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HIGH COURT OF JUDICATURE AT ALLAHABAD

CRIMINAL APPEAL No. - 1696 of 1993

Babu Khan and 7 others

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s) : Ishan Deo Giri, K.s. Tewari,
Lila Wati, Mohammad Tausif,
Mohammad Wadood,
Saddam Husain, Sadrul
Islam Jafri, Salman Ahmad,
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Counsel for Respondent(s) : Basharat Ali Khan, Abha
Pandey, D. Vaish, D.g.a., Lal
Ji Pandey, Mohd.
Samiuzzaman Khan, Obaidur
Rahman Khan, R.k. Singh,
Shri Prakash Dwivedi

Court No. - 43

HON'BLE SIDDHARTH, J.

HON'BLE VINAI KUMAR DWIVEDI, J.

holding brief of Mr. Ishan Deo Giri, learned counsel for the appellants; Mr. Zawwar Haider Naqvi, Advocate, holding brief of Mr. B.A. Khan, learned counsel for the informant; Mohd. Shueb Khan, learned AGA-Ist for State-respondent and perused the record.

2. The instant criminal appeal has been preferred by the appellants, namely, Babu Khan, Sayeed Khan, Malik Khan, Jafu Khan, Irshad Khan, Rustam Khan, Najaru Khan and Hashim Khan, respectively, against the impugned judgment and order of conviction and sentence dated 24.09.1993 passed by the learned IInd Additional Sessions Judge, Mirzapur in Sessions Trial No. 329 of 1989 (State v. Babu Khan and others), arising out of Case Crime No. 283 of 1988, under Sections 147, 148, 149, 302, 307 IPC, Police Station- Kotwali Dehat, District- Mirzapur.

3. Brief facts of the present case as narrated in the written report (Exhibit Ka-1) are that informant Fakruddin (PW-1) has got ascribed the written report from Sadaruddin S/o Sharif Khan and lodged the same at Police Station- Kotwali Dehat, District- Mirzapur. Informant Fakhruddin, S/o Mohd. Hussain Khan, is a resident of Village Chitawanpur, Post Vindhychal, Police Station Kotwali Dehat, Mirzapur. Today, on 24.10.1988, my maternal grandfather (*nana*) Jasim Khan went with Akilu to plough his field, bearing plot No. 1387. While

back right now with a gun'. On hearing about the dispute, Karimuddin, Hakimuddin, Sons of Jasim, Kallu @ Ayyub and Rahimuddin also reached the field. Babu S/o Chhedi, holding a gun in his right hand, challenged them, saying, 'Kill them, let no one escape'. At around 7:30 in the morning, Babu Khan with a gun in his right hand, and from his house Shabvir S/o Vaish Khan with a gun in his right hand, Hashim S/o Vais Khan with a gun in his right hand, Sayeed Khan S/o Vaish Khan with a gun in his right hand, Jafu Khan S/o Waheed Khan with a gun in his right hand, Irshad Khan and Alau Khan with country-made pistols (*katta*) in their right hands, Rustam S/o Bhikkhu Khan with a country-made pistol in his hand, Kallu @ Ayyub S/o Abdul Haq with country made pistol (*katta*) in his hand, Badru @ Josab with a country made pistol (*katta*) in his hand, Mahau S/o Isha with a spear (*ballam*) in his hand, Mitthoo S/o Gulfan with a country-made pistol in his hand, Ikhlauque S/o Gulam Farid with a country-made pistol in his hand, Sahabu S/o Isha Khan with a country-made pistol in hand, Malik S/o Shabvir with a gun in his hand, Istekhar S/o Kasim Khan with a country-made pistol in his hand, Riyaz S/o Munis with a spear (*ballam*) in his hand, Parvez S/o Shabvir with a spear (*ballam*) in his hand, Najaru S/o Waheed Khan arrived with a country-made pistol (*katta*) in his hand. Upon Babu's instigation, these people started firing guns and country-made pistols (*katta*) at Jasim, Akilu, Rahimu,

us, they (the attackers) again challenged us, saying, 'These people have also arrived, kill them all'. Saying this, they started firing, due to which I, Badruddin, Sharif Khan and Ashraf @ Guddu got injured. Badruddin fell down right there. Upon being challenged by the villagers, all the accused fled towards the west. All the villagers were loading us into a tractor to bring us to the police station. Upon reaching Ramai Patti, Badruddin passed away. The villagers took Kallu @ Hashim, Rahimu, Hasnain and Ashraf @ Guddu on one tractor to the hospital. I have come to the police station on another tractor along with the deceased Badruddin, Sharif Khan, Hakim, Karim, Jasim and the villagers. Please register my report and take appropriate action.

4. On the basis of the written report (Exhibit Ka-1), Constable-406, Ghurfekan Ram (PW-9), registered the First Information Report (Exhibit Ka-31) on 24.10.1988 at 9:15 A.M. as Case Crime No. 283 of 1988, under Sections 147, 148, 149, 302 & 307 IPC at Police Station Kotwali Dehat, District Mirzapur, against 18 named accused persons.

5. After registration of the First Information Report, the matter was handed over to Investigating Officer Badri Prasad Mishra (PW-12) for investigation. During the course of the investigation, the Investigating Officer prepared the *Panchayatnama* (inquest report) of the

examination. Thereafter, the dead body of the deceased was duly sealed and packed and was handed over to Constable Rajeshwar Prasad and Constable Sundar Pal Singh at the police station for being taken to the hospital for post-mortem examination. Subsequently, the Investigating Officer proceeded to the place of occurrence, recorded the statement of the informant, Fakruddin (PW-1). On the informant's pointing out, he inspected the place of the incident. During the inspection, he collected samples of plain soil and blood-stained soil from the place of occurrence and prepared a recovery memo thereof, which was exhibited as Exhibit Ka-46. He also recovered empty cartridge from the place of occurrence and prepared a recovery memo, marked as Exhibit Ka-47.

6. The Investigating Officer further prepared the site plan of the place of occurrence in his own handwriting, signed it, and proved the same as Exhibit Ka-48. During the investigation, he also recorded the statements of the prosecution witnesses under Section 161 Cr.P.C. After 27.10.1988, the first Investigating Officer was transferred, and on 30.10.1988, the investigation of the case was entrusted to the second Investigating Officer, B.B. Singh (PW-14). Upon taking over the investigation, B.B. Singh (PW-14) commenced the investigation and recorded the statements of Jasim Khan (PW-3) and other prosecution witnesses under Section 161 Cr.P.C. He also

investigation and collecting sufficient material against the accused persons, B.B. Singh (PW-14) submitted the charge sheet (Exhibit Ka-42) against accused persons, before the Court of the competent Magistrate having jurisdiction.

7. Constable Rajeshwar Prasad (PW-7), along with Constable Sundar Pal Singh, took the dead body of the deceased, Badruddin, to the mortuary for autopsy. Dr. R.K. Sood (PW-10) conducted the postmortem examination of the deceased, Badruddin, and prepared the postmortem report (Exhibit Ka-37). The following ante-mortem injuries were found on the dead body of the deceased, Badruddin:-

"(I) There were gunshot Injuries on the chest, abdomen, both hands, and face of the deceased, the sizes of which ranged from 0.25 cm to 0.25 cm. Several pellets were felt under the skin. It was found that rigor mortis had passed off from the neck but was present in the hands and legs."

