant time was not lost between the initial report of the gun and the information which was conveyed to Gulabsingh. After receiving the information within short span of time after first gun started opening fire, Gulab must have returned to the said house very hurriedly and, therefore, he was able to see some part of the chain of the incidents. When that was so, it was not unbelievable that he could see a person descending from staircase. It is to be kept in mind that in view of the two functions which were celebrated by both families Gulab must have been acquainted with the kith and kins of Sangita and Shivraj happens to be none else but real brother of Sarnamsingh, the father of Sangita. It is matter of experience that when the persons are acquainted and not

strangers with each other they can be identified even by such onlookers by witnessing the glimpses. It is further important to note that Gulabsingh has identified Shivraj in the Court at the time of giving evidence on oath. That evidence of Gulab is even well corroborated by evidence on identification parade which was held in his presence when Gulab correctly identified Shivraj who was standing amongst number of persons. It is the evidence on record that the police machinery was not having any access to this identification parade. The witnesses have stated that identification parades were not held by police. At this juncture evidence of Kavita needs to be kept in mind.

16. Shri Rajendra Singh criticised the omission of name of Shivraj so far as FIR is concerned. He submitted that Gulabsingh had time of nearly 45 minutes to have a talk with the family members before he went to police station for the purpose of giving the FIR. He submitted that when that was so, had Shivraj being present in the house at that time and had participated in any of the incidents, Gulabsingh would not have omitted his name. It has to be kept in mind that when there were seven murders in the family, Madansingh was killed, leaving behind only Gulab as the elder one, Gulab must have been under lot of tension and pressure of the situation. When such seven murders took place in the said house, none must have been having peace of mind to talk coolly and comfortably with Gulabsingh. They must have been stunned by such rude shock. Similarly, it has to be kept in mind that both the families were conservative families and were very much attentive of the customs and traditions. Therefore, it is very much unlikely that the female members of the family could have the daring and the opportunity of opening their lips freely before the elder/elderly, who was living person as such after death of deceased Madansingh. Onlookers, inquisitive persons of the village must have gathered to know the things and, those, inquisitive minds and lips must have started playing their own roles. Some of them must have been engaged in making queries about the situation on their own accord. There must have been a chaotic condition. The behaviour of city dwellers is susceptible to pressure of such situation, then what could more be said about rustic villagers? Gulabsingh though acquainted with Shivraj, could have forgotten to mention the name of accused Shivraj. After happening of such incident in the house he must have started his legs towards police station for the purpose of taking the action for the purpose of taking care of legal side of the said incident. In such condition it is very likely that he might have forgotten the name of Shivraj. It is also possible that in the haste and bustle, the person recording the FIR might not be having coolness of mind of hearing neatly what Gulab was telling him and to record it neatly as FIR of Gulab. If other acceptable evidence is making good this omission in respect of name of Shivraj from FIR, it would not give fatal blow to the prosecution case.

17. This initial assessment of the prosecution evidence led us to the another important aspect of the matter and that is the evidence of boys Kundan, Jwalasingh, Kavita and Ajay. It is to be kept in mind before assessing-evidence of these young persons in context with other part of the prosecution evidence in

such case when the main incident is consisting chain of incidents, the Court has to appreciate the evidence as a whole by testing it on anvil of truth as well as keeping in view the human experience. In this case seven inmates have been killed on three spots (1) in the office of advocate, Madansingh (2) near the main entry gate and (3) in the kitchen. Even assuming for the sake of argument, that these three places are at some distance from each other, it cannot be forgotten that all three spots are in the same house. After the first incident took place in the office of Madansingh, other incidents might have started but these incidents did not take place at the one and the same time. Evidence on record makes it clear that these incidents followed each other and they formed a chain, which was completed, after the departure of the assailants, because three were killed near main entry gate and it has come in the evidence that Jitendra had shouted "these two are here". When prosecution case revolves around the chain of incidents, the evidence adduced by the prosecution in that context has to be assessed keeping in view the way in which those incidents took place and the common experience of human behaviour. In such peculiar case the truth would not surface at once as complete and full size picture. It may surface slowly or non-systematically and even by piecemeal style. In this case one witness cannot claim that he was the witness of all the incidents. If one says, then the Court would start harbouring doubt about the veracity of his statement. In the present case that is not the case, on the contrary, the prosecution witnesses are narrating the incidents which they witnessed. Shri Rajendra Singh has criticised the investigation by calling it unfair, full of infirmities but we do not agree with him, on the contrary the way in which the evidence is surfacing, it shows that the investigating agency has done the investigation in straight forward manner and it was not shy of exposing what it could collect during the course of investigation. The prosecution has also brought the evidence on record in fair way without doing any embroidery and without embellishment. That speaks of bona fides of prosecution and its uprightness. In this case evidence has been adduced as it came out of the mouth of the prosecution witnesses whom it examined.

18. A criticism was levelled by the defence against majority of eye witnesses by calling them as child witnesses indirectly putting question mark. It was submitted that when the incident took place they were children and, therefore, they were not able to narrate the incidents correctly as they were children hence, their evidence is not safe for acting on for basing the conviction in a serious case like the present one. These children have stated what they witnessed. At this juncture it is important to note that prosecution witness Ajay had stated categorically in his evidence that he had gone to the house of some others for witnessing "Mahabharat" serial on T.V. as he was having and possessing a black and white T.V. and he wanted to witness "Mahabharat" on colour T.V. Had Ajay been motivated with oblique motive and was prepared to tell falsehood only for the purpose of achieving his purpose and conviction against the accused, it would have been very easy for him to say that he was also present in the said T.V. room for viewing the serial "Mahabharat". Why he should have said that he had gone

to view that serial at the house of a person of his acquaintance? Why he should have gone to the stage of telling that when he had returned to the home, he was able to see some of the incidents. It is showing the straight forwardness of the prosecution and this prosecution witness. It also indicates that they stated what they saw and nothing more. this Court is pointing out this aspect of the matter because a criticism has been levelled by defence in context with these witnesses by pointing out discrepancy in their evidence in respect of the timing of the said serial, the viewing of the said serial and the timing of starting of another serial which used to follow serial "Mahabharat". It is to be noted that when witnesses are stating the facts after lapse of sufficient time, gap of some years, they are bound to falter on minor points. Variance in their evidence on fringes itself assures the credibility and frankness in their attitude while giving the evidence in the court on oath. It also shows that prosecution was not interested in patching up these holes in their wall of evidence for the purpose of fastening the cord of guilt around the accused.

