HIGH COURT OF MADHYA PRADESH

BENCH AT GWALIOR

DIVISION BENCH

PRESENT:

HON'BLE MR. JUSTICE SHEEL NAGU

&

HON'BLE MR. JUSTICE G.S. AHLUWALIA

CRIMINAL APPEAL NO. 507 OF 2005

Kishanlal & Anr.

-Vs-

State of M.P.

AND

CRIMINAL APPEAL NO. 562 OF 2005

Hukum Singh

-Vs-

State of M.P.

Shri V.K. Saxena, Senior Counsel with Shri J.S.Kushwah, Counsel for the appellants.

Shri Ajay Chaturvedi, Public Prosecutor for the respondent/State.

J U D G M E N T
(18/08/2017)

PER JUSTICE G.S. AHLUWALIA:

By this common judgment, the Cr.A. No. 507/2005 filed by Kishanlal and Purushottam and Cr.A. No. filed by Hukum Singh shall be decided. It is not out of place to mention here that the fourth accused Upai Singh, who has also been convicted, has not filed the Criminal Appeal against his conviction.

2. These Criminal Appeals have been filed against the

judgment and sentence dated 23-7-2005 passed by IVth A.S.J. (Fast Track), Shivpuri in Sessions Trial No. 65/2005, by which the appellants and co-accused Upai Singh have been convicted for offence under Section 302/34 of I.P.C. and have been sentenced to undergo the Life imprisonment and a fine of Rs. 1000/- with default imprisonment.

3. It is not out of place to mention here that appellants were tried for offence punishable under Sections 302,302/34 of I.P.C. and Pooran and Raghuvir were tried for offence under Sections 201 of I.P.C. Pooram and Raghuvir have been acquitted by the Trial Court and their acquittal has not been challenged. Therefore, any reference to the role alleged against Pooran and Raghuvir shall be in the context of the allegations made against the appellants.

4. The necessary facts for the disposal of the present appeal in short are that Banwarilal (P.W.1) lodged an F.I.R. on 18-1-2005 at about 10 A.M. alleging that at about 8:30 in the morning, he was going back to his house from his well by the side of the pond. His brother Lakhanlal was also going back to his house after fetching water from the pond. All of a sudden, the appellants came there. Appellants Hukum Singh, Purushottam Yadav and Kishanlal Yadav were armed with axe whereas the appellant Upai Singh was having a country made pistol. All the appellants surrounded the deceased Lakhanlal and started assaulting him. Hukum Singh caused an injury on the head of Lakhanlal, whereas Purushottam caused an injury on the neck and Kishanlal Yadav caused injuries on the waist and legs of Lakhanlal and Upai Singh assaulted him by kicks as a result of which Lakhanlal fell down on the ground. All the four appellants have killed his brother Lakhanlal, and while assaulting they were alleging that Lakhanlal was having an evil eye on the daughter-in-law of the appellants. After some time, Raghuvir Yadav brought a tractor trolley and Pooran was

sitting on the Tractor. Thereafter all six persons put the dead body of Lakhanlal in the trolley and were saying that they shall throw the body at some place. The incident is also witnessed by Satish Saxena, Deepak Saxena, Manoj Bhatnagar and Naresh Saxena.

5. The police after registering the F.I.R. started the investigation, and prepared spot map, recorded the statements of prosecution witnesses under Section 161 of Cr.P.C., arrested the appellants and seized the weapons and after completing the investigation, filed the charge sheet against the appellants, another convicted accused Upai Singh and acquitted accused namely Pooran and Raghuvir for offence under Sections 302,201,34 of I.P.C.

6. The Trial Court by order dated 11.4.2005 framed charges under Sections 302 or in the alternative under Section 302/34 of I.P.C. against the appellants and Upai Singh and framed charge under Section 201 of I.P.C. against the acquitted accused Pooran and Raghuvir.

7. The accused persons abjured their guilt and pleaded not guilty.

8. The prosecution, in order to prove its case, examined Banwarilal (P.W.1), Satish (P.W.2), Poonam (P.W.3), Mamta (P.W.4), Kamlesh (P.W.5), Nisar Ahmed (P.W.6), Naresh (P.W.7), Deepak Saxena (P.W.8), Manoj (P.W.9), Dr. Subhash Chandra (P.W.10), Ram Singh Chouhan (P.W. 11), R.C. Bhoj (P.W.12), and Dr. Rishishwar (P.W.13). The appellants examined Bhura (D.W.1), Man Singh (D.W.2), and Dr. S.K. Malhotra (D.W.3) in their defence.

9. The Trial Court by its judgment and sentence dated 23-7-2005 acquitted Pooran and Raghuvir for offence under Section 201 of I.P.C. and convicted the appellants and Upai Singh for offence under Section 302/34 of I.P.C.

10. The first question for determination is that whether the

death of Lakhanlal was homicidal in nature or not?

11. Dr. Rishishwar (P.W.13) has conducted the Post mortem. According to this witness, he had conducted the post mortem of the dead body of Lakhanlal and had found the following injuries :

> "(1) incised wound- 3" x 1"x2"- Left side of neck Anteroposteriorly from left side of mandibular border to left border of hairline of head, lower part of left ear lobe cut & separated clotted blood present inside the wound
>
> (2) incised wound 3"x1/2"xBone deep (1 1/2"), cut piece of bone seen-Left parietal region of head postr 1/3 part laterally, Anteroposteriorly
>
> (3) Incised wound 1/2" x 1/4" xBone deep-upper part of nose antrly,, horizontal
>
> (4) incised wound – 1"x1mmxSkindeep – (Lt) side of nose lower part Anteroportry
>
> (5) Abrasion 1/2"x1/2"- Left side of neck middle 1/3 laterally
>
> (6) Abrasion – 1"x1mm- left side of lower neck laterally
>
> (7) Incised wound 3"x1"x1 1/2" - Left lower 1/3 back, laterally, Horizontal
>
> (8) Incised wound – 1 1/2"x1/2x1 1/2" - Left upper leg posterolaterally, upper part, Horizontal
>
> (9) Incised wound – 1/2" x1/4"xskin deep-right Shin, middle 1/3, inner side
>
> (10) Incised wound – 1/2"x1/4"x skindeep-right Shin, lower 1/3 inner side
>
> (11) Incised wound 1"x1/2"x mussle deep-

right upper back at scapular region Horizontal laterally

(12) Incised wound – 1”x1/2”x1” - right upper back medially vertical (upper 1/3 part)

(13) Lacerated wound – 1/4”x1/4”x skindeep- left side of face at lateral margin of left eye.

