HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH

DIVISION BENCH

G.S. AHLUWALIA

&

RAJEEV KUMAR SHRIVASTAVA J.J.

Cr.A. No. 410 of 2010

Ahmed Sayeed & Ors.

Vs.

State of M.P.

&

Cr.A. No. 456 of 2010

State of M.P.

Vs.

Ahmed Sayeed & Ors.

Shri R.K.S. Kushwaha, Counsel for Appellants No. 1 and 2
Shri Padam Singh with Shri Udaiveer Singh Counsel for Appellants No. 3 and 4
Shri C.P. Singh Counsel for the State

Date of Hearing : 21-12-2021
Date of Judgment : 4/Jan/2022
Approved for Reporting : Yes

Judgment

4th- January-2022

Per G.S. Ahluwalia J.

1. By this common judgment, the Cr.A. No. 410/2010 and Cr.A. No. 456 of 2010 shall be decided.

2. Cr.A. No. 410 of 2010 has been filed by Appellants Ahmed Sayeed, Samim, Anees and Shakeel against the judgment and sentence dated 13-4-2010 passed by Additional Sessions Judge, Sironj, Distt. Vidisha in S.T. No. 15/2004, by which the appellants have been convicted and sentenced for the following offences :

a. Under Section 302/149 of I.P.C. (On three counts for murder of Fida Mohd., Abdul Azeez and Rabia bi) and sentenced to undergo Life Imprisonment and fine of Rs.1000/- in default 6 months R.I., on three counts ;

b. Under Section 307/149 of I.P.C. (On three counts for attempting to kill Anwar, Johra bi, and Mohd. Khalil) and sentenced to undergo 7 years R.I. and fine of Rs. 1000/- in default 6 months R.I., on three counts ;

c. Appellant Ahmed Sayeed under Section 148 of I.P.C. and sentenced to undergo 1 year R.I. and fine of Rs. 500/- in default 3 months R.I.

d. Appellants Samim, Anees and Shakeel under Section 147 of I.P.C. and sentenced to undergo 1 year R.I. and fine of Rs. 500/- in default 3

months R.I.

All the sentences to run concurrently.

Whereas Cr.A. No.456/2010 has been filed by the State for enhancement of sentence and for award of death penalty.

3. The necessary facts for disposal of present appeal in short are that the complainant Gaffar Khan lodged a Dehati Nalishi, Ex. P.1 on 5-5-2003 at 10:25 A.M., on the allegations that he is the resident of village Jhujhalakheda and is an agriculturist by profession. There was a dispute between Abdul Azeez and Ahmed Sayeed on the question of boundary of field. At about 8:00 A.M., Haneef Khan, Munne bhai, Fida Bhai and the complainant had gone to amicably settle the matter. Anees, Shakeel, Yusuf and Shamim, all sons of Ahmed Sayeed were also there. The complainant, Munna bhai, Fida Bhai and Haneef Bhai were affixing stones on the earthen boundary. Ahmed Sayeed and his sons Anees, Samim, Yusuf and Shakeel started abusing and scuffling. They were separated by the complainant and others. Thereafter, Ahmed Sayeed and his sons ran towards their house. Ahmed Sayeed came out along with his .12 bore gun. Shakeel was following him along with a belt of cartridges. Shakeel, Yusuf and Samim also came there and started shouting that all should be killed. Ahmed Sayeed fired a gun shot causing injury to Khalil who was standing in the courtyard of Ahmed Sayeed. He fell down after sustaining gun shot injury. Thereafter, Ahmed Sayeed fired a

gun shot causing injury to Azeez, who also fell down after sustaining gun shot injury. Azeez was standing in front of the house of Munnawar. Rabia bi was also standing there, who also sustained gun shot injuries and also fell down. The children and other ladies came on the spot and started crying and pleading for mercy from Ahmed Sayeed, but Ahmed Sayeed did not stop. Anees, Shamim, Shakeel and Yusuf were exhorting that no one should be spared. Thereafter, Ahmed Sayeed, after reloading his gun caused gun shot injuries to Johra bi, Akhtar, Jamil, Anwar, Rabia bi, Chhammu Khan, Haneef Khan. Ahmed Sayeed was challenging that if any body has a courage, then he may come forward. The people ran helter-skelter. Fida Bhai along with his wife, was going on a motor cycle to lodge a report. The movement he started the motor cycle, Sayeed Ahmed came nearer to the house of the complainant, and fired a gun shot causing injuries to Fida and his wife as a result, both of them fell down from the motor cycle. Thereafter, the complainant and Haneef Khan took all the injured persons to the hospital on a tractor and trolley. Some more gun shots were heard, therefore, it is possible that some more injured persons must be lying in the village. The Doctors have informed that Fida bhai and Abdul Azeez have died.

4. Accordingly, the police registered the F.I.R. and started investigation. Rabia bi also died on her way to Bhopal as the injured persons were referred to Hamidia Hospital, Bhopal. Post-mortem of

dead persons was got done. The injured persons were got medically examined. Spot map was prepared. Statements of the witnesses were recorded. Appellants were arrested. Weapons and other incriminating articles were sent for F.S.L. The police after completing the investigation, filed charge sheet for offence under Sections 302,307,147,148,149 of I.P.C. It is not out of place to mention here that Yusuf and Shakeel were absconding. However, two months after the filing of the charge sheet, Shakeel was also arrested and supplementary charge sheet was filed against him. Yusuf has been arrested after the judgment was passed in the present trial and his trial is pending.

5. The Trial Court by order dated 16-6-2004 framed charges under Section 147,148, 302/149 (On three counts), 307/149(On Ten Counts).

6. The Appellants abjured their guilt and pleaded not guilty.

7. The prosecution examined Gaffar Khan (P.W. 1), Anwar (P.W.2), Kailash (P.W.3), Chhammu Khan (P.W.4), Johra bi (P.W.5), Mohammad Khalil (P.W. 6), Munna Lal (P.W.7), Iliyas (P.W. 8), Mohammad Akhtar (P.W. 9), Dr. Gitarani Gupta (P.W. 10), Dr. Arun Jaroliya (P.W. 11), Nijam Khan (P.W. 12), Mohammad Rafiq (P.W. 13), Mohammad Haneef (P.W. 14), Jai Narayan Katiyar (P.W. 15), Ghanshyam Prasad (P.W. 16), Shambhu Singh (P.W. 17), Liyakat Khan (P.W. 18), Shamim Khan (P.W. 19), and Alok Shrivastava (P.W.

20).

8. The appellants examined Munnawar Ali @ Munne Khan (D.W.1), Shambhu Singh Rajput (D.W.2) and Dr. Amit Hadole (D.W.3).

9. The Trial Court after hearing both the parties, have convicted and sentenced the appellants for the above mentioned offences.

10. Challenging the impugned judgment of conviction, it is submitted by Shri R.K.S. Kushwaha that the eye witnesses including the complainant are not reliable witnesses. In fact that the complainant party was aggressor and they caused gun shot injury to the appellant Samim and even the house of the appellant Ahmed Sayeed was also set on fire. No blood stains were found on the spot. The spot map which was prepared on the very first date of incident, has not been filed. The injuries sustained by Samim have not been explained by the prosecution. There are material variance in the evidence of the material witnesses. To buttress his contentions, the Counsel for the Appellants No. 1 and 2 relied upon the judgments passed by Supreme Court in the case of **Parsuram Pandey and others Vs. state of Bihar** reported in **2005 SCC (Cri) 113, Bhagwan Swaroop Vs. State of M.P.** reported in **AIR 1992 SC675, Bijay Singh and others Vs. State of M.P.** reported in **2003 SCC (Cri) 1093, Khima Vikamshi and others Vs. State of Gujarat** reported in **2003 SCC (Cri) 1825, Rukma (Smt) and others Vs. Jala and**

others reported in **1998 SCC (Cri) 213, Shri Gopal and others Vs. Subhash and others** reported in **2005 SCC (Cri) 98, Jainul Haque Vs. State of Bihar** reported in **AIR 1974 SC 45, Kuldeep Yadav and others Vs. State of Bihar** reported in **(2011) 5 SCC 324, Ramaiah @ Rama Vs. State of Karnataka** reported in **(2014) 9 SCC 365, Shaji and others Vs. State of Kerala** reported in **(2011) 5 SCC 423, State of Haryana Vs. Gurdial Singh and others** reported in **AIR 1974 SC 1871, Suraj Mal Vs. State (Delhi Adm)** reported in **AIR 1979 SC 1408, Lakshman Prasad Vs. State of Bihar** reported in **AIR 1981 SC 1388** and **Sarwan Singh Rattan Singh Vs. State of Punjab** reported in **AIR 1957 SC 637, Ram Narain Vs. State of Punjab** reported in **AIR 1975 SC 1727, State of U.P. Vs. Ram Bahadur Singh and others** reported in **2004 SCC (Cri) 1463, Chhabilal and others Vs. State of M.P.** reported in **ILR 2009 MP 536, Harjinder Singh @ Bhola Vs. State of Punjab** reported in **2004 SCC (Cri) Supp 28,** and **State of Bihar Vs. Bishwanath Rai and others** reported in **AIR 1997 SC 3818.**

11. Shri Padam Singh Counsel for appellants no. 3 and 4 submitted that the ocular evidence is belied by the medical evidence. No specific role has been assigned by the witnesses. Scientific evidence/ Forensic evidence, doesnot support the ocular evidence. Some of the witnesses have turned hostile. The belt of cartridges has not been seized. There is no overt act on the part of the appellants no. 3 and 4

and they have been falsely implicated, only because of the fact that they are the sons of Appellant No. 1 Ahmed Sayeed. One more gun was seized, but the prosecution has not explained that who was the owner of the said gun and the relevance of the said gun has also not been explained. The evidence of Dr. Arun Jaroliya (P.W. 11) clearly indicates, that the direction of the injuries sustained by the injured witnesses was downward which indicates that the assailant was standing at a high place like roof of the house and thus, the evidence of the witnesses is unreliable. Accordingly to the witnesses, the gun shots were fired from a distance of 30-32 steps, but as per the post-mortem report as well as M.L.C. reports of all the injured persons, blackening was found around the wounds, which clearly indicates, that the gun shots were fired from a very close range. It is further submitted that in fact, the appellant no.2 Samim was caused gun shot injury and the house of Ahmed Sayeed was set on fire, therefore, Ahmed Sayeed, had retaliated in exercise of his private defence. It is further submitted that otherwise in alternative, the appellant no. 1 is guilty of committing offence under Section 304 Part I of I.P.C. as the incident took place on the trivial issue of affixing of stone on the earthen boundary and the parties are real brother. To buttress his contentions, the Counsel for the appellants no. 3 and 4 has relied upon the judgments passed by Supreme Court in the case of **Sukumaran Vs. State** reported in **(2019) 15 SCC 117, Bachan**

Singh and others Vs. State of Punjab reported in **AIR 1993 SC 305, State of Rajasthan Vs. Bhawani** reported in **(2003) 7 SCC 291, Dattu Shamrao Valake Vs. State of Maharashtra** reported in **(2005) 11 SCC 261, Virsa Singh Vs. State of Punjab** reported in **AIR 1958 SC 465, Harjinder Singh Vs. Delhi Administration** reported in **AIR 1968 SC 867** and **Sawal Das Vs. State of Bihar** reported in **AIR 1974 SC 778.**

12. Per contra, the Counsel for the State has supported the prosecution case as well as also supported the findings recorded by the Trial Court. It is submitted that it is incorrect to say that the incident took place all of a sudden. One day prior to the date of incident, both the parties had gone to police station for lodging F.I.R. against each other, but Fida Mohd. persuaded them not to lodge the report and assured that the matter would be settled down by mutual settlement. It is further submitted that it appears that Dr. Arun Jaroliya (P.W.11) was not honest towards his duties and deliberately mentioned blackening in all medical documents, whereas Dr. Amit Hadole (D.W.3) and Dr. Smt. Gitarani Gupta (P.W.10) did not find any blackening and therefore, Dr. Arun Jaroliya (P.W.11) was hesitant in appearing before the Trial Court. When the witnesses are truthful witnesses, then there is always a possibility of some embellishments and therefore, their reliable evidence cannot be discarded on the basis of minor omissions and contractions.

13. Heard the learned Counsel for the parties.

14. Before adverting to the merits of the case, this Court thinks it apposite to consider as to whether the death of Fida Mohd., Abdul Azeez and Rabia bi was homicidal or not?

15. The post-mortem of Rabia bi was conducted by Dr. Gitarani Gupta (P.W.10) who found following injuries :

Postmortem report of Rabia, Ex.P/10

Shot gun fired from a distant range. Direction from anterior to posterior, corresponding entry of pellets also present.

There are multiple entry wounds present over anterior aspect of abdomen, anterior aspect of both thighs, left leg, left upper limbs, right upper arm, right dorsum of hand, lateral aspect of foot of left side. They are more dense at abdomen, thighs and left upper limb. Size of entry wound 0.3 to 0.5 cm in diameter. Some are oval and some are circular. They are situated from heal to 51" height of the body.

On X-ray examination : (1) Right and left upper arm (2) Left forearm and hand (3) both thighs (4) Chest (5) Abdomen.

In AP view (anterior and posterior) showing radio opaque shadow, but more on abdomen and pelvic region. Abdominal wall, mesentery muscle of abdomen ecchymosed.

Multiple entry and exit wound present in the intestinal to stomach through and through. The pellets embedded in the liver, pelvic muscles mesentery.

Abdominal cavity contains about 2 liter of blood. Some of which is clotted.

2nd Metacarpal at distal end on left side of hand, fracture Ecchymosis present.

5 pellets recovered from the body from different places in different form.

Opinion : Death was due to shock and hemorrhage, as a result of firearm injuries to the body.

Injuries have been caused by shotgun fired from a distant range. Death is homicidal in nature.

Pellets recovered from the body preserved, clothings and articles preserved, sealed and handed over to P.C.

concerned. Duration of death is within 24 hrs since postmortem examination. Signs of primary aid present.

16. Dr. Geeta Rani Gupta (P.W. 10) was cross-examined. In cross examination, She stated that there were surgical bandage on the wounds. Rigor mortis had started. The distant range written in the post-mortem report, can be of more than 2 ft.s but this witness was not in a position to tell about the exact distant.

17. The post-mortem of deceased Fida Mohd. And Abdul Azeez was conducted by Dr. Arun Jarolia (P.W.11) who found the following injuries on the dead body of the dead persons :

Postmortem Report of Fida Mohammad Ex.P/24

Ext. Examination: Body of a man with strong built body lying in supine position - Body cool rigor mortis present all over body, mouth closed, eyes closed, pupil dilated, clotted blood present all over the face and nostrils. Both upper and lower limb extended. Ext. Genitolia- NAD

Ext. Injury: (1) Multiple contact wound (puncture wound) about 15 to 17 in no. ….....and ant. aspect of right shoulder, size about ¼ x ¼ x deep to skin 5 to 6, and some wound ¼ x ¼ x superficial to skin about (8 to 10) and blacking present all around the each wound.

(2) Multiple contact (puncture wound) about 16 to 20 in no. each size ¼ x ¼ inch present left shoulder region and upper 1/3 of left arm anterior aspect, some superficial to skin (8 to 12), some deep to skin (6 to 8) and blacking present all around each wound.

(3) Multiple contact (puncture wound) about 10 to 14 in no. each size ¼ x ¼ inch present over anterior aspect of chest region. Some wound about 3 to 4 penetrating deep to muscle and reach to visceral (lung and heart), one puncture wound present over right lungs and remaining puncture wound superficial to skin and some deep to skin and muscle, blackening present all around wound.

(4) Multiple contact (puncture wound) about 5 to 7 present over face at right side of face size ¼ x ¼ deep to skin, blacking present around the wound.

Direction of wound - All deep wound upward to downward.

All injuries described on page No.3 are antemortem in nature caused by gunshot injury, duration 6 to 12 hours.

In my opinion, mode of death is syncope due to injuries described on page no.3 caused by gunshot injury.

Duration - 6 to 12 hours prior to autopsy.

Postmortem report of Abdul Azeez, Exhibit P-25

Ext. Examination :- Body of a man with strong built body lying supine position – Body cool rigor mortis present all over body, mouth semi-open, eyes closed, pupil dilated, clotted blood filled in mouth and nostrils (both), both upper and lower limb extended, ext. genitolia – NA.

Ext. Injury :-

1. Multiple contact wound (punctured wound) about 14 to 16 in number, present over right shoulder (Ant. Aspect) and right arm & right forearm, size about ¼ x ¼ inch into deep to skin.
2. Multiple contact wound (punctured wound) about 18 to 20 in number, present over the chest region. Some wound about 6 to 8 penetrating deep to mus. & reach the viscera (lungs & heart) [(4) (four) punctured wound penetrate & reach the left side of lung so 4 holes seen upper lobe of left lung & one hole present over left ventricle region and some wound superficial to skin about 6 to 8 blacking present all around the each wound, size ¼ x ¼ inch deep.
3. Multiple puncture wound about 4 to 6 size ¼ x ¼ inch deep to skin, present over left arm and forearm, blackening present.
4. About 8 to 10 puncture wound present over abdomen, size ¼ x ¼ x deep to skin, blackening present.
5. About 3 to 4 puncture wound present over left thigh (anterior aspect), size ¼ x ¼ deep to skin, blacking.
6. About 2 wound (punctured) present over right thigh (anterior aspect), size ¼ x ¼ deep to skin, blacking.

Direction of wound – All deep wound direction upward to downward.

All injuries described on Page No.3 are antemortem in nature caused by gunshot injury, duration 6 to 12 hours.

In my , mode of Death is syncope due to injuries described on Page No.3 caused by gunshot injury.

Duration 6 to 12 hours prior to autopsy.

18. Dr. Arun Jaroliya (P.W.11) was cross-examined. In cross-

examination, this witness stated that he did not find any charring but had found blackening around the wounds. He further admitted that no firearm was sent in order to find out as to whether the injuries could have been caused by the said firearm or not. However, he explained on his own, that even otherwise, they merely give general opinion after looking at the weapon of offence. He was unable to explain any difference between Shotgun and .12 bore gun. He further stated that multiple persons may suffer pellet injuries due to single shot by gun using pellet cartridge. He further stated that he had medically examined various injured persons, and although many relatives of the injured persons had also come, but they were not co-operating. He further stated that both chambers of the heart of dead persons namely Fida Mohd and Abdul Azeez were empty. Both the deceased persons were taller than Ahmed Sayeed, therefore, if the gun shots were fired while standing on the ground, then the deceased persons could not have suffered the injuries,. He further stated that it is possible that the gun shots might have been fired from a height but was unable to say as to whether the gun shots were fired from the height of 10-15 ft.s or not.

19. From the evidence of Dr. Geeta Rani Gupta (P.W. 10) and Dr. Arun Jaroliya (P.W. 11) it is clear that the death of Rabia bi, Fida Mohd. and Abdul Azeez was homicidal in nature, due to gun shot iinjuries. Accordingly, it is held that the prosecution has succeeded in

establishing that the death of Rabia bi, Fida Mohd. and Abdul Azeez was homicidal in nature.

