

**(2016) 06 RAJ CK 0056**

**RAJASTHAN HIGH COURT (JAIPUR BENCH)**

**Case No:** Criminal Appeal No. 456 of 2007

Phoolchand

APPELLANT

Vs

State of Rajasthan

RESPONDENT

**Date of Decision:** June 2, 2016

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 148, Section 149, Section 302

**Citation:** (2017) 1 CriCC 341 : (2016) 2 WLCRajUC 671

**Hon'ble Judges:** Mr. Mohammad Rafiq and Mr. Vijay Kumar Vyas, JJ.

**Bench:** Division Bench

**Advocate:** Shri Kamlakar Sharma, Senior Advocate, with Shri Himanshu Sharma, Advocates, for the Appellants; Shri Aladeen Khan, Public Prosecutor, for the State

**Final Decision:** Dismissed

### **Judgement**

**Vijay Kumar Vyas, J.** - This appeal has been preferred against the judgment dated 24.1.2007 passed by learned Additional Sessions Judge, Special Court, Women Atrocities & Dowry Act, cases, Kota in Sessions Case No. 4/2006, whereby while acquitting co-accused Udaivil and Mukesh from charges of offence punishable u/s 148 and 302/149 IPC, appellants Phoolchand, Chandu @ Chandprakash and Narendra Kumar have been convicted for the offence u/s 148 and 302/149 IPC and sentenced as follows :-

U/s 148 IPC- Three years" simple imprisonment with fine of Rs.2,000/-; in default thereof, to further undergo one month"s simple imprisonment to each appellant.

U/s 302/149 IPC- Life imprisonment with fine of Rs.5,000/-; in default thereof, to further undergo two months" simple imprisonment to each appellant.

All the sentences were ordered to run concurrently.

2. Brief facts giving rise to this appeal are that on 6.9.2003 at about 12.30 PM, complainant Shivraj S/o Shri Ram Narayan Meena, R/o Dhakiya, Police Station

Chechat informed at Mortuary, Government Hospital, Ramganjmandi to SHO, Abdul Majid Khan (PW-36) that at about 9.00 AM when he was at his house and his elder brother Giriraj had gone to river for plantation, a girl child of the locality came and informed him that Phoolchand - Master, his father Uda Patel, Ghanshyam and cousins of Phoolchand ♦ Narendra, Vinod and Chandu are beating your brother Giriraj with sword, knife, pistol (country made pistol) and incised weapons. Immediately, the informant rushed to his brother. He saw on the way, near house of Amarjal, Phoolchand Master was assaulting his brother with pistol. He had heard the sound of fire. His brother was lying on earth. Ghanshyam, Vinod and Chandu were giving blows with knife and sword. Narendra was giving blow with Gandasi. Meanwhile, brothers of informant - Jugraj and Dhanraj also reached there. They also saw the whole incident. Ghasi Meena and other villagers also reached the spot and saw the incident. Assuming that brother has died and on seeing that, other brothers have reached, the appellants fled away towards Rai Khera. Two years ago, Phoolchand-Master had committed rape with a lady, a relative of informant. Phoolchand doubted that Giriraj had given the information of rape. Phoolchand was absconding since then. He had threatened Giriraj that he would kill him. Since then, an enmity is going on between Giriraj and Phoolchand-Master. Due to this enmity - Phoolchand, Ghanshyam, Vinod, Narendra and Chandu, with common object of killing Giriraj, attacked him and injured him. Blood was coming out profusely from the injuries and in that condition, informant and others brought Giriraj at Government Hospital, Ramganjmandi, where doctor declared him dead. Abdul Majid Khan (PW-36), SHO, Police Station Chechat took down this information on Parcha (Ex.P-1) and sent it to Police Station and started investigation. Prior to his reach, an inquest report was prepared by Ratan Singh Chundawat, ASI, P.S. Ramganjmandi, the same was handed over to Abdul Majid Khan. On the same day at about 3.30 PM, after reaching at Police Station Chechat, FIR No. 106/2003 was formally registered. During investigation, site plan (Ex.P-5) and other necessary memos were prepared. Empty cartridges found at the site of crime, were seized vide memo (Ex.P-10) in presence of Narayan (PW-5) and Bherunlal (PW-8). Postmortem of the dead body was conducted by Dr. N.B. Joshi (PW-35). Postmortem report is Ex.P-45. Blood smeared soil, control soil, blood of deceased were collected and sealed. Blood stained Baniyan and underwear of the deceased were also seized and sealed. Statements of the witnesses were recorded. Statements of witnesses Ghasi Lal, Mangi Lal, Ramesh and Bajrang Lal Bairwa were got recorded u/s 164 Cr.P.C. as well. Photography was conducted. Accused Phoolchand, Ghanshyam Meena, Narendra, Vinod Meena, Chandu @ Chandra Prakash, Mukesh and Udailal were found to have committed the offence. Accused Phoolchand, Narendra Kumar, Chandu @ Chandra Prakash and Mukesh were arrested. Appellant Udailal was granted anticipatory bail by this Court. Accused Vinod and Ghanshyam could not be arrested. They were got declared absconders. Informations u/s 27 of the Indian Evidence Act, given by the accused persons were recorded and at the instance of accused Chandu @ Chandra Prakash, a sword was recovered. A Gandasi was recovered at the instance of