(14) Injuries no. 5, 6 & 13 are caused by hard and blunt object and other injuries by sharp cutting object. Injuries are antemortem in nature. Rigour mortis present in neck region.”

12. On internal examination, fracture of left parietal bone of head was found and bone pieces were found embedded inside brain matter at left posterior cerbral region. Neck veins and arteries were found cut at upper part of left side of neck. According to Dr. Rishishwar (P.W.13), the cause of death was shock which occurred due to excessive hemorrhages from wound. The post mortem report is Ex. P.30.

13. In cross examination, witness admitted that the injuries No. 5,6 and 13 could have been caused by hard and blunt object and the remaining injuries could have been caused by Farsa, Sword, Baka etc. It was further admitted by this witness that in the post mortem report (Ex. P.30), he had not mentioned about the cuts which were found on the cloths of the deceased. This witness also denied the suggestion that the postmortem report was falsely prepared on the basis of the police documents. This witness was cross examined in detail, however, nothing could be elicited from his cross examination, which may establish that the deceased Lakhanlal did not die a homicidal death. As many as 13 injuries were found on the body of the deceased, out of which 10 injuries

were incised wounds.

14. Thus, the prosecution has proved beyond reasonable doubt that the death of the deceased Lakhanlal was homicidal in nature.

15. The next question for determination is that who are the authors of the injuries sustained by the deceased Lakhanlal?

16. Banwarilal (P.W.1) has stated that the accused persons are known to him. The deceased Lakhanlal was his younger brother. On 18-1-2005 at about 8:30 in the morning, he was coming back to his house from his well and at the same time, his brother Lakhanlal and his daughter Poonam were also going back to their house after fetching water from the well of Jagdish Teli. All of a sudden, the appellants and Upai came there. Upai was having a country made pistol with him whereas the appellants were having axe. Upai pointed his country made pistol towards Lakhanlal. Thereafter, the appellants started assaulting Lakhanlal. Hukum Singh assaulted on the head of Lakhanlal, whereas Purushottam assaulted on the neck of Lakhanlal and Kishanlal assualted on the waist and legs of Lakhanlal by axe. The deceased Lakhanlal fell down on the spot and died. Thereafter, the accused persons started saying that the deceased was having an evil eye on their daughter-in-law. After the assault was over, the co-accused Raghuvir brought a tractor and Pooran was sitting in the trolley and said that the dead body may be thrown at some place. Thereafter, all the six accused persons took away the dead body for throwing the same in the forest area and this witness ran away from the spot as he was afraid. The F.I.R., Ex. P.1 was lodged by this witness at Police Station Kolaras which bears his signatures at A to A. The spot map Ex. P.2, was prepared by the police on the same day. Notice is Ex. P.3 and Naksha Panchayatnama (Inquest Report) Ex. P.4 was prepared. This witness received the dead body by Ex.

P.5. This witness was cross examined in detail. In cross examination, this witness submitted that the incident took place at a distance of 500-600 meters away from their house. Everyday, the deceased Lakhanlal used to fetch water from the well of Jagdish. He had seen the incident from a distance of 50 meters and was on the other side of the pond. The incident took place for near about 15-20 minutes and the Kolaras Police Station is about 5-6 Kms from the place of incident. He reached the Police Station by 10 A.M. This witness could not explain as to why the fact of pointing the country made pistol by Upai towards the deceased was not mentioned in the F.I.R. Ex. P.1 and his case diary statement Ex. D.1. He further stated that the fact of throwing the dead body in the forest area is also not mentioned in the F.I.R., however, it was stated by this witness that forest is adjoining to the pond. This witness further stated that although the prosecution witness Naresh is the resident of same village but denied his any relationship with him. This witness had orally narrated the incident to the police and the report was lodged by Town Inspector. The report was written within 5 to 7 minutes and thereafter, the police went to the spot along with this witness. He further stated that they reached on the spot by approximately 10:30 A.M. The dead body was lying in the trolley and the trolley was parked in the mid of the dry pond. This witness further denied that the appellant Hukum Singh was insane. He also denied that the treatment of the appellant Hukum Singh was going in Gwalior. This witness further denied the suggestion that it was the appellant Hukum Singh, who had killed the deceased under insanity. This witness accepted the suggestion that there was election rivalry between the parties. This witness further denied the general suggestion that the appellants had not assaulted the deceased. He further denied that he was not present on the spot and had not seen

the incident.

17. Santosh (P.W.2) has stated that the injuries were caused by appellant Hukum Singh and about 1 minute after the initial assault made by the appellant Hukum Singh, the appellants Kishanlal, Purushottam, Raghuvir etc came on the spot and he had not seen any weapon in their hands. This witness was declared hostile and was cross examined by the Public Prosecutor. In cross examination, this witness admitted that blood stained earth was seized from the spot vide seizure memo Ex. P.7 and the Tractor and Trolley were seized vide seizure memo Ex. P.8. The memorandum of the appellant Hukum Singh was recorded which is Ex. P.8 and an axe was seized from the possession of appellant Hukum Singh vide seizure memo Ex. P.9. Although this witness denied that any memorandum of appellant Purshottam and Kishanlal were recorded but he admitted his signatures on their confessional statements Ex. P.11 and P.12. He further denied that axe was seized from the possession of Purshottam and Kishanlal but admitted his signatures on seizure memos Ex. P.13, and P.14. He admitted that the appellants were arrested vide arrest memo Ex. P.15 to P.20. This witness further denied that he is not telling the truth before the Court as a compromise has taken place with appellants Purshottam, Kishanlal and Upai. So far as the assault by the appellants Purshottam, Kishanlal and Upai is concerned, nothing could be elicited from the cross examination of this witness, which may support the prosecution case.

18. Poonam (P.W.3) is a child witness aged about 10 years. She has stated that She had gone along with her father Lakhanlal (Deceased) to fetch water. She was behind her father and the appellants and Upai were hiding themselves behind the trees. Upai pointed his country made pistol on the forehead of her father and thereafter, She ran to her mother

and in the meanwhile, all the appellants had started assaulting her father. When She came back along with her mother, she found that the dead body of her father was lying in the trolley and the appellants were taking away. This witness was cross examined. In cross examination, She specifically stated that the accused persons were known to her. A suggestion was also given that she had consulted the Govt. Advocate, which was denied by her. She further denied that She was tutored by her relatives. In cross examination, this witness accepted the suggestion, that on the date of incident, Banwarilal was not in the village.

