MAHMOOD AND ANR. A

v.

STATE OF U.P.

NOVEMBER 15, 2007

B

[ALTAMAS KABIR AND B. SUDERSHAN REDDY, JJ.]

Penal Code, 1860—s.302 r/w s.149 and ss.147, 148 and 379—Murderous assault on father of PW1 with fire-arms and lathis—Five accused—Prosecution case entirely resting upon direct evidence of PWs C *1,2 and 3—PW 1 stating details of the incident in his FIR—Conviction of all accused by Courts below—On appeal by two convicts, held: Sequence of events clearly indicate that FIR was not ante-timed and ante-dated as alleged by defence—Nothing unnatural about conduct of PW-1—He gave detailed version as to manner of assault and role* D *played by each accused—PW-2 and PW-3 were independent witnesses and their testimony fully corroborated with testimony of PW-1—Presence of PW-1 at the scene of offence cannot be considered doubtful merely because he made no attempt to save his father from being further assaulted—PW-1 may not have mustered courage to risk his* E *own life—Response in such situations may differ from person to person—Common object of unlawful assembly is evident from fact that some of them were armed with deadly weapons—None of them were curious onlookers or spectators—Conviction maintained.*

Code of Criminal Procedure, 1973—s.157—Despatch of Special F *Report by SHO to local Magistrate—Time limit for—Held: No universal rule as to within what time Special Report required to be despatched—Each case turns on its own facts—Delay in despatch of FIR by itself not a circumstance which can throw out prosecution case in its entirety,* G *particularly when cogent and reasonable explanation for such delay is provided.*

Evidence—**Medical opinion** *v.* **Ocular evidence**—*Held: Ocular evidence if otherwise acceptable has to be given importance over*

H

A *medical opinion.*

According to the prosecution, five persons including the two Appellants assaulted the father of PW1 with guns and lathis while he was returning to his village on a motorcycle which resulted in his death. Both Trial Court and the High Court convicted all the accused persons including the Appellants. Appellant No.1 was convicted under Section 302 r/w 149 and Section 148 IPC, while Appellant No.2 was convicted under Section 302 r/w 149 IPC and under Sections 147 and 379 IPC.

In appeal to this Court, the conviction of Appellants was primarily challenged on the ground that the FIR lodged by PW-1 was ante-timed and ante-dated and brought into existence after due deliberations and considerations with the police.

Dismissing the appeal, the Court

HELD: 1.1. FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating evidence led by the prosecution at the trial. FIR is the earliest information regarding the circumstances under which the crime was committed, including the names of the actual culprits and the part played by them, the weapons, if any, used as also the names of the eye-witnesses, if any. Delay in lodging the FIR may result in embelishment, which is a creature of an after thought. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the Courts generally look for certain external checks. One of the check is the receipt of the copy of the FIR, called as a Special Report in a murder case, by the local Magistrate.

[Para 8] [59-E-H; 60-A]

1.2. It is the duty of the Station House Officer to despatch Special Report to the Illaqua Magistrate as is required under Section 157(2), CrPC. But there may be variety of factors and circumstances for delay in despatch of the FIR and its receipt by the local Magistrate. [Para 13] [61-E-F]

1.3. Delay in despatch of FIR by itself is not a circumstance

which can throw out the prosecution's case in its entirety, particularly in cases where the prosecution provides cogent and reasonable explanation for the delay in despatch of the FIR.

[Para 10]

1.4. It is not possible to lay down any universal rule as to within what time the special report is required to be despatched by the Station House officer after recording the FIR. Each case turns on its own facts. [Para 12] [61-D]

***Meharaj Singh* v. *State of U.P.* [1994] 5 SCC 188; *Anil Rai* v. *State of Bihar,* [2001] 7 SCC 318; *Alla China Apparao & Ors.* v. *State of A.P.,* JT (2002) 8 SC 167; *Balaka Singh and Ors.* v. *State of Punjab,* AIR (1975) SC (1962); *Datar Singh* v. *The State of Punjab,* [1975] 4 SCC 272 and *Budh Singh & Ors.* v. *State of U.P.* JT (2006) 11 SC 503, referred to.**

