

(2007) 10 AHC CK 0119**Allahabad High Court****Case No:** None

State of U.P.

APPELLANT

Vs

Nanhey Sheikh alias Ishaq,
Sahulat and Irshad

RESPONDENT

Date of Decision: Oct. 3, 2007**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 120B, 148, 149, 302

Hon'ble Judges: S.C. Nigam, J; M. Chaudhary, J**Bench:** Division Bench**Final Decision:** Dismissed

Judgement

M. Chaudhary, J.

Since all the three appeals have arisen out of one and the same judgment dated 29th of January, 2002 passed by Sri A.K. Tripathi, Additional Sessions Judge Court No. 6 Bareilly in Sessions Trial No. 1502 of 1999 State v. Sohrab and Ors. all the three appeals have been taken up and heard together and are being disposed of by this common judgment.

2. Two Criminal Appeals have been filed on behalf of accused appellants from judgment and order dated 29th of January, 2002 passed by Additional Sessions Judge Court No. 6 Bareilly in Sessions Trial No. 1502 of 1999 State v. Sohrab and Ors. convicting accused Sohrab, Nanhey son of Mehtab, Gantha, Maqsood @ Taini, Bhola, Salim and Akbar u/s 148 IPC and Section 302 read with Section 149 IPC and sentencing each of them to two years" rigorous imprisonment and imprisonment for life respectively thereunder. Accused Akbar, Salim, Sohrab, Maqsood @ Taini and Gantha were also convicted u/s 25 of the Arms Act and each of them sentenced to two years rigorous imprisonment thereunder and accused Irshad u/s 4/25 of the Arms Act and sentenced to one year"s rigorous imprisonment thereunder. Accused Nanhey Sheikh @ Ishaq, Sahulat and Irshad were acquitted of the charge levelled against them under Sections 147, 148 and 120-B IPC and Section 302 read with

Section 149 IPC.

3. Brief facts giving rise to these appeals are that Nisar Khan, Ali Bahadur, Bhurey Khan and Kallu Khan were real brothers being sons of Surram Khan. Altaf Ali and Ahmad Shafi Khan are sons of Bhurey Khan. Navi Ahmad, Iqbal Khan, Rahmat Ali and Anwar Ali were real brothers being sons of Ahmad Shafi Khan. Accused Sohrab and Nanhey are real brothers being sons of Mehtab Khan. In the evening of 30th of May, 1999 there was a feast to celebrate madha ceremony of the marriage of Gauhar Ali son of Muqaddar Ali. At about 7:00 p.m. that evening Nisar Khan and his brothers Ali Bahadur, Bhurey and Kallu alongwith Anwar Ali, Navi Ahmad, Rahmat Ali and Iqbal Khan sons of Ahmad Shafi had also gone to attend the feast that all of a sudden Sohrab, Nanhey, Maqsood @ Taini, Akbar, Salim, Gantha and Bhola alongwith 2-3 unknown persons armed with rifle, guns and countrymade pistols reached there shouting that they had damaged them a lot and would be shot down now and immediately they started firing at Anwar Ali with their respective weapons. Immediately all the persons including persons who were taking food throwing their plates ran for their lives. Sustaining fatal injuries Anwar Ali fell down. Nisar Khan, Iqbal Khan and their family members ran towards their respective houses. Sahulat Hussain, Nanhey Sheikh and Irshad armed with countrymade pistols standing at the kharanja encircled Ali Bahadur, and in the meanwhile after assaulting Anwar Ali all the seven assailants abovenamed alongwith 2-3 others also reached there and all of them started firing at Ali Bahadur. All the persons who were running towards their houses got frightened and closed the doors of their respective houses, and the assailants firing shots fled away towards cast. Then Nisar Khan and his family members went to injured Ali Bahadur and Anwar AIL By that time both of them succumbed to the fatal injuries sustained by them. Immediately Nisar Khan got report of the occurrence scribed by one Mohammad Anis and went to police station Bithri Chainpur situate at a distance of three kms from the village and handed over written report of the occurrence to the police there at 9:15 p.m. the same night. The police registered a crime against the accused and made entry regarding registration of the crime in the GD. Station Officer K.P. Singh took up investigation of the crime in his hands and went to the scene of occurrence. As the investigating officer was inspecting the place of occurrence generator operating at the scene of function went out of order. Then after arrangement of proper light the investigating officer recorded statements of the witnesses and inspected the scene of occurrence. He collected bloodstained and simple earth from both the places where dead bodies of Anwar Ali and Ali Bahadur were lying at a distance of some 70-75 paces from each other and prepared their recovery memos and scaled the same in separate packets. He also picked up empty cartridges, pieces of butt lying at the scene of occurrence, scaled them in separate packets and prepared their memos. After inspecting the site he also prepared site plan map of the place of occurrence. On the directions of station officer K.P. Singh SI Fauji Singh drew inquest proceedings on the dead bodies of Anwar Ah and Ali Bahadur after sunrise and handed over both the dead

bodies in separate scaled covers alongwith necessary papers to constables Mohan Singh and Sri Pal for being taken for their postmortem.

