
(2013) 09 CHH CK 0005
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 440 of 2007

Vakil Quraishi and Others

APPELLANT

Vs

State of C.G.

RESPONDENT

Date of Decision : 16-09-2013

Acts Referred:

Citation : (2014) 1 CGLJ 7

Hon'ble Judges : Yatindra Singh, C.J;Radhe Shyam Sharma, J

Bench : Division Bench

Advocate : Indira Tripathi, for the Appellant; D.K. Gwalre, Government Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Radhe Shyam Sharma, J.—This appeal is directed against judgment dated 04-05-2007 passed by 8th Additional Sessions Judge (FTC), Bilaspur in Sessions Trial No. 389/2005. By the impugned judgment, accused/appellants Vakil Quraishi, Ganesh Tiwari, Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari have been convicted and sentenced in the following manner with a direction to run the sentences concurrently:

The prosecution case, briefly stated, is as under:

Deceased Kundan Singh was brother of complainant Jitendra Singh (PW-2). Kunal Singh (PW-1) is son of deceased Kundan Singh and nephew of Jitendra Singh (PW-2). Jitendra Singh (PW-2) lodged First Information Report (Ex. P-1) in Police Station Torwa that he was a resident of Portar Kholi, Police Station Torwa, Bilaspur and was employed. On the fateful day, i.e., 04-07-2005, at about 7:30 A.M., deceased Kundan Singh was taking Kunal Singh (PW-1) on his motorcycle to drop him at the school. Kunal Singh (PW-1) was sitting ahead on the motorcycle. Pora alias M. Venkat Rao (PW-7), who was a boy of the locality, was also sitting on the motorcycle behind deceased Kundan Singh keeping the school-bag of Kunal Singh (PW-1) with him. Jitendra Singh (PW-2) was going on his

motorcycle to Railway Station to collect Dak (Posts) and newspaper and was driving the motorcycle behind deceased Kundan Singh. As soon as Chuchuiyapara Railway Crossing was crossed and deceased Kundan Singh reached near Subhash Bengali Hotel, appellants Vakil Quraishi and Ganesh Tiwari, who were sitting on a motorcycle and appellants Rajendra Prasad Tiwari, Sukhdeo alias Chhakku Tiwari and Laxmi alias Laxman Tiwari, who were sitting on another motorcycle met there. Appellant Ganesh Tiwari shot a fire with a Katta (Country made Pistol) on the abdomen of deceased Kundan Singh and appellant Vakil Quraishi shot a fire with another Katta on the back portion of the neck of deceased Kundan Singh. When Pora alias M. Venkat Rao (PW-7), taking Kunal Singh (PW-1) with him, tried to flee, appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari shouted for not to let deceased Kundan Singh and his son Kunal Singh (PW-1) run away and for killing them. Appellant Ganesh Tiwari shot a fire with the Katta on Kunal Singh (PW-1). The bullet passed away causing injury on the left hand of Kunal Singh (PW-1). On intervention by Jitendra Singh (PW-2), the appellants pushed him away and caused him to fall down. He sustained injuries on hands and knees. Thereafter, the appellants fled on their motorcycles. At the time of occurrence, Dilip Sharma alias Pintu (PW-9), Ramcharan Pal, Parmendra Rao (PW-3), Pora alias M. Venkat Rao (PW-7) were present there. With their assistance, Jitendra Singh (PW-2) sent deceased Kundan Singh to CIMS, Bilaspur for treatment and he went to Police Station Torwa for lodging the FIR (Ex. P-1). At the time of lodging the FIR (Ex. P-1), he received a telephonic message from Dilip Sharma alias Pintu (PW-9) that deceased Kundan Singh died. Merge Intimation (Ex. P-2) was recorded in Police Station Torwa on 04-07-2005 at 8:15 A.M. The Investigating Officer reached CIMS, Bilaspur, gave notice (Ex. P-3) to Panchas and prepared inquest (Ex. P-4) on the dead body of deceased Kundan Singh. The dead body was sent for post mortem examination. Dr. V.K. Manwani (PW-4) conducted post mortem examination on the dead body of the deceased and gave his report (Ex. P-9) in which he found following injuries:

- (i) lacerated wound, 1.1 x 1.2 c.ms. x muscle deep on right thumb, impression of an injury caused by a bullet was present around the above lacerated wound, the bullet had passed away causing the injury,
- (ii) entered wound, 3.1 x 1.7 c.ms. x muscle deep, oval shape, 23.2 c.ms. below the sternal angle,
- (iii) entered wound, 3.5 x 1.2 c.ms. x bone deep at the right occipital region, 5.4 c.ms. away and upward from mastoid region, bullet pierced the brain and trapped inside left frontal lobe of brain,
- (iv) scalp haematoma, extradural haematoma and intracerebral haemorrhage,
- (v) fracture, 12.2 c.ms. length, horizontally moving upward below occipital region,
- (vi) fracture, 22.2 c.ms. length, moving upward, 4.9 c.ms. above mastoid at left

tempo-parietal region,

(vii) fracture, 7.1 c.ms. length, at the insertion of left temporals,

(viii) abrasion, 5.3 x 3.1 c.ms. at left forehead,

(ix) large size haematoma over the omentum after opening,

(x) blood clot was present in the abdomen

He opined that the cause of death was severe haemorrhage and shock due to multiple grievous injuries caused by firearm and the nature of death was homicidal.