2.1. In the present case, it is in the evidence of P.W.1 that he rushed to the police station by a bicycle and lodged written FIR within 1½ hours of the incident. The distance between the place of occurrence and the police station is about 9 kms. It is in the evidence of PW1 that he took about 15-20 minutes to prepare his report and nobody advised him in preparation of the report. He went to the police station all alone. There is no reason whatsoever to disbelieve this version given by PW1. There is nothing unnatural and unusual in PW1 stating the details of the incident in his written FIR. The behavioral pattern and response of individuals in a given situation may differ from person to person. From a bare reading of the FIR, one does not find anything artificial in it. It cannot be said to be a contrived one brought into existence after due deliberations as contended by the appellant. [Para 16] [62-C-E]

2.2. The inquest report was prepared on the spot and the body was sent for post-mortem examination. The Inquest Report specifically refers to the lodging of FIR by PW 1 at 4.45 p.m. on 19.02.1977. The mere fact that crime number is not mentioned in the Inquest Report is of no significance. [Para 17] [62-F-G]

2.3. The sequence of events, namely, that PW 7, the officer-in-

A charge of Police Station, Kothi, reached the scene of offence at 6.00 p.m. and prepared Inquest Report duly mentioning about lodging of the FIR by PW 1 at 4.45 p.m. on 19th February, 1977 followed by despatch of the dead body to the hospital which reached the hospital by 9.30 p.m. and the post-mortem examination at 9.30 a.m. on 20th B February, 1977 in clear and unequivocal terms reveal that the FIR was lodged at the time it is stated to have been recorded. It cannot be treated as an ante-timed and ante-dated one.

[Para 18] [62-H; 63-A]

C 3.1. Arrest of one Maiku Bhujwa on 19th February, 1977 at 3.00 p.m. in Crime No.17 under Section 147 etc. and his being lodged in police station at about 5.30 p.m. by two constables has been used as a sheet anchor to challenge the time of FIR by saying that if the two constables were summoned by Station Officer, on reaching the place of occurrence, then in all probability Station Officer reached the D place of occurrence by 3.00 p.m. even before the FIR was issued.

[Para 19] [63-C-D]

3.2. The High Court adverting to this aspect of the matter observed that the investigating officer PW7 does not say that he E arrested Maiku Bhujwa. Moreover, arrest of Maiku was not in connection with the murder in question, but was in connection with another case. Most importantly, what could have been the object behind delaying the time of occurrence of reaching PW7, on the spot, has not been made clear. The arrest of Maiku at about 3.00 p.m. F and his lodging in Hawalat at 5.30 p.m. by two constables, does not militate against the time of FIR as shown in police papers. It is also possible that some manipulation was made in the context of the arrest of Maiku, to make the case against him more sound.

[Para 20] [63-E-F]

G 4.1. The prosecution story entirely rests upon the direct evidence of PW Nos. 1, 2 and 3. PW-1 is none other than the son of deceased. He was present in his fields situated nearby the place of occurrence where his father was attacked. PW-1 no doubt was doing his part time G.N.S. in plantation at Lucknow but that itself would H not make his presence doubtful at the scene of offence on the fateful

day. The defence did not elicit anything in the cross-examination casting any doubt about the presence of PW-1 at the scene of offence. There is nothing unnatural about the conduct of PW-1 at the scene of occurrence. He gave detailed version as to the manner of assault and the role played by each of the accused. The names of PW-2 and PW-3 were also mentioned as eye-witnesses in the First Information Report itself. In the circumstances, PW-2 and PW-3 cannot be treated as chance witnesses. The Trial Court and as well as the High Court did not commit any error in relying on the testimony of PW-2 and PW-3 as eye-witnesses of the occurrence which fully stands corroborated with the testimony of PW-1. There was not even a suggestion to PW-2 and PW-3 that they had animosity towards the accused persons. They are independent witnesses and there is no reason for them to speak against the accused. [Para 22] [64-B-E]

4.2. The contention that the presence of PW-1 at the scene of offence was highly doubtful as he made no attempt whatsoever to save his father from being further assaulted, is without any substance. It is in the evidence of PW-1 that all the four shots were fired in quick succession and at that moment PW-1 was at some distance from the actual place of attack. Notably at least 2 accused were armed with fire-arms and one with lathi and they were using the weapons with all impunity. In such circumstances, PW-1 may not have mustered his courage to jump into the fray and risk his own life. It is very difficult to predict or express any opinion as to what could have been normal or natural conduct of a person in such a situation. Response of individuals in such situations may differ from person to person. It is not possible to reject the evidence or doubt the presence of PW-1 on that ground. [Para 23] [64-F-H; 65-A]