4. Autopsy on the dead body of Anwar Ali and Ali Bahadur was conducted by Dr Devendra Kumar Bajpayee, medical officer District Hospital Bareilly at 2:00 p.m. and 2:35 p.m. respectively. Autopsy on the dead body of Anwar Ali revealed belownoted anti mortem injuries:

1. A firearm wound of entry 1.5 cm x 1.5 cm x bone deep on left side temporal region of skull 1.5 cm above and anterior to left ear with margins inverted and lacerated, temporal bone underneath fractured. Blackening and tattooing was found present around the wound in 4 cm area. On dissection frontal bone, anterior cranial fossa around the left side maxillary and sphenoidal bones fractured. Mandible also fractured.
2. A firearm wound of exit 4 cm x 2.5 cm x brain cavity deep through & through corresponding to injury No. 1 on right side forehead just above right eyebrow with margins everted and lacerated.
3. A firearm wound of entry 2 cm x 2 cm x chest cavity deep on lateral aspect of left side chest six cms below post axillary fold with margins inverted & lacerated, blackening and tattooing present.
4. A firearm wound of exit 4.5 cm x 4 cm x chest cavity deep through and through on front of left side chest 6 cm medially to left nipple at 8 o "clock position with margins lacerated and everted, 3r and 4th ribs underneath fractured.
5. Abraded contusion 2 cm x 2 cm over right side nostril and nose.
6. Abraded contusion 3 cm x 3 cm over left cheek.
7. A firearm wound of entry 2 cm x 2 cm x muscle deep through and through on back of left upper arm 6 cm below axilla with margins lacerated and inverted. Blackening and tattooing present.
8. A firearm wound of exit 4 cm x 3.5 cm corresponding with injury No. 7 five cm below axillary fold with margins everted and lacerated.
9. A firearm wound of entry 4.5 cm x 3.5 cm x muscle deep over left side chest 3 cms above left nipple in anterior axillary line.

On internal examination brain and its membranes were found lacerated and hematoma present at the base of skull. Left lung, pleura, pericardium and heart were lacerated. Stomach and peritoneum were also found lacerated.

The doctor removed 75 small pellets, one wadding piece and two plastic pieces from left side chest and left arm.

The doctor opined that death was caused due to shock and hemorrhage as a result of ante mortem injuries about one day ago.

Autopsy conducted on the dead body of Ali Bahadur revealed below noted ante mortem injuries:

1. A lacerated wound 2 cm x 1.5 cm on right side forehead 4 cm above and lateral to eyebrow. Underneath frontal bone depressed and fractured.
2. Lacerated wound 1.5 cm x 1 cm x muscle deep over left cheek bone.
3. Lacerated wound 3 cm x 0.5 cm x muscle deep over left nostril and face.
4. Lacerated wound 1 cm x 0.5 cm x muscle deep over left lower jaw bone fractured underneath.
5. A firearm wound of entry 3 cm x 2.5 cm over left side chest 6 cm above left nipple at 11 o'clock position with margins inverted and lacerated, blackening and tattooing present.
6. Lacerated wound 1 16 cm x 1 cm x muscle deep just above right nipple.
7. A firearm wound of entry 4 cm x 3 cm x cavity deep over left side abdomen upper part 14 cm below left nipple with multiple small wounds of entry present around the wound each measuring 0.6 cm x 0.6 cm. Margins of the main wound inverted and lacerated. Blackening and tattooing present around the central wound.
8. A firearm wound of exit 3 cm x 2 cm over right hypochondrium 15 cm below right nipple corresponding with wound No. 7.
9. Multiple firearm wounds of entry in an area of 24 cm x 14 cm with a central hole 3 cm x 2 cm x cavity deep, small wounds each measuring 0.6 x 0.6 cm. Margins of wound lacerated and inverted.
10. A firearm lacerated wound 7 cm x 3 cm (grazing) muscle deep over post medial aspect of right forearm in the middle. Blackening and tattooing present.
11. A firearm wound of entry 1 cm x 1 cm x muscle deep on right side back in middle near midline, gun powder marks present around in an area of 8 cm x 6 cm.
12. Abrasion 1 cm x 1 cm over the iliac spine on right side.