20. Further, various persons had sustained multiple gun shot injuries. Dr. Arun Jaroliya (P.W.11) as well as Dr. Amit Hadole (D.W.3) had medically examined the injured persons and found the following injuries on their body :

M.L.C. Report of Rubina Ex.P/13 prepared by Dr. Arun Jaroliya (P.W.11)

1. Entrance contact wound with penetrating injury, blacking present all around wound with bleeding. Size in number ¼ x ¼ deep to skin rounded shape. Outer aspect of upper 1/3 of right arm. Projectile object with force like pellet of gunshot.
2. Entrance contact wound with penetrating injury blacking present all around wound with bleeding. Size in number ¼ x ¼ deep to skin rounded shape. Over right scapular bone. Projectile object with force like pellet of gunshot.
3. Entrance contact wound with penetrating injury blacking present all around wound with bleeding. Size in number ¼ x ¼ deep to skin rounded shape. Middle of lower 1/3 of back side. Projectile object with force like pellet of gunshot.

M.L.C. report of Rubina Bee, Ex. P/57 prepared by Dr. Amit Hadole (D.W.3)

On examination - Puncture wound right scapular region back
active bleeding (+)
Puncture wound, on back over L S spine.
Puncture wound right arm.
Active bleeding (+)
Above mentioned injury is probably caused by a firearm weapon.

M.L.C. Report of Zarina Bee Ex.P/14 prepared by Dr. Arun Jaroliya (P.W.11)

Entrance contact wound with penetrating injury blacking present all around wound with bleeding. Two in number each ¼ x ¼ deep to skin rounded shape. Back side of let leg. Projectile object with force like pellet of gunshot.

M.L.C. report of Haneef Khan, Ex. P/15 prepared by Dr. Arun Jaroliya (P.W.11)

(1) Contact wound with lacerated wound with blacking present all around wound (2 in number entrance wound with bleeding), size (i) ¼ inch x ¼ inch x deep to skin rounded shape (ii) ¼ inch x ¼ inch x deep to skin rounded shape. Medial border of left foot below the medial malleolus. Projectile object with force like pellet's gunshot.

M.L.C. report of Azra Bee, Ex. P/16 prepared by Dr. Arun Jaroliya (P.W.11)

(1) Entrance contact wound with penetrating injury blacking present all around wound with bleeding. Multiple like 19 to 15 in No. ¼ inch x ¼ inch deep to skin rounded shape. Over left buttock region. Projectile object with force like pellet of gunshot.

M.L.C. report of Mohammad Khalil, Ex. P/17 prepared by Dr. Arun Jaroliya (P.W.11)

(1) Entrance contact wound with penetrating injury blacking present all around wound with bleeding. One in number ¼ inch x ¼ inch deep to skin rounded shape. Above the left nipple. Projectile object with force like pellet of gunshot.

M.L.C. of Chhammu Khan (Exhibit P-18) prepared by Dr. Arun Jaroliya (P.W.11)

1. Entrance contact wound with penetrating injury blacking present all around wound with bleeding. 6 to 8 in number each ¼ x ¼ deep to skin rounded shape. All around right leg. Projectile object with force like pellets of gunshot.
2. Entrance contact wound with penetrating injury blacking present all around wound with bleeding. 5 to 7 in number each ¼ x ¼ deep to skin same shape as above. All around left leg. Projectile object with force like pellets of gunshot.

M.L.C. report of Chhammu Exhibit P-61 prepared by Dr. Amit Hadole (D.W.3)

O/E Three puncture wounds about .5x.5 cms with margins abraded over lateral aspect of left thigh 1/3rd.

Multiple puncture wounds about .5 x .5 cm over left leg, posterior aspect of right leg 1/3rd

One puncture wound over posterior aspect of right thigh 1/3rd.

One puncture wound each over base & one at tip of left index finger.

Above mentioned injury is probably caused by a firearm weapon.

M.L.C. of Anwar Khan, Exhibit P-19 prepared by Dr. Arun Jaroliya (P.W.11)

1. Entrance contact wound with penetrating Injury blackening present all around wound with bleeding. Multiple holes near about 14 to 18 in number each ¼ x ¼ inch deep to skin rounded shape. All around over right iliac fossa, Rt. Right and Rt. leg region. Projectile object with force like pellet of gunshot.

M.L.C. report of Anwar, Exhibit P-60 prepared by Dr. Amit Hadole (D.W.3)

O/E :- Three small superficial abrasion right leg lateral surface just below knee.

- No bony deformity
- No restriction of movement.

Above mentioned injury is probably caused by a firearm weapon.

M.L.C. report of Jameel Ahmad, Exhibit P-20 prepared by Dr. Arun Jaroliya (P.W.11)

1. Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 5 to 7 in number each ¼ x ¼ inch deep to skin rounded shape. Around the left arm. Projectile object with force like pellet of gunshot.
2. Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 6 to 8 in number each ¼ x ¼ inch deep to skin rounded shape. Around the right arm. Projectile object with force like pellet

of gunshot.

3. Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 1 in number ¼ x ¼ inch deep to skin rounded shape. Over left hypochondrium (spleen region). Projectile object with force like pellet of gunshot.

4. Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 1 in number ¼ x ¼ inch deep to skin rounded shape. Appical area of left chest. Projectile object with force like pellet of gunshot.

5. Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 1 in number ¼ x ¼ inch deep to skin rounded shape. Right side of forehead. Projectile object with force like pellet of gunshot.

6. Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 1 in number ¼ x ¼ inch deep to skin rounded shape. Just near the left ear. Projectile object with force like pellet of gunshot.

M.L.C. report of Jameel, Ex. P/56 prepared by Dr. Amit Hadole (D.W.3)

On examination - Two puncture wound about .5 x .5 cm with abrasions at border over right shoulder and one puncture wound over left shoulder.

Distal neurovascular status normal.

Adv. X-ray right and left shoulder AP

Above mentioned injury is probably caused by a firearm weapon.

M.L.C. report of Mohammad Irshad, Ex. P/21 prepared by Dr. Arun Jaroliya (P.W.11)

(1) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 5 to 7 in no. each ¼ inch x ¼ inch deep to skin rounded shape. Around left leg. Projectile object with force like pellet of gunshot.

(2) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 9 to 11 in no. each ¼ inch x ¼ inch deep to skin rounded shape. Over right thigh & leg. Projectile object with force like

pellet of gunshot.

M.L.C. Report of Mohd. Irshad Ex.P-63 prepared by Dr. Amit Hadole (D.W.3)

On examination, patient conscious and oriented.

Multiple puncture wound of about .5 x .5 cm. over left leg with margins abraded and puncture wounds of about .5x.5 cm. with margins abraded over the medial aspect of right knee.

One puncture wound each over medial aspect of right thigh 1/3rd over right leg 1/3rd.

Above mentioned injury is probably caused by a firearm (shot gun).

M.L.C. report of Zayra Bee, Ex. P/22 prepared by Dr. Arun Jaroliya (P.W.11)

(1) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. Size one in no. ¼ inch x ¼ inch deep to skin rounded shape. Over right temporal bone, just above the right ear. Projectile object with force like pellet of gunshot.

M.L.C. report of Rabiya Bi, Ex. P/23 prepared by Dr. Arun Jaroliya (P.W.11)

(1) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. Size ¼ inch x ¼ inch deep to skin rounded shape. Dorsal aspect of left hand near metacarpal. Projectile object with force like pellets of gunshot.
(2) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 15 to 16 in number each ¼ inch x ¼ inch deep to skin rounded shape. All over right buttock. Projectile object with force like pellets of gunshot.
(3) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 13 to 15 in number same shape as above. All over left buttock. Projectile object with force like pellets of gunshot.
(4) Entrance contact wound with penetrating injury blackening present all around wound with bleeding. 6 to 8 in number same shape in each thigh. All around upper 1/3 of both thigh. Projectile object with force like pellets of gunshot.

M.L.C. report of Mohd. Akhtar, Ex.P/62 prepared by Dr. Arun Jaroliya (P.W.11)

Multiple puncture wounds of around 0.5x0.5 cm with margin abraded over anterior aspect of right and left thigh
Distal neurovascular status (N.)
Ad. X-ray thigh full length
Above mentioned injury is probably caused by firearm.

M.L.C. report of Mohd. Khalil Ex. P/62 prepared by Dr. Arun Jaroliya (P.W.11)

On Examination, Circular wound of about 0.5 cm x 0.5 cm at left side of chest about 5 cm below to the clavicle in midclavicular line. Black scab present over the wound.
Injury caused to the patient is dangerous to life, may be caused by gunshot injury within 24 hours.

21. From the Medico Legal Certificates of different injured persons, it is clear that all of them have sustained gun shot injuries.

22. Now the moot question for consideration is that whether the appellants have caused death of Fida Mohd., Abdul Azeez and Rabia bi apart from making an attempt to kill the injured persons or not?

23. Before adverting to the above mentioned question, this Court would like to mention that the prosecution did not examine all the injured persons and only Anwar (P.W.2), Chhammu Khan (P.W.4), Johara bi (P.W. 5), Mohd. Khalil (P.W.6), Akhtar (P.W.9) and Mohd. Haneef (P.W. 14) have been examined. Further more, the appellants have been convicted under Section 307/149 of IPC for making an attempt to kill Anwar (P.W.2), Johara bi (P.W.5) and Mohd. Khalil (P.W.6) only and came to a conclusion that the prosecution has failed to prove that any injury was caused to Akhtar (P.W.9), Chhammu

Khan (P.W.4), Rubina bi, Jarina bi, Haneef Khan, Ajarabi, Jamil, and Mohd. Irshad. So far as the acquittal of appellants for making an attempt to kill Chhammu Khan (P.W.4) is concerned, it is basically on the ground that this witnesses had turned hostile and did not support the prosecution case. So far as acquittal for attempting to kill Akhtar (P.W. 9) is concerned, the Trial Court in para 223 of its judgment has held that the M.L.C. of Akhtar (P.W. 9) was proved by Dr. Amit Hadole (D.W.3) and since, the said witness was given up by the appellants themselves, therefore, the appellants could not get any opportunity to cross-examine him, and thus, the M.L.C. of Akhtar cannot be read.

24. It is not out of place to mention here that the prosecution or complainant has not filed any appeal against the acquittal of the appellants for causing making an attempt to kill Akhtar (P.W.9), therefore, the acquittal of appellants for making an attempt to kill Akhtar (P.W.9) cannot be reversed, but this Court while appreciating the prosecution case, can certainly re-consider the reasoning given by the Trial Court in respect of Dr. Amit Hadole (D.W.3).

25. Thus, this appeal is being considered for having committed three murders i.e., Fida Mohd., Abdul Azeez and Rabia bi and for making an attempt to kill Anwar (P.W.2), Johara bi (P.W.5) and Mohd. Khalil (P.W.6).

Whether the Ocular Evidence is contrary to Medial Evidence ?

26. One of the most important arguments of the appellants is that the Ocular Evidence is contrary to Ocular Evidence, therefore, the Ocular Evidence should be discarded.

27. Before adverting to the submission made by the Counsel for the appellants, this Court thinks it apposite to consider the law governing the field.

28. The Supreme Court in the case of **Palani v. State of T.N.,** reported in **(2020) 16 SCC 401** has held as under :

> **15.** As per the alleged variance between the medical and ocular evidence concerned, it is well settled that oral evidence has to get primacy and the medical evidence is basically opinionative and that the medical evidence states that the injury could have been caused in the manner alleged and nothing more. The testimony of the eyewitness cannot be thrown out on the ground of inconsistency. In *State of Haryana* v. *Bhagirath*, it was held as under:
>
> "*15*. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation."
>
> When the opinion given is not inconsistent with the probability of the case, the court cannot discard the credible direct evidence otherwise the administration of justice is to depend on the opinionative evidence of medical expert. The medical jurisprudence is not an exact science with precision; but merely opinionative. In the case in hand, the contradictions pointed out between the oral and medical evidence are not so grave in nature that can prove fatal to the prosecution case.

29. The Supreme Court in the case of **State of Uttarakhand v. Darshan Singh,** reported in **(2020) 12 SCC 605** has held as under :

> **43.** In *Abdul Sayeed* v. *State of M.P.*, this Court discussed elaborately the case law on the subject of conflict between

medical evidence and ocular evidence: (SCC pp. 272-74, paras 32-39)

"***Medical evidence versus ocular evidence***

32. In *Ram Narain Singh* v. *State of Punjab* this Court held that where the evidence of the witnesses for the prosecution is *totally* inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.

33. In *State of Haryana* v. *Bhagirath* it was held as follows: (SCC p. 101, para 15)

'*15. The opinion given by a medical witness need not be the last word on the subject*. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts *it is open to the Judge to adopt the view which is more objective or probable*. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.'

34. Drawing on *Bhagirath case*, this Court has held that where the medical evidence is at variance with ocular evidence,

'it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".'

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such

credibility.

'*21*. … The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.'

[Vide *Thaman Kumar* v. *State (UT of Chandigarh)* and *Krishnan* v. *State* at SCC pp. 62-63, para 21.]

36. In *Solanki Chimanbhai Ukabhai* v. *State of Gujarat* this Court observed: (SCC p. 180, para 13)

'*13*. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. *Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.*'

37. A similar view has been taken in *Mani Ram* v. *State of U.P.*, *Khambam Raja Reddy* v. *Public Prosecutor* and *State of U.P.* v. *Dinesh*.

38. In *State of U.P.* v. *Hari Chand* this Court reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)

'*13*. … In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.'

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely

> rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."
>
> (emphasis in original)

30. The Supreme Court in the case of **CBI v. Mohd. Parvez Abdul Kayuum,** reported in **(2019) 12 SCC 1** has held as under :

> **64.** In *Ram Narain Singh* the Court observed that the prosecution has to prove that injury was caused by the weapon in the manner as alleged. There is no dispute with the aforesaid proposition. However, the applicability of ratio has to be seen in the facts and circumstances of each case. In the instant case, the ocular evidence of PW 55 is not discredited by the medical evidence.
>
> **65.** Even otherwise as submitted on behalf of the prosecution that in case of any discrepancy between the ocular or medical evidence, the ocular evidence shall prevail, as observed in *Yogesh Singh* v. *Mahabeer Singh*: (SCC pp. 217-18, para 43)
>
> > "*43*. The learned counsel appearing for the respondents has then tried to create a dent in the prosecution story by pointing out inconsistencies between the ocular evidence and the medical evidence. However, we are not persuaded with this submission since both the courts below have categorically ruled that the medical evidence was consistent with the ocular evidence and we can safely say that to that extent, it corroborated the direct evidence proffered by the eyewitnesses. We hold that there is no material discrepancy in the medical and ocular evidence and there is no reason to interfere with the judgments of the courts below on this ground. In any event, it has been consistently held by this Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. [See *Solanki Chimanbhai Ukabhai* v. *State of Gujarat*, *Mani Ram* v. *State of Rajasthan*, *State of U.P.* v. *Krishna Gopal*, *State of Haryana* v. *Bhagirath*, *Dhirajbhai Gorakhbhai Nayak* v. *State of Gujarat*, *Thaman Kumar* v. *State (UT of Chandigarh)*, *Krishnan* v. *State*, *Khambam Raja Reddy* v. *Public*

Prosecutor, *State of U.P.* v. *Dinesh*, *State of U.P.* v. *Hari Chand*, *Abdul Sayeed* v. *State of M.P.* and *Bhajan Singh* v. *State of Haryana*.]"

66. The ocular evidence to prevail has also been observed in *Sunil Kundu* v. *State of Jharkhand* thus: (SCC p. 432, para 24)

"*24*. In *Kapildeo Mandal* v. *State of Bihar*[28], all the eyewitnesses had categorically stated that the deceased was injured by the use of firearm, whereas the medical evidence specifically indicated that no firearm injury was found on the deceased. *This Court held that while appreciating variance between medical evidence and ocular evidence, oral evidence of eyewitnesses has to get priority as medical evidence is basically opinionative*. But, when the evidence of the eyewitnesses is totally inconsistent with the evidence given by the medical experts then evidence is appreciated in a different perspective by the courts. It was observed that when medical evidence specifically rules out the injury claimed to have been inflicted as per the eyewitnesses' version, then the court can draw adverse inference that the prosecution version is not trustworthy. This judgment is clearly attracted to the present case."

(emphasis supplied)

67. Similarly, in *Bastiram* v. *State of Rajasthan*, it was observed: (SCC pp. 407 & 408, paras 33 & 36)

"*33. The question before us, therefore, is whether the "medical evidence" should be believed or whether the testimony of the eyewitnesses should be preferred? There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence. This principle has more recently been accepted in* Gangabhavani *v.* Rayapati Venkat Reddy.

* * *

36. Similarly, a fact stated by a doctor in a post-mortem report could be rejected by a court relying on eyewitness testimony, though this would be quite infrequent. In *Dayal Singh* v. *State of Uttaranchal*, the post-mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased. This Court rejected the "medical evidence" and upheld the view of the trial court (and

> the High Court) that the testimony of the eyewitnesses supported by other evidence would prevail over the post-mortem report and testimony of the doctor. It was held: (SCC p. 286, para 41)
>
> '*41*. … [T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court.'"
>
> (emphasis supplied)

31. The Supreme Court in the case of **Yogesh Singh v. Mahabeer Singh,** reported in **(2017) 11 SCC 195** has held as under :

> **43.** The learned counsel appearing for the respondents has then tried to create a dent in the prosecution story by pointing out inconsistencies between the ocular evidence and the medical evidence. However, we are not persuaded with this submission since both the courts below have categorically ruled that the medical evidence was consistent with the ocular evidence and we can safely say that to that extent, it corroborated the direct evidence proffered by the eyewitnesses. We hold that there is no material discrepancy in the medical and ocular evidence and there is no reason to interfere with the judgments of the courts below on this ground. In any event, it has been consistently held by this Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a

> conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. [See *Solanki Chimanbhai Ukabhai* v. *State of Gujarat*, *Mani Ram* v. *State of Rajasthan*, *State of U.P.* v. *Krishna Gopal*, *State of Haryana* v. *Bhagirath*, *Dhirajbhai Gorakhbhai Nayak* v. *State of Gujarat*, *Thaman Kumar* v. *State (UT of Chandigarh)*, *Krishnan* v. *State*, *Khambam Raja Reddy* v. *Public Prosecutor*, *State of U.P.* v. *Dinesh*, *State of U.P.* v. *Hari Chand*, *Abdul Sayeed* v. *State of M.P.* and *Bhajan Singh* v. *State of Haryana*.]

32. The Medical Evidence is merely a corroborative piece of evidence whereas the eye-witnesses are eyes and ears of the Court. In case of conflict between medical and ocular evidence, then ocular evidence has to be preferred unless and until, the medical evidence completely rules out the oral evidence.

