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ONKAR & ANR.

v.

STATE OF U.P.

(Criminal Appeal No. 1840 of 2008)

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JANUARY 18, 2012

[DR. B.S. CHAUHAN AND T.S. THAKUR, JJ.]

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Penal Code, 1860 – ss.302/149, 307/149 and 452 – Common object – Armed assault by appellants and five other accused – Murder of PW2's uncle – Injuries to son and daughter of PW2 – Conviction of appellants by Courts below – Challenged – Held: PW2 fully supported the case of prosecution – His evidence was totally corroborated by PW3 and PW4 – Injury reports stood proved by Dr.(PW1) and Dr.(PW7) in the court and they corroborated the prosecution version – FIR was lodged most promptly within a period of 3 hours of the incident though the police station was at a distance of 3 miles from the place of occurrence – The appellants were specifically named – The other co-accused who were not the residents of the village where the offence was committed, had been duly identified in Test Identification Parade as well as in court by all the three eye-witnesses – Witnesses deposed that not a single article was looted nor any attempt had been made to commit dacoity, rather it was specifically stated that all the assailants/miscreants declared that no one would be left alive and had been exhorting one another to eliminate all – All the assailants came together and participated in the crime – The offence was committed at midnight – From a collective reading of the entire evidence, inference can safely be drawn that the assailants had an object to commit murder of persons on the victims' side and they participated in the crime – Graveness of charges against the accused-appellants that they in concert with other accused to achieve a common object entered into the house of the PW2/

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complainant stood proved – Conviction of appellants accordingly upheld.

Evidence – Witnesses – Related witnesses – Held: Evidence of closely related witnesses is required to be carefully scrutinised and appreciated – In case, the evidence has a ring of truth, is cogent, credible and trustworthy it can be relied upon.

According to the prosecution, the two appellants and five other accused in concert with each other and to achieve a common object entered into the house of the PW2, the appellants armed with country-made pistols and the other accused armed with lathi, bhala etc. and caused the death of PW2's uncle ('O') and injuries to PW2's daughter ('T') and son ('C'). The trial court convicted all the accused. The appellants were convicted under Section 302/149; 307/149 and Section 452 IPC and sentenced to life imprisonment. On appeal, the High Court upheld the conviction and maintained the sentence.

The appellants challenged their conviction before this Court *inter alia* on grounds that only close relatives of the deceased 'O' were examined and that in the facts and circumstances of the case, the provisions of Section 149 IPC were not attracted and the prosecution failed to prove that there was unlawful assembly constituted for the purpose of executing a common object.

Dismissing the appeal, the Court

HELD:1. The prosecution examined 3 eye-witnesses. According to PW.2 (complainant), the victims' side had earlier filed criminal cases against some of the accused persons. In one case, they had been convicted and in another case they had been acquitted. In so far as this incident is concerned, PW.2 has fully supported the case

A of the prosecution. This witness deposed that accused
 Bira was having a gun and the appellants were having
 country made pistols and the other accused were armed
 with lathi and ballom etc. In order to save himself from
 the assailants, PW.2 jumped in the house of his other
 B uncle 'B' while 'O' climbed down from the roof. The
 accused had a scuffle with 'O' who suffered a gun shot
 injury. The accused also tried to break the door of the
 room of 'O' and when the door was not broken, they fired
 shot at the door and bullets from the ventilator of the
 C house due to which 'C' and 'T' suffered fire injuries. In
 this incident, accused 'MS' also got injured. His evidence
 is totally corroborated by PW.3 and PW.4. [Para 7] [1176-
 D-G]

2. It is a settled legal proposition that evidence of
 D closely related witnesses is required to be carefully
 scrutinised and appreciated before resting of conclusion
 as regards the convict/accused in a given case. In case,
 the evidence has a ring of truth, is cogent, credible and
 trustworthy it can be relied upon. There is nothing on
 E record to show that at the time of cross-examination of
 the Investigating Officer (PW.6), any of the accused had
 put him a question as to why the other witnesses have
 not been examined. [Para 7] [1176-H; 1177-A-B]

F *Himanshu v. State (NCT of Delhi) (2011) 2 SCC 36:*
2011 (1) SCR 48 and Ranjit Singh & Ors. v. State of Madhya
Pradesh (2011) 4 SCC 336: 2010 (14) SCR 133 – relied on.