Injured Kunal Singh (PW-1) was sent to CIMS, Bilaspur for medical examination vide Ex. P-44. Dr. R.K. Upadhyay (PW-5) examined him and gave his report (Ex. P-10) in which he found following injuries:

(i) Abrasion, 7 c.ms. x 2 c.ms., vertically placed, from the medial aspect of the left wrist to the terminal part of the left thumb, blackish-red in colour with black-brown deposit in the wound; he advised for X-Ray of the left thumb,

(ii) Abrasion, 2 c.ms. x 2 c.ms., obliquely placed on the lateral aspect of the left thigh, middle part, black-pink in colour.

He opined that the injuries could be caused by flame of fire of a gun (Ex. P-12).

Injured Jitendra Singh (PW-2) was also sent to CIMS, Bilaspur for medical examination vide Ex. P-45. Dr. R.K. Upadhyay (PW-5) examined him and gave his report (Ex. P-11) in which he found following injuries;

(i) Contusion on the palmer aspect of the right hand, tenderness present, pink-red in colour, he advised for X-Ray of the right hand,

(ii) Contusion, 4 c.ms. x 2.5 c.ms. on the back and upper part of the right leg, tenderness present, he advised for X-Ray of the right leg.

He opined that the injuries were caused by hard and blunt object.

In further investigation, memorandum statements of appellants Vakil Quraishi and Ganesh Tiwari were recorded u/s 27 of the Evidence Act vide Ex. P-19 and P-20, respectively. At the instance of appellant Ganesh Tiwari, a Katta (Country made Pistol) of 315 Bore and empty cartridges were seized vide Ex. P-21. At the instance of appellant Vakil Quraishi, another Katta of 315 Bore was seized vide Ex. P-22. A Nokia mobile was seized from appellant Ganesh Tiwari vide Ex. P-23. Another mobile of LG Make and a bunch of keys were seized from appellant Vakil Quraishi vide Ex. P-24. Blood stained soil, plain soil and 2 empty cartridges were seized from the place of occurrence vide Ex. P-25. Spot-Map (Ex. P-5) was prepared by Investigating Officer Inspector T.P. Singh (PW-16). Another Spot-Map (Ex. P-6) was prepared by Patwari Chhatlall Kashyap (PW-11). The seized articles were sent to Central Forensic Science Laboratory, Chandigarh for

examination and reports (Ex. P-49 and 51) were received from there.

After completion of the investigation and after obtaining sanction for prosecution (Ex. P-47) from the District Magistrate, Bilaspur against appellants Ganesh Tiwari and Vakil Quraishi for the offences under Sections 25(1B) and 27(1) of the Arms Act, charge-sheet was filed against all the 5 appellants in the Court of Additional Chief Judicial Magistrate, Bilaspur, who, in turn, committed the case to the Court of Session, Bilaspur, from where it was received on transfer by 8th Additional Sessions Judge (FTC), Bilaspur, who conducted the trial and convicted and sentenced the appellants as mentioned above.

To bring home the offence, the prosecution examined Kunal Singh (PW-1), Jitendra Singh (PW-2), Parmendra Rao (PW-3), Dr. V.K. Manwani (PW-4), Dr. R.K. Upadhyay (PW-5), Dr. A.S. Khan (PW-6), M. Venkat Rao alias Pora (PW-7), Kaushal Singh (PW-8), Dilip Sharma alias Pintu (PW-9), Umesh Yadav (PW-10), Patwari Chhatlal Kashyap (PW-11), Dr. George M. Xaxa (PW-12), Sub-Inspector Kavita Dhurve (PW-13), Assistant Sub-Inspector Ramgopal Dewangan (PW-14), Assistant Sub-Inspector Jalil Ahmed Khan (PW-15), Inspector T.P. Singh (PW-16), Head Constable Rajendra Sharma (PW-17), Head Constable Jugal Kishore Singh (PW-18) and Shatrughan Singh (PW-19). The appellants examined Dr. R.L. Tiwari (DW-1), Head Constable Bhagwan Das Markande (DW-2) and Inspector T.P. Singh (DW-3) in their defence.

2. Smt. Indira Tripathi, learned counsel for the appellants argued that the appellants have been falsely implicated. Kunal Singh (PW-1) is a child witness and was aged about 7 years at the time of his deposition. Jitendra Singh (PW-2) is brother of the deceased. M. Venkat Rao alias Pora (PW-7) is also an interested witness. Their evidence is not reliable. The conduct of Jitendra Singh (PW-2) is unnatural. She further argued that when the police reached the hospital (CIMS, Bilaspur), Kunal Singh (PW-1), Jitendra Singh (PW-2) and Dilip Sharma alias Pintu (PW-9) were present there, but they did not disclose the incident to the police. Therefore, their evidence is not reliable and cannot be based for conviction of the appellants. She further argued that formation of an unlawful assembly or the appellants being members thereof was not proved. Common object(s) were also not proved. Looking to the evidence of Kunal Singh (PW-1) and the FIR (Ex. P-1), it appears that appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari were not in the company of appellants Vakil Quraishi and Ganesh Tiwari. Mere their present at the place of occurrence is not sufficient to connect them with the crime in question. Hence, the appellants deserve acquittal.

3. Shri D.K. Gwalre, learned Government Advocate for the State/respondent, supporting the impugned judgment, submitted that the conviction and sentence awarded to the appellants do not warrant any interference by this Court.