Narendra Kumar and a Chhura was recovered at the instance of accused Mukesh. The recovered articles were seized and sealed. After due investigation, a complete charge-sheet against appellants Chandu @ Chandra Prakash, Phoolchand, Narendra Kumar and two other - Udailal and Mukesh and incomplete charge-sheet u/s 299 Cr.P.C. against accused Vinod and Ghanshyam was filed before the Judicial Magistrate, Ramganjmandi, who in turn, committed the case for trial to the Additional Sessions Judge, Ramganjmandi, wherefrom, the case was transferred to Additional Sessions Judge, Special Court, Women Atrocities & Dowry Act cases, Kota. Appellant Phoolchand was charged of the offence u/s 302 and 148 IPC. Rest of the appellants and Mukesh & Udailal were charged for the offence punishable u/s 148 and 302/149 IPC. All of them denied the charges and claimed trial. In all, 38 witnesses were examined and 53 documents were exhibited by the prosecution. Accused were examined u/s 313 Cr.P.C. Accused denied the evidence and stated that they have been wrongly implicated due to enmity. They have not committed any offence. Deceased Giriraj had enmity with all people of the area. In defence, Dinesh Kumar Rawal (DW-1) ♦ Notary Public was examined and in all nine documents were exhibited. After hearing arguments of both the sides and considering the written arguments submitted from the side of accused, the learned trial court passed the judgment dated 24.1.2007, whereby, the learned trial court acquitted accused Udailal & Mukesh and convicted & sentenced the appellants as aforesaid.

3. Learned counsel for the appellants submit that FIR (Ex.P-1), lodged by Shiv Raj (PW-1) on 6.9.2003 at about 12.30 PM, is based upon the information given to him by Reena (PW-9). She has been declared hostile. Therefore, the basis of FIR comes to an end. The FIR was lodged after three hours of the alleged incident and a formal FIR has been registered at police station on 6.9.2003 at about 3.30 PM. Prior to lodging of formal FIR, police has also prepared Panchnama of dead body, site inspection, etc.

