

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.329 of 2019

Arising Out of PS. Case No.-31 Year-2015 Thana- KALER District- Jehanabad

RAJESH YADAV, Son of Late Rajkishor Singh Resident of Village- Karnaul
Chandi, P.S.- Charpokhari, District- Bhojpur (Ara)

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 332 of 2019

Arising Out of PS. Case No.-31 Year-2015 Thana- KALER District- Jehanabad

RAM BRAT YADAV @ RAMBARAT YADAV @ RAMBRAT SINGH, Son
of Ishwar Yadav Resident of Village - Hichhan Bigha, P.S.- Dauded Nagar,
Distt.- Aurangabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 1059 of 2019

Arising Out of PS. Case No.-31 Year-2015 Thana- KALER District- Jehanabad

FIDDU YADAV @ RAJU RANJAN KUMAR @ RAJU RANJAN, Son of
Rambarat Yadav Resident of Village - Hichchanbigha, P.S.- Daudnagar, Distt
- Aurangabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 192 of 2022

Arising Out of PS. Case No.-31 Year-2015 Thana- KALER District- Jehanabad

JALENDRA YADAV, Son of Late Chhedi Yadav, Resident of Village-
Hichhanbigha, P.S.- Daudnagar, District- Aurangabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :	
(In CRIMINAL APPEAL (DB) No. 329 of 2019)	
For the Appellant/s	: Mr.Ramchandra Singh, Advocate Mr.Shankar Kumar, Advocate Mr.Radha Krishna, Advocate
For the State	: Mr.Ajay Mishra, APP
For the Informant	: Mr.Ashok Kumar Singh, Advocate MrAbhishek Kumar Singh, Advocate
(In CRIMINAL APPEAL (DB) No. 332 of 2019)	
For the Appellant/s	: Mr.Tej Kumar Maharaj, Advocate
For the State	: Mr.Ajay Mishra, APP
For the Informant	: Mr.Ashok Kumar Singh, Advocate MrAbhishek Kumar Singh, Advocate
(In CRIMINAL APPEAL (DB) No. 1059 of 2019)	
For the Appellant/s	: Mr.Diwakar Upadhyaya, Advocate
For the State	: Mr.Ajay Mishra, APP
For the Informant	: Mr.Ashok Kumar Singh, Advocate MrAbhishek Kumar Singh, Advocate
(In CRIMINAL APPEAL (DB) No. 192 of 2022)	
For the Appellant/s	: Mr.Mr.Ramakant Sharma, Sr. Advocate Mr.Mayank Raj, Advocate Mr.Adarsh Prasar, Advocate
For the State	: Mr.Dilip Kumar Sinha, APP
For the Informant	: Mr.Abhishek Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI
and
HONOURABLE MR. JUSTICE DR. ANSHUMAN
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)

Date : 27-02-2026

The present criminal appeals arise out of a common occurrence and have been heard together, as they challenge two separate judgments of conviction and orders of sentence passed by the learned Additional Sessions Judge-II, Jehanabad, in sessions trials arising from Kaler P.S. Case No. 31 of 2015.

2. Criminal Appeal preferred by appellant Fiddu Yadav

@ Raju Ranjan Kumar arises out of Sessions Trial No. 287 of

2016/256 of 2018, wherein judgment of conviction was delivered on 01.08.2019 and order of sentence passed thereafter.

3. The remaining appeals preferred by appellants Jalendra Yadav, Rajesh Yadav and Rambrat Yadav arise out of Sessions Trial No. 287 of 2016 along with Sessions Trial Nos. 431/2017, 98/2018 and 188/2017, wherein judgment of conviction was passed on 20.02.2019 and order of sentence subsequently.

4. Since both sets of appeals arise out of the same First Information Report, same occurrence, common evidence and involve identical questions of fact and law, they are being disposed of by this common judgment.

5. The prosecution case, as unfolded in the fardbeyan of the informant and the First Information Report, in brief, is that on 24.06.2015 at about 12:00 noon an occurrence took place near Aganur High School within the jurisdiction of Kaler Police Station in the district of Arwal.

6. The informant, Pratibhesh Pandey, stated that his father Umesh Pandey was employed as a peon at Aganur High School and was usually deployed near the school gate for safety and security. It is alleged that certain miscreants,

including one Pankaj Kumar and his associates, used to sit near the school gate armed with weapons and often indulged in objectionable activities. The deceased had objected to such conduct and had reported the matter to the local police.

7. It is further alleged that on 23.06.2015, the local police conducted a raid in connection with the said activities, which allegedly angered the accused persons. On the following day, i.e., 24.06.2015, at about noon, the accused persons including Fiddu Yadav, Jalendra Yadav, Rambrat Yadav, Rajesh Yadav and others, allegedly came armed with firearms and other weapons and in furtherance of their common object fired upon Umesh Pandey and assaulted him, causing grievous injuries. He was taken towards hospital but succumbed to his injuries on the way.

8. On the basis of the said fardbeyan, Kaler P.S. Case No. 31 of 2015 was registered under Sections 147, 148, 149, 341, 323, 504, 506, 307 and 302 of the Indian Penal Code and Section 27 of the Arms Act.

9. Investigation was taken up by the Investigating Officer who inspected the place of occurrence, recorded statements of witnesses and, after completion of investigation, submitted charge-sheet against the accused persons under

Sections 147, 148, 149, 341, 323, 504, 506, 302 and 120B of the Indian Penal Code and Section 27 of the Arms Act.

10. The case being triable by the Court of Sessions was committed to the court of learned Sessions Judge, Jehanabad, and subsequently transferred to the court of learned Additional Sessions Judge-II for trial and disposal.

11. Upon perusal of materials available on record, charges were framed against the accused persons under Sections 147, 148, 149, 302, 323, 341, 504 and 506 of the Indian Penal Code and Section 27 of the Arms Act. The charges were read over and explained to the accused persons in Hindi, to which they pleaded not guilty and claimed to be tried.

12. In order to bring home the charges, the prosecution examined altogether nine witnesses and also exhibited documentary evidence including post-mortem report, fardbeyan, formal FIR, seizure list, FSL report and material exhibits including ammunition.

13. The defence did not adduce any oral or documentary evidence and the case of the defence, as gathered from cross-examination and statements recorded under Section 313 Cr.P.C., is that of denial and false implication.

14. The principal question before the trial court was

whether the prosecution had been able to establish beyond reasonable doubt that the accused persons, being members of an unlawful assembly and in furtherance of their common object, committed the murder of Umesh Pandey by firearm and thereby committed offences punishable under Sections 302/149 IPC and allied sections.