4. We have heard learned counsel for the parties and have perused the record of Sessions Trial No. 389/2005. The conviction of the appellants is based on the

evidence of eye-witnesses Kunal Singh (PW-1), Jitendra Singh (PW-2), Parmendra Rao (PW-3), Pora alias M. Venkat Rao (PW-7) and Dilip Sharma alias Pintu (PW-9).

5. It is not disputed that Kunal Singh (PW-1) is the son of the deceased and he was aged about 7 years on the date of his deposition. It is also not disputed that Jitendra Singh (PW-2) is the brother of the deceased. Since both Kunal Singh (PW-1) and Jitendra Singh (PW-2) sustained injuries in the same occurrence, therefore, they are injured witnesses.

Child Witness

6. In *Dattu Ramrao Sakhare and Others Vs. State of Maharashtra*, it was held that "A child witness, if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered u/s 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored." The same view has been further reiterated in *Nivrutti Pandurang Kokate and Others Vs. State of Maharashtra*,

7. In *State of M.P. Vs. Ramesh and Another*, , the Hon"ble Supreme Court held as follows:

7. In *Rameshwar Vs. The State of Rajasthan*, , this Court examined the provisions of Section 5 of the Oaths Act, 1873 and Section 118 of the Evidence Act, 1872 and held that (AIR p. 55, para 7) every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the court considers otherwise. The Court further held as under: (AIR p. 56, para 11)

11.It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate.

8. In *Mangoo and another Vs. State of Madhya Pradesh*, , this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion

that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

9. In *Panchhi and others Vs. State of UP*, 6, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that:

the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring (SCC p. 181, para 11)

10. In *Nivrutti Pandurang Kokate and Others Vs. State of Maharashtra*, , this Court dealing with the child witness has observed as under: (SCC pp. 567-68, para 10)

70.....".....7The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

11. The evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could bring anything to indicate that the child could not differentiate between right and wrong. The Court may ascertain his suitability as a witness by putting questions to him and even if no such question had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him. (Vide *Himmat Sukhadeo Wahurwagh and Others Vs. State of Maharashtra*,

12. In *State of U.P. Vs. Krishna Master and Others*, this Court held that there is

no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

8. In *Md. Kalam Vs. The State of Bihar*, , the Hon''ble Supreme Court held as follows:

7. In *Panchhi and others Vs. State of UP*, it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others.

Relative and Injured Witness

9. In *Dharnidhar Vs. State of U.P. and Others*, the Hon''ble Supreme Court held as follows:

12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In *Jayabalan Vs. U.T. of Pondicherry*, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24)

23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

13. Similar view was taken by this Court in *Ram Bharosey Vs. State of U.P.*, where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same.

10. In *Mano Dutt and Another Vs. State of U.P.*, the Hon"ble Supreme Court observed as follows:

30.Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more res integra, as has been consistently stated by this Court in uniform language.

31. We may merely refer to *Abdul Sayeed Vs. State of Madhya Pradesh*, where this Court held as under: (SCC pp. 271-72, paras 28-30)

28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide *Ramlagan Singh and Others Vs. State of Bihar*, *Malkhan Singh and Another Vs. State of U.P.*, , *Machhi Singh and Others Vs. State of Punjab*, , *Appabhai and Another Vs. State of Gujarat*, *Bonkya Alias Bharat Shivaji Mane and others Vs. State of Maharashtra*, *Bhag Singh and Others Vs. State of Punjab*, *Mohar and Another Vs. State of U.P.*, *Dinesh Kumar Vs. State of Rajasthan*, *Vishnu v. State of Rajasthan*, (2009) 10 SCC 477, *Anna Reddy Sambasiva Reddy and Others Vs. State of Andhra Pradesh*, and *Balraje @ Trimbak Vs. State of Maharashtra*,

29. While deciding this issue, a similar view was taken in *Jarnail Singh and Others Vs. State of Punjab*, , where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

28. *Darshan Singh (PW 4)* was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the

tubewell. In *Shivalingappa Kallayanappa and others Vs. State of Karnataka*, this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P. Vs. Kishan Chand and Others*, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana*, (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.

30. The law on the point can be summarized to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

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11. Kunal Singh (PW-1) deposed that he knew accused Ganesh Tiwari and Vakild Quraishi, but he did not know other three accused, i.e., Rajendra, Laxman, Sukhdeo. He further deposed that he saw them for the first time. He further deposed that last year on 4th July, he and his father (deceased Kundan Singh) together went for his school by a motorcycle and from there they both went to his grandmother's home. He further deposed that they took lunch box and fetched his uncle (Pora chacha - PW-7) from chowk. He also deposed that he was sitting in front of the motorcycle and his father was riding it and his Pora uncle was sitting at back. He further deposed that the time they reached near railway crossing, Vakild Quraishi and Ganesh Tiwari were waiting there and they pushed the motorcycle because of which they fell down and when his father tried to stand, accused Ganesh Tiwari assaulted his father with the gun in the abdomen. He further deposed that when his father again tried to get up, Quraishi assaulted his father with the gun on the neck from backside. When his uncle took him and they started running away from that place, accused Ganesh Tiwari assaulted them because of which he received injury on the thumb of right hand. He further deposed that every morning he used to go to the school with his father. He further deposed that three people were standing nearly at a distance of 15-20 feet away from the place of the incident who were shouting to assault him. He

further deposed that he used to play with Sonu, the child of accused Quraishi that was the reason he remembered him and can saw home's sight of the accused.