19. Mamta (P.W.4) has stated that Lakhanlal was her husband. She was in her house and her daughter Poonam came running to the house. Upai had pointed his country made pistol towards the deceased whereas the appellants had assaulted the deceased and thereafter, they had taken away the dead body for throwing the same in the pond. This witness went to the spot along with her daughter Poonam and She found that the accused persons were taking away the dead body of her husband. She saw the dead body of her husband in the trolley. In cross examination, this witness specifically stated that she had met with Banwarilal in the morning of the date of incident. From the evidence of this witness, it appears that at the time of the incident, She was in the house and reached on the spot only after the assault was over and the dead body was already kept in the trolley.

20. Kamlesh (P.W. 5) had prepared the spot map. It is stated by this witness that he was posted as Patwari and had prepared the spot map Ex. P.21 and the image of place of incident is Ex. P.22 and the place of incident is shown in red colour.

21. Nisar Ahmed (P.W.6) has stated that on 18-1-2005, he was posted in Police Station Kolaras and had brought a sealed

packet and a specimen of seal from Hospital and handed over to the Head Constable Amarsingh vide seizure memo Ex. P.23. He further stated that the counter copy of the F.I.R. is Ex. P.24 which was sent to the J.M.F.C., Kolaras on 18-1-2005. The entry in the outward and inward register is Ex. P.24 and Ex. P.25. Dak book delivery is Ex. P.26 which was sent to J.M.F.C. Kolaras and the photocopies of the documents are Ex. P.24C,25C, and 26C.

22. Naresh (P.W.7) is an eye witness and he has stated that the incident took place at about 8:30 A.M. On 18-1-2005. He was going to the well of Jagdish for fetching water and Lakhanlal and his daughter were coming back. At that time he saw that the appellants Hukum Singh, Kishanlal,Purshottam and Upai were standing near the tree and the three were having axe and Upai was empty handed. All of a sudden, all the appellants and Upai surrounded the deceased and started assaulting him. The deceased Lakhanlal fell down and thereafter Raghuvir and Poonam brought a tractor and they took the dead body of Lakhanlal on the trolley but could not specify that to which place they had taken the dead body. About one and a half hour, the police came on the spot and seized an axe from the possession of Hukum Singh vide seizure memo Ex. P.10 however, the said document does not contain his signatures. No other seizure was done by the police in his presence. As this witness had not stated about certain formalities which were performed by the police therefore, he was declared hostile for limited purposes, and in cross examination, this witness admitted that blood stained and plain earth was seized by the police vide seizure memo Ex. P.7 and a tractor was also seized vide seizure memo Ex. P.8. This witness was cross examined in short and only question with regard to enemity were asked. In cross

examination this witness admitted that he is facing trial on the allegation of theft of gun of Kishanlal. No question was put to this witness about the incident narrated by this witness in examination-in-chief and even no suggestion was given that he had not seen the incident, or the appellants and Upai had not committed the offence.

23. Deepak Saxena (P.W.8) has stated that on 18-1-2005, at about 8:30 A.M., the deceased Lakhanlal was coming back along with his daughter. He heard the screams of the ladies and when he went to the place of incident, he noticed that Hukum Singh was running towards the fields. He did not notice any other accused. Hukum Singh was caught with the help of the villagers. This witness was declared hostile and was cross examined by the Public Prosecutor. In cross examination, this witness admitted that he had disclosed the names of Purshottam, Kishanlal and Upai to the police as one of the assailants in his case diary statement. He further admitted that the dead body was kept in the trolley by all the accused persons. He further stated that by mistake he could not state in his exmaination-in-chief about the assault made by the appellants Purshottam, Kishan and Upai. Purshottam and Kishan were having axe whereas Upai was having country made pistol. This witness was cross examined by the Counsel for the defence. Again no question was put to this witness about the incident and a suggestion was given about the enemity which was denied. This witness in his cross examination further stated that he had seen the appellant Hukum Singh assaulting the deceased from a distance of 300 meters. He further stated that he along with other villagers had caught hold of Hukum Singh.

24. Manoj (P.W.9) has merely stated that on 18-1-2005 at about 8:30 he heard that Lakhanlal has been killed by Hukum.

When he reached on the place of incident, the dead body was kept in the trolley and all the accused persons were sitting in the trolley. This witness was cross examined by the Counsel for the defence and in his cross examination, this witness could not name the villagers who were saying that Lakhanlal was killed by Hukum Singh. This witness further admitted in his cross examination done by appellants, that the police had reached on the spot at about 10:30 A.M.

25. It appears that an application was filed by the Counsel for the appellant Hukum alleging that the mental condition of the appellant Hukum is not good therefore, the Trial Court by order 21.4.2005 had directed the jail authorities to get the appellant Hukum Singh examined by a Doctor. The Jail authorities, accordingly, submitted the medical report of the appellant Hukum Singh and Dr. Subhash Chandra (P.W.10) was examined in the Trial with regard to the mental condition of appellant Hukum Singh. It is not out of place to mention that no application was ever filed by the defence for staying the proceedings under Section 328 of Cr.P.C. on the ground that the appellant Hukum Singh is not in a position to understand the proceedings of the Trial Court.

26. Dr. Subhash Chandra (P.W.10) has stated that the appellant Hukum Singh was under depression as he was having a suspicion about the character of his wife. This witness further stated that no document was ever brought to his knowledge about the previous treatment and he had treated the appellant Hukum Singh for the first time on 2-2-2005. This witness has further stated that a patient might become aggressive against the person with whom he had grievance but his behavior with other members of the society remains normal.

27. Ram Singh Chouhan (P.W.11) has admitted that the

appellants Purshottam, Hukum Singh, Kishanalal, Pooran were arrested vide arrest memo Ex. P.15 to P.20 and also admitted that the police had come to the village but denied the recording of memorandum of the appellants and seizure of weapons from them. This witness was declared hostile and was cross examined by the Public Prosecutor. This witness admitted his signatures on memorandum of Hukum Singh, Purshottam and Kishanlal which are Ex. P.9,P.11 and P.12. He denied that any weapon was seized from their possession but admitted his signatures on the seizure memos.