On internal examination frontal bone on right side was found fractured and hematoma present thereunder. Left lung and pleura, heart, peritoneum and pericardium were found lacerated. 6th rib on right side and 3rd and 4th on left side were found fractured. Small and large intestines were lacerated at places. Stomach contained 200 ml semi digested food material.

The doctor opined that death was caused due to shock and hemorrhage as a result of ante mortem injuries about one day ago.

On transfer of Station Officer K.P. Singh SI J.P. Gautam who took over charge on 3rd of June, 1999 continued the investigation. On receiving information on 6th of June, 1999 Station Officer J.P. Gautam alongwith the police force arrested three persons namely Salim, Akbar and Irshad near Plywood Factory on Nariyawal-Pasona road at about 9:30 p.m. and recovered one countrymade pistol of 12 bore from the possession of each of accused Salim and Akbar and one knife of prohibited blade from the possession of Irshad. On being inquired Salim and Akbar disclosed that they had used those countrymade pistols in the murder of Anwar Ali and Ali Bahadur. Then Station Officer J.P. Gautam lodged an FIR regarding recovery of the arms and ammunition from accused Salim, Akbar and Irshad. Station Officer J.P. Gautam prepared recovery memo of arms and ammunition recovered from the possession of three persons arrested and sealed them in separate packets. The police registered crime Nos. 206 to 208 of 1999 against all the three accused u/s 25 of the Arms Act accordingly. Investigation of the crime aforesaid u/s 25 Arms Act was entrusted to ASI Rajendra Singh.

5. On 21st of June, 1999 the investigating officer learnt that accused Sohrao, Nanhey son of Mehtab, Gantha and Maqsood @ Taini had surrendered in the Court. Then he interrogated all the four in jail after obtaining permission of the Court. Accused Sohrab, Gantha and Maqsood @ Taini disclosed that they had concealed gun and countrymade pistols used in the murder and could get the same recovered. Then after getting accused Sohrab, Gantha and Maqsood @ Taini on police remand on 2nd of July, 1999 the investigating officer interrogated all the three again and then reached the sugarcane field of Salim on the chak road at village Alampur Gajraula where Sohrab got countrymade gun of 12 bore alongwith five live cartridges wrapped in a cloth concealed in a heap of rubbish and earth recovered disclosing that it was that very gun with which he had fired at Ali Bahadur and Anwar Ali. Then accused Gantha got a countrymade pistol of 12 bore and two live cartridges wrapped in a piece of cloth recovered from that very heap of garbage and earth concealed at a distance of five paces from the gun telling that that was the same countrymade pistol with which he had fired at Ali Bahadur and Anwar Ali. Accused Maqsood @ Taini also got a countrymade pistol and three live cartridges wrapped in a piece of cloth concealed under the earth adjacent to that place recovered telling that it was the same with which he had fired at Anwar Ali and Ali Bahadur. The investigating officer prepared recovered memos of arms and ammunition recovered at the instance of accused Sohrab, Gantha and Maqsood @ Taini and sealed them in separate packets. Crimes against accused Sohrab, Gantha and Maqsood @ Taini were also registered u/s 25 of the Arms Act at the police station at the instance of Station Officer J.P. Gautam the same day at 7:45 p.m. (Crimes No. 254, 255 and 256 of 1999). Investigation of the crimes u/s 25 of the Arms Act was entrusted to ASI Nanhu Singh. The investigating officer got blood stained clothes of deceased Anwar Ali and Ali Bahadur and bloodstained earth and simple earth collected from the places where their respective bodies were lying sent to Forensic Science Laboratory,

Agra for serologist's opinion. He also got gun and countrymade pistols and cartridges recovered at the instance of accused Sohrab, Maqsood @ Taini and Gantha and from the possession of Salim and Akbar alongwith the empty cartridges picked up by him from the scene of occurrence sent to Forensic Science Laboratory Agra for opinion of ballistic expert if empty cartridges picked up from the scene of occurrence were fired with the gun or countrymade pistols recovered. After completing investigation Station Officer J.P. Gautam submitted charge sheet against the accused accordingly.

