A BHAGWATI PRASAD

v.

STATE OF M.P.

(Criminal Appeal No. 1368 of 2003)

DECEMBER 3, 2009

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[R.V. RAVEENDRAN, V.S. SIRPURKAR AND DEEPAK VERMA, JJ.]

Penal Code, 1860: s.304 (Part II) – Conviction under, based on evidence of eye-witnesses – Interference with – C *Held: Case not made out for interference – Attack witnessed by eye-witnesses in broad daylight – Injuries on eye-witnesses not explained – Minor discrepancies would not affect the whole prosecution story – Conviction upheld – Sentence of five years not harsh.*

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Prosecution case was that on the day of incident PW-2, PW-3 and deceased had gone to irrigate their field from the canal. When they opened the canal for irrigation, appellant and other accused persons came there, armed E **with spear and lathis and stopped them from opening the canal. As the complainant PW-2 insisted on taking water, A-1 gave lathi blow to him. Deceased intervened. A-6 gave a spear blow on his back and deceased fell down. The other accused persons A-2, A-3, A-5 also gave lathi blows** F **on the deceased. Deceased succumbed to injuries on way to hospital.**

The trial Court found irregularities in the prosecution version and acquitted the accused persons. High Court convicted the appellant under Section 304 (II) and A-1 and G **A-4 under Section 323 IPC. A-2, A-3 and A-5 were acquitted. Appellant was awarded 5 years rigorous imprisonment while A-1 and A-4 were sentenced to undergo simple imprisonment. Hence the present appeal.**

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Dismissing the appeal, the Court A

HELD: 1. The witnesses specifically explained that the main canal was on the Northern side of the two adjacent fields of the complainant. Bamba, i.e., outlet of canal is from that canal on the Northern side and the B water then comes in that small outlet, which feeds Eastern side field of the complainant. Adjacent to that field is another field of the complainant and naturally, in order to draw water from Bamba, there has to be an aqueduct, which would go up to the adjacent field of the C deceased. It is at that spot that the incident must have taken place. This situation was explained by PW-2. PW-3 specified that when water was opened from cool, then mar-pit had taken place. The vocabulary and the terms used by the villagers could always be confused by the police when they recorded their statements. Much D importance cannot be given to such minor discrepancies. The broad features of the evidence were that the complainant party wanted to irrigate their field and for that they wanted to open the aqueduct for supplying water to their field and it was at that spot that the incident E took place. Once the evidence of the two eye-witnesses, who themselves were injured eye-witnesses, was accepted by High Court after the detailed consideration and when they asserted that the incident took place in the field of the complainant and when placement of the F field of the complainant was fixed by the evidence, the evidence becomes immediately acceptable and then such minor discrepancy whether it was spot `A' or spot `B', would be pushed to the background. Such minor discrepancy cannot affect the whole prosecution story. G It is only when the defence is able to establish that the change of the spot was deliberate and such a change was so substantial as would affect the whole prosecution story, that such discrepancies assume importance. In the

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A present case, it was clearly an open and shut case where the two eye-witnesses in the broad day light witnessed the attack by the accused persons. There was absolutely no variance in the version of the two eye-witnesses to the effect that it was the appellant, who gave the spear blow
B on the back of the deceased. Both the witnesses, PW-2 and PW-3 were injured and there was no explanation for their injuries. [Para 11] [137-A-D; 139-D-H; 140-A-C]

Rachamreddi Chenna Reddy v. State of A.P. **1999 (3) SCC 97**; *Lilaram (Dead) through Duli Chand v. State of*
C *Haryana & Anr.* **1999 (9) SCC 525**; *State of Rajasthan v. Hanuman* **2001(1) SCC 337**; *Munshi Prasad & Ors. v. State of Bihar* **2002(1) SCC 351**; *Shankar Mahto v. State of Bihar* **2002(6) SCC 431 – referred to.**

D **2. In the medical certificate, age of the injuries was mentioned as 24 hours. What was meant was that the injuries could have been caused within 24 hours from the time the witnesses were examined by the Doctor. In the post mortem report, the determination of precise duration**
E **of the injuries can be possible due to the internal examination of the injuries, whereas no such advantage is available to the Doctor when he examines the injuries in the nature of contusions. Therefore, normally the approximate duration is indicated in such certificates. The**
F **High Court was absolutely right in upsetting the judgment of acquittal passed by the trial Court and convicting the accused persons. The sentence of five years is not harsh, considering that a life is lost and that too without any justification. [Paras 12, 14 and 15] [140-C-F; 141-A-C]**

