

A.F.R.

Neutral Citation No. - 2024:AHC:81201-DB

Reserved on 18<sup>th</sup> April, 2024

Delivered on 7<sup>th</sup> May, 2024

**Court No. - 45**

**Case :-** CRIMINAL APPEAL No. - 257 of 1981

**Appellant :-** Ayodhya And Ors.

**Respondent :-** State of U.P.

**Counsel for Appellant :-** C.S.Saran,Adya Prasad Tiwari,Amar Saran,Arunesh Kumar Singh,Rajeev Chaddha,S.S.Tripathi

**Counsel for Respondent :-** D.G.A.

With

**Case :-** GOVERNMENT APPEAL No. - 757 of 1981

**Appellant :-** State of U.P.

**Respondent :-** Pyare Singh And Ors.

**Counsel for Appellant :-** A.G.A.,Sanjeev Kumar Khare

**Counsel for Respondent :-** T. Rathore, Anil Kumar Singh,Arunesh Kumar Singh,Devendra Singh,Gyan Prakash Singh,P.K. Singh,Rajeev Chaddha

**Hon'ble Rajiv Gupta,J.**

**Hon'ble Shiv Shanker Prasad,J.**

**(Delivered by Hon'ble Shiv Shanker Prasad, J.)**

1. Both the Criminal as well as Government Appeals are directed against the impugned judgment dated 21<sup>st</sup> January, 1981 passed by the II Additional District & Sessions Judge, Gorakhpur in Sessions Trial No. 205 of 1980 (State Vs. Ayodhya & 6 Others), arising out of Case Crime No. 36 of 1978, under Sections 147/148/149/302 I.P.C., Police Station-Ghughuli, District-Gorakhpur, whereby accused-appellants Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji, have been convicted for offence

under Section 147 I.P.C. and Section 302 read with Section 149 I.P.C. and have been sentenced to two years rigorous imprisonment for commission of offence under Section 147 and life imprisonment for commissioning of offence under Section 302 read with Section 149 I.P.C., with an observation that both the sentences were to run concurrently, whereas the accused- Pyare and Chhotkoo have been acquitted for all charges alleged against them.

2. Since the basic facts, issues and the judgment of the trial court are similar and common, both criminal appeals have been clubbed and heard together and the same are being decided by this common judgment.

3. We have heard Mr. J.P. Tripathi, learned A.G.A. for the State, Shri P.K. Singh and Mr. Gyan Prakash Singh, learned counsel for accused-respondents in Government Appeal and Mr. Rajeev Chaddha and Arunesh Kumar Singh, learned counsel for accused-appellants in criminal appeal as well as perused the entire material available on record.

4. The present case proceeds on a written report of the informant/P.W.-1 Naik (Exhibit-ka-1) dated 23<sup>rd</sup> September, 1978, wherein it has been stated that he was resident of village Nebuiya Tola Dusadhi Bari. Sister of accused Ayodhya, namely, Sitabi having a bad character was resident of same village. There was rumour/discussion about illicit relationship of Sitabi with informant's son i.e. deceased Ganga and other villagers, namely, Pyare Singh and Chhotku Baba etc. Sister of accused Ayodhya, namely, Sitabi fled away somewhere three-four days ago. The accused Ayodhya and others suspected that the deceased enticed away Sitabi. Due to the said grudge, on the night of 22<sup>nd</sup> September, 1978 at around 9 p.m, the accused Ayodhya and his associates, namely, Pyare Singh, Chhotku, Ramjeet, Lakhan, Sanhu and Chhangur having consensus opinion and having been armed with lathi (sticks) and spears came at the doorstep of the informant and started asking

him as to where his son Ganga was, on which the informant replied that his son went to the place of his relative at Pipara. Just in the meantime when the conversation between the informant/P.W.-1 and accused Ayodhya was being exchanged, his son Ganga came with his relative, namely, Mahajan resident of Sakin Pipra, Police Station Shyam Deukha and suddenly the accused persons pounced on his son and started beating him and dragging him towards accused Ayodhya's house. On this, the informant, his wife Jaleba and his relative Mahajan also followed and reached at the doorstep of the accused Ayodhya for saving Ganga. At the doorstep of accused Ayodhya, all the accused persons started beating Ganga mercilessly by sticks (lathi) and spears, due to which deceased Ganga sustained injuries and fell down. On the alarm being raised by the informant, so many persons of the village including Kanhai and Sita Ram also arrived flashing their torches. The accused Ayodhya and the accused Pyare had pressed the throat of Ganga and the other accused persons wielded sticks (lathis) and spears at him. The son of the informant Ganga died instantly there. With the help of witnesses, the accused Ayodhya was caught on the spot, whereas the other accused persons succeeded in running away. The dead body of his son Ganga was lying at the doorstep of accused Ayodhya throughout the night.

5. The next morning, first informant Naik went to the police station Ghughuli, which was at a distance of about 7 miles from his village and lodged first information report on 23<sup>rd</sup> September, 1978 at 7.30 A.M. on the basis of his written report (Exhibit-Ka/1) dated 23.9.1978. After that, Head Constable Brijraj Yadav prepared the chik report. The head constable also re-arrested the accused Ayodhya, who was brought by the informant and the village Chaukidar at the police station. The blood stained Kurta worn by the accused Ayodhya was taken into custody and recovery memo (Exhibit-ka/14) in that regard has been prepared by the Head Constable. The case was entered in General Diary

No. 11 at 7.30 A.M. (Exhibit-Ka/13). The Investigating Officer/P.W.-3, namely, Devendra Kumar Singh started the investigation on 23<sup>rd</sup> September, 1978 and interrogated the accused Ayodhya at the police station. Thereafter the Investigating Officer/P.W.-3 proceeded for the place of occurrence and took into possession the dead body of the deceased Ganga from the house of the accused Ayodhya. The inquest (Exhibit-Ka/2) was prepared on the same date i.e. 23<sup>rd</sup> September, 1978 at 10.00 A.M and ended at 12:05 P.M. on the same date. The Investigating Officer/P.W.-3 also prepared the Khaka Lash( Exhibit-Ka/3) and Challan Lash (Exhibit-Ka/4). The dead body of the deceased was handed over in a sealed cover to constable Sharda Lal Srivastava for being taken to mortuary. A letter (Exhibit-Ka/5) requesting the Medical Officer to conduct the post-mortem examination of the dead body of the deceased was also prepared and sent. The Investigating Officer also collected the blood-stained earth and plain earth from the place where the dead body was lying and recovery memo in that regard was also prepared (Exhibit-Ka/ 6). Two recovery memos Exhibits Ka/7 and 8 were also prepared for the torches, which were produced by the witnesses Kanhai and Sita Ram. On the same date the Investigating Officer prepared the site-plan (Exhibit Ka/9) showing the house of accused Ayodhya and the place where the dead body was found lying. The Investigating Officer/P.W.3 also recorded the statements of the informant/P.W.-1 Naik, his wife Jaleba, his relative Mahajan and other witnesses at the spot. All other accused persons ultimately surrendered in the court.