15. In the separate trial relating to appellant Fiddu Yadav @ Raju Ranjan Kumar, the learned trial court, upon appreciation of oral and documentary evidence, held that the prosecution had been able to establish the charges under Sections 147, 148, 302 read with Section 149 IPC and Section 27 of the Arms Act.

16. The trial court found that the evidence of prosecution witnesses, particularly the family members and other supporting witnesses, coupled with medical evidence and surrounding circumstances, proved the case beyond reasonable doubt against the accused. The accused Fiddu Yadav was accordingly convicted and sentenced to undergo imprisonment for life along with fine for the offence under Section 302/149 IPC and further sentence under the Arms Act.

17. In the connected sessions trials against Jalendra Yadav, Rajesh Yadav and Rambrat Yadav, the learned trial

court, upon consideration of the same set of evidence, arrived at similar findings and held that the prosecution had been able to establish the charges under Sections 147, 148, 506 and 302 read with Section 149 IPC and Section 27 of the Arms Act.

18. The learned trial court, however, recorded that the prosecution failed to prove certain minor charges such as Sections 341 and 504 IPC and acquitted the accused of those charges, but held them guilty for the principal offences relating to rioting, unlawful assembly and murder in furtherance of common object.

19. Accordingly, all the accused persons were convicted and sentenced to undergo imprisonment for life and to pay fine, with sentences under the Arms Act and other sections directed to run concurrently.

20. Aggrieved by the aforesaid judgments of conviction and orders of sentence, the present appeals have been preferred by the appellants challenging the legality, correctness and propriety of the findings recorded by the learned trial court.

21. Since all the appeals arise out of the same occurrence, involve common questions of law and fact and were heard analogously, they are being disposed of by this common judgment.

22. The appellants have preferred the present appeals assailing the judgments of conviction and orders of sentence primarily on the following grounds:

1. That the learned trial court failed to properly appreciate the evidence on record in its correct perspective.

2. That there is no reliable eye-witness to the actual occurrence of firing and the case of the prosecution rests primarily upon hearsay and circumstantial evidence.

3. That the alleged dying declaration attributed to the deceased is oral in nature and not corroborated by any independent witness or medical officer and therefore cannot form the sole basis of conviction.

4. That independent witnesses available at the place of occurrence were not examined by the prosecution, which creates serious doubt regarding the veracity of the prosecution case.

5. That there exist material contradictions and inconsistencies in the testimonies of prosecution witnesses which have not been properly appreciated by the trial court.

6. That the prosecution has failed to establish the existence of any unlawful assembly or common object so as to attract the provisions of Section 149 of the Indian Penal Code.

7. That the appellants have been falsely implicated due to prior enmity and village rivalry.

23. On the aforesaid grounds, the appellants have prayed for setting aside the judgment of conviction and order of sentence.

24. Learned counsel appearing on behalf of the State has supported the findings recorded by the trial court and submitted that the prosecution has been able to prove the charges beyond reasonable doubt.

25. It has been contended that, The occurrence is supported by medical evidence. The Motive stands established, The deceased had named the accused persons while being taken to hospital, The Presence of prosecution witnesses at the place of occurrence stands proved and Minor discrepancies do not affect the core of the prosecution case.

26. It appears from the evidence of P.W 1 Dr. Umesh Prasad that the medical officer who conducted the post-mortem examination on the dead body of deceased Umesh Pandey.

27. He has deposed that on 24.06.2015 he was posted as Medical Officer at Sadar Hospital and on that day he conducted the post-mortem examination over the dead body of Umesh Pandey. During examination he found multiple ante-mortem

firearm injuries on the person of the deceased. He noticed firearm entry wounds on vital parts of the body including chest and head. On internal examination he found laceration of the lung and brain and accumulation of blood in the thoracic and cranial cavity. He also recovered a bullet from inside the body.

28. According to his opinion, the injuries were ante-mortem and caused by firearm. He opined that the death was caused due to shock and haemorrhage resulting from firearm injuries. He proved the post-mortem report prepared by him and his signature thereon.

29. In cross-examination, this witness stated that he did not mention the exact time since death in the post-mortem report. He also admitted that certain formal particulars such as case number were not mentioned in the report. However, he denied the suggestion that the post-mortem report was prepared in collusion with the police or that he had not properly conducted the examination. Nothing substantial could be elicited in his cross-examination to discredit his testimony regarding the nature of injuries or cause of death.

30. PW-2 Dr. Dhruv Narayan Mishra has been examined as a prosecution witness to prove the circumstances preceding and immediately following the occurrence.

31. He has deposed that on the date of occurrence, i.e., 24.06.2015, at about 12:00 noon, he was taking classes in Aganur High School. While he was inside the classroom, he heard the sound of firing, which according to him was of three to four gunshots. Due to fear, he did not immediately come out of the classroom. After about ten minutes, when he came out, he found that Umesh Pandey, the peon of the school, was lying outside the school gate in an injured condition having sustained gunshot injuries. He stated that seeing the condition of the injured, he went to the police station to inform the police. When he returned, he found that the injured had already been taken towards hospital for treatment.

32. This witness has further stated that the cause of the incident was the conduct of one Pankaj Kumar, who used to sit outside the school and allegedly harass girls. According to him, the deceased had objected to such conduct and had informed the police. He also stated that the police had arrested Pankaj Kumar on the previous day, and while being taken by the police, Pankaj Kumar had threatened the deceased. He further stated that thereafter, at about noon, the incident of firing took place.

33. In his deposition, this witness initially made

statements indicating that from the roof of the school he had seen certain persons assaulting the deceased and taking their names. However, subsequently, when confronted, he stated that he had not seen the actual firing.

34. In cross-examination, this witness admitted that at the time of firing he was inside the classroom and had not witnessed the occurrence with his own eyes. He clearly stated that he did not see who fired the gunshots. He admitted that his knowledge regarding the assailants was not based on direct perception of the occurrence.

35. PW-3 Santu Prasad Verma has deposed that on the date of occurrence at about 12:00-12:15 p.m. he was taking class inside the school. During that time he heard the sound of gunshot. According to him, after about ten minutes he along with students came outside and saw that Umesh Pandey had sustained gunshot injuries and was lying on the ground outside the school. He stated that thereafter the injured was taken to hospital and there was commotion in the school premises. He further stated that he did not know the cause of the occurrence and did not know who had fired upon the deceased.