19. Evidence of Kavita, Kundan, Jwalasingh, Ajay will have to be assessed together and as a whole. Kundan, P.W. 2 stated in his evidence that when he witnessed the incident, he saw two persons, each of them was holding a gun. He also stated on oath that Sarnamsingh said at that time of Shivraj "Shivraj Dekhta Kya Hai Maar Goli" and thereafter one person out of them fired bullet on his father Narendrasingh. It is evidence of Kavita, PW.4, that she witnessed that Sarnamsingh and two more persons were present in the room and three of them were holding guns. It is her evidence that her father Narendrasingh said to Sarnamsingh by asking as to what he was doing, and at that time Sarnamsingh said to Shivraj "Shivraj Dekhta Kya Hai Maar Goli". Ajay stated in his evidence that when he saw the incident he could see Sarnamsingh who was with two persons and all of them were possessing guns. It is his evidence that at that time his elder brother Narendrasingh came out of the room and by catching gun which was held by Sanamsingh said to him "Dadda Kya Karte Ho" and at that time a person who was behind Sarnamsingh fired a bullet to Narendrasingh. He further stated on oath that said person was wearing a raincoat. At this juncture it is necessary to remember that it is the evidence of Gulab that after getting the information from Jwalasingh about the firing of the guns in their house, when he returned, he saw a person who was wearing raincoat descending from the staircase. It has been pointed out by the defence that it is the statement of P.W. Kavita that she was not knowing as to who fired first bullet. It has also come in her evidence that when a bullet struck her mother Ushadevi, Kundan and Chintu were present. Said Chintu has not been examined by the prosecution but we do not find any fault on the part of prosecution in context with that. It has been pointed out by defence that Kavita categorically stated that she was not knowing as to where Ajay had gone. It is not an unnatural thing that Kavita was not knowing as to where Ajay had gone. Ajay that way was grown up boy in comparison to Kavita and, therefore, Ajay might not have thought it proper to inform Kavita as to where he was going. This seniority of age invites such

behaviour in growing males and, therefore, said statement of Kavita sounds to be natural and not unnatural. It is pertinent to note here that all these children were calling Sarnamsingh as "DADDA"; that means they were knowing Sarnamsingh as senior person of the family. They were acquainted with his name and his title as "DADDA". Though criticised by defence, we do not find any unnaturalness in that, because these children must have been used in those ceremonies for the purpose of entertaining and assisting the elderly persons like valets. It is a common practice in such families that such children are used for the purpose of entertaining elderly persons of the family for showing honour towards them. Therefore, they must have been knowing that Sarnamsingh was being called in his family as "DADDA". At this juncture it is pertinent to note again that Shivraj was not occupying that status in the family, and, therefore, Gulab might not have remembered his name particularly. And on account of that, he might have forgotten to mention name of Shivraj in the FIR. May be, that he was knowing him by face only and, therefore he was not able to mention his name in the FIR. It happens on many occasions that at the time of panicky situation even normal persons forget the names of kith and kins or the persons thickly acquainted. When Shivraj was not having equivalent status in comparison with Sarnam in the family of the parental house of Sangita, it is but natural for Gulab to not mention his presence by naming his name in F.I.R. It is important to note that all these witnesses did not say anything about Shivraj by stating his name except by stating that Sarnamsingh-Dadda, asked a person by saying "Shivraj Dekhta Kya Hai Maar Goli." These infirmities are explainable on account of fallible human memory in panicky situation.

20. A criticism has been levelled against this set of evidence of prosecution by defence by pointing out that statement of Kavita was recorded belatedly. When a question was asked to investigating officer in that context, he immediately replied by saying that Kavita had gone to the place of her maternal uncle and, therefore, she was not available earlier for recording her statement. Shri K.K. Singh, had assumed the charge of investigating officer in August 1990, and immediately on the next day, statement of Kavita has been recorded in the same month. Had there been truth in the criticism of the defence on this point, a question could have been and should have been asked to Kavita as to where she was immediately after the incident. Had that question been asked to Kavita, Kavita a sufficiently grown up girl would have answered that she was taken to her maternal uncle's home immediately after that incident. After such an incident, it is very possible that the children might have been taken to the house of their near relatives for avoiding the terrifying impact of that incident. When mother of Kavita was murdered, it was but natural for her close relatives to take Kavita to their house. We do not find anything unnatural, blamable on this point so far as; prosecution evidence is concerned. We do not find that Kavita has been brought as got up witness. We do not find that Kavita's evidence is concocted and fabricated for the purpose of rendering support to the evidence of other witnesses. Why prosecution should do it when the prosecution was equipped with

the evidence of Kundan, Ajay, Sangita and Sheela. We are satisfied that evidence of all these three witnesses passes the test of truth if tested on anvil of acceptability. After scanning of evidence, it passes all necessary test of truth.

21. That brings us to next witnesses Sheela and Sangita. The evidence of Sheela has been criticised heavily by the defence. It has been submitted that Sheela was a witness who was prepared to say anything which was suiting her purpose of rendering support to the prosecution case. It has been submitted by defence that it has come in the evidence of Sheela that a person who was along with accused Parmalsingh, sat on the body of Madansingh and he was pressing him and was dealing with him in violence. It has come also in her evidence that she started assaulting him for the purpose of saving Madansingh and she went upto the stage of hitting him with the wooden and glass frame in which the "SANAD" of practicing as lawyer given to Madansingh was framed. It has come further in her evidence that she closed the door of the staircase which was made for entry in the office, however two persons kicked the said door and opened it and she went out of the said room. She stated that two persons were holding the. guns. Such action taken by Sheela was natural. After all she attempted to protect Madansingh who was falling helplessly on the ground and Parmalsingh was behaving with him violently. It is but natural for her to close the door for the purpose of making an attempt to save Madansingh. Her evidence is vouchsafe by presence of dead bodies of Surendrasingh and Devendrasingh because according to her evidence Devendrasingh and Surendrasingh had accompanied her. The presence of dead bodies of Surendrasingh and Devendrasingh show that those persons-assailants did something as stated by Sheela. Furthermore, it is necessary to point out that evidence of Sheela gets corroboration from evidence of Jwalasingh. Evidence of Jwalasingh and Sheela is in harmony with each other on this point.