"Internal Examination:- The membrane over the lung on the left side was found ruptured/torn, and two entry wounds caused by pellets were present in the left lung. The membrane over the heart was ruptured/torn at several places, and entry wounds caused by pellets were present in the left chamber of the heart. All chambers of the heart were empty. Upon examination of the Chest Cavity, about one liter of blood was found. The membrane of the stomach (Peritoneum) was ruptured/torn at one place, and about one liter of blood was also present in the stomach. The food bag (stomach bag) was

redness (congestion). The urinary bladder was half full."

The cause of death was found to be shock due to the aforementioned injuries and excessive bleeding.

8. The injured persons involved in the incident were medically examined at the District Hospital, Mirzapur. Their medical examination was conducted by Dr. Rama Kant (PW-6), who prepared their respective injury reports.

Dr. Rama Kant (PW-6) medically examined injured Hashim @ Kallu on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-29. The following injuries were noted on his person:-

"(i) Circular bluish abrasion measuring 3 x 2 cm on the left side of the front part of the chest below the left shoulder.

(ii) Multiple marks of entry/penetrating injuries on the posterior and outer part of the left forearm.

(iii) Multiple marks of penetrating wounds on the front and side of the chest and abdomen.

(iv) Situated between the collarbone and the lower abdomen/pelvis, measuring 2 x 2 cm.

(v) A penetrating wound measuring 0.2 x 0.2 cm on the front part of the right arm, 11 cm above the elbow.

(vi) Multiple entry marks measuring 0.2 x 0.2 cm on the front and inner part of the left thigh, spread over

(viii) Entry marks measuring 0.2 x 0.2 cm on the outer side of right knee, a penetrating wound of size 0.2 x 0.2 cm on the inner part of the right leg, 4 cm below the knee.

(ix) A penetrating wound measuring 0.2 x 0.2 cm in size on the inner part of the left leg, which is 11 cm above the ankle."

There were signs of oozing/bleeding in all the abovementioned injuries. The above wounds were kept under observation. All injuries were fresh and were likely to have been caused by a firearm.

Dr. Rama Kant (PW-6) medically examined the injured Hasnain on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-30. The following injuries were noted on his person:-

"(i) An oval-shaped penetrating wound measuring 0.2 cm x 0.3 cm on the front side of the left shoulder, 5 cm below the left shoulder.

(ii) Multiple penetrating wounds on the right side of the front part of the chest, spread over an area of 27 x 9 cm. The size of the wounds is 0.2 x 0.2 cm.

(iii) Multiple penetrating wounds on the dorsal side of the left thumb, index finger, and middle finger.

(iv) Multiple penetrating wounds of 0.2 x 0.2 cm size on the inner side of the left thigh, spread over an area of 9 x 5 cm, 20 cm above the knee.

(v) Multiple penetrating wounds measuring 0.2 x 0.2 cm on the inner side of the right thigh, spread over an area of 10 x 5 cm, 6 cm above the knee "

lungs. All the above wounds were kept under observation, which were fresh and likely to have been caused by a firearm.

Dr. Rama Kant (PW-6) medically examined the injured Rahimuddin on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-31. The following injuries were noted on his person:-

"(I) An abrasion measuring 1.5 x 0.2 cm on the front part of the chest, on the right side, 5 cm outwards from the right nipple.

(ii) An oval-shaped abrasion measuring 0.2 x 0.1 cm on the lower part of the right side of the front of the chest, in which a pellet is embedded and blackening is present around it, located 16 cm below the right nipple and towards the inner side.

(iii) A large number of small wounds are present on the left side of the abdomen, the sizes of which vary, located 6 cm outwards from the left side of the umbilicus.

(iv) Multiple wounds on the front and inner part of the left thigh, spread over an area of 18 x 5 cm, 6 cm above the knee.

(v) Three wounds measuring 0.2 x 0.2 cm on the outer part of the left forearm, 10 cm from the elbow.

(vi) Multiple penetrating wounds measuring 0.2 x 0.2 cm on the dorsal aspect of the left thumb.

(vii) Two wounds measuring 0.2 x 0.2 cm on the dorsal aspect of the index and middle fingers of the left hand.

respect of wound no. 2. All the above wounds were kept under observation, which were fresh and likely to have been caused by a firearm.

Dr. Rama Kant (PW-6) medically examined the injured Ashraf @ Guddu on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-32. The following injuries were noted on his person:-

"(i) Two penetrating wounds measuring 0.2 x 0.2 cm on the left cheek, in front of the left ear.

(ii) A penetrating wound measuring 0.2 x 0.2 cm on the left side of the front of the neck, 3 cm below and anterior to the angle of the lower jaw.

(iii) A penetrating wound measuring 0.2 x 0.2 cm on the left side of the front of the chest, 2 cm above and medial to the left nipple.

(iv) Two penetrating wounds measuring 0.2 x 0.2 cm on the left side of the upper abdomen, 4 cm above the umbilicus towards the left side."

No blackening, tattooing, or charring was present. An X-ray of the abdomen and chest was advised. All the above wounds were fresh and were likely to have been caused by a firearm.

Dr. Rama Kant (PW-6) medically examined the injured Jasim on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-33. The following injuries were noted on his person:-

"(i) A penetrating wound measuring 0.2 x 0.2 cm on

(iii) Two penetrating wounds measuring 0.2 x 0.2 cm on the left side of the upper part of the abdomen, spread over an area of 4 cm, located 11 cm above the navel.

(iv) A penetrating wound measuring 0.2 x 0.2 cm on the posterior part/root of the left thumb.

(v) A penetrating wound measuring 0.2 x 0.2 cm on the outer part of the right thigh, 16 cm above the knee.

(vi) Multiple penetrating wounds on the outer part of the left leg, spread over an area of 8 x 1 cm.

(vii) An abrasion measuring 3 x 0.2 cm located on the front aspect of the lower part of the right leg."

There was no blackening or swelling present. An X-ray of the chest and abdomen was advised. The injuries were kept under observation.

Dr. Rama Kant (PW-6) medically examined the injured Karimuddin on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-34. The following injury was noted on his person:-

"(i) An oval abrasion measuring 0.2 x 0.2 cm on the front inner part of the left thigh."

An X-ray was advised. The injury was simple in nature and was kept under observation.

Dr. Rama Kant (PW-6) medically examined the injured Fakruddin on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-35. The following ante-

of the chest, located 10 cm outwards from the right nipple."

An X-ray of the chest was advised. No blackening, charring, or singeing was present. The above wounds were kept under observation, which were fresh and likely to have been caused by a firearm.

Dr. Rama Kant (PW-6) medically examined the injured Sharif Khan on 24.10.1988 and prepared his injury report, which was proved as Exhibit Ka-36. The following injuries were noted on his person:-

"(i) A circular abrasion measuring 0.5 cm in size on the front part of the left wrist.

(ii) A bluish contusion/discoloration measuring 1 x 1 cm on the front part of the right thigh, 12 cm above the knee.

(iii) An injury measuring 0.5 x 0.5 cm on the front part of the right thigh, just above the knee. Bleeding was present under the big toe of the right foot. An X-ray was advised.

