

(2017) 04 AHC CK 0224
ALLAHABAD HIGH COURT
Case No: 1820 of 2004

Mahavir & Others

APPELLANT

Vs

State Of U.P.

RESPONDENT

Date of Decision: April 28, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 161, Section 313 - Examination of witnesses by police - Power to examine the accused
- Indian Penal Code, 1860, Section 302, Section 147, Section 307, Section 148, Section 506, Section 149, Section 436, Section 504 - Punishment for murder - Punishment for rioting - Attempt to murder - Rioting, armed with deadly weapon - Punishment for criminal ,intimidation - Every member of unlawful assembly guilty of offence committed in prosecution of common object - Mischief by fire or explosive substance with intent to destroy house, etc - Intentional insult with intent to provoke breach of the peace
- Arms Act, 1959, Section 25 - Punishment for certain offences

Hon'ble Judges: Bharat Bhushan, Shailendra Kumar Agrawal

Bench: Division Bench

Advocate: Apul Misra, P.K. Singh, P.N. Misra, S.K. Tewari, Ved Prakash Pandey, Ashwini Kumar Awasthi, Manish Tiwary

Judgement

1. Criminal Appeal No.1820 of 2004 by the accused-appellants Mahavir, Devendra and Abhilakh, Criminal Appeal No.1698 of 2004 by accused-appellant Ramvir and Criminal Appeal No.1397 of 2004 by accused-appellant Sarvesh have been filed challenging the impugned judgment and order dated 21/24.02.2004 passed by Additional Sessions Judge, Court No.4, District- Shahjahanpur, in Sessions Trial No.376 of 2001 (State of U.P. Vs. Ramvir and others); Crime No.243 of 2000, Police Station Jalalabad, District Shahjahanpur, whereby all the accused-appellants were convicted under Sections 147, 148, 302 read with Section 149 I.P.C. and 307 read

with Section 149 I.P.C. and the accused-appellants Ramvir and Abhilakh were convicted under Section 436 I.P.C. and all the accused-appellants were sentenced under Section 302 read with Section 149 I.P.C. with life imprisonment along with fine of Rs.10,000/- each; under Section 307 read with Section 149 I.P.C. with seven years rigorous imprisonment along with fine of Rs.5000/- each under Section 148 I.P.C. with three months rigorous imprisonment and the accused-appellants Ramvir and Abhilakh were also sentenced under Section 436 I.P.C. with five years" rigorous imprisonment along with fine of Rs.2000/- each and all sentences were to run concurrently. As these appeals, arise out of a common judgment dated 21/24.02.2004, they were heard together, and are being decided together.

2. It is relevant to mention that during the pendency of these criminal appeals accused-appellant no.3 Abhilakh in Criminal Appeal No.1820 of 2004 has died. Therefore, the appeal filed on his behalf stands abated vide order dated 13.01.2017 of this Court.

3. It is also relevant to mention here that Naresh was one of the named accused in this case. However, he was acquitted by the learned trial Court vide same impugned judgment and order dated 21.2.2004 for the offences under Section 147, 148, 302, 307 read with 149 I.P.C. Accused-appellants Abhilakh, Devendra, Ramvir and Sarvesh were also acquitted for the offence under Section 25 Arms Act by the same impugned judgment.

4. The brief facts of the case are that on 22.10.2000 at about 2:00 p.m. the informant Ram Prasad along with injured Smt. Dhanna Devi, Laturi and other persons namely Prempal, Ramesh, Chhotey Lal of his village and Tejram, Ram Babu, Anil and Vishnu of village Khayi Kheda after coming to the Police Station Jalalabad had submitted a written report Ex. Ka1 scribed by one Virendra Kumar to the effect that on 19.10.2000 accused Ramvir of village Deora in drunken state riding on mare, came and whipped his cousin Vedram. Jagdish and Jagatpal sons of his uncle caught Ramvir and slapped him. On the intervention of villagers, compromise took place between the parties and no information was given to the Police Station in this regard.

5. On 22.10.2000 at about 11:00 a.m., accused Ramvir, his brother accused Mahavir both armed with country-made guns, accused Sarvesh armed with country-made rifle, accused Abhilakh armed with rifle, accused Devendra armed with country-made rifle and Naresh armed with country-made gun came to the door of Jagatpal, brother of informant and challenged in abusive language. When Jagdish and Jagatpal came out from their houses, aforesaid accused made indiscriminate fires upon them. Jagdish and Jagatpal fell down. One Km. Sanyogita, who was smearing clay on the wall, also received fire shots and fell down on the spot. Smt. Dhanna Devi wife of Jagatpal, came out from the house and sustained serious

injuries. Jagatpal, Jagdish and Sanyogita died on the spot and Smt. Dhanna Devi was seriously injured. Vedram, Laturi and others came on the spot on hearing commotion. Accused Ramvir asked to burn the Chappar. Accused Abhilakh set fire upon the Chappar of Jagatpal. On hearing the challenge the accused persons ran away towards east, village Paidapur. Laturi was also shot in the firing done at the time of escape of accused persons.

6. On the basis of written report Ex. Ka-1, Head Moharrir registered a Chik F.I.R. Ex. Ka-5. The case was entered in G.D. No.25 Ex. Ka-6 of police station Jalalabad. At the time of occurrence, the Station House Officer was not present at the Police Station, hence S.S.I. S.K. Bhardwaj, present at the Police Station started investigation. The information was given to the senior police officers on R.T. Set. After preparing the letters Ex. Ka-7 and Ka-8, the injured Laturi and Smt. Dhanna Devi along with Home Guard No.3804 Sonpal were sent for medical examination at C.H.C. Jalalabad. S.S.I. S.K. Bhardwaj taking documents like, copy of written report, file of Inquest Report etc. along with Constables Rampal Singh, Jai Lal Maurya, Manoj Kumar and Vijay Kumar proceeded to place of occurrence.