3. Injury reports stood proved by Dr. (PW.1) and Dr.
 (PW.7) in the court and they corroborate the prosecution
 G version. In spite of the fact that the accused 'MS' got
 injured but no grievance has ever been raised by him in
 this regard. The Trial Court has rightly taken note of it and
 reached the correct conclusion that it supports the case
 of the prosecution and establishes the presence of 'MS'
 H at the place of occurrence and his participation in the

crime. 'MS' himself could not explain as under what circumstances such injuries had been caused to him. [Para 8] [1177-C-E]

4. The courts below reached the correct conclusion that it is highly improbable that the witnesses would screen and spare the real assailants and falsely enroped the appellants and others only because of old enmity. Had it been so, there could have been no reason to involve at least four other accused persons in the crime, particularly, 'MS', Suresh, Ahmad Sayeed and Omveer. Admittedly, the FIR was lodged most promptly within a period of 3 hours of the incident at 2.50 A.M. though the police station was at a distance of 3 miles from the place of occurrence. So far as the appellants are concerned, they have specifically been named. The other co-accused who were not the residents of the village where the offence has been committed, had been duly identified in Test Identification Parade as well as in court by all the three eye-witnesses. [Para 9] [1177-F-H; 1178-A]

5. There is no force in the submission that in the facts and circumstances of the case provisions of Section 149 IPC were not attracted, for the reason, that this court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it may yet fall under second part of Section 149 IPC, which states that if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to the number of persons involved in the crime; how many of them were merely passive witnesses; what arms and weapons they were

A carrying alongwith them. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident. [Para 10] [1178-B-E]

B *Ramachandran & Ors. v. State of Kerala* (2011) 9 SCC 257; *Chandra Bihari Gautam & Ors. v. State of Bihar* AIR 2002 SC 1836 and *Ramesh v. State of Haryana* AIR 2011 SC 169 – relied on.

C 6. The witnesses have deposed that not a single article was looted nor any attempt had been made to commit dacoity, rather it has been specifically stated that all the assailants/miscreants declared that no one would be left alive and had been exhorting one another to eliminate all. All the assailants came together and participated in the crime in which 'O' was killed, 'T' and 'C' were injured. The assailants tried to break open the door of the house but could not succeed, thus they fired from the ventilator and that is why 'T' and 'C' got injured. After commission of the offence a large number of persons gathered at the place of occurrence. The assailants ran away. The offence was committed at midnight. Therefore, after reading the entire evidence collectively inference can safely be drawn that the assailants had an object to commit murder of persons on the victims' side and they participated in the crime. The graveness of charges against the appellants that they in concert with other accused to achieve a common object entered into the house of the complainant stood proved. [Paras 12, 13] [1179-G-H; 1180-A-C]

G Case Law Reference:

	2011 (1) SCR 48	relied on	Para 7
	2010 (14) SCR 133	relied on	Para 7
H	(2011) 9 SCC 257	relied on	Para 10