(iv) A penetrating wound measuring 0.2 x 0.2 cm on the front aspect of the left leg, 18 cm above the ankle. "

An X-ray was advised. All the above injuries were simple and fresh. Injury Nos. 1, 2 and 3 were likely to have been caused by friction/abrasion. Injury Nos. 4 and 5 were kept under observation.

9. Dr. A.P. Singh (PW-13), examined injured

"(i) Firearm injury measuring 0.2 cm x 0.2 cm x muscle deep, situated on the front aspect of the right leg, which was 15 cm above the ankle joint. X-ray was advised.

(ii) Firearm injury measuring 0.2 cm x 0.2 cm x deep up to muscle, situated on the right leg, which was slightly below and adjacent, at a distance of 6 cm from injury no. 1. X-ray was advised."

Both the aforementioned injuries were simple in nature and X-ray was advised. These injuries have been caused by a firearm and are fresh.

10. After submission of the charge-sheet (Exhibit Ka-42) against accused persons in the Court concerned, learned Magistrate committed the case to the Court of Session for trial.

11. Charges were framed by the Trial Court on 09.07.1990 against accused Riyaz and Parvez, under Sections 148, 302 read with Section 149, and Section 307 read with Section 149 IPC. Charges were also framed against the accused persons Babu Khan, Hashim Khan, Sayeed, Malik, and Jafru on 09.07.1990, under Sections 148, 302 read with Section 149, and Section 307 read with Section 149 IPC. On the same date, i.e., on 09.07.1990, charges were also framed against the accused persons Irshad, Rustam, Mitthoo, Ikhlauque, Istekhar, Nazaru Khan, Badaru, Kallu @ Ayyub, and Sahabu, under Sections 148, 302 read with Section 149,

(PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3) were examined as witnesses of fact. The remaining witnesses, namely, Dr. Ashok Kumar Mishra (PW-4), Dr. K.P. Singh (PW-5), Dr. Rama Kant (PW-6), Rajeshwar Prasad (PW-7), Ganga Prasad Sharma (PW-8), Ghurfekan Ram (PW-9), Dr. R.K. Sood (PW-10), Sadanand (PW-11), Badri Prasad Mishra (PW-12), Dr. A.P. Singh (PW-13) and B.B. Singh (PW-14), were examined as formal witnesses. In addition to the oral evidence, the prosecution also relied upon documentary evidence marked as Exhibits Ka-1 to Ka-47 in support of the charges against the accused persons.

13. After recording the evidence of all the prosecution witnesses, the accused persons were examined under Section 313 Cr.P.C. In their statements recorded under Section 313 Cr.P.C., the accused persons accepted the facts mentioned in question nos. 1, 2 and 3, as true. However, for the rest of the questions that were put before them, the accused persons either expressed their ignorance about the facts mentioned in those questions or stated them to be false and fabricated. They also claimed that the case was registered and the prosecution witnesses testified against them due to enmity.

14. In their statements recorded under Section 313 Cr.P.C., the accused appellants Malik and Hashim Khan stated that they have no concern with the disputed field and were not involved in the incident. At that time when

under Section 313 Cr.P.C. that he had enmity with Fakruddin concerning the property dispute of Jamiran Bibi. Due to this enmity, he was falsely implicated in this case. Ikhlaque is the grandson of Jamiran and I am Ikhlaque's cousin.

15. The accused-appellants stated that they would adduce evidence in their defence. In pursuance thereof, they produced documentary evidence, which was marked as Exhibits Kha-5 to Kha-23.

16. Learned Trial Court, after hearing arguments of both sides and perusing the evidence available on record, acquitted the accused Kallu, Badru, Mitthoo, Ikhlaque, Sahabu, Istkhar, Riyaz and Parvez of all charges. Trial Court also acquitted Babu Khan, Jafru Khan, Najaru Khan, Malik Khan, Sayeed Khan, Rustam Khan and Irshad Khan of the charge under Section 302 read with Section 149 IPC. However, Trial Court found appellant nos. 1 to 7, namely, Babu Khan, Sayeed Khan, Malik Khan, Jafru Khan, Irshad Khan, Rustam Khan and Najaru Khan guilty under Sections 147, 148 and 307 read with Section 149 IPC. Each of these accused appellants was sentenced to one year of rigorous imprisonment under Section 147 IPC, two years under Section 148 IPC, and four years under Section 307 read with Section 149 IPC, along with a fine of Rs 1,000/- each, with a default sentence of six months additional rigorous imprisonment. Appellant no. 8. Hashim was held guilty under Sections 302, 307, 147,

1,000/- with a default sentence of six months additional rigorous imprisonment. All sentences were directed by the Trial Court to run concurrently.

17. Aggrieved by the impugned judgment and order of conviction and sentence dated 24.09.1993 passed by the Trial Court, appellants Babu Khan, Sayeed Khan, Malik Khan, Jafu Khan, Irshad Khan, Rustam Khan, Najaru Khan and Hashim Khan have preferred this criminal appeal before this Court.

18. It is worthwhile to mention that during the pendency of this criminal appeal, appellant No. 1 Babu Khan, appellant No. 2 Sayeed Khan, appellant No. 4 Jafu Khan and appellant No. 7 Nazaru Khan, have died. Due to the death of these appellants, the appeal in relation to them has already abated. Therefore, this criminal appeal is currently being adjudicated only in respect of surviving appellants, appellant No. 3 Malik Khan, appellant No. 5 Irshad Khan, appellant No. 6 Rustam Khan, and appellant No. 8 Hashim Khan.

19. Learned counsel for the accused appellants has submitted that the Trial Court, while convicting and sentencing the appellants, erroneously relied upon the statements of Kallu and Hasnain recorded under Section 164 Cr.P.C. by Kanak Tripathi (Deputy Collector). However, neither the Kanak Tripathi (Deputy Collector), nor the injured witnesses, Hasnain and Kallu, were examined as prosecution witnesses. The Trial Court's

but were acquitted of the charge under Section 302 read with Section 149 IPC. Lastly, the Trial Court convicted and sentenced appellant No. 8, Hashim Khan, under Sections 147, 148, 302 & 307 IPC based on the same set of evidence and the Section 164 Cr.P.C. statements recorded by Kanak Tripathi, Deputy Collector.

20. Learned counsel for the appellants has further submitted that no specific charge under Section 302 IPC was framed against appellant No. 8, Hashim Khan. Despite the absence of such a charge, appellant No. 8 has been convicted and sentenced under Section 302 IPC, which has caused serious prejudice to him and has vitiated the conviction. In support of his submission, learned counsel has placed reliance upon paragraph nos. 2, 3, 4 and 7 of the judgment of the Hon'ble Supreme Court in ***Suraj Pal v. State of U.P.*, AIR 1955 SC 419.**

21. It has also been submitted by learned counsel for the appellants that the evidence against the appellants as well as against the acquitted accused persons, namely, Kallu, Badru, Mitthoo, Ikhlague, Sahabu, Istkhar, Riyaz and Parvez, is exactly identical, as is evident from the evidence of informant Fakruddin (PW-1), Wakilu @ Akilu (PW-2), and Jasim Khan (PW-3). Furthermore, the statements of injured Hasnain and injured Hashim @ Kallu, recorded under Section 164 Cr.P.C., are not proved and are not put to the appellants under Section 313 Cr.P.C. Therefore, the surviving appellants are also

116, has held that each and every incriminating material or piece of evidence sought to be relied upon against the accused must be put to the appellants in their statements recorded under Section 313 Cr.P.C. In the present case, the statement recorded under Section 164 Cr.P.C., which has been relied upon by the Trial Court, is liable to be excluded from consideration as it was not put to the appellants in their statements recorded under Section 313 CrPC.