36. As this witness did not support the prosecution case regarding identification of the assailants, he was declared

hostile and was cross-examined by the learned Additional Public Prosecutor. During cross-examination by the prosecution he denied having stated before the police that he had seen the accused persons assaulting the deceased or that he had named any of the accused as participants in the occurrence. He was confronted with his previous statement recorded under Section 161 Cr.P.C., but he did not support the same and maintained that he had not seen the actual occurrence.

37. In cross-examination by the defence, he reiterated that at the time of occurrence he was inside the classroom and had not witnessed the incident with his own eyes.

38. PW-4 Vimleshwar Singh has deposed that on the date of occurrence at about noon he was present in the teachers' room of the school when he heard the sound of firing. He came outside and saw that Umesh Pandey had sustained gunshot injuries and was lying in an injured condition. He stated that thereafter the injured was taken to hospital. He further stated that he did not know the cause of the occurrence and had not seen who had assaulted the deceased.

39. As this witness did not support the prosecution case regarding the involvement of the accused persons, he was declared hostile and cross-examined by the prosecution. During

such cross-examination, he denied having made any statement before the police implicating the accused persons. He was confronted with his earlier statement allegedly recorded during investigation, but he did not support the same and stated that he had not seen the occurrence.

40. In cross-examination by the defence, he reiterated that he had not seen the persons who had committed the assault and that he did not know who had fired upon the deceased.

41. PW-5 Vikash Kumar Pandey, son of the deceased, has deposed that on the date of occurrence at about noon he was present at Aganur High School along with his father. According to him, his father was working as a peon in the school. He has stated that while he and his younger brother were present there for collecting certain certificates and money, some persons called his father outside the gate. Shortly thereafter, some children raised alarm that his father was being assaulted.

42. He stated that he and his brother rushed towards the gate and saw that several accused persons including Fiddu Yadav, Rajesh Yadav, Rambrat Yadav and others were dragging his father outside the school gate and assaulting him. According to this witness, the accused persons assaulted his

father with fists and kicks and thereafter took out firearms. He has specifically alleged that one of the accused fired at the head of his father and thereafter other accused persons also fired, as a result of which his father fell down. Even thereafter, the accused persons continued to assault him. He further stated that after the occurrence the accused persons fled away from the place of occurrence.

43. He has also spoken about the motive and previous dispute relating to objection raised by his father against certain activities of the accused persons near the school premises.

44. In cross-examination, this witness was subjected to lengthy questioning. He admitted certain facts regarding his education, residence and relationship with the deceased. He was questioned regarding the exact manner of occurrence, presence of other persons and surrounding circumstances. He denied the suggestion that he was not present at the place of occurrence or that he had falsely implicated the accused persons. He also denied the suggestion that the accused persons were innocent or that he was deposing falsely due to enmity.

45. Despite lengthy cross-examination, he remained consistent on the material aspect that he had seen the accused persons assaulting and firing upon his father.

46. The testimony of PW-5 is that of a close relative of the deceased being his son. His presence at the place of occurrence appears natural and probable. His evidence provides a direct account of the assault upon the deceased and attributes specific roles to the accused persons. Though he is an interested witness, his testimony cannot be discarded solely on that ground and requires careful scrutiny.

47. His evidence finds corroboration from medical evidence regarding firearm injuries and from other surrounding circumstances. Nothing substantial has been elicited in cross-examination to discredit his presence at the place of occurrence or the core of his testimony.

48. PW-6 Vipul Kumar Pandey, another son of the deceased, has deposed that on the date of occurrence at about 12:00 noon he was present at Aganur High School along with his father and brother. According to him, he had gone there to receive certain certificates and money from his father. He stated that during that time a person came and called his father outside the school gate. His father then went outside and shortly thereafter some children raised alarm that the peon was being assaulted.

49. This witness has deposed that he and his brother

rushed towards the gate and saw several accused persons including Fiddu Yadav, Rajesh Yadav, Rambrat Yadav, Jalendra Yadav and others assaulting his father. He stated that the accused persons dragged his father outside the gate and assaulted him with fists and kicks. He further stated that thereafter some of the accused persons took out firearms and fired upon his father. According to him, the first shot was fired at the head of his father and thereafter other shots were also fired, as a result of which his father fell on the ground in an injured condition. Even thereafter, the accused persons continued to assault him and threatened the witnesses with dire consequences.

50. He further stated that after the accused persons fled away, he and others arranged a vehicle and took the injured towards hospital. He has also stated that on the way to hospital his father was uttering the names of the accused persons as the assailants. Ultimately, his father succumbed to the injuries.

51. In cross-examination, this witness was questioned at length regarding his presence at the place of occurrence, the manner in which the occurrence took place and the sequence of events thereafter. He admitted that several teachers and students were present in the school at that time. He was also

questioned regarding prior disputes and other surrounding circumstances. He denied the suggestion that he had not witnessed the occurrence or that he was falsely implicating the accused persons. He maintained that he had seen the accused persons assaulting and firing upon his father.

52. Nothing material could be elicited in his cross-examination so as to completely discredit his presence at the place of occurrence or his version regarding the assault.

53. PW-6 is also a son of the deceased and therefore an interested witness. However, his presence at the place of occurrence appears natural in view of his statement that he had gone to the school to receive certificates and money from his father. His testimony provides a direct account of the occurrence and attributes specific roles to the accused persons. His evidence also supports the prosecution case regarding the alleged oral dying declaration made by the deceased while being taken to hospital.

54. His testimony broadly corroborates the version given by PW-5 and also finds support from the medical evidence regarding firearm injuries. Though being a related witness his testimony requires careful scrutiny, it cannot be discarded solely on that ground.

55. PW-7 is the informant of the case and another son of the deceased. He has deposed that on the date of occurrence he received information regarding the assault upon his father and rushed towards the place of occurrence. Upon reaching there he found his father in injured condition having sustained gunshot injuries. He, along with others, arranged for a vehicle and took the injured towards hospital for treatment.

56. He has further deposed that while being taken to hospital his father was uttering the names of the accused persons including Fiddu Yadav, Rajesh Yadav, Rambrat Yadav and others and stating that they had assaulted and shot him. He has stated that thereafter his father succumbed to injuries during treatment.

57. He has proved the fardbeyan recorded by the police and the formal FIR drawn on its basis.

58. In cross-examination, this witness admitted that he had reached the place of occurrence after receiving information and had not witnessed the actual act of firing with his own eyes. He was questioned regarding the sequence of events, presence of other persons and circumstances under which the statement of the deceased was allegedly made. He denied the suggestion that no such statement was made by the deceased or

that the accused persons had been falsely implicated.