28. R.C. Bhoj (P.W.12) is the investigating officer. He has stated that Banwarilal (P.W.1) had lodged a F.I.R., Ex. P.1 on 18-1-2005 which was written by this witness and the signatures of Banwarilal (P.W.1) is at B to B and the signatures of this witness are at A to A. Naksha Panchayatnama Ex. P.4 was prepared. The spot map Ex. P.2 was prepared on the information given by Banwarilal (P.W.10). The blood stained earth and plain earth was collected vide seizure Memo Ex. P.7. One tractor trolley was seized vide seizure memo Ex. P.8 and had recorded the statements of the witnesses. On 20-1-2015, he recorded the statement of appellant Hukum Singh under Section 27 of Evidence Act, Ex. P.9 and an axe was seized vide seizure memo Ex. P.10. On 20-1-2015 itself, this witness had recorded the statements of Kishanlal and Purshottam and their statements under Section 27 of Evidence Act are Ex. P.11 and P.12. Axe were seized from the possession of Kishanalal and Purshottam vide seizure memos Ex. P.13 and P.14. Query was sent to Medical Officer, Kolaras vide Ex. P.18 and by draft Ex. P.29, the blood stained earth and seizued weapons were sent to F.S.L. Gwalior for Chemical analysis. This witness was cross examined but nothing could be elicited from the evidence of his witness, which may make his evidence unreliable.

29. It is submitted by the Counsel for the appellants that none of the witness has said about the presence of Banwarilal (P.W.1) on the spot and therefore, the F.I.R. Ex. P.1 lodged by Banwarilal (P.W.1) is doubtful. Further it is submitted that as the counter copy of the F.I.R. was not sent to the concerning Magistrate therefore, it is clear that the F.I.R. is ante-timed and ante-dated. It is further submitted that Hukum Singh was insane and he had committed the offence under the insanity and in the light of the evidence of Dr. Subhash Chandra (P.W.10) and Dr. S.K. Malhotra (D.W.3), it is clear that the appellant Hukum Singh was not in a position to understand the things at the time of incident, therefore, he is entitled for protection under Section 84 of the Indian Penal Code. It is further submitted that the prosecution has not produced the F.S.L. Report with regard to the presence of blood on the weapons, as well as of the blood stained earth therefore, the prosecution story becomes doubtful. It is further submitted that Deepak (P.W. 8) had stated that as the villagers were saying that Hukum Singh has killed the deceased Lakhanlal therefore, the evidence of other witnesses become doubtful. It is further submitted that none of the witness has stated that any of the appellant was armed with hard and blunt object, but in the postmortem, three abrasions were also found which makes the prosecution story doubtful as there is no explanation on record with regard to the abrasions which were found on the body of the deceased. Alternatively, it was also argued by the Counsel for the appellants that even if the entire prosecution story is accepted, then the case would fall within Section 304 Part I and the appellants have already undergone the period of more than 12 years.

30. Per contra, it is submitted by the Counsel for State that the F.I.R. Ex. P.1 was lodged promptly and the police also

reached on the spot immediately and in the crime detail form which was prepared at 10:25 A.M., the crime no. is mentioned which clearly shows that by 10:25 A.M., the F.I.R. was already lodged. Banwarilal (P.W.1) is the witness of spot map , Ex. P.2 prepared at 10:25 A.M., therefore, his presence is undoubtful. The countercopy of the F.I.R. was also sent to the J.M.F.C. Kolaras on 18-1-2005 itself, which rules out the possibility of F.I.R. being ante-dated or ante-timed. It is further submitted that the eye witnesses have specifically stated that the appellants had assaulted the deceased by means of axe and near about 10 incised wounds were found on the dead body of the deceased. So far as the insanity of appellant Hukum Singh is concerned, it is submitted by the Counsel for the State that the evidence which has come on record, clearly shows that the appellant Hukum Singh was merely suffering from depression which by no stretch of imagination can be said to be insanity and further there is nothing on record to show that the appellant Hukum Singh was not able to understand the things at the time of commission of offence. It is further submitted that the manner in which the incident is alleged to have taken place as well as the number of injuries inflicted on the deceased by the appellants clearly show that they had intention and knowledge to kill the deceased and the presence of additional three abrasions on the dead body of the deceased would not make the prosecution case doubtful. It is clear from the evidence that the dead body was kept in the trolley and therefore, while doing so, the abrasions might have been caused.

31. Heard, the learned Counsel for the parties.

32. It is contended by the Counsel for the appellants that since, none of the witnesses have stated about the presence of Banwarilal on the spot, therefore, not only his evidence as an

eye witness is unreliable but as the F.I.R. was lodged by him, therefore, it also becomes unreliable. The submission made by the Counsel for the appellants is misconceived and is therefore rejected. Banwarilal (P.W.1) has stated that he was going back to his house from his well and was on one side of the pond whereas the incident took place on the another side of pond and after the incident, he went running to the police station. If the evidence of Banwarilal (P.W.1) is scrutinized, then it would be clear that he had seen the incident from a distance of atleast 50 Meters and was alone. The remaining witnesses had seen the incident from different places, which is also clear from the Spot Map Ex. P.2. After the incident, Banwarilal (P.W.1) didnot go to the place of incident, but he went to the Police Station by running. Thus, the possibility of not noticing Banwarilal (P.W.1) by any other eye witness cannot be ruled out. Further more, according to the prosecution case, the incident took place at about 8:30 A.M. and the F.I.R. was lodged at 10 A.M. The police reached on the spot and prepared the crime detail form at 10:25 A.M. in which the crime no. is also mentioned, as well as the said document was also signed by Banwarilal (P.W.1) as a witness. This clearly proves the presence of Banwarilal (P.W.1) on the spot. Banwarilal (P.W.1) has stated in his evidence that he took about 5-7 minutes for lodging the F.I.R. and reached on the spot along with the police approximately by 10:30 A.M. Further more, all other witnesses had also accepted that the police had reached on the spot within 1-1 1/2 hours of the incident. The countercopy of the F.I.R. was also sent to the J.M.F.C. Kolaras on 18-1-2005 vide outward and inward register Ex. P.24 and P.25, the photocopies of which are Ex. P.24C and P.25C. Thus, not only all the documents which were prepared immediately after the recording of the F.I.R. contains

the crime Number, as well as the signatures of Banwarilal (P.W.1) but the countercopy of the F.I.R. was also sent to the J.M.F.C. Kolaras on the very same day of incident ruling out any possibility of ante-dated or ante-timed F.I.R. Further, the prosecution case is not based on the sole testimony of Banwarilal (P.W.1).