7. Dr. Brijesh Chandra Saxena at C.H.C. Jalalabad examined injured Laturi and Smt. Dhanna Devi on 22.10.2000 at 7:45 a.m. and 8:05 a.m. respectively. X-ray was advised. For expert opinion the matter was referred to District Hospital, Shahjahanpur.

8. Injured Laturi was examined on 22.10.2002 at 7:45 p.m. by Dr. Brijesh Chandra Saxena. His injury report is Ex. Ka-29. Following injuries were found on his body:

I. A punctured wound of size 0.3 cm x 0.3 cm, black coloured, position of wound was 2.3 cm laterally from the left nostril and 3.0 cm below the middle of left eye at the left side of cheek.

The above injury was kept under observation and referred to District Hospital, Shahjahanpur for X-ray and Expert opinion.

On the same day at 8:05 p.m. Dr. Brijesh Chandra also examined injured Smt. Dhanna Devi. Her injury report is Ex. Ka-30. Following injuries were found on her body:

I. Punctured wound of size 0.3 cm x 0.3 cm, black coloured. position of wound was 1.0 cm below the inner end of left eye at about 6 o'clock position.

II. Swelling of size 5.0 cm x 4 cm covering all over the left eye was somewhat blackish. The left eye could not be opened by the patient by her best effort.

III. Punctured wound of size 0.3 cm x 0.3 cm, black coloured, position of wound was about 5.4 cm above the outer end of right eyebrow over right side of frontal head.

IV. Punctured wound of size 0.3 cm x 0.3 cm, black coloured. No. of wound were four on ant. side of chest. Position of wound was (i) 4 cm below the right shoulder tip, on ant. aspect of right shoulder (ii) 7.5 cm away from right nipple, at about 1 o'clock position over right breast, (iii) Two cm away from med. end of left clavicle at about 5 o'clock position, (iv) 8.5 cm away from medial end of left clavicle at about 1 o'clock position.

V. A large wound (multiple punctured wound) with black margin of size 5.0 cm x 2.5 cm x muscle deep. Black colour multiple pellets were seen inside the wound. Position of wound was about 11.5 cm above the right knee joint on lat. side of right thigh. Other 3 punctured wound at distance about 4 cm, 3.5 cm, 1 cm away from the large wound, around the wound. Colour of wound was black.

Above all five injuries were kept under observation and referred to District Hospital, Shahjahanpur for X-ray and expert opinion. Cause of injuries might be bullet injury. Duration of injuries was about 6-10 hours.

9. On 23.10.2000 at about 4.00 p.m. Dr. Ram Kumar (PW4) conducted postmortem on the corpse of Jagdish. Post mortem report Ex. Ka-2 was prepared. Rigor mortis in both the arms was present; postmortem staining were present in the back side of the body. Following ante mortem injuries were found on the corpse of deceased Jagdish:

There were multiple injures 0.1 to 0.2 c.m. diameter LW and left 0.5 cm diameter (contusion) lacerated wounds depth not pierced situated on all over abdomen front and side up to (I) iliac fossa and lower part of chest size 31x20 cm, left upper 1/2 forearm whole front size depth not present area 21.9 cm.

On internal examination following injuries were found:-

Three pellets were recovered from lower wall of the chest, two pellets were found in stomach, nine pellets were found in stomach and its wall. 200 gram semi-digested food containing blood was in the stomach, semi-digested food and faecal materials were present in small and large intestines, small intestine was perforated, the pancreas was perforated due to pellet wounds. Cause of death was opined haemorrhage and shock due to ante mortem fire arm injury.

10. On the same day at about 2:30 p.m. Dr. Ram Kumar (PW-4) conducted postmortem on the corpse of Sanyogita aged about 12 years and prepared report Ex. Ka-3 and found that the deceased was average built up, abdomen distended, rigor mortis upper passed, down present, postmortem staining was present in the back side of the body.

Following ante mortem injuries were found on the corpse of deceased Sanyogita:

(i) Oval LW 1.4 x1 cm situated on front antero medial aspect of right thigh, upper part 13 cm below pubic symphysis (LW) back of right thigh post, medial aspect below back of injury (I) muscle deep.

(ii) There was zone of blackening and tattooing 2-3 mm from margins of bone. Injury 2 was connected with injury no. 1 tract coming through subcutaneous tissue of muscle.

(iii) Large lacerated wound on left thigh post medial aspect, size 15x13 c.m. muscle lacerated. Shape of tissues broken, protruding out. There was one lacerated wound on antero lateral aspect of left thigh size 9x 3 1/2 cm exit.

On internal examination 100 gm thick muddy semi-digested food was found, small intestine was half filled with semi-digested food and gases, large intestine was filled up with faecal matter and gases. The cause of death was haemorrhage and shock due to ante mortem firearm injuries.

11. On the same day at about 3:15 p.m. Dr. Ram Kumar (PW-4) conducted postmortem on the corpse of Jagatpal aged about 28 years, and prepared a report which is Ex. Ka-4. He found rigor mortis upper passed, lower present and found following ante mortem injuries:-

(i) Lacerated wound surrounded by zone of blackening and tattooing 1.5 c.m. distal to margin on right hypochondrium 1.5 cm below front 10 cm from umbilicus at 10 o'clock position.

(ii) Wound of Exit with averted margins loop and torn muscles coming out situated on trunk right below rib margin and oval wound size 9x6 cm diameter antero -post - anterior abdominal wall, lever stomach - transverse colon- posterior abdominal wall-out .

On internal examination the cause of death was opined as haemorrhage and shock due to ante mortem firearm injuries.