33. In order to substantiate the submission that the medical evidence is contrary to ocular evidence, therefore, the Court must disbelieve the ocular evidence, it is submitted by the Counsel for the appellants, that Dr. Arun Jaroliya (P.W. 11) had found blackening around all the wounds sustained by either deceased persons or injured persons, therefore, it is clear that all the persons must have sustained the gun shot injuries from a very close range, whereas the witnesses have stated that the gun shots were fired from a distance of 30-32 steps. Thus, it is submitted that the medical evidence, completely belies the ocular evidence.

34. Considered the submissions made by the Counsel for the appellants.

35. The submission regarding discrepancy in medical and ocular evidence has been created by Dr. Arun Jaroliya (P.W.11). Therefore, the conduct of Dr. Arun Jaroliya (P.W.11) in the Trial becomes important. Order Sheet dated 14-12-2005, reads as under :

> प्रकरण शेष अभियोजन साक्ष्य हेतु नियत है।
> डाक्टर अरूण जारोलिया को जारी संमस इस टीप के साथ वापिस प्राप्त हुआ कि जब तामील कुनिन्दा उनके धर पहुंचा तो संमस लेने से इन्कार किया प्रार्थी तीन चार बार जा चुका है धर के अंदर फेंककर तामील करायी सामने व्यक्ति शैतान सिंह एवं भीकम सिंह के समक्ष।
> चिकित्सक डा. जालोरिया पुकार पर अनुपस्थित है उनकी उपस्थिति सुनिश्चत करने हेतु उसके खिलाफ गिरफ्तारी वारंट जारी किया जावे।

36. Further, whether Dr. Arun Jaroliya (P.W.11) had rightly mentioned blackening around all the wounds sustained by all the injured/dead persons or not is also a matter of concern. Dr. Geeta Rani Gupta (P.W.10) had conducted post-mortem of Rabia bi and in post-mortem, she did not find any blackening around the wounds of Rabia bi. Further, Dr. Amit Hadole (D.W.3) had also examined various injured persons including Rubina bi, Ajra, Jarina bi, Anwar (P.W.2), Chhammu Khan (P.W.4), Mohd. Akhtar (P.W. 9) and Mohd. Ishakh but did not find any blackening around the wounds. Whereas Dr. Arun Jaroliya (P.W. 11) had mentioned blackening around the wounds of all the injured persons. It is not out of place to mention here that Dr. Amit Hadole (D.W.3) was posted in Gandhi Medical Hospital, Bhopal, whereas Dr. Arun Jaroliya (P.W. 11) was posted Community Health Centre, Lateri, Distt. Vidisha. However, Dr. Arun

Jaroliya (P.W. 11) has not stated that he had given any treatment to any of the injured person. On the contrary, in para 25 of his cross-examination, he has stated that the relatives of the injured persons were not co-operating. Thus, it is clear that the injured persons did not get any first aid in Community Health Center, Lateri,Distt. Vidisha therefore, it cannot be said that the blackening might have been cleaned before their examination by Dr. Amit Hadole (D.W.3). Further, blackening cannot be cleaned because the gun shot injury gives black colour to the skin due to heat. Dr. Arun Jaroliya (P.W.11) also admitted that he had not found any charring around wound. Thus, it is clear that neither Dr. Geeta Rani Gupta (P.W.10) did not find any blackening around the wounds of deceased Rabia bi, but even Dr. Amit Hadole (D.W.3) did not find any blackening around the wounds of the injured. Further more, in para 8 of her deposition, Dr. Geeta Rani Gupta (P.W. 10) has specifically stated that the gun shots were fired from a distant range. In view this discrepancy in the evidence of Dr. Arun Jaroliya (P.W.11) and Dr. Geeta Rani Gupta (P.W. 10) and Dr. Amit Hadole (D.W.3), the conduct of Dr. Arun Jaroliya (P.W. 11) also assumes importance. As already pointed out, Dr. Arun Jaroliya (P.W. 11) was refusing to receive summons and ultimately he was forced to appear by issuing warrants of arrest. Therefore, hesitant attitude of Dr. Arun Jaroliya (P.W.11) in appearing before the Trial Court, clearly indicates, that his conduct is in doubt

and he was not completely honest in discharging his duties. Thus, it is held that in fact the evidence of Dr. Arun Jaroliya (P.W.11) that "blackening was found around the wounds of all the injured and dead persons" is false and hence, his evidence to that extent is discarded. Further more, it is well established principle of law that in case if there is some inconsistency between medical and ocular evidence, then ocular evidence has to be given preference, unless and until, the medical evidence, completely rules out the ocular evidence. In the present case, Dr. Amit Hadole (D.W.3) was examined by the appellants themselves. Prosecution had closed its case on 15-12-2006 and the appellants were examined under Section 313 of Cr.P.C. on 19-1-2007. Thereafter, the appellants cited Dr. Amit Hadole (D.W. 3) as one of their defence witness. As Dr. Amit Hadole (D.W. 3) was out of country, therefore, the case was adjourned for examination of Dr. Amit Hadole (D.W.3) and ultimately he was examined on 24-10-2008 i.e., after more than 1 ½ years.

37. The appellants had cited Dr.Amit Hadole (D.W.3) to prove the injuries of appellant Samim. When Dr. Amit Hadole (D.W. 3) entered in the witness box, then the prosecution also started cross-examining Dr. Amit Hadole (D.W.3) with regard to the injuries sustained by other injured persons, as Dr. Amit Hadole (D.W. 3) had also medically examined them in Gandhi Medical Hospital, Bhopal. When the defence realized, that the M.L.C.s of other injured

witnesses are also being proved by their witness Dr. Amit Hadole (D.W.3), then an objection was raised that since, Dr. Amit Hadole (D.W.3) has been summoned by the defence, therefore, he cannot prove the injuries sustained by the other injured persons/witnesses. However, without any adjudication of the said objection, it appears that the defence counsel expressed that he want to **giveup** Dr. Amit Hadole (D.W.3). It appears that the prosecution did not object to it, and the Trial Court allowed the verbal prayer of the defence Counsel to **give up** Dr. Amit Hadole (D.W.3) and accordingly, his cross-examination could not be concluded. Now the question is that whether the defence could have **givenup** their own witness, specifically when his examination-in-chief was already recorded and he was being cross-examined?

38. **Givenup** means that although a party had summoned a witness, but doesnot wish to examine him. Thus, a witness can be **givenup** without examining him. After the examination-in-chief begins, no witness can be **given up**. The **Kerala High Court** in the case of **Rajeevan Aswathy Vs. Superintendent of Police** reported in **2011 Cr.L.J. 2801** has held as under :

> 31. P.W. 6 was given up by the prosecution after putting two questions to him in chief-examination and after showing him Ext. P12 file but without eliciting any answer from him. The above procedure adopted by the prosecution is to be deprecated (See Hamsa v. State of Kerala. 1966 KLT 136).
>
> A witness can be given up before he enters the witness box. Even when a witness enters the witness box and oath is administered to him, it is not too late and he can be asked to

withdraw from the witness box. But once chief examination is commenced, the party who calls him cannot give up the witness or withdraw him and thereby deprive the opposite party the right of cross-examination. The practice of the prosecution giving up a witness after the commencement of chief-examination and without tendering the witness for cross-examination is unhealthy, irregular and not warranted by law. (See Lalitha v. Sarangadharan - 1988 (2) KLT 394). In Sukhwant Singh v. State of Punjab - MANU/SC/0305/1995 : AIR 1995 SC 1601 the Apex Court observed as follows: --

> Section 138 envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be reexamined by the prosecution. There is, No. meaning in tendering a witness for cross-examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief. There is No. procedure whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross-examined. The effect of witnesses being tendered only for cross-examination amounts to the failure of the prosecution to examine them at the trial. Their non-examination, in our opinion, seriously affects the credibility of the prosecution case and detracts materially from its reliability. Thus, the prosecution was not justified in giving up P.W.6. after putting two questions to him in chief-examination.

39. In the present case, it is not the case of the defence, that before starting examination of Dr. Amit Hadole (D.W.3) they had decided not to examine him as a defence witness. But in fact, Dr. Amit Hadole (D.W. 3) was examined by the defence and only during cross-examination, they realized that the prosecution is also proving the medical reports of other injured persons/witnesses. Therefore, the defence after having examined Dr. Amit Hadole (D.W.3) could not

have given up his own witness. Further, the Trial Court while accepting the prayer of the Counsel for the defence, should have decided the legal question, as to whether a witness who has already been examined and partially cross-examined can be **given up** or not, but it appears from order dated 24-10-2008, the Trial Court accepted the prayer made by the defence Counsel only because such prayer was not opposed by the Public Prosecutor.

40. Whenever, a question of law arises for adjudication, then the Courts must decide the same on merits irrespective of the fact that whether any objection has been raised by the opposite party or not?

41. Although the Trial Court has refused to read the evidence of Dr. Amit Hadole (D.W.3) but the reasoning assigned by the Trial Court in para 223 of its judgment cannot be approved. The Trial Court has held that since, the defence did not get an opportunity to cross-examine Dr. Amit Hadole (D.W.3) therefore, his incomplete evidence cannot be read. The said reasoning is contrary to fact and law. Dr. Amit Hadole (D.W. 3) was a defence witness. Therefore, the appellant had no right to cross-examine him. At the most, they could have declared him hostile and only thereafter, they could have cross-examined him. Dr. Amit Hadole (D.W. 3) was summoned by the appellants to prove the injuries found on the body of the appellant Samim and Dr. Amit Hadole (D.W. 3) had supported the version of the defence by proving the M.L.C. of appellant Samim. Therefore,

there was no occasion for the appellants to declare Dr. Amit Hadole (D.W. 3) hostile. It is not the objection of the defence that since, Dr. Amit Hadole (D.W. 3) had not examined any other person or witness except the appellant Samim, therefore, he cannot prove the M.L.C. of other persons or witnesses. If the defence was of the view that Dr. Amit Hadole (D.W. 3) is required to be cross-examined on the question of injuries sustained by other persons or witnesses, then they could have declared him hostile and could have cross-examined him under Section 154 of Evidence Act or could have re-examined him. Section 138 and 154 of Evidence Act, reads as under :

> **138. Order of examinations.**—Witnesses shall be first examined-in chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> **Direction of re-examination.**—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.
>
> **154. Question by party to his own witness.**—(1)] The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.
>
> (2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.

42. Thus, it is held that the incomplete evidence of Dr. Amit Hadole (D.W.3) can be read in evidence.

43. Since, Dr. Amit Hadole (D.W. 3) had also examined the injured persons or injured witnesses, therefore, his evidence regarding medical examination of those injured persons or witnesses can be read. Thus, according to the defence witness Dr. Amit Hadole (D.W.3) no blackening around the wounds of the witnesses/injured persons was found, therefore, it is held that there is no discrepancy in the medical and ocular evidence. Further more, the discrepancy is not such which may warrant rejection of the ocular evidence.

44. Thus, the first contention of the Counsel for the appellants that there is a discrepancy in the medical and ocular evidence warranting rejection of ocular evidence is hereby rejected.

Whether the appellant Ahmed Sayeed had fired in exercise of his right of private defence and Whether downward direction of injuries as alleged by Dr. Arun Jaroliya (P.W. 11) gives a dent to the prosecution story or not?

45. By referring to para 41 of evidence of Dr. Arun Jaroliya (P.W. 11), it is submitted by Shri Padam Singh, Counsel for the appellants no.3 and 4 that the deceased Abdul Azeez and Fida Mohd. were taller then the appellant Sayeed Mohd. and the direction of the gun shot injuries was downward, therefore, the deceased persons could not have sustained the injuries if the assailant was standing on the ground. Dr. Arun Jaroliya (P.W. 11) has also clarified that when the assailant is standing on a height, only then, the deceased persons

could have sustained the injuries, thus, it is clear that the assailant was standing at a high place therefore, either the prosecution story is incorrect or the appellant Ahmed Sayeed had fired gun shots from the roof of his house. It is further submitted that in fact the appellant Ahmed Sayeed had fired gun shots in exercise of his right of private defence, which is evident from written complaint, Ex.D.8, therefore, the appellants no. 3 and 4 have been falsely implicated being the son of Ahmed Sayeed.

Right of Private Defence

46. It is submitted that in fact on the question of affixing stone, some dispute arose between the parties, and the complainant party came to the house of the appellant Ahmed Sayeed and caused gun shot injury to appellant Samim and also put the house of the appellant Ahmed Sayeed on fire and thus, the appellant Ahmed Sayeed was left with no other option, but to go to the roof of his house and fire gun shots, thereby causing death of three persons and causing injuries to various persons.

47. To substantiate his submissions, the Counsel for the appellants referred to the evidence of Shambu Singh Rajput (D.W.2) who proved that on the report of Appellant Anees Khan, he had registered FIR No. 40/2003 on 5-5-2003 for offence under Sections 307,147,148,149,427 of I.P.C., Ex. D.7. Thereafter, the injured appellant Samim Khan was sent for medical examination to

Community Health Center, Lateri, Distt. Vidisha, Ex. D-3. In cross-examination, this witness admitted that it is also mentioned in the complaint, Ex. D.8, that the appellant Ahmed Sayeed, could not keep control on his mind and went to the roof and fired gun shots. He further admitted that on the same day, offence under Section 302 of IPC was also registered against the appellants.

48. Before considering the ground of self defence, this Court thinks it apposite to consider the prosecution case.

49. Gaffar Khan (P.W.1) is the complainant and an eye witness, Anwar (P.W. 2) is an injured eye-witness, Johara bi (P.W. 5) is an injured witness, Mohd. Khalil (P.W.6) is an injured eye-witness, Iliyas (P.W. 8) is an eye-witness, Mohd. Akhtar (P.W. 9) is an injured eye-witness. Whereas Kailash (P.W.3), Chhammu Khan (P.W.4) and Munnalal (P.W.7) have not supported the prosecution case.

50. Gaffar Khan (P.W. 1) has stated that the appellant Ahmed Sayeed is his real elder brother and the other appellants are his nephews being the son of appellant Ahmed Sayeed. There was a dispute between Abdul Azeez and appellant Ahmed Sayeed on the question of earthen boundary of the fields. In order to resolve the dispute amicably, this witness, his elder brother Fida Mohd., Haneef bhai, Munne Bhai etc. had gathered for affixing stones. Appellants Ahmed Sayeed, Anish Khan, Shakeel, Yusuf (was absconding but now he has been arrested and his separate trial is pending), Samim,

and the deceased Abdul Azeez, his son injured Anwar (P.W.2), Khalil (P.W. 6) Jameel (injured) were present. Stones were being affixed as per the compromise. On the question of affixing stones, all the appellants started abusing and had a scuffle. They were separated. Thereafter, all the appellants ran towards their house. Thereafter, the appellant Ahmed Sayeed came out along with his .12 bore gun. Shakeel was behind him along with a belt of cartridges. Appellants Anees, Shakeel, Samim and Yusuf (absconding) started exhorting that they should be killed. Accordingly, the appellant Ahmed Sayeed took cartridges from the appellant Shakeel and loaded his gun and fired at Khalil. Khalil who was in the courtyard fell down. Thereafter, Anees gave cartridges to the appellant Ahmed Sayeed who again loaded his gun and fired at Abdul Azeez who also fell down. Rabia bi, the wife of Abdul Azeez was also there. She too was shot by Ahmed Sayeed, who fell down. The children of Abdul Azeez started crying and were pleading for mercy but the appellants did not stop. The appellant Ahmed Sayeed fired gun shots causing injuries to various persons. Ahmed Sayeed, while loading the gun was also throwing challenge that if any body has a courage, then he can come forward. The appellants Shakeel, Samim, Anees and Yusuf (absconding) were exhorting their father Ahmed Sayeed, that no one should be spared. When Ahmed Sayeed stopped firing gun shots, then the injured persons were kept in the tractor trolley. Fida Mohd and his wife

Johara bi (P.W. 5) were going towards Lateri on their motor cycle. Ahmed Sayeed came running near to the house of this witness and fired gun shot causing injuries to Fida Mohd (deceased) and Johara bi (P.W.5). They both got injured and fell down. Fida Mohd and Johara bi (P.W.5) were also kept in the trolley. The tractor and trolley was being driven by Munnawar Khan. The doctor informed that Fida Mohd and Abdul Azeez have already died. Rabia bi died on her way to Bhopal. The Dehati Nalishi, Ex. P.1/F.I.R, Ex. P.34 was lodged after reaching at Bhopal. The spot map, Ex. P.2 was prepared. This witness was cross-examined.

51. In cross-examination, this witness admitted that the field on which the incident took place was purchased by deceased Abdul Azeez. He denied that any agreement to sell the said piece of land had taken place between the appellant Abdul Sayeed and Abdul Azeez (deceased). He denied that any money by way of advance was given by the appellant Ahmed Sayeed. 4-5 bigha of Govt land was also situated adjoining to the land of Ahmed Sayeed, who got it mutated in his name. One day prior to the date of incident, the appellant Ahmed Sayeed has destroyed the earthen boundary which was in between the fields of appellant Ahmed Sayeed and Abdul Azeez (deceased). On 4-5-2003, Abdul Azeez (deceased) and Ahmed Sayeed went to police station to lodge the F.I.R., but they were brought back by Fida Mohd. (deceased)on the pretext that the matter

can be resolved amicably. He further admitted that the house of Abdul Azeez (Deceased) is also constructed in the same disputed field. The house of Abdul Azeez (deceased) is situated at a distance of 10-12 ft.s from the earthen boundary of the field. He further admitted that the house of Ahmed Sayeed is situated adjoining to the house of Lal Singh which is situated in front of the house of Abdul Azeez (deceased). He further admitted that Haneef bhai, who was also present on the spot, is in jail. However, denied for want of knowledge that he has been convicted on the allegation of cutting the nose of a ranger, but admitted that he is in jail. He denied that during the detention of Haneef, Fida Mohd. (deceased) used to bear his household expenses. After the shoot out, one tractor with trolley and one tractor had gone to Police Station Lateri. The injured persons were kept in the trolley and Munnawar Khan was driving the said tractor. Another tractor was being driven by this witness. He admitted that his wife Jarina, daughter Rubina and son Irshaad had suffered gun shot injuries but admitted that he did not go to Bhopal along with injured. He admitted that the appellants Anees, Samim and Yusuf (absconding) were empty handed. The house of Ahmed Sayeed is at a distance of about 60-70 steps from the place, where the stones were being affixed. After the appellant Ahmed Sayeed and his sons went back to their house, this witness, Fida Mohd., Munnawar and some other boys also went to the house of appellant Ahmed

Sayeed. When Ahmed Sayeed came out of the house, Khalil was in the courtyard, and all other persons were going towards the house of Munne. Thereafter, all the appellants and Yusuf came out of the house and shouted that all should be killed. When Jalil suffered injuries, he was in the courtyard of Abdul Azeez (deceased) and not in the courtyard of appellant Ahmed Sayeed. However, could not explain as to how it was mentioned in his police statement, Ex. D.1 that Jalil was in the courtyard of Ahmed Sayeed. Khalil had suffered gun injury from a distance of 30-32 steps. Ahmed Sayeed had loaded the gun for 10-12 times. Abdul Azeez was standing by the side of a Neem tree situated near to the house of Munne. The house of Munne is a distance of 8-10 ft.s from the house of Abdul Azeez. Rabia was also with Abdul Azeez. He further stated that Rabia had not sustained injuries from the gun shot fired on Abdul Azeez but claimed that a separate gun shot was fired. However, he could not explain as to why in the F.I.R.,Ex. P.1, it is mentioned that Rabia bi also sustained injuries from the gun shot fired at Abdul Azeez. Gun shot was fired from a distance of 30 steps. He further claimed that he had informed the police that Anees had given a cartridges to Ahmed Sayeed, but could not explain as to why this fact is not mentioned in the F.I.R.,Ex. P.1 and police statement, Ex.D.1. The entire incident continued for 15-20 minutes. He denied that the appellant Anees had also lodged a report. He denied that after dispute arose on the question of affixing

of stone, then Abdul Azeez, Fida Mohd., Anwar Khan, Khalil Khan, Iliyas Khan, Irshad Khan, Haneef Khan, Akhtar Khan, Sabir Khan went to the house of the appellant Ahmed Sayeed and broke open the door and forcibly entered inside the house. He also denied that a part of the house was also set on fire. He denied that Fida Mohd. was having gun, Abdul Azeez was having .12 bore gun, Haneef was having country made pistol, and others were having *Luhangis*. He denied for want of knowledge that on the report of Anees, the police had registered F.I.R. against Abdul Azeez, Haneef Khan, Anwar Khan, Khalil Khan, Jamil Khan, Ilyas, Irshad Khan, Akhtar Khan, Sabir Khan etc in crime no. 40/2003 for offence under Sections 307,436,427,148,149 of I.P.C. He denied that gun shot was fired at appellant Samim. He denied that this witness and Fida Mohd., Abdul Azeez, Munnawar Khan had old enmity with Ahmed Sayeed. Ahmed Sayeed was demanding that one stone be shifted back by 6 inches, so that the tractor can pass. At that time, the son of Abdul Azeez had said in a high voice that stone will be affixed as per decision. He denied that the appellant Anees had said that he should not talk to his uncle in such a manner. He admitted that both the sides had abused each other. He denied that there was any cross firing from the complainant side.