23. It is also submitted that the other injured persons, namely, Sharif Khan, Hakimuddin, and Karimuddin, have not been examined by the prosecution. Since the statements of the injured Hasnain (now deceased) and Hashim @ Kallu were neither proved by the prosecution nor put to the appellants in their statements recorded under Section 313 Cr.P.C., the same are liable to be excluded from consideration. Therefore, on the basis of the same evidence that led to the acquittal of eight other accused persons by the Trial Court, the surviving appellants, namely, appellant No. 2 Sayeed Khan, appellant No. 3 Malik Khan, appellant No. 5 Irshad Khan, appellant No. 6 Rustam Khan, and appellant No. 8 Hashim Khan, are also entitled to be acquitted. In support of this submission, learned counsel for the appellants has placed reliance upon paragraphs 15, 17 and 21 of the judgment of the Hon'ble Supreme Court in

Javed Shaukat Ali Oureshi v. State of Gujarat.

appreciated the evidence available on record in its proper perspective and in accordance with law. The Trial Court has based its findings on inadmissible evidence and has also acted contrary to the settled principles of law in this regard. Therefore, the judgment and order of conviction and sentence dated 24.09.1993 passed by the Trial Court, being perverse, illegal, and unsustainable in law, is liable to be set aside, and the criminal appeal filed by the surviving accused appellants deserves to be allowed.

25. *Per contra*, learned AGA for the State and learned counsel for the informant have submitted that the present case is based on the direct evidence of eyewitnesses, namely, PW-1, PW-2 and PW-3, and it is not a case of circumstantial evidence. Trial Court, after appreciating and evaluating the evidence of eyewitnesses, namely, PW-1, PW-2 and injured witness Jasim Khan (PW-3), found no evidence against the acquitted accused persons. However, after considering the evidence of the aforesaid eyewitnesses, including injured witness Jasim Khan (PW-3), and taking into account the specific role, active participation, and overt acts attributed to the present appellants, the Trial Court found the material evidence against them to be cogent, reliable and sufficient for recording their conviction and sentence for the alleged offence. The Trial Court neither relied upon nor considered the statements of other injured witnesses, namely, Hasnain and Hashim @ Kallu,

26. The Trial Court has only referred to the statements under Section 164 Cr.P.C. of the injured witnesses, including Jasim Khan (PW-3), and injured witnesses Hasnain and Hashim @ Kallu, under Section 157 of the Evidence Act, because the defence itself cross-examined these three witnesses on this point. Meaning thereby, the Trial Court has based its findings solely on the evidence of PW-1, PW-2 and injured witness Jasim Khan (PW-3). Therefore, mere reference by the Trial Court to the statements of the witnesses recorded under Section 164 Cr.P.C., in the light of the cross-examination conducted by the defence, does not render the findings, reasoning, and conviction of the accused appellants illegal or perverse in law. It is also a settled principle of law that if, on the same evidence of the prosecution witnesses, some accused persons are acquitted, the other accused persons can still be legally convicted, if the evidence against them is found to be cogent, reliable, and trustworthy. The Trial Court has discharged its duty and recorded its findings and reasoning in accordance with the settled principles of law. Therefore, putting questions regarding the statements recorded under Section 164 Cr.P.C. of the injured witnesses was not legally required in the present circumstances. It is also submitted by learned counsel for the State and learned counsel for the informant that if a separate charge under Section 302 IPC has not been framed simpliciter, the conviction under Section 302 read

learned Trial Court has minutely appreciated all the evidence available on record in its proper perspective and in accordance with law and has recorded its findings and reasoning on the basis of cogent and reliable evidence. Therefore, there is no perversity or illegality in the impugned judgment and order of conviction and sentence dated 24.09.1993 passed by the learned Trial Court. Hence, the criminal appeal filed by the surviving accused appellants, being devoid of merit and substance, deserves to be dismissed. Consequently, the impugned judgment and order dated 24.09.1993 passed by the learned Trial Court is liable to be affirmed.

28. In the light of the above submissions and counter-submissions advanced by learned counsel for the parties, we have perused the written report (Exhibit Ka-1) and the deposition of informant Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3). From a perusal of the written report (Exhibit Ka-1), it is revealed that informant Fakruddin (PW-1) named the surviving accused appellants, namely, Malik Khan, Irshad Khan, Rustam Khan and Hashim Khan, along with other appellants (now deceased) and acquitted accused persons, for the commission of the crime. PW-1 stated that they were all armed with guns and country-made pistols (*katta*). A few accused persons were also armed with spears (*ballam*). The place and cause of occurrence was Arazi No. 1387.

According to the written report and the evidence of

deceased) then came to the place of occurrence from his house and prohibited Akilu (PW-2) from ploughing the field. Upon this, a hot exchange and altercation took place between Babu Khan and Jasim Khan (PW-3). Thereafter, appellant Babu Khan (now deceased) rushed to his home and returned to the place of occurrence with a gun. At that time, upon hearing the altercation, Rahimuddin, Kallu @ Hashim, Karimuddin, Hakimuddin and Hasnain also arrived at the spot. Following Babu Khan, 17 other accused persons also arrived at the spot armed with guns or *kattas*. Upon the exhortation of Babu Khan (now deceased), all the accused persons began firing upon Akilu, Jasim, Rahimuddin, Karimuddin, Hakimuddin and Kallu @ Hasnain. As Akilu (PW-2) was ploughing the field, he hid behind the tractor, therefore, he did not receive any injury.

29. From a perusal of the written report (Exhibit Ka-1) and the evidence of the informant Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3), it appears that due to the firing by the accused persons, Jasim Khan and other injured persons received injuries. From the evidence of the prosecution witnesses, it is further revealed that after receiving injuries from firearms, all the injured persons began to cry out, drawing the attention of Badruddin, Sharif Khan and Ashraf @ Guddu. Upon seeing them, the accused appellant Babu Khan (now deceased) attempted to kill

second set of the incident, Badruddin received a fatal gunshot injury and died on the way to the hospital.

30. Thus, from a perusal of the evidence of Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3), as well as the injury reports of injured persons, namely, Hashim @ Kallu, Hasnain, Rahimuddin, Ashraf @ Guddu, Jasim, Karimuddin, Fakruddin, Sharif Khan and Hakimuddin, it is revealed that a total nine persons received gunshot injuries in the incident and Badruddin died in the same incident due to the gunshot injury, while he was on the way to the hospital.

31. We have also perused the findings and reasoning recorded by the Trial Court in this regard. We find that the Trial Court, after a detailed discussion and appreciation of the prosecution evidence, held that Kallu, Badru, Mitthoo, Ikhlaque, Sahabu and Istekhar, although present at the place of occurrence, had not caused any injury to the injured persons. The Trial Court, after a detailed discussion and appreciation of the evidence of the informant Fakruddin (PW-1), Wakilu @ Akilu (PW-2), and the injured witness, Jasim Khan (PW-3), also held that the named accused persons, namely, Riyaz, Parvez and Mahau, had not participated in the incident, although they were alleged to have been carrying spears (*ballams*) in their hands. Upon appreciation of the prosecution evidence, the Trial Court found that the accused-

Ka-1), Shabvir and Mahau, had died during the pendency of the trial.