6. The post-mortem has been conducted by Dr. A.P. Singh (P.W.-4) on 24<sup>th</sup> September, 1978 at 12:30 p.m. and in the post-mortem report (Exhibit-ka/11), the cause of death of the deceased has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

*"1. Lacerated wound 1" x 1/4" x bone deep on left side head, 3 1/2" above the left ear.*

2. *Contusion 1 1/2" x 1" on left upper lid.*
3. *Abressed contusion 1" x 1/2" on right eyebrow.*
4. *Abressed contusion 1" x 1" on right side of face just below eye.*
5. *Contusion swelling 4" x 1" on part of neck middle.*
6. *Incised wound 1" x 1/2" x 2" on back of left upper arm, 3" above elbow joint, direction from back to front.*
7. *Incised wound 1" x 1/2" x 1 1/2" on back of left forearm, 2" below the elbow joint, direction from back to front.*
8. *Multiple contusion area of 8" x 4" on back of right upper arm.*
9. *Multiple contusion area of 4" x 3" on back of right forearm just above wrist joint.*
10. *Contusion 3 1/2" x 1 1/2" on right iliac fossa.*
11. *Contusion 2" x 2 1/2" on outer aspect of left thigh middle.*
12. *Incised wound 1" x 1/2" x 1 1/2" on front of left leg, 3" below knee joint.*
13. *Incised wound 1" x 1/2" x 1 1/2" on front of left leg, 2" below injury no. 12*
14. *Incised wound 1" x 1/2" x 1/2" on front of left leg, 3" below injury no.13*
15. *Incised wound 1/2" x 1/3" x 1/2" on front of left leg, 1" below injury no. 14.*
16. *Incised wound 1" x 1/2" x 1 1/2" on front of right leg, 2" below ankle joint.*
17. *Multiple contusion on area of 6" x 4" on front of right leg, 2" below knee joint.*

*18. Contusion 4" x 1" on front of left thigh, 3 1/2" above knee joint.*

*19. Contusion 5 1/2" x 1" on outer aspect of right thigh, 2" above knee joint.*

*20. Multiple contusion on area of 12" x 12" on back both side just below neck root."*

7. After conclusions of the statutory investigation under Chapter XII Cr.P.C.. P.W.-3 has submitted the charge-sheet (Exhibit-Ka/10) against all the accused persons, namely, Ayodhya, Chhotkoo, Pyare, Ramji, Sanhu, Lakhan and Chhangur on 17<sup>th</sup> October, 1978.

8. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 10<sup>th</sup> September, 1980, the concerned Court framed following charges against the accused-persons:

*"CHARGES*

*I, G. Chandra, II Addl. District and Sessions Judge, Gorakhpur, hereby charge you Ayodhya, Pyare Singh, Chhotkoo, Ram Ji, Lakhan, Sanhoo and Chhangur as follows:-*

*Firstly, that you, on 22.9.1978, at about 9.00 P.M., at village Nebuiya, Tola Dusadhi Bari, P.S. Ghughuli District Gorakhpur were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, viz., in committing the murder of Ganga, committed the offence of rioting and there by committed an offence punishable u/s. 147,1.P. C., and within my cognizance.*

*Secondly, that you, on the aforesaid date, time and place, were a member of an unlawful assembly, in prosecution of the common object of which, did*

*commit murder by intentionally or knowingly causing the death of Ganga, and thereby committed an offence punishable under section 302 read with section 149, I.P.C., and within my cognizance. And I hereby direct that you be tried by me on the said charges."*

9. The charges were read out and explained to the accused persons in Hindi, who pleaded not guilty denying the accusation and demanded trial.

10. The trial started and the prosecution has examined six witnesses, who are as follows:-

1	Naik (complainant) (father of the deceased)/eye witness as per the prosecution	P.W.-1
2	Mahajan (relative of the informant/P.W.-1)/another eye witness as per the prosecution	P.W.-2
3	Devendra Kumar Singh/Investigating Officer, the then Station House Officer, Police Station-Ghughuli, District-Gorakhpur	P.W.-3
4	Dr. A.P. Singh, the then Medical Officer, Primary Health Centre, Maharajganj, who conducted the autopsy of the deceased	P.W.-4
5	Sharda Lal, Constable, Police Station-Ghughuli District-Gorakhpur	P.W.-5
6	Brijraj Yadav, the then Head Constable, Police Station-Ghughuli, District-Gorakhpur	P.W.-6

11. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following

documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 23 <sup>rd</sup> September, 1978	Ex.Ka.-1
2	First Information Report dated 23 <sup>rd</sup> September, 1978	Ex.Ka.-12
3	Recovery memo of blood stained and plain earth dated 23 <sup>rd</sup> September, 1978	Ex. Ka.-6
4	Two recovery memos torches which were produced by the witnesses Kanhai and Sita Ram dated 23 <sup>rd</sup> September, 1978	Ex. Ka/7 & 8
5	Recovery memo of Kurta, which was taken into possession from accused Ayodhya dated 23 <sup>rd</sup> September, 1978	Ex.Ka.-14
6	Copy of the G.D. entry about the first information report	Ex.Ka.-13
7	Panchayatnama (Inquest Report)	Ex.Ka.-2
8	Khakha Lash and Photo Lash	Ex.Ka.-3 & 4
9	Letter written to the Chief Medical Officer for getting the post-mortem of the deceased conducted	Ex.Ka.-5
10	Post-mortem report dated 24 <sup>th</sup> September, 1978	Ex.Ka.-11
14	Charge-sheet original dated 17 <sup>th</sup> October, 1978	Ex.Ka.-10
15	Site plan with index dated 23 <sup>rd</sup> September, 1978	Ex.Ka.-9

12. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused



Chhotkoo, Pyare, Ramji, Sanhu, Lakhan and Chhangur, while giving their statements in the Court, denied the prosecution evidence and stated that they have been falsely implicated on account of harbouring grudges. The accused persons had also taken a plea that they had been implicated falsely due to the election rivalry of Pradhan. The accused Ayodhya, while giving his statement in the Court of Session u/s.313, Cr.P.C., also denied the entire prosecution evidence. He further stated that the informant Naik and the Pradhan Vidya Singh were very close to each other and that he did not cast his vote in favour of Vidya Singh in the election rivalry of Pradhan. He further stated that he had accompanied the informant Naik to Maun Nala' where the dead body of Ganga was lying. Naik took the dead body and carried it to his (Naik's) house. Naik took him (accused Ayodhya) to the police station. It was at the instance of Naik that the police had taken him into custody at the police station. The accused persons did not adduce any defence evidence.