33. Naresh (P.W. 6) is an eye witness who has fully supported the prosecution case. As already observed, detailed cross examination of this witness was not done by the Counsel for the appellants and only few questions with regard to enemity were asked. Although this witness had admitted that he is facing trial on the allegation of committing theft of gun of Kishanalal, but that by itself cannot be a ground to discard the evidence of Naresh (P.W.6), if the same is otherwise found reliable. The presence of Naresh (P.W.6) on the spot cannot be doubted as in the F.I.R., Ex. P.1 also, it is mentioned that Naresh had also witnessed the incident.

34. Deepak Saxena (P.W.8) is the another eye witness. It is submitted by the Counsel for the appellant that Deepak Saxena (P.W. 8) had stated in his examination-in-chief that he was told by the villagers that the appellant Hukum Singh had killed the deceased and therefore, his evidence is binding on the prosecution. The submissions made by the Counsel for the appellants cannot be accepted. Deepak Saxena (P.W.8) had stated in his examination-in-chief that he was not present on the spot and he had heard from the villagers that the appellant Hukum Singh had killed the deceased, but this witness was declared hostile and was cross examined by the Public Prosecutor. In cross examination by Public Prosecutor, this witness admitted that by mistake he had not stated in his examination-in-chief that the appellants and Upai had also assaulted the deceased and the appellants Purshottam,

Kishanalal were having axe whereas Upai was having a country made pistol. This witness was cross examined by the defence Counsel, but no question was put to this witness with regard to his admission of witnessing the assault by the appellants and Upai. This witness was merely cross examined on the question of enemity between the appellants and Naresh (P.W.7).

35. It is well established principle of law that the evidence of a hostile witness would not be totally rejected if spoken in favor of the prosecution but it should be subjected to close scrutiny and the portio of the evidence which is consistent with the case of prosecution or defence can be relied upon.

36. The Supreme Court in the case of **Ramesh Harijan Vs. State of U.P.** reported in **(2012) 5 SCC 777** has held as under :

> **"24.** In *State of U.P.* v. *Ramesh Prasad Misra (1996) 10 SCC 360* (SCC p. 363, para 7) this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde* v. *State of Maharashtra (2002) 7 SCC 543*, *Gagan Kanojia* v. *State of Punjab (2006) (2006) 13 SCC 516*; *Radha Mohan Singh* v. *State of U.P. (2006) 2 SCC 450*, *Sarvesh Narain Shukla* v. *Daroga Singh (2007) 13 SCC 360* and *Subbu Singh* v. *State (2009) 6 SCC 462*.
>
> "*83*. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."
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> [See also *C. Muniappan* v. *State of T.N. (2010) 9 SCC 567* (SCC p. 596, para 83)

and *Himanshu* v. *State (NCT of Delhi) (2011) 2 SCC 36*.]

25. Undoubtedly, there may be some exaggeration in the evidence of the prosecution witnesses, particularly that of Kunwar Dhruv Narain Singh (PW 1), Jata Shankar Singh (PW 7) and Shitla Prasad Verma (PW 8). However, it is the duty of the court to unravel the truth under all circumstances.

26. In *Balaka Singh* v. *State of Punjab (1975) 4 SCC 511*, this Court considered a similar issue, placing reliance upon its earlier judgment in *Zwinglee Ariel* v. *State of M.P., AIR 1954 SC 15* and held as under: (*Balaka Singh case (1975) 4 SCC 511*, SCC p. 517, para 8)

"*8*. … the court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

27. In *Sukhdev Yadav* v. *State of Bihar (2001) 8 SCC 86* this Court held as under: (SCC p. 90, para 3)

"*3*. It is indeed necessary, however, to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment—sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness box detail out an exaggerated account."

28. A similar view has been reiterated in *Appabhai* v. *State of Gujarat 1988 Supp SCC 241* (SCC pp. 246-47, para 13) wherein this Court has cautioned the courts below not to give undue importance to

minor discrepancies which do not shake the basic version of the prosecution case. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness for the reason that witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. However, the courts should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

29. In *Sucha Singh* v. *State of Punjab (2003) 7 SCC 643* (SCC pp. 113-14, para 51) this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno, falsus in omnibus* has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

30. In *Shivaji Sahabrao Bobade* v. *State of Maharashtra (1973) 2 SCC 793* this Court held: (SCC pp. 799-800, para 6)

"*6*. … Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that 'a miscarriage of justice may arise from the

> acquittal of the guilty no less than from the conviction of the innocent….' In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant."
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> [See also *Bhagwan Singh* v. *State of M.P. (2002) 4 SCC 85*, *Gangadhar Behera* v. *State of Orissa (2002) 8 SCC 381* (SCC p. 395, para 18), *Sucha Singh vs. State of Punjab (2003) 7 SCC 643* (SCC p. 654, para 21), and *S. Ganesan* v. *Rama Raghuraman (2011) 2 SCC 83* (SCC p. 92, para 23).]
>
> **31.** Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense."

37. Thus, it is clear that the F.I.R. was lodged within a time of 1 1/2 hour from the time of incident and the police station was situated at a distance of 5 Kms. and Banwarilal (P.W.1) went to the police station by running, clearly shows that not only the F.I.R. was lodged promptly by Banwarilal (P.W.1) but there was every possibility of not noticing the presence of Banwarilal (P.W.1) on the spot by other witnesses and further in the first document i.e., Crime detail form Ex. P.2 which was prepared at 10:25 A.M., the crime no. 27/2005 was

mentioned, as well as Banwarilal (P.W.1) has signed this document as a witness, clearly show that the F.I.R. was already lodged prior to 10:25 A.M. According to the prosecution story, the incident took place at about 8:30 A.M. and the incident continued for about 15 minutes and thereafter, Banwarilal (P.W.1) rushed to the police station by running and lodged the F.I.R. at 10 A.M., clearly establishes the presence of Banwarilal (P.W.1) on the spot beyond any reasonable doubt and it is held that Banwarilal (P.W.1) had witnessed the incident and thereafter lodged the F.I.R., and in the F.I.R. every detail was mentioned in the F.I.R. The countercopy copy of the F.I.R. was also sent to the J.M.F.C. Kolaras on the very same day ruling out the possibility of an ante-dated or ante-timed F.I.R. Thus, in considered opinion of this Court, it is established beyond reasonable doubt that Banwarilal (P.W.1) had witnessed the incident and had also lodged the F.I.R (Ex. P.1)