G **Case Law Reference :**

1999 (3) SCC 97	referred to	Para 6
1999 (9) SCC 525	referred to	Para 6
H 2001(1) SCC 337	referred to	Para 6

2002(1) SCC 351	**referred to**	**Para 6**	A
2002(6) SCC 431	**referred to**	**Para 7**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1368 of 2003. B

From the Judgment & Order dated 13.12.2002 of the High Court of Judicature at Jabalpur Bench at Gwalior in Criminal Appeal No. 239 of 1986.

S.K. Dubey, J.P. Pandey, Yogesh Tiwari (for Somnath Mukherjee) for the Appellant. C

Vibha Datta Makhija, B.S. Banthia, for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Appellant herein, who was original accused No. 6 (A-6) in the trial, has challenged the judgment of the High Court, allowing the State's Appeal and setting aside the judgment of acquittal passed by the Trial Court. All the accused persons were tried for the offences punishable under Sections 148 and 149 read with Section 302 of the Indian Penal Code (hereinafter called "IPC" or short), while the charge against the present appellant was substantively for the offence under Sections 148 and 302 IPC. D E

2. The allegation was that all the accused persons, six in number, formed an unlawful assembly and by way of a common object thereof, committed murder of one Ramgopal (deceased) on 18.2.1984 at about 7 A.M. As per the prosecution story, a report came to be lodged by one Kedar Prasad (PW-2) of Bansipura, the brother of Ramgopal (deceased) in Police Station Ambah to the effect that he alongwith the deceased and neighbour farmer Ramgopal (PW-3) S/o Tularam had gone to irrigate their field from the canal in Village Lahdaria situated at a distance of 12 K.M. When they opened the canal for irrigation, at that time, Bhagwati (appellant herein), armed with F G H

A spear and the other accused persons armed with Lathi came there and stopped them from opening the canal. The said accused persons belonged to Village Lahdaria and they were staying nearby. There were arguments, as the accused persons objected to the complainant party taking water from B the canal while the complainant insisted upon taking water, on which Baburam, original accused No. 1 (A- 1) gave Lathi blow upon Kedar Prasad (complainant/ PW-2). When Ramgopal (deceased) came to his rescue, Bhagwati (A-6) gave a spear blow on Ramgopal' back, as a result of which Ramgopal fell C down. It was further stated that other accused persons, namely, Devi Prasad, original accused No. 5 (A-5), Hari Shankar, original accused No. 2 (A-2) and Radhacharan, original accused No. 3 (A-3) also gave Lathi blows on injured Ramgopal (deceased). Ramgopal was then taken to Ambah, D but he died on the way.

3. On receipt of the information, the usual investigation started. Inquest report was drawn and the body of Ramgopal (deceased) was sent for post mortem examination, which was conducted by Dr. K.S. Chauhan (PW-1). In the post mortem E report, it was shown that the death was caused because of the piercing blow, due to which right lung was damaged by penetrating spear. After the registration of offence, Sambhu Singh, Sub-Inspector (PW-9) arrested all the accused persons, who were initially absconding. After their arrest, Bhagwati F (appellant herein) agreed to discover the spear used in the crime from the wheat field, which was accordingly recovered from that place. So also, the other accused persons gave information leading to the recovery of their respective Lathis, which were used in commission of crime. The spear was sent G to Forensic Science Laboratory, Sagar, M.P. and after completion of the investigation, the chargesheet was filed.