59. PW-8 and PW-9 are the Investigating Officers who conducted investigation of the case at different stages. They have deposed regarding the steps taken by them during investigation including visiting the place of occurrence, preparing inquest report, recording statements of witnesses, seizure of materials and submission of charge-sheet against the accused persons.

60. They have proved the formal FIR, inquest report, seizure list and other documents prepared during investigation. They have also stated that upon completion of investigation and finding sufficient materials against the accused persons, charge-sheet was submitted under the relevant sections of law.

61. In cross-examination, the Investigating Officers were questioned regarding the manner of investigation, non-examination of certain witnesses and alleged inconsistencies in statements recorded during investigation. They denied the suggestions that the investigation was biased or that the accused persons had been falsely implicated.

62. Mr. Ajay Thakur, learned Senior Advocate on behalf of the appellant Rajesh Yadav in Criminal Appeal (DB) No. 329 of 2019 submits, at the outset, that Rajesh was not named

in the FIR. The evidence on record is not clear how name of Rajesh transpired during investigation of Kaler P.S. Case No. 31 of 2015 dated 24th of June, 2015. However, it transpires from the evidence of the Investigating Officers, namely, P.W. 8 and P.W. 9 that Rajesh Yadav was booked in connection with above-mentioned case as an accused on the basis of his statement admitting the guilt before P.W. 8. It is needless to say that any statement before the Police is not admissible in evidence and shall not be proved as against the person accused of any offence under Sections 25 and 26 of the Indian Evidence Act. Therefore, the above-named accused was implicated in this case on the basis of inadmissible evidence except the alleged confessional statement recorded by P.W. 8. Prosecution failed to produce any incriminating evidence against the accused Rajesh Yadav. Therefore, he was wrongly convicted by the Trial Court.

63. Mr. Thakur further submits that from the evidence of P.W. 2 Dr. Dhruv Narayan Mishra who was the headmaster of Aganur High School, it is ascertained that on 24th of June, 2015 at about 12:00 noon he was taking class, he heard three or four sounds of firing. He could not immediately come out of his class out of fear to see the incidence. About 10 minutes after he heard

the sounds of firing, he came out of the premises of the school and found Umesh Pandey, Guard of the said school lying being hit by gunshot injuries in a critical situation. Then he went to Police Station to inform the matter. When he returned the school, he found that the sons of Umesh Pandey had already taken him to the hospital by a tempo for medical treatment. It is urged by Mr. Thakur that information given by P.W. 2 in the Police Station was first information about the incident. It is the duty of the Police to record such information that discloses cognizable offence and to register FIR on the basis of the said information. It is not necessary that in the initial statement, the informant is required to state the name(s) of the assailants. However, Police did not register FIR on the basis of information given by P.W. 2 Dr. Dhruv Narayan Mishra at the earliest point after incidence.

64. It is contended by the learned Advocate on behalf of the accused Rajesh Yadav that it is of course within the power and authority of the Police Officer of the jurisdictional Police Station not to treat a cryptic information as FIR, but, obviously, it is the duty of the Police to at least record the said information in the General Diary Entry Book of the Police Station. During trial of the case, the Investigating Officer failed to produce any record of any information submitted by P.W. 2 as to whether such information

given by P.W. 2 was in the nature of disclosing a cognizable offence on the basis of which the Police was responsible for recording FIR. Had it been so, the statement of P.W. 7 Prativesh Kumar Pandey which was recorded by Md. Shahid Ashraf, SHO, Kaler Police Station on the date of occurrence at 02:45 P.M. ought not to have been treated as FIR and such statement would have been hit by the provision contained in Section 162 of the Cr.P.C. In any case, when the Investigating Authority failed to produce the information received by them for the first time about the incident, the Court ought to hold that the Investigating Authority was withholding the first information about the incident only to suppress the actual fact and an adverse presumption may be drawn in favour of the appellants for suppression of the first information about the incident. It is open for the Court to presume, had the first information been produced, it might not implicate the accused persons / appellants.

65. It is also submitted by Mr. Thakur that amongst the witnesses, P.W. 1 is the Autopsy Surgeon; P.W. 2 is the Headmaster of the school; P.W. 3 Santu Prasad Verma; and P.W. 4 Bimleshwar Prasad Singh are two Assistant Teachers of the school who were taking class on the date and time of the occurrence. P.W. 5 Vikash Kumar Pandey and P.W. 6 Vipul Kumar Pandey are to

sons of the deceased who claimed themselves as eye-witnesses of the occurrence. P.W. 7 is the informant. It is already recorded that P.W. 8 and P.W. 9 are the Investigating Officer of Kaler Police Station Case No. 31 of 2015. P.W. 9 submitted charge-sheet against the appellants.

66. Thus, it is contended by the learned Advocate on behalf of the appellant, Rajesh Yadav, that the Trial Court recorded the order of conviction and sentence against the appellants only on the basis of the alleged eye witnesses' account of P.W. 5 and P.W. 6. P.W. 7 Prativesh Kumar Pandey is the informant but admittedly he did not see the occurrence. He came to the place of occurrence after the incident and saw his father lying drains with blood having gunshot injuries on his person. He narrated the incident in his *fardbeyan* about what he had heard from his brothers, P.W. 5 and P.W. 6.

67. In this regard, it is submitted by the learned Advocates on behalf of the appellant Rajesh Yadav that both P.W. 5 and P.W. 6, who claimed themselves as eye-witnesses of the occurrence, are interested witnesses. They claimed that on the date of occurrence at about 11:00 A.M., they came to the school to collect the school leaving certificate of their younger brother and the sum of Rs. 2500/- which was deposited in the school. It is also

learnt that the deceased received the school leaving certificate of his youngest son and a sum of Rs. 2500/- from the school authority on 23rd of June, 2015. There is absolutely no explanation that when the deceased already collected the school leaving certificate and some money which his youngest son was entitled to get why did not he brought it to his house after his duty hours on 23rd of June, 2015. On the contrary, he had kept the said document and money in the school itself. Failure to explain the above fact by the prosecution is another suspicious circumstance which the prosecution failed to explain. It is submitted by Mr. Thakur that the above story was manufactured only to show P.W. 5 and P.W. 6 as eye-witnesses of the occurrence. Since P.W. 5 and P.W. 6 are closed relatives of the deceased and they are interested in the outcome of the case, the Trial Court committed a gross error in accepting their evidence without any independent corroboration.