52. Anwar (P.W. 2) is an injured eye-witness. Apart from narrating the incident, he specifically stated that he had sustained gun shot

injury by the gun shot fired by Ahmed Sayeed. He further submitted that the police had seized three shirts, one pant, one Kameez and one Salwar and Kurta vide seizure memo Ex. P.3. About 1 month and 6 days thereafter, the police had seized 6 quintals and 16 quintals of *chana* (gram) and one double barrel gun vide seizure memo Ex. P.4. The motor cycle of Fida Mohd. was handed over in *supurdagi* to Akhtar. The Supurdaginama,Ex. P.5 was prepared in his presence and bears his signatures. (*Chana* (Gram) and a gun were seized as the property was attached under Section 82 and 83 of Cr.P.C.). This witness was cross-examined.

53. In cross-examination, this witness clearly stated that the stones were being affixed at a distance of 10-15 steps away from his house. This witness and his father Abdul Azeez had not eaten anything. His mother Rabia bi was also in the house. After the initial dispute took place, all the appellants went back to their house without saying anything. However, he further clarified that Ahmed Sayeed had said that they will see the matter. After 2-3 minutes thereafter, all the appellants came out of their house. The deceased Abdul Azeez, injured Khalil, deceased Fida Mohd. were standing at the place where stones were being affixed. Rabia bi was inside the house. The house of Gaffar is about 65-70 steps away from the house of this witness. He denied that he had not seen the appellant coming out of their house along with gun. After Khalil sustained gun shot injury, no one

tried to save him. The sons of Ahmed Sayeed had instigated even prior to causing gun shot injury to Khalil. They had exhorted that all should be killed and no one should be spared. After Khalil sustained gun shot injury, this witness ran towards the house of Munne whereas his father, uncle and brother had already gone towards the house of Munne. He denied that he had not seen Fida Mohd and his wife sustaining gun shot injury. He further denied that he had not witnessed the injuries caused to his father Abdul Azeez and mother Rabia bi. He denied that they had tried to surround the house of Ahmed Sayeed. He further denied that they had broke open the gate of the house of Ahmed Sayeed. He denied that the house of Ahmed Sayeed was set on fire. He denied that his father Abdul Azeez had also fired gun shot. He denied that the appellant Samim had suffered gun shot injury on his knee. He denied that the police did not take any action against the complainant party due to pressure put by this witness. He denied for want of knowledge that any complaint was filed before the Court of J.M.F.C. against the complainant party. He further stated that at the time of affixing of stones, his mother Rabia bi was not present on the spot. He admitted that the appellant Samim had sustained gun shot injury on his knee, but clarified that the said injury was caused by appellant Ahmed Sayeed himself.

54. Chhammu Khan (P.W. 4) was declared hostile. However, in cross-examination by the Public Prosecutor, this witness admitted that

Ahmed Sayeed came out of his house along with .12 bore gun and fired gun shots. He admitted that one person had suffered pellet injuries on his abdomen. He further admitted that he too had suffered pellet injuries. However, he claimed that as he had fallen unconscious, therefore, he doesnot know as to whether the gun shot fired by Ahmed Sayeed had caused injuries or not? *He further admitted that Ahmed Sayeed is a dangerous person, therefore, he is afraid of him.*

55. Although this witness has turned hostile, but he has supported the prosecution case to the extent that Ahmed Sayeed had come out of his house along with .12 bore gun and had fired gun shots.

56. Johara bi (P.W. 5) is also one of the injured eye-witness. She has stated that She was in her house. Her husband Fida Mohd. came running and said that Ahmed Sayeed is firing gun shots, therefore, they would go to police station to lodge FIR. Accordingly, they both were going on their motor cycle. When they reached near the house of Gaffar bhai, the appellant Ahmed Sayeed came running towards them and fired gun shots at this witness and Fida Mohd. After sustaining gun shot injuries, both of them fell down. Thereafter, they were picked up by Gaffar Bhai and were taken to Lateri on a tractor. Her husband Fida Mohd. died and She had also sustained gun shot injuries. This witness was cross-examined.

57. In cross-examination, this witness has stated that after first gun

shot was fired, this witness and Fida Mohd. fell on the ground. Second fire also caused injuries near her ears. Both the shots were fired from a distance of 20-25 steps. She further stated that She remained admitted in Bhopal Hospital for 14 days. She further stated that she was not wearing *Burka* while She was standing in front of her house. She further stated that She always wear *Burka* while going outside the house. She further stated that after she and her husband fell down, they were taken to the house of Gaffar and blood had fallen on the ground. She denied that She is alleging falsely that she was going to police station along with her husband. She denied that her husband used to bear household expenses during the absence of Haneef and was also visiting his house in his absence. She denied that when Haneef came out of the jail, then he felt bad. She further admitted that prior to incident, her husband Fida Mohd. had no dispute with Ahmed Sayeed. The incident took place on the issue of boundary dispute between Ahmed Sayeed and Abdul Azeez. Ahmed Sayeed had fired gun shot in her presence. She denied that She had sustained gun shot fired by Abdul Azeez and his sons.

58. Mohd. Khalil (P.W. 6) is also one of the injured eye-witness. He has also narrated the same story. This witness was cross examined.

59. In cross-examination, this witness stated that the sons of appellant Ahmed Sayeed had insisted that the stone should be affixed

at a particular place. He could not explain the omission in his police statement that after both the parties were separated, the appellants ran towards their house and Shakeel came out along with a belt of cartridges. He denied that he has been tutored. He further claimed that first gun shot caused injuries to him. His father did not come near to him and also did not enquire about his well being. He denied that Fida Mohd., Abdul Azeez and his sons had attacked the house of Ahmed Sayeed and had broke open his gate. He denied that they entered inside the house of Ahmed Sayeed and tried to put it on fire. He denied that some part of the house was also burnt. He denied that one gun shot fired by Abdul Azeez and Fida Mohd. had hit the motor cycle parked in the house of Ahmed Sayeed as well as on the knee of the appellant Samim. He admitted that his maternal uncle Haneef was also at the place of incident. He denied that the police had registered report under Section 307,436 of I.P.C. against the complainant party. He further claimed that since, Ahmed Sayeed was in habit of destroying the earthen boundary, therefore, the *panchas* had gathered. One day prior to incident also, Ahmed Sayeed had destroyed the earthen boundary, therefore, stones were being affixed. There was a helter-skelter after the gun shots were fired. He denied that his mother, father and this witness did not sustain any injury by gun shot fired by Ahmed Sayeed.

60. Iliyas (P.W. 8) has also narrated the same story. He further

stated that after the shoot out, he saw that Ahmed Sayeed and his sons were breaking their own gate. He also saw that smoke was coming out of their house. He further claimed that Ahmed Sayeed fired a gun shot on his own son Samim. Samim was saying that he would die. Appellant Ahmed Sayeed had said that now when he is in difficulty but appellant Samim is thinking about himself. The police had seized a motor cycle vide seizure memo Ex. P.9. About 22-23 days after the incident, the tractor and plough of Ahmed Sayeed was also seized vide seizure memo Ex. P.10. After 14-15 days thereafter, *Chana* (Gram) and one double barrel gun was also seized vide seizure memo Ex. P.3. This witness was cross-examined.

61. In cross-examination, this witness admitted that he was not present on the previous day when a dispute had arisen between the parties. He also did not accompany them when they had gone to lodge the report. He was not present in Lateri when his father Fida Mohd. had persuaded them to come back. He further admitted that prior to the incident in question, he had not seen any father causing any gun shot injury to his own son. He further stated that he felt bad, when he saw the appellant Ahmed Sayeed had caused gun shot injury to his own son. Certain questions were also put to this witness in order to dislodge his evidence by projecting that he was not present on the spot, but except minor contradictions, nothing could be elicited to show that he had no opportunity to witness the incident.

62. Mohd. Akhtar (P.W. 9) is also an injured eye-witness. He has also narrated the prosecution story. He further stated that the appellant Ahmed Sayeed had fired a gun shot causing injury on both of his thighs. He was kept in the trolley along with other injured persons. When the trolley reached near the house of Gaffar, at that time his father Fida Mohd and mother Johara bi were going to police station Lateri on their motor cycle. At that time, Ahmed Sayeed came along with his .12 bore gun and fired gun shot on his father and mother causing injuries to them. Thereafter, his father was also kept in the same trolley. From C.H.C. Lateri, they were referred to Bhopal. Rabia bi died on her way to Bhopal. Later on he came to know that his father Fida Mohd and uncle Abdul Azeez have also died. About one month after the incident, one .12 bore gun was seized by the S.H.O. from his uncle Ahmed Sayeed vide seizure memo Ex. P.10. The motor cycle was also seized vide seizure memo Ex. P.10. This witness was also cross-examined.

63. In cross-examination, this witness stated that his father are five brothers namely, Fida Mohd. (deceased), appellant Ahmed Sayeed, Abdul Azeez (deceased), Gaffar Khan and Munne @ Munnawar Khan. He denied that Shakeel had gone for getting of tyre of his tractor repaired. He accepted that one Ashraf Miyan is in the business of repairing tyres, but denied that Shakeel was not in the village at the time of incident. He denied that as the Appellant

Ahmed Sayeed and his sons had made progress, therefore, the deceased Abdul Azeez and his sons had developed ill will towards the appellants. He accepted that Anees, son of Ahmed Sayeed is a *Shiksha Karmi*. He accepted that no member of his family is in Govt. job. He denied that the deceased Abdul Azeez and his sons were trying to grab the land of Ahmed Sayeed and his sons. His father Fida Mohd. had come from the side of the house of Abdul Azeez. His statement under Section 161 of Cr.P.C. was recorded in Bhopal after 5 to 6 days of incident. He stated that he had informed the police that Ahmed Sayeed had caused him gun shot injury, but could not explain as to why this fact was not mentioned in his police statement, Ex. D.6. He admitted that there is a house of Gaffar between the place where he sustained gun shot injury and the place where his father Fida Mohd and mother Johara bi had suffered gun shot injuries. He had seen his parents suffering gun shot injuries. He on his own explained that after he sustained gun shot injury, he was picked up and was kept in the trolley and when trolley had started for Lateri, then his parents were shot. This witness was not in a position to say with certainty as to whether his parents had suffered pellets injury from one shot or from different shots. He denied that he has been tutored. He denied that this witness and Abdul Azeez, Fida Mohd., Anwar Khan, Khalil Khan, Jamil Khan, Iliyas, Irshad, Gaffar Khan, Sabir Khan had broke open the gate of Ahmed Sayeed with the help

of gun, Farsa, Axe etc and set his house on fire and also denied that any gun shot was fired by Fida Mohd and Abdul Azeez causing injury on the knee of Samim and causing gun shot marks on pillar, motor cycle etc. He denied for want of knowledge that Anees had also lodged a report on the same day against this witness and other persons. He accepted that Samim had also suffered gun shot injury and he too was treated in hospital at Bhopal. However, he on his own claimed that appellant Ahmed Sayeed himself had caused injury to his son Samim. He further stated that the incident of demolishing earthen boundary had taken place one day prior to the date of incident. He denied for want of knowledge that quarrel had taken place between the sons of Ahmed Sayeed and Abdul Azeez and his sons and accordingly Ahmed Sayeed had gone to lodge the report. He stated that in order to resolve the dispute, Haneef Khan, Fida Mohd., Gaffar etc had come. He denied for want of knowledge that one day prior to the date of incident, Fida Mohd. had persuaded Ahmed Sayeed to come back from Police Station Lateri, on the pretext that the matter will be resolved amicably. He denied that in fact Azeez, Anwar, Khalil were trying to take possession of land of Ahmed Sayeed. He denied the suggestion that the plan behind persuading Ahmed Sayeed not to lodge the report was to involve him in a case of quarrel so that his land can be encroached upon. He denied that on the date of incident, this witness, his father, brother,

uncle and their sons had attacked the house of Ahmed Sayeed and fired gun shots. He further stated that gun shot was fired at him from a distance of 30-40 ft.s.

64. By referring to evidence of Alok Shrivastava (P.W.20), it is submitted that this witness in para 30 of his cross-examination, has admitted that cross case in crime no. 40/2003 was also registered in Police Station Lateri for offence under Sections 307, 436, 427,147,148,149 of IPC. The said report was lodged by appellant Anees. In the said report, Fida Mohd., Khalil, Jamir Khan, Ilyas Khan, Irshad Khan were made an accused.

65. In para 31, this witness further stated that charge sheet was not filed in the said cross case. According to the allegations made in Crime No. 40/2003, the complainant party had broke open the gate of appellant Ahmed Sayeed and his house was set on fire and Fida Mohd and Abdul Azeez fired gun shots causing injury on the knee of Samim. He admitted that the appellant Samim was also treated in a hospital at Bhopal. He further admitted that during investigation, blood stained earth and pellets were found in the courtyard of Ahmed Sayeed, which were seized. He also admitted that one motor cycle was also found in the courtyard which was having pellet marks. He also admitted pellet marks were also found on the walls of the house of Ahmed Sayeed.

66. In para 38 of his cross-examination, this witness further stated

that during investigation, he came to know that in fact Ahmed Sayeed and his sons had themselves had broke open the gate of their house and also set their house on fire. He further stated that in fact appellant Ahmed Sayeed himself had caused gun shot injury to his son appellant Samim.

67. He further stated that he had prepared a spot map on 5-5-2003 in a **cursory manner**(सरसरी तौर पर), but the same has not been produced. He further admitted that as per seizure memo Ex. P.53, blood stained and plain earth was seized in front of the house of Munne @ Munnawar Khan. He further admitted that as per spot map Ex. P.2, he had not found any blood at the places where Fida Mohd., Johara bi, and Khalil had suffered gun shot injuries. He further stated that he did not find blood inside the house of any body except the house of Ahmed Sayeed. He admitted that while investigating crime no.40/2003, he had not carried out any search in the houses of Abdul Azeez, Abdul Gaffar, Fida Mohd. etc. He on his own clarified that there was no body in the village. Two persons were already killed and 10 persons were already shifted to Hamidia Hospital, Bhopal and no body was there in the village. He admitted that the dead bodies of Fida Mohd. and Abdul Azeez were brought back in the village in the evening of 5-5-2003 itself. This witness has admitted that he had seen village Jhujhalakheda and except the houses of appellants and injured/dead persons, the houses of Lal Singh Thakur and Chowkidar

Bhai are situated and there is no other house.

68. He further admitted that Munnawar Khan and Abdul Gaffar were present at the time of preparation of spot map, Ex. P.2 but admitted that he had not shown the place from where the above mentioned witnesses had seen the incident. He further admitted that the belt of cartridges and live cartridges could not be seized. He further submitted that only one fired cartridge was found on the spot. He denied that the fired cartridge was not fired from the gun of the appellant Ahmed Sayeed. He admitted that in crime no. 39/2003, 3 persons had died and 10 were injured, but denied that tilted investigation was done in crime no. 40/2003. He stated that spot map Ex. P.2 was prepared belatedly, as he was busy in getting the post-mortem done and also members of the family had also gone to Bhopal. On 5-5-2003, no body was there to point out the places for preparation of spot map, and accordingly, he had collected physical evidence which ever was available. He further admitted that on 8-5-2003, Patwari had also prepared the spot map and this witness was not present at the time of preparation of spot map by Patwari. Spot "F" was mentioned in spot map, Ex. P.2 on the instructions of Abdul Gaffar. He admitted that distance between various spots has not been disclosed in the spot map, Ex. P.2. He further stated that double barrel gun was seized vide seizure memo Ex. P.4 in compliance of order under Section 82/83 of Cr.P.C.

69. In re-examination by Public Prosecutor, this witness admitted that in F.I.R. no. 40/2003, he was not informed that the appellant Samim has sustained gun shot injury on his knee.

70. He further stated that the spot map prepared in crime no. 40/2003 has not been produced in the present case.

71. Munnawar Ali (D.W.1) is a different person who has been named by prosecution witnesses. This witness has stated that Ahmed Sayeed is his brother-in-law (बहनोई) and appellants Anees, Shakeel and Samim are his nephews. He stated that he was informed by some one that he is immediately required in village Jhujhalakheda, and accordingly he went there. He found that dispute was going on between Ahmed Sayeed and Abdul Azeez on the question of affixing stones. Abdul Azeez, Fida Mohd. and his sons started scuffling with Ahmed Sayeed. Thereafter, the appellants went back to their house. Fida Mohd., Abdul Azeez with gun, Anwar, Khalil, Jameel, Akhtar, Sabir, Gaffar Khan, Iliyas who were armed with lathi, knief etc came to the house of Ahmed Sayeed. Ahmed Sayeed locked his house from inside. The said door was broke open by Abdul Azeez, Fida Mohd., Anwar Khan, Khalil Khan, Jamil Khan. The motor cycle of this witness was also parked in the house of Ahmed Sayeed. As the dispute was escalating, therefore, this witness left the place and thereafter he heard noise of gun shots. This witness came back to his shop. Thereafter, Rajendra who is his neighbor informed that gun

shots have been fired in village Jhujhalakheda. This witness was cross-examined by Public Prosecutor.