4. Shivraj (PW-1), Jugraj (PW-10), Sanju Meena (PW-14), Dhanraj (PW-33) and Bali Bai (PW-34) cannot be regarded as eye witnesses. They are interested witnesses as well, being close relatives of the deceased. Furthermore, their evidence suffers from infirmity and they have been contradicted at the material point with their police statements. Shivraj (PW-1) has admitted in cross examination that when he reached the site, he saw his brother (deceased) lying on the ground. He heard a sound of firing while on the way. He also admitted that he did not mention in the report (Ex.P-1) that two fires were made towards the deceased and that Mukesh was also beating the deceased. This witness cannot be said to be eye witness as he reached the spot after the alleged incident taken place. Jugraj (PW-10) and Dhanraj (PW-33), both brothers of the deceased, have stated that they reached the spot after Shivraj (PW-1) and many other people were assembled there. Sanju Meena (PW-14) clearly admitted that she did not see the beating to the deceased by the accused persons. Bali Bai (PW-34), wife of the deceased, in her cross examination, admitted that when she reached the spot, she found that the blood was coming out profusely from the

body of the deceased and many people were standing there. From statement of Bajrang (PW-13), it is evident that Shivraj (PW-1), Jugraj Meena (PW-10), Sanju Meena (PW-14), Dhan Raj (PW-33), and Bali Bai (PW-34) reached the spot after the alleged incident taken place. Thus, none of these witnesses can be said to be eye witness. Credibility of a witness has to be decided by referring to his evidence and finding out how he has fared in cross examination and what impression is created by his evidence taken in other context of the case and not by entering into the realm of conjecture and speculation. On this point, learned counsel for the appellants placed reliance on **State of U.P. v. Noorie (Smt) alias Noor Jahan and Others, 1996 SCC (Cri.) 945.**

5. Learned counsel further argued that Sanju Meena (PW-14), Bajrang Lal (PW-16), Santosh (PW-17), Dhanraj (PW-33) and Bali Bai (PW-34) are close relatives of the deceased and interested witnesses. Thus, the possibility is that they may be falsely implicating the accused appellants, cannot be ruled out. As per law, evidence of interested, relatives or partisan witnesses have to be scrutinised with caution & great care, to be tested in the light of probabilities, previous statements and surrounding circumstances. When evidence adduced by these witnesses is tested on these parameters, it is clear that they are not trustworthy, reliable and convincing. Learned trial court has committed serious mistake, error and irregularity in placing reliance on statements of these witnesses.

6. Learned counsel for the appellants submit that Maula Bhai (PW-11) and Bajrang (PW-13) are also not eye witnesses. Maula Bhai (PW-11) admits in his cross examination that when he reached the spot, he did not see any person of village there, meaning thereby, he reached the spot after alleged incident. Bajrang (PW-13) admits that he and Maula Bhai (PW-11), both reached the spot after hearing sound of gun fire and before that every body had gone.

7. Out of 38 witnesses examined by the prosecution, five; namely, Ghasiram (PW-2), Reena (PW-9), Ramesh (PW-12), Santosh (PW-17) and Amar Lal (PW-18) have turned hostile.

8. Learned counsel for the accused appellants submit that the alleged recoveries of weapon of offence - one Gandasi at the instance of appellant Narendra Kumar and one sword at the instance of appellant Chandu @ Chandra Prakash have also not been proved. Devlal (PW-20) and Amarlaal (PW-21), the attesting witnesses of recovery memos - Ex.P-19 and Ex.P-20, respectively, have not corroborated. Moreover, Alok Gautam (PW-37), Investigating Officer has admitted that the recovered articles were not stained with blood and the recoveries were made from the open place. So far as the appellant Phoolchand is concerned, who is alleged to have made gun fire, no weapon of offence has been recovered.

9. Learned counsel for the appellants submit that when eye witnesses are not furnishing credible evidence about the incident, then motive becomes irrelevant.

10. It is argued that the empty cartridges, alleged to be recovered from the site of the crime, were not sent for examination to the ballistic expert. The case of three appellants cannot be distinguished from the case of two co-accused acquitted by the trial court. The evidence against the appellants is not severable from that of the acquitted accused. Present appellants should also have been acquitted in the same manner as other two co-accused were acquitted.

11. In criminal cases, the prosecution is ought to prove a case beyond reasonable doubt. The prosecution story may be true but there is a long distance between "may be true" and "must be true". The distance is to be covered by leading legal, reliable and unimpeachable evidence.