6. After investigating the crimes u/s 25 of the Arms Act and obtaining necessary sanction of District Magistrate, Bareilly ASI Rajendra Singh submitted charge sheets against accused Salim and Akbar and also against accused Irshad and ASI Nanhu Singh against accused Sohrab, Gantha and Maqsood @ Taini accordingly. A perusal of the scrologist report goes to show that the bloodstained earth collected from both the places where dead bodies of Anwar Ali and Ali Bahadur were lying and their clothes contained human blood. Joint Director, Forensic Science Laboratory, Agra also opined that bloodstained earth and simple earth collected from one place (item No. 1) were alike in their geological characteristic and likewise simple earth and bloodstained earth collected from another place (item No. 7) appeared to be identical on the basis of their geological characteristics (Exts ka 45 & ka 46). A perusal of the report of ballistic expert, Forensic Science Laboratory Agra goes to show that disputed cartridge marked as EC-16 was fired from countrymade pistol marked as 1/2000 (recovered from Salim registered at Crime No. 206 of 1999 u/s 25 of the Arms Act State v. Salim, police station Bithli Chainpur), disputed empty cartridge marked as EC 6 from countrymade pistol marked as 4/2000 (recovered from Maqsood-registered as Crime No. 256 of 1999 u/s 25/27 of the Arms Act State vs Maqsood, police station Bithli Chainpur) and empty cartridges marked as EC2 and EC 7 were fired from countrymade SBBL gun marked as 5/2000 (recovered from Sohrab-registered as Crime No. 254 of 1999 u/s 25/27 of the Arms Act State vs Sohrab, police station Bithli Chainpur)(Ext ka-47).

7. The accused pleaded not guilty denying the alleged occurrence altogether stating that they were implicated in the case falsely on account of party factions due to elections of village pradhan. The defence case as suggested to the prosecution witness is that at about 10:00 p.m. the alleged night dacoits came in the village and as Anwar Ali and Ali Bahadur resisted they were done to death by the dacoits. The accused examined DW1 Nanhcy Lal and DW2 Wahid Khan in their support. Both of them stated that at about 10 or 10:30 p.m. the alleged night some dacoits came in the village and as Ali Bahadur and Anwar Ali resisted the dacoits started firing at them and sustaining firearm injuries they died. D.W. 2 Wahid Khan admitted that accused Sahulat is his real brother-in-law (said) and accused Nanhcy Sheikh happens to be his chachiya sasur. On an appraisal of the parties' evidence the learned trial judge held accused Sohrab, Nanhey son of Mehtab Khan, Gantha, Maqsood @ Taini, Bhola, Akbar and Salim guilty of the charge levelled against them

and convicted and sentenced them as stated above. However accused appellants Nanhey Sheikh @ Ishaq, Sahulat Hussain and Irshad were acquitted of the charge levelled against them under Sections 148 and 302 read with Section 149 IPC. Feeling aggrieved by the impugned judgment and order the accused appellants preferred this appeal for redress. The State filed Government appeal against accused appellants Nanhey Sheikh @ Ishaq, Sahulat Hussain and Irshad assailing judgment of the trial court to that extent.

8. Heard Sri P.N. Misra, learned Senior Counsel present for the appellants in both the criminal appeals, Sri Karuna Nand Bajpayc learned AGA for the State in Government appeal, Sri Satish Trivcdi learned Senior Counsel for the first informant, Sri Ved Mani Sharma learned Counsel for the accused respondents in Government appeal and Sri M.A. Siddiqui, learned AGA for the State respondent in both the criminal appeals. PW 1 Nisar Khan, the first informant and PW 2 Iqbal Khan have appeared as eye witnesses of the occurrence. PW 1 Nisar Khan, real brother of deceased Ali Bahadur and the first informant stated all the facts of the occurrence from beginning to the end as narrated above deposing that at about 7:00 p.m. the alleged evening he alongwith his brothers Ali Bahadur, Bhorcy and Kallu and also Anwar Ali, Iqbal Ali, Navi Ahmad and Rahmat Ali went to attend the madha ceremony of Gauhar Ali that as they reached there Sohrab, Nanhey, Gantha, Maqsood @ Taini, Akbar, Salim and Bhola alongwith 2-3 others armed with guns, rifle and countrymade pistols reached there shouting that they had damaged them much and now they would be shot dead started firing shots at Anwar Ali with their respective weapons; that sustaining the fatal injuries Anwar Ali fell down and the persons present including those who were taking food ran away throwing their plates; that they also ran for their lives passing through the house of Muqaddar Ali; that as they were running towards their houses Sahulat Hussain, Nanhey Sheikh and Irshad armed with countrymade pistols encircled Ali Bahadur on the kharanja shouting as to where he will go by running away; that in the meanwhile all the seven assailants abovenamed alongwith 2-3 others also reached there and all of them started firing at Ali Bahadur with their respective weapons; that sustaining the fatal injuries Ali Bahadur fell down and all the miscreants firing shots ran away towards cast and that then he alongwith others went to see Ali Bahadur and Anwar Ali and by that time both succumbed to the injuries sustained by them. He further deposed that immediately he got report of the occurrence scribed by Anis Khan and affixed his thumb impressions thereon and taking the written report he went to the police station and handed over written report of the occurrence to the Head Moharrir there. PW 2 Iqbal, brother of deceased Anwar Ali corroborated him on all the material points deposing likewise, Both these witnesses were subjected to long and searching cross-examination but nothing tangible could be elicited therefrom to shake their credibility. Both the eye witnesses stood their cross-examination firmly. Both of them appears to be truthful, honest and straightforward witnesses. Their sworn testimony stands well corroborated by FIR of the occurrence lodged at police