5.1. To a pointed query in cross-examination as regards the nature of injury no.1, PW5, the Medical Officer stated that the said injury was caused by bullet only. The Appellant contended that weapons in the hands of the accused even according to PW-1 were of 12 bore guns and not any pistols or revolvers and no bullet injury could have been caused with the fire-arms that were alleged to be

A in the hands of the assailants. There is no substance in this submission. The Medical Officer is not ballistic expert. He was not expected to answer as to whether injury no. 1 could have been caused by bullet alone. His opinion to that extent is of no consequence. It is not possible to disbelieve the evidence of PW-1, 2 and 3 and their B presence at the scene of occurrence based on the medical evidence. The High Court rightly observed that the controversy as regards injury No. 1 and whether the same could have been caused by bullet or pellet to be without any basis. [Para 25] [65-F-H; 66-A-D]

5.2. Medical evidence is only an evidence of opinion and it is C not conclusive and when oral evidence is found to be inconsistent with the medical opinion, the question of relying upon one or the other would depend upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor. The ocular evidence if otherwise is acceptable has to be given importance over medical D opinion. [Para 25] [66-A-B]

6. The State rightly contended that in case of attack by members of un-lawful assembly on the victim in furtherance of common object, it is not necessary for the prosecution to establish overt-act done E by each accused. Noticeably, A-1 who had fired two shots, convicted by the Sessions Court, did not even challenge his conviction in the High Court. The appellants have been rightly convicted under Section 302 read with aid of Section 149 of IPC. PW-5 in his evidence stated that all the injuries sustained by the deceased were from gun. F It is further stated that "from the body of deceased one bullet, one cover 'tikli', two dat and 40 'chare' shots were taken out, put in packet and sealed ....." It is also stated in his evidence that injuries caused on the body of the deceased were sufficient in the normal course to cause death. This part of the medical evidence if G juxtaposed with the oral evidence of PW-1, 2 and 3 it becomes unnecessary to go into the question as to which accused caused what injury and which was a fatal one. Once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish any specific overt-act to any of the accused for fastening of liability with the aid of section 149 of the IPC. Commission of H

overt-act by each member of the unlawful assembly is not necessary. The common object of the unlawful assembly of the accused in the present case is evident from the fact that some of them were armed with deadly weapons. None of them were curious onlookers or spectators to the macabre drama that was enacted on 19.2.1977 at 3.30 p.m. at galiyara, village Badipur. [Para 26] [66-E-H; 67-A] A B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 402 of 2006.

From the final Judgment and Order dated 17.5.2005 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Crl. A. No. 367/1980. C

Harjinder Singh, R.C. Kohli, Shikha Tyagi and Seema Juneja for the Appellants.

Shail Kumar Dwivedi, A.A.G., A.K. Jha, Prashant Choudhary, Vandana Mishra and Manoj Dwivedi for the Respondent. D

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. This is an appeal by special leave preferred by the appellants – Mahmood and Khaliq. The appellant – Mahmood has been convicted for the offence punishable under Section 302 read with Section 149 of IPC and sentenced to imprisonment for life. He has been also convicted under Section 148 of IPC and sentenced to undergo rigorous imprisonment for 1½ year. The second appellant has been convicted for the offence punishable under Section 302 read with Section 149 and sentenced to undergo life imprisonment. He has been further convicted under Section 147 of IPC and sentenced to undergo one year rigorous imprisonment and further convicted under Section 379 of IPC and sentenced to undergo rigorous imprisonment for a period of two years. E F G

Put briefly the prosecution case is as follows :

On 19th February, 1977 at about 4.45 p.m. the accused Ram Samujh and Mahmood – appellant No.1 both armed with guns, Khalid – appellant No.2, Bajrang and one unidentified person armed with lathi H