12. Learned Public Prosecutor submits that prosecution story has been proved by trustworthy ocular evidence. Minor discrepancies, here and there, in the statements of witnesses, recorded in the court after considerable time, are natural phenomena. Though most of the eye witnesses are relatives and may be interested also, but merely on this ground the whole testimony of such witnesses cannot be thrown away.

13. Acquittal of two accused cannot be a ground or basis for claiming acquittal by other co-accused against whom cogent, credible and trustworthy evidence is available.

14. The incident took place at about 9.00A.M, police reached at hospital where the deceased was taken, at about 12.30 P.M. Police has recorded information on Parcha Bayan. Formal FIR could be registered at police station at about 3.30 P.M. Prior to formal registration of FIR, initiation of investigation by the Investigating Officer, ipso facto, cannot be said to be bad in the eye of law. If there is evidence so as to doubt doctoring in the information report, only then delays, even trivial one, and initiation of investigation prior to formal registration of FIR, become important and relevant.

15. It is argued that though recoveries of weapon of offence have not been corroborated by attesting witnesses Devlal (PW-20) and Amaralal (PW-21), yet the recoveries are proved on the basis of statement made by Alok Gautam (PW-37), the Investigating Officer.

16. Learned trial court has rightly believed that there was motive behind the murder. Accused appellant Phoolchand committed a rape with a lady in the family of deceased Giriraj. Phoolchand doubted that Giriraj had informed the police. Since that occurrence, appellant accused was absconding. It is a brutal murder committed in a day light, in front and view of several villagers. The witnesses have deposed the incident in the manner they perceived the same when they reached site of the crime. Therefore, there is nothing on record so as to interfere with the findings of learned trial court.

17. We have considered the rival submissions made before us and perused the precedents referred herein.

18. It is a case mainly based on eye witnesses where the crime was committed in day light in a densely populated village. Though the eye witnesses are mostly relatives of, or otherwise interested persons in the deceased, it is well settled law that relatives and interested witnesses are to be examined more closely and their evidence is to be scrutinised minutely and only thereafter trustworthy part of it, should be relied upon.

19. As per prosecution story, first information was given by Shivraj Meena (PW-1) on 6.9.2003 at about 12.30 PM to Abdul Majid Khan (PW-36), SHO, Police Station Chechat at Mortuary of Government Hospital, Ramganjmandi, which was recorded on Parcha Bayan (Ex.P-1). As per Ex.P-1, at about 9.00 AM, Shivraj (PW-1) was at his house and his elder brother Giriraj had gone to river for plantation, a girl child of the locality came and informed him that Phoolchand - Master, his father Uda Patel, Ghanshyam, and cousins of Phoolchand ◆ Narendra, Vinod and Chandu are beating his brother Giriraj with sword, knife, country made pistol (Desi Katta) and incised weapon. Immediately, the witnesses rushed to his brother. On the way, near the house of Amarjal, he saw Phoolchand ◆ Master assaulting his brother with pistol. He heard the sound of gun fire also. His brother was lying on the ground. Ghanshyam, Vinod and Chandu were giving blows with knife and sword. Narendra was giving blow with Gandasi. Meanwhile, brothers of informant ◆ Jugraj and Dhanraj also reached there. They also saw the incident. Ghasi Meena and other villagers also reached at the spot and saw the incident. Assuming that Giriraj has died and on seeing that, other brothers have arrived there, the appellants fled away towards Rai Kheda. The injuries were profusely bleeding. So immediately, Giriraj was brought to the Government Hospital, Ramganjmandi, where doctor declared him dead.

20. Dr. N.B. Joshi (PW-35), who was member of the Medical Board, conducted postmortem at about 12.15 PM. As per his statement, following ante-mortem injuries were found on the dead body :-

1. Incised wound 15cm long and 2◆ cm deep gaping about 2cm on back of neck horizontal placed.
2. Incised wound 15cm long and 2cm deep situated 1◆ cm above and parallel to injury No. 1.
3. Multiple sharp edged stab wounds 8 in number varying from 1◆ cm x 3cm on the back of upper part of chest. Depth varying from ◆ cm on midline level & left.
4. Stab wound 1 cm x ◆ cm deep about 7 cm left to T8 vertebral spine on back.
5. Stab wound 2 cm x 2 cm deep on upper end of natal cleft on back.