station Bithari Chainpur promptly and the medical evidence. Autopsy conducted on the dead body of Anwar Ali revealed four ante mortem firearm wounds of entry out of which three having their communicating wounds of exit. On internal examination brain and its membranes, left lung and pleura, heart, pericardium and peritoneum were found lacerated. Autopsy conducted on the dead body of Ali Bahadur revealed five ante mortem firearm wounds of entry besides few ante mortem lacerated wounds. On internal examination left lung and pleura, pericardium, heart and peritoneum were found lacerated and frontal bone of head, 6th rib on right side and 3rd and 4th on left side were found fractured. Medical evidence leaves no room for doubt as to the factum of occurrence, and the prosecution case with regard to its time and the weapons used in the assault also receives corroboration from it. The place of occurrence is also fixed up by recovery of blood and empty cartridges by the investigating officer therefrom. The investigating officer deposed that canopy (shamiyana) was fixed in front of the house of Muqaddar Ali and broken plates were lying and food spread all over there (Ext ka 13). The serologist's report further goes to lend assurance that the incident occurred at the place alleged by the prosecution (Ext ka 45). A perusal of the report of the ballistic expert also goes to show that some of the empties (picked up by the investigating officer from the place of occurrence) marked as EC-2 and EC-7 were fired with the SBBL gun 5/2000 (recovered from accused Sohrab), and empty cartridges EC-6 and EC-16 from the countrymade pistols marked as 4/2000 and 1/2000 respectively (recovered from accused Maqsood and Gantha respectively). Considering this overwhelming evidence on the record wc arc of the view that accused appellants Sohrab, Nanhy son of Mehtab, Gantha, Maqsood @ Taini, Bhola, Akbar and Salim constituted unlawful assembly and in prosecution of common object of that unlawful assembly they committed murder of Anwar Ali; that accused appellant Nanhy Sheikh, Sahulat Hussain and Irshad were also members of the said unlawful assembly and also shared common object of committing the murder of Anwar Ali and further in prosecution of the common object to commit the murder of Ali Bahadur all of them as members of unlawful assembly aforesaid and in prosecution of its common object aforesaid they committed the murder of Ali Bahadur.

9. Now we propose to deal with different aspects of the case hereinbelow having regard to the arguments advanced across the bar:

First, it has been argued by learned Counsel for the appellants that FIR of the occurrence lodged at the police station is ante timed. In order to substantiate the said contention the appellants' learned Counsel placing reliance on paper No. 18 ka which happens to be the letter written by the sub-inspector drawing inquest on the dead bodies to CMO, District Hospital Barcilly pointed out that at the top of the letter after mentioning crime number and sections name of the accused has been mentioned as v. Maqsood and Ors. whereas in the FIR name of accused Sohrab has been mentioned as the first name. The said argument advanced by the appellants' learned Counsel has got no substance at all. In all the papers relating to inquests

crime number and sections have been mentioned. In second line at page 2 of the inquest report crime number and sections have been mentioned in the body of the inquest report. Time of lodging FIR, name of the first informant, brief narration of the fact that both the deceased were murdered by firing with firearms, distance of police station from the place of occurrence etc. have been mentioned in the inquest report. Thus the contention of appellants" learned Counsel that since name of accused Maqsood in place of Sohrab has been mentioned in the letter written by the sub-inspector to the chief medical officer District Hospital Batrcilly for autopsy on the dead body of Anwar Ali (paper No. 18 ka) it should be concluded that the FIR was not in existence till the inquests were drawn is wholly fallacious. This fact alone is not sufficient at all to draw an inference that the FIR of the occurrence was not lodged at the police station at the time it purports to be. Hence FIR can not be said to be ante timed.