12. Jitendra Singh (PW-2) deposed that on 4th July, 2005, at about 7:00-7:30 a.m., according to the daily routine, his elder brother (deceased Kundan Singh) was going by a motorcycle with his son (Kunal Singh, PW-1) to drop him to the school and one of the boy named Pora (PW-7) of the colony was sitting at the back of the motorcycle. He further deposed that he was behind his brother (the deceased) was going towards railway station post office for collecting news paper. He also deposed that the time when Kundan (deceased) crossed the railway crossing of Chuchuhiyapara, accused Quraishi and Ganesh Tiwari were also there with their motor cycle. He also deposed that nearly at a distance of 15-20 feet, the other three accused were standing and he was also far from Kundan (deceased) at a same distance. He also deposed that when his brother, after falling down, tried to stand-up, accused Ganesh Tiwari assaulted him with a gun shot on his abdomen and accused Quraishi assaulted the deceased on the neck. At that time, Pora took Kunal (PW-1) and fled from that place, then the other three accused, i.e., Rajendra Tiwari, Laxmi Tiwari, Sukhdeo Tiwari shouted that don't let them fled and kill them. He also deposed that accused Ganesh Tiwari assaulted with the gun to his Bhatija (nephew Kunal Singh, PW-1) on the thumb of his right hand. He further deposed that when he fell down, the five accused fled from there on the motorcycle. He further deposed that at the time of the incident, Dilip, Ramchandran and others were present there and they also saw the incident and with their assistance, he was able to took his brother (the deceased) to CIMS hospital and thereafter he went for lodging a report. He also deposed that while he was lodging the report, he received information about Kundan's death from Dilip Sharma (PW-9).

13. Parmendra Rao (PW-3) deposed that on 4th July, 2005, he along with Dilip Sharma (PW-9), Ramcharan Pal went for morning walk at 6:00 a.m. and they reached near hotel Subhash at 7:30 a.m. He further deposed that accused Vakil Quraishi and Ganesh Tiwari were waiting near the hotel and the time deceased and his son along with Pora (PW-7) crossed, accused Quraishi pushed the bike of the deceased due to which they fell down. He further deposed that when Kundan (the deceased) tried to stand-up, accused Ganesh Tiwari assaulted with a gun shot on his abdomen and accused Quraishi assaulted the deceased on his neck. He further deposed that the three brothers Rajendra, Sukhdeo, Laxmi of accused Ganesh Tiwari were standing there. He further deposed that Pora took Kunal (PW-1) and tried to fled from the place, then Rajendra shouted that don't let them fled and kill them. He further deposed that accused Ganesh Tiwari assaulted them by which Kunal (PW-1) received injury on the thumb of his right hand. He also deposed that Jitendra (PW-2) also reached the place of the incident where accused Quraishi assaulted him by leg due to which he fell down.

14. M. Venkat Rao @ Pora (PW-7) deposed that on 04-07-2005, nearly at 7:30

am, he was standing near Portar Kholi Chowk. He further deposed that the deceased was going to drop his son Kunal (PW-1) to the school and offered him to sit with them and the deceased's younger brother Jitendra (PW-2) was also there near the same chowk. He further deposed that Kundan (the deceased) was riding the bike and his son Kunal (PW-1) was sitting in front and he was sitting at the backside of the bike. He further deposed that when they crossed Chuchuhiyapara Railway Crossing, accused Ganesh Tiwari and Quraishi were waiting and the bike was pushed by accused Quraishi because of which they fell down. He also deposed that the time Kundan (the deceased) stood-up and he pulled Kunal (PW-1) towards him, accused Quraishi assaulted Kundan with a gun shot on his abdomen. He also deposed that the time when Kundan tried to stand-up, accused Ganesh Tiwari assaulted him from a distance of 2 feet and fired with the gun on his neck. He further deposed that he took Kunal (PW-1) towards his home. He further deposed that accused Rajendra, Laxmi, Sukhdeo were shouting to kill both the child and his father. He also deposed that then accused Ganesh Tiwari assaulted with the gun and fired towards them due to which Kunal (PW-1) received injury on the thumb of his right hand. He also deposed that Jitendra also came there where the accused assaulted him with leg due to which he fell down.

15. Dilip Sharma alias Pintu (PW-9) deposed that deceased Kundan came with his son Kunal (PW-1) and Pora (PW-7) on the bike. He further deposed that accused Quraishi pushed the bike due to which it fell down. Accused Ganesh Tiwari assaulted Kundan Singh (the deceased) with a gun shot on his abdomen. He further deposed that accused Quraishi assaulted Kundan Singh with a gun on his neck. He further deposed that at the same time, Pora (PW-7) took Kunal (PW-1). Three accused Rajendra, Laxmi, Sukhdeo shouted to kill both the son and his father. He further deposed that accused Ganesh Tiwari assaulted with the gun to Kunal (PW-1). The brother of the deceased Jitendra (PW-2) tried to help him, but accused Quraishi assaulted him.

16. Investigating Officer Inspector T.P. Singh (PW-16) deposed that he sent injured Kunal Singh (PW-1) and Jitendra Singh (PW-2) to CIMS, Bilaspur for medical examination vide Ex. P-44 and P-45, respectively and reports (Ex. P-10 and P-12) were received in respect of Kunal Singh (PW-1) and report (Ex. P-11) was received in respect of Jitendra Singh (PW-2) from there.