32. Thus, upon appreciation of the evidence of PW-1, PW-2 and PW-3, the Trial Court found that no role or act of participation in the commission of the crime had been established against the named accused persons, namely, Kallu, Badru, Mitthoo, Ikhlaque, Sahabu, Istekhar, Riyaz and Parvez. Consequently, they were acquitted of the charges levelled against them. However, after a detailed discussion and appreciation of the evidence, the Trial Court found the accused-appellants, namely, Babu Khan, Jafru, Najar, Malik, Sayeed, Rustam and Irshad, guilty under Sections 147, 148, 307 and 149 IPC. The accused-appellant Hashim was found guilty under Sections 147, 148, 149, 302 and 307 IPC and, accordingly, was convicted under Section 302 IPC. The remaining accused, namely, Babu Khan, Jafru, Najar, Malik, Sayeed, Rustam and Irshad, were acquitted of the charge under Section 302 read with Section 149 IPC.

33. Since, in the present case, one person, Badruddin, died due to a gunshot injury, and Hashim @ Kallu, Hasnain, Rahimuddin, Ashraf @ Guddu, Jasim, Karimuddin, Fakruddin, Sharif Khan and Hakimuddin sustained gunshot injuries caused by the appellants, firearm injuries were found on their bodies. Thus, in this incident, a total of nine persons sustained gunshot

Khan, Rustam Khan, Najaru Khan and Hashim Khan and held them guilty of the offences alleged against them.

34. Upon reviewing the Trial Court's findings and reasoning, we find that the Court properly appreciated the evidence on record in a legal manner. Based on the prosecution's evidence, the Court found accused appellants, namely, Babu Khan, Sayeed Khan, Malik Khan, Jafu Khan, Irshad Khan, Rustam Khan, Najaru Khan, and Hashim Khan guilty and convicted them accordingly, while acquitting the other named accused persons.

35. On this point, the learned counsel for the surviving accused-appellants submitted that if, on the basis of the same evidence, some of the accused persons have been acquitted by the Trial Court, then the present accused-appellants are also entitled to acquittal of the alleged charges. In support of this submission, the learned counsel for the appellants has placed reliance on the judgment of the Hon'ble Supreme Court in ***Javed Shaukat Ali Qureshi v. State of Gujarat*, (2023) 9 SCC 164**, particularly paragraphs 15, 17 and 21, which read as follows:-

"15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the

17. *Accused nos. 1, 5 and 13 were convicted only on the basis of the testimony of PW-25 and PW-26. They were acquitted by holding that the testimony of both witnesses was unreliable and deserved to be discarded. If the same relief is not extended to accused nos. 3 and 4 by reason of parity, it will amount to violation of fundamental rights guaranteed to accused nos. 3 and 4 by Article 21 of the Constitution of India. Therefore, we have no manner of doubt that the benefit which is granted to accused nos. 1,5 and 13 deserves to be extended to accused nos.3 and 4, who did not challenge the judgment of the High Court. In this case, the suo motu exercise of powers under Article 136 is warranted as it is a question of the liberty of the said two accused guaranteed by Article 21 of the Constitution.*

21. *Accordingly, the appeal succeeds and we pass the following order:*

21.1. *The appellant, accused no.6–Javed Shaukat Ali Qureshi, is acquitted of the offences alleged against him by setting aside the judgment of the Trial Court dated 17th March 2006 and judgment of the High Court dated 11th February 2016 to the extent. He is on bail. His bail bonds stand cancelled;*

21.2. *We set aside the order of conviction of accused no.3 Mehboobkhan Allarakha and accused no.4 Saidkhan @ Anna Ikbalkhusain by setting aside the same judgments to that extent and acquit them of the offences alleged against them. They shall be forthwith set at liberty if they are not required to be detained in connection with any other case;*

21.3. *We recall the order dated 11th May*

to be detained in connection with any other offence; and

21.4. *The appeal is allowed on the above terms. "*

36. We have perused the judgment of the Hon'ble Supreme Court in ***Javed Shaukat Ali Qureshi (Supra)***, referred to and relied upon by the learned counsel for the accused-appellants. We have also perused the judgment of the Hon'ble Supreme Court in ***Gurcharan Singh and Another v. State of Punjab, (1955) 2 SCC 424***, rendered by a **three-Judge Bench**. Further, we have considered the decision of the Hon'ble Supreme Court in ***Nisar Ali v. State of Uttar Pradesh, (1957) 1 SCC 350***, also rendered by a three-Judge Bench.

37. In ***Gurcharan Singh (Supra)***, the Hon'ble Supreme Court, while dealing with the same issue, held in paragraph-9 as follows:-

"9. The case in hand is similar to the case reported as Dalip Singh v. State of Punjab, (1953) 2 SCC 36, insofar as it was found in that case, as we are inclined to hold in this case, that the acquittal of the other two accused by the High Court may not have been entirely correct. Reference to that reported case is only by way of illustration and not by way of an appeal to precedent, because on facts no two cases can be similar. Each case has its own peculiar facts and it is therefore always risky to appeal to precedents on questions of fact. The highest that can be or has been said on behalf of the appellants in this case is that two of the four accused have been

38. Similarly, the Hon'ble Supreme Court, in **Nisar Ali (Supra)**, has held on the same point in paragraph nos. 8 and 9 as follows:-

"8. It was next contended that the witnesses had falsely implicated Qudrat Ullah and because of that the Court should have rejected the testimony of these witnesses as against the appellant also. The well-known maxim falsus in uno falsus in omnibus was relied upon by the appellant. The argument raised was that because the witnesses who had also deposed against Qudrat Ullah by saying that he had handed over the knife to the appellant had not been believed by the courts below as against him, the High Court should not have accepted the evidence of these witnesses to convict the appellant. This maxim has not received general acceptance in different jurisdictions in India, nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that in such cases, the testimony may be disregarded and not that it must be disregarded. One American author has stated:

'... the maxim is in itself worthless; first in point of validity ... and secondly, in point of utility because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore, it is a superfluous form of words. It is also in practice pernicious...'

9. *The doctrine merely involves the questions of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'."*

20. *The ... in light of the ... is ...*

some accused persons, is found reliable, while in respect of others, it is found unreliable.

40. According to the law as enunciated by the Hon'ble Supreme Court in case laws of this nature, the Court should cautiously and carefully analyze and appreciate the evidence of prosecution witnesses. If the evidence of prosecution witnesses is found reliable and trustworthy in respect of some accused persons, but unreliable in respect of other accused persons, the evidence shall not be rejected outright. Meaning thereby, the part and portion of evidence of the prosecution witnesses that is found trustworthy and reliable shall be read into evidence. In light of such reliable and trustworthy prosecution evidence, accused persons can be legally held guilty and convicted. If, upon appreciation of the prosecution evidence, there is no trustworthiness or creditworthiness regarding the evidence of the prosecution witnesses in respect of other co-accused persons, then, on the basis of the same evidence, those accused persons could be legally acquitted. Thus, it is merely a rule of caution and not a mandatory rule of evidence, in light of the legal principles enunciated by the Hon'ble Supreme Court in the case laws referred above.