22. There may be dents here and there in the verbal narration of a witness or witnesses so far as narrations of the incidents which took place some years back is concerned. But that does not mean that their evidence is to be thrown out. Human memory is fallible; after all Sheela happens to be a girl of village, and when men were likely to be panicky by seven murders in the said house, how it can be expected that Sheela would be having coolness of mind so as to memorise the things systematically and state accurately after number of days. We do not find any infirmity in her evidence so far credibility is concerned on the contrary, her evidence has been supported by the evidence of Jwalasingh and presence of dead bodies of Surendrasingh, Devendrasingh and Madansingh in the said office.

23. Thereafter comes the death nail for the defence in the nature of evidence of Sangita. Sangita happens to be daughter of Sarnamsingh, and niece of Parmalsingh, Shivraj and sister of Jitendra. Her behaviour has to be also carefully seen. When Jitendra came in the kitchen, she offered him a cup of tea and when Jitendra demanded the milk, she gave him the milk to drink. That shows that she

was very much affectionate towards her family members of parental house. As pointed out by Shri Rajendra Singh they remained cordial as they were, after those two ceremonies were performed. Shri Rajendra Singh in his argument pointed out that Surnamsingh did not shoot even a bullet towards Sangita because he did not forget that Sangita was his daughter. Shri Rajendra Singh submitted that Sarnamsingh could not have done any harm to Sangita because she was his daughter who grew on his laps by getting the parental love and affection. True it may be, but at the same time it shows that Sangita also did not forget sweetness of said relations. When on the previous day as per prosecution case, Jitendra and Shivraj were disappointed when they had come to invite Sangita to parental home, the act of Sangita of offering cup of tea to Jitendra and thereafter milk by itself shows that livelihood of relations was still alive so far as mind of Sangita was concerned. When that was so, how such a lady would go to the extent of giving to be evidence against her father and brother? The relationship which has been pointed out by Shri Rajendra Singh, the counsel appearing for accused is, reacting both ways. The relationship and the reaction of Sangita and Sarnamsingh would be considered at later stage of the judgment when it would be necessary to consider but so far as assessment of her evidence is concerned, it speaks eloquently in favour of credence of her evidence and against the defence.

24. Sangita stated in her evidence that Jitendra came in kitchen and he was possessing a country made revolver commonly known in this area as KATTA. According to her evidence he attempted to fire through said KATTA towards herself but she jumped at the said arm of Jitendra and dislodged said country made revolver from his hand. There is nothing unnatural in it because Sangita was made of the same blood, ? flesh and bones of which, Sarnamsingh and Jitendra were made. On such behaviour of Sarnamsingh and Jitendra, this sort of action is very much expected from Sangita. It is also natural that being sister and brother, they were having that much of affection and nearness which permitted Sangita to jump over country made revolver and dislodge it from hands of her real brother. It has come in her evidence that thereafter Jitendra whipped out a knife and attacked her by it, and caused injury on her shoulder when Mahendrasingh rushed towards Sangita for saving her. This action is also very much natural because Mahendrasingh had married Sangita by venturing to go against desire and will of strong person like Sarnamsingh by visiting her school and taking her away from it and thereafter marrying her in a temple. A person who had married Sangita by that way adventurously invited the wrath of Sarnamsingh, a strong man who had slapped him at earlier instant. It is to be noted that when Jitendra had whipped said knife for the purpose of attacking Sangita, what such husband should do? When he attempted to save Sangita, Jitendra had shouted inviting attention of Sarnamsingh that Sarnamsingh should come there because both Mahendra and Sangita were present there. After that, her evidence shows that Sarnam had come in the kitchen and he fired bullets from the gun at Mahendra which caused injuries to him which resulted in his

death. It is pertinent to note at this juncture that Sarnamsingh did not like the marriage settlement between Mahendra and Sangita because according to him Mahendra was from lower grade of same caste. When that was the reason for cancelling the engagement of Sangita and Mahendra, Jitendra must have been also having same ideas in respect of gradation in the caste. It is to be noted here that firstly against their wish such marriage was performed by Mahendra and that too by taking away Sangita from school. Who would like his daughter being taken away in such fashion from the school, not only that, but thereafter marrying secretly in a temple? Sarnamsingh and his family members including Jitendra who were of the opinion that Mahendrasingh was of inferior grade of caste, would be having some animosity against him. Though there were two functions celebrated, it appears that the deep root feelings of hatred did not vanish. It must have been triggered by the parents-in-law of Sangita refusing her visit to parental home when Jitendra and Shivraj had gone to the house of Madansingh a day earlier, for inviting Sangita to her parents house. Thereafter, a day, the incident took place. There must be some discussion by members of the family of Sarnamsingh in the night intervening the said day and day of incident, otherwise, Parmalsingh would not have decided to talk with Madansingh privately in his office, as Parmalsingh was elder than Sarnamsingh. When Jitendra made request for such visit of Sangita which was turned down by the in-laws of Sangita, after discussion, it is very likely that it might have been decided that the eldest member of the family of Sarnamsingh, Parmalsingh should talk the reasonable things with Madansingh for the purpose of securing such visit of Sangita to her parental home which failed. Not only that, but the attempts made by Jitendra by getting sympathy of mother-in-law of Sangita also failed. After the shootings in the office of Madansingh and killings near main frontal gate, all were over, Jitendra must have thought it proper and necessary to call his father Sarnamsingh by shouting that both Sangita and Mahendrasingh were present in the kitchen. That exactly has been indicated by the evidence of Sangita. That is the effect of evidence of Sangita. Her evidence has been corroborated by injuries sustained by her and presence of dead body of Mahendra in kitchen. Not only that but her evidence has been corroborated by another witness Sheela also.