72. In cross-examination, this witness admitted that he did not inform any body on his way to Lateri about the firing. Even he did not inform the Lateri Police Station. He further stated that he informed Babu Bhai that Fida Bhai, Abdul, Anwar and their sons were trying to break open the door of the house of Ahmed Sayeed. He further admitted that Babu bhai is the same person, who is *pairokar* of the appellants. He further admitted that he has been asked by Babu Bhai to depose in the present case. He also admitted that he did not receive any summons from the Court and has come to the Court at the request of Babu bhai. Babu bhai had informed him that he has been summoned by an Advocate to give statement.

73. Thus, it is clear that Munnawar Khan (D.W. 1) has admitted a part of the incident and has supported the prosecution story that the incident took place on the question of affixing of stones on earthen boundary.

74. By referring to evidence of Jai Narayan Katiyar (P.W. 15), it is submitted that this witness is a police officer, who reached on the spot at the earliest and has stated in para 23 of his cross-examination, that when he reached on the spot, he found that smoke was coming out from the roof of a house which was made up of earthen tiles. A part of the door was broken. The fire was already extinguished and smoke

which was coming out, was extinguished by this witness. He admitted that he did not prepare any panchnama of burning house or broken gate. He admitted that he had brought 4-5 injured persons on his police vehicle. He further admitted that he did not lodge any FIR on the information given by any other injured. He further admitted that one injured had come out of the burning house, but could not identify the appellant Samim in the dock. He further admitted that on 4-5-2003 the appellant and complainant party had come to the police station for lodging a F.I.R., however, their relatives took them back on the pretext that the matter can be resolved amicably.

75. Dr. Arun Jaroliya (P.W.11) had medically examined the injured appellant Samim and found the following injuries :

> Lacerated wound with profused bleeding some blackening over wound, 6 inches x 6 inches x bone deep caused by projectile object with force like pellet of gun shot. The M.L.C. of Samim is Ex.D3A.

76. Dr. Amit Hadole (D.W.3) had also medically examined the appellant Samim and found following injuries :

> One lacerated wound on the back side of left leg 10x5 cm with bleeding and blackening. Some pellets were also visible but had no fracture.

77. In cross-examination, this witness admitted that there was blackening around the wound. The gun shot was fired from a close range i.e., less than 30 cm, therefore, blackening was found. Further, all the pellets were at one place only, otherwise the pellets would

have spread in case if a gun shot is fired from a distance.

78. Thus, it is clear that the appellant Samim had suffered a gun shot, fired from a very close range, because not only all the pellets were found at one place, but the wound was having blackening around it.

79. From the evidence of Alok Shrivastava (P.W. 20) it is clear that no charge sheet was filed in Cr.No. 40/2003 (lodged by appellant Anees). Alok Shrivastava (P.W. 20) has also stated that during investigation, he came to know that it was Ahmed Sayeed (Appellant) himself, who broke the gate as well as set his own house on fire and also caused gun shot injury to his own son Samim (Appellant).

80. It is submitted by Shri Padam Singh, Counsel for appellants no. 3 and 4 that the personal information disclosed by Alok Shrivastava about the self burning of house, breaking the door as well as causing injury to his own son Samim, cannot be said to be an evidence against Ahmed Sayeed and therefore, it cannot be read against the appellants. However, Shri Padam Singh, Counsel for the appellants no.3 and 4 expressed his ignorance about the outcome of the crime no. 40/2003, except by saying that an expunge report was prepared. However, Shri R.K.S. Kushwaha, Counsel for appellants no. 1 and 2 submitted that a closure report was filed by the police, and a complaint was also filed by the appellants, and both the proceedings were taken simultaneously by the Magistrate, and the complaint filed by the

appellants was rejected and the closure report was accepted. Thereafter, the appellants filed a Criminal Revision, which was dismissed by the Revisional Court and against the order passed by the Revisional Court, the appellants preferred an application under Section 482 of Cr.P.C. which was also dismissed by the High Court. Thus, it is clear that the not only the report lodged by the appellant Anees was found to be incorrect, but the said proceedings have attained finality after the dismissal of application by the High Court, filed under Section 482 of Cr.P.C.

81. However, it is submitted by Shri R.K.S. Kushwaha, Counsel for appellants no. 1 and 2 that the complaint filed by the appellants might have been dismissed and the closure report filed in crime no.40/2003 might have been accepted, but it is well established principle of law that the cross cases should be decided by one Court and the evidence led in one case, cannot be read in another case and both the cases are to be decided on their own merits, therefore, the defence of the appellants that the appellant Ahmed Sayeed had acted in exercise of private defence can still be considered.

82. Considered the submissions made by the Counsel for the appellants.

83. The Supreme Court in the case of **Nathi Lal v. State of U.P.,** reported in **1990 (Supp) SCC 145** has held as under :

> **2.** We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the

> same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

84. The Supreme Court in the case of **State of M.P. Vs. Mishrilal by** judgment **dated 2-4-2003 passed in Cr.A. No. 489 of 1996** has held as under :

> In the instant case, it is undisputed, that the investigating officer submitted the challan on the basis of the complaint lodged by the accused Mishrilal in respect of the same incident. It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross- cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments. In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood. Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice.

85. Thus, it is clear that the basic purpose behind trial of cross

cases by one Court is to avoid conflicting judgments and legal obligation is on the investigating officer to find out the truth from the falsehood.

86. In the present case, the police did not file charge sheet in the cross case and after completing investigation, came to a conclusion that in fact the story developed by appellants of attacked on their house by breaking open the door, setting up their house on fire and causing gun shot injury to appellant Samim is a self created story. According to Shri R.K.S. Kushwaha, Counsel for the appellants no.1 and 2 that the appellants also filed a criminal complaint and accordingly, the criminal complaint filed by the appellants as well as the closure report filed by the police were heard together by the same Court, and not only the complaint filed by the appellants was dismissed but the closure report was also accepted and the said order was approved upto the stage of High Court.

87. Thus, there is a specific finding against the appellants that in fact neither the complainant party tried to break open the house of the appellants, nor their house was set on fire. Further, the appellant Ahmed Sayeed himself caused gun shot injury to his son Samim in order to falsely create a ground of self defence.

88. The submissions made by Shri R.K.S. Kushwaha, Counsel for appellants no.1 and 2 that since, the findings in the cross case were recorded on the basis of the evidence led in the said case, and as that

evidence cannot be read in the present case, therefore, the findings recorded in the cross case can not be read in this case.

89. The submission made by the Counsel for the appellants no.1 and 2 is misconceived and is liable to be rejected. First of all, the appellants have examined Munnawar Khan (D.W.1) to show that in fact it was the complainant party who was trying to break open the door of the house of Ahmed Sayeed. The presence of this witness has not been admitted by any prosecution witness as no suggestion was given to them about his presence. Further, Munnawar Khan (D.W.1) has not disclosed the name of the person, who informed him that he is required in village Jhujhalakheda. Further, this witness is said to have immediately left the village after the dispute arose between the parties, and thereafter, kept mum and did not even try to inform the police about the ruckus in the village. Thus, the evidence of Munnawar Khan (D.W. 1) is not reliable. Further more, this Court cannot give any self contradictory findings by ignoring the order passed by this Court in a petition filed by the appellants under Section 482 of Cr.P.C. by which dismissal of their complaint was upheld.

90. Another submission by Shri Padam Singh, Counsel for appellants no. 3 and 4 is that after the house of the appellant Ahmed Sayeed was set on fire, it appears that in exercise of his right of private defence, Ahmed Sayeed went to the roof of his house and

opened indiscriminate firing. To buttress his contentions, the Counsel for the appellants also referred to the evidence of Dr. Arun Jaroliya (P.W. 11) who stated that the deceased Fida Mohd and Abdul Azeez were taller than the appellant Ahmed Sayeed and it was not possible to cause injuries to the deceased persons, while standing on the ground. Further more, the appellants also relied on the suggestion given to Jai Narayan Katiyar (P.W. 15) to the effect that when he reached on the spot, he found that smoke was coming out of the earthen tiles of the roof of the house of Ahmed Sayeed.

91. Considered the submissions made by the Counsel for the appellants.

92. A suggestion was given to Jai Narayan Katiyar (P.W. 15) that when he reached on the spot, smoke was coming out of the earthen tiles of the roof of the house of the appellant Ahmed Sayeed. Thus, it is clear that the roof of the house of appellant Ahmed Sayeed was made up of earthen tiles. According to the appellants, the house of the appellant Ahmed Sayeed was set on fire and his son Samim was shot and only then, he climbed to the roof of his house and opened firing. If the earthen tiles of the roof of the house of Ahmed Sayeed were already burning, then it was not possible for appellant Ahmed Sayeed to go to the roof and open fire. Thus, the defence taken by the appellants run contrary to their own suggestions. Further, nothing has been placed on record to show that there were any staircases

going to the roof of the house of Ahmed Sayeed. No suggestion has been given to Jai Narayan Katiyar (P.W.15) or to Alok Shrivastava (P.W. 20). Further, if indiscriminate firing was done by Ahmed Sayeed from his roof, then empty cartridges should have been found on the roof. It is true that .12 bore gun is not an automatic gun but whenever a second round is fired, the assailant has to remove the fired cartridges from the barrel of the gun and in that situation, the fired/empty cartridges should have been found on the roof of the appellant Ahmed Sayeed. Further more, various injured persons had sustained gun shot injuries at different places, which could not have been caused by firing from the roof of the house of the appellant Ahmed Sayeed.

93. Further, a suggestion was given to Jai Narayan Katiyar (P.W. 15) that when he reached on the spot, he found that one injured person had come out of the house of the appellant Ahmed Sayeed and the said suggestion was admitted by Jai Narayan Katiyar (P.W. 15). Although Jai Narayan Katiyar (P.W. 15) could not identify the injured person, but the claim of the appellants was that the injured was Samim.

94. Considered the said suggestion. Jai Narayan Katiyar (P.W. 15) went to the spot after FIR, Ex. P. 34 was registered on the basis of Dehati Nalishi, Ex. P.1, lodged by Gaffar Khan (P.W.1). The incident took place in between 8 to 8:30 A.M., and Dehati Nalishi, Ex. P.1 was

lodged at 10:25 A.M., whereas F.I.R., Ex. P.34 was lodged at 10:55 A.M. Only after the FIR, Ex. P. 34 was lodged, Jai Narayan Katiyar (P.W. 15), went to the spot. Thus, it is clear that Jai Narayan Katiyar (P.W. 15) must have gone to the spot after 11:00 A.M. If the suggestion given by the appellants to the effect that when Jai Narayan Katiyar (P.W. 15) reached on the spot, then one injured had come out of the house, then it is clear that the appellant Samim had remained in the house for atleast 3 hours whereas none of the other appellants were found on the spot and they had run away. If Samim had sustained gun shot injury at the beginning of the incident, then he should have also rushed to the hospital, but he remained in the house. Thus, it is clear that the suggestion given by the appellants to the witnesses, itself demolish their case of right of private defence.

95. Further, by referring to the evidence of Dr. Arun Jaroliya (P.W.11), it is submitted by Shri Padam Singh and Shri R.K.S. Kushwaha, Counsels for the appellants that in para 41 of his cross-examination, he has stated that the deceased Fida Mohd. and Abdul Azeez were taller than Ahmed Sayeed therefore, it is clear that Ahmed Sayeed was standing at a higher place otherwise, they would not have sustained the gun shot injuries with downward directions.

96. Considered the submissions made by the Counsels for the appellants.

97. As already held the conduct of Dr. Arun Jaroliya (P.W.11) was

not upto the mark. Further, Dr. Arun Jaroliya (P.W. 11) has conducted post-mortem of Fida Mohd. and Abdul Azeez, Ex. P. 24 and P.25. In both the post-mortem reports, Dr. Arun Jaroliya (P.W.11) has mentioned that "Body of a man with strong built". The height of both the deceased persons was not mentioned. Merely a person is of a strong built doesnot mean that he is taller also. Further, there is nothing on record to show the height of Ahmed Sayeed. Thus, it is clear that certain claims made by Dr. Arun Jaroliya (P.W.11) were baseless and indicates towards his dishonest intention. Be that whatever it may be. It is true that Dr. Arun Jaroliya (P.W.11) is a prosecution witness but this Court after having considered the conduct of Dr. Arun Jaroliya (P.W. 11) during the trial as well as material contradictions in the medical reports given by Dr. Arun Jaroliya (P.W.11) and the medical reports of Dr. Geeta Rani Gupta (P.W. 10) and Dr. Amit Hadole (D.W.3), this Court is not hesitant in ignoring the claims made by Dr. Arun Jaroliya (P.W. 11) in para 41 of his cross-examination.

98. Further, Ahmed Sayeed was arrested on 13-6-2003 which clearly indicates that he remained absconding for more than 1 ½ months. Further more, the subsequent conduct of appellant Ahmed Sayeed shows his guilty mind.

99. Since, Ahmed Sayeed was absconding, therefore, order under Section 82 and 83 of Cr.P.C. was issued and accordingly, the crop of

Ahmed Sayeed was attached on 12-6-2003. Thereafter, Ahmed Sayeed was arrested on 13-6-2003. Vide seizure memo, a Hero Honda Splender Motor Cycle was seized from the possession of Ahmed Sayeed. The .12 bore gun was kept under the seat of the motor cycle in a broken condition. Thus, it is clear that the .12 bore gun which was used by Ahmed Sayeed was broken in different parts and was kept under the seat of the motor cycle. Further as per F.S.L. report, Ex. P.58, Nitrate was found in the barrels. Even in the seizure memo, Ex. P.10, it was mentioned that particles of gun powder were present. Further, from the F.S.L. report, Ex. P.58, it is clear that firing pins of both the barrels were found "cut" as a result they were not hammering the cartridges. The use of word "cut" clearly shows that not only the .12 bore gun was broken in pieces, but its firing pins were also "cut" so as to project that the said .12 bore gun was not in working condition. Keeping the gun under the seat of the motor cycle in pieces, clearly indicates that every attempt was being made by Ahmed Sayeed to destroy the evidence, and that is why, Chhammu Khan (P.W. 4) has stated that the appellant Ahmed Sayeed is a dangerous person, therefore, he is afraid of him.

100. The Counsel for the appellants have also relied on written complaint made by appellant Anees, Ex. D.8 to show that the appellant Ahmed Sayeed had opened fire from the roof of his house in exercise of right of private defence. The said submission is hereby

rejected for the reasons already mentioned in the previous paragraphs.

101. It is submitted by the Counsel for the appellants, that merely because Ahmed Sayeed absconded after the incident, would not mean that he was of a guilty mind.

102. Considered the submission.

103. The fact of firing gun shots by Ahmed Sayeed was already admitted by appellant Anees by making a written complaint, Ex. D.8. Further, subject to surrounding circumstances, abscondence of an accused immediately after the incident is also one of the circumstance to show his guilty mind. It is true that sometimes, an innocent person, under a false apprehension may also run away from the spot, but in the present case, the surrounding circumstances, clearly indicates that the immediate abscondence of the appellant Ahmed Sayeed was with guilty mind. The Supreme Court in the case of **Subedar Tewari v. State of U.P.,** reported in **1989 Supp (1) SCC 91** has held as under :

> 19.....Then accused Narendra quietly made himself scarce for about a month. The evidence pertaining to absconding on the part of accused Narendra has not been dealt with by the High Court, but it has been summarized by the trial court in the following passage:
>
> "The conduct of absconding of accused is also a factor which can be used for cementing the prosecution evidence. Both the accused Narendra Nath and Meera were found absconding after the lodging of the FIR. PW 10 Hridaynarain, Sub-Inspector of Police has given statement that he had gone to Dildarnagar on 19-9-1984 in search of accused Meera but she was not available there and, therefore, the goods of the house of Dildarnagar were attached to execute the processes

> of attachment under Sections 82 and 83 CrPC. PW 12 Shri Sheshnath Pandey, GO Police has given statement that the accused of this case were absconding and on receiving information about the availability of accused in Kadarma and Bardha. He had deputed Sri Sabru Yadava SI of Police of P.S. Adampur on 22-9-1984 for the search of accused in Kodarma. He has further stated that on 24-9-1984 he deputed Shri Rajesh Kumar Sub-Inspector of Police of P.S. Lanka for the search of accused in Bardha. But even then the accused were not traceable up to 25-9-1984 and therefore, he got published the photo of accused Narendra Nath in the daily newspapers through the incharge DCRS. The statement of Shri Shesnath Pandey (PW 13) is supported by the documents Ex. Ka-19 and Ka-20. On 12-10-1984 the accused had surrendered in the court. The accused have given explanation that they had gone to Dildarnagar in order to perform all the death ceremonies of deceased Veena but this statement is found false in view of the prosecution evidence that the accused were not traceable even in Dildarnagar."
>
> If Veena had committed suicide accused Narendra did not have to keep himself away for as long as a month. Even when a person loses his own father or his son, he ordinarily does not withdraw himself from the society for as long as a month in connection with the obsequial ceremonies. And what obsequial ceremonies were to be performed by the husband, Narendra who did not show any affection towards Veena in her lifetime as narrated in the earlier part of the judgment? The matrimonial life was of a short duration of seven months though they lived together for less than 3 months only. <u>The explanation is thoroughly unconvincing. Besides, his photograph had been published in the newspapers and he was declared as an absconder. It was only when matters became uncomfortable for him that he surrendered himself one month after the occurrence. This is also a factor which buttresses the theory of homicide rather than the theory of suicide.</u>
>
> (Underline supplied)

104. Thus, the story of private defence as suggested by the Counsel for the appellants is misconceived and is hereby rejected. Even otherwise, the right of private defence is not an absolute defence, and

even if a person has acted in a cruel manner or has exceeded his right of private defence, then he cannot take advantage of the right of private defence.

Whether Forensic Evidence doesnot support the prosecution story?

105. It is submitted by the Counsel for the appellants, that since, the .12 bore gun which was seized from the possession of the appellant Ahmed Sayeed was not in a working condition, therefore, it is clear that Forensic evidence doesnot support the prosecution story.

106. Considered the submissions made by the Counsel for the appellants.

107. This Court has already considered the fact that the .12 bore gun was broken by the appellant Ahmed Sayeed in pieces and it was hidden under the seat of his motor cycle. Further more, as per seizure memo, Ex. P.10, gun powder was present in both the barrels. As per F.S.L. report, Ex. P.58, the firing pins of both the barrels were found to be “cut”, therefore, they were shortened and were not hitting the cartridges. Thus, it is clear that Ahmed Sayeed, after breaking the .12 bore gun in pieces, also must have “cut” the firing pins to make it unworkable, but the presence of Nitrate in the barrels of .12 bore gun seized from his possession, clearly indicates, that it was used. Thus, the contention of the Counsel for the appellants, that the .12 bore gun seized from the possession of Ahmed Sayeed was not never used, is

misconceived and is hereby rejected.

Whether Appellants No. 2,3 and 4 Samim, Anees and Shakeel were members of Unlawful Assembly and were sharing common object or not?