41. From a perusal of the findings and reasoning of the Trial Court on this point, we find that the Trial Court has minutely and thoroughly discussed and analyzed the

accused-appellants, in the commission of the alleged crime.

42. Thus, we find, in the facts and circumstances of the case, case laws of the Hon'ble Supreme Court referred to above are fully applicable in the present case. In light of the above discussions and the legal principles enunciated by the Hon'ble Supreme Court in the aforementioned case laws, we find no force in the arguments raised by the learned counsel for the accused appellants on this point.

43. In light of the next submission made by the learned counsel for the surviving accused appellants, we have perused the records of the case. A perusal of the record confirms that charges were framed by the Trial Court against accused Riyaz and Parvez on 09.07.1990, under Sections 148, 302 read with Section 149 and 307 read with Section 149 IPC. Against the accused Babu Khan, Hashim, Sayeed, Malik and Jafru, charges were framed under Sections 148, 302 read with Section 149, and Section 307 read with Section 149 IPC. Similarly, against the accused Irshad, Rustam, Mitthoo, Ikhlaque, Istekhar, Nazaru, Badru, Kallu @ Ayyub and Sahabu, charges were also framed under Sections 148, 302 read with Section 149, and Section 307 read with Section 149 IPC. To substantiate these charges, the prosecution adduced evidence, and after the recording of evidence, the accused persons were examined under Section 313

Trial Court after elaborately and minutely scrutinizing the entire evidence of prosecution witnesses, namely, Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3), along with other relevant evidence in this respect, concluded that accused persons, namely, Malik, Jafru, Nazaru, Sayeed and Rustam, gathered at the place of occurrence, formed an unlawful assembly, and committed the roit while armed with deadly weapons, such as, guns, country-made pistols and spears. Trial Court found that accused persons, namely, Malik, Jafru, Nazaru, Sayeed and Rustam, armed with guns, fired upon the injured persons with the intention to kill them. Consequently, based on the evidence on record, the Trial Court convicted appellants, namely, Babu Khan, Jafru Khan, Nazaru Khan, Malik Khan, Sayeed Khan, Rustam Khan and Irshad Khan, under Sections 147, 148 and 307 read with Section 149 IPC.

45. However, upon appreciation of the evidence, the Trial Court found that the deceased, Badruddin, did not die from gunshots fired by accused persons, namely, Malik, Jafru, Nazaru, Sayeed & Rustam, and concluded that those accused did not fire at the deceased. Trial Court concluded that Badruddin died from the gunshot fired by the accused, Hasim Khan. Consequently, based on the evidence on record, the Trial Court acquitted accused persons, namely, Babu Khan, Jafru Khan, Nazaru Khan, Malik Khan, Sayeed Khan and Rustam Khan, of the

Badruddin, and was further convicted under Section 307 of the IPC along with other co-accused persons.

46. The main submission of the learned counsel for the surviving accused-appellants is that when charges were framed against appellant Hashim Khan and the other co-accused persons under Section 302 read with Section 149 IPC, the conviction and sentence of the surviving accused-appellants simpliciter under Section 302 IPC, without framing an alternative and simpliciter charge under Section 302 IPC by the Trial Court, is illegal and contrary to the settled principles of law. In support of this submission, the learned counsel for the accused-appellants has placed reliance upon the judgment of the Hon'ble Supreme Court in ***Suraj Pal v. State of Uttar Pradesh, AIR 1955 SC 419.***

47. A perusal of ***Suraj Pal (Supra)*** reveals that, in that case, nineteen accused were tried for offences under Sections 148, 307 and 302 read with Section 149 IPC. The Sessions Court initially convicted all nineteen accused. Upon appeal, the High Court acquitted ten of the accused while affirming the conviction and sentence of one individual for offences under Sections 148, 307 and 302 IPC. Notwithstanding these facts, the Hon'ble Supreme Court held that the absence of a specific charge against the appellant under Sections 307 and 302 IPC, for which he was subsequently convicted and sentenced,

48. In light of the aforementioned submission and the reliance placed by the learned counsel for the surviving accused appellants on the decision in **Suraj Pal (Supra)**, we have also perused the judgment of a **five Judge Constitution Bench** of the Hon'ble Supreme Court in **Willie (William) Slaney v. The State of Madhya Pradesh, (1955) 2 SCC 340**. In the said judgment, the Hon'ble Supreme Court held as follows:-

"Held, is to further the ends of justice through a full and fair trial on well- established and well Understood lines in accord with natural justice - If the accused fully understands the charge he is to defend and for that given a full and fair opportunity, then if there is substantial competence with the spirit and requirements of the Code, held, mere mistakes in procedure and were inconsequential errors and omissions will not vitiate the trial unless substantial prejudice has been caused to the accused.

The question before the Supreme Court was whether the omission to frame an alternative charge under Section 302 simpliciter of the Penal Code was an illegality that cuts at the root of the conviction and makes it invalid or whether it was a curable irregularity in which all that the Court was concerned was to see is whether there was prejudice. Basically, is the charge to be regarded as a ritualistic formula so sacred and fundamental that a total absence of one, or any departure in it from the strict and technical requirements of the Code of Criminal Procedure, is so vital as to cut at the root of the trial and vitiate it from the start, or is it one of many regulations designed to ensure a fair and proper trial so that substantial, as opposed to purely technical,

of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If an accused gets full and fair trial in accord with natural justice and well established principles, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the CrPC and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the CrPC is based.

Certain procedures are regarded as vital, the disregard of which is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the court is satisfied that there was prejudice. The question of curing an irregularity can only arise when one or more of the express provisions of the CrPC is violated. It is impossible to lay down any hard and fast rule but taken by and large the question usually narrows down to one of prejudice. In any case, the courts must be guided by the plain provisions of the CrPC without straining at its language wherever there is an express provision. The real object of the CrPC is to leave these matters to the discretion and vigilance of the courts.

Chapter 45 CrPC, 1898 deals generally with irregular

error has caused prejudice to the accused or, as some of the sections put it, has occasioned a failure of justice. The CrPC has carefully classified certain kinds of error and expressly indicates how they are to be dealt with. In every such case the Court is bound to give effect to the express commands of the legislature: there is no scope for further speculation. The only class of case in which the Courts are free to reach a decision is that for which no express provision is made.

A charge must set out the offence with which the accused is charged and if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated "as to give the accused notice of the matter with which he is charged". The charge must also contain such particulars of date, time, place and person "as are reasonably sufficient to give the accused notice of the matter with which he is charged" (Sections 221 to 223).

The object of the charge is to enable the accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. However, in a summons cases no formal charge is required: all that is necessary is to tell accused the substance of the accusation made against him (Section 242).

When a charge contains either an error or omission in it or both, and whatever its nature, it is not to be regarded as material unless:

(1) the accused has in fact been misled by it and

(2) it has occasioned a failure of justice. (Section 225)

That is reasonably plain language

neither side is prejudiced (Section 228). So no error or omission in the charge, and not even a total absence of a charge, cuts at the root of the trial. The proceedings up to the stage of the alteration, which can be at the very end of the trial, are not vitiated unless there is prejudice; they are good despite these imperfections. That is impossible when the error is so vital as to cut at the root of the trial. It follows that errors in the charge, and even a total absence of a charge, are not placed in the non-curable class.