68. Mr. Thakur next argues that according to the prosecution case, the deceased suffered gunshot injury from a very close range. It is practically stated by the alleged eye- witnesses that one of the accused fired at the deceased touching the barrel on his body. When a person receives gunshot injury from a very close range, there would be marks of charring, blackening and singeing around the entry point of the wound but the Autopsy Surgeon did

not find any such charring, blackening and singeing around the entry wound of injury no. 2 being a gunshot injury on the right side mid auxiliary line of fourth rib opening the chest cavity with laceration of right lung with opening interior chest between nipple and sternum with corresponding exit wound. Thus, the medical evidence does not corroborate the nature of injury received by the deceased as narrated by the alleged eye-witnesses.

69. Thus, the learned Advocate for the Rajesh Yadav submits that evidence on record is not at all sufficient to hold this appellant guilty for committing offence under Section 302 read with Section 149 of the IPC and Section 27 of the Arms Act.

70. Mr. Ramakant Sharma, learned Senior Counsel on behalf of the appellant Fiddu Yadav has adopted the argument advanced by Mr. Ajay Thakur. He further submits that as per the evidence of P.W. 5 Vikash Kumar Pandey, the deceased was dragged from the school premises outside the gate by accused Fiddu Yadav, Rajesh Yadav, Pappu Yadav, Jailendra Yadav, Rambarat Singh and 2/3 unknown persons. After taking him outside the entrance gate of the school, the accused persons assaulted him by fist, blows and kicks for sometime. Thereafter, accused Fiddu Yadav, Rajesh Yadav, Pappu Yadav and Guddu brought out pistols from their waist. Fiddu Yadav first resorted to

gunshot injury upon his father on his head. Then Rajesh and Pappu assaulted him by gunshot injury. Father of P.W. 5 fell down on the ground. Thereafter also the accused persons assaulted father of P.W. 5 by fist, blows and kicks. Then all three persons fled away from the spot, riding on a black colored motorcycle. Fiddu was sitting on the middle of the motorcycle brandishing a riffle on his hand. P.W. 6 Vipul Kumar Pandey also gave the same account of incident in his deposition.

71. It is submitted by Mr. Sharma, the learned Senior Counsel on behalf of the Fiddu Yadav that the Investigating Officer did not take any attempt to recover the fire-arm with help of which, the appellant Fiddu Yadav allegedly fired at the victim. The Investigating Officer also did not take any attempt to recover the fire-arm from Rajesh Yadav and Pappu Yadav. Therefore, the nature of fire-arm was not established during trial of the case. It is found from the evidence of the Autopsy Surgeon as well as P.W. 5 and P.W. 6 that one bullet perforated the chest of the deceased having exit wound on the back of the deceased. Surprisingly enough, no empty cartridge was found from the place of occurrence. The Investigating Officer seized one fired cartridge which was recovered after post-mortem examination. The said fired cartridge was not sent to a FSL or to any Ballistic Expert to

get the scientific opinion as to whether the injuries caused to the deceased were actually caused by the seized cartridge.

72. In view of such anomalies, the appellant Fiddu Yadav was entitled to get benefit of doubt.

73. Learned Counsels on behalf of the appellant Rambarat Singh and Jailendra Yadav adopted the argument advanced by Mr. Thakur and Mr. Sharma.

74. The learned Advocate on behalf of the State/respondents, on the other hand, supports the impugned judgement, stating, inter alia, that the appellants were convicted on the basis of the eye-witnesses' account. There is no reason to disbelieve P.W. 5 and P.W. 6 only because they are sons of the deceased. During cross-examination of the above-named two witnesses, the defence even did not suggest that they had enmity with the appellants or that they falsely implicated them in a false case. Therefore, there is no reason to take any alternative decision against the appellants.

75. We have duly considered the submissions made by the learned counsels for the appellants and the State/respondents.

76. It is found from the record that initially accused Rajesh Yadav and Jailendra Yadav were charged for the offences punishable under Sections 148, 149, 302, 323, 341, 504 and 506

of the IPC and Section 27 of the Arms Act. Subsequently, charge under the same penal provisions was framed against Rambarat Singh and thereafter Fiddu Yadav @ Raju Ranjan Kumar. The accused persons pleaded not guilty when the charge so framed, was read over and explained to them. Therefore, trial of the case commenced.

77. On perusal of the impugned judgement, this Court finds that the appellants were convicted and sentenced to suffer imprisonment for life for the offence punishable under Section 302 read with Section 149 of the IPC and also to pay fine of Rs. 10,000/-, in default, further rigorous imprisonment for one year each. They were also sentenced to suffer rigorous imprisonment for three years with fine of Rs. 5,000/- each, in default of payment of fine fuhrer rigorous imprisonment six months each for the offence under Section 27 of the Arms Act by two separate judgement dated 21st of February, 2019 and 2nd August, 2019.

78. It is needless to say that Section 147 of the IPC is the penal provision for rioting. Section 148 is the penal provision for rioting with deadly weapon. Section 149 speaks about vicarious liability of every member of unlawful assembly guilty of offence committed in prosecution of common object.

79. Section 141 of the IPC defines “unlawful assembly”

as an assembly of five or more persons, if the common objection of the persons composing that assembly is:

“1. To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

2. To resist the execution of any law, or of any legal process; or

3. To commit any mischief or criminal trespass, or other offence; or

4. By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

5. By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.”

80. Thus, the ingredients of “unlawful assembly” is the number of persons forming assembly must be five or more and their common object would be to commit and act described in first to fifth of Section 141 of the IPC.

81. It is settled proposition of law that common object of

the persons composing the assembly could be formed on the spur of the moment and does not require prior deliberations. The Courts of conduct adopted by the members of such assembly; their behavior before, during and after the incident and the arms carried by them are a few basic relevant factors to determine the common object. The basic and relevant factors to determine the common object is succinctly stated in the case of **Manjit Singh v. State of Punjab** reported in **(2019) 8 SCC 529**. In this regard, the Hon'ble Supreme Court relied on its earlier decision in **Sikandar Singh v. State of Bihar** reported in **(2010) 7 SCC 477** in paragraph 14.3 and 14.4 which runs as hereunder:-

“14.3. We may also take note of the principles enunciated and explained by this Court as regards the ingredients of an unlawful assembly and the vicarious/constructive liability of every member of such an assembly. In Sikandar Singh [Sikandar Singh v. State of Bihar, (2010) 7 SCC 477 : (2010) 3 SCC (Cri) 417], this Court observed as under : (SCC pp. 483-85, paras 15 & 17-18)

“15. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly, and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed

in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

* * *

17. A “common object” does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The “common object” of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of

each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

18. In Masalti v. State of U.P. [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226] a Constitution Bench of this Court had observed that : (AIR p. 211, para 17)

'17. ... Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a

sense vicarious and does not always proceed on

14.4. In Subal

Ghorai Subal

Ghorai v. State of W.B., (2013) 4 SCC 607 : (2013) 2 SCC (Cri) 530] , this Court, after a survey of leading cases, summed up the principles as follows :

“52. The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines “unlawful assembly” to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in

clauses “First”, “Second”, “Third”, “Fourth” and “Fifth” of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite

often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise

of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.”