13. On the basis of above evidence oral as well as documentary adduced during the course of trial, the trial court, relying upon the testimonies of P.W.-1/Informant and P.W.-3 Mahajan that the accused Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji, all belong to the same family, had wielded sticks (lathi) and spears (Ballam) on the deceased Ganga and that the deceased died instantaneously on the spot as a result of injuries caused by them, has come to the conclusion that the case against those accused persons is fully established for the offence under Section 147 and Section 302 read with Section 149 I.P.C. As such, they have been sentenced to undergo two years rigorous imprisonment for the offence under Section 147 I.P.C. and life imprisonment for the offence under Section 302 read with Section 149 I.P.C. However, the trial court under the same impugned judgment, with regard to the involvement of the accused Pyare and Chhotkoo in the alleged crime, has recorded its finding that there is no strength in the testimonies of the witnesses to show

that those accused Pyare and Chhotkoo would also have involved in committing the alleged crime, more so when they neither had any friendship with the informant/P.W.-1 nor they had any foeship against the deceased Ganga. The trial court had further recorded that though in the first information report lodged on the basis of written report given by the informant/P.W.-1, specific role has been attributed to the accused Pyare of throttling the neck of the deceased Ganga along with accused Ayodhya but in their testimonies, P.W.-1 and P.W.-3 did not at all state that the accused Pyare had played any part in the alleged crime. The trial court has also observed that on the basis of such finding, the prosecution has failed to prove the guilt of the accused Pyare and Chhotkoo successfully in commissioning of the alleged crime. As such the trial court has given benefit of doubt to the accused Pyare and Chhotkoo and resultantly, the trial court has acquitted both the accused.

14. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellants has preferred the present Criminal Appeal, whereas the State of U.P. has preferred the present Government Appeal against the impugned judgment of acquittal of accused Pyare and Chhotkoo by the trial court.

15. Assailing the impugned judgment and order of conviction, the learned counsel for the accused-appellants in present criminal appeal has advanced following submissions:

(i) The alleged occurrence happened on 22<sup>nd</sup> September, 1978 at 09:00 p.m. (night), whereas the first information report was lodged on 23<sup>rd</sup> September, 1978 at 7 to 8 a.m. (morning), meaning thereby that there is delay of 10 to 11 hours in lodging of first information report for which no plausible explanation has been given making the prosecution case doubtful.

(ii) On the date and time of alleged incident, there was no source of light so as to identify the accused, who have committed the alleged crime.

(iii) P.W.-2 Mahajan, who is stated to be relative of the informant is a chance witness and not an eye witness. His testimony that on the date of incident, he came along with the deceased to drop him at his house is also doubtful. Since deceased was a major person and not a minor, therefore, it is impossible to believe as to why P.W.-2 accompanied the deceased when he was returning to his home.

(iv) As per the prosecution version, the accused persons have assaulted the deceased with lathi (sticks) and spears (Ballam) but during the course of investigation, no recovery of any weapon was made from any of the accused persons.

(v) As per the version of the first information report as well as the testimony of P.W.-1, at the door of accused Ayodhya, when the accused persons were assaulting the deceased, on shouting of the informant/P.W.-1 so many persons of the village including Kanhai and Sita Ram also arrived flashing their torches and recovery memos of the torches of Kanhai and Sita Ram have also been prepared and exhibited. However, both Kanhai and Sita Ram have not been examined as prosecution witnesses during the course of trial.

(vi) Neither the place i.e. front of house of P.W.-1, initially where the accused persons have assaulted the deceased with lathi and spears, when he returned from his relative place along with P.W.-2 has been marked by the Investigating Officer in the site plan nor any blood stain earth or plain earth has been collected by the Investigation Officer while preparing the recovery memo.

(vii) As per the post mortem report of the deceased, no stab wound has been found on the body of the deceased whereas

according to the prosecution witnesses, the accused have assaulted the deceased by lathi and spears.

(viii) The watchman/village chowkidar, who is alleged to have guarded the body of the deceased throughout the night till morning, has not been examined during the course of trial.

16. On the cumulative strength of the aforesaid submissions, learned counsel for the accused appellants submits that the impugned judgment and order of conviction cannot be legally sustained and is liable to be quashed.

17. Following submissions have been made by the accused-respondents in the present Government Appeal in order to support the judgement of the trial court:

In the murder case of one Ram Parikhan Singh, Vidya Singh was an accused. Though it is not clear from the record as to whether he was convicted or acquitted in the said case but it crops up from the record that he was in jail for some period in the said murder case. Vidya Singh who was friend of P.W.-1 was also village pradhan and accused Pyare had not cast his vote in favour of Vidya Singh. Sundar Singh i.e. father of the accused Pyare Singh was also a witness in the murder of Ram Parikhan Singh and that is why there was direct inimical relations between the family of Pyare Singh and Vidya Singh along with P.W.-1. The accused Pyare Singh and Chhotkoo were neither the family members of other accused Ayodhya and others nor they had any concern with their family. Because of inimical relations with Vidya Singh, they have been falsely implicated in the present case.

18. On the cumulative strength of the aforesaid submissions, learned counsel for the accused-respondents submits that since this is not a case of direct evidence and there are major contradictions and inconsistencies in the prosecution evidence oral as well as documentary, produced during the course of trial, impugned judgment and order of conviction does not suffer from

any illegality and infirmity so as to warrant any interference by this Court. As such the Government Appeal filed by the State is liable to be dismissed.

19. On the other-hand, learned A.G.A. for the State in reply to the submissions made by the learned counsel for the accused-appellants have made his point wise submissions.

(i) To the first submission made by the learned counsel for the accused-appellant regarding delay in lodging of the first information report, it is submitted that the delay has satisfactorily been explained by the prosecution. In the cross-examination, P.W.-1 has stated that the villagers advised him that the accused persons who ran away, had come and were hiding here and there and if the informant and other villagers would go to the Police Station for lodging of the first information report, in their absence, the remaining accused persons could take away the accused Ayodhya along with them, who was caught from the spot and other accused would succeed to run away. P.W.-1 has also stated that since it was already late in the night and the dead body also had to be guarded, as such, they did not go to file the report at night and waited for the morning.

(ii) Qua the second submission made by the learned counsel for the accused-appellants, learned A.G.A. submits that since all the accused were of the same village of informant/P.W.-1 and were well known, they could be identified at night easily. Apart from the above, it is submitted that in the torch lights of several people along with Kanhaiya and Sita Ram, who came to the spot on shouting of informant, the accused persons have been identified by the prosecution witnesses. The recovery memos of the torches of Kanhaiya and Sita Ram have also been exhibited.