38. It is submitted by the Counsel for the appellants that Poonam (P.W.3) had not witnessed the entire incident and immediately after Upai pointed his country made pistol towards the deceased She ran away. Similarly, Mamta (P.W.4) is not an eye witness. So far as the evidence of Poonam (P.W.3) and Mamta (P.W.4) is concerned, it is true that both these witnesses have not seen the entire incident, but these two witnesses have specifically stated about the presence of the appellants on the spot. Poonam (P.W. 3) has also stated that when Upai had pointed his country made pistol towards the deceased, the appellants were also there. Similarly, when Mamta (P.W.4) came on the spot, she saw that the appellants were sitting in the trolley along with the dead body of the deceased. Therefore, the evidence of Poonam (P.W. 3) and Mamta (P.W. 4) fully corroborates the evidence of eye

witnesses Banwarilal (P.W.1), Naresh (P.W.7) and Deepak Saxena (P.W.8).

39. So far as the question of enemity is concerned, the evidence of a witness cannot be discarded merely on the ground that the witness was on inimical terms, although his evidence would be required to appreciately more cautiously.

40. The Supreme Court in the case of **Dilawar Singh Vs. State of Haryana** reported in **(2015) 1 SCC 737** has held as under :

> **"26.** The evidence of Chanda Singh (PW 6) is corroborated by the evidence of Sham Singh (PW 7). Credibility of PW 7 is assailed on the ground that he was also challaned along with Narinder Singh in criminal case in 1994 and that PW 7 has animosity against the accused persons. The mere fact that PW 7 was also challaned along with Narinder Singh and that he was inimical towards the accused would not result in mechanical rejection of evidence of such a witness; but would only make the court cautious while evaluating the testimony of the witness and we do not find any infirmity in the appreciation of evidence of PW 7 by the courts and relying upon the same as corroborative evidence."

In the case of **State of Maharashtra Vs. Kashirao** reported in **(2003) 10 SCC 434,** it has been held by Supreme Court as under:

> **"9.** Evidence of PWs 1, 5 and 7 is cogent and credible. Merely because there was some animosity between PW 1 and the accused persons as claimed by the prosecution, that cannot be a ground to discard his evidence even if it is credible and cogent."

41. It was next contended by the Counsel for the appellants that the appellant Hukum Singh had committed the offence under the insanity and therefore, he is entitled for protection

under Section 84 of I.P.C.

42. Before appreciating the submissions made by the Counsel for the appellants with regard to Section 84 of I.P.C., it would be apposite to consider the effect of Section 84 of I.P.C.

43. The Supreme Court in the case of **Hari Singh Gond Vs. State of M.P.** reported in **(2008) 16 SCC 109** has held as under :

> **10.** "*7.* Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Evidence Act, 1872 (in short 'the Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See *Dahyabhai Chhaganbhai Thakkar* v. *State of Gujarat*) AIR 1964 SC 1563. In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be

borne in mind. Mayne summarises them as follows:

'Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections, whether after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case: "Would the prisoner have committed the act if there had been a policeman at his elbow?" It is to be remembered that these tests are good for cases in which previous insanity is more or less established.'

These tests are not always reliable where there is, what Mayne calls, 'inferential insanity'.

8. Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (*a*) the nature of the act, or (*b*) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this is not done, it creates

a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

9. There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind) i.e. (*1*) an idiot; (*2*) one made *non compos* by illness; (*3*) a lunatic or a mad man; and (*4*) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (see *Archbold's Criminal Pleadings, Evidence and Practice*, 35th Edn., pp. 31-32; *Russell on Crimes and Misdemeanors*, 12th Edn., Vol. 1, p. 105; 1 *Hale's Pleas of the Crown* 34). A person made *non compos mentis* by illness is excused in criminal cases from such acts as are committed while under the influence of this disorder, (see 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (see *Russell*, 12th Edn., Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

10. Section 84 embodies the fundamental maxim of criminal law i.e. *actus non facit reum nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furiosi nulla voluntas est*).

11. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in *History of the Criminal Law of England*, Vol. II, p. 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognises nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section. This Court in *Sheralli Wali Mohammed* v. *State of Maharashtra* (1973) 4 SCC 79 held that: (SCC p. 79)

'… The mere fact that no motive has been proved why the accused murdered his wife and children or the fact that he made no attempt to run away when the door was broke open, would not indicate that he was

insane or that he did not have necessary mens rea for the commission of the offence.'

12. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated *M'Naughton* rules of 19th century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in *M'Naughton case, (1843) 4 St Tr NS 847 (HL)*. Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or perfect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past or that he was liable to recurring fits of

> insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."*

In the case of **Bapu Vs. State of Rajasthan** reported in **(2007) 8 SCC 66**, the Supreme Court has held as under :

> **"9.** There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind) i.e. (*1*) an idiot; (*2*) one made *non compos* by illness; (*3*) a lunatic or a mad man; and (*4*) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (see *Archbold's Criminal Pleadings, Evidence and Practice*, 35th Edn., pp. 31-32; *Russell on Crimes and Misdemeanors*, 12th Edn., Vol. 1, p. 105; 1 *Hale's Pleas of the Crown* 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are committed while under the influence of this disorder, (see 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (see Russell, 12th Edn., Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.
>
> **10.** Section 84 embodies the fundamental maxim of criminal law i.e. *actus non reum facit nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est*).
>
> **11.** The section itself provides that the benefit is available only after it is proved

that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in *History of the Criminal Law of England*, Vol. II, p. 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognises nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section. This Court in *Sheralli Wali Mohd.* v. *State of Maharashtra (1973) 4 SCC 79* held that: (SCC p. 79)

"The mere fact that no motive has been proved why the accused murdered his wife and children or the fact that he made no attempt to run away when the door was broken open, would not indicate that he was insane or that he did not have the necessary mens rea for the commission of the offence."

12. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated *M'Naughton* rules of 19th century England. The provisions of Section 84 are in substance the same as those laid down in the answers of the Judges to the questions put to them by the House of Lords, in *M'Naughton's case (1843) 4 St Tr NS 847 (HL)*. Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or perfect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

13. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there

> was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

In the case of **Sudhakaran Vs. State of Kerala** reported in **AIR 2011 SC 265,** the Supreme Court has held as under :

> **"19**. It is also a settled proposition of law that the crucial point of time for ascertaining the existence of circumstances bringing the case within the purview of Section 84 is the time when the offence is committed. We may notice here the observations made by this Court in the case of Ratan Lal v. State of Madhya Pradesh (1970 (3) SCC 533. In Paragraph 2 of the aforesaid judgment, it is held as follows:-
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> "It is now well-settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the appellant."

The Supreme Court in the case of **Surendra Mishra Vs. State of Jharkhand** reported in **AIR 2011 SC 627** has held as under :

> **"7**. From a plain reading of the aforesaid provision it is evident that an act will not be an offence, if done by a person who, at the time of doing the same by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. But what is unsoundness of mind? This Court had the occasion to consider this question in the case of Bapu alias Gujraj Singh v. State of Rajasthan, (2007) 8 SCC 66 : (2007 AIR SCW 3808), in which it has been held as follows:
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> "The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not

quite all right, of that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

8. The scope and ambit of the Section 84 of the Indian Penal Code also came up for consideration before this Court in the case of Hari Singh Gond v. State of Madhya Pradesh, (2008) 16 SCC 109 : AIR 2009 SC 31 in which it has been held as follows:

Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity."

9. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all

right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code.

10. Next question which needs consideration is as to on whom the onus lies to prove unsoundness of mind. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him. Reference in this connection can be made to a decision of this Court in the case of T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219 : (AIR 2001 SC 3828), in which it has been held as follows:

> "9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.
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> 10. In State of M.P. v. Ahmadull, AIR 1961 SC 998, this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (a)]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.
>
> 11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."

44. In the present case, as already pointed out, two applications were filed by the appellant Hukum Singh during

the Trial. The first application was filed under Section 54 of Criminal Procedure Code, and another application was filed for summoning the Collector, Vidisha as a defence witness on the ground that after the arrest, the appellant Hukum Singh was tied with the rope which was seen by the Collector, and on the orders of the Collector, the ropes were removed. The application for summoning the Collector was rejected by the Trial Court by order dated 27-5-2005.

45. So far as the application under Section 54 of Cr.P.C. is concerned, the same was allowed by the Trial Court and by order dated 21-4-2005, the Trial Court directed the jail authorities, to get the appellant Hukum Singh examined medically and to produce the medical report. Accordingly, the appellant Hukum Singh was examined medically and the medical documents were produced. The Trial Court by order 29.4.2005 directed for examination of Dr. Subhash Chandra as a witness and accordingly, he was examined as P.W.10. Dr. Subhash Chandra has stated that the appellant Hukum Singh was suffering from depression. This witness has specifically stated that the behavior of such a witness remains normal with other members of the society but he may become aggressive against the person with whom he had grievance and the appellant Hukum Singh had a suspicion about the character of his wife and therefore, he was under depression. Although there is nothing on record about the mental condition of the appellant at the time of incident, but in order to ascertain the mental condition of an accused at the time of incident, his previous and subsequent mental condition may be taken into consideration, but there should be close proximity of time in pre-incident and post-incident mental condition. The incidents of insanity should not be remote. In the present case, the appellant Hukum Singh has examined

Dr. S.K. Malhotra (D.W.3) who has stated that She had treated the appellant Hukum Singh who was suffering from mental disease. The treatment was given on 22-12-2003, 23-12-2003, 16-1-2004 and 4-7-2004. In the present case, the incident took place on 18-1-2005 and there is no document on record to show that the appellant Hukum Singh was treated by Dr.S.K. Malhotra (D.W.3) immediately prior to the date of incident. Dr. S.K. Malhotra (D.W.3) had medically examined the appellant Hukum Singh on 22-12-2003, 23-12-2003, 16-1-2004 and 4-7-2004, therefore, the evidence of Dr. S.K. Malhotra (D.W.3) is not sufficient to ascertain the mental condition of the appellant Hukum Singh. Similarly, Dr. Subhash Chandra (P.W. 10) had examined the appellant Hukum Singh after the incident. However, Dr. Subhash Chandra (P.W.10) has not stated that the appellant Hukum Singh was unable to understand the things. The evidence of Dr. Subhash Chandra (P.W.10) is that the appellant Hukum Singh was under depression because he had a suspicion on the character of his wife. Mental insanity and Legal insanity are two different things. Every Mental insanity may not be a Legal insanity. Unless and until it is proved by the accused that he was not in a position to understand the nature of his act at the time of incident, he cannot get advantage of Section 84 of Indian Penal Code. The burden to prove insanity is on the accused, although the degree of proof may not be so onerus. Further, the appellant Hukum Singh did not file any application before the Trial Court to postpone the proceedings as he is unable to make his defence due to unsoundness of his mind.

46. Section 329 of Cr.P.C. reads as under :

"329.Procedure in case of person of unsound mind tried before Court.-

> (1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defense, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.
>
> (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court."

47. In the present, the only application filed by the appellant Hukum Singh was under Section 54 of Cr.P.C., but no application was filed under Section 329 of Cr.P.C. which clearly means that the appellant Hukum Singh was not under the disability of unsoundness of his mind and was capable of making his defence. He was examined under Section 313 of Cr.P.C. and the Trial Court also didnot notice any abnormaility in the conduct of the appellant Hukum Singh. Thus, it is clear that the appellant Hukum Singh has failed to prove that he had committed the offence under the insanity and therefore, it is held that the appellant Hukum Singh is not entitled for the benefit of Section 84 of Indian Penal Code and thus, the submissions made by the Counsel for the appellant Hukum Singh with regard to his insanity at the time of incident is rejected.