25. Sangita who herself sustained injuries in the said attack and fortunately survived to lead the life of a widow after losing her newly wedded husband Mahendrasingh, cannot be disbelieved unless there are compelling grounds to do so. The important question which arises for dismissing the submission of defence made for dismissing her evidence is that as to why Sangita should state falsehood against her father who gave birth to her and brought her in this world, to live. Why she should speak falsehood against her brother who was born out of the same parents and was the part of same blood? Sangita would be the last person to state falsehood against her father who gave her birth and her brother who got the birth from the same parents. The blood is thicker when it is flowing from the veins and arteries of kith and kins but more thicker is the truth; more thicker is the piousness of mind. More pious is the duty cast on a person to

speak the truth when he takes the oath to speak the truth. Sangita has done same. She crossed the boundary of relationship, and decided to choose the path of truth and spoke against her father and brother. Therefore, keeping in view the facts and circumstances on record and the evidence of other witnesses, we come to the conclusion that evidence of Sangita is above board. We accept it. We do not find that the learned Sessions Judge has committed any error in accepting it.

26. The defence criticised the seizure of the fire arms. It has been argued that non-examination of the fire arms by ballastic experts, non-examination of any such witness creates a big infirmity in the prosecution case so as to herald for acquittal of these accused. We find no substance in this submission. When the oral evidence is convincing to prove the incidents and part played by various accused, such infirmities on minor fringes deserve to be discarded. In this case we discard it.

27. After assessing the evidence of these witnesses as we have done above, we come to other circumstances which also lend corroboration to the evidence of above mentioned prosecution witnesses. It is in the nature of finding of a raincoat on the outer portion of the house of the incident. The person wearing raincoat and some of the witnesses identifying a person wearing raincoat taking active part in the incident. Therefore, that raincoat though small in nature, small in significance acquired corroborating strength to the evidence of these prosecution witnesses which passed test of truth. The use of fire arms may not be of specific description, also lends support to the evidence of these witnesses. Presence of fire arm injuries on the bodies of deceased Mahendrasingh also lend corroboration to the evidence of these prosecution witnesses.

28. When occult evidence passes the ordeal for the test for the truth, it is not necessary to search for corroboration but in the present, case such corroboration is available. What more is required to prove the incidents and the participation of each accused in it?

29. In the present case the motive is present. The motive is in the nature of feeling of insult which was created by way in which Mahendrasingh married Sangita against the desire and wish of Sarnamsingh and his family members. Though differences were patched up and two functions which were celebrated, still wound created by the said act of Mahendrasingh remained alive and was oozing though it was somewhat healed. When Sarnamsingh, Parmalsingh, Jitendra and Shivraj had come with their associates to the house of Madansingh for inviting Sangita to bridal return to the parental house, the initial request made by Jitendra was turned out by her father-in-law. That initiated second visit to the said house by parmalsingh, Sarnamsingh, Shivraj, Jitendra and their associates. Two attempts were made to convince the inlaws for such return visit of Sangita ? one by Parmalsingh and other by Jitendra but both were futile. This disappointment resulted in frustration and was also the motive behind commission of the present crime. It is indirectly indicated by the impact created by the prosecution evidence in this case that initially the accused had come to

the house of Madansingh to make request to them to send Sangita for return visit to the parental house after marriage. Had that been allowed, they would have gone happily to their house but when they were disappointed, this disappointment gave birth to frustration and that frustration surfaced as motive behind commission of the present crime. From the assessment of evidence as a whole it comes out as irresistible conclusion that the accused must have decided to take Sangita back to their house for such tradition return firstly by amicable way and when it failed by using muscle power and violence. It is necessary to be pointed out here that it has been mentioned in arguments advanced by the defence that absence of such visit would have created a stigma on the reputation of the family of Sangita, Jitendra, Shivraj as well as Parmal. It has been also pointed out in the argument from the side of defence that the accused were conservative in thinking and as such they would have felt insulted very much on account of refusal of such traditional visit of Sangita by her in laws. The family which was very much cautious of traditions and family ego, the dignity, would not have been able to sustain the impact of such refusal and, therefore, that might have come with vindicting tinge which resulted in these incidents which left the rein of unhappiness and dooming effect on the entire family of Madansingh.

30. It has been argued by the defence that Tikaram has been falsely implicated in the present case and, false evidence has been fabricated against him through the mouth of various prosecution witnesses and out of them main witness is Sheela. The question arises as to why prosecution should do that? What Sheela was having in her mind to grind an axe against Tikaram? There is no evidence on record to show that Sheela was having animosity against Tikaram. While criticising the evidence of Sheela, it has been submitted from the side of defence that identification memorandum has not been signed by Sheela, and, therefore, Sheela had not identified Tikaram at all. We do not give any importance to this criticism because we do not find any necessity of that when the evidence of the relevant witness who conducted identification parade is creating confidence in judicial mind. When evidence has been given in respect of identification parade on oath by concerned witness and when Sheela had identified accused Tikaram on oath in the Court, why Court should doubt about the complicity of Tikaram in the said incidents. It has been also pointed out that Sheela has not mentioned the name of Tikaram in her statement recorded by police, and, therefore, the evidence of Sheela should not be believed. We dismiss this submission also because though two functions were celebrated after the marriage of Mahendra and Sangita, it is not necessary that all the members of both the families should know persons by name. The persons who were present in those two functions identified the participation of those persons by their faces. Sheela might not have known the name of accused Tikaram in spite of being acquainted with him by face. She might not have taken the name of accused Tikaram specifically but she had identified him as a person taking active part in the said incidents. When Sheela had seen the incident taking place in her presence when her dears were being killed, how she could have forgotten the face of the person playing an

overt act in the incidents. The identification parade has not been held after gap of many days. Happenings of such incidents create significant impression in the minds of witnesses and, therefore, the witness can remember the face of the culprit even after gap of significant days. In view of that, the identification of accused Tikaram by Sheela in identification parade and in the Court can not be ignored.

31. It was argued on behalf of defence that solitary witnesses have given the evidence speaking for the overt acts played by the accused. It has been also argued that the incidents are different and occurred at different place in the house, therefore, insufficiency of evidence should be available as ground for acquittal of accused Shivraj and Tikaram. In view of that submission, the view taken by the Supreme Court in respect of acceptability of the evidence of single witness, will have to be kept in mind. Following cases are important in that context:

(1) Vemireddy Satyanarayan Reddy and Others Vs. The State of Hyderabad, .
(2) Vadivelu Thevar Vs. The State of Madras, . (3) Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, .