17. Dr. R.K. Upadhyay (PW-5) deposed that he examined injured Kunal Singh (PW-1) and gave his reports (Ex. P-10 and P-12) in which he found above-mentioned injuries. He further deposed that he also examined injured Jitendra Singh (PW-2) and gave his report (Ex. P-11) in which he found above-mentioned injuries.

18. Kunal Singh (PW-1) deposed in cross-examination in paragraph 7 that he used to play with Sonu, the son of appellant Vakil Quraishi, therefore, he knew appellant Vakil Quraishi and identified him. He used to go to the house of appellant Vakil Quraishi to play, therefore, he had seen the house of appellant

Vakil Quraishi.

19. Jitendra Singh (PW-2) deposed that he lodged FIR (Ex. P-1) and Merg Intimation (Ex. P-2) in Police Station Torwa. He further deposed that after crossing Chuchuhiyapara Railway Crossing, as soon as the deceased reached near Subhash Bengali Hotel, appellants Vakil Quraishi and Ganesh Tiwari were standing with a motorcycle and appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari were standing with another motorcycle there at a distance of about 15-20 feet from the deceased. He was also there at a distance of about 15-20 feet from the deceased.

20. Learned counsel for the appellants has argued that when the police reached the hospital, the prosecution witnesses were present there, but they did not disclose the incident to the police. Their statements u/s 161 Cr.P.C. were also recorded belatedly. Therefore, their evidence is not reliable and cannot be based for conviction of the appellants. This argument is not acceptable.

21. On the date of incident, i.e., 04-07-2005, Jitendra Singh (PW-2) went to the police station and thereafter went to the hospital (CIMS, Bilaspur); Kunal Singh (PW-1) is a child witness; he was, after the incident, left at his house by Pora alias M. Venkat Rao (PW-7); the Investigating Officer prepared inquest (Ex. P-4) on the dead body of the deceased, sent the dead body for post mortem examination and prepared Spot-Map (Ex. P-5) of the place of occurrence. Therefore, the statements of the prosecution witnesses u/s 161 Cr.P.C. could be recorded by the police on the next day of the occurrence, which cannot be said to be belated recording.

22. In State of U.P. Vs. Satish, the Hon''ble Supreme Court observed thus:

18. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion.

20. It is to be noted that the explanation when offered by the IO on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of the prosecution''s evidence tendered by the other witnesses.

23. In *Shyamal Ghosh Vs. State of West Bengal*, the Hon''ble Supreme Court held that:--

Delay in examination of witnesses is variable factor. It would be depend upon a number of circumstances. For example, non-availability of witnesses, the investigating officer being preoccupied in serious matters, the investigating officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc.

24. In *Banti @ Guddu Vs. State of Madhya Pradesh*, the Hon''ble Supreme Court held thus:

As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion (See *Ranbir and Others Vs. State of Punjab*, and *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*,

25. In *Surajit Sarkar Vs. State of West Bengal*, the Hon''ble Supreme Court observed thus:

49. In *State of U.P. Vs. Satish*, relied on by learned counsel for the State, the reason for the delay in examination of the witnesses is not quite clear. But, this Court reiterated the two principles earlier recognized, namely, that mere delay in examination of a witness does not make the prosecution version suspect and that the investigating officer must be asked the reason for the delay in examination of the witness. *Ganesh Bhavan Patel and Another Vs. State of Maharashtra*, was explained by observing that delay in examination of the witnesses was not the only determinative factor - in fact, there were several factors taken together along with the delayed examination of witnesses that provided the basis for acquittal.

50. Finally, reference was made by learned counsel for the *Shyamal Ghosh Vs. State of West Bengal*, to contend that the delayed examination of a witness will not vitiate the prosecution case. We agree that delay per se may not be a clinching factor but when there is a whole range of facts that need to be explained but cannot, then the cumulative effect of all the facts could have an impact on the case of the prosecution.

26. In the instant case, the evidence of Kunal Singh (PW-1) and Jitendra Singh (PW-2) is corroborated by the evidence of other witnesses Parmendra Rao (PW-3), Pora alias M. Venkat Rao (PW-7) and Dilip Sharma alias Pintu (PW-9) as

also by medical evidence. Therefore, merely they are relative witnesses and Kunal Singh (PW-1) is a child witness, their evidence cannot be discarded.

27. The date and time of the incident was 04-07-2005 at about 7:30 A.M. FIR (Ex. P-1) was lodged on the same day at about 8:00 A.M., i.e., within ? hour of the incident. Case diary statements of Kunal Singh (PW-1), Pora alias M. Venkat Rao (PW-7) and Dilip Sharma alias Pintu (PW-9) vide Ex. D-1, D-2 and D-3, respectively on 05-07-2005, i.e., on the next day of the incident. Kunal Singh (PW-1) was a child witness. According to Pora alias M. Venkat Rao (PW-7) and Jitendra Singh (PW-2), after the occurrence, Kunal Singh (PW-1) was taken to his house by Pora alias M. Venkat Rao (PW-7) and, thereafter, Pora alias M. Venkat Rao (PW-7) went to the hospital (CIMS, Bilaspur), where the deceased was taken. After lodging the FIR (Ex. P-1), Jitendra Singh (PW-2) also went to CIMS, Bilaspur. No explanation has been offered by the prosecution for 1 day's delayed recording of their statements. Therefore, merely the case diary statements of the above witnesses were recorded on the next day of the occurrence, their evidence cannot be doubted.