A assaulted deceased Ram Singh at Galiyara near the fields of Ram Sewak Ahir, while he was returning to his village Badipur on his motorcycle. It was alleged that the accused Ram Samujh and Mahmood fired four shots, as a result of which the deceased fell down injured and thereafter Khaliq snatched the licensed revolver belonging to the deceased and all the five B fled away from the scene. Ram Singh died on the spot. The incident of murderous attack was witnessed by Jaikirat Singh (P.W.1) who is none other than the son of deceased – Ram Singh, Ram Ratan (P.W.2), resident of village Sujerpur hamlet of Bodipur and Ram Adhar (P.W.3). P.W.1 lodged written First Information Report Ext.Ka.1 on the same day at 4.45 C p.m. naming all the accused and the manner in which the murderous attack on the deceased had taken place. Jagdamba Prasad Dwivedi (P.W.7) the office in-charge of Police station, Kothi rushed to the scene of offence at about 6.00 p.m. and found the dead body of Ram Singh and his motorcycle in galiyara near the fields of Ram Sewak Ahir. The broken D pieces of the skull of the deceased and broken three teeth were seized from the place of occurrence. The discharged cartridge and tickli were also seized from the spot. P.W.7 after preparing the Inquest Report (Ext. Ka.7) sent the dead body for conducting post-mortem. Dr. R.S. Katiyar P.W.5 performed the autopsy on the dead body on 20th February, 1977 E at about 9.45 a.m. and found as many as five ante-mortem gun shot wounds. A cap of cartridge was extricated from the brain of the deceased. Scalp bones were found fractured. It was found that vital organs like peritoneum, liver, kidneys were badly ruptured. In the opinion of the doctor, the cause of death was due to shock and hemorrhage resulting F from ante-mortem injuries. The investigation of the case was transferred in the first week of March, 1977 to CBCID. Inspector M.L. Gautam having completed rest of the investigation submitted chargesheet against the appellants and other accused.

The accused have denied the charges framed against them and took G the plea that they have been falsely implicated due to enmity. The accused were accordingly put on trial. The prosecution in order to establish its case in altogether examined 8 witnesses and got marked 39 documents as Exts. Ka.1-39. Amongst the witnesses examined by the prosecution, Jaikirath Singh, Ram Ratan and Ram Adhar (P.Ws. 1,2 and 3) respectively were H eye-witnesses to the murderous attack on the deceased. The accused also

led evidence and examined Virendra Singh DW 1, Laxmi Narain Sinha DW 2 and Bindra Charan DW 3.

The learned Sessions Judge upon appreciation of the oral evidence and material on record found all the accused guilty of the charges framed against them and sentenced them to various terms of imprisonment. On appeal the High Court of Allahabad confirmed the conviction and sentences imposed by the learned Sessions Judge. The appellants who are accused No.2 and 3 respectively alone have preferred this appeal by special leave, challenging their conviction and sentence.

We have elaborately heard the learned senior counsel Shri Harjinder Singh and Shri R.C. Kohli as well as Shri Shail Kumar Dwivedi, learned Additional Advocate General for the State.

The learned senior counsel Shri Harjinder Singh mainly contended that the FIR lodged by P.W.1 Jaikirath Singh was ante-timed and ante-dated and brought into existence after due deliberations and consultations with the police.

According to the learned senior counsel, the special report required to be sent to the superior authorities and a copy of check FIR to the Illaqua Magistrate as required under Section 157 of the Code of Criminal Procedure was not sent by the police. That apart arrest of Maiku Bhujwa before 3.40 p.m. and his detention in the police station at 5.30 p.m. and also the fact that some seizure memos, prepared by Investigating Officer on the same day which do not bear any crime number, are more than sufficient to doubt the timings of FIR Ext.Ka.1.

There is no doubt that FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating evidence led by the prosecution at the trial. FIR is the earliest information regarding the circumstances under which the crime was committed, including the names of the actual culprits and the part played by them, the weapons, if any, used as also the names of the eye-witnesses, if any. Delay in lodging the FIR may result in embelishment, which is a creature of an after thought. This court in *Meharaj Singh* v. *State of U.P.*[1] observed that with a view to determine whether the FIR was lodged at

1. [1994] 5 SCC 188.

A the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the check is the receipt of the copy of the FIR, called as a Special Report in a murder case, by the local Magistrate. "If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged
B to have been recorded, unless, of course, the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. The second external check equally important is sending of copy of the FIR along with the dead body and its reference in the Inquest Report."

C

This court while construing Section 157 of the Code of Criminal Procedure in *Anil Rai* v. *State of Bihar*[2] observed that the said provision is designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159 of the Code.
D "But where the FIR is shown to have actually been recorded without delay and investigation started on the basis of the FIR, the delay in sending the copy of the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable."