Even in a case where the error is not observed and corrected during the trial and the accused is convicted, the High Court is empowered to direct a retrial only if, in its opinion, the accused was "misled in his defence" (Section 232). It is to be observed that this is so whether there was a total absence of a charge or merely an error in it. It is evident that a conviction cannot stand if the defect cuts at the root of the trial, therefore, defects even of this nature are not regarded as fatal."

49. Thus, a perusal of the five- Judge Constitution Bench decision in **Willie (William) Slaney (Supra)**, the position of law is clear that if the charge framed discloses the overt act committed by a particular accused, though the charge is for the offence under Section 302 read with Section 149 IPC and the accused faced trial with the knowledge that the prosecution case is that he committed the particular overt act which caused the death, the non-framing of a distinct charge for the offence under Section 302 IPC will not cause prejudice to the accused, even though the charge framed was under Section 302 read

when the charge discloses an overt act by a particular accused which caused the death of the victim, if the evidence establishes that the particular accused inflicted that particular injury which caused the death, he could definitely be convicted for the offence under Section 302 IPC simpliciter. Even though there is no specific charge for Section 302 IPC simpliciter and the charge is for the Section 302 read with Section 149 IPC, there could be a conviction under Section 302 of the IPC simpliciter.

50. In light of the law laid down by the five-Judge Constitution Bench of the Hon'ble Supreme Court in ***Willie (William) Slaney (Supra)***, we have perused the records and evidence of the present case. It is evident that the Trial Court framed charges against the accused appellant, Hasim Khan, along with co-accused appellants. The record reveals that nine persons sustained gunshot injuries during the incident, and one person, namely, Badruddin, died in this incident by gunshot injuries on various parts of his body. Consequently, the accused appellant, Hasim Khan, was fully aware and had sufficient notice that he was being charged for the murder of Badruddin. This is further corroborated by the written report (Exhibit Ka-1) and the testimonies of prosecution witnesses Fakruddin (PW-1), Wakilu @ Akilu (PW-2), and Jasim Khan (PW-3), all of whom consistently stated that the accused appellant, Hasim Khan, was armed with a gun at the time of the incident.

post-mortem report, pellets also entered his body and reached the left lung of deceased Badruddin. Not only this, pellets were also found in the left chamber of his heart along with injuries, and injuries from the pellets were also found on the left lung of Badruddin. The chambers of the heart were ruptured or torn at several places. Pellets also entered the large intestine of the deceased, and marks of injuries were found at the points of entry of the pellets. The right part of the liver was punctured at two places.

52. From a perusal of the above injuries and according to the post-mortem report (Exhibit Ka-37) of deceased Badruddin, it is amply clear that this kind of injury to different parts of the body, with the entry of pellets, can only be caused by a firearm like a gun. It is the case of the prosecution that accused appellant Hasim had a gun in his hand. Therefore, accused appellant Hasim was fully aware about the role played by him in causing the death of deceased Badruddin from the time of the incident, also during the trial of the case and the examination of the prosecution witnesses.

53. From a perusal of the findings and reasoning recorded by the Trial Court in this regard, we find that the Trial Court deeply and thoroughly examined and appreciated the entire evidence adduced by the prosecution. It specifically determined that the surviving

upon the injured witnesses in this case, by their respective firearms.

54. Thus, in light of the aforementioned discussions and the legal principles enunciated by the **five-Judge Constitution Bench** of the Hon'ble Supreme Court in ***Willie (William) Slaney (Supra)***, we find that no prejudice has been caused to the accused appellant, Hasim Khan, nor has there been any miscarriage of justice, by virtue of his conviction and sentencing under Section 302 IPC. Accordingly, we find no substance in the arguments advanced by the learned counsel for the surviving accused-appellants in this regard.

55. From a perusal of the evidence of Jasim Khan (PW-3), it is clear that he was present at the place of the occurrence and sustained gunshot injuries. A total of seven injuries were found on his body, as recorded in the injury report (Exhibit Ka-33) prepared by Dr. Rama Kant (PW-6). In his examination-in-chief, Jasim Khan (PW-3) stated that all of them were sent to the hospital where they were medically examined and he was admitted. After six days, the investigating officer recorded his statement in the hospital.

56. Upon perusing the entire examination-in-chief of Jasim Khan (PW-3), we find that this witness did not state that his statement or dying declaration was recorded by the Executive Magistrate in the hospital.

date of the incident because the ground had become dry. He clarified that the Magistrate had only asked about the assault, so he had only provided details regarding the assault. Elsewhere in his cross-examination, when questioned further regarding the statement given to the Magistrate, he stated that he had not told the Magistrate that he had nothing in his hands except *lathi & danda*. He also stated that on that day, the Magistrate recorded his statement and that he told the Magistrate the names of the attackers, namely, Rustam, Irshad, Sahabu, Mahabu, Ikhlaque, Riyaz, Istekhar, Kallu and Badaru along with others involved in the incident. He added that if the Magistrate did not record these things, he cannot state the reason for this.

57. Thus, we find that despite the fact that Jasim Khan (PW-3) has not given any statement in his examination-in-chief regarding the recording of his dying declaration under Section 164 Cr.P.C. before the SDM/Executive Magistrate, however, defence itself questioned him on this point during cross-examination. In light of the above, the Trial Court referred to the statement of injured Jasim Khan (PW-3) as recorded by Deputy Collector, Kanak Tripathi only for the purpose of corroboration and contradiction under Sections 157 & 155 of the Evidence Act.

58. In this respect, the Trial Court referred to and relied

statement cannot be read under Section 32 of the Evidence Act. However, the statement of the injured person can be used under Sections 157 & 155 of the Evidence Act for the purpose of corroboration and contradictions and for testing the veracity and truthfulness of the subsequent testimony and evidence of that witness.

59. Since the defence itself questioned the injured witness, Jasim Khan (PW-3), during cross-examination, the Trial Court considered those answers while deciding the case. In its judgment and order dated 24.09.1993, the Trial Court examined the prosecution evidence to ensure justice, especially for those persons whose involvement was not proved by the evidence. Therefore, the Trial Court referred to the statement of Jasim Khan (PW-3), which had been recorded by Kanak Tripathi (Deputy Collector), and considered his entire evidence in that context.

60. A perusal of the statements of the accused appellants under Section 313 Cr.P.C., reveals that a total of 32 questions were put to them. Question No. 18 placed the incriminating circumstances relating to the evidence of Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3) before the accused appellants in the Court. Although no separate specific question regarding the evidence of Jasim Khan (PW-3) was framed under Section

substantially complied with the provisions of Section 313 Cr.P.C. through Question No. 18. Furthermore, it is noteworthy that no grievance or objection in this regard was raised by the accused-appellants before the Trial Court.

61. A three-Judge Bench of the Hon'ble Supreme Court, in ***Wasim Khan v. State of U.P.*, AIR 1956 SC 400, and *Bhoor Singh v. State of Punjab*, (1974) 4 SCC 754**, held that every error or omission in compliance with the provisions of Section 313 Cr.P.C. does not necessarily vitiate the trial. The accused must show that actual prejudice has been caused or was likely to have been caused to him.