A their house in their village Kidhara. The appellants came to the
house of complainant alongwith other accused persons. One
Jagdish who was having a shop in the outer room of the
complainant's house, woke up after hearing the sound of the
movement of appellants and accused persons and raised alarm
and took to his heels. Jalsur (PW.2) and his uncle Onkar Singh
(deceased) also woke up. Onkar Singh (deceased) climbed
down from the roof towards Chabutara while Jalsur (PW.2)
jumped in the adjoining house of his uncle Bahori and came
out in the open and set fire to a "chappar" in front of his own
house. It was in the light of the fire made on account of burning
of "Chappar", that Jalsur (PW.2) saw the accused Bira, Tara,
Onkar, Rati Ram and some 7-8 unknown persons. The
appellants were armed with country made pistols and other
assailants were armed with lathi, bhala and other lethal
weapons. A scuffle took place between the assailants and
Onkar Singh (deceased) and he received a gun shot injury on
his chest and died. Some of the assailants climbed down into
the house of the informant and tried to break open the doors
of the rooms but on their failure to do so, they opened fire on
the doors and some of them entered the rooms through
ventilators. The firing caused injuries to the informant's son
Chandra Bose and daughter Tarwati. On seeing pressure
mounting, the culprits pushed the deceased (Onkar) into the fire
of the "Chappar" which had been set ablaze by the informant.

F B. On the basis of the said FIR, investigation commenced
and I.O. N.P. Singh (PW.6) came at the place of occurrence
and collected seven empty shells of 12 bore cartridges alleged
to have been fired by the miscreants. He also recorded the
statement of witnesses. Site plan was prepared. Blood stained
earth and sample of ash of burnt Chappar was collected. The
injured persons were sent for medical examination and
treatment. Dead body of Onkar Singh was sent for post-mortem.
The Investigating Officer arrested Mohd. Shafi, Ahmad Syeed
and Suresh on 25.3.1980 and other accused persons
subsequently. The Test Identification parade of four accused,

namely, Omveer, Suresh, Ahmad Sayeed, and Mohd. Shafi was conducted and the accused were identified by the witnesses, namely, Roshan Singh, Shishu Pal, Hukam Singh and Jalsur on 17.5.1980. The Investigating Officer filed chargesheet dated 14.1.1981 against 7 accused persons, namely, Bira, Tara, Onkar, Mohd. Shafi, Omveer, Ahmad Sayeed and Suresh.

C. The Trial Court framed the charges on 14.1.1981 against all the 7 accused persons under Sections 147, 302/149, 307/149 and 452 IPC. So far as the present appellants and accused Bira are concerned, an additional charge was framed against them under Section 148 IPC. To prove the case, prosecution examined large number of witnesses including Jalsur (PW.2), Shishu Pal (PW.3) and Bani Singh (PW.4) as eye-witnesses of the occurrence.

D. The accused persons, namely, Bira, Tara, Onkar and Omveer when examined under Section 313 of the Code of Criminal Procedure (hereinafter called Cr.P.C.) took the plea that they had falsely been implicated because of their previous enmity as 5-6 years prior to the incident, an attempt was made on the life of Shishupal, uncle of the complainant Jalsur (PW.2) and in that case accused Tara, his brother Mahabir and father Munshi faced trial and stood convicted under Section 307 IPC and they served the sentence. It was further submitted that Tara, Bira and Onkar were closely related to each other. In respect of another incident, Jalsur (PW.2) had filed a complaint against Tara and Mahabir under Section 395 IPC but the said case ended in acquittal. The other accused persons took the defence that they had enmity with the police and had falsely been implicated in the case.

E. After appreciating the evidence on record and considering all other facts and circumstances of the case, the Trial Court vide judgment and order dated 16.4.1982 convicted all the 7 accused persons and awarded the sentence as mentioned hereinabove in S.T. Case No.277 of 1980.

A Aggrieved, all the 7 convicts preferred Criminal Appeal No.1096 of 1982 before the High Court of Allahabad.

B F. During the pendency of the said appeal, Omveer, Ahmad Sayeed and Suresh died and thus, their appeal stood abated. At the time of hearing the appeal, it stood established that Bira was a child on the date of occurrence and therefore, his conviction was maintained but sentence was set aside giving benefit under the provisions of Section 2(4) of the U.P. Children Act, 1951. The appeal of remaining three convicts, namely, Tara, Onkar and Mohd. Shafi stood dismissed vide C impugned judgment. Mohd. Shafi did not prefer any appeal.

Hence, this appeal only by two convicts.