32. In all these cases the evidence of single witness has been considered and criteria for examining the evidence of single witness has been indicated. In the matters of Vemireddy Satyanarayan Reddy and Vadivelu Thever (supra) the Supreme Court held that ? Evidence of single witness can be accepted after it inspires the confidence in judicial mind. As a matter of prudence the Court would search for corroboration to such evidence on material particulars. The same view has been taken by the Supreme Court in Shivaji Sahebrao Bobade's case (supra). These categories of witnesses have been pointed: (1) Wholly reliable (2) Wholly unreliable (3) Neither wholly reliable nor wholly unreliable. It has been pointed out that in the first category the Court should have no difficulty in coming to its conclusion either way- it may convict or may acquit on the testimony of single witness. In second category, the court equally has no difficulty in coming to its conclusion. It has to be circumspect and has to look for corroboration in material particulars in the third category of witness. However, Supreme Court has pointed out that the Court should not fall in the zone of danger in insisting on plurality of witnesses, irrespective of the quality of the oral evidence. If Courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. The situations may arise and do arise where only a single person is available to witness the commission of crime and to give evidence in respect of that. The Court naturally has to weigh carefully such a testimony and if it is satisfied that evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, require corroboration of a partur nature. But where there no such exceptional

reasons operating, it becomes the duty of the Court to convict, if it is satisfied with the testimony of a single witness that it is entirely reliable.

33. In Shivajirao Bobde's case (supra) the Supreme Court observed: "Where the witnesses to a criminal case are rustic, their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in Courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses the Court has to inform itself that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered."

34. Supreme Court further observed in same judgment:

Even if a witness is not reliable, he need not be false and even if the police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused. Even if the case against the accused hangs on the evidence of single eye witness it may be enough to sustain the conviction given on sterling testimony of a competent, honest man, although as a rule of prudence Courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs.

35. In the present case so far as same incidents are concerned, the prosecution is dependent on single witness qua accused Shivraj and Tikaram. Sangita happens to be the daughter of Sarnamsingh, sister of Jitendra, niece of Shivraj and Parmalsingh. Tikaram appears to be a family friend. Being that so, Sangita must have been naturally affectionate towards them. Why she should give false evidence against her father on whose laps she grew? Why she should give false evidence against her real brother Jitendra who got the birth like her from the same parents? Why she should give false evidence against her uncles Parmalsingh and Shivraj who must have been very affectionate towards her since her childhood? Why witness Ajay, Sheela, Kavita, Jwalasingh, Kundan and Gulab should give false evidence against the present accused? What was there for them to harbour enimical feelings against them. The presence of all these witnesses in the said house and in its near proximity is natural and beyond doubt. It is pertinent to note that these witnesses have chosen to speak the truth and therefore, there are some variance in their evidence on small fringes. Though criticised by defence, those variances in their evidence instead of reducing the credibility of their evidence, strengthens it and makes the Court to come to conclusion that whatever they spoke while giving the evidence, was the truth, substantive truth and, therefore, sterling one. Besides that their evidence has been corroborated by medical evidence and presence of injuries on the bodies of the persons who were killed in the said house in those incidents. The seizure of

fire arms and other articles like raincoat are also lending corroboration to their evidence. Therefore, we come to the conclusion that the trial Court has committed no error in accepting the evidence of these witnesses as a whole and accepting the impact created by it leading towards the conclusion of guilt of these accused.

36. It has been argued by defence that Tikaram's participation in the incidents is not sufficient enough to convict him. It has been further argued by the defence that these incidents took place at different places in the house and at different times, therefore, if at all Court comes to a conclusion that the prosecution evidence is to be accepted as believable, the liability of each accused will have to be assessed individually. We cannot accept this submission because the incidents took place within short span of time and one after another. By the speedy way the incidents have taken place and the way in which the incidents had taken place, there is irresistible conclusion available for concluding that there was a common thread of continuity in it. The evidence on record makes one to infer that the first incident must have been in the office of Madansingh and after hearing the report of guns from the office of Madansingh, the persons who were present near the main gate entry must have been alert and they must have opened the fire either for attacking or otherwise. That must have been followed by the incidents which took place in kitchen because the prosecution evidence shows that Jitendra had shouted calling Sarnamsingh by saying that both Mahendra and Sangita were present in the kitchen. The sequence of the incidents, the way in which those incidents took place shows that, it has a common thread in it. And that takes us to further aspect of this matter so far as the complicity of all the accused in the crime either attracting provisions of Section 34 or Section 149 of Indian Penal Code is concerned.

37. It was not disputed that injuries sustained by deceased persons were sufficient to cause the death of human being in ordinary course of nature. Keeping in view the medical evidence it is also proved. Apart from that, the medical evidence proves that those injuries were caused with the intention of causing such bodily injuries to the deceased with the knowledge that those injuries would in ordinary course of nature cause death of human being. Apart from that, those injuries were so imminently dangerous that in all probability those injuries would cause the death of human being in ordinary course of nature. It also makes very clear that the intention behind causing those injuries was nothing less than committing their murders. Thus, the prosecution has established that all seven persons who have been killed in the said incidents in the said house have been murdered.

38. This takes us to the next aspect of the matter that is the complicity of the accused individually or in view of provisions of Section 34 or 149 of Indian Penal Code.

39. Section 34 of Indian Penal Code reads:

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Section 149 provides: "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence.

Unlawful assembly has been defined in Section 141, Indian Penal Code which provides that:

An assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is ?

First ? To overawe by criminal force, or show of criminal force, (the Central or any State Government or Parliament or the Legislature of any State), or any public servant in the exercise of the lawful power of such public servant; or

Second ? To resist the execution of any law, or of any legal process; or

Third ? To commit any mischief or criminal trespass, or other offence; or

Fourth ? By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth ? By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. Explanation has been provided which reads: ? An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

40. The learned Sessions Judge has held Sarnamsingh, Shivraj and Tikaram guilty of commission of murders of those seven persons by holding all of them as members of unlawfully assembly along with absconding accused Parmalsingh and Jitendra whose common object was to commit murders of above seven persons and others who could have been found and murdered. Sangita was not murdered because she was the daughter of Sarnamsingh and sister of Jitendra as well as niece of Parmalsingh and Shivraj. Other prosecution witnesses fortunately escaped otherwise they would have been also murdered.

41. For dealing with this aspect, it is necessary to consider the observation of Supreme Court in the matter of Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, wherein Supreme Court considered the purview of Section 149 as well as Section 34 of Indian Penal Code qua a murder case. Supreme Court observed: ?