12. As and when P.W.6 S.I. S.K. Bhardwaj reached at the place of occurrence, S.H.O. Rajvir Singh also reached there who took the charge of investigation. On the instructions of S.H.O. Rajvir Singh, inquest reports Ex. Ka-14, Ka-15 & Ka-16 of deceased Jagatpal, Jagdish and Sanyogita respectively, were prepared by S.I. S.K. Bhardwaj. After preparing the photo lash Exs. Ka-11, Ka-19 & Ka-18, the dead bodies of Sanyogita, Jagatpal & Jagdish were sealed and sample seals Ex.Ka-12, Ka-21 & Ka-20 were prepared, Challan lash Exs. Ka-10, Ka-17 & Ka-16 and letters to C.M.O., Ex. Ka-13, Ka-23 & Ka-22 were also prepared and the dead bodies were handed over to Constables Manoj Kumar and Vijay Kumar to carry for postmortem.

13. The samples of bloodstained earth and plain earth were taken from the place of occurrence where the death of Jagatpal, Sanyogita and Jagdish took place and recovery memos Ex. Ka-24, Ka-25 and Ka-26 in this regard were prepared. Recovery memo Ex. Ka-27 regarding ashes of Chappar was also prepared. Three empty cartridges of 315 bore, one empty cartridge of 12 bore, one plastic tikali and three Gatta were recovered from the place of occurrence and recovery memo in this regard Ex. Ka-28 was prepared. S.H.O. Rajvir Singh recorded the statements of informant Ram Prasad and Vedram on the spot and inspected the place of occurrence and prepared the site plan Ex. Ka-31 and also raided the houses of accused persons.

14. On 23.10.2000 accused Devendra along with gun material Ex. 1 and two live cartridges of 12 bore, was apprehended near crossing of village Mudiya Jhud on the way towards Village Chaukhatiya and recovery memo Ex. Ka-32 in this regard was prepared on the spot. On the basis of this recovery memo, Chik F.I.R. Ex. Ka-37 bearing case crime no.244 of 2000, under Section 25 of the Arms Act was registered at the police station by Constable Rakesh Kumar. The case was entered in G.D. No.44 at 8:05 p.m., which is Ex. Ka-38. The investigation was handed over to A.S.I. O.P. Rajput, who inspected the spot and prepared the site plan Ex. Ka-39. He

obtained sanction letter Ex. Ka-50 from District Magistrate, Shahjahanpur. After completion of investigation, charge-sheet Ex. Ka-40 was submitted against accused Devendra.

15. On 23.10.2000 at 10:55 p.m. accused Abhilakh along with country-made gun, material Ex. 2 and two live cartridges of 12 bore, was apprehended from a closed room of Brick furnace and recovery memo Ex. Ka-33 in this regard was prepared on the spot. On the basis of this recovery memo, Chik F.I.R., Ex. Ka-43 bearing case crime no.252 of 2000, under Section 25 of the Arms Act was registered at the police station by Constable Clerk Krishna Chandra. The case was entered in G.D. No.12 at 7:05 o'clock, carbon copy of which is Ex. Ka-44. The investigation was handed over to A.S.I. Chandra Pal Singh, who inspected the spot and prepared the site plan Ex. Ka-52 and also obtained sanction letter Ex. Ka-51 from District Magistrate, Shahjahanpur to proceed the case. After completion of investigation, charge-sheet Ex. Ka-53 was submitted against accused Abhilakh.

16. On 18.11.2000 at about 8:00 a.m. accused Ramvir and Sarvesh were apprehended from Village Yatibara. One country-made gun 12 bore material Ex. 3 and one cartridge of 12 bore and one country-made rifle material Ex. 4 and one cartridge of 315 bore were recovered from accused Ramvir and Sarvesh respectively. In this regard recovery memo Ex. Ka-34 was prepared on the spot. On the basis of this recovery memo, Chik FIRs Ex. Ka-41 in Case Crime No.278 of 2000, under Section 25 of the Arms Act was registered against accused Ramvir and case crime no.279 of 2000, under Section 25 of the Arms Act was registered against accused Sarvesh. The case was entered in G.D. No.19 at 10:00 a.m., carbon copy of which is Ex. Ka-42. The investigation was handed over to S.I. Ram Singh Mehata, who prepared site plan Ex. Ka-45 of the place of recovery and obtained separate sanction orders Ex. Ka-48 and Ka-49 from the District Magistrate, Shahjahanpur to proceed case against accused Ramvir and Sarvesh respectively. After completion of investigation, two separate charge-sheets Ex. Ka-46 and Ka-47 were submitted against accused Ramvir and Sarvesh respectively. On 5.1.2001 Investigation Officer P.W.8 sent the case property, weapons to FSL, Agra through const. Baijnath. The concerned form of FSL is Ex. Ka-36. The FSL report is Ex. Ka-54. Tikli was recovered from spot which is material Ex. 5. The witness also stated that three live cartridges of 12 Bore, one live cartridge of 315 Bore material Ex. 6 to 9 were also recovered.

17. After completion of investigation, the Investigating Officer/ S.H.O. Rajvir Singh submitted charge sheet Ex. Ka-35 in case crime no.243 of 2000, under Sections 307, 302, 504, 506, 436 I.P.C. against all the accused-appellants on 20.12.2000.

18. All the accused-appellants were formally charged for the offence under Sections 148, 302 read with Section 149 I.P.C. and 307 read with Section 149 I.P.C. and accused-appellants Ramvir and Abhilakh were also charged for the offence under

Section 436 I.P.C. Accused-appellants Devendra, Abhilakh, Ramvir and Sarvesh were also charged for the offence under Section 25 of the Arms Act. All the accused-appellants pleaded not guilty and claimed to be tried.