(iii). So far as the third submission made by the learned counsel for the accused-appellants that P.W.-2 Mahajan is a chance witness is concerned, it is submitted that P.W.-2 is not a chance but an eye witness of the alleged crime. In his cross-examination,

he has specifically stated that on the date of incident the deceased went to his relative place and reached the place of P.W.-2 and requested him to drop him to his house and on his request, he came to his house along with him. He is thoroughly consistent in his examination-in-chief as also in his cross-examination. His testimony has also been supported by P.W.-1 in his testimony. There is no inconsistency in testimonies of both eye witnesses i.e. P.W.-1 and P.W.-2.

(iv) Qua the fourth submission made by the learned counsel for the accused-appellants that as per the prosecution case, all the accused persons have caused injuries to the deceased by sticks (lathi) and spears but no recovery has been made from any of the accused persons, which cast a dent in the prosecution version, learned A.G.A. submits that since the prosecution version that the accused persons assaulted the deceased by lathi (sticks) and spears has been supported by the testimonies of eye witnesses i.e. P.W.-1 and P.W.-2 and the post-mortem report of the deceased, non recovery of any weapon from any of the accused persons would not affect the credibility of the prosecution witnesses. It was failure on the part of the Investigating Officer that he has not made any recovery of any weapon from any of the accused for which no benefit can be extended to the accused-appellants.

(v) So far as the fifth and eighth submissions made by the learned counsel for the accused-appellants that non examination of eye witnesses, namely, Kanhaiya and Sita Ram in whose torch lights, the accused have been identified and also the village chowkidar, who guarded the dead body of the deceased throughout the night, as per the version of the first information report is concerned, it is submitted by the learned A.G.A. that same does not prevail over the clinching evidence produced by the prosecution by way of testimonies of eye-witnesses, namely, P.W.-1 and P.W.-2, which has been fully supported by the medical evidence.

(vi) It is submitted by the learned A.G.A. that the sixth submission made by the learned counsel for the accused-appellants that since the Investigating Officer has not made any recovery memo of the blood stain earth and plain earth from the place i.e. front of the house of the informant/P.W.1, where initially, the accused persons assaulted the deceased by lathi and spears as soon as he reached thereafter from his relative place along with P.W.-2 nor the Investigating Officer marked the said place in the site plan, which makes the prosecution case doubtful, has also no relevance, as at that time, where the deceased was not seriously injured and no blood was coming out from his body. Even otherwise, the Investigating Officer has collected the blood stain earth and plain earth from the place i.e. front of the house of accused Ayodhya, where the deceased was seriously injured and ultimately has been done to death and he has also prepared their recovery memos, which have been exhibited and has also marked the said place in the site plan.

(vii) To the seventh submission made by the learned counsel for the accused-appellants that since no stab wound has been found on the body of the deceased as per the post-mortem report, the entire prosecution case is doubtful, learned A.G.A. submits that according to the prosecution case the accused persons assaulted the deceased by lathi (sticks) and spears, which is duly supported by the post mortem report on the ground that if a person assaulted with a stick and a spear, he will not get the same injury as if he is assaulted with a knife like stab wound.

20. On the basis of the aforesaid submissions learned A.G.A. submits that as this is a case of direct and clinching evidence, the testimonies of eye witnesses, namely, P.W.-1 and P.W.-2 who are consistent throughout in their examination-in-chief and the cross-examinations are credible in the facts and circumstances of the case and they have disclosed about the commissioning of the offence of murder of the deceased Ganga and the same has also been supported by the medical evidence and the police evidence,

therefore, trial court has not committed any error in recording conviction of the accused-appellants under Section 147 and 302 read with Section 149 I.P.C. As such the appeal filed by the accused-appellants, who committed heinous crime by murdering the deceased Ganga is liable to be dismissed.

21. In reply to the submissions made by the learned counsel for the accused-respondents in Government Appeal, learned A.G.A. submits that the prosecution has fully established its case beyond reasonable doubt against the accused-respondents by oral as well as documentary evidence but the trial court has not examined the same and passed the impugned judgment of acquittal of accused Pyare and Chhotkoo only on the argument raised by the defence counsel before the trial court, which is per se illegal and is liable to be quashed. The learned A.G.A. further submits that in support of the above argument, learned counsel for the accused-respondent has failed to produce any documentary as well as oral evidence before this Court as well as trial court. There exist direct evidence against the accused Pyare and Chhotku by way of testimonies of P.W.-1 and P.W.-2. As such the Government Appeal filed by the State is liable to be allowed reversing the impugned judgment of the trial court and convicting and sentencing them for the offence under Section 147 I.P.C. and Section 302 read with Section 149 I.P.C. as to when other five accused have been convicted on the same evidence, how could these two accused go scot free.

22. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

23. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law or it suffers from infirmity and perversity.



24. Before entering into the merits of the case set up by the learned counsel for the accused-appellant and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

25. P.W.-1/informant Naik , who is the father of the deceased Ganga, has stated in his examination-in-chief that the accused Ayodhya, Chhangur, Lakhan, Sanhu and Ramjit belong to the same family, whereas the accused Pyare and Chhotkoo are their associates. The name of sister of accused Ayodhya is Sitaabi. Sitaabi's behavior was not good, she had an illicit relationship with the deceased Ganga. Two years ago, murder of the deceased took place. Sitaabi ran away from the village four days prior to the incident and the deceased also ran away from his home. The accused Ayodhya and others tried to search Sitaabi but she was not traced. Ayodhya and others suspected that the deceased had taken away Sitaabi along with him and showed their serious displeasure towards the deceased. Further P.W.-1 has reiterated the same version as unfolded in the first information report.

26. In the cross-examination it has been submitted by P.W.-1 that the father of the accused Pyare is Sundar Singh and nephew of Sundar Singh is Satveer Singh. Bidya Singh is the relative (Pattidar) of the aforesaid persons. Sunder Singh was not the relative (Pattidar) of Ram Parikhan Singh, who was murdered in which Vidya Singh and others were implicated. He did not know whether Vidya Singh was convicted in that case or not but he was imprisoned. He also did not know whether Sunder Singh was pursuing the said case against Vidya Singh. Vidya Singh was the Pradhan of the village. There was no enmity between Vidya Singh and Sundar Singh, and they used to talk. Consolidation cases were pending between Satveer Singh and Vidya Singh.

27. It has been further stated by this witness that Sitaabi had four brothers. Initially Sitaabi was married in Pakdi and then she

started living with Vanshraj resident of her village. The name of her first husband was not known to him. Vanshraj has three boys and one girl. The name of Sitaabi's eldest son is Sudarshan. Sitaabi's two sons and one daughter were married. At the time of the incident, Sitaabi's son had already given birth to a daughter. Sudarshan's daughter was 3 years old at the time of the incident. Sitaabi's husband Vanshraj was working in Dhanbad coal mine at the time of the incident. Sitaabi lived with her husband in Dhanbad. He did not know as to whether Sitaabi has filed any affidavit in this case or not. Other brothers of Sitaabi are Beni, Mangroo and Brijlal and they had also come at the time of the incident but they were not involved in the alleged crime. He did not disclose the names of the aforesaid brothers of Sitaabi to the Investigating Officer because they were not involved. He only disclosed the names of those persons who had actually killed the deceased, to the Investigating Officer.