82. In the aforesaid judgement, the Hon’ble Supreme Court has sounded words of caution recording, however, the concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC.

83. Coupled with the above-mentioned principle of law enunciated by the Hon’ble Supreme Court while considering a case based on common object under Section 149 of the IPC, we may also state before discussing the factual position of this batch of appeals available from the evidences on record led by the prosecution during trial that there is no law that discards the

evidence of interested witness in respect of an incident on the ground that they are closed relatives of the deceased.

84. On the contrary, it is the common experience of the Court that specially in criminal cases, independent witnesses do not want to come forward and dispose against the accused persons out of fear. In spite of their knowledge and specific statement during investigation, they preferred not to disclose the incident during evidence and often turned hostile. It is the witnesses whose near and dear once suffered serious injury causing end of his life, do not want to falsely implicate the innocent person at the cost of the real culprits. Only caution which has been sounded by the Apex Court is that the evidence of interested witness shall be subject to close scrutiny so that some innocent person may not be held guilty for commission of offence. We may refer to the following decisions of the Hon'ble Supreme Court in support of our observation in the cases of *Gajula Venkateswara Rao v. State of A.P.* reported in (2002) 6 SCC 487, *Ram Sanjiwan Singh v. State of Bihar* reported in (1996) 8 SCC 552 and *Bhagga v. State of M.P.* reported in (2007) 13 SCC 442.

85. Bearing the aforementioned principles in mind, let us now independently considered the evidence on record. It is not in dispute that Umesh Pandey was a Guard of Aganur High

School. Indisputably, he died on 24th of June, 2015 on being hit by fire-arm. On 24th of June, 2015 at about 12:00 noon, his post-mortem was done on the same day at 03:45 P.M. at Sadar Hospital, Arwal. The Autopsy Surgeon found the following injuries on the dead body of Umesh Pandey:-

“I) A hole on right side mid axillary line 4” rib (size 1 cm) and opening of chest cavity-there is laceration of right lung with opening on Anterior chest between Nipple and Sternorn exist wound. Size 2 cm, chest cavity shows blood mixed fluid. There is no charing and blackening on entrance side.

II) A hole on near left ear size 1 cm and opening on head (vertit region) size 2 cm exit would. Brain cavity blood and blood clot present and lacerated brain materials.

III) A hole on left hand index finger size 1 cm and opening on in between index and middle finger blood and blood clot present. Exit would size 2 cm.

IV) A hole on back side 6th vertiora inernal examination - Rupture blander collection fluid and blood. Pillet is found in Shoulder: (one Pillet) and received by kaler Thana (fire arm injury) ”

86. Accordingly, death is caused by Cardio respiratory failure due to external and internal hemorrhage of brain and internal hemorrhage lungs.

87. On perusal of the post-mortem report, we find that

the deceased received three gunshot injuries. One on the head, another on the chest and the third-one on left hand index finger. Two of the wounds had corresponding exit wounds. During post-mortem examination the Autopsy Surgeon recovered one fired cartridge from his body. The said fire-arm was examined by the Ballistic Expert in Forensic Science Laboratory, Patna. In connection with Kaler P.S. Case No. 31 of 2015 dated 24th of June, 2015, the Ballistic Expert opined that the fired bullet which was sent for scientific examination was of .315 / 8 mm caliber rifle cartridge and through microscopic examination, he opined that the said bullet marked 'A' was fired from country made fire-arm designed to fire .315 / 8mm caliber rifle cartridge. Thus, it is found that at least one of the fire-arms was a country made rifle through which exhibit A was fired and it was extracted from the body of the deceased. From the evidence of P.W. 5 and P.W. 6, it is ascertained that they went to Aganur High School on 24th of June, 2015 at about 11:00 A.M. When they were collecting the certificate of P.W. 6 Vipul Kumar Pandey and sum of Rs. 2500/-, somebody called his father from outside. After a while some students raised hue and cry saying that some people was assaulting his father. Hearing this P.W. 5 and P.W. 6 rushed to the place of occurrence. Along with them, some teachers and students

also rushed to the place of occurrence. P.W. 5 saw Fiddu Yadav, Rajesh Yadav, Pappu Yadav, Guddu, Jalendra Yadav, Rambarat Singh and 2 / 3 other unknown persons were forcibly pulling him outside the gate. As soon as, he was taken outside the school premises, the said persons severely assaulted him by fists, blow and kicks. After assaulting him for a while, Fiddu Yadav, Rajesh Yadav, Pappu Yadav, Guddu brought out pistols from their waist. Fiddu Yadav fired at his head. Thereafter, Rajesh Yadav and Pappu Yadav also fired at him. Receiving three gunshots, the father of P.W. 5 fell down. Even thereafter, the accused persons assaulted him by fists, blow and kicks. Thereafter, Rajesh Yadav, Fiddu Yadav and Pappu Yadav left the place riding on a black colored motorcycle. Fiddu Yadav was brandishing a rifle while leaving the place. Other persons left the place walking.