19. To prove its case the prosecution examined following witnesses:-

i. Ram Prasad, informant of the case as PW-1;

ii. Smt. Dhanna Devi, injured eye-witness and wife of deceased Jagatpal as PW-2, iii. Laturi, injured eye-witness and nephew of deceased Jagatpal as PW-3, iv. Dr. Ram Kumar, who conducted postmortem on the corpse of Jagatpal, Jagdish and Sanyogita as PW-4, v. Constable Rakesh Kumar, Chik and G.D. writer as PW-5, vi. S.I. S.K. Bhardwaj, who prepared the site plan of the place of incident as PW-6, vii. Dr. Brijesh Chandra Saxena, who examined the injured Smt. Dhanna Devi and Laturi as PW-7, viii. Inspector Rajvir Singh, Investigating Officer of the case of murder as PW-8, ix. Constable Krishna Chandra, constable clerk, writer of Chik and G.D. u/s 25 Arms Act as PW-9, x. S.I. Ram Singh Mehta, Investigating Officer against accused Ramvir and Sarvesh for the offence under Section 25 of the Arms Act as PW-10, xi. H.C.P. Chandra Pal Singh, Investigating Officer against accused Abhilakh for the offence under Section 25 of the Arms Act as PW-11.

20. All accused-appellants in their statement u/s 313 Cr.P.C. have denied all material facts of the prosecution. However, all accused have admitted that Mahavir and Ramvir are real brothers. Accused Devendra stated that it was matter of neighbourhood. Ram Prasad knew them. Jagdish and Jagatpal were real brothers. They had not gone there. Witnesses Ram Prasad, Dhanna Devi and Laturi had deposed on the persuasion of Pradhan Laloo Singh who played politics for vote. He was coming from Jalalabad Market, when he reached the village, Daroga Ji met him and son of Laloo Singh got him apprehended. Laloo Pradhan was his relative, votes were not given to him, hence he was annoyed with them.

21. Accused-appellant Sarvesh has stated that due to local enmity Ram Prasad, Dhanna Devi and Laturi had given false evidence against accused persons. Ram Prasad did not know him. He had come to village Deora to take his sister. His brother-in-law did not cast vote for Laloo Singh, therefore he had been falsely implicated.

22. Accused-appellant Abhilakh stated that he was not present on the spot, rather he had gone to Jalalabad Market. It was the matter of neighbourhood. Informant Ram Prasad knew accused Mahavir and Ramvir. Witnesses Dhanna Devi, Laturi and Ram Prasad had given false testimonies due to party-bandi. False recovery of guns

had been shown against them by police. Laloo Pradhan was against them.

23. Accused-appellant Mahavir stated that the informant Ram Prasad did not know him and due to enmity of Pradhani, this false report was registered against him, Pradhan. Ram Prasad, Dhanna Devi and Laturi deposed falsely on the persuasion of Pradhan Laloo Singh. He had lodged a false case against them.

24. Accused-appellant Ramvir stated that informant Ram Prasad did not know him. He was in Saifai (Etawah) at the time of incident. Laloo Pradhan had got a false report written against them due to old enmity.

25. However, no oral or documentary evidence in defence has been produced by any of the accused.

26. Heard Shri Apul Misra, learned counsel for all the surviving appellants as well as Shri Ajit Ray, learned A.G.A. for the State.

27. It has been argued on behalf of appellants that it was a case of dacoity committed in house of Jagatpal and the appellants have been falsely implicated due to enmity with Pradhan Laloo Singh. Naresh was also falsely implicated, but acquitted by learned trial Court. F.I.R. was ante-timed. It has been further argued on behalf of appellants that there are major contradictions in the statements of all witnesses. The story of Ved Ram being beaten by Ramvir is concocted; the witnesses are partisan and independent witnesses have not been examined.

28. Learned A.G.A. by refuting all the contentions, advanced on behalf of appellants, stated that there was a clear-cut motive on the part of accused Ramvir of taking vengeance as he had already beaten Ved Ram (cousin brother of informant Ram Prasad) on 19.10.2000 and in counter Ramvir was slapped by both Jagdish and Jagatpal, and case of dacoity could not be proved and there is no previous enmity between parties.

29. We have considered the rival submissions advanced by the learned counsel for the parties and perused the entire record.

30. Hon"ble Apex Court has been pleased to lay down the guidelines for decision of an appeal from time to time. Hon"ble Apex Court has propounded the following principles in Majjal Vs. State of Haryana, 2013 (6) SCC 798 and Kamlesh Prabhudas Tanna and Anr Vs. State of Gujarat reported in 2014 Cr.LJ 443 :-

"It was necessary for the High Court to consider whether the trial court's assessment of the evidence and its opinion that the appellant must be convicted

deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court's concurrence with the trial court's view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter."

31. The prosecution has examined P.W.1 complainant, the eye-witness, P.W.2 Smt. Dhanna Devi and P.W.3 Laturi, the injured witnesses as witnesses of fact.

32. P.W.1 Ram Prasad has stated that he knew the accused Ramvir, Mahavir, Abhilakh, Sarvesh, Naresh and Devendra before the incident. Ramvir and Mahavir are real brothers, residents of village Deora and Sarvesh belongs to village Bhatiyani and rest Abhilakh, Devendra and Naresh belong to village Paidapur. Ram Prasad supporting the version of F.I.R. stated that three days prior to this incident, Ramvir came riding a mare in a drunken state and whipped Ved Ram. And in counter Jagdish and Jagatpal slapped Ramvir. This caused a grudge in the mind of Ramvir. After three days of this incident, at 11:00 a.m. all these accused armed with rifle and guns reached at the house of Jagatpal and started firing and yelled that he will be taught a lesson for that slap. At that time P.W.1 was in his house which was near the house of Jagatpal. He witnessed the whole incident. At the time of firing Jagdish, Sanyogita, Dhanna Devi and Laturi were shot down. Jagatpal, Jagdish and Sanyogita died on the spot. Accused rushed towards Paidapur after hearing the noise of villagers. On instigation of Ramvir, Abhilakh set fire on Chappar of Jagatpal. P.W.1 proved the written report scribed by one Virendra Kumar Ex. Ka1. P.W.2 and P.W.3 have corroborated the prosecution version.