108. It is submitted by the Counsel for the appellants, that according to prosecution case, the appellants No.2 and 3 namely Samim and Anees were empty handed and the manner in which the incident is alleged to have taken place, it is clear that Samim and Anees have been falsely implicated merely on the ground that they are the sons of main accused Ahmed Sayeed. It is further submitted that the role assigned to Shakeel that he was carrying the belt of cartridges is also false, thus, they were not the member of Unlawful Assembly and were not sharing any common object (The fifth accused Yusuf was absconding and has been arrested after the judgment was pronounced by the Trial Court in the present case).

Whether incident took place all of a sudden or there was a prior enmity between the parties on the land dispute.

109. It is submitted by Shri Padam Singh and Shri R.K.S. Kushwaha that the incident took place all of a sudden on the question of affixing stones in the field.

110. Although the argument advanced by the Counsel for the appellants appeared to be very attractive but in view of the evidence led by the prosecution coupled with the suggestions given by the

appellants themselves to the witnesses, it is clear that the incident did not take all of a sudden, but bad blood was going on between the parties.

111. According to Gaffar Khan (P.W.1), one day prior to the date of incident, some scuffle had taken place between the accused and complainant parties on the land dispute itself and accordingly, the appellant Ahmed Sayeed and deceased Abdul Azeez had gone to police station Lateri to lodge F.I.R. against each other. At that time, the deceased Fida Mohd., persuaded them not to lodge F.I.R. and assured that the dispute shall be resolved amicably. Similarly, a suggestion was given to Jai Narayan Katiyar (P.W.11) in para 32 of his cross-examination that one day prior to the date of incident, the appellant Ahmed Sayeed and the deceased Abdul Azeez had come to Police Station Lateri to lodge FIR against each other, but the other brothers of the appellant Ahmed Sayeed and deceased Abdul Azeez, took them back on the pretext of resolving the dispute amicably. Thus, it is clear that it is incorrect to say that there was no bad blood between the parties and even one day prior to the date of incident, both the parties had gone to the police station to lodge FIR against each other on the land dispute.

112. As per Dehati Nalishi, Ex. P.1/FIR Ex. P.34, after the scuffle started between the parties and they were separated by Fida Mohd and others. All the appellants and Yusuf went back to their house.

Appellant Ahmed Sayeed came out along with his .12 bore gun whereas appellant Shakeel was carrying a belt of cartridges, whereas Samim, Anees and Yusuf were exhorting that all should be killed, and thereafter, Ahmed Sayeed started firing gun shots. Thus, in the Dehati Nalishi, Ex. P.1/FIR Ex. P.34, there are specific allegations that Shakeel came out of the house along with belt of cartridges whereas the other two appellants namely Samim and Anees were empty handed but they were exhorting their father to kill the persons.

113. Similarly, Gaffar Khan (P.W.1) has re-iterated the same allegations in his Court evidence and specifically stated that after the parties were separated by Fida Mohd and others, all the appellants went back to their house. Ahmed Sayeed came out of the house along with his .12 bore gun, whereas Shakeel was having a belt of cartridges. Anees, Samim and Yusuf were exhorting that all should be killed. Anwar Khan (P.W.2), Mohd. Khalil (P.W. 6), Iliyas (P.W. 8), have also repeated the same allegations in his Court evidence.

114. Johara bi (P.W.5) is not the witness of entire incident and She has stated about the assault made by Ahmed Sayeed on herself and her husband Fida Mohd. It is not out of place to mention here that according to the prosecution story, Fida Mohd and Johara bi (P.W.5) were shot at the end of the incident.

115. Mohd. Akhtar (P.W. 9) is also an injured eye-witness, but he has not witnessed the incident from the beginning. When he heard

the noise of firing, then he went towards the Mosque. Mohd. Akhtar (P.W.9) also sustained gun shot injury at the end of the incident.

116. Thus, it is clear from the evidence of Gaffar Khan (P.W.1), Anwar Khan (P.W.2), Mohd. Khalil (P.W.6) and Iliyas (P.W.8), as well as the Dehati Nalishi, Ex. P.1/FIR,Ex. P.34, when both the parties were separated, the appellants went towards their house and the appellant came out of the house along with his .12 bore gun, whereas Shakeel was having a belt of cartridges. Although, appellants Anees and Samim were empty handed, but they were exhorting their father to kill all the persons.

117. Now the question is that whether the allegations of exhortation made against Samim and Anees and the allegation of carrying a belt of cartridges against Shakeel is indicative of fact that they were members of unlawful assembly and were sharing common object or not?

118. The Supreme Court in the case of **Sukhbir Singh Vs. State of Haryana** reported in **(2002) 3 SCC 327** has held as under :

> **12.** ….....An accused is vicariously guilty of the offence committed by other accused persons only if he is proved to be a member of an unlawful assembly sharing its common object. There is no dispute to the legal provision that once the existence of common object of unlawful assembly is proved, each member of such an assembly shall be liable for the main offence notwithstanding his actual participation in the commission of the offence. It is not necessary that each of the accused, forming the unlawful assembly, must have committed the offence with his own hands.
>
> **13.** Unlawful assembly has been defined under Section 141 of the Penal Code, 1860 as under:

"141. *Unlawful assembly*.—An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is —

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

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

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

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

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

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

14. The prosecution in the instant case could not specifically refer to any of the objects for which the accused are alleged to have formed the assembly. It appears, from the circumstances of the case, that after altercation over the splashing of mud on his person and receiving two slaps on his face from the complainant party, Sukhbir Singh declared to teach the complainant party, a lesson and went home. Immediately thereafter he along with others came on the spot and as held by the High Court wanted to remove the obstructions caused in the flow of water. As the common object of the assembly is not discernible, it can, at the most, be held that Sukhbir Singh intended to cause the fatal blow to the deceased and the other accused accompanied him for the purpose of removing the obstruction or at the most for teaching a lesson to Lachhman and others. At no point of time any of the accused persons threatened or otherwise reflected their intention to commit the murder of the deceased. Merely because the other accused persons were accompanying him when the fatal blows were caused by Sukhbir Singh to the deceased, cannot prove the existence of the common object specifically in the absence of any

evidence of the prosecution in that behalf. The members of the unlawful assembly can be held liable under Section 149 IPC if it is shown that they knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. It is true that the common object does not require prior concert and a common meeting of mind before the attack. It can develop even on spot but the sharing of such an object by all the accused must be shown to be in existence at any time before the actual occurrence.

(Underline supplied)

119. The Supreme Court in the case of **Manjit Singh Vs. State of Punjab** reported in **(2019) 8 SCC 529** has held as under :

14.3. We may also take note of the principles enunciated and explained by this Court as regards the ingredients of an unlawful assembly and the vicarious/constructive liability of every member of such an assembly. In *Sikandar Singh*, this Court observed as under: (SCC pp. 483-85, paras 15 & 17-18)

"*15.* The provision has essentially two ingredients viz. (*i*) the commission of an offence by any member of an unlawful assembly, and (*ii*) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

* * *

17. A "common object" does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has

the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

18. In *Masalti* v. *State of U.P.* a Constitution Bench of this Court had observed that: (AIR p. 211, para 17)

'*17.* … Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.'"

14.4. In *Subal Ghorai*, this Court, after a survey of leading cases, summed up the principles as follows: (SCC pp. 632-33, paras 52-53)

"*52.* The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines "unlawful assembly" to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any

assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

53. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful

> assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution."

14.5. We need not expand on the other cited decisions because the basic principles remain that the important ingredients of an unlawful assembly are the number of persons forming it i.e. five; and their common object. Common object of the persons composing that assembly could be formed on the spur of the moment and does not require prior deliberations. The course of conduct adopted by the members of such assembly; their behaviour before, during, and after the incident; and the arms carried by them are a few basic and relevant factors to determine the common object.

14.6. The facts of the present case, as established by the prosecution, make it clear that on the relevant date i.e. 3-3-2001 and at the relevant time i.e. 11.15 a.m., at least five of the accused persons, including the present appellants were present at the Barnala Court Complex. The members of the complainant party purportedly came to the very same court complex to attend the hearing of the aforesaid rape and murder case of the village girl in which, their kith and relatives were the accused persons and the case was being pursued by the appellant Manjit Singh. It is also established that when the persons related with the complainant party were about to board their vehicle, the accused persons attacked them with weapons. Significantly, the attack on the complainant party was triggered with exhortation by the appellant Manjit Singh to avenge the rape and murder of the village girl in the expressions "*aj eh bach ke naa jaan KK**

> *da badla lai kay rahenge*". This clearly brings out the motive for the attack as also the object of the assembly. Moreover, the blows hurled by the accused persons on the members of the complainant party had been of wide  range, sufficient force and chosen aims. The appellant Manjit Singh himself had given two blows to the witness PW 5 on either of his hands. Labh Singh gave kirpan-blow on the head of Beant Singh. The appellant Sukhwinder Singh aimed the first blow on Dalip Singh but hit the right hand of the victim. The appellant Sukhvinder Singh caused yet another injury to PW 6 Gurnam Singh by the handle of his kirpan. These were apart from the repeated blows by the accused Bakhtaur Singh on the head of the deceased Dalip Singh with his ghop and then three blows to PW 6 Gurnam Singh. That apart, Bakhtaur Singh also gave the blow of his kirpan on the left leg of Gurnam Singh. It is beyond the pale of doubt that the accused persons had acted in concert and the object had clearly been to ensure casualties amongst the members of the complainant party. On the applicable principles, we have no hesitation in concluding that the accused persons did constitute an unlawful assembly; did indulge in rioting in the Court Complex with deadly weapons; and did cause grievous bodily injuries to members of the complainant party. The deceased Dalip Singh was attacked rather repeatedly by the members of this unlawful assembly and he sustained grievous injury on the head that proved fatal. The background aspects as also the conduct of the accused persons at and during the incident leaves nothing to doubt that each of the member of this assembly remains liable for the offence committed by himself as also by every other member of the assembly.

120. The Supreme Court in the case of **Bhagwan Jagannath Markad v. State of Maharashtra,** reported in **(2016) 10 SCC 537** has held as under :

> **20.** Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.
>
> **21.** An offence committed in prosecution of common object of an unlawful assembly by one person renders members of unlawful assembly sharing the common object vicariously

liable for the offence. The common object has to be ascertained from the acts and language of the members of the assembly and all the surrounding circumstances. It can be gathered from the course of conduct of the members. It is to be assessed keeping in view the nature of the assembly, arms carried by the members and the behaviour of the members at or near the scene of incident. Sharing of common object is a mental attitude which is to be gathered from the act of a person and result thereof. No hard-and-fast rule can be laid down as to when common object can be inferred. When a crowd of assailants are members of an unlawful assembly, it may not be possible for witnesses to accurately describe the part played by each one of the assailants. It may not be necessary that all members take part in the actual assault. In *Gangadhar Behera*, this Court observed: (SCC pp. 398-99, para 25)

> "*25*. The other plea that definite roles have not been ascribed to the accused and therefore Section 149 is not applicable, is untenable. A four-Judge Bench of this Court in *Masalti case* observed as follows: (AIR p. 210, para 15)
>
> '*15*. Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true

and which is not.'"

121. The Supreme Court in the case of **Dev Karan v. State of Haryana,** reported in **(2019) 8 SCC 596** has held as under :

> **11.** The learned counsel took us through the provisions of Chapter VIII of IPC, dealing with "Offences against the Public Tranquility". It was his submission that the provisions have to be read holistically, and in sequence. Thus, Section 141 IPC defines an "unlawful assembly" as an assembly of five or more persons with a common object. Such common objects are specified in the section, and what would be applicable, in this case, would be the third aspect i.e. "to commit any mischief or criminal trespass, or other offence". Section 142 IPC provides that a person who, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly, while Section 143 IPC provides the punishment for being part of such an unlawful assembly. Section 144 IPC deals with joining an unlawful assembly, armed with deadly weapon, which is likely to cause death; Section 146 IPC deals with rioting; Section 147 IPC deals with punishment for rioting while Section 148 IPC deals with rioting, armed with deadly weapon. Section 149 IPC reads as under:
>
> "**149.** ***Every member of unlawful assembly guilty of offence committed in prosecution of common object***. —If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."
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> **12.** It was, thus, the submission advanced that unless there is infliction of punishment under Section 143 IPC, as a sequitur to forming an unlawful assembly under Section 141 IPC, there could be no cause to apply Section 149 IPC.
>
> **13.** The learned counsel referred to the judgment in *Vinubhai Ranchhodbhai Patel* v. *Rajivbhai Dudabhai Patel* to elucidate his submission. The concept of vicarious liability, as a result of which a large number of accused constituting an unlawful assembly can be held guilty, has been discussed, to hold that it is not necessary that each of

the accused inflict fatal injury or any injury at all; the mere presence of an accused in such an assembly is sufficient to render him vicariously liable under Section 149 IPC, for causing the death of the victim of the attack, provided that the accused are told that they are to face the charge, rendering them so vicariously liable. The principle of this vicarious liability, under Section 149 IPC has been set out in para 28 of the judgment and reads as under: (SCC p. 755)

> "*28*. Section 149 propounds a vicarious liability [*Shambhu Nath Singh* v. *State of Bihar*] in two contingencies by declaring that (*i*) if a member of an unlawful assembly *commits an offence in prosecution of the common object of that assembly*, then every member of such unlawful assembly is guilty of the offence committed by the other members of the unlawful assembly, and (*ii*) even in cases where all the members of the unlawful assembly do not share the same common object to commit a particular offence, *if they had the knowledge of the* fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object."
>
> (emphasis in original)

14. The concept of unlawful assembly under Section 149 IPC was, thus, as per para 31, opined to have two elements: (*Vinubhai Ranchhodbhai Patel case*, SCC p. 756)

> "(*i*) The assembly should consist of at least five persons; and
>
> (*ii*) They should have a common object to commit an offence or achieve any one of the objects enumerated therein."

15. In that context, in paras 32 and 33, it has been observed as under: (*Vinubhai Ranchhodbhai Patel case*, SCC p. 756)

> "*32*. For recording a conclusion, that a person is (*i*) guilty of any one of the offences under Sections 143, 146 or 148 or (*ii*) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an "unlawful assembly" consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.
>
> *33*. The common object of assembly is normally to be

> gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); *merely* on the ground that the injuries inflicted by such members are relatively less serious and non-fatal."
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> (emphasis in original)

122. The Supreme Court in the case of **Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel,** reported in **(2018) 7 SCC 743** has held as under :

> **15.** It was held by a three-Judge Bench of this Court in *Shambhu Nath Singh* v. *State of Bihar*: (AIR p. 727, para 6)
>
> "*6. Section 149 of the Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly* for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object."
>
> (emphasis supplied)
>
> However, there are Benches of a lesser smaller strength which have observed that Section 149 creates a specific and distinct offence. In view of the fact that decision in *Shambhu Nath Singh* was decided by a larger Bench, the law declared therein must be taken to be declaring the correct legal position. With utmost respect, we may also add that the same is in accord with the settled principles of the interpretation of the statutes having regard to the language of Section 149 and its context.
>
> * * * *

20. In cases where a large number of accused constituting an "unlawful assembly" are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at all. Invocation of Section 149 is essential in such cases for punishing the members of such unlawful assemblies on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries in appropriate cases if the evidence on record justifies. The mere presence of an accused in such an "unlawful assembly" is sufficient to render him vicariously liable under Section 149 IPC for causing the death of the victim of the attack provided that the accused are told that they have to face a charge rendering them vicariously liable under Section 149 IPC for the offence punishable under Section 302 IPC. Failure to appropriately invoke and apply Section 149 enables large number of offenders to get away with the crime.

* * * *

33. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); *merely* on the ground that the injuries inflicted by such members are relatively less serious and non-fatal.

34. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence *by the members of the assembly* is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the

fact that the offence of murder is likely to be committed.

35. The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with deadly weapons like axes and firearms and attack another person or group of persons, any member of the attacking group would have to be a moron in intelligence if he did not know murder would be a likely consequence.

123. Thus, it is clear that it is not necessary that each and every member of the Unlawful Assembly must play some overact in the commission of offence. The essential aspect is as to whether the Assembly was unlawful or not and whether the members of the Unlawful Assembly have acted in furtherance of common Object or not? In order to find out as to whether the object was unlawful or not, the role played by an individual coupled with language used by them, arms carried by the members and behavior of the members prior to, during and after the incident along with surrounding circumstances, plays an important role. Common object is in the minds of the participants and therefore, the said mental attitude is to be deciphered from the over all circumstances. In some case, a silent presence may be an innocent presence, and in some case, a silent presence may be an Unlawful Assembly with common object.

124. By referring to the judgment passed by Supreme Court in the case of **Kuldip Yadav (Supra)** it is submitted that in the said case, the co-accused persons were allegedly armed with deadly weapon and it was found that none of them had used their weapons, then it can be

held that neither they were the members of Unlawful Assembly for committing murder of the deceased, nor they were sharing common object.

125. Considered the submissions made by the Counsel for the appellants.

126. The Supreme Court in the case of **Kuldip Yadav (Supra)** has held as under :

> **39.** It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

127. Thus, it is clear that allegations made against members of Unlawful Assembly are to be considered independently in order to find out as to whether they were sharing common object or not?

128. If the facts of this case are considered, then it is clear that there was a bad blood between the appellants and complainant/deceased party and one day prior to the date of incident, both the parties had gone to lodge F.I.R. against each other on the question of same land dispute. Due to intervention by elderly members of the family, the FIRs could not be lodged against each other, and on the date of incident, the people had gathered for amicable settlement of dispute.

It is not out of place to mention here that the appellant Ahmed Sayeed and deceased Abdul Azeez, Fida Mohd. were real brother and most of the injured persons were the sons or family members of Abdul Azeez. During the discussion on the question of land dispute, it appears that scuffle took place between the appellants and the complainant party and it is alleged that the appellants went back to their house, which is also situated at a nearby place. Thereafter, the appellant Ahmed Sayeed, came out of the house along with his .12 bore gun, whereas it is alleged that the appellant Samim and Anees were exhorting Ahmed Sayeed to kill every one. The appellant Shakeel was having a belt of cartridges with him. Multiple gun shots were fired, therefore, it is clear that Shakeel played an active role in providing cartridges to Ahmed Sayeed for firing indiscriminately causing death of 3 persons and causing injuries to 10 persons. As already pointed out, the allegations against Anees, Samim of exhortation and allegation of carrying a belt of cartridges against Shakeel is consistent from the very beginning i.e., from Dehati Nalishi, Ex. P.1.

129. It is true that Anees and Samim were empty handed, but their active role of exhortation clearly indicates that when they came out of their house, they were the members of Unlawful Assembly and were sharing common object of killing their own relatives on the land dispute.