10. Secondly, learned Counsel for the accused appellants vehemently argued that ante mortem injuries sustained by the two deceased are not consistent with the prosecution version as none of the two eye witnesses could tell as to how deceased Anwar Ali received ante mortem abrasions at his nose and left check (injuries No. 5 and 6) and Ali Bahadur received six ante mortem lacerated wounds at his forehead, face and chest and ante mortem abrasion on back. It has come in evidence that there was a pakaria tree near which Anwar Ali was fired at. The possibility can not be ruled out that when he was being assaulted by the assailants he might have got struck with the tree and received abrasions at his nose and cheek. Further, it has also come in evidence that the investigating officer found pieces of butt of gun lying at the place of occurrence. The possibility can not be ruled out that some of the assailants taking vengeance might have given blows to Ali Bahadur with the butt of gun causing ante mortem lacerated wounds on right side of his forehead and on left jaw with the result that the butt of gun got broken and pieces of butt were found lying there. A perusal of the post mortem report goes to show that autopsy conducted on the dead body of Ali Bahadur revealed ante mortem lacerated wounds on right side of forehead and there was depressed fracture on frontal bone and lower jaw bone was also found fractured. Injuries No. 2, 3 and 4 were on left side check, face and lower jaw. Possibility can not be ruled out that these three injuries might have been caused by one blow with the butt of gun. There was also an ante mortem lacerated wound just above the right nipple and an abrasion on the back. Both these ante mortem injuries could also be caused with the butt of gun. It has come in evidence that at the time of assault at Ali Bahadur indiscriminate firing was going on and some 12-13 persons armed with guns, rifle and countrymade pistols were present firing at Ali Bahadur. Under the circumstances it was not necessary that two witnesses abovenamed who were also running for their lives could have noted that some of the assailants gave butt blows to Ali Bahadur. Hence the said argument advanced by the appellants" learned Counsel is repelled.

11. Thirdly, learned Counsel for the accused appellants laid much emphasis upon the fact that according to both the eye witnesses above named the said incident was witnessed by many of the co-villagers but no independent witness has been examined by the prosecution in its support and hence implicit reliance should not be placed on the testimony of these two eye witnesses who are closely related to the deceased. In our view, said contention advanced by the appellants learned Counsel deserves outright rejection. A perusal of the record goes to show that accused Sohrab and Nanhy who are real brothers and accused Irshad, Gantha and Maqsood @ Taini were involved in several criminal cases. Excepting one all the accused appellants are residents of the same village. Under the circumstances none might have mustered courage to appear as a witness against such high handed persons and to invite trouble for himself. Moreover, relationship is not a factor to effect credibility of a witness as a relation would not conceal actual culprits falsely roping innocent persons. Both the eye witnesses have been subjected to gruelling and rambling cross-examination but nothing material could be elicited therefrom to render their testimony doubtful. Their testimony has been found to be reliable and trustworthy. Sworn testimony of both the eye witnesses stands corroborated by FIR of the occurrence lodged promptly at the police station and the medical evidence. Scrologist's report and opinion of the ballistic expert further lend credence to their testimony. Hence testimony of two eye witnesses which is of unimpeachable character can not be discarded though they were closely related to the deceased.

12. Fourthly, it has also been argued by the appellants' learned Counsel that no specific role has been assigned to any of the accused by the eye witnesses and hence their interested testimony should not be relied upon. When the victims were being fired at by 10-12 persons armed with guns, rifle and countrymade pistols and the persons present there were running for their lives out of terror it is not possible for the witnesses to give specific role to the assailants. Since both the eye witnesses withstood their cross-examination firmly and nothing could be elicited therefrom to shake the central core of their versions in respect of the prosecution case it would not be just and proper to discard the prosecution case on such tenuous grounds.

13. Fifthly, the appellants' learned Counsel contended that the injuries sustained by the two deceased are disproportionate as compared to the number of the assailants. According to the prosecution case there were some 9-10 assailants who fired at Anwar Ali and 12-13 at the time of assault at Ali Bahadur whereas autopsy conducted on the dead body of Anwar Ali revealed four ante mortem firearm wounds of entry besides two ante mortem abrasions and that of Ali Bahadur five ante mortem firearm wounds of entry besides five ante mortem lacerated wounds and one abrasion. The investigating officer picked up fifteen empty cartridges lying at the spot. There was distance of about 60-70 paces between the places where two dead bodies were lying. It has come in evidence that after firing at Ali Bahadur the assailants went away firing and shouting if some one had courage should come forward. It is not necessary that all the miscreants present there would have fired.

Besides it, some of the miscreants fired while running away just to scare away the co-villagers. Hence the said argument advanced by the appellants" learned Counsel that ante mortem injuries sustained by the two deceased arc disproportionate to the number of assailants is of no avail to the accused appellants and falls down.

14. Sixthly, it has also been argued that there was no light at the place where Ali Bahadur was assaulted by the miscreants. It has come in evidence that the incident took place at sunset time at about 7:00 p.m. on 30* May. In the last week of May sunset takes place at about 7:00 p.m. and for about half an hour thereafter there remains so much light that known persons can well be recognized without any artificial light.