33. It has been argued on behalf of appellants that dacoity took place in the night in the house of Jagatpal. P.W.1 has also been suggested that Jagatpal and Jagdish resisted dacoity. Dacoits fired, in which Jagatpal, Jagdish, Sanyogita, Dhanna Devi and Laturi got fire-arm injuries and Jagatpal, Jagdish and Sanyogita died on the spot and complainant and his family members themselves set fire on Chappar to get light to identify the dacoits and raised alarm to the villagers. However, P.W.1 has denied all these suggestions, but by giving these suggestions the accused persons have admitted the prosecution version of firing upon Jagatpal, Jagdish and Sanyogita which resulted in their death and accused also admitted the firing on Dhanna Devi and Laturi which resulted in grievous injury. Accused persons have also admitted that Chappar of Jagatpal was set on fire. Thus place of occurrence has been fully admitted by accused persons which need not to be further proved and thus has been fully established.

34. However, P.W.2 was asked about the dacoits. The witness simply stated that she did not know about dacoity. This witness was not given any suggestion that whole incident took place due to dacoity, and she got injured during commission of that dacoity. In the same way P.W.3 Laturi has been asked whether any dacoity took place in his surrounding village? The witness expressed his ignorance. This witness is also injured witness and no suggestion was given that he got injury in any dacoity.

35. The main object of cross-examination is to bring out falsity and to find out the truth. Cross-examination is an art. It would help the Court to assess the relative merits of the case projected by the parties. Matter of cross-examination is not a mere empty formality, but one is required to put its own case in cross-examination, otherwise deposition of the witness has to be taken as unchallenged. The matter has been considered in a number of decisions that it is the duty to put ones own version to opponent in cross-examination, otherwise deposition of the witness cannot be discredited as was held in Maroti Bansi Teli Vs. Radhabai, AIR 1945 Nag 60: 1944 NLJ 492 In Chunni Lal Dwarka Nath Vs. Hartford Fire Insurance Co.Ltd.,AIR 1958 Punj 440 it has been held as under:

" It is well established rule of evidence that a party should put to each of his opponent"s witnesses so much of his case as concerns that particular witness. If no such questions are put, the Courts presume that the witness"s account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation."

36. The suggestion made in cross-examination form part of the evidence on record. Those suggestion can be taken into consideration while determining whether the reply given was believable or not. Though suggestion in cross-examination which is denied by the witness, is not evidence at all. Any suggestion made in the cross-examination of the prosecution witness by the defence, can not be used as an evidence against the accused but at the same time it can be called in aid when the other evidence establishes the guilt of the accused. 2003 All MR (Cri) 298 (307) (DB) (Bom.).

37. Though the suggestion made in the cross-examination is not evidence but certainly the same may be called into aid to lend assurance to the prosecution case particularly when other evidence establishes the guilt of the accused. In (Mehra Vs. State of Rajasthan, AIR 1957 SC 369 Yusuf Ali vs. State of Maharashtra, AIR 1968 SC 147) it was held that when the accused did not suggest to prosecution witnesses in cross-examination indicating his defense, it was held that the defense version may

be rejected as an afterthought.

38. In this case the suggestions have been given to the witnesses regarding alleged dacoity. Witnesses have denied the suggestions. Accused persons have not produced any evidence in defence in this light. Hence these suggestions may be called into aid to lend assurance to the prosecution case to prove the place of occurrence, firing on complainant side resulted in death or injury to someone. The version of prosecution seems to be trustworthy.

39. It is also noteworthy that accused persons in their statements under Section 313 Cr.P.C. have not stated even a single word regarding the commission of this dacoity in village or in house of Jagatpal while during argument the learned counsel for appellants has advanced the theory of dacoity.

40. P.W.8 Investigating Officer, has been suggested that due to the pressure of senior officers, he did not register the case of dacoity and rather converted the case into a case of murder. Investigating Officer has denied this suggestion. It is noteworthy that financial position of deceased persons was ordinary. Defence version has no force. In this situation the version of prosecution cannot be rejected.

41. Postmortem and injury reports of the dead persons and injured persons have not been challenged during arguments.

42. It has been argued on behalf of appellants that P.W.2 admitted in her cross-examination that police searched her house and found the scattered appliances. It shows that dacoity was committed in her house and whole incident took place there. We are of the opinion that simple scattering of house hold goods itself is not a proof of dacoity because there is no evidence of dacoity on the record.

43. It has also been argued that it was not possible for the witnesses to witness the occurrence. P.W.1 has stated in his cross-examination that his house was in the west of house of Jagdish and there were two houses between his house and house of Jagdish and the house of Laturi, injured. As per site plan Ex. Ka31, the house of Laturi was just near the house of Jagatpal. P.W.1 has specifically corroborated the version of prosecution of firing by accused. He was the first man to reach there. After the firing was stopped, many villagers also reached on the spot. P.W.1 has stated that Sanyogita was dead and Jagatpal and Jagdish were breathing. The witness confirmed the topography as exhibited in site plan Ex. Ka31 and stated that he was witnessing the incident standing behind the carton in corridor at the time of firing. No suggestion has been given to this witness that it was not possible for him to witness the occurrence from there or his house was situated in such position, from where it was impossible for him to see the occurrence when he came out of his house at the time of firing.

44. Though the house of this witness has not been shown in Ex. Ka31, yet it would not cast any adverse effect on the prosecution version. P.W.2 has thrown light to prove the location of house of P.W.1 Ram Prasad. She has stated that there was street north-south in west of her house, and the house of Ram Prasad was situated in this street, and its gate was on eastern side and as per Ex. Ka31, main gate of her house was on western side. Thus, after perusal of the site plan Ex. Ka31 it is clear that Ram Prasad could have easily witnessed the whole occurrence. Hence, the presence of P.W.1 cannot be doubted in anyway. P.W.2 has also stated that her husband and elder brother-in-law (jeth) were living in one and the same house but separately. The witness has specifically stated in her cross-examination that at the time of firing, Ram Prasad was screaming from the gate of his house. The presence of P.W.1 is not doubtful in any way.