130. The Supreme Court in the case of **Lakshman Singh Vs. State**

of Bihar reported in **(2021) 9 SCC 191** has held as under :

> **17.** Thus, once the unlawful assembly is established in prosecution of the common object i.e. in the present case, "to snatch the voters list and to cast bogus voting", each member of the unlawful assembly is guilty of the offence of rioting. The use of the force, even though it be the slightest possible character by any one member of the assembly, once established as unlawful constitutes rioting. It is not necessary that force or violence must be by all but the liability accrues to all the members of the unlawful assembly. As rightly submitted by the learned counsel appearing on behalf of the State, some may encourage by words, others by signs while others may actually cause hurt and yet all the members of the unlawful assembly would be equally guilty of rioting. In the present case, all the accused herein are found to be the members of the unlawful assembly in prosecution of the common object i.e. "to snatch the voters list and to cast bogus voting" and PW 5, PW 8, PW 10 & PW 12 sustained injuries caused by members of the unlawful assembly, the appellant-accused are rightly convicted under Section 147 IPC for the offence of rioting.
>
> (Underline supplied)

131. Continuous exhortation by the appellants Samim and Anees clearly indicates that right from very beginning they were aware of the offence which was going to be committed. Shakeel had played a prominent role by carrying a belt of cartridges. Thus, it is held that the appellants Shakeel, Samim, and Anees were the members of Unlawful Assembly and were sharing Common Object.

Whether variance in the evidence of witnesses is major or minor in nature.

132. It is next contended by the Counsel for the appellants, that there is a variance in the evidence of the witnesses regarding the words uttered by Anees and Samim for exhorting their father,

therefore, the prosecution has failed to prove that Anees and Samim were the members of Unlawful Assembly and were sharing common object.

133. Considered the submissions made by the Counsel for the appellants.

134. It is submitted that Gaffar (P.W.1) has alleged that Shakeel and Anees were giving cartridges to Ahmed Sayeed, but Khalil in his statement under Section 161 of Cr.P.C. had stated that Ibrahim was giving cartridges to Ahmed Sayeed. There is a contradiction in the exact words uttered by Samim and Anees. Gaffar (P.W. 1) has stated that the children of Abdul Azeez were pleading for mercy, but this fact is not supported by any other witness. Further, in Dehati Nalishi, Ex. P.1, it was alleged that Johra bi (P.W. 5) and Fida Mohd. sustained gun shot injuries from a single shot fired by Ahmed Sayeed, but in the Court evidence, it is alleged that two different gun shots were fired by Ahmed Sayeed, causing injuries to Fida Mohd. and Johara bi (P.W.5). Gaffar (P.W.1) has stated that at the time when Fida Mohd. was shot, he was standing behind him, whereas Johara bi (P.W. 5) has stated that after 10-15 minutes, Gaffar (P.W.1) had come and had enquired about the incident. Shri R.K.S. Kushwaha, Counsel for the appellants further submmitted that why the blood stained cloths of Gaffar (P.W.1) were not seized? Gaffar (P.W.1) has stated that Ahmed Sayeed had caused gun shot injury to Anwar (P.W.2)

whereas Anwar in his statement under Section 161 of Cr.P.C. had alleged that he was shot by Anees. Although witnesses have stated that Anwar (P.W.2) had sustained gun shot injury in front of the house of Lal Singh and Munne Khan, whereas Anwar (P.W. 2) has not disclosed the exact place, where he sustained gun shot injury. Gaffar (P.W.1) has stated in his Dehati Nalishi, Ex. P.1 that all the injured persons were taken to hospital in one trolley whereas in the Court evidence, it was alleged that the injured persons were taken on two different trolleys. Anwar (P.W.2) has not disclosed the name of Shakeel, which is contradictory to the evidence of Khalil (P.W. 6) and Gaffar (P.W.1). Further, no blood was found at the place, where Anwar (P.W. 6) is alleged to have fallen down. Anwar (P.W.6) has stated that Ahmed Sayeed was firing by moving from one place to another, whereas blood was found only on one place. Similarly, it is submitted that Johara bi (P.W.5) is not consistent as to whether She and her husband Fida Mohd. had sustained injuries by one gun shot or two different gun shots were fired at them. She further stated that She and her husband Fida Mohd. were taken inside the house of Gaffar, but no blood was found in the house of Gaffar. Further, no blood was found on the place, where Johara bi (P.W. 5) had allegedly fallen down. Further, Johara bi (P.W.5) had sustained only one pellet injury on her ear and She doesnot disclose as to how, Jarina, Rubina, Azra, Mohd. Akhtar, Chhammu Khan, Jamil, and Haneef sustained

injuries. Similarly, Khalil (P.W.6), in his statement under Section 161 of Cr.P.C., doesnot speak about injuries sustained by Rabia bi. In his statement under Section 161 of Cr.P.C., Khalil (P.W. 6) had alleged that in fact Ibrahim had exhorted and given cartridges, where as he has given different version in his Court evidence. Khalil (P.W.6) in his statement under Section 161 of Cr.P.C. has not stated that Ahmed Sayeed and his sons came out of their house along with .12 bore gun and a belt of cartridges. Similarly, Mohd. Akhtar (P.W.9) in his police statement, had stated that Yusuf had caused him gun shot injury but in the Court evidence, he has stated that he was shot by Ahmed Sayeed. Similarly in his police statement this witness had stated that earlier Fida Mohd and Johara bi were shot and thereafter he suffered injuries, but in Court evidence, he has changed the sequence. This witness has not said anything about exhortation. This witness has also admitted that the place where Fida Mohd and Johara bi (P.W.5) were shot is not visible from the place, where he was lying.

135. Considered the submissions made by the Counsel for the appellants.

136. First of all, it is not out of place to mention here that the appellants have been acquitted for the charge of making an attempt to commit murder of Mohd. Akhtar. Further more, Mohd. Akhtar (P.W.9) has stated that after he got injured, he was kept on a trolley and when he was being taken to Hospital, then Fida Mohd. and

Johara bi (P.W.5) were shot. Thus, it is clear that according to the prosecution case, Fida Mohd. and Johara bi (P.W.5) were not shot while he was lying on the ground in an injured condition, but he had seen the incident, while he was being shifted to hospital. Further more, the allegations of firing is against Ahmed Sayeed. Whether two gun shots were fired at Fida Mohd and Johara bi (P.W. 5) or both of them sustained injuries by one gun shot would not make much difference. The variance in the evidence of the witnesses pointed out by the Counsel for the appellants, donot go to the root of the case, and thus, doesnot give any dent to the prosecution. It is well established principle of law that the injured witnesses enjoy a special status as the injury sustained by them, is a guarantee of their presence on the spot. The Supreme Court in the case of **Abdul Sayeed Vs. State of M.P.** reported in **(2010) 10 SCC 259** has held as under :

> **30.** The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

137. The Supreme Court in the case of **Mohd. Ishaque v. State of W.B.,** reported in **(2013) 14 SCC 581** has held as under :

> **16.** PW 1, PW 2, PW 4 in the present case sustained serious injuries and their evidence was believed by the court. It is trite law that the testimony of injured witnesses is entitled to

> great weight and it is unlikely that they would spare the real culprit and implicate an innocent person. Of course, there is no immutable rule of appreciation of evidence that the evidence of injured witnesses should be mechanically accepted, it should also be in consonance with probabilities (Ref: *Makan Jivan* v. *State of Gujarat*, *Machhi Singh* v. *State of Punjab*, *Jangir Singh* v. *State of Punjab*).

138. Furthermore, it is well established principle of law that even if a part of evidence of a witness has been found to be incorrect, but still his remaining evidence can be relied upon. The Supreme Court in the case of **Mahendran Vs. State of T.N.** reported in **(2019) 5 SCC 67** has held as under :

> **38.** It is argued that the prosecution has put on trial twenty-four accused, but presence of A-11 and A-16 to A-24 was doubted by the learned trial court and they were acquitted on benefit of doubt. Five accused, A-10, A-12, A-13, A-14 and A-15 have been granted benefit of doubt in appeal as well. The argument that the entire case set up is based on falsehood and thus is not reliable for conviction of the appellants, is not tenable. It is well settled that the maxim "*falsus in uno, falsus in omnibus*" has no application in India only for the reason that some part of the statement of the witness has not been accepted by the trial court or by the High Court. Such is the view taken by this Court in *Gangadhar Behera case*, wherein the Court held as under: (SCC pp. 392-93, para 15)
>
> > "*15.* To the same effect is the decision in *State of Punjab* v. *Jagir Singh* and *Lehna* v. *State of Haryana*. Stress was laid by the appellant-accused on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "*falsus in uno, falsus in omnibus*" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff 80 can

be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a 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 witnesses cannot be branded as liars. The maxim "*falsus in uno, falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question 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". (See *Nisar Ali* v. *State of U.P.*) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See *Gurcharan Singh* v. *State of Punjab*.) The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, 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 acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab* v. *State of M.P.* and *Ugar Ahir* v. *State of Bihar.*) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from

> the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel* v. *State of M.P.* and *Balaka Singh* v. *State of Punjab*.) As observed by this Court in *State of Rajasthan* v. *Kalki* normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi* v. *State of Bihar*. Accusations have been clearly established against the appellant-accused in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned."
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> (emphasis in original)
>
> **39.** Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed.

139. Further, if the evidence of the witness(s) is in a Parrot like manner, then it creates a doubt on the veracity of the witnesses. Where indiscriminate firing took place and people were running helter-skelter for saving their lives, and 3 persons lost their lives and 10 were injured, then minute description of incident would certainly create a doubt that whether parrot like evidence is an outcome of tutoring or not?

140. The Supreme Court in the case of **State of Punjab v. Mohri Ram,** reported in **1994 Supp (1) SCC 632** has held as under :

> 5.....First of all the presence of the lantern itself is a doubtful factor. Even assuming there was a lantern, it is highly unbelievable that the witness could have given so many details of the occurrence. This report in our opinion appears to have been brought into existence with the help of a person well-versed in these matters after noting the injuries on the deceased person and that such a version is doubtful in the initial stages. When the interested witness falls in line verbatim and repeats the same in a parrot-like manner, naturally that creates some amount of suspicion about his veracity.....

141. The Supreme Court in the case of **Menoka Malik v. State of W.B.,** reported in **(2019) 18 SCC 721** has held as under :

> **12.** We could not find any significant variation in the testimonies of all these witnesses. No major contradiction or variation is found. The presence of the witnesses on the spot has not been seriously doubted by the defence during the cross-examination. It is but natural to have certain minor variations in the evidence of eyewitnesses, when a large number of people had gathered to assault a smaller group of people and which resulted in death of five persons and injuries to 24 persons. In such a scenario, it could not have been possible to meticulously observe all the actions of each and every accused. The Court also should not expect from the witnesses to depose in a parrot-like fashion. However, the overall evidence of these witnesses, prima facie, appears to be untainted.

142. The Supreme Court, in the case of **Imrat Singh Vs. State of M.P.** reported in **(2020) 14 SCC 257,** after considering the evidence of the witnesses where it appeared to be a parrot like evidence, disbelieved the version of the witnesses by holding as under :

> 6. The subsequent portion of the statements of these witnesses is so much at variance with each other and there are so many material contradictions in the statements of these two witnesses that as far as other aspects are

> concerned, a doubt has been cast in our minds that these witnesses are prepared witnesses who have come out with a parrot like version as far as the incident itself is concerned but when it comes to the attending circumstances their evidence falls apart and does not withstand the scrutiny of cross-examination.

143. Thus, it is held that minor omissions and contradictions in the evidence of witness is indicative of fact that they were not tutored and the manner in which the present incident took place, minor embellishments is the natural conduct of the witnesses.

Whether specific role has been disclosed by the witnesses or not?

144. It is further submitted that no specific role has been assigned by the witnesses thereby clarifying that which gun shot fired by Ahmed Sayeed, caused injury to which person or witness.

145. Considered the submissions made by the Counsel for the appellants.

146. The witnesses have specifically stated that the first gun shot fired by Ahmed Sayeed, hit Mohd. Khalil (P.W. 6) and thereafter, Ahmed Sayeed killed Abdul Azeez and Rabia bi. Indiscriminate firing was done by Ahmed Sayeed causing injuries to various persons and in the last, he fired at Johara bi (P.W. 5) and Fida Mohd, causing his death. Mohd. Akhtar (P.W.9) has also clarified that when and where he sustained gun shot injury.

147. The manner in which the incident took place and the manner in which indiscriminate firing was done by Mohd. Sayeed, there was helter-skelter and persons were running to save their lives and under

these circumstances, it is not possible for the witnesses to depose with minute details and certainty, specifically when the allegation of firing is against Ahmed Sayeed only, and the allegation against Shakeel is providing cartridges and the appellant Samim and Anees were exhorting to kill the persons.

Important witnesses were given up, its effect?

148. It is submitted by the Counsel for the appellants, that total 6 injured eye witnesses were withheld by the prosecution without assigning any cogent reason, therefore, an adverse inference should be drawn against the prosecution.

149. Considered the submissions made by the Counsel for the appellants.

150. It is not out of place to mention here that the appellants have been convicted under Section 307 of IPC on three counts only for making an attempt to kill Anwar (P.W.2), Johara bi (P.W. 5) and Khalil (P.W.6). None of the appellant has been convicted for making an attempt on the life of those persons who have not been examined.

151. Further, it is well established principle of law that quality of a witness is the decisive factor and not quantity of witnesses. The Supreme Court in the case of **Sarwan Singh Vs. State of Punjab** reported in **(1976) 4 SCC 369** has held as under :

> 13.....The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to

choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well-settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters.....

152. The Supreme Court in the case of **Yanob Sheikh v. State of W.B.,** reported in **(2013) 6 SCC 428** has held as under :

19. Basruddin, admittedly was not produced before the court. The defence also did not summon this witness. Even if for the sake of arguments, it is assumed that Basruddin, if produced would have spoken the truth, that necessarily does not imply that he would not have supported the case of the prosecution. Even if we give some advantage to the case of the defence, for the reason that this witness has not been produced, even then by virtue of the statement of three other witnesses, PW 1, PW 5 and PW 6, attendant circumstances and the statement of PW 14, the prosecution has been able to bring home the guilt of the accused.

20. We must notice at this stage that it is not always the quantity but the quality of the prosecution evidence that weighs with the court in determining the guilt of the accused or otherwise. The prosecution is under the responsibility of bringing its case beyond reasonable doubt and cannot escape that responsibility. In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature. In *Namdeo* v. *State of Maharashtra*, the Court held as under : (SCC p. 161, para 28)

"*28.* From the aforesaid discussion, it is clear that

> Indian legal system does not insist on plurality of witnesses. Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on *value, weight* and *quality* of evidence rather than on *quantity, multiplicity* or *plurality* of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eyewitness, therefore, has no force and must be negatived."
>
> (emphasis in original)
>
> **21.** Similarly, in *Bipin Kumar Mondal* v. *State of W.B.*, this Court took the view : (SCC p. 99, para 31)
>
> "*31.* … In fact, it is not the number [and] quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy [and reliable]."

153. The Supreme Court in the case of **S.P.S. Rathore v. CBI,** reported in **(2017) 5 SCC 817** has held as under :

> **53.** No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of even a single eyewitness, truthful, consistent and inspiring confidence is sufficient for maintaining conviction. It is not necessary that all those persons who were present at the spot must be examined by the prosecution in order to prove the guilt of the accused. Having examined all the witnesses, even if other persons present nearby are not examined, the evidence of eyewitness cannot be discarded.

154. Therefore, the evidence of witnesses who were examined by the prosecution cannot be discarded only on the ground that some of

the other injured witnesses were not examined. It is once again re-iterated that it is the quality and not quantity of witnesses which decides the fate of a trial. The evidence must be qualitative and not quantitative.

Whether material evidence was suppressed by the Prosecution

155. It is next contended by the Counsel for the appellants, that Alok Shrivastava (P.W. 20) had admitted that earlier he had prepared a spot map on cursory basis, but the same has not been placed on record, which shows that important material was suppressed by the prosecution.

156. Considered the submissions made by the Counsel for the appellants.

157. In the present case, 10 persons were injured and 3 persons had died. Almost all the material witnesses were already shifted to hospital and according to Jai Narayan Katiyar (P.W. 15) when he reached to the village, no body was there. Further Liyakat Khan (P.W. 18) son-in-law of Fida Mohd. has also stated that when he went to the spot, he found that no body was in the house of his father-in-law. No family member was there. Thus, under these circumstances, it is clear that on 5-5-2003, there was no body to give instructions to the investigating officer, therefore, he prepared a spot map on cursory manner. Further, on 5-5-2003, blood stained earth was seized from a public place in front of house of Munne Khan, blood stained earth

was also seized from the place where Rabia bi had fallen. Liyakat Khan (P.W. 18) has proved the seizure of blood stained earth vide seizure memo Ex. P.53. Thereafter, on 8-5-2003, spot map, Ex. P.2 was prepared. If no blood was found on various places at the time of preparation of spot map, Ex. P.2, then it would not give any dent to the prosecution story because by that time 3 days had passed and the incident took place on the public place.

Belt of Cartridges allegedly carried by Shakeel has not been seized.

158. Initially, the police after arresting Ahmed Sayeed, Samim and Anees filed charge sheet on 4-8-2003 and the co-accused Shakeel and Yusuf were absconding. Later on, Shakeel was also arrested and supplementary charge sheet was filed against him on 17-10-2003. Thus, it is clear that immediately after the incident, the appellant Shakeel absconded. Under these circumstances, if he succeeded in destroying or concealing the belt of cartridges, then it cannot be inferred that the allegation of carrying a belt of cartridges by Shakeel was false. Further more, multiple gun shots were fired, which clearly indicates that multiple cartridges were used and under these circumstances, the allegations of carrying a belt of cartridges by Shakeel is reliable. Furthermore, non-recovery of weapon of offence would not make the ocular evidence unreliable. Recovery of weapon of offence is dependent upon the co-operation by the accused. If he

donot co-operate with the investigating officer, or successfully destroys or conceals the weapon of offence, then he cannot take advantage of his own misdeed of destroying/concealing the weapon of offence.

159. The Supreme Court in the case of **Gulab Vs. State of Uttar Pradesh** by judgment dated **9-12-2021** passed in **Criminal Appeal No. 81 of 2021** has held as under :

> **C.2 Failure to recover the weapon and examine a ballistic expert**
> 17 The deceased had sustained a gun-shot injury with a point of entry and exit. The non-recovery of the weapon of offences would therefore not discredit the case of the prosecution which has relied on the eyewitness accounts of PWs 1, 2 and 3.

160. The Supreme Court in the case of **Rakesh Vs. State of U.P.** Reported in **(2021) 7 SCC 188** has held as under :

> **12.** Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the firearm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all. For convicting an accused recovery of the weapon used in commission of offence is not a sine qua non.....

161. The Supreme Court in the case of **Krishna Gope Vs. State of Bihar** reported in **(2003) 10 SCC 45** has held as under :

> **8.** Learned counsel further pointed out that the country-made firearm alleged to have been used by the appellant was not recovered by the police and the same was not sent to the police station. The learned counsel submitted that the

investigation was not properly done and that the appellant is entitled to the benefit of doubt. In our view, this plea is not tenable. The house of the appellant was searched immediately after the incident, but the police could not recover the weapon of offence from his house. It appears that the appellant had succeeded in concealing the weapon before the police could search his house. In our opinion, the fact of non-recovery of the weapon from the house of the appellant does not enure to his benefit.