D 3. Shri S.B. Upadhyay, learned Senior counsel appearing for the appellants has submitted that injured witnesses, namely, Tarawati and Chandra Bose have not been examined. Similarly, independent eye-witnesses, namely, Roshan Singh and Hukum Singh whose presence at the scene of occurrence had been witnessed by Jalsur (PW.2) himself were not examined. Jagdish E who had raised hue and cry immediately after hearing the sound of coming of the accused persons on the spot has also not been examined. Only close relatives of Onkar Singh (deceased) have been examined. Therefore, the prosecution withheld the material evidence in its possession. In the facts and circumstances of the case, the provisions of Section 149 F IPC were not attracted. The prosecution miserably failed to prove that there was unlawful assembly constituted for the purpose of executing a common object. The prosecution case itself had been that the prime object was to commit dacoity and not murder of Onkar Singh (deceased). In the deposition, Jalsur G (PW.2) had made a statement in the court that Rati Ram was involved in the killing of Onkar Singh (deceased) and his name also finds place in the FIR lodged by Jalsur (PW.2) but no chargesheet has been filed against him. In view of the above, the appeal deserves to be allowed.

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4. Per contra, Shri D.K. Goswami, learned counsel appearing for the State has vehemently opposed the appeal contending that the FIR had promptly been lodged within a period of 3 hours after mid-night though the police station was at a distance of 3 miles from the place of occurrence. The appellants had been named in the FIR. Roles attributed to each of them had been explained. Motive had also been mentioned. Injuries suffered by Tarawati and Chandra Bose had also been given. Law does not proscribe reliance upon the evidence of closely related witnesses. However, it requires that evidence of such witnesses must be appreciated with care and caution. Once the evidence is found reliable/trustworthy, it cannot be discarded merely on the ground that the witness has been closely related to the victim. The injuries found on the person of the deceased as well as on Tarawati, Chandra Bose and Mohd. Shafi corroborate the case of the prosecution and in such a fact-situation, the provisions of Section 149 IPC have rightly been applied. The issue of non-examination of the injured witnesses, namely, Tarawati and Chandra Bose and of eye-witnesses, namely, Roshan Singh, Hukum Singh and Jagdish has not been put to the Investigating Officer in cross-examination who could have furnished the explanation for their non-examination. Thus, the issue cannot be raised first time in appeal before this Court. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. Before we enter into the merits of the case, it may be relevant to refer to the injuries caused to the victims.

(a) The post mortem examination of the dead body of Onkar Singh, son of Sher Singh, was conducted by Dr. Pradeep Kumar (P.W.7) on 23.3.1980 at about 5.15 a.m. and he found following ante mortem injuries on his person:-

1. Gun shot wound of entry of left nipple 1" x 1" x chest

A cavity deep, margins inverted, blackening and tattooing present around the wound part of lung coming out of the wound.

2. Abrasion 3" x 1" on the top of left shoulder.

B 3. Abrasion 1" x ½ on the right elbow.

4. Abrasion 2" x 1" on the right iliac spine region.

5. Abrasion 1 ½ "x ½" on left iliac spine region.

C 6. Abrasion 3 "x 1" on upper part of right leg.

7. Abrasion ¼ "x ¼" on middle part of left leg.

8. Abrasion 2" x 1" on the right side of back.

D 9. Superficial burn on left side of chest and abdomen.

On the internal examination, 3rd, 4th, 5th, 6th, 7th, ribs on the left side were found fractured. In the right lung 800 ml of dark blood and 12 pellets were recovered. Left lung was lacerated and 8 pieces of wadding were recovered. In large intestine gases and faecal matters were found. In the opinion of the doctor, death had occurred due to shock and haemorrhage due to ante mortem injuries and duration of death was ¾ day to one day.

F (b) Dr. D.P. Singh (P.W.1) of PHC Harduwaganj had examined the injuries of Tarwati, daughter of Jalsur (PW.2) on 23.3.1980 at 1.15 p.m. and following injuries were found by him:-

G 1. Lacerated circular pellet wound 1/8" x 1/8" x muscle deep on the anterior aspect of scalp exactly in the midline of head.