15. Lastly, it has also been argued by learned Counsel for the accused appellants that they had no motive to commit the murder of Anwar Ali and Ali Bahadur. Admittedly the parties were on inimical terms. The accused themselves stated in their statements recorded u/s 313 of Code of Criminal Procedure that they were got implicated in the case falsely due to enmity on account of village pradhani elections. Admittedly Latifan, wife of accused Salim fought election of village pradhan against deceased Anwar All"s real brother Rahmat All"s wife. It is a matter of common knowledge that most of the villages arc faction ridden due to several reasons such as village pradhani elections. PW 1 Nisar Khan also mentioned in the FIR that the parties were inimical to each other. However, it is not of much importance as it is well established that in the case of direct evidence motive pales into insignificance.

16. Testimony of DW 1 Nanhey Lai and DW 2 Wahid Khan regarding the alleged dacoity and murder of Anwar Ali and Ali Bahadur by the dacoits in the village at about 10:00 p.m. the fateful day is palpably false as FIR of the occurrence in which the two were murdered by Sohrab and his associates had already lodged by Nisar Khan, brother of deceased Ali Bahadur that very night at the police station at 9:15 p.m.

17. Now coming to the acquittal of accused Nanhey Sheikh, Sahulat Hussain and Irshad, learned trial judge gave benefit of doubt to them on the grounds : (i) had the three accused abovenamed been members of the unlawful assembly and shared common object of committing murder of Anwar Ali they would have accompanied accused Sohrab and others to that very place where he was murdered, (ii) the three accused abovenamed could not have guessed that after assault at Anwar Ali Nisar Khan and his brothers would run through that very kharanja where it is alleged that they armed with countrymade pistols were standing, (iii) they had no motive to commit the murder of Anwar Ali and Ali Bahadur and (iv) no recovery of any firearm was made from the possession of accused Nanhey Sheikh, Sahulat Hussain and Irshad and the weapon recovered from appellant Irshad was not used in the said crime.

18. All the four grounds aforesaid on which accused Nanhey Sheikh, Sahulat Hussain and Irshad were acquitted are fragile and feeble. In our view, this part of impugned judgment acquitting the three accused abovenamed is clearly unreasonable as the same is based on faulty and erroneous appreciation of evidence regarding their participation. After careful scrutiny once testimony of PW 1 Nisar Khan and PW 2 Iqbal has been found to be convincing and trustworthy regarding the occurrence there is no plausible reason to discard their testimony relating to the participation of accused Nanhey Sheikh, Sahulat Hussain and Irshad in the said crime. Arrest of accused Irshad alongwith accused Salim and Akbar by station officer J.P. Gautam has been believed by the trial court.

19. Further, learned trial judge observed that no recovery of any firearm was made from the possession of accused Nanhey Sheikh, Sahulat Hussain and Irshad and the weapon recovered from appellant Irshad was not used in the said crime. If on interrogation by the investigating officer accused Nanhey Sheikh and Sahulat Hussain would not have disclosed concealment of any firearm made by any of them leading to the recovery thereof at their instance how the investigating officer could have recovered any firearm at their instance. Further, two murders were committed on 30* of May, 1999 whereas accused Irshad alongwith Akbar and Salim was arrested by Station Officer J P Gautam on 6* of June, 1999. If at that time knife of prohibited blade was recovered from the possession of accused Irshad the arresting officer had to recover that very weapon and prepare recovery memo thereof. One countrymade pistol was recovered by SI J P Gautam from accused appellant Salim who was arrested with accused Irshad, and according to the report of the ballistic expert empty cartridge marked as EC-16 was fired from the countrymade paistol marked as 1/2000 recovered from Salim (registered as Crime No. 206 of 1999 u/s 25 of the Arms Act State v. Salim police station Bithri Chaipur.

20. Further, a perusal of the site plan map goes to show that house of Ali Bahadur was situate to the north of main tiraha at the kharanja and it has come in evidence that house of Anwar Ali and his brothers was situate towards east from tiraha at kharanja where the three accused armed with countrymade pistols were standing. Hence the trial judge was unreasonable in observing as to how these three accused could anticipate if Ali Bahadur and his brothers would run towards that side after the assault on Anwar Ali.