28. So far as the discrepancies or improvements are concerned, discrepancies or improvement which do not materially affect the case of prosecution and are insignificant and as such can not form the basis for doubting the case of the prosecution. The Courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly shift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. (See Kuria and Another Vs. State of Rajasthan,

29. In the instant case, eye-witnesses Kunal Singh (PW-1), Jitendra Singh (PW-2), Parmendra Rao (PW-3), Pora alias M. Venkat Rao (PW-7) and Dilip Sharma alias Pintu (PW-9) specifically deposed that appellants Vakil Quraishi and Ganesh Tiwari shot fires with Katta on the deceased and the deceased sustained injuries on the abdomen and the back portion of the neck. Their evidence is corroborated by the medical evidence and the promptly lodged FIR (Ex. P-1).

30. Eye-witnesses Kunal Singh (PW-1), Jitendra Singh (PW-2), Parmendra Rao (PW-3), Pora alias M. Venkat Rao (PW-7) and Dilip Sharma alias Pintu (PW-9) were cross-examined by the defence, but nothing material could be brought out from their cross-examination, on which either their entire testimonies may be discarded or it may be said that they are falsely implicating appellants Vakil Quraishi and Ganesh Tiwari stating that they shot fires with Katta on the

deceased and the deceased sustained injuries and succumbed thereto. Their evidence is also corroborated by the evidence of Dr. V.K. Manwani (PW-4). Dr. V.K. Manwani (PW-4) deposed that all the injuries were ante mortem, the injuries were caused by firearm, the cause of death was severe haemorrhage and shock due to multiple grievous injuries and the nature of death was homicidal.

31. Investigating Officer Inspector T.P. Singh (PW-16) deposed that he made seizures of blood stained soil, plain soil and 2 empty cartridges from the place of occurrence vide Ex. P-25, prepared Spot-Map (Ex. P-5) and made seizure of a Bajaj Boxer Motorcycle vide Ex. P-15. On the next day of the incident, i.e., 05-07-2005, he recorded case diary statements of Ramcharan Pal, Parmendra Rao (PW-3), Dilip Sharma alias Pintu (PW-9), Kunal Singh (PW-1) and Pora alias M. Venkat Rao (PW-7). He recorded memorandum statements of appellants Vakil Quraishi and Ganesh Tiwari vide Ex. P-19 and P-20, respectively. He seized a country made pistol (Katta) of 315 Bore from appellant Vakil Quraishi vide Ex. P-22 and another country made pistol of 315 Bore from appellant Ganesh Tiwari vide Ex. P-21. He had sent the seized articles to Central Forensic Science Laboratory, Chandigarh for examination and reports (Ex. P-49 and 51) were received from there. In Ex. P-49 and 51, it is mentioned thus:

Results of Examination:

(1) On thorough examination and comparison of individual characteristic marks present on crime and test fired cartridge cases under the comparison microscope, I came to the conclusion that the .315"/8 mm rifle cartridge case marked "C/1" had been fired through the country made pistol marked "A/1" and it could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

(2) On thorough examination and comparison of individual characteristic marks present on crime and test fired cartridge cases under the comparison microscope, I came to the conclusion that the .315"/8mm rifle cartridge case marked "C/3" had been fired through the country made pistol marked "A/2" and it could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

(3) On thorough examination and comparison of individual characteristics marks present on crime and test fired bullets under the comparison microscope, I came to the conclusion that the .315"/8mm rifle bullet marked "B/1" had been fired through the country made pistol marked "A/2" and it could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

(4) On thorough examination and comparison of individual characteristics marks present on crime and test fired bullets under the comparison microscope, I came to the conclusion that the .315"/8mm rifle bullet marked "B/2" had been fired through the country made pistol marked "A/1" and it could have not been fired through any other firearm because every firearm has its own individual

characteristic marks.

(5) On thorough examination and comparison of individual characteristic marks present on crime and test fired cartridge cases under the comparison microscope, I came to the conclusion that the .315"/8mm rifle cartridge case marked "C/2" had not been fired through either of the country made pistols marked "A/1" and "A/2".

(6) The two country made pistols marked "A/1" and "A/2" were test fired successfully. On test firing, the country made pistols marked "A/1" and "A/2" were found in working order and capable of firing .315"/8mm rifle cartridges.

RESULTS OF THE EXAMINATION

After an intensive chemical & Microscopically examination of the exhibits as mentioned in Item No. 7, it is inferred that:

- i. Human blood was examined on exhibits-4a, 4b, 4c, 4d, 5, 6, 7, 8a, 8b & 9a, 9b. However, the results of blood group on these exhibits found to be inconclusive.
- ii. Blood was found on exhibit-1. However, the results of origin and blood group on this exhibit found to be inconclusive.
- iii. Blood could not be detected on exhibits-2, 3a & 3b.

32. From the evidence of eye-witnesses Kunal Singh (PW-1), Jitendra Singh (PW-2), Parmendra Rao (PW-3), Pora alias M. Venkat Rao (PW-7) and Dilip Sharma alias Pintu (PW-9), it appears that when the deceased reached near Bengali Hotel, appellants Ganesh Tiwari and Vakil Quraishi shot fires on the deceased and the deceased sustained injuries on the abdomen and the back portion of the neck and succumbed to those injuries. The names of appellants Ganesh Tiwari and Vakil Quraishi are also mentioned in the FIR (Ex. P-1) as the assailants.