E This court further took the view that the delay contemplated under Section 157 of the Code for doubting the authenticity of the FIR is not every delay but only extra-ordinary and unexplained delay. We do not propose to burden this short judgment of ours with various authoritative pronouncements on the subject since the law is so well settled that delay
F in despatch of FIR by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly in cases where the prosecution provides cogent and reasonable explanation for the delay in despatch of the FIR.

The same principle has been reiterated by this court in *Alla China*
G *Apparao & Ors.* v. *State of A.P.*[3] wherein this court while construing the expression "forthwith" in Section (1) of Code of Criminal Procedure observed that " it is a matter of common experience that there has been

2. [2001] 7 SCC 318.

H 3. JT (2002) 8 SC 167.

tremendous rise in the crime resulting into enormous volume of work, but increase in the police force has not been made in the same proportion. In view of the aforesaid factors, the expression "forthwith" within the meaning of Section 157(1) obviously cannot mean that the prosecution is required to explain every hour's delay in sending the first information report to the magistrate, of course, the same has to be sent with reasonable despatch, which would obviously mean within a reasonable possible time in the circumstances prevailing. Therefore, in our view, the first information report was sent to the magistrate with reasonable promptitude and no delay at all was caused in forwarding the same to the magistrate. In any view of the matter, even if magistrate's court was closed by and the first information report reached him within six hours from the time of its lodgment, in view of the increase in work load, we have no hesitation in saying that even in such a case it cannot be said that there was any delay at all in forwarding the first information report to the magistrate."

It is not possible to lay down any universal rule as to within what time the special report is required to be despatched by the Station House officer after recording the FIR. Each case turns on its own facts.

The learned senior counsel invited our attention to the judgments of this court in *Balaka Singh and Ors.* v. *State of Punjab*[4] and *Datar Singh* v. *The State of Punjab*[5] in which this court highlighted the importance of despatch of special report to the Illaqua Magistrate. There is no dispute with the proposition that it is the duty of the Station House Officer to despatch Special Report to the Illaqua Magistrate as is required under Section 157(2) of the Code of Criminal Procedure. But there may be variety of factors and circumstances for the delay in despatch of the FIR and its receipt by the local Magistrate. The existence of FIR and its time may become doubtful in cases where there is no satisfactory and proper explanation from the investigating agencies.

In *Budh Singh & Ors.* v. *State of UP*[6], this court while making reference of the regulations made by the State of U.P. in terms of the

4. AIR (1975) SC 1962.

5. [1975] 4 SCC 272.

6. JT (2006) 11 SC 503

A U.P. Police Act held the regulations to be statutory in nature. The regulations provide the procedure as to how and in what form the information relating to commission of a cognizable offence when given to an officer in-charge of a police station is to be recorded and sent to superior officers. The regulations are procedural in nature which are meant B for the guidance of the police. The regulations do not supplant but supplement the provisions of Code of Criminal Procedure.

We shall now consider the facts of the present case and apply the law declared by this court in more than one decision.

C It is in the evidence of Jaikirath Singh (P.W.1) that he rushed to the police station by a bicycle and lodged written FIR Ext.Ka.1 within 1 ½ hours of the incident. The distance between the place of occurrence and the police station is about 9 kms. It is in his evidence that he took about 15-20 minutes to prepare his report and nobody advised him in preparation D of the report. He went to the police station all alone. We do not find any reason whatsoever to disbelieve this version given by PW 1. There is nothing unnatural and unusual in PW 1 stating the details of the incident in his written FIR Ext.Ka.1. The behavioral pattern and response of individuals in a given situation may differ from person to person. From a E bare reading of the FIR Ext.Ka.1 we do not find anything artificial in it. It cannot be said to be a contrived one brought into existence after due deliberations as contended by the counsel for the appellant.

Be it noted, Jagdamba Prasad Dwivedi, PW 7, the officer in-charge of police station, Kothi having received the relevant papers in village F Sethmau, rushed to the place of occurrence and reached there at about 6.00 p.m. where he found the dead body of Ram Singh. The inquest report Ext.Ka.7 was prepared on the spot and the body was sent for post-mortem examination. The Inquest Report Ext.Ka.7 specifically refers to the lodging of FIR by PW 1 at 4.45 p.m. on 19.02.1977. The mere fact G that crime number is not mentioned in the Inquest Report is of no significance.