6. Incised wound 2 cm x 1 cm x ♦ cm on lateral aspect of left forearm about 4 cm above wrist.

7. Incised wound 3 cm x 1 cm x ♦ cm horizontal on lateral aspect of left forearm about 3 cm above injury No. 6.

8. Abrasion - two in number 5 cm x linear parallel set in front of R forearm about 6 cm below elbow.

9. Gun shot wound on back of chest at median plane at T10 spine level, margins of wound lacerated. Direction of wound downwards, forwards and little towards left. Black gun powder stretched in the area of about .20 cm around wound.

10. Gun shot wound ♦ Wound of entry placed on right side of neck situated about 8 cm vertically below the lower end of root of right external ear. It is directed upward, medially and towards left upto wound of exit.

Wound of exit ♦ It is situated on left side of neck split open wound margins lacerated size about 10 cm x 10 cm. Lt side of mandible fractured, zygomatic arch of maxilla also fractured.

In the opinion of the Board, the cause of death of Sh. Giriraj Meena was shock due to excessive haemorrhage because of gun shot wound at neck and other associated injuries. Postmortem report (Ex.P-45) was prepared.

21. Thus, Dr. N.B. Joshi (PW-35) and postmortem report (Ex.P-45) corroborate the prosecution story that Giriraj was assaulted by firearm, incised & blunt weapons and killed. As per postmortem report (Ex.P-45), opinion of the Medical Board is that cause of death of Giriraj is shock due to excessive haemorrhage because of gun shot wound at neck and other associate injuries.

22. Ratan Singh (PW-31), Sub-Inspector, Police Station Ramgangmandi has stated that on receipt of information on 6.9.2003 that Giriraj Meena has been killed by bullet fire and other weapons at village Dhakiya and his dead body has been brought and placed in the Mortuary of Ramganjmandi, he reached the Government Hospital and prepared an inquest report (Ex.P-2), whereupon, "A to B" signatures is of Shivraj. In his cross examination, he stated that as the incident was of the area of Police Station Chechat, he informed the Police Station Chechat. Abdul Majid Khan (PW-36), SHO, Police Station Chechat stated that after reaching Mortuary, Ramganjmandi and recording Parcha Bayan (Ex.P-1), he started investigation and obtained the inquest report prepared by Ratan Singh, Sub-Inspector of P.S. Ramganjmandi and thereafter requested the Medical Officer to conduct postmortem. Photography of the dead body was get done. Memo of dead body (Ex.P-3) was prepared. After postmortem, dead body was handed over to Shivraj vide memo (Ex.P-4). Blood stained underwear and Baniyan of the deceased were seized and sealed vide seizure memo (Ex.P-8). Thereafter, he went to village Dhakiya and inspected the site of crime in presence of witnesses Narain (PW-5), Bheru Lal

(PW-8) and complainant Shivraj. Memo of site inspection is Ex. P-5. Photography of site of crime was get done vide memo (Ex.P-11). Blood smeared soil, control soil and blood of deceased were collected and sealed vide memo (Ex.P-9). A live 9 mm cartridge, three empty cartridges, another empty cartridges of 315 bore found at the site of crime were also collected and sealed vide memo (Ex.P-10). Thereafter, he returned to the Police Station Chechat and formal FIR No. 106/2003 (Ex.P-46) was registered by him, Bheru Lal (PW-8) has corroborated the statement of Abdul Majid Khan (PW-36). Narain (PW-5) has turned hostile. However, he admitted his signatures on memo of site of crime (Ex.P-5), memo of seizure of soil (Ex.P-9), memo of seizure of cartridges (Ex.P-10) and memo of photography (Ex.P-11). Rajendra Kumar (PW-28) stated that he had taken photographs Ex.P-34 to Ex.P-41 of deceased Giriraj. Hariprakash (PW-26) stated that on 6.9.2003 on the request of police Chechat, he had taken photographs of the site of the crime. Photographs are Ex.P-26 to Ex.P-30 and negatives of which are Ex.P-31 and Ex.P-32. As per Chalked FIR (Ex.P-46), first information of the offence was formally registered at Sr. No. 106/2003 on 6.9.2003 at 3.30 PM.