In case of Section 34 it is well established that a common intention presupposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case. The partition which divides their bounds is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

In the same judgment the Supreme Court observed further that: The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, to have the same intention independently of each other, e.g. the intention to rescue another, and, if necessary to kill those who oppose.

It is true, prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently, reached unless it is a necessary inference deducible from the circumstances of the case.

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is question of fact in every case and however similar precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof necessarily lead to that inference, or "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.

42. It has been argued by the defence that in the present case the evidence is very insufficient so far as participation of accused Tikaram is concerned. The defence has pointed out that name of Tikaram does not find place in FIR specifically. But it has to be kept in mind that his presence has been indicated otherwise in the FIR itself. Apart from that, there is evidence against him proving his complicity. The same sort of argument has been put forth for Shivraj. Same is the answer for repelling the criticism. It has been convincingly proved by the

acceptable evidence that Shivraj and Tikaram were participating actively in the said incidents and were very much with Sarnamsingh and Jitendra, as member of unlawful assembly.

43. It will have to be also kept in mind that the explanation to Section 141 provides that an assembly which was not unlawful, when it assembled, may subsequently become an unlawful assembly. All these accused had gone to the house of Madansingh for such traditional visit of Sangita to their house. Firstly Shivraj and Jitendra had visited the said house and when their request was turned down, on the next day all these accused along with Parmal and Sarnam had gone to the said house. Parmal had requested Madansingh to come in the office for the purpose of talking peacefully. May be Madansingh might have asked Parmalsingh to come in the office for talking in better way, whatever it may be, but the said talk was for such traditional return visit of Sangita. When that failed, as evidence indicates Parmalsingh sat on the body of the deceased Madansingh and started dealing with him violently and thereafter accused Shivraj and Tikaram broke the door and made the entry in the said office. They had the guns and they opened the fire causing such fatal wounds to Madansingh and his two sons. After that, the incident near entry gate took place where Manoramabai, Ushabai and Narendrasingh were killed. After that the incident in kitchen took place. Taking into consideration these incidents, it can well be inferred that the said persons who had come together to the said house with the common object and specific plan in their minds and that was to take back Sangita, firstly by amicably talks and thereafter by show of muscle power and violence. The impact created by the evidence on record makes this Court to come to conclusion that these persons were members of unlawful assembly the common object of which was to take Sangita back to her parental house and in executing that, they opened fire from the guns and these three incidents took place which were connected by a common thread. Therefore, this Court does not have any hesitation in mind that the learned Sessions Judge was right in holding them as members of unlawful assembly and holding them guilty for committing the murders of those seven persons in view of provisions of Section 149 of Indian Penal Code also. Such visit was taken to be a matter of prestige by those accused and the absconding accused when the amicable talks failed. When complicity of the accused in view of provisions of Section 149 has been proved, the Court need not advert its attention towards provisions of Section 34 of Indian Penal Code.

44. This conclusion is also irresistible if the piecemeal evidence in respect of said incidents is considered in a sequence and in connected way. The said incidents were connected with a common thread, and, therefore, only those witnesses could be examined for giving the narration of these separate incidents. A witness cannot be expected to be present in all the incidents. Had that been so, there would have been eye brows raised in suspicion. But that is not so, so far as present case is concerned. On the contrary, the prosecution evidence is surfacing in piecemeal way proving the incidents, so also proving its common thread.

45. This case renders no advantage to defence because in the present case the accused had a common object in their minds and that was to enforce the revisit of victim Sangita to parental home after marriage. In the present case the incident was actuated by the refusal on the part of deceased Madansingh to accept the request made by Shivraj and Jitendra who requested Madansingh to allow revisit of Sangita to parental home after such marriage. It has been indicated by prosecution evidence that Tikaram was a family friend. It has been also indicated by the arguments advanced by the defence that such marriage insulted the feelings of the accused family and they were hurt. That was followed by Sarnamsingh's slapping deceased Mahendrasingh and that was again followed by Mahendrasingh taking away victim Sangita from her school and thereafter marrying with her in Trikeshwar temple. When these were set of facts, this second visit of the accused to the house of Madansingh was definitely with an object and that object of the said assembly was to enforce revisit of Sangita to parental home after such marriage. Turning down of the request made by accused Shivrajsingh and Jitendra by Madansingh gave birth to second visit to said house with arms with a plan and specific object. There was no necessity of pointing out the overt act played by each of the accused. Apart from that, there is positive evidence on record to show that Tikaram did an act which could be called as an overt act. Accused Tikaram with accused Shivraj kicked the door by which P.W. Sheela had closed the office of deceased Madansingh. They forced their entry in the office and thereafter by using the guns which they were possessing killed Madansingh, Devendrasingh and Surendrasingh in the said office. Thereafter the other persons were killed near main entry gate and they were Ushadevi, Manoramadevi and Narendrasingh which was followed by death of Mahendrasingh and serious injuries sustained by P.W. Sangita. The evidence on record is clinchingly disclosing that all the accused who were present, did overt acts. Apart from that, the over all assessment of the evidence on record is sufficient enough to prove beyond reasonable doubt that this assembly started reacting immediately after first bullet was fired in the office of Madansingh, to open fire on other inmates of the house and result was seven murders. Fortunately kids escaped. Ajay alias Mirchu Chacha was also saved as he had gone to witness Mahabharat on colour T.V. at a place of person of his acquaintance. There is common thread between all the acts done by the accused persons who were present there and they are linked by common thread, it forms a complete chain which proves that every member of that assembly was sharing a common object and that was to enforce revisit of Sangita at the cost of taking out lives of the inmates of that house. Section 142, Indian Penal Code makes it clear that a person who is member of an assembly may thereafter become member of such unlawful assembly. An Assembly which may not be unlawful initially, may turn into an unlawful assembly after some time gap. Thus, over all assessment of the prosecution evidence leaves no doubt that all the persons were members of the unlawful assembly and they did murder seven persons in executing the common object of unlawful assembly. In addition to that, every member of this unlawful assembly was knowing that for achieving common

object of the said assembly, the members of unlawful assembly were to kill the persons who would come across, the act would be of such nature which would fall under definition of Section 300, Indian Penal Code which would be punishable under Section 302 of Indian Penal Code.

46. After assessing the evidence, this Court does not find any difficulty to confirm the finding recorded by the sessions judge convicting all the accused for attempting to commit murder of prosecution witness Sangita.