The sequence of events, namely, that Jagdamba Prasad Dwivedi - PW 7 reached the scene of offence at 6.00 p.m. and prepared Inquest H Report duly mentioning about lodging of the FIR by PW 1 at 4.45 p.m.

on 19th February, 1977 followed by despatch of the dead body to the hospital which reached the hospital by 9.30 p.m. and the post-mortem examination at 9.30 a.m. on 20th February, 1977 in clear and unequivocal terms reveal that the FIR was lodged at the time it is stated to have been recorded. It cannot be treated as an ante-timed and ante-dated one. It is required to note that 20th February, 1977 being Sunday, the Illaqua Magistrate received special report on 21st February, 1977. The special report was despatched by dak.

Arrest of one Maiku Bhujwa on 19th February, 1977 at 3.00 p.m. in Crime No.17 under Section 147 etc. and his being lodged in police station at about 5.30 p.m. by two constables Ram Naresh and Ram Tool Misra as shown in Exts. Ka. 3 and 4 has been used as a sheet anchor to challenge the time of FIR Ext.Ka.1 by saying that if the two constables were summoned by Station Officer, on reaching the place of occurrence, then in all probability Station Officer reached the place of occurrence by 3.00 p.m. even before the FIR was issued.

The High Court adverting to this aspect of the matter observed "the investigating officer Sri Dwivedi does not say that he arrested Maiku Bhujwa. Moreover, arrest of Maiku was not in connection with the murder in question, but was in connection with another case. Most importantly, what could have been the object behind delaying the time of occurrence of reaching Sri Dwivedi, on the spot, has not been made clear by Sri Kidwai. We are of the view that arrest of Maiku at about 3.00 p.m. and his lodging in Hawalat at 5.30 p.m. by two constables, does not militate against the time of FIR Ext.Ka-1 as shown in police papers. It is also possible that some manipulation was made in the context of the arrest of Maiku, to make the case against him more sound."

We do not find any fallacy or error in the reasoning of the High Court. For the aforesaid reasons we do not find any substance in the submission made by the learned senior counsel about the ante-time and ante-dating of the FIR. The findings in this regard as recorded by Sessions Judge as well as the High Court are supported by acceptable evidence and there is no reason to take a different view. It is well settled that this court normally does not reappreciate the evidence unless it is shown that the findings are patently erroneous or perverse in nature. However, in

order to satisfy ourselves we have looked into the evidence of PWs 1,2,3 and 7 and we are satisfied that the FIR was lodged on the date and time as stated by the prosecution.

The prosecution story entirely rests upon the direct evidence of PW Nos. 1, 2 and 3. PW-1 is none other than the son of deceased Ram Singh. He was present in his fields situated nearby the place of occurrence where his father was attacked. Jaikirat (PW-1) no doubt was doing his part time G.N.S. in plantation at Lucknow but that itself would not make his presence doubtful at the scene of offence on the fateful day. The defence did not elicit anything in the cross-examination casting any doubt about the presence of PW-1 at the scene of offence. There is nothing unnatural about the conduct of PW-1 at the scene of occurrence. He gave detailed version as to the manner of assault and the role played by each of the accused. The names of PW-2 and PW-3 were also mentioned as eye-witnesses in the First Information Report itself. In the circumstances, PW-2 and PW-3 cannot be treated as chance witnesses. The Trial Court and as well as the High Court did not commit any error in relying on the testimony of PW-2 and PW-3 as eye-witnesses of the occurrence which fully stands corroborated with the testimony of PW-1. Be that as it may, there was not even a suggestion to PW-2 and PW-3 that they had animosity towards the accused persons. They are independent witnesses and there is no reason for them to speak against the accused.