H 2. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp away from the midline and 2 ¾" above

the left eye brow.

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3. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right of scalp, 1" behind the injury No.3.

The injuries, in the opinion of the doctor, were simple and were caused by fire arm and it was half day old.

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(c) Chandra Bose, son of Jalsur (PW.2) was examined by Dr. D.P. Singh (PW.1) on 23.3.1980 at 1.20 p.m. and the following injuries were found by him:-

1. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right side of face, 1 1/2" in front of the lower angle of right mandible.

C

2. Lacerated circular wound 1/8" x 1/8" x muscle deep on the right side of scalp. 4 1/2" above the base of right ear and 1 1/2" away from mid line.

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3. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp. 1/2" away from mid line and 2 1/2" above the left eye brow.

E

4. Lacerated circular wound 1/8" x 1/8" x muscle deep on the left side of scalp 1" behind the injury no.3.

All the injuries were simple in nature and were caused by fire arm and their duration was about half a day old.

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(d) Dr. D.P. Singh (PW.1) examined the injuries of Mohd. Shafi on 26.3.1980 at 11.15 a.m. and the following injuries were found on his person:-

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1. Circular wound 1/8" x 1/8" x muscle deep on the front aspect of right forearm 4" below the level of right elbow joint.

2. Multiple circular wound 1/8" x 1/8" x muscle deep on the

H

A front and lateral aspect of right upper arm 12 in numbers in an area 8" x 5" between the shoulder and elbow joint.

3. Three circular wounds 1/8" x 1/8" x muscle deep each in an area of 3 ½ x 2" on the right shoulder joint.

B 4. Multiple circular wounds 1/8" x 1/8" x muscle deep, 5 in numbers, extending in a linear fashion starting from 3 ½" above the right nipple to the lower part of 9th rib at a place 6 ½" away from mid line of back.

C In the opinion of the doctor, all the injuries were simple and were caused by fire arm. Duration of these injuries was found to be 3 ½ days which is corresponding to the date of incident.

7. The prosecution has examined 3 eye-witnesses. According to Jalsur (PW.2), the victims' side had earlier filed criminal cases against some of the accused persons. In one case, they had been convicted and in another case they had been acquitted. In so far as this incident is concerned, Jalsur (PW.2) has fully supported the case of the prosecution. This witness deposed that accused Bira was having a gun and the present appellants were having country made pistols and the other accused were armed with lathi and ballom etc. In order to save himself from the assailants, Jalsur (PW.2) jumped in the house of his uncle and Onkar Singh climbed down from the roof. The accused had a scuffle with Onkar Singh who suffered a gun shot injury. The accused also tried to break the door of the room of Onkar Singh and when the door was not broken, they fired the shot at the door and bullets from the ventilation of the home due to which Chandra Bose and Tarawati, son and daughter of Jalsur (PW.2) suffered fire injuries. In this incident, Mohd. Shafi also got injured. His evidence is totally corroborated by Shishu Pal (PW.3) and Bani Singh (PW.4).

H It is a settled legal proposition that evidence of closely related witnesses is required to be carefully scrutinised and appreciated before resting of conclusion the convict/accused

in a given case. In case, the evidence has a ring of truth, is cogent, credible and trustworthy it can be relied upon. (Vide: *Himanshu v. State (NCT of Delhi)*, (2011) 2 SCC 36; and *Ranjit Singh & Ors. v. State of Madhya Pradesh*, (2011) 4 SCC 336).

There is nothing on record to show that at the time of cross-examination of the Investigating Officer (PW.6), any of the accused had put him a question as to why the other witnesses have not been examined.