28. Again this witness has stated that his son Ganga (deceased) was married but his wife had died a year before the incident. The characters of both Ganga and Sitaabi were bad. He did not know which woman was related to Ganga. When Ganga left his house since 3 to 4 days, he did not make any effort to search him as he had gone to his relative place at Pipra. At the time of the incident, he was sitting on the outer porch of his house. The accused came to his door but did not come to his porch. Even his son Ganga and his relative Mahajan (P.W.-2) could not come to his porch. When his son came to the door, the accused started beating him with a stick only for a minute but none of the accused hit the deceased at his door with a spear. There was no blood on his door. His son Ganga was hanged by the accused from his hands and legs and taken along with them. Two accused caught the hands of the deceased and two caught his legs. When the informant/P.W.-1, his wife and P.W.-2 Mahajan reached the door of accused Ayodhya, his son Ganga was on the ground and the accused were beating him. He first saw from a distance of two steps that the accused were beating his son at the door of accused Ayodhya. He started

screaming as soon as he saw it. At that time there was no one else there except the accused. On his alarm, people reached there. Kanhai and Sita came first on his alarm. Seeing Kanhai and Sita, the accused started running away. However, accused Ayodhya was apprehended by the informant/PW.-1 and P.W.-2 Mahajan, Sita Ram and Kanhai.

29. It has also been stated that after apprehending accused Ayodhya, he brought him to his house and made him sit there. No information was sent to the Village Pradhan. The watchman/village chowkidar had arrived shortly after the murder took place. Sita, P.W.-2 Mahajan and the people of the village had come near the dead body. Till the Police came, the same people were guarding the dead body. His wife and he stayed at their home. People advised him that the remaining six accused had returned and they were hiding here and there. If they went to the Police Station along with accused Ayodhya, they would rescue him on the way and also the dead body had to be guarded and that is why he didn't go to lodge the report at night. There were still 2 hours of night left and then he went to the police station along with the watchman and the accused Ayodhya.

30. In his cross-examination, this witness has denied that accused Pyare Singh has been falsely implicated under the influence of Vidya Singh from him. He also denied that Vidya Singh was his friend or associate. He further stated that dead body of his son remained lying at the door of accused Ayodhya till 11 o'clock on that date. From the door of accused Ayodhya, the body of the deceased was taken on a cot to Badagaon and then taken on a Dunlap. He has denied that body of the deceased was taken away from the spot much later.

31. In his examination-in-chief, P.W.-2 Mahajan, who is another eye and star witness has stated that the deceased Ganga and the informant/P.W.-1 are his relatives. Two years ago, Ganga was murdered. He had gone to his house in the morning on the day when Ganga was murdered. He left his house at 8:00 p.m. in the

evening to drop Ganga at his house and reached his house at around 9:00 p.m. in the night. When P.W.-1 along with Ganga reached his doorstep, he saw that accused Sanhu, Ayodhya, Lakhan, Chaangur, Ramjeet, Chhootkoo and Pyare having sticks (lathi) and spears were inquiring about the whereabouts of Ganga, in the meantime, he alongwith Ganga reached there. Immediately thereafter, all the accused pounced on Ganga and wielded two-three lathi blows, consequent to which he fell down. Thereafter, all the accused together dragged Ganga to the door of accused Ayodhya and when they were hitting Ganga by sticks (lathi) and spears, P.W.-2, P.W.-1 Naik and his wife reached the door of accused Ayodhya. On hearing the noise, Sita and Kanhai came there having torches in their hands and thereafter several people reached there. Seeing them coming, all the accused except accused Ayodhya, ran away but the accused Ayodhya was apprehended by them and he was brought at the doorstep of P.W.-1 Naik. When Ganga went to his house, he was wearing lungi and shirt.

32. In the cross-examination, P.W.-2 stated that on the day of incident, he just went to drop Ganga at his house but otherwise, had no specific reason to visit there. They did not carry any weapon from the village. Only on the request of Ganga, he went to drop him at his house for which he did not assign any reason. No one accompanied Ganga at his place.

33. This witness has further stated that he and Ganga were ten steps away when they overheard the accused at the door of Ganga. As soon as they saw Ganga, the assailants attacked him and they did not try to save Ganga because accused were seven in number.

34. Again this witness has stated that he knew Vidya Singh, the then Pradhan of Nebuiya village. When the Investigating Officer came to the spot, Vidya Singh also came. Before Vidya Singh, Ram Parik Singh was the Pradhan, who had been murdered before the instant incident. He did not know that father of accused Ram Pyare, namely, Sundar Singh used to represent the

prosecution case before the court concerned. He also did not know whether there is enmity between the families of Vidya Singh and accused Ram Pyare or not. He has denied that under influence of prosecution, he has implicated the accused Ram Pyare. On the day, when he went with Ganga to his house, there was no special reason for accompanying him at night. Ganga told him that he was not coming from his home, he was coming from some other place. He did not inquire from where he was coming.

35. It has been further stated that when he reached at the house of Ayodhya, he saw Ganga lying in prone position. Ganga must have been assaulted for about 3 to 4 minutes at the doorstep of accused Ayodhya. He saw Ganga's injury. Ganga sustained four injuries of spears, one on the thigh, second on the armpit, third on the spleen and fourth on the back side of head near the ear. He cannot point out as to who caused the injuries by spear to the deceased as there was seven persons, who had beaten the deceased altogether. All the accused dragged Ganga to the doorstep of Ayodhya, threw him forcefully on the ground and assaulted him. When the accused were taking Ganga at the doorstep of accused Ayodhya, then he along with first informant Naik and his wife had accompanied them there.

36. Inspector Devendra Singh, the then Station House Officer of Police Station Ghughuli is the Investigating Officer, who has been examined as P.W.-3. In his examination-in-chief, he stated that he started the process of investigation of the instant case from 23<sup>rd</sup> September, 1978. The accused Ayodhya was apprehended and brought to the police station and was detained in the lock-up of the police station. He recorded the statement of the accused Ayodhya at the police station and then left for the incident site along with relevant papers.

37. This witness has further stated that when he reached the spot of the incident, he found the dead body of Ganga lying in front of the house of accused Ayodhya. He had shown the place where he found the dead body with the symbol "A" on the site plan.