48. It is further submitted by the Counsel for the appellant that since, the prosecution has failed to prove the presence of blood on the weapons, as well as has also failed to prove the presence of human blood on the spot, therefore, the prosecution case is unreliable and should be thrown

overboard. The submissions made by the Counsel for the appellant cannot be accepted. Although the independent seizure witnesses have not supported the prosecution case, but they have accepted their signatures on the seizure memos Ex. P10, Ex. P.13 and Ex. P.14. It is well established principle of law that the evidence of the police personal cannot be discarded merely because he is a police officer. In the present case, R.C. Bhoj (P.W.12) has specifically stated that he had seized the axe from the possession of Hukum Singh, Kishanlal Purshottam and vide seizure memo Ex. P. 10, Ex. P.13 and Ex. P.14. But as the prosecution has failed to prove the presence of blood stains on the weapons, therefore, the seizure of weapons looses its significance. However, it is well established principle of law that where the direct evidence is available and if it is found to be reliable, then the same cannot be discarded only on the ground that the weapon of offence was not recovered.

49. The Supreme Court in the case of **Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and another** reported in **(2013) 12 SCC 796** has held as under :

> **"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* v. *State of U.P.(2002) 7 SCC 198* this Court has ruled that: (SCC p. 205, para 16)
>
> "*16*. 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."
>
> **35.** In *Lakhan Sao* v. *State of Bihar (2000) 9 SCC 82* it has been opined that: (SCC p. 87, para 18)
>
> "*18*. The non-recovery of the pistol or spent cartridge does not detract from the case of the prosecution where the direct evidence is acceptable."
>
> **36.** In *State of Rajasthan* v. *Arjun Singh (2011) 9 SCC 115* this Court has expressed that: (SCC p. 122, para 18)
>
> "*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."
>
> Thus, when there is ample unimpeachable ocular evidence and the same has been corroborated by the medical evidence, non-recovery of the weapon does not affect the prosecution case.
>
> **37.** In view of the aforesaid analysis, the appeal is allowed, the judgment of acquittal passed by the High Court being wholly unsustainable is set aside and the judgment of conviction of the trial court is restored. The respondent is directed to surrender to custody to serve out the sentence."

50. It was next contended by the Counsel for the appellants that although the prosecution case is that the appellants had assaulted the deceased by means of axe but on the dead body, three abrasions were also found and according to the

Doctor, the said abrasions were caused by hard and blunt object, therefore, it is clear that the prosecution has not narrated the entire story and has suppressed the material facts. The submission made by the Counsel for the appellants is misconceived and is hereby rejected. It is the case of the witnesses, that after killing the deceased, his dead body was put by the appellants in a tractor trolley. After committing the crime, the dead body of the deceased must have been put in the trolley in a haste by the appellants, therefore, the possibility of sustaining abrasions on some parts of the body of the deceased are not ruled out.

51. As this Court has already come to a conclusion that Banwarilal (P.W.1) is a truthful witness, and no questions were put by the appellants to Naresh Saxena (P.W.7) and Deepak Saxena (P.W.8) in their cross examination with regard to the incident, as well as the evidence of Poonam (P.W.3) and Mamta (P.W.4) which clearly establishes the presence of the appellant immediately prior to the incident and after the incident, coupled with the fact that Mamta (P.W.4) had seen all the appellants sitting in the tractor trolley with the dead body, this Court is the considered opinion that the prosecution has proved beyond reasonable doubt that the appellants had assaulted the deceased, which had resulted in his death.

52. The next submission made by the Counsel for the appellants that the overtact on the part of the appellants would not be a murder but would fall within the ambit of Section 304 Part I. Considered the submission made by the Counsel for the appellants and the same is rejected. As already pointed out, as many as 10 incised wounds were found on the dead body of the deceased. The deceased was unarmed and was returning back to his home along with his daughter, after fetching water, which was his normal routine.

No altercation took place between the appellants and deceased and all the appellants were armed with deadly weapons. There was no provocation by the deceased. Thus, it is clear that all the appellants had come with premeditation of mind and after locating the deceased, all the appellants started assaulting the deceased by means of axe.

53. The Supreme Court in the case of **Veeran Vs. State of M.P.** Reported in **(2011) 11 SCC 367**, while considering the distinction between Section 299 and 300 of I.P.C. has held as under:-

> **"17.** Also, the fine distinction between Section 299 and Section 300 IPC has been eloquently and beautifully carved out by Hon'ble Dr. Justice Arijit Pasayat in a recent judgment, after considering all the previous judgments of this Court. We may quote profitably the following paragraphs of the judgment in *Thangaiya* v. *State of T.N. (2005) 9 SCC 650*: (SCC pp. 656-57, paras 17-20)
>
> "*17*. These observations of Vivian Bose, J. have become locus classicus. The test laid down by *Virsa Singh* v. *State of Punjab AIR 1958 SC 465* for the applicability of clause 'Thirdly' is now ingrained in our legal system and has become part of the rule of law. Under clause 'Thirdly' of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (*a*) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (*b*) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.
>
> *18*. Thus, according to the rule laid down in

> *Virsa Singh case AIR 1958 SC 465* even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (*c*) appended to Section 300 clearly brings out this point.
>
> *19*. Clause (*c*) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons—being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.
>
> *20*. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

54. If the facts of this case are considered, then, the following picture would emerge :

The deceased was going back to his house along with minor daughter, after fetching water. The appellants, who were armed with deadly weapons, were hiding behind a tree and were waiting for the arrival of the deceased. They immediately surrounded the deceased and without any provocation, they started assaulting the deceased and caused

as many as 10 incised wounds including on the vital part of the bodies and the neck veins and arteries were found cut. Two incised wounds were found on head whereas two incised wounds were found on the nose and remaining incised wounds were found on the legs and back of the deceased. The manner in which the injuries were caused and the part of the body chosen by the appellants for causing injuries, clearly establishes that they had come with the sole intention and knowledge to kill the deceased Lakhanlal, and the injuries inflicted by them were sufficient in the ordinary course of nature to cause death.

55. No other argument was advanced by the parties.

56. Thus, considering the totality of the facts and circumstnaces of the case, this Court is of the considered opinion, that the appellants are guilty of committing offence under Section 302/34 of I.P.C. as the deceased has died due to the excessive hemorrhage from wounds on the body.

57. Accordingly, the conviction of the appellants for offence under Section 302/34 of I.P.C. awarded by the Trial Court by judgment dated 23-7-2005 is hereby affirmed.

58. So far as the question of sentence is concerned, as the minimum sentence is Life Imrisonment, therefore, sentence of Life Imprisonment awarded by the Trial Court is also affirmed.

59. The appeal fails and is hereby **dismissed.**

(SHEEL NAGU)
Judge
(18.08.2017)

(G.S. AHLUWALIA)
Judge
(18.08.2017)

(alok)