23. After perusing the above evidence, it is crystal clear that no delay was committed in taking prompt action, on receiving the information about crime given by Shivraj vide Ex.P-1. Time taken in completing all necessary proceedings at Hospital and site of crime are explicit from the statement of Abdul Majid Khan (PW-36). So delay in registering the formal FIR has been explained. Moreover, we do not find any contradiction between formal FIR (Ex.P-46) and Parcha Bayan (Ex.P-1), which is, in fact, the real first information of crime.

24. It is undisputed that Shivraj (PW-1), Jugraj Meena (PW-10) and Dhanraj (PW-33) are brothers of the deceased. Sanju Meena (PW-14) and Bali Bai (PW-34) are sister and wife, respectively, of the deceased. Obviously, they are interested & relatives witnesses. But on perusal of memo of site inspection (Ex.P-4), it reveals that the distance of their houses from site of crime is hardly 87 foot steps. Learned trial court has rightly believed that immediate presence of these witnesses at the site of crime cannot be doubted.

25. Shivraj (PW-1) has stated that his brother Jugraj (PW-10) also reached the site of crime, almost at the same time when he reached. Jugraj (PW-10) has stated that on the information given by Reena (PW-9), Shivraj (PW-1) rushed and the witness also followed him. The witness heard two sounds of firing on the way and saw that accused were beating his brother near the house of Amarjal. When he reached, the beating was over. Accused Phoolchand, Narendra, Chandu, Mukesh, Ghanshyam and Vinod were there. Pistol was in the hand of Phoolchand. Gandasi was in the hand of Narendra. Sword was in the hand of Chandu. Knife was in the hand of Vinod. There was an injury of fire in the head of his brother. Ghasi Meena, Ghanshyam Meena, Ramesh Meena and Maula Musalman were also present there. Many people reached there. His sister Sanju and Bhabhi did also come there.

Accused Phoolchand warned his sister not to come forward, otherwise she would also have the same fate. His brother Dhanraj also reached there.

26. Dhanraj (PW-33), who reached the spot after Jugraj, has deposed the incident as if he was eye witness. On the other hand, Statement (Ex.D-7) u/s 161 Cr.P.C. does not contain eye witnessing details of incident. Learned trial court has rightly observed that Dhanraj (PW-33) has improved his version while deposing his evidence before the court. Similarly, Sanju (PW-14) and Bali Bai (PW-34) have also made improvements in their versions rendered by them to police u/s 161 Cr.P.C. They are deposing before the court as if they were eye witnesses. Jugraj (PW-10), Sanju (PW-14), Dhanraj (PW-33) and Bali Bai (PW-34) did not see the action of beating but they have reached the site of crime immediately after the crime and they have stated the presence of the accused and weapons which they were carrying with them. All these witnesses are also stating that accused Phoolchand had threatened them to meet the same fate if they came forward. We do not find anything wrong in believing the statements of these witnesses to the extent as aforesaid.

27. Ghanshyam (PW-7), Maula Bhai (PW-11), Bajrang (PW-13), Mangilal (PW-15) and Bajrang (PW-16) have also been examined as eye witnesses. Learned trial court has believed only Maula Bhai (PW-11) and Bajrang (PW-13) to be eye witnesses. Looking to the improvements made in the statement given u/s 161 Cr.P.C. while deposing before the court, their presence as eye witnesses not corroborated by the witnesses, who reached the site earlier to them and delay in recording their statements by police u/s 161 Cr.P.C. - all have rightly led the trial court to disbelieve Ghanshyam (PW-7), Mangilal (PW-15) and Bajrang Lal (PW-16) as eye witnesses.