4. The Trial Court acquitted all the accused persons of all the offences. The Trial Court held that there was no direct evidence for common object. It was also held that the two eye-

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witnesses, namely, Kedar Prasad (PW-2), being the brother of Ramgopal (deceased) and Ramgopal (PW-3) S/o Tularam, being the cousin of the deceased could not be relied upon. After quoting from their evidence, the Trial Court found two irregularities, which according to the Trial Court were substantial. The first was relating to the spot of occurrence not being properly identified. For this, the Trial Court found that there was contradiction in the version of the eye-witnesses and the spot map (Exhibit P-4). The second irregularity, according to the Trial Court, was about the inquest panchnama (Exhibit P-12), which was found to be torn. According to the Trial Court, the Police had failed to supply the carbon copy of the panchnama, though direction was given by the Court, which was not complied with by the Police. According to the Trial Court that panchnama was deliberately held back. By way of some other irregularities, the Trial Court found that there was contradiction in the version of Kedar Prasad (PW-2) and Ramgopal (PW-3) about existence of the blood in the field and the spot on which the blood was found. One more contradiction was found in the evidence of Ramgopal (PW-3) as to whether he was accompanying the complainant party or whether he had joined them some time later. On these grounds, the Trial Court came to the conclusion that the prosecution case was not proved.

5. This order was appealed against before the High Court. The High Court, in its well considered judgment, discussed all the issues. The High Court firstly held that it had the full powers to review the evidence being the Court of Appeal. The High Court then examined the principles to be adopted in appeal against acquittal for appreciation of evidence. The High Court then went on to hold that the traumatic and homicidal death of deceased was proved. After discussing the medical evidence, the High Court firstly dealt with the caustic remarks by the Sessions Judge against the Police. Those remarks are to be found in Paras 13 and 14 of the judgment of the Trial Court. It so happened that some portion of panchnama (Exhibit P-12)

A was not to be found. The Trial Court held that that portion of the original panchnama was deliberately torn. It seems that the Sessions Judge had directed production of carbon copy of some documents and written some letters (Exhibits C-1 to C-4). However, it was pointed out by the Public Prosecutor that
B the originals of Case Diary and the documents were already there before the Court and, therefore, there was no question of producing the carbon copy of the record. This was not taken very well by the Sessions Judge and he observed in Para 13 of his judgment that :-

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> "13. ..... It is the matter of regret that police has treated this Court just like defence and enemy. When the police has such respect towards Court, then bad day of judiciary has come. It is said that till today people has faith upon judiciary. The people should
D be ready to bear bad result."

Further, in Para 14, the Sessions Judge held that:-

> 14. Fact is not so simple, Chor-ke-dadhi-me-tinka's
E fact is materialized in this case. Carbon copy of case diary is intentionally concealed. Had the carbon copy produced, then purpose of tourning of bottom portion of panchnama of dead body (P-12) would have been clearly proved or the good-faith
F of prosecution have been proved..... From the activities of non-producing the carbon copy of diary into the Court, it can be easily said that this person Shri R.B. Sharma, S.P.O. (Police), Ambah is himself responsible for tourning (probably tearing) of panchnama of dead body to save his
G under-working employee. He cannot take the risk of contempt of Court and hence, there is sign of second offence."

The High Court noted this and found that all these
H comments were completely unwarranted, irrelevant and

unnecessary for the decision of the case. It was further observed that no explanation of the Reader, who keeps the record, was taken on 22.8.1985, when one R.N. Sharma (PW-6), who prepared the inquest panchnama, was examined and no question was put to him. The High Court thus found that at least till that date, inquest panchnama was intact. It further expressed that perhaps it was torn or mutilated while handling the file. The High Court further found that copy of the panchnama was supplied to the defence and the Trial Court either should have taken such copy from defence or could have written a suitable memo to the S.P. for sending carbon copy of the same, explaining the situation. The High Court also observed that sending the APP for obtaining the carbon copy and insisting upon his personally talking to S.P. was an unnecessary exercise. The High Court also observed that drawing of any adverse inference therefrom was unwarranted.

6. High Court then discussed the evidence of two eye-witnesses being Kedar Prasad (PW-2) and Ramgopal (PW-3) in details and came to the conclusion that their evidence was credible and unshakable. For this, the High Court also relied on the medical evidence of Dr. K.S. Chauhan (PW-1) and the further fact that even Kedar Prasad (PW-2) and Ramgopal (PW-3) had sustained injuries in the same occurrence. The High Court rejected the claim of the defence that these two witnesses were relations and, therefore, their evidence was liable to be rejected. For this proposition, the High Court relied on the decisions in *Rachamreddi Chenna Reddy Vs. State of A.P.* [1999 (3) SCC 97], *Lilaram (Dead) through Duli Chand Vs. State of Haryana & Anr.* [1999 (9) SCC 525], *State of Rajasthan Vs. Hanuman* [2001(1) SCC 337] and *Munshi Prasad & Ors. Vs. State of Bihar* [2002(1) SCC 351].