38. From the place where the dead body was lying, he collected the blood stained earth and plain earth and sealed it in different boxes. He also inspected the torches of the witnesses. He has also recorded the statements of the informant/P.W.-1, his wife Jilewa, Mahajan P.W.-2 etc. He inspected the incident site at the instance of the witnesses. He searched the accused and tried to arrest them but the accused had absconded, hence no arrest could be made. The accused in the instant case had surrendered in the court and were sent to jail on 30<sup>th</sup> October, 1978, where he recorded their statements. After completing the investigation, charge sheet (Ex. A/10) came to be submitted in the court in his writing and signature on 17<sup>th</sup> October, 1978.

39. Dr. A.P. Singh, who conducted an autopsy on the person of the deceased Ganga has been examined as P.W.-4. During the course of post-mortem, he has noted as many as 20 injuries on the body of the deceased. In his examination-in-chief this witness has stated that as per his opinion, the cause of death of the deceased was due to shock and haemorrhage caused by the injuries. He has also opined in his testimony that incised wounds could be caused by spears and contusion and abraded contusion wounds can be caused by lathi. Ganga could have died on 22nd September, 1978 at 9 o'clock during night hours. The injuries in ordinary course were sufficient to cause death.

40. Sharda Lal Constable has been examined as P.W.-5. He stated that he has taken the body of the deceased to the Mortuary for post-mortem. He identified the dead body of the deceased in the presence of doctor.

41. Sub-Inspector Brij Raj Yadav has been examined as P.W.-6. He stated in his examination-in-chief that he had prepared the chik report and made entry of the same in General Diary. He has also proved the same before the trial court. He further stated that the accused Ayodhya was brought at the Police Station by the informant/P.W.-1 and Chowkidar (watchman), who handed him over and he was detained in the police lock-up. One of the shirts

(kurtas) which was worn by the accused Ayodhya on which some blood stains were found, was taken in possession by the police and sealed.

42. Before proceeding to discuss the issues raised in these appeals we may note some background facts.

43. The incident i.e. murder of the deceased Ganga, occurred on 22<sup>nd</sup> September, 1978 at around 09:00 p.m. during night hours and his dead body was lying at the doorstep of accused Ayodhya all through the night. On the next day i.e. 23<sup>rd</sup> September, 1978, inquest and post-mortem examination of the dead body of the deceased Ganga were conducted.

44. As per the prosecution, P.W.-1/informant, namely, Naik, who was father of the deceased Ganga and P.W.-2 Mahajan, who is relative of P.W.-1/informant are the star eye witnesses.

45. Both the star prosecution witnesses i.e. P.W.-1 and P.W.-2 have specifically stated in their testimonies i.e. in their examination-in-chiefs as well as in their cross-examinations that all the seven accused with intention to kill the deceased Ganga, had first beaten him at his doorstep and thereafter they had dragged him to the doorstep of accused Ayodhya, where they had mercilessly beaten him by lathi and spears due to which he sustained serious injuries and ultimately died on the spot. There is no contradiction or inconsistencies in the testimonies of both the star prosecution witnesses. In the first information report as well as in his testimony, P.W.-1 is consistent in stating that all seven accused persons have murdered his son Ganga.

46. The relevant portion of the testimony of informant/P.W.-1 Naik qua the commissioning of the alleged offence is extracted herein below:

**(In examination-in-chief)**

"आज से लगभग 2 वर्ष हुआ रात के नव बजे का समय था। मैं अपने दरवाजे पर था। मुलजिमान अयोध्या प्यारे, छोटकू, लखन, छागुर, सन्तू और रामजीत हाजिर अदालत जो लाठी भाला लिए थे। आये और मेरे लडका गंगा के बारे गाली देकर पूछा कि कहा है तो मैंने बताया कि पिपरा रिस्तेदारी में गया है। बातचीत हो ही रही थी कि इसी में महाजन व गंगा आ गये। यह देखकर मुझे गाली देने लगे व मेरे लडके को लाठी भाला से मारने लगे। जब मेरा लडका मार खाकर गिर गया तब उसे अयोध्या आदि मुलजिमान उठा ले गये और अपने दरवाजे पर अयोध्या के दरवाजे पर लाठी भाला से मारने लगे। मैं व मेरी स्त्री भी रोती पिटते उसके पीछे गये। वहाँ पर हम लोगो ने शोर किया और हमारे शोर पर कन्हई व सीता टार्च लेकर आ गये। मेरा लडका वहीं अयोध्या के दरवाजे पर मार से उसी वक्त मर गया। मेरे गाँव के दस बीस आदमी वहाँ आ गये। मारने वाले मारना छोड़कर भागे। अयोध्या को लोगो ने पकड़ लिया शेष मुलजिमान भाग गये। अयोध्या को अपने दरवाजे पर लाया। चौकीदार को बुलाया। रात को, लाश रखाने व मुलजिम को पकड़ने के वजह से थाने पर नहीं जा पाये। इस कत्ल की दरखास्त 2 बजे रात को मैंने लिखाया। इकज० क-1 को पढकर सुनाया गया गवाह ने कहा कि वही रिपोर्ट है इसे मैंने गाँव के एक आदमी से लिखाया था यह याद नहीं आ रहा है कि किससे लिखाया था।"

### **(In cross-examination)**

"घटना के समय मैं अपने घर के बाहरी ओसारे में बैठा हुआ था। मुलजिमान मेरे दरवाजे पर आये लेकिन मेरे ओसारे में नहीं आये। मेरा लडका व महाजन भी मेरे ओसारे में नहीं आ पाये थे। जब मेरा लडका दरवाजे पर आ गया तो मुलजिमान ने लाठी से मारना शुरू किया। मेरे दरवाजे पर मुलजिमान ने एक मिनट तक लाठी से मारा। मेरे दरवाजे पर किसी ने भाला से नहीं मारा। मेरे दरवाजे पर खून नहीं गिरा था। मेरे लडके को हाथ पैर पकड़ टांग कर मुलजिमान ले गये। 2 आदमियों ने हाथ पकड़ा था। और 2 आदमी पैर पकड़े थे। मैं अपने लडके के साथ पीछे-2 नहीं गया मैं अपनी औरत को जानकर साथ में लेकर गया। महाजन भी मेरे व मेरे औरत के साथ-2 अयोध्या के दरवाजे पर गये। अयोध्या के दरवाजे पर जब हम तीनों आदमी पहुँचे तब मेरा लडका गिरा पड़ा था व मुलजिमान उसको मार रहे थे। मैं पहले पहल 2 लड्डे की दूरी से देखा कि मुलजिमान अयोध्या के दरवाजे पर मेरे लडके को मार रहे हैं। मैं देखते ही चिल्लाने लगा था। उस वक्त मुलजिमान के अलावा वहाँ और कोई नहीं था। मेरे शोर पर लोग पहुँचे। मेरे शोर पर पहले कन्हई व सीता आये। कन्हई व सीता को देखकर मुलजिमान भागना शुरू किये। अयोध्या को मैं व महाजन ने पकड़ा था। सीता व कन्हई ने भी पकड़ा था। जहाँ मेरा लडका मारा गया था वहाँ से 2 कटटा पच्छिम पर अयोध्या मुलजिम पकड़ा गया। 20 कट्टे (लड्डे) का एक बित्ता होता है। यह मुझे नहीं मालूम कि कितने हाथ या कितने कदम का एक कट्टा होता है। मैं नहीं बता सकता कि मुलजिमान हमारे घर से अयोध्या के घर ले जाने के रास्ते में मारा या नहीं मारा। मैंने रिपोर्ट में यह लिखाया था कि हमारे घर से मुलजिमान टांग ले गये। रिपोर्ट में यह लिखाया था कि घर से मारते पीटते हमारे लडके को अयोध्या के घर तक ले गये।"