47. Learned Sessions Judge has committed error in concluding that all the accused had committed offence punishable under provisions of Section 395 read with 397, Indian Penal Code. So also he committed the error in convicting the accused for offence punishable under Section 396 of Indian Penal Code. It is very difficult to understand as to from where learned Judge was able to draw this inference leaving aside conclusion. There is absolutely no material on record to show that these persons formed unlawful assembly with common object of dacoity in the house of deceased Madansingh. Nothing has been stolen; nothing has been removed from any of deceased by any member of the said assembly. Prosecution has totally failed to prove that any article, leaving aside the guns, was stolen from the said house.

48. We do not find any error in appreciation of evidence on the part of learned sessions Judge so far as his order of conviction against these accused for offence punishable under provisions of Section 302 read with 149 and for offence punishable under Section 307 read with 149 is concerned. The way in which the learned Sessions Judge has accepted the evidence on record is correct. We wish to point out that learned Sessions Judge should have been more detailed in discussion in respect of appreciation of evidence on record.

49. Now we turn to another aspect of the matter where the sentence of hanging recorded against the accused Sarnamsingh, Shivraj is to be considered, examined. We are also dealing with the prayer made by the prosecution for enhancing the sentence inflicted on accused Tikaram for sentencing him to the sentence of hanging by his neck till his death.

50. While discussing this aspect, this Court will have to see observations made by the Supreme Court in number of cases which are enumerated as under chronologically:

(a) Vemireddy Satyanarayan Reddy and Others Vs. The State of Hyderabad, . (b) Vadivelu Thevar Vs. The State of Madras, . (c) AIR 1978 SC 1248, Shankaria v. State of Rajasthan. (d) Rajendra Prasad Vs. State of Uttar Pradesh, (e) Munawar Harun Shah and Others Vs. State of Maharashtra, (f) Machhi Singh and Others Vs. State of Punjab, (g) Kannan and other vs. State of Tamil Nadu, AIR 1989 SC 396 (h) 1999 SCC (Cri) 34, Om Prakash v. State of Haryana. 51. In the matter of Vemireddy's case (supra) the Supreme Court pointed out that the murder committed was gruesome and revolting and Supreme Court was of the opinion that the accused should be thankful to the

trial Court for inflicting sentence on them which was imprisonment for life.

52. In the matter of Vadivelu Thever (supra) the Supreme Court observed that:?

If the Court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. In other words, the nature of the proof has nothing to do with the character of the punishment. The nature of the proof can only bear upon the question of conviction ? whether or not the accused has been proved to be guilty. If the Court comes to the conclusion that the guilt has been brought home to the accused, and conviction follows, the process of proof is at an end. The question as to what punishment should be imposed is for the Court to decide in all the circumstances of the case with particular reference to any extenuating circumstances. But the nature of proof, as we have indicated, has nothing to do with the question of punishment." Supreme Court found in that case that ? "There is no such extenuating circumstances which can be legitimately urged in support of the view that the lesser penalty under Section 302 of the Indian Penal Code, should meet the ends of justice. It was a cold-blooded murder. The accused came for the second time, determined to see that their victim did not possibly escape the assassin's hands.

53. In the matter of Munawar Harun Shah's case (supra) the Supreme Court held that ?

The conviction under Section 302 against accused though it mainly dependent on furnishing material particulars, the said accused were involved in at least seven murders out of 10 for which they faced trial. Having regard to the magnitude, the gruesome nature of the offence and manner of perpetrating them in that case in all facts and circumstances must be regarded as falling within the rare of the rarest category and the extreme penalty of death is clearly called for. In that case the accused were convicted on circumstantial evidence, coupled with evidence of accomplice.

54. In the present case also seven murders have been proved by the evidence of trustworthy eye witnesses.

55. In the case of Shankaria (supra) the prosecution case indicated that:?

One Shamsingh who gave the FIR, found three persons, one of whom, Madansingh, lay groaning on a cot, and Kartarsingh lay dead on a cot with injuries on his head. The other two persons Madansingh and Wazir Singh were lying injured and goods were found in scattered condition. Supreme Court found that said accused had committed the crime in most brutal and dastardly fashion. The victims were taken away when they were asleep. Two of them were blind persons. His Neronian conduct even after the occurrence in languishing in the stricken premises, looking for something to eat in the kitchen, drinking water, smoking bidis, bringing water and bathing himself, mindless of the spectre of the slain and the groans and gasps of the dying, betrays an extreme depravity of

character. The risly and grueless and helpless state of the victims, the fiendish modus operandi of the Appellant to first kill and then steal - all, steel the heart of law to call for its extreme penalty.

56. In the matter of Macchi Singh's case (supra), the Supreme Court held that:?

The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime". Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be in altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances. A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. 57. In the matter of Rajendra Prasad's case (supra) the majority of the view expressed by Hon. Justice Krishna Iyer indicated that:?

When the legislative test is too bald to be self-acting or suffers zigzag distortion in action, the primary obligation is on Parliament to enact necessary clauses by appropriate amendments to Section 302 Indian Penal Code. But if legislative undertaking is not insight Judges who have to implement the Code cannot fold up their professional hands but must make the provision viable by evolution of supplementary principles, even if it may appear to possess the flavour of law-making. The crucial question is that the crime and its horrendous character except to the extent it reveals irreparable depravity and chronic propensity, the innocent three will not be happy because one guilty companion is also added to their number. Is Janardan a social security risk, altogether beyond salvage by therapeutic life sentence? If he is, the pall must fall on his cadaver. If not, life must burn on, so viewed, no material, save juridical wrath and grief, is discernible to invoke social justice and revoke his fundamental right to life. A course of anti-aphrodisiac treatment or willing castration is a better recipe for this hyper sexed human than outright death sentence. We have not even information on whether he was a desparate hedonist or randy rapist with "Y" chromosomes in excess, who sipped every flower and changed every hour, so as to be a sex menace to the locality. Sentencing is a delicate process, not a blind man's buff. We commute the death sentence to life imprisonment. 58. In the matter of Kannan's case (supra) the Supreme Court has followed the same view of modifying the sentence of hanging to a term of sentence for imprisonment for life. The said opinion was formed on the ground that if case of accused not considered as "rarest of the rare case" case of the said accused was not coming within parameters of decision of requiring for a capital sentence.