21. Further, PW 2 Iqbal Khan stated in his examination-in-chief that the alleged evening as he and his brothers were going to attend the feast of madha ceremony at the marriage of Gauhar Ali Nisar Khan, Bhurey, Ali Bahadur and Kallu met them at the kharanja in front of their house. Learned trial judge observed that had accused Sahulat, Nanhey Sheikh and Irshad would have intended to commit the murder of Ali Bahadur they would have murdered him at that very time. This observation has been made by the learned trial judge under some misapprehension and confusion because PW 1 Nisar Khan categorically stated in his cross-examination that when

they were going to attend the feast of madha ceremony at the marriage of Gauhar Ali they did not see any of the accused on the way though their houses fell on the way from his house to the place of occurrence.

22. Furthermore, it has been wrongly observed by the learned trial judge that had accused Nanhey Sheikh, Sahulat Hussain and Irshad being members of the unlawful assembly and sharing common object to commit murder of Anwar Ali they would have accompanied Sohrab and others to that very place where Anwar Ali was murdered. After assault at Anwar Ali Iqbal Khan, Ali Bahadur and their brothers rushed towards the house of Ali Bahadur. All the three accused abovenamed surrounded Ali Bahadur shouting as to where he will go and in the meanwhile all the assailants who assaulted Anwar Ali reached the place where all the three were standing armed with countrymade pistols and all of them started firing at Ali Bahadur indiscriminately. In our view, at the sunset time when assault was made at Anwar Ali by 8-10 assailants armed with firearms and the house of Ali Bahadur was situate at a short distance towards north to the place of occurrence it was but natural for Ali Bahadur, Iqbal Khan and their brothers to run towards their respective houses. All the three accused abovenamed armed with countrymade pistols were standing at the tiraha on kharanja and since they could lay their hands on Ali Bahadur they encircled him and immediately all the assailants who had fired at Anwar Ali reached there and then all of them fired at Ali Bahadur. Thus background of the incident, nature of the arms carried by members of the unlawful assembly and behaviour of the members of the unlawful assembly soon before, at and after actual commission of the crime leads to the irresistible conclusion that accused appellants Nanhey Sheikh, Sahulat Hussain and Irshad alongwith accused appellants Sohrab & others constituted an unlawful assembly and shared common object of the unlawful assembly to commit murder of Anwar Ali and Ali Bahadur.

23. For the above, we feel satisfied that the view taken by the learned trial judge in acquitting accused Nanhey Sheikh, Sahulat Hussain and Irshad u/s 148 IPC and Section 302 read with Section 149 IPC is unreasonable resulting in miscarriage of justice as the view taken by the trial judge is based on faulty appreciation of evidence and conjectures and surmises.

24. Thus on a conspectus of evidence on record and after considering all the relevant aspects we are of the view that all the accused appellants and accused respondents Nanhey Sheikh @ Ishaq, Sahulat Hussain and Irshad formed an unlawful assembly armed with firearms with a common object to commit murder of Anwar Ali and Ali Bahadur and in prosecution of the said common object they did commit the murder of Anwar Ali and Ali Bahadur. Both the criminal appeals filed by the accused appellants have got no merit and are liable to be dismissed and Government appeal filed by the State against accused appellants Nanhey Sheikh @ Ishaq, Sahulat Hussain and Irshad succeeds.

25. Criminal Appeals No. 556 of 2002 Sohrab and Ors. v. State of U.P. and 475 of 2002 Akbar and Anr. v. State of U.P. are hereby dismissed and the impugned judgment and order convicting accused appellants Sohrab, Nanhey, Gantha, Maqsood @ Taini, Bhola, Akbar and Salim u/s 148 IPC and Section 302 read with Section 149 IPC and convicting Akbar, Salim, Sohrab, Maqsood @ Taini and Gantha u/s 25 of the Arms Act and sentencing each of them thereunder as stated above is hereby affirmed. Impugned judgment and order acquitting accused Nanhey Sheikh @ Ishaq, Sahulat Hussain and Irshad u/s 148 IPC and Section 302 read with Section 149 IPC is hereby set aside to that extent, and all the three accused respondents abovenamed are hereby convicted u/s 148 IPC and Section 302 read with Section 149 IPC and each of them is sentenced to two years" rigorous imprisonment and imprisonment for life respectively thereunder.

26. Accused appellants Sohrab, Nanhey, Gantha, Maqsood @ Taini, Bhola, Salim and Abrar are in jail. They shall remain in jail to serve out the sentence imposed upon them. Accused respondents Nanhey Sheikh @ Ishaq, Sahulat Husain and Irshad are on bail. Their bail is hereby cancelled. Chief Judicial Magistrate, Bareilly is directed to get all the three accused respondents abovenamed arrested and send them to jail to serve out the sentence imposed upon them. Office is directed to send certified copy of the judgment alongwith record of the lower Court to the Court below immediately for ensuring necessary compliance under intimation to this Court within one month from today.