33. Now, we shall examine whether on the basis of evidence of the above witnesses it can be established that the appellants formed an unlawful assembly or they were members of the said assembly, if so, what was the common object of the assembly?

34. Section 149 IPC contemplates common object and Section 141 IPC defines an unlawful assembly. Section 141 IPC 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 one or more of the 5 objects mentioned in Section 141. It further provides by an Explanation that an assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly. This makes very clear that an assembly of not less than 5 persons having an unlawful common object which must be of the nature of one of the 5 objects specified in Section 141 would primarily constitute an unlawful assembly and an assembly which was not unlawful when it assembled may also

subsequently become an unlawful assembly for the purpose of Section 149 IPC which provides that every member of the unlawful assembly would be guilty of offence committed in prosecution of common object. The words figured as "common object" in Sections 149 and 141 IPC have great significance. It has to be understood in contradistinction with common intention. Therefore, with a view to look into the implications of Section 149 IPC, mere presence of a person in an unlawful assembly would do nothing unless there was a common object, he was actuated by that common object and that object was one or more than one of those provided in Section 141. Therefore, unless a common object of an unlawful assembly is proved, one cannot be convicted with the aid of Section 149 and the common object of an unlawful assembly may be more than one. To ascertain that a person has shared the alleged common object of the unlawful assembly, it shall have to be determined that he was well aware that the assembly, of which, he was one of the members, was to commit or likely to commit the act or the acts provided in Section 141. The common object may be formed at any stage. A common object formed at a particular stage may be left and a different object may be formed later. One has to determine all this in the given facts and circumstances of each case, and then, the provisions of Section 149 has to be applied for convicting every member of the unlawful assembly, that is what the legislature intended by engrafting the words like "in prosecution of common object" in Section 149 IPC. Equally, in the facts and circumstances of each case, where there were sequence of acts committed, one has to determine on evidence that whether the common object of the unlawful assembly existed only upto commission of the first act and thereafter whether the assembly was disbursed or any member of the unlawful assembly or disbursed assembly committed the subsequent act and if it be so whether it would be his own act or it shall be held to be an act committed in furtherance of the common object of the assembly which was unlawful at a particular time. If it is found on evidence that the common object of an unlawful assembly was only to commit a particular act which was committed in the first instance and thereafter any member of the initial unlawful assembly commits a subsequent act which was not in furtherance of the common object, it would certainly be an individual act and not that of assembly and in such a case, no liability can be fastened with the aid of Section 149 IPC.

35. In *Muthu Naicker and Others Vs. State of Tamil Nadu*, , while dealing the matter in relation to unlawful assembly, the Hon"ble Supreme Court held that where there is melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence is undoubtedly partisan evidence, the distinct possibility of innocent being falsely included with guilty cannot be easily ruled out. The Hon"ble Supreme Court held that in a faction ridden society where an occurrence takes place in a village involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is

partisan to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in such a situation the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed and, therefore, the evidence has to be examined with utmost care and caution. Reference was also made to decision of *Masalti v. U.P.* (supra).

36. The Hon^{ble} Supreme Court has held in *Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra*, that the two ingredients of Section 149 are (i) commission of offence by members of unlawful assembly; and (ii) such offence must be in prosecution of common object of that assembly, or must be such as members of that assembly knew it to be likely to be committed. For determining common object the conduct of each member of unlawful assembly before and at the time of attack is relevant consideration; object of unlawful assembly is a question of fact which has to be determined keeping in view nature of assembly, arms carried by members, and behavior of members at or near scene of incident.

37. In *Sikandar Singh and Others Vs. State of Bihar*, the Supreme Court held that the common object does not require a prior concert and a common meeting of minds before attack. It is enough if each member has same object and all act in assembly to achieve that object. Common object has to be ascertained from acts and language of members and from consideration of all surrounding circumstances. For determination of the common object, conduct of each member of unlawful assembly, before and at the time of attack and motive of crime are some of the relevant considerations.

38. In *Ramachandran and Others etc. Vs. State of Kerala*, the Supreme Court further reiterated about the two ingredients of Section 149 IPC as defined in *Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra*, It was also held that for "common object", it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, the common object may form on the spur of the moment and it is enough that if it is adopted by all the members and is shared by all of them. The Supreme Court held that the crucial question for determination in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects specified by Section 141 IPC. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

39. In the instant case, so far as the case of appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari is concerned, the prosecution witnesses have deposed that these appellants were standing with a motorcycle near Bengali Hotel at a distance of about 15-20 feet from the

deceased. Jitendra Singh (PW-2) deposed that these three appellants are brothers of appellant Ganesh Tiwari. He further deposed that these three appellants were standing near the place of occurrence. Pora alias M. Venkat Rao (PW-7) deposed that appellants Ganesh Tiwari and Vakil Quraishi shot fires with Katta on the deceased. He further deposed that appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari had shouted for not to let the deceased and his son run away and for killing them.

40. Kunal Singh (PW-1) deposed that he did not know appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari. He saw them for the first time in the Court on the date of his deposition.