59. The Supreme Court took a view in Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra, :?

That though Ronny and his associates committed a dacoity in the house of maternal uncle of co-accused and committed three murders of the family and did not leave the wife of his maternal uncle-Ruhi, by raping her and murdering her." The capital sentence was not awarded.

That case depended on circumstantial evidence. Supreme Court modified the sentence from hanging to imprisonment for life.

60. Similar view has been taken by the Supreme Court in the matter of Omprakash v. State of Haryana (supra). Similar view has been followed by the Supreme Court in the matter of State of U.P. Vs. Dharmendra Singh and Another, .

61. Now the question arises before this Court whether this Court should look with eyebrows up in view of seven murders which the accused in the present case committed and out of them one was none else but the husband of a newly married bride named Sangita. Sangita was none else but the daughter of accused Sarnamsingh and niece of accused Shivrajsingh. Tikaram has been termed as family friend who had gone with these accused to the house of Madansingh for the purpose of amicable talks for ensuring revisit of Sangita to parental home after marriage. We have also dismissed the submission of the defence that this is a case of circumstantial evidence. What is necessary to be seen is whether the offenders acted in gruesome way, in brutal way, in a way which was having total disregard to the value of human life? Whether they acted in committing the murder in cold blooded way? whether they had sufficient time to reflect and to think whether they should continue the act of committing murder or whether they should stop. Whether the act of murder were committed in such a sequence which did not allow the accused to cool down? It is also to be seen whether there was a provocation which provoked the accused for committing murder singally, doubly and in multiple way. All these things have to be considered.

62. Though seven murders were committed by these and absconding accused, this is not a case equal to one where a lad was killing the flies for fun, simple fun. Deep rooted feeling of insult and hurt ego flared and the episode took place when T.V. was exhibiting "Mahabharat".

63. In the present case there is no doubt that the accused had plan in minds when a previous request made by accused Jitendra and Shivraj was turned down by the father-in-law of Sangita, Madansingh, followed by second request which was made by the elderly person of the family Parmalsingh who specially went to request deceased Madansingh by calling him in his office. At this juncture an attempt which has been made by Jitendra to convince mother-in-law of Sangita will have to be also taken into consideration. It has to be kept in mind that Jitendra firstly was offered tea by his sister Sangita. He did not take tea but

demanded the milk which was offered by his sister Sangita which he preferred. By taking the advantage of that time gap by sitting near the mother-in-law of Sangita chatting with her what could be his intention in doing that. When the elder persons were reluctant to send Sangita to parental home after the marriage for allowing customary tradition, it was an attempt of a brother to convince mother-in-law of Sangita for such revisit.

64. Needless to point out here that Mahendrasingh had married with Sangita. It seems that they were in love with each other prior to marriage and, therefore, Mahendra went to school of Sangita and took her away from the school. Thereafter Sangita eloped with him and they married in Trikeswar temple and started living as husband and wife. After that two functions were celebrated by both the families one at Sarnamsingh's place and another in the house of Madansingh. Though there were two functions, there was an injury to the ego, reputation, dignity and hearts of family members of Sarnamsingh. They tried to patch up that. Thereafter again male members of family of accused Sarnamsingh went to the house of deceased Madansingh for the purpose of inviting Sangita to pay customary, traditional visit to parental house but the request was turned down. Not for once but twice. What can be the feelings lingering in the mind of accused Sarnamsingh, Shivraj, Jitendra and Parmalsingh. Accused Tikaram accompanied them for the purpose of using his good office as it appears from the evidence on record. He would have joined the said unlawful assembly later on but it cannot be ignored that the intention of the said unlawful assembly was firstly to have an amicable settlement and thereafter to use force.

65. The way in which murders have taken place has also to be seen. It is to be noted that Jitendra did not attack Mahendra first. It is to be noted that Sarnamsingh did not open fire towards Sangita. Examining the evidence, Tikaram and Shivraj and Sarnamsingh had acted being motivated with hurt, ego which seems to have started oozing again. Thus keeping these things in view this Court comes to a conclusion that it were not a cold blooded and gruesome murders. By taking a circumspective approach of the evidence as a whole, this Court comes to a conclusion that this is not a case which falls under the category of rarest of rare.

66. Therefore, this Court modifies that sentence which has been inflicted on accused Sarnamsingh and Shivrajsingh and converts it from the capital one to imprisonment for life. this Court turns down the prayer made by the prosecution to enhance sentence which has been inflicted on Tikaram. this Court does not find any propriety and need of enhancing it to the sentence of hanging by neck till death. this Court does not also find it necessary to pass an order acquitting Sarnamsingh, Shivrajsingh and Tikaram by setting aside the order of conviction and sentence passed against them. this Court also does not find it necessary to interfere in the order which has been passed by the trial Court by which all the accused have been convicted and sentenced for attempting to commit murder of Sangita in view of Section 307 read with 149 of Indian Penal Code. The order of

conviction and sentence passed against accused Sarnamsingh, Shivrajsingh and Tikaram for offences punishable under Sections 395 read with 34, 396 Indian Penal Code stands set aside as there is absolutely no evidence to justify it. They stand acquitted of said charge which they faced.

67. Thus, the death reference submitted by the Sessions Judge, Dewas is hereby rejected. The appeals preferred by Appellants Sarnamsingh, Shivraj and Tikaram stand dismissed. The appeal preferred by the State for enhancing the sentence which has been inflicted on accused Tikaram for committing offence under Section 302 read with 149 is hereby dismissed. No order is passed further in respect of disposal of Muddemal keeping in view that the trial is yet to start against the accused who have been shown as absconding. They be tried according to law whenever they are arrested. It is made clear that trial Court should not weigh, in any way, the observations made by this Court in this judgment in context with the trial of the absconding accused. There shall be neither prejudice to prosecution or the defence. this Court makes it a point to appreciate the assistance rendered by Sarvashri Rajendra Singh, Sr. Advocate, H.S. Oberai, Manoj Soni, Prasad and Saurabh Srivastava for the accused; so also this Court appreciates assistance rendered by Shri Prakash Verma, Dy. G.A. assisted by the Mrs. Dipti Chopra, P.L. and Shri Mayank Upadhyay, P.L. this Court makes a note of the valuable assistance rendered by these counsel in view of the voluminous record which has been studded with number of documents.