62. Since it is the prosecution case that the surviving accused appellant, Hashim Khan, was armed with a gun and that the injuries found on the body of the deceased, Badruddin, could only be caused by such a firearm, it cannot be presumed that any prejudice was caused to the accused appellant, Hashim Khan by the omission of a specific question under Section 313 Cr.P.C. during his examination before the Court. This fact is further established from the statements of the prosecution witnesses, namely, Fakruddin (PW-1), Wakil @ Akilu (PW-2) and Jasim Khan (PW-3), who have consistently stated that Hashim Khan was armed with a gun. Therefore, we find no force in the arguments advanced by the learned counsel for the surviving accused

13) prepared the injury reports of the injured persons. From a perusal of the injury reports, it is evident that nine persons received gunshot injuries, with pellets entering different parts of their bodies. The deceased, Badruddin, had received fatal gunshot injuries on various parts of his body, with many pellets penetrating and puncturing his internal organs. However, out of nine injured persons, the prosecution only adduced Jasim Khan (PW-3) as a prosecution witness.

64. A perusal of the written report (Exhibit Ka-1), the evidence of Fakruddin (PW-1) and Wakilu @ Akilu (PW-2) establishes that along with other injured persons, Jasim Khan (PW-3) was also present at the place of occurrence when the alleged incident occurred. Jasim Khan (PW-3) witnessed the occurrence from the very beginning till the end. The injury report of Jasim Khan (Exhibit Ka-33) further reveals that he sustained injuries as an eyewitness in the alleged incident. In this case, the prosecution produced Jasim Khan (PW-3) as a witness to support its case. While other injured persons, including Hasnain and Hashim @ Kallu, have not been adduced and examined by the prosecution in support of its case.

65. From a perusal of the evidence available on record, it is clear that Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3) were present at the place of occurrence and witnessed the incident with their own eyes. Jasim Khan (PW-3) also sustained gunshot injuries

prosecution to support the its case. The prosecution has full discretion to select and adduce relevant witnesses whose evidence is sufficient to prove the charges beyond a reasonable doubt.

66. Upon perusing the evidence and the findings recorded by the Trial Court, we find that the prosecution has successfully proved its case beyond a reasonable doubt through documentary evidence, including the injury reports of the injured persons, and the direct testimony of the eyewitnesses, namely, Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3).

67. According to settled principles of law, there is no fixed number of witnesses required to be produced by the prosecution to prove its case beyond a reasonable doubt. In the present case, the prosecution has successfully proved its case through the evidence of eyewitnesses, namely, Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3) and supporting documentary evidence beyond a reasonable doubt. Therefore, we find no merit in the arguments advanced by the learned counsel for the surviving accused appellants in this respect.

68. From a perusal of the written report (Exhibit Ka-1), the evidence of eyewitnesses, namely, Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3) and the other supporting documentary evidence available on record, it is clear that present case is based directly on the evidence of ewewitnesses. In other words, the

the establishment of every chain of evidence, as is required in cases based on circumstantial evidence.

69. We have perused the judgment of the Hon'ble Supreme Court in ***Sharad Birdhi Chand Sarda v. State of Maharashtra, (1984) 4 SCC 116***. It reveals that the facts of that case centered on murder by poisoning and suicide, with no direct evidence available, and the case was entirely based on circumstantial evidence. However, the case in hand is based on direct evidence provided by the eyewitnesses, namely, Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3). Therefore, the accused appellants are not entitled to any benefit from the judgment in ***Sharad Birdhi Chand Sarda (Supra)***. Consequently, we find no substance in the arguments advanced by the learned counsel for the surviving accused-appellants in this respect.

70. It is also a settled principle of law that in a case of direct evidence, no proof of motive for the incident is required to be established by the prosecution. The present case is based entirely on the direct evidence of eyewitnesses, namely, Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3), who were present at the place of occurrence and witnessed the incident. However, a perusal of the record reveals that the cause of the dispute was Arai No. 1387, to which both the prosecution and the defence laid their respective claims. Thus, the dispute over Arai No. 1387 was the main cause that led

prosecution with respect to the commission of the alleged crime.

71. We have also gone through and perused the findings and reasoning recorded by the learned Trial Court in the judgment and order of conviction and sentence dated 24.09.1993. A perusal of the said judgment and order reveals that the Trial Court has discussed the entire evidence in a detailed and elaborate manner. The evidence of all the prosecution witnesses has been considered and findings have been recorded on every point of argument raised by the defence before the Trial Court. By analysing and scrutinising the entire prosecution evidence, the Trial Court has discussed each and every point and recorded findings thereon, which are based on the cogent and reliable evidence of the prosecution witnesses.

72. From a perusal of the findings and reasoning recorded by the Trial Court, it is also revealed that the Trial Court has appreciated the entire evidence in its proper perspective and in accordance with law. The Trial Court has relied upon the evidence of the eyewitnesses, namely, informant Fakruddin (PW-1), Wakilu @ Akilu (PW-2) and Jasim Khan (PW-3), treating the same as reliable in support of the prosecution case, and has found the surviving accused appellants, along with the other appellants (now deceased), guilty of the commission of the alleged crime.

case. However, we find that there are no material or major contradictions, variations or omissions in the evidence of the prosecution witnesses. The findings and reasoning recorded by the Trial Court are based on the evidence of the prosecution eyewitnesses and documentary evidence. The Trial Court has appreciated the evidence in accordance with the settled principles of law applicable in this regard. Therefore, we find no perversity or illegality in the impugned judgment and order dated 24.09.1993 passed by the Trial Court.

74. Hence, the present criminal appeal preferred by the surviving accused appellants is liable to be dismissed, and the impugned judgment and order of conviction and sentence dated 24.09.1993 passed by the Trial Court is found to be sustainable in the eyes of law and deserves to be affirmed.

75. In view of the above discussions, we ***affirm*** the impugned judgment and order of conviction and sentence dated 24.09.1993 passed by the learned IInd Additional Sessions Judge, Mirzapur in Sessions Trial No. 329 of 1989 (State v. Babu Khan and others), arising out of Case Crime No. 283 of 1988, under Sections 147, 148, 149, 302, 307 IPC, Police Station- Kotwali Dehat, District- Mirzapur. Consequently, the present criminal appeal is devoid of merit and is, accordingly, ***dismissed***.

76. The surviving accused appellants- **Malik Khan, Irshad Khan, Rustam Khan** and **Hashim Khan**, are on

from today or from the date of production of a certified copy of this order, to serve out the remaining sentence passed by the learned Trial Court vide its order dated 24.09.1993.

78. In the event, if surviving accused appellants- **Malik Khan, Irshad Khan, Rustam Khan** and **Hashim Khan**, fail to surrender before the court concerned within the stipulated period of one month, the Chief Judicial Magistrate, Mirzapur, shall take immediate steps by issuing non-bailable warrants against them to secure their arrest. Upon their arrest, they shall be sent to jail to serve out the remaining sentence as passed by the Trial Court vide order dated 24.09.1993.

79. Let a copy of this judgment and order, along with the Lower Court Record, be transmitted to the Trial Court **forthwith** for necessary information and compliance.

(Vinai Kumar Dwivedi,J.) (Siddharth,J.)

July 24, 2026

Aditya