88. P.W. 6 corroborated the evidence of P.W. 5 on all material details. It is found from his evidence that on the date of occurrence at about 12:00 noon, he and P.W. 5 were with his father. They were taking the certificate and sum of Rs. 2500/- from him. At that time, a student came and told his father that somebody was calling from outside the gate of the school. His father went to open the gate. After sometime, some students raised hue and cry that some outsiders were fighting with the father of

P.W. 5 and P.W. 6. Hearing this, they rushed to the place of occurrence and saw that Fiddu Yadav, Rajesh Yadav, Rambarat Singh, Jailendra Yadav, Guddu, Chhootu Mahto and 2 / 3 unknown persons were assaulting their father. Both P.W. 5 and P.W. 6 requested them to leave their father but they did not. On the contrary Fiddu Yadav, Rajesh Yadav, Pappu and Guddu brought out pistol from their waist and declared that they would kill Umesh Pandey because he made some allegations to the police. Then Fiddu Yadav fired at Umesh Pandey on his head. Rajesh and Pappu also fired at the chest and waist of the deceased. The father of the P.W. 5 and P.W. 6 fell down on the ground, receiving gunshots injuries, drains with blood. Even after that the accused persons assaulted him with fists, blow and kicks. They also threatened the witnesses directing them not to make any complaint to the police. Thereafter, Fiddu Yadav and his associates left the place towards Hichhin Bigha Village. After about half an hour, the brother of P.W. 5 and P.W. 6, namely, Prativesh Kumar Pandey came to the spot with a tempo and took his father with the help of same villagers to Kaler Hospital. On the way, they found an ambulance. The Medical Officer referred the injured to District Hospital, Arwal. On the way, the father of P.W. 5 and P.W. 6 were murmuring the names of Fiddu Yadav, Rajesh Yadav, Pappu

Yadav, Guddu, Choottu, Jailendra, Rambarat and etc. and was telling that they had assaulted his father. The Trial Court accepted the last part of evidence of P.W. 5 and P.W. 6 as a statement of the deceased made to the witnesses immediately before his death and it is in the nature of oral dying declaration.

89. There is no dispute on the question that a dying declaration can be the sole basis for convicting the accused. However such a dying declaration should be trustworthy, voluntary, blemish-less and reliable. In the instant case, both P.W. 5 and P.W. 6 stated in their statement In-Chief that while their father was being taken to Kaler Hospital by a tempo with the help of other local villagers, their father was murmuring the names of Fiddu Yadav and other accused persons as his assailants. P.W. 6 also deposed in the similar manner regarding his father's statement stating the names of the accused persons as his assailants. On the way to Arwal District Hospital, the deceased died. The Trial Court considered the aforesaid evidence and held that immediately before his death, the deceased made oral dying declaration implicating the accused persons while he was taken to the hospital by a tempo.

90. In *Poonam Bai v. State of Chhattisgarh* reported in *(2019) 6 SCC 145*, the Hon'ble Supreme Court held as

hereunder:-

“16. As far as the oral dying declaration is concerned, the evidence on record is very shaky, apart from the fact that evidence relating to oral dying declaration is a weak type of evidence in and of itself. As per the case of the prosecution, the deceased had made an oral dying declaration before Lalita Sahu (PW 2), Pilaram Sahu (PW 3), Parvati Bai (PW 4), and others. Though PWs 2, 3 and 4 have deposed that the deceased did make an oral dying declaration before them implicating the appellant, this version is clearly only an afterthought, inasmuch as the same was brought up before the trial court for the first time. In their statements recorded by the police under Section 161 of the Code of Criminal Procedure, these witnesses had not made any statement relating to the alleged oral dying declaration of the deceased. These factors have been noted by the trial court in its detailed judgment. Thus, the evidence of PWs 2, 3 and 4 relating to the oral dying declaration is clearly an improved version, and this has been proved by the defence in accordance with law.”

91. In ***Arun Bhanudas Pawar v. State of Maharashtra*** reported in ***(2008) 11 SCC 232***, the Hon’ble Supreme Court held in paragraph no. 25 that the oral dying

declaration made by the deceased ought to be treated with care and caution since the maker of the statement cannot be subjected to any cross-examination. In the said reported decision the alleged dying declaration had not been made to any doctor or to any independent witness, but only to the mother who arrived at the hospital only on the following day at about 3.30 p.m. when Medical Officer had already operated the deceased for his injuries and thereafter he was lying on the bed in unconscious condition with oxygen tubes having been inserted in his nostrils. The prosecution has not brought on record any medical certification to prove that after operation the deceased was in a fit condition to make the declaration before his mother. The evidence of alleged oral dying declaration by the deceased to his mother relied upon by the prosecution and accepted by the trial court and the High Court was held to be not cogent, satisfactory and convincing to hold that deceased before his death was in a fit condition to make oral declaration to his mother.

92. In the instant case, it is not in dispute that the deceased received three gunshot injuries, out of which two injuries were very serious and fatal and would cause death of a person in normal circumstance. From the autopsy report, it is

found that as a result of gunshot injury received by the deceased on his head his brain matter was lacerated. The gunshot which struck on his chest caused perforation of sternum and lungs with exit wound on the back. There is absolutely no evidence that the deceased was physically and mentally fit to make the alleged dying declaration to his sons.

93. P.W. 7 is the informant. He is one of the sons of the deceased. He brought out a tempo and took his father to hospital for medical treatment. It is obvious that if the deceased had made any dying declaration, the informant would have stated the said fact of oral dying declaration in his fardbeyan. However, in the fardbeyan, he remained silent about making of oral dying declaration by his father.

94. It appears also from the evidence of P.W. 5, P.W. 6 and P.W. 7 that they took their father to the hospital with the help of local villagers. It is obvious that if the deceased made some oral dying declaration, it would have been heard by the local villagers who accompanied the above-named witnesses to the hospital. However, the prosecution failed to examine any independent witness in support of such oral dying declaration.

95. Under such circumstances, we are of the view that the Trial Court committed gross error in appreciating the

evidence of P.W. 5, P.W. 6 and P.W. 7, so far as it relates to oral dying declaration and held the appellants guilty for committing murder of the father of the above-named witnesses.

96. The learned Advocate on behalf of the appellants voluntary raised a question as to why the information made by the headmaster of the school, P.W. 2 to the Police was not treated as a complaint under Section 154 of the Code of Criminal Procedure.

97. It is also contended by the learned Advocate on behalf of the appellants that the prosecution purposefully suppress the initial statement about the incident made by the P.W. 2. In such circumstances, the accused persons are entitled to get an adverse presumption to the effect that had the first information made by P.W. 2 being brought by the prosecution, it would have disclosed some other story not involving the appellants.

98. We are not in a position to accept such argument advanced by Mr. Thakur in this regard because of the fact that on the above fact, the Investigating Officer was not cross-examined. From the evidence of P.W. 2, Dr. Dhruv Narayan Mishra, it is ascertained that he appeared at the place of occurrence after about ten minutes of the incident and found the

deceased lying in injured condition with profused bleeding from the place of injuries which he sustained by gunshots. He did not see the assailants. He only informed in the local Police Station that the gatekeeper of his school was murdered by some unknown persons. There is no procedural error, if Police does not accept such cryptic information as FIR and proceed to the spot to ascertain the facts and circumstances of receiving injury by the gatekeeper of the said school.