45. P.W.2 and P.W.3 are injured eye-witnesses. P.W.2 has stated that after three days of wrangle, on Sunday, at about 12:00 p.m., Ramvir, Abhilakh, Mahavir, Devendra, Sarvesh all armed with rifles and guns in their hands came and killed her husband, elder brother-in-law and her daughter Sanyogita and also fired on her which caused injuries in her eye and thigh. Now she is unable to see with that eye. Laturi also received firearm injury. In her cross-examination also this witness fully corroborated the prosecution version. This witness also denied the suggestion that she could not recognize perpetrators of the crime. However, P.W.2 has stated that Investigating Officer did not record her statement. The possibility cannot be ruled out that as she lost her one eye due to injury during this incident, she could not recollect questioning done by I.O. P.W.8 has specifically stated that he did record her statement under Section 161 Cr.P.C. on 18.12.2000. Hence, we do not find any force in the argument of learned counsel for the appellants that in absence of statement under Section 161 Cr.P.C. of P.W.2, her statement in Court cannot be taken into consideration.

46. P.W.3 has also admitted the presence of P.W.1 Ram Prasad on the spot. No suggestion has been given to this witness that Ram Prasad was not present on his gate at the time of incident. No suggestion has been given to P.W.2 or P.W.3 that this incident did not take place at the time and place as mentioned. The cadavers of Jagdish and Jagatpal have been shown in Ex. Ka31 near their houses and the place where the Chappar of Jagatpal was set on fire, was not very far away. As per statement of witnesses of fact, on hearing the commotion of villagers when accused ran away towards east side to the side of Paidapur, then on the instigation of Ramvir, accused Abhilakh set on fire the Chappar where cousin brother of Jagatpal was residing. Investigating Officer P.W.5 collected ashes from there and prepared a fard Ex. Ka-27. Accused themselves have admitted that complainant side itself set on fire in Chappar. However, defence version is that Chappar was set on fire for spreading light to make awareness amongst villagers regarding dacoity, and also to

get light to recognize the dacoits and to put pressure on them but those facts could not be proved by any evidence. Thus, offence under Section 436 I.P.C. has been proved against Abhilakh and Ramvir beyond reasonable doubt.

47. Statements of P.W.3 are natural and reliable. He has stated that Ramvir and four others came and started abusing and firing. At that time he was present on the gate of his house. This firing resulted in the death of Jagatpal, Jagdish and Sanyogita. They also caused fire arm injury to Dhanna Devi and to him. Both the witnesses P.W.2 and P.W.3 categorically stated that police came in the evening at about 5 p.m. All this corroborates the statement of Investigating Officer. Thus, the presence of witnesses is not doubtful. They are reliable on all counts.

48. It has also been argued that witnesses are partisan and related to each other. Independent witnesses have not been examined. It is correct that witnesses are related to each other and to the deceased persons, as deceased Jagdish and Jagatpal were real brother, Deceased Sanyogita is daughter of Jagatpal, P.W.2 Dhanna Devi is wife of deceased Jagatpal, P.W.3 Laturi is son of Ved Ram and Jagatpal was his uncle. P.W.1, P.W.2 and P.W.3, the eye witnesses, have supported the prosecution version in their examination-in-chief. All these witnesses have been cross-examined at great length but nothing adverse could be extracted from their cross-examination. There is no material contradiction in the statement recorded under Section 161 Cr.P.C. and the ocular evidence in court. Their evidence cannot be disbelieved merely on the basis of some normal, natural or minor contradictions, inconsistencies, embellishments etc. and such minor discrepancies do not corrode the credibility of parties. The testimony of P.W.1, P.W.2 and P.W.3 appears to be natural, direct, cogent, credible, reliable and inspire confidence.

49. The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. However, in such a case, court has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of testimony of such related witness.

50. In the case of Kuria and another vs State of Rajasthan, (2012) 10 SCC pg 433 it has been held as under :-

"The testimony of an eyewitness, if found truthful, cannot be discarded merely because the eyewitness was a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary

evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated. Reference in this regard can be made to the case of Sunil Kumar vs State of Punjab, (2003) 11 SCC 367, Brathi vs State of Punjab (1991) 1 SCC 519 and Alagupandi @ Alagupandian vs State of T.N., (2012) 10 SCC 451."

51. From the law laid down by the Apex Court from time to time it can safely be deduced that the testimony of related or interested witness as a whole cannot be discarded but, a heavy duty is cast upon the Courts to appreciate the evidence with utmost care and caution.

52. We have considered the rival submissions advanced by learned counsel for the parties and have also gone through the entire records carefully in light of evidence of these witnesses of fact.

53. The testimonies of P.W.1 and P.W.2 and P.W.3 are of high quality. Both have narrated the entire episode in great detail and in spite of being subjected to lengthy cross-examination, they have depicted the prosecution story in a trustworthy manner.

54. As regard the argument that other independent witnesses have not been examined is concerned, it is correct that as per the statement of P.W.1, P.W.2 and P.W.3, many villagers had assembled after hearing the commotion. Many persons went to police station with informant P.W.1, Ram Prasad but no one amongst them has been examined. But it is not fatal to the prosecution case. In Kripal Singh Vs. State of Haryana, AIR 2013 SC 286, Sandeep Vs. State of U.P. (2012) 6 SCC 107 and in so many other judgments, the Hon'ble Apex Court has held that if witness examined in the court are otherwise found reliable and trustworthy, the fact sought to be proved by those witnesses need not be further proved through other witnesses though there may be other witnesses available who could have been examined but were not examined. Non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of a sole witness even if he is relative of the deceased and non-examination of independent witness would not be fatal to the prosecution case.