47. The relevant portion of the testimony of P.W.-2 Mahajan qua the commissioning of the alleged offence is extracted herein below:

### **(In examination-in-chief)**

"आज से लगभग 2 वर्ष हुये जब गंगा का कत्ल हुआ। गंगा का जिस दिन कत्ल हुआ उस दिन सुबह वह मेरे घर गये थे। मैं अपने घर से शाम के 8 बजे गंगा को उनके घर पहुँचाने के लिये चला था और उनके घर पर करीब नव बजे रात में पहुँच गया था। हम लोग जब गंगा के दरवाजे पर पहुँचे तो देखा कि सन्तू, अयोध्या, लखन, छागुर, रामजीत, छोटकू और प्यारे लाठी व भाला लेकर नायक से पूछ रहे थे कि गंगा कहा गया। तब तक हम लोग पहुँच गये। तब वह लोग गंगा के उपर टूट पडे व 2-4 लाठी मारे, मार खाकर गंगा गिर गये। गंगा को सभी मुलजिमान मिलकर अयोध्या के दरवाजे,



पर उठा ले गये। और फिर सभी मुलजिमान हाजिर अदालत लाठी भाला से मुलजिमान को मारा। अयोध्या के दरवाजे पर पीछे 2 मै, नायक व नायक की स्त्री गई शोर पर सीता व कन्हई हाथों में टार्च लिये हुये आ गये और उसके बाद कई आदमी आ गये। और आदमियों को आते देखकर मुलजिमान भागे जिसमें से मुलजिम अयोध्या पकड़ लिये गये शेष भाग गये। अयोध्या को नायक के दरवाजे पर लाकर विठाया गया। गंगा जब मेरे घर गये थे तब लुंगी व कमीज पहने थे।"

**(In cross-examination)**

"हम लोग दस कदम पर थे जब हम लोगों ने गंगा के दरवाजे पर मुलजिमान की बातें सुनी हो। जैसे हम लोग पहुँचे वैसे ही गंगा नजर आ गये और उनपर मुलजिमान टूट पड़े। हमने गंगा को बचाने की कोशिश नहीं किया क्योंकि मुलजिमान सात आदमी थे किसी मुलजिम ने मुझपर कोई वार नहीं किया।"

.....

जब अयोध्या के घर पर पहुँचा तो गंगा गिरे हुये थे। वह मुँह के बल गिरे थे। अयोध्या के दरवाजे पर करीब 3-4 मिनट तक गंगा मारे गये होंगे। मैंने गंगा का चोट देखा। गंगा को भाले की चोट चार जगह लगी थी। जाँघ में, एक कन्धे के नीचे बगल में, एक किल्ली और एक सिर पर पीछे कान के पीछे। यह मैं नहीं बता सकता कि भाले की चोट किसने 2 पहुँचाई क्योंकि सात आदमी मार रहे थे। मुलजिमान ने गंगा को अयोध्या के दरवाजे पर ले जाकर पटक दिया व मारा था। जब लोग गंगा को अयोध्या के दरवाजे ले जा रहे थे तब मैं नायक व उसकी औरत साथ अयोध्या के दरवाजे पर गये।"

48. The post mortem report of the deceased as well as the testimony of P.W.-4 Dr. A.P. Singh, who conducted the autopsy of the deceased also supports the prosecution case. In his testimony, P.W.-4 has stated that the incised wound and contused wounds could be caused by spears and lathi (sticks), which have been used in the commissioning of alleged offence as per the testimonies of P.W.-1 and P.W.-2.

49. The accused also had motive to commit the murder of the deceased as they had suspected that the deceased Ganga had enticed away the sister of the accused Ayodhya, namely, Sitaabi because of their illicit relationship.

50. Now we may come on the merits of the submissions made by the learned counsel for the accused-appellants in Criminal Appeal, learned counsel for the accused-respondents in Government Appeal as well as the submissions made by the learned A.G.A. in both the above appeals.

51. On the basis of deeper scrutiny of the evidence oral as well as documentary led during the course of trial and as has been

discussed herein above in detail, we find substance in submissions made by the learned A.G.A. for the State in both the appeals.

52. As regards, submission made by the counsel for the accused-appellants that there is delay in lodging of the first information report, we find that P.W.1/informant has satisfactorily explained the same in his examination-in-chief as well as in his cross-examination respectively. For ready reference, the same are extracted here-under:

*"अयोध्या को लोगो ने पकड़ लिया शेष मुलजिमान भाग गये। अयोध्या को अपने दरवाजे पर लाया। चौकीदार को बुलाया। रात को, लाश रखाने व मुलजिम को पकड़ने की वजह से थाने पर नहीं जा पाये। इस कत्ल की दरखास्त 2 बजे रात को मैंने लिखाया"*

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*"लोगों ने कहा कि मुलजिमान लौट आये हैं व इधर उधर छिपे हैं। अयोध्या को थाने ले जाएंगे तो वो लोग उसे रास्ते में छुड़ा लेंगे और लाश को भी रखना है। इसीलिए रात में रिपोर्ट लिखाने नहीं गया। 2 घड़ी रात बाकी थी तब मुलजिम अयोध्या को लेकर चौकीदार के साथ मैं थाने गया।"*

53. So far as the submissions made by the learned counsel for the accused-appellant that since neither the Investigating Officer has collected any earth (blood stained earth or plain earth) from the door of the informant/P.W.-1 nor he has marked the said place in the site plan, which makes the prosecution case doubtful, is concerned, we may record that P.W.-1 and P.W.-2 have specifically stated in their testimonies that at the doorstep of informant/P.W.-1, the accused had wielded four lathi blows at Ganga and thereafter they dragged him at the doorstep of accused-Ayodhya where they wielded several lathi blows and repeatedly assaulted him with spears resulting in his instantaneous death. Therefore the main place of occurrence in the facts of the present case is the door of accused Ayodhya, which has been marked as "A" in the site plan.