7. The High Court also discussed the evidence of Amar Singh (DW-1), Omprakash (DW-2), who were the relatives of the accused persons, as also Gopinath (DW-3), brother-in-law of the sister of Bhagwati Prasad (appellant herein). Gopinath

A (DW-3) was examined to prove the alibi of Bhagwati Prasad (appellant herein), however, the High Court rejected that claim. The High Court also refused to draw adverse inference for not examining some other witnesses like Ramdayal and Bansi, since they had come to the place of occurrence, only after the B incident. The High Court, in Para 18 of its judgment, has discussed the topography of the place of occurrence and critically examined the evidence of Vishram Palia (PW-8), Head Constable and Jamna Prasad (PW-7), Patwari, who had drawn the spot map. It also examined the placement of Canal, Bamba C and aqueduct. The claim of the defence that there was a serious discrepancy in respect of the place of occurrence was rejected by the High Court and concluded that the Trial Court had over-emphasized on this issue. The High Court then recorded that the defence had no alternative case to suggest that event had D happened anywhere else. The defence had merely suggested that someone had murdered Ramgopal (deceased) in the night by the side of outlet of canal (Bamba) and a false case had been framed against the accused. The High Court, therefore, came to the conclusion that the actual spot of dispute was of no consequence and the two injured eye- witnesses, namely, E Kedar Prasad (PW-2) and Ramgopal (PW-3) had clearly supported the prosecution case and, therefore, in keeping with the law laid down by this Court in *Shankar Mahto Vs. State of Bihar* [2002(6) SCC 431], the minor discrepancies, if at all, were not sufficient to disbelieve the evidence of two eye- F witnesses. It was pointed out that there was no previous enmity between the parties and the incident arose on account of opening of the aqueduct for irrigation.

8. The High Court further found that participation of Devi G Prasad (A-5), Hari Shankar (A-2) and Radhacharan (A-3) was not proved beyond doubt and proceeded to acquit them. It was also held that the participation of five persons was not proved and there could not be the common intention also of Baburam (A-1) and Bhagirath, original accused No. 4 (A-4) to cause H death of the deceased. Ultimately, in Para 20 of its judgment,

the High Court pointed out that the offence on the part of the present appellant could not be that under Section 302 IPC and it was only covered under Section 304 Part II IPC, while Babulal (A-1) and Bhagirath (A-4) were held guilty for the offences punishable under Section 323 IPC. In that view, the appellant was awarded 5 years' rigorous imprisonment, while Babulal (A-1) and Bhagirath (A-4) were sentenced to undergo simple imprisonment till rising of the Court and to pay a fine of Rs.1,000/-, in default of payment of which, to undergo rigorous imprisonment for 3 months.

9. Shri S.K. Dubey, Learned Senior Counsel appearing on behalf of the appellant led great stress on the spot, where the incident allegedly had occurred. He also took us through the evidence of the eye-witnesses and urged that the High Court had erred in setting aside the well considered verdict of acquittal by the Trial Court. Shri Dubey firstly urged that the change of spot of occurrence was apparent as the place where the incident allegedly took place, did not have any blood, though according to the witnesses, Ramgopal (deceased) had fallen down on that place. It is to be noted that Kedar Prasad (PW-2) had not referred to any spot of blood in the field of the complainant, while as per the evidence of Ramgopal (PW-3), there was blood at one spot. Ramgopal (PW-3) went on to depose that he had shown the spot where there was presence of blood and Vishram Palia (PW-8), Investigating Officer had also seized the blood-stained earth from the place of incident. In Para 9 of his deposition, Ramgopal (PW-3) had deposed that the place where Ramgopal (deceased) had fallen, there was presence of blood on that spot in the field. When we see the evidence of Vishram Palia (PW-8), Investigating Officer, he asserted that there was no blood found in the field. The Learned Senior Counsel for the appellant, therefore, argued that the whole prosecution claim is contradictory as according to Kedar Prasad (PW-2), incident took place near the canal. There was no blood to be found at that spot or even at the spot where the aqueduct was sought to be opened by the deceased. In

A comparison to this, on the claim of Ramgopal (PW-3) that there was blood somewhere in the field and it is at that spot that Ramgopal (deceased) was assaulted, the Learned Senior Counsel contended that this only suggested that both the eye-witnesses were lying completely and the whole incident was
B imaginary.