41. In FIR (Ex. P-1), it is mentioned that on the date of incident, at about 7:30 A.M., the deceased was taking his son Kunal Singh (PW-1) on his motorcycle to drop him at the school. Kunal Singh (PW-1) was sitting ahead on the motorcycle. Pora alias M. Venkat Rao (PW-7) was also sitting on the motorcycle behind the deceased. After crossing the railway-crossing, when they reached near Bengali Hotel, appellants Vakil Quraishi and Ganesh Tiwari, who were standing with a motorcycle and appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari, who were standing with another motorcycle met there. Appellant Ganesh Tiwari shot a fire with a Katta (Country made Pistol) on the chest of the deceased and appellant Vakil Quraishi shot a fire with another Katta on the back portion of the neck of the deceased. Appellant Ganesh Tiwari also shot a fire with the Katta on Kunal Singh (PW-1), but the bullet passed away causing injury on the left hand of Kunal Singh (PW-1). At that time, appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari shouted for not to let the deceased and his son run away and for killing them.

42. In Jainul Haque Vs. State of Bihar, , the Supreme Court held that "The evidence of exhortation is, in the very nature of things, a weak piece of evidence. There is quite often a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. The Supreme Court further held that the evidence adduced at the trial in respect of the part alleged to have been played by the appellant is contradictory and far from convincing and on that the conviction of the appellant was set-aside and he was acquitted."

43. It is true that the commission of an overt act may not always be necessary to prove that a member of an unlawful assembly shared the common object of the assembly, but then, the minimum that the prosecution must prove is that the persons concerned were members of the unlawful assembly.

44. In the instant case, there is no evidence worthy of credence to prove that appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias

Chhakku Tiwari formed unlawful assembly with appellants Ganesh Tiwari and Vakil Quraishi.

45. From the evidence of prosecution witnesses, it appears that appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari were standing with a motorcycle near the place of occurrence. Appellant Ganesh Tiwari shot a fire with the Katta on the deceased and when the deceased tried to stand-up, appellant Vakil Quraishi also shot a fire with the another Katta on the deceased. Appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari shouted for killing of the deceased and his son. The evidence of prosecution witnesses is not reliable in regard to appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari. Except the evidence that appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari shouted for killing of the deceased and his son, no other evidence is available on record against them, therefore, we are of the view that in the above facts and circumstances of the case, presence and overt act attributed to appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari appear to be suspicious. Hence, they would be entitled for benefit of doubt.

46. So far as appellants Ganesh Tiwari and Vakil Quraishi are concerned, they were present at the place of occurrence. When the deceased reached near Bengali Hotel, i.e., the place of occurrence, they shot fires with Katta on the deceased and the deceased sustained injuries and succumbed thereto. Hence, appellants Ganesh Tiwari and Vakil Quraishi are liable for punishment u/s 302 read with Section 34 IPC.

47. From the above discussion, we find that the prosecution has not been able to establish that the appellants formed any unlawful assembly or they were members thereof. The prosecution has also not been able to prove participation of the appellants in any riot. Therefore, the conviction and sentence awarded to the appellants under Sections 147 and 148 IPC are not sustainable and deserve to be set aside.

48. We further find that the prosecution has not been able to prove that appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari formed any unlawful assembly and in furtherance of any common object of the unlawful assembly, they committed murder of deceased Kundan Singh and caused injuries to Kunal Singh (PW-1) and Jitendra Singh (PW-2). Therefore, the conviction and sentence awarded to appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari are not sustainable and they deserve acquittal of the charges framed against them.

49. From the above discussion, it is crystal clear that appellants Ganesh Tiwari and Vakil Quraishi assaulted the deceased and the deceased succumbed to the injuries caused by them. Therefore, appellants Ganesh Tiwari and Vakil Quraishi are liable for punishment u/s 302 read with Section 34 IPC. The prosecution has

also succeeded in proving that appellants Ganesh Tiwari and Vakil Quraishi were carrying the country made pistols (Katta) in their possession and used them for unlawful purposes. Therefore, the conviction and sentence awarded to them under Sections 25(1B) and 27(1) of the Arms Act do not call for any interference by this Court. So far as the offences under Sections 307 and 323 IPC are concerned, from the evidence discussed above, we find that appellant Ganesh Tiwari shot fire on Kunal Singh (PW-1) and Kunal Singh (PW-1) sustained injuries in consequence thereof. Appellant Vakil Quraishi assaulted Jitendra Singh (PW-2), caused him to fall down and Jitendra Singh (PW-2) sustained injuries in consequence thereof. Therefore, the conviction and sentence awarded to appellants Ganesh Tiwari and Vakil Quraishi under Sections 307 and 323 IPC also do not call for any interference.

In the result, the appeal is allowed in part in following terms:

(i) The conviction and sentence awarded to appellants Rajendra Prasad Tiwari, Laxmi alias Laxman Tiwari and Sukhdeo alias Chhakku Tiwari are set aside. They are acquitted of the charges framed against them.

(ii) The conviction and sentence awarded to appellants Ganesh Tiwari and Vakil Quraishi under Sections 147 and 148 IPC are set aside. They are acquitted of the charges framed thereunder. Their conviction and sentence under Sections 302/149, 307/149 and 323/149 IPC are set aside; instead thereof, they are convicted and sentenced in the following manner:

(iii) The conviction and sentence awarded to appellants Ganesh Tiwari and Vakil Quraishi under Sections 25(1B) and 27(1) of the Arms Act are affirmed.

(iv) All the sentences shall run concurrently.