54. To the submissions made by the learned counsel for the accused-appellants that P.W.-2 Mahajan, who is stated to be

relative of the informant/P.W.-1 is a chance witness and not an eye witness, we may record that he is an eye witness. He is throughout consistent in his examination-in-chief as well as in his cross-examination. He has specifically supported the prosecution case. In his testimony, he has narrated the entire incident as unfolded by P.W.-1 in the first information report as well as in his testimony. He also has sufficiently explained his presence at the place of incident, where he had accompanied the deceased Ganga.

55. To the submission made by the learned counsel for the accused-appellant that non recovery of any weapon having been made from any of the accused creates a doubt in the prosecution case, we may record that such minor discrepancy on the part of the Investigating Officer does not effect on the otherwise clinching evidence produced by the prosecution which have been discussed in detail herein above.

The Hon'ble Supreme Court in the case of **Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas & Another** reported in (2013) 12 SCC 796 has held that when there is ample unimpeachable ocular evidence and same has been corroborated by medical evidence, non-recovery of weapon does not affect the prosecution case. The relevant paragraphs i.e. paragraph nos. 33 and 34 are being quoted herein below:

*"33. The learned counsel for the respondent has urged before us that there has been no recovery of weapon from the accused and hence, the prosecution case deserves to be thrown overboard and, therefore, the judgment of acquittal does not warrant interference.*

*34. In Lakshmi and Others v. State of U.P. [(2002) 7 SCC 198 : (AIR 2002 SC 3119 : 2002 AIR SCW 3596)], this Court has ruled that*

*"Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 IPC. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it*

*would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder".*"

In **Lakhan Sao v. State of Bihar and Another** reported in [(2000) 9 SCC 82 : (AIR 2000 SC 2063 : 2000 AIR SCW 1955)], it has been opined by the Hon'ble Supreme Court that the non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable.

In **State of Rajasthan v. Arjun Singh and Others** reported in [(2011) 9 SCC 115 : (AIR 2011 SC 3380 : 2011 AIR SCW 5295)], the Hon'ble Supreme Court has expressed that:

*"18..... mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place".*

56. The submission made by the learned counsel for the accused-appellant that since no stab wound has been found on the body of the deceased therefore, the prosecution case is doubtful, has no force. Stab wound can be caused by knife or a sharp edged weapon and as per the post-mortem report of the deceased, incised and contusion wounds have been found on the person of the deceased, which can be caused by spears and lathi (sticks) respectively and the same has also been opined by P.W.4 Dr. S.P. Singh in his testimony, inasmuch as spears and lathi have been used in the alleged crime as per the version of P.W.-1 and P.W.-2.

57. The next submission made by the learned counsel for the accused-appellants that non-examination of witnesses of first information report, namely, Kanhai and Sita Ram in whose torch lights, the accused have been identified and Chowkidar, who guarded the dead body of the deceased throughout the night at the door of accused Ayodhya, during the course of trial, cast a dent in the prosecution case, has also no force, as they are not

eye witnesses and their testimonies are not relevant than the testimonies of eye witnesses like P.W.-1 and P.W.-2, whereas recovery memos of torches were proved by the Investigating Officer (P.W.-3).

58. We have also considered the submissions made by the accused-respondents in the Government Appeal and the counter submissions made by the learned A.G.A.

59. The submissions made by the learned counsel for the accused-respondents qua false implications of accused-respondents, namely, Pyare Singh and Chhotku along with other accused in the present case because there is inimical relations between Pyare Singh and Vidya Singh, the then Village Pradhan and also the informant/P.W.-1 Naik is an associate of Vidya Singh, in whose influence, P.W.-1 has implicated them in the present case, are liable to be rejected as the defence on their behalf have completely failed to establish such plea of false implication. They have neither produced any document in that regard nor they have produced any oral evidence like defence witness to testify the said plea during the course of trial.

60. While acquitting both the accused-respondents, namely, Pyare Singh and Chhotku, the trial court has completely failed to examine the said issue. The trial court has not carefully scrutinize the testimonies of eye witnesses i.e. P.W.-1 and P.W.-2 and misread the same while recording a finding that from perusal of the testimonies of P.W.-1 and P.W.-2, the accusation of both the accused-respondents do not crop up. In his testimony, P.W.-1 has specifically stated that he is not friend or associate of Vidya Singh, the then Village Pradhan from whom, there were inimical relations of accused-respondent Pyare Singh. P.W.-1 and P.W.-2 have clearly stated in their statements before the trial court that the accused-respondents Pyare and Chhotku also actively participated in alleged crime along with other five accused, who have been convicted by the trial court on the same set of

evidence. As such the false implications of accused-respondents, namely, Pyare Singh and Chhotku has no legs to stand.

61. In view of the aforesaid facts and the findings recorded by us herein above, we are of the firm opinion that the finding of the Court below with regard to accused-appellants Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji, is correct and the guilt of the accused-appellants Ayodhya, Sanhu, Chhangur, Lakhan and Ram Ji has been proved beyond reasonable doubt by the prosecution, which is sustainable.

62. Consequently, in view of the deliberations held above the criminal appeal at the behest of appellant no.5 Chhangur stands dismissed. The appellant no.5, who is reported to be in jail, need not surrender before the Court concerned.

63. Since the appellant nos. 1 to 4, namely, Ayodhya, Ram Ji, Lakhan and Sanhu had died, the present criminal appeal at their behest have already been abated by this Court. As such, no further order is required to be passed by us qua appellant nos. 1 to 4.

64. However, after considering the facts and circumstances of the case and examining the findings recorded by the trial court in acquittal of accused-respondents Pyare Singh and Chhotku, we are of the view that the trial court has not examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has not succeeded in proving its case beyond reasonable doubt against the accused-respondents cannot be sustained. The prosecution has fully established the guilt of the accused-respondents on the basis of evidence led at the stage of trial by the prosecution. The acquittal of the accused-respondents, namely, Pyare Singh and Chhotku, is consequently, reversed.

65. Both the accused-respondents, namely, Pyare Singh and Chhoktu are accordingly convicted for the offence under Sections

147 and 302/149 I.P.C. and sentenced to two years rigorous imprisonment for the offence under Section 147 I.P.C. and life imprisonment for the offence under Section 302/149 I.P.C., like accused-appellants, who have been convicted and sentenced by the trial court under the impugned judgment.

66. The Government Appeal filed on behalf of the State is, hereby, allowed.

67. There shall be no order as to costs.

68. The Chief Judicial Magistrate, Gorakhpur shall ensure that both the accused-respondents are arrested and sent to jail for serving their sentences awarded herein above.

69. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Gorakhpur, henceforth, for necessary compliance.

(Shiv Shanker Prasad, J.)

(Rajiv Gupta, J.)

**Order Date :- 07.05.2024**

Sushil/-