55. As it is a matter of common knowledge that now a days no one comes forward in the matter of any person before police or Court. They do not desire to involve themselves in the disputes of other persons. In this case, the accused are very

hardened criminals. On a trivial matter all the accused persons came with deadly weapons and in the broad daylight committed heinous crime. Who will dare to come forward to give evidence against such hardened criminals? Hon"ble Supreme Court has laid down in many cases that prosecution case cannot be thrown out merely because independent witnesses were not produced, if available evidence is trustworthy.

56. As far as motive is concerned, prosecution has established its case that on 19.10.2000 accused Ramvir in drunken state riding on mare whipped Ved Ram. Jagdish and Jagatpal (both deceased) slapped accused Ramvir. In retaliation accused persons armed with deadly weapons committed this serious offence.

57. It is very material that in statement recorded under Section 313 Cr.P.C. accused Devendra, has stated that at the time of incident he was coming from the market of Jalalabad. Accused Abhilakh has stated in statement recorded under Section 313 Cr.P.C. that he had gone to market of Jalalabad and accused Ramvir has stated that he was not in the village Vamela, rather he had gone to Saifai, District- Etawah. Accused Mahavir has not stated anything that where he was at the time of incident.

58. This plea of alibi taken by Devendra, Sarvesh, Abhilakh has not been proved by any evidence. Only version in statement under Section 313 Cr.P.C. is itself not sufficient to prove plea of alibi. It was the bounden duty of defence side to prove the plea of alibi. The plea of alibi is a rule of evidence recognized in Section 11 of the Evidence Act that facts "which are inconsistent with the fact in issue are relevant." It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and had participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need to be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden, it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi as has been held in Binay Kumar Singh Vs. State of

59. Burden of proving the plea of alibi lies upon the accused. If the accused has not adequately discharged that burden, the prosecution version which was otherwise plausible has, therefore, to be believed as has been held in Sandeep Vs. State of U.P., (2012) 6 SCC 107.

60. In Shaikh Sattar Vs. State of Maharashtra, (2010) 8 SCC 430 the plea of alibi has to be established by accused by leading positive evidence. Failure of said plea would not necessarily lead to success of prosecution case which has to be independently proved by prosecution beyond reasonable doubts. Plea of alibi has to be proved with absolute certainty so as to completely exclude possible presence of accused at place of occurrence at the relevant time.

61. When accused is not discharging such burden, the plea of alibi cannot be entertained and cannot be accepted and it cannot be presumed that accused persons were not present on the place of occurrence at the time of incident. This failure of accused side also corroborate the version of prosecution that they committed the offence as they could not prove their innocence.

62. It has been argued on behalf of the appellants that F.I.R. is ante-timed. The letter written to C.M.O. for medical examination of Laturi and Smt. Dhanna Devi Ex. Ka-7, Ka-8 do not bear the details of crime nos. etc. The Panchayatnama Ex. Ka-15 of deceased Jagdish does not contain the time of initiation of Panchayatnama. It is also argued that P.W.3 has stated that he went to police station after medical examination and his medical examination was done at 7:45 p.m. and P.W.2 Smt. Dhanna Devi was medically examined by 8:05 p.m. hence, F.I.R. would have been lodged after 8:05 p.m while F.I.R. was shown to have been lodged at 2:00 p.m. All this shows that F.I.R. is ante-timed. It has also been argued that P.W.3 Laturi has admitted that firstly he went to doctor for medical examination then he went to police while the prosecution case is that Laturi firstly went to police station with Ram Prasad and others to lodge the F.I.R. He was medically medically examined at 7:45 p.m. and in the same way P.W.2 Dhanna Devi also admitted that she went to police station and the police personnel brought her to hospital for medical treatment and she was medically examined at 8:05 p.m. All this shows that there was much gap between registration of F.I.R. and medical examination of both the injured persons. It shows that medical examination must have been completed by 2:00 p.m. and yet no explanation has been given by the prosecution for the delay in medical examinations. All this creates doubt about the prosecution version.

63. We are not inclined to accept the arguments of the learned counsel for the appellants. It is proved by G.D. No. 25 written at 2:00 p.m. dated 22.10.2000, corroborated with the statement of P.W.5 constable Rakesh Kumar the Chik writer

that at the time of registration of F.I.R. Dhanna Devi, Laturi and some villagers with complainant Ram Prasad, were present at the police station and from there Dhanna Devi and Laturi were sent for medical examination. P.W.5 has denied the suggestion that F.I.R. was ante-timed. It is also noteworthy that both P.W.2 and P.W.3 have not been cross-examined or even suggested that they were not present in police station at the time of lodging of F.I.R.

64. This possibility also cannot be ruled out as the corpses of husband, daughter and jeth of P.W.2 Dhanna Devi were lying in the village, the Panchayatnama proceedings were carried on in the village, therefore, Dhanna Devi and Laturi might have returned to their village to see the corpses and to pay last respect to deceased persons. Both P.W.2 and P.W.3 are illiterate persons. Some contradictions were bound to occur. These two witnesses also should have been asked on stated delay in their medical examination. It was not done. Hence, it cannot be said that F.I.R. was ante-timed or was not in existence at that time.

65. It is also noteworthy that Ram Prasad is witness of Panchayatnama of all three deceased persons. Crime nos. and other details were mentioned on all Panchayatnamas and all concerned papers which were sent with Panchayatnamas bear details of crime no. etc. and last Panchayatnama was fully filled and prepared by 7:45 p.m. Dr. Brijesh Chandra P.W.6, who medically examined Laturi and Dhanna Devi at 7:45 p.m. and 8:05 p.m. respectively, has not been suggested that he wrote different time in injury reports. Though it is correct that this crime no. and sections were not written on Ex. Ka-7 and Ex. Ka-8, the letters sent by police station Jalalabad to medical officer Jalalabad for medical examination of injured persons. But it would have no bearing on the prosecution case because we are fully satisfied with the prosecution version that F.I.R. was not ante-timed.