28. So far as Maula Bhai (PW-11) and Bajrang (PW-13) are concerned, both of them were sitting on a Chabutri and heard the sound of firing. Both of them rushed and saw near Ramdeo Temple that Ghanshyam had fired in the beginning. Accused Phoolchand fired at ear cartilage of Giriraj. Thereafter, he fell down on ground. While lying down, Narendra gave him assault on neck by Gandasi, accused Chandu gave a blow of sword in abdomen. Mukesh stabbed in the abdomen with Chhura and Vinod also stabbed in the abdomen with knife. Mukesh moved towards the witnesses, hurling Chhura, thus the witnesses fled away. By that time - Bali Bai, Jugraj Shivraj, Sanju and Dhanraj were reached there. When these people reached near, then these two witnesses fled away.

29. Reena (PW-9) is the girl child, who first of all informed Shivraj (PW-1) about the incident, but she turned hostile. Ghasiram (PW-2) and Ramesh (PW-12) have also been examined as eye witnesses, but they deposed in their statements before the court that they had reached after the incident and only heard that accused had murdered Giriraj.

30. Having close scrutiny, we find that out of several witnesses examined by the prosecution as eye witnesses, Shivraj (PW-1), Jugraj (PW-10), Maula Bhai (PW-11),

Bajrang (PW-13) and Dhanaraj (PW-33) are fully corroborating the prosecution story that appellant Phoolchand gunned down Giriraj, Chandu assaulted him with sword and Narendra Kumar with Gandasi and consequently Giriraj succumbed to the injuries.

31. Alok Gautam (PW-37), Investigating Officer, has stated that one Gandasi at the instance of appellant Narendra Kumar and one sword at the instance of accused Chandu @ Chandra Prakash were recovered vide memo Ex.P-19 and Ex.P.-20, respectively. However, attesting witnesses Devlal (PW-20) and Amarlal (PW-21) are not corroborating. As per prosecution, the recovered articles were sent for examination to the FSL. But Ex. P-47, the FSL report, reveals that neither on the recovered sword nor on the recovered Gandasi was found any human blood. It is alleged that accused Phoolchand shot fire at the ear cartilage of Giriraj, but no fire arm has been recovered.

32. As the eye witnesses stated that they themselves had seen accused Phoolchand inflicting gun fire injury at the ear cartilage of the deceased, appellant Chandu gave a blow of sword and appellant Narendra Kumar also giving a blow of Gandasi on the body of deceased Giriraj. Postmortem report (Ex.P-45) and statement of Dr. N.B. Joshi (PW-35) corroborates that gun shot injuries and incised wounds were found ante-mortem on the dead body of Giriraj. As per postmortem report (Ex.P-45), opinion of the Medical Board is that cause of death of Giriraj is shock due to excessive haemorrhage because of gun shot wound at neck and other associate injuries. Thus, the charges against the appellant are well proved by the primary evidence. In this situation, non-recovery of fire arm, no evidence connecting the recovered weapons with commitment of crime cannot be given any importance for the purpose of doubting truthfulness of the prosecution story.

33. In the result, we do not find any force in the appeal presented by appellants Phoolchand, Narendra Kumar and Chandu @ Chandra Prakash and it is hereby dismissed. The conviction and sentence passed against the appellants by the trial court are upheld. Appellants Phoolchand and Narendra Kumar are in jail, they are to serve out the remaining sentence. Accused Chandu @ Chandra Prakash is on bail as his sentence was suspended vide order dated 22.10.2007 passed by this Court. He is directed to surrender immediately before the trial court, who will take him into custody and send him to jail to serve out the remaining sentence of imprisonment. In case, the accused appellant Chandu @ Chandra Prakash does not surrender within one month, the trial court shall take necessary steps to take him into custody and send him into jail to serve out the remaining sentence of imprisonment.