99. Be that as it may, from the evidence of P.W. 5 and P.W. 6, it is found that both the witnesses were present with his father at the time of occurrence. At the risk of repetition if we independently discuss the evidence of P.W. 5 and P.W. 6, it appears that P.W. 5 saw accused Fiddu Yadav, Rajesh Yadav, Pappu Yadav, Guddu, Rambrat Yadav and Jalendra Yadav and 2/3 unknown persons who were forcibly pulling their father in order to bring him outside the school premises through a mini gate. As soon as, they were successful to bring him outside school premises, they started physically assaulting him by fist, blows and kicks. After he was assaulted for few minutes, Fiddu Yadav, Rajesh Yadav, Pappu Yadav and Guddu brought out pistols from their waist. First Fiddu Yadav resorted to a gunshot injury on the head of the father of P.W. 5. Then Rajesh and

Pappu opened fire at him causing injury on his chest and left hand index finger. Receiving gunshot injuries, the injured fell down on the ground. Thereafter also the appellants assaulted him by fist, blows and kicks for about 4 to 5 minutes. Rajesh, Fiddu and Pappu leave the place by black coloured pulsar motorcycle. At the time of departure, Fiddu Yadav was brandishing his rifle. Other assailants left the place towards their village by foot. P.W. 6 also gave the same account of statement in his evidence claiming himself to the eye-witness of occurrence.

100. They also stated on oath that one Pankaj Kumar used to tease the girl students of the said high school. The deceased asked him not to tease the girls students inside the school but Pankaj Kumar did not pay any heed to the words of the deceased. The deceased also informed the matter to the Police and Police conducted raid in the said school and arrested the said Pankaj Kumar. Fiddu Yadav, Rajesh Yadav and Pappu Yadav were the associates of Pankaj Kumar. As Pankaj Kumar was arrested by Police, the appellants committed murder of the father of P.W. 5 and P.W. 6 by resorting two gunfire. The post-mortem report supports the evidence of P.W. 5 and P.W. 6 so far as the cause of the death of the father of P.W. 5 and P.W. 6 is

concerned.

101. Now the question that naturally arises for consideration as to whether the evidence of P.W. 5 and P.W. 6 is required to be ignored and discarded on the ground of interestedness.

102. It is not the law that the evidence of an interested witness cannot be accepted without corroboration. They should not be equated with that of a tainted evidence or that of a approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such but the Courts required as a rule of prudence, not as a rule of law that the evidence of such witness should be scrutinized with a little care. Once that approach is made and the Court is satisfied that the evidence of interested witness having a ring of truth, such evidence could be relied upon even without corroboration. Indeed, there may be circumstance, where only interested evidence may be available and no other or when only witnesses who deposed are the close family members of the deceased. In such cases, it would not be proper to insist that the family member should be disbelieved merely because of their interestedness. On the other hand, it is open for the Court to hold that the sons of the deceased before whose eyes the father

was killed in broad day light will not implicate a wrong person/s at the cost of real culprits.

103. Based on the reasons stated above, We have no hesitation to rely on the evidence of P.W. 5 and P.W. 6 against the accused persons.

104. In these batch of appeals, Appellants, Rajesh Yadav, Fiddu Yadav @ Raju Ranjan Kumar, Rambarat Yadav @ Rambarat Singh and Jalendra Yadav are faced trial in the Court below. The accused persons who also faced the trial along with them have not filed any appeal against the judgement passed by the Trial Court.

105. In the FIR, one Chhotu, village Kera, P.S. Daudnagar in the district of Aurangabad was named as an accused but the Investigating Officer failed to arrest the said accused and till date he did not face trial. Name of Rajesh and Pappu were not stated in the FIR. However, it is stated in the FIR that beside the named accused persons, there were 5 / 6 other persons. During investigation of the case, the name of Rajesh and Pappu transpired. Rajesh was arrested and he faced trial. Against the judgement of order of conviction and sentence, Rajesh Yadav, Fiddu Yadav, Rambarat Singh and Jailendra preferred these appeals.

106. On close scrutiny of evidence of P.W. 5 and P.W. 6, this Court finds that Rambrat Singh and Jailendra Yadv along with Fiddu, Rajesh and other accused persons in a group came to Aganur High School and all of them forcibly took away deceased Umesh Pandey out of the school gate and started to assault him by fist, blows and kicks. The Autopsy Surgeon found urinary bladder of the deceased was ruptured. However, bladder of the deceased was not ruptured as a result of any gunshot injury but it is obviously due to the result of physical assault perpetrated by the members of the unlawful assembly to the deceased. Subsequently, the deceased was murdered by gunshot injury inflicted upon him by the Fiddu Yadav, Rajesh Yadav and Pappu Yadav.

107. In view of the above finding, we hold that the Trial Court rightly convicted the appellants Rajesh Yadav and Fiddu Yadav for the offence under Section 302 of the IPC / 302 read with Section 149 of the IPC and Section 27 of the Arms Act.

108. Since this Court does not find any evidence of committing murder of the deceased by Rambrat Singh and Jalendra Yadav, except the evidence of rioting within the meaning of Section 147 and causing hurt to the deceased

punishable under Section 323 of the IPC. The appellants, namely, Rambarat and Jalendra are convicted and sentenced to suffer imprisonment for the offence punishable under Sections 147 / 323 and sentence to suffer rigorous imprisonment for one year for the offence punishable under Section 147 of the IPC with fine of Rs. 1,000/-, in default of payment of fine further simple imprisonment for a period of one month for the offence punishable under Section 147 of the IPC.

109. The above-named appellants i.e., Rambarat and Jalendra are also sentenced to suffer simple imprisonment for six months for offence punishable under Section 323 of the IPC with fine of Rs. 1,000/-, in default to suffer simple imprisonment for the offence punishable under Section 323 of the IPC.

110. The period of incarceration by appellants Rambarat Yadav and Jalendra Yadav shall be set off against the period of actual punishment.

111. The Criminal Appeal (DB) No 329 of 2019 and Criminal Appeal (DB) No. 1059 of 2019 filed by Rajesh Yadav and Fiddu Yadav are dismissed.

112. The judgement and order of conviction and sentence passed against the appellants, namely, Rajesh Yadav

and Fiddu Yadav be affirmed.

(Bibek Chaudhuri, J)

(Dr. Anshuman, J)

uttam/-

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