66. Thus, it is well established that P.W.2 and P.W.3 together with the complainant had gone to the police station. P.W.2 Dhanna Devi has admitted in the cross-examination that she was not fully conscious. This Court can imagine the mental condition of an illiterate, old and injured lady who had already sustained such serious injury from bullet in her eye. Her some statements or contradictions cannot create doubt regarding her presence or her creditworthiness.

67. Though Virendra Kumar the scribe of the written report has not been produced, yet it cannot be said that it is fatal to the prosecution. As it is a case of direct evidence and the complainant has already been examined as P.W.1. and has proved the written report Ex. Ka1 in accordance with law. In the case of Motilal Vs. State of U.P. 2009 (7) Supreme 632 Hon"ble Apex Court has laid down that non-examination of scribe of F.I.R. is not fatal to prosecution and no adverse inference can be drawn against the prosecution if the scribe was not an eye-witness to the incident and the complainant/ informant had proved the execution of the F.I.R. by examining himself.

It is noteworthy that no material contradiction or glaring omission regarding F.I.R. is found in the statement of P.W.1.

68. It is also clear that Sarvesh belongs to village Bhatiyani. Remaining accused Abhilakh, Naresh and Devendra belong to village Paidapur. It has been argued that how these witnesses identified accused persons who did not belong to the village Vamela where this incident took place. We do not agree with the argument of the learned counsel for appellants because all the witnesses have clearly stated that they knew and recognized all the accused persons, as village Deora was just one and a half km away from village Vamela and village Paidapur was just 1.25 km away from village Vamela. No suggestion has been given to the witnesses that these witnesses did not recognize these accused. It was a day light incident. Accused persons could be recognized very easily. All the witnesses have recognized all the accused in the open court. No suggestion was given to the witnesses that they were not present on the said date, time and place of the occurrence.

69. It has been argued that prosecution case is that Sanyogita was smearing clay on the wall at the time of incident but in the postmortem or in Panchayatnama no clay was found on her body. All this shows that incident did not take place during day and on that place. We do not agree with this contention because all the witnesses have supported the prosecution version in toto that at the time of incident she was smearing clay on the south corner of her house. As per statement of P.W.4 Dr. Ram Kumar Medical Officer, District- Shahjahanpur, these injuries were caused by fire arms. It was also not necessary to assume that some clay must stuck on her body when Sanyogita was smearing clay on the wall. This is not so material point which may create any doubt about the prosecution case.

70. It has also been argued on behalf of the appellants that as per P.W.2 Dhanna Devi, food was not cooked in the house up to the time this incident took place, while post mortem report discloses the fact that 150 gms of undigested food was found in the stomach of Sanyogita, Jagatpal and Jagdish. According to counsel for appellants this fact also indicates that incident did not take place in the day rather it shows that this incident took place in the night at some time. We do not agree with the argument of the learned counsel for appellants. It is common knowledge that village people often take breakfast prepared in the previous night. No question was asked about breakfast. Hence, evidence of undigested food also corroborates the prosecution version because in the stomach undigested food is found for 4-6 hours, hence, it all shows that this incident took place at about 11-12 a.m. as the prosecution case reveals.

71. It has also been argued that co-accused Naresh was also named in the same F.I.R. but P.W.1 and other witnesses did not support the prosecution version regarding involvement of Naresh resulting in his acquittal. Remaining accused

should have also acquitted by applying the principle of parity. We do not agree with the argument of the learned counsel for the appellants as this Court has to see the evidence on record and all the witnesses have supported the prosecution version and justified the involvement of all the appellants in this triple murder case. There are also two injured persons. The whole ocular evidence corroborates medical evidence. Hence, these appellants cannot take the benefit of acquittal of Naresh.

72. It has also been argued on behalf of appellants that it is not the case of prosecution that Sanyogita was fired upon from a close range while as per post mortem report there is tattooing and blackening on her body. This creates a doubt about the story of prosecution. We do not agree with this argument because all accused persons came with deadly weapons and made indiscriminate firing and which accused fired from which place, could not be ascertained. If one of the accused was to fire from the close range it would naturally cause injury to Sanyogita with blackening and tattooing.

73. Thus, on the basis of aforesaid discussion and after critical appraisal of the prosecution case and the evidence available on record, we are of the considered view that prosecution has proved its case beyond all reasonable doubt. Learned trial Court has not committed, any illegality or irregularity in recording the findings of conviction against the present accused appellants Ramvir, Mahavir, Sarvesh and Devendra. As such, there appears to be no justification for interference of this court.

74. In view of the aforesaid discussions judgments and orders dated 21/24/2/2004 passed by the learned trial Court convicting and sentencing the accused-appellants Ramvir, Mahavir, Sarvesh and Devendra are hereby affirmed. Accordingly, Criminal Appeal Nos. 1820 of 2004, 1698 of 2004, 1397 of 2004 are dismissed. Accused-appellants Mahavir and Ramvir are in jail custody. Devendra and Sarvesh are on bail. Their personal bonds are cancelled and sureties are discharged.

75. Accused-appellants Mahavir and Ramvir be informed accordingly to serve out the remaining sentence awarded by the learned trial Court and the accused-appellants Devendra and Sarvesh are directed to surrender before the court of Chief Judicial Magistrate, Shahjahanpur forthwith. If these appellants do not surrender within 15 days from the date of judgment and order of this Court, the concerned Chief Judicial Magistrate will ensure the compliance of the judgment and order of this Court.

76. Let the lower court's record be sent to the court concerned forthwith along with a copy of this judgment for necessary compliance. Concerned court shall send compliance report within one month thereafter.