8. Injuries reports so referred to hereinabove stood proved by Dr. D.P. Singh (PW.1) and Dr. Pradeep Kumar (PW.7) in the court and they corroborate the prosecution version. In spite of the fact that the accused Mohd. Shafi got injured but no grievance has ever been raised by him in this regard. The Trial Court has rightly taken note of it and reached the correct conclusion that it supports the case of the prosecution and establish the presence of Mohd. Shafi at the place of occurrence and he participated in the crime. Mohd. Shafi himself could not explain as under what circumstances such injuries have been caused to him.

9. The courts below have reached the correct conclusion that it is highly improbable that the witnesses would screen and spare the real assailants and falsely enroped the appellants and others only because of old enmity. Had it been so, there could have been no reason to involve at least four other accused persons in the crime, particularly, Mohd. Shafi, Suresh, Ahmad Sayeed and Omveer.

Admittedly, he lodged the FIR most promptly within a period of 3 hours of the incident at 2.50 A.M. though the police station was at a distance of 3 miles from the place of occurrence. So far as the present appellants are concerned, they have specifically been named.

The other co-accused who were not the residents of the

A village where the offence has been committed, had been duly identified in Test Identification Parade as well as in court by all the three eye-witnesses.

10. We do not find any force in the submission made by Shri Upadhyay, learned Senior counsel that in the facts and circumstances of the case provisions of Section 149 IPC were not attracted, for the reason, that this court has been very cautious in the catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it may yet fall under second part of Section 149 IPC, which states that if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to the number of persons involved in the crime; how many of them were merely passive witnesses; what arms and weapons they were carrying alongwith them. Number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.

(See : *Ramachandran & Ors. v. State of Kerala* (2011) 9 SCC 257).

11. In *Charandra Bihari Gautam & Ors. v. State of Bihar*, AIR 2002 SC 1836, this Court while dealing with a similar case held as under:

"Section 149 has two parts. First part deals with the commission of an offence by a member of unlawful assembly in prosecution of the common object of that assembly and the second part deals with the liability of the members of the unlawful assembly who knew that an offence was likely to be committed in prosecution of the object for which they had assembled. Even if the common

object of the unlawful assembly is stated to be apprehending Nawlesh Singh only, the fact that the accused persons had attacked the house of the complainant at the dead of the night and were armed with deadly weapons including the guns, and used petrol bombs proves beyond doubt that they knew that in prosecution of the alleged initial common object murders were likely to be committed. The knowledge of the consequential action in furtherance of the initial common object is sufficient to attract the applicability of Section 149 for holding the members of the unlawful assembly guilty for the commission of the offence by any member of such assembly. In this case the appellants, along with others, have been proved to have formed unlawful assembly, the common object of which was to commit murder and arson and in prosecution of the said common object they raided the house of the informant armed with guns and committed offence. The Courts below have, therefore, rightly held that the accused persons formed an unlawful assembly, the common object of which was to commit murder of the informant and his family members and in prosecution of the said common object six persons were killed. The appellants were also proved to have hired the services of some extremists for the purposes of eliminating the family of the complainant."

(See also: *Ramesh v. State of Haryana*, AIR 2011 SC 169)

12. The witnesses have deposed that not a single article was looted nor any attempt had been made to commit dacoity, rather it has been specifically stated that all the assailants/miscreants declared that no one would be left alive and had been exhorting one another to eliminate all. All the assailants came together and participated in the crime in which Onkar Singh was killed, Tarawati and Chandra Bose were injured. The assailants tried to break open the door of the house but could

A not succeed, thus they fired from the ventilator and that is why Tarawati and Chandra Bose got injured. After commission of the offence a large number of persons gathered at the place of occurrence. The assailants ran away. The offence was committed at mid-night. Therefore, after reading the entire evidence collectively inference can safely be drawn that the assailants had an object to commit murder of persons on the victims' side and they participated in the crime.

13. Thus, the graveness of charges against the appellants that they in concert with other accused to achieve a common object entered into the house of the complainant stood proved.

14. In view of the above, we do not find any force in the appeal. Facts and circumstances of the case do not warrant any interference in the matter. The appeal lacks merit and is, accordingly, dismissed.

B.B.B.

Appeal dismissed.