10. We cannot accept this contention. The version of Ramgopal (PW-3) that he showed the blood spot to Vishram Palia (PW-8), Investigation Officer and that there was blood, has to be rejected as exaggeration. Instead of relying on the
C evidence of a villager regarding the blood spot, we would chose to accept the evidence of Vishram Palia (PW-8), Investigation Officer, who very specifically asserted that there was no blood anywhere in the field. The Learned Senior Counsel argued that it was impossible that the blood would not come out of the
D body, however, the Learned Counsel appearing on behalf of the State pointed out that it is not necessary that the blood would flow like tap-water from a single wound, even if the said wound proved fatal, as has been asserted by Dr. K.S. Chauhan (PW-1). It must be borne in mind that the deceased, at that
E time, was wearing a vest and a shirt above and even if the blood came out, it could be soaked in the clothes worn by the deceased at that time. Therefore, the Learned Counsel for the appellant urged that the evidence of Vishram Palia (PW-8), Investigation Officer would be more acceptable and
F appropriate. The Learned Senior Counsel is undoubtedly right. Further, there is no evidence that any artery of the deceased was cut. This is apart from the fact that there was no cross-examination of Kedar Prasad (PW-2) on this issue. The Learned Counsel for the State rightly pointed out that in the
G spot-map or in the observation panchnama, there is no place shown as blood-stained and had the blood been present there, there was no reason for the prosecution to hide that spot or to avoid stating about that. In our opinion, the existence of blood or absence thereof would by itself not be such a fact as would
H completely wipe out the evidence of two eye-witnesses.

11. In fact, much confusion was caused on account of the use of three words, namely, canal, Bamba and cool. The witnesses have specifically explained that the main canal was on the Northern side of the two adjacent fields of the complainant. Bamba, i.e., outlet of canal is from that canal on the Northern side and the water then comes in that small outlet, which feeds Eastern side field of the complainant. Adjacent to that field is another field of the complainant and naturally, in order to draw water from Bamba, there has to be an aqueduct, which would go up to the adjacent field of the deceased. It is at that spot that the incident must have taken place. This situation is explained by Kedar Prasad (PW-2). He says in Para 15 of his deposition that on the earlier day of the incident, water from the canal was released in his field; the water was released firstly in the canal and they (complainant party) went in the morning to open the water in his field. He was specific that before that, water was not flowing in the canal. He was obviously referring to the Northern side main canal. Much was made by the learned defence Counsel that the word used is "canal" in the First Information Report and, therefore, urged that the spot of occurrence must be near the canal in the Northern side. This is obviously impossible for the simple reason that both the eye-witnesses are unanimous on the point that the incident took place in the field of complainant, which was not adjacent to the main canal flowing East-West on the Northern side. The witness Kedar Prasad (PW-2) has specifically deposed:-

> "When water is opened from canal, it comes to bomba and thereafter when bomba opens then comes to cool and when cool is opened, it comes to field."

As regards the spot of occurrence, the witness said in para 18 of his deposition that:

> "Murder took place in the field situated near Lahdaria village. Murder was not taken place in the field situated near road named Ambah Used Ghat."

A The witness was very specific in his answer when he was asked whether Investigation Officer collected the blood from the place of incident. He deposed:-

> "I do not know whether I.O. had collected blood at the time
B of preparation of spot map. I do not know whether blood was present on the place of incident."

Ramgopal (PW-3) also asserted that:-

> "Quarrel had taken place on the issue of water. Kedar was
C releasing water in his field. He was releasing water from the cool."

Ramgopal (PW-3) was very specific that the murder took place in the field of Kedar Prasad (PW-2). In his cross-examination, he stated that he was not called by Ramgopal
D (deceased) or Kedar Prasad (PW-2) to irrigate the field and that he was going to his own field alongwith them. The Learned Senior Counsel for the appellant found fault with this and according to the Learned Senior Counsel, since the version was that he was going for irrigating his field and since the
E version of Kedar Prasad (PW-2) was that this witness was going with them to their field, this witness was lying. The argument is correct. What was the purpose of this witness in going was not material. Whether the witness was there or not at the time of assault on Ramgopal is the material fact. It was
F obvious that he may have gone to the spot either for irrigating or for collecting grass from his own field. The purpose is irrelevant. Therefore, the contention of the Learned Senior Counsel is not right.