However, it was strenuously urged that the presence of Jaikirat (PW-1) at the scene of offence is highly doubtful as he made no attempt whatsoever to save his father from being further assaulted. We find no substance in this contention. It is in the evidence of Jaikirat (PW-1) that all the four shots were fired in quick succession and at that moment PW-1 was at some distance from the actual place of attack. Be it noted that at least 2 accused were armed with fire-arms and one with lathi and they were using the weapons with all impunity. In such circumstances, Jaikirat (PW-1) may not have mustered his courage to jump into the fray and risk his own life. It is very difficult to predict or express any opinion as to what could have been normal or natural conduct of a person in such a situation. Response of individuals in such situations may differ from person to person. It is not possible to reject the evidence or doubt the presence

of PW-1 on that ground. A

The post-mortem examination of the deceased Ram Singh was performed by Dr. R.S. Katiyar (PW-5). The post-mortem report is exhibit Ka-4. The Medical Officer found the following ante-mortem injuries on the person of the deceased: B

1. A gun shot wound (wound of entry) 3 cm x 1 cm. Over left side of face just above the left side of the lower lip.

   Wound of Ext. 3 cm x 2 cm. Over the right parietal bone, 7 cm. Above the right ear. C

2. A gun shot wound 2.5 cm x 1 cm. Over the right side of face below max. prominence.

3. Multiple gun shot wounds in an area of 13 cm x 11 cm. Over the right side of back below the inferior angle of scapula.

4. A gun shot wound (wound of entry) 2 cm x 2 cm over the right side of the back 2 cm. Right to 12th thoracic vertebra. D

5. Multiple gun shot wounds in an area of 9 cm. X 4 cm. Over the back and middle of right arm.

Relying on his evidence the learned counsel for the appellant contended that the oral account as given by PW-1, 2 and 3 is at variance with medical evidence available on record. It is contended that while according to the eye-witnesses all the four shots were fired from the gun, from right side of the victim, wound no.1 (wound of entry) was on the left side of the face and caused by bullet and this evidence belies the claim of eye witnesses that they saw the assault on Ram Singh. It is true that to a pointed query in cross-examination as regards the nature of injury no. 1, the Medical Officer stated that the said injury was caused by bullet only. The learned counsel contended that weapons in the hands of the accused even according to PW-1 were of 12 bore guns and not any pistols or revolvers. No bullet injury could have been caused with the fire-arms that were alleged to be in the hands of the assailants. We find no substance in this submission. The Medical Officer is not ballistic expert. He was not expected to answer as to whether injury no. 1 could have been caused by bullet alone. His opinion to that extent is of no E F G H

A consequence. It is well settled that medical evidence is only an evidence of opinion and it is not conclusive and when oral evidence is found to be inconsistent with the medical opinion, the question of relying upon one or the other would depend upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor. The ocular evidence if B otherwise is acceptable has to be given importance over medical opinion. However, where the medical evidence totally improbabilises the ocular version the same can be taken to be a factor to affect credibility of the prosecution version. We are not inclined to place any reliance upon the opinion of the Medical Officer that the injury no.1 could have been caused C only with bullet since he is not a ballistic expert. This part of the evidence of the Medical Officer cannot be considered to be the opinion of an expert and the same has no evidentiary value. It is not possible to disbelieve the evidence of PW-1, 2 and 3 and their presence at the scene of occurrence based on the medical evidence. The High Court rightly observed that the D controversy as regards injury No. 1 and whether the same could have been caused by bullet or pellet to be without any basis.

The learned counsel for the State rightly contended that in case of attack by members of un-lawful assembly on the victim in furtherance of common object, it is not necessary for the prosecution to establish overt- E act done by each accused. It is required to be noticed that Ram Smujh (A-1) who had fired two shots, convicted by the Sessions Court, did not even challenge his conviction in the High Court. The appellants have been rightly convicted under Section 302 read with aid of Section 149 of IPC. PW-5 in his evidence stated that all the injuries sustained by the deceased F were from gun. It is further stated that "from the body of deceased one bullet, one cover 'tikli', two dat and 40 'chare' shots were taken out, put in packet and sealed ....." It is also stated in his evidence that injuries caused on the body of the deceased were sufficient in the normal course to cause death. This part of the medical evidence if juxtaposed with the G oral evidence of PW-1, 2 and 3 it becomes unnecessary to go into the question as to which accused caused what injury and which was a fatal one. Once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish any specific overt-act to any of the accused for fastening of liability with the aid of section 149 of the H IPC. Commission of overt-act by each member of the unlawful assembly

is not necessary. The common object of the unlawful assembly of the accused in the present case is evident from the fact that some of them were armed with deadly weapons. None of them were curious onlookers or spectators to the macabre drama that was enacted on 19.2.1977 at 3.30 p.m. at galiyara, village Badipur. A

For the aforesaid reasons, we find no merit in this appeal. The appeal is accordingly dismissed. B

B.B.B. Appeal dismissed.