G As regards the incident and topography, Ramgopal (PW-3) says that:-

> "It is true that water is first released from canal to the Bomba and when released from Bomba then it comes to cool and when it released from cool then it comes to
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Baraha and when it is released from Baraha then it comes to field. No quarrel had taken place when water was opened from canal. Bomba from the canal came upto Lahdaria Village and take a turn therefrom. I do not know the distance between the place of murder and the place of cool where from water released for Baraha. Even I cannot say the distance in yard, hand, fields, steps etc."

He, however, refuted the suggestion that the quarrel has taken place where the water was released from the canal. He further asserted that:-

"It is also not a fact that when water open from canal then accused persons came with lathi and Ballam and started qurreling and mar-pit. "

Now, such suggestion, in our opinion, was a suicidal suggestion. It merely established the presence of the accused persons with weapons, which they handled. The witness further specified that when water was opened from cool, then mar-pit had taken place. It must be realized that vocabulary and the terms used by the villagers could always be confused by the police when they recorded their statements. Much importance cannot be given to such minor discrepancies. The broad features of the evidence were that the complainant party wanted to irrigate their field and for that they wanted to open the aqueduct for supplying water to their field and it was at that spot that the incident took place. Once the evidence of the two eye-witnesses, who themselves were injured eye-witnesses, was accepted by the High Court after the detailed consideration and when they asserted that the incident took place in the field of the complainant and when placement of the field of the complainant was fixed by the evidence, the evidence becomes immediately acceptable and then such minor discrepancy whether it was spot 'A' or spot 'B', would be pushed to the background. Such minor discrepancy cannot affect the whole prosecution story. It is only when the defence is able to establish that the change of the spot was deliberate and such a change

A was so substantial as would affect the whole prosecution story, that such discrepancies assume importance. In the present case, it was clearly an open and shut case where the two eye-witnesses in the broad day light witnessed the attack by the accused persons. There was absolutely no variance in the B version of the two eye-witnesses to the effect that it was the present appellant, who gave the spear blow on the back of the deceased. It must be seen immediately that both the witnesses, i.e., Kedar Prasad (PW-2) and Ramgopal (PW-3) were injured and there was no explanation for their injuries.

C 12. Shri S.K. Dubey, Learned Senior Counsel for the appellant tried to suggest that in the medical certificate, age of the injuries was mentioned as 24 hours. Now, it is obvious that the maximum duration of the injuries was stated in the medical certificate. What was meant was that the injuries could D have been caused within 24 hours from the time the witnesses were examined by the Doctor. Shri Dubey again pointed out that in the post mortem report, the age of the injuries of the deceased was mentioned as 6 hours. It must be borne in mind that in the post mortem report, the determination of precise E duration of the injuries can be possible due to the internal examination of the injuries, whereas no such advantage is available to the Doctor when he examines the injuries in the nature of contusions. Therefore, normally the approximate duration is indicated in such certificates. We are not impressed F by the argument of the defence on this aspect and reject the same.

13. It was also tried to be argued by the Learned Senior Counsel for the appellant that there were certain discrepancies in the First Information Report (FIR), like from the FIR, it was G suggested as if the incident had taken place near the canal. We have already considered this contention that the use of the word "canal" may be because of the impression of the Constable, who wrote the report in vernacular. That, however, will not take the spot of occurrence near the canal on the H Northern side.

14. We are, therefore, of the clear opinion that the High Court was absolutely right in upsetting the judgment of acquittal passed by the Trial Court and convicting the accused persons. A

15. Shri S.K. Dubey, Learned Senior Counsel for the appellant then contended that the sentence of five years is too harsh, considering the fact that the prosecution is pending for so many years. We do not think that the sentence of five years is unduly harsh, considering that a life is lost and that too without any justification. In the result, the appeal fails and is dismissed. B

CRL. M.P. NO. 18556 OF 2009 C

In view of the order passed in the main appeal, this application has become infructuous and is accordingly dismissed.

D.G. Appeal dismissed. D