162. The Supreme Court in the case of **Mritunjoy Biswas v. Pranab,** 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.* 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* 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* 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.

163. Therefore, if the appellant Shakeel successfully destroyed or concealed the belt of cartridges, then it would not give any dent to the prosecution case, and would not make the ocular evidence unreliable.

Whether FIR is an Encyclopedia?

164. It is submitted that minute details have not been given in the Dehati Nalishi, Ex.P.1, and thus, the evidence of prosecution witnesses is unreliable.

165. Considered the submissions made by the Counsel for the appellants.

166. It is well established principle of law that FIR is not an encyclopedia. Each and every minute detail is not expected in the FIR. The Supreme Court in the case of **CBI Vs. Tapan Kumar Singh** reported in **(2003) 6 SCC 175** has held as under :

> **20.** It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or

satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

167. The Supreme Court in the case of **Budh Singh Vs. State of M.P.** reported in **(2007) 10 SCC 496** has held as under :

20. The purported improvement made by PW 1 is not of much significance. First information report, as noticed hereinbefore, was lodged at the quickest possible time. A first information report is not supposed to be an encyclopædia of the entire event. It cannot contain the minutest details of the events.

Whether prosecution has failed to prove injury on appellant Samim and its effect ?

168. It is next contended by the Counsel for the appellants, that the appellant Samim had also sustained gun shot injury, which has not been explained by the prosecution, therefore, the very genesis of the incident has been suppressed.

169. Considered the submissions made by the Counsel for the appellants.

170. The Supreme Court in the case of **Gurvinder Singh Vs. State of Punjab** reported in **(2018) 16 SCC 525** has held as under :

> **11.** It cannot be held as an invariable proposition that as soon as the accused received the injuries in the same transaction, the complainant party were the aggressors—it cannot be held as a rule that the prosecution is obliged to explain the injuries and on failure of the same, the prosecution case should be disbelieved. It is well settled that before placing the burden on the prosecution to explain the injuries on the person of the accused, two conditions are to be satisfied:
>
> (*i*) the injuries were sustained by the accused in the same transaction; and
>
> (*ii*) the injuries sustained by the accused are serious in nature.

171. As already held, cross case in Crime no. 40/2003 was registered against the complainant party, and the police after completing the investigation, came to the conclusion that the allegation of breaking open the door of the house of Ahmed Sayeed, setting the house on fire as well as causing gun shot injury to Samim by the complainant party is false. In fact Appellant Ahmed Sayeed, himself caused injury to appellant Samim in order to create a false ground of private defence. The appellants had also filed a criminal

complaint and as disclosed by Shri R.K.S.Kushwaha, Counsel for the appellants, the complaint filed by the appellants was dismissed and the closure report filed by the prosecution was accepted. The revision filed by the appellants was dismissed and the application filed under Section 482 of Cr.P.C. was also dismissed. Further more, this Court has also considered this aspect on the basis of evidence which has been brought on record and has found that in fact the complainant party had not caused any gun shot injury to the appellant Samim. In the present case, it cannot be said that there is no explanation by the prosecution regarding injury sustained by appellant Samim, Further, the appellant Samim did not sustain any injury in the same transaction, but it was caused at a later stage by the appellant Ahmed Sayeed himself in order to create a false defence of private defence.. Thus, it cannot be said that the very genesis of the incident was suppressed by the prosecution,

Delayed compliance of Section 157 of Cr.P.C.

172. It is submitted that the copy of the FIR was dispatched to the Magistrate after a month, and therefore, it is clear that the FIR is ante-dated and ante-timed giving deep dent to the prosecution story.

173. Considered the submissions made by the Counsel for the appellants.

174. It is true that the copy of the FIR was dispatched belatedly, but when this Court has come to a conclusion that the FIR was lodged

promptly and the investigation had also started immediately after the lodging of FIR, then mere delay in dispatching of copy of FIR to the concerning Magistrate would be a mere irregularity without adversely effecting the authenticity of the prosecution case.

175. The Supreme Court in the case of **State of Karnataka Vs. Moin Patel** reported in **(1996) 8 SCC 167** has held as under :

> **16.** The matter can be viewed from another angle also. It has already been found by us that the prosecution case that the FIR was promptly lodged at or about 1.30 a.m. and that the investigation started on the basis thereof is wholly reliable and acceptable. Judged in the context of the above facts the mere delay in dispatch of the FIR — and for that matter in receipt thereof by the Magistrate — would not make the prosecution case suspect for as has been pointed out by a three-Judge Bench of this Court in *Pala Singh* v. *State of Punjab*, the relevant provision contained in Section 157 CrPC regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under Section 159 CrPC and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable.

176. The Supreme Court in the case of **Jafel Biswas v. State of W.B.,** reported in **(2019) 12 SCC 560** has held as under :

> **16.** The purpose and scope of Section 157 CrPC has time and again been considered by this Court in large number of cases.
>
> **17.** The learned counsel for the appellant has relied on *State of Rajasthan* v. *Daud Khan*, *Sheo Shankar Singh* v. *State of U.P.* and *Bijoy Singh* v. *State of Bihar.*
>
> **18.** In *State of Rajasthan* in paras 27 and 28, this Court has laid down as follows: (SCC pp. 620-21)

"*27*. The delay in sending the special report was also the subject of discussion in a recent decision being *Sheo Shankar Singh* v. *State of U.P.* wherein it was held that before such a contention is countenanced, the accused must show prejudice having been caused by the delayed dispatch of the FIR to the Magistrate. It was held, relying upon several earlier decisions as follows: (SCC pp. 549-50, paras 30-31)

'*30*. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding the FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of the FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 4.00 p.m. on 13-6-1979 and was forwarded on the very next day viz. 14-6-1979. Further, a perusal of the impugned judgments of the High Court as well as of the trial court discloses that no case of any prejudice was shown nor even raised on behalf of the appellants based on alleged violation of Section 157 CrPC. Time and again, this Court has held that unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating (sic) effect on the case of the prosecution. Therefore, the said submission made on behalf of the appellants cannot be sustained.

31. In this context, we would like to refer to a recent decision of this Court in *Sandeep* v. *State of U.P.* wherein the said position has been explained as under in paras 62-63: (SCC p. 132)

"*62*. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in *Pala Singh* v. *State of Punjab* wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on

the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

63. Applying the above ratio in *Pala Singh* to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was subsequently followed in *Sarwan Singh* v. *State of Punjab*, *Anil Rai* v. *State of Bihar* and *Aqeel Ahmad* v. *State of U.P.*"'

28. It is no doubt true that one of the external checks against antedating or ante-timing an FIR is the time of its dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR "forthwith" ensures that there is no manipulation or interpolation in the FIR. If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so. However, if the court is convinced of the prosecution version's truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case.

19. The obligation is on the IO to communicate the report to the Magistrate. The obligation cast on the IO is an obligation of a public duty. But it has been held by this Court that in the event the report is submitted with delay or due to any lapse, the trial shall not be affected. The delay in submitting the report is always taken as a ground to challenge the veracity of the FIR and the day and time of the lodging of the FIR.

20. In cases where the date and time of the lodging of the FIR is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground.

21. This Court in *Anjan Dasgupta* v. *State of W.B.* (of which

> one of us was a member, Hon'ble Ashok Bhushan, J.) had considered Section 157 CrPC. In the above case also, the FIR was dispatched with delay. Referring to an earlier judgment of this Court, it was held that in every case from the mere delay in sending the FIR to the Magistrate, the Court would not conclude that the FIR has been registered much later in time than shown.
>
> **22.** The High Court has rightly noted this submission and opined that to find out whether the FIR is genuine or not, and whether the trial court has rightly convicted the accused or not, the entire evidence has to be looked into.
>
> **23.** On delayed dispatch of FIR, some prejudice has to be proved by accused. The prejudice which was sought to be projected by the appellants is that in FIR names of only 7 accused were mentioned but in the report sent to the Magistrate there were 10 names. For the present case, it is sufficient to notice that name of all the appellants were very much in the FIR, hence addition of three names in report can in no manner prejudice the appellants.

Whether the act of appellants would fall under Exception 4 to Section 300 or not?

177. Although it is the claim of the appellants that the incident took place on a trivial issue of small piece of land, but the manner in which indiscriminate firing was done, it cannot be said that the act of the appellants would fall under Exception 4 of Section 300 of IPC. The Supreme Court in the case of **Nagji Odhavji Kumbhar v. State of Gujarat,** reported in **(2019) 5 SCC 802** has held as under :

> **18.** The deceased had multiple stab wounds on the chest. Since there are multiple wounds, it cannot be said that the appellants have acted at the spur of the moment without premeditation and that the appellants have not taken any advantage or acted in a cruel or unusual manner. It is not a case of single injury which one can infer on account of sudden fight. We, therefore, do not find any merit in the alternate argument that the appellants are entitled to be convicted under Section 304 IPC as they have given multiple injuries on the vital parts of the deceased.

178. The Supreme Court in the case of **Mohd. Asif v. State of Uttaranchal,** reported in **(2009) 11 SCC 497** has held as under :

> **19.** It is not a case where the death of the deceased had nothing to do with the injury inflicted. The utterances on the part of the appellant that he would not leave the deceased alive indicate the state of mind on the part of the appellant. The doctors tried their best to save his life. They could not do it.
>
> * * * *
>
> **24.** Indisputably, the doctor has noticed that left lung was infarct and collapsed. A big blood clot in the left pulmonary artery was also noticed. There was thus no adequate blood supply. There may be a scuffle but it occurred because of the overt acts on the part of the appellant and Iqbal. We have noticed hereinbefore the manner in which the assault had taken place as well as the manner in which the force was applied in inflicting the assault is evident. It ruptured the kidney. The wound was therefore deep. Profuse bleeding was noticed. And that is the reason he had to be operated upon.
>
> **25.** The question with regard to finding out the intention on the part of the accused to cause death depends upon the facts and circumstances of each case. No hard-and-fast rule can be laid down therefor.
>
> **26.** Section 300 of the Code provides that subject to the exceptions contained therein culpable homicide would be murder if the act by which the death is caused is done with the intention of causing death. Exception 1 thereto providing for a situation when culpable homicide is not murder. In terms of Exception 1:
>
> "*Exception 1*.—*When culpable homicide is not murder*.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."
>
> The said provision is, however, subject to the following provisos:
>
> "*First*.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.
>
> *Secondly*.—That the provocation is not given by anything done in obedience to the law, or by a public

servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence."

The Explanation appended thereto states that:

"*Explanation*.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

27. It is not a case of exercise of the right of private defence. The provocation was not given by a thing done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. The provocation, if any, was sought for by the offenders. In this case, the appellant and Iqbal must be held to have known that it was so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death.

28. What is meant by "imminently dangerous" which, in all probability, cause death or such bodily injury as is likely to cause death came up for consideration before this Court in *Virsa Singh* v. *State of Punjab* wherein it was held: (AIR p. 468, para 15)

"*15*. … We quote a few sentences earlier from the same learned judgment††:

'… No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged….'

That is exactly the position here. No evidence or explanation is given about why the appellant thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and that digested food oozed out from cuts in three places. In the absence of evidence, or reasonable explanation, that the prisoner did not intend to stab in the stomach with a degree of force sufficient to penetrate that far into the body, or to indicate that his act was a regrettable accident and that he intended otherwise, it would be perverse to conclude that he did not intend to inflict the injury that he did. Once that intent is established (and no other conclusion is reasonably possible in this case, and in any case it is a question of fact), the rest is a matter for objective determination from the medical and other

evidence about the nature and seriousness of the injury."

29. A Bench of this Court in *Kesar Singh* v. *State of Haryana* applied the standard laid down in *Virsa Singh* to hold: (*Kesar Singh case*, SCC p. 763, para 16)

> "*16. … '12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly*".
>
> First, it must establish, quite objectively, that a bodily injury is present.
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
>
> *13*. Once these four elements are established by the prosecution (and, indisputably, the burden is on the prosecution throughout) the offence is murder under Section 300 "Thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.'*"
>
> (emphasis in original)

Applying the aforementioned principles, we have no doubt in our mind that it is not a case which attracts the provisions of Section 304 Part II IPC or Section 326 thereof.

179. This Court has already held that the appellants were aggressor

and no right of private defence was available to them. Thus, under these circumstances, the conviction of the appellants cannot be altered from Section 302 of IPC to 304 Part 1 of IPC.

180. No other argument is advanced by the Counsel for the parties.

181. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the Trial Court has rightly convicted the appellants for the offence under Sections 302/149 of IPC (On three counts for killing Fida Mohd., Abdul Azeez and Rabia bi), 307/149 of IPC (On three counts for making an attempt to commit murder of Anwar (P.W.2), Johara bi (P.W. 5) and Mohd. Khalil (P.W.6). The appellant no. 1 Ahmed Sayeed has also been rightly convicted under Section 148 of IPC and the appellants no. 2 to 4, namely Samim, Anees and Shakeel have also been rightly convicted under Section 147 of IPC. Thus, their conviction for the above mentioned offences is hereby **affirmed.**

Cr.A. No. 456 of 2010 for enhancement of sentence and for awarding death penalty

182. It is submitted by the Counsel for the appellants and the complainant that the appellants have committed murder of three persons and also caused injuries to 10 innocent persons, therefore, the sentence of Life Imprisonment awarded by the Trial Court must be enhanced and the appellants be awarded death sentence.

183. In reply, it is submitted by the Counsel for the appellants that

the incident took place on a small piece of land. The appellant Ahmed Sayeed and deceased Fida Mohd. and Abdul Azeez are real brothers. On day prior to the date of incident, the appellant Ahmed Sayeed had gone to the Police Station Lateri to lodge the report, but on account of assurance of amicable settlement given by Fida Mohd, the appellant Ahmed Sayeed did not lodge the report. On the day of incident also, hot talk and scuffle had taken place between the parties, therefore, even if the appellants have acted in such a manner, still it cannot be said that the act of the appellants fall in the category of **rarest of rare case.**

184. Considered the submissions made by the Counsel for the parties.

185. The Supreme Court in the case of **Amar Singh Yadav Vs. State of U.P.** reported in **(2014) 13 SCC 443** has held as under :

> **22.** This Court noticed the aggravating and mitigating circumstances in *Ramnaresh* v. *State of Chhattisgarh* and held as follows: (SCC pp. 284-86, para 76)
>
> "*76*. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in *Bachan Singh* and thereafter, in *Machhi Singh*. The aforesaid judgments, primarily dissect these principles into two different compartments—one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the

court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

(*1*) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(*2*) The offence was committed while the offender was engaged in the commission of another serious offence.

(*3*) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(*4*) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(*5*) Hired killings.

(*6*) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(*7*) The offence was committed by a person while in lawful custody.

(*8*) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of [455]lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(*9*) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(*10*) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(*11*) When murder is committed for a motive which evidences total depravity and meanness.

(*12*) When there is a cold-blooded murder without provocation.

(*13*) The crime is committed so brutally that it pricks or

shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(*1*) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(*2*) The age of the accused is a relevant consideration but not a determinative factor by itself.

(*3*) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(*4*) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(*5*) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(*6*) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(*7*) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

23. While determining the questions relating to sentencing policy, the Court laid down the principles at para 77 which read as follows: (*Ramnaresh case*, SCC p. 286)

> "*77.* While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(*1*) The court has to apply the test to determine, if it was the "rarest of the rare" case for imposition of a death sentence.

(*2*) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely

inadequate and would not meet the ends of justice.

(*3*) Life imprisonment is the rule and death sentence is an exception.

(*4*) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(*5*) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

24. In *Shankar Kisanrao Khade* v. *State of Maharashtra* dealing with a case of death sentence, this Court observed: (SCC p. 576, para 52)

> "*52*. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are 'crime test', 'criminal test' and the 'R-R test' and not the 'balancing test'. To award death sentence, the 'crime test' has to be fully satisfied, that is, 100% and 'criminal test' 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the 'criminal test' may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is 'society-centric' and not 'Judge-centric', that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

25. On the question of sentence of death the principle in nutshell has been stated in *Haresh Mohandas Rajput* v. *State of Maharashtra*, which reads as under: (SCC pp. 63-64, para 20)

> "*20*. 'The rarest of the rare case' comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of 'the rarest of the rare case'. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See *C. Muniappan* v. *State of T.N.*, *Dara Singh* v. *Republic of India*, *Surendra Koli* v. *State of U.P.*, *Mohd. Mannan* and *Sudam* v. *State of Maharashtra*.)"

26. In *Sandeep* v. *State of U.P.*, this Court observed: (SCC p. 135, para 72)

> "*72*. It is, therefore, well settled that awarding of life sentence is the rule, death is an exception. The application of 'the rarest of the rare case' principle is dependent upon and differs from case to case. However, the principles laid down earlier and restated in the various decisions of this Court referred to above can be broadly stated that a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the

> conscience of everyone and thereby disturbing the moral fibre of society would call for imposition of capital punishment in order to ensure that it acts as a deterrent."

186. The Supreme Court in the case of **Santosh Kumar Singh Vs. State of M.P.** reported in **(2014) 12 SCC 650** has held as under :

> 30.....There is nothing specific to suggest the motive for committing the crime except the articles and cash taken away by the accused. It is not the case of the prosecution that the appellant cannot be reformed or that the accused is a social menace. Apart from the incident in question there is no criminal antecedent of the appellant. It is true that the accused has committed a heinous crime, but it cannot be held with certainty that this case falls in the "rarest of the rare category".

187. In the present case, it is true that three persons lost their lives and 10 others got injured, but it is equally true, that a dispute was going on between the families of two brothers on a small piece of land. The appellant Ahmed Sayeed, had also tried to lodge a report just one day prior to the date of incident. The dispute between the parties could not be sorted out amicably which resulted in such an incident. However, there is nothing on record to suggest that any of the appellant had any criminal antecedents or their activities were detrimental to civilized society. There is nothing on record to show that the conduct of the appellants after their conviction is not indicative of possibility of reformation. Above all, the Trial Court has not awarded death sentence. Under these circumstances, this Court is of the considered opinion, that this case doesnot fall within the category of **rarest of rare case** warranting grant of death penalty.

Accordingly, the Criminal Appeal filed by the State for enhancement of sentence **fails**.

188. So far as the question of sentence is concerned, the minimum sentence for offence under Section 302 of IPC is Life Imprisonment. Accordingly no interference is called for.

189. *Ex-consequenti*, the judgment and sentence dated 13-4-2010 passed by Additional Sessions Judge, Sironj, Distt. Vidisha in S.T. No. 15/2004 is hereby **affirmed.**

190. The appellants Samim and Anees were granted bail by orders dated 7-12-2016 and 19-12-2016, whereas the appellant Ahmed Sayeed and Shakeel are in jail.

191. The appellants Ahmed Sayeed and Shakeel shall undergo the remaining jail sentence.

192. Bail bonds of appellants Samim and Anees are hereby cancelled. The appellants Samim and Anees are directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

193. Let a copy of this judgment be immediately provided to the appellants, free of cost.

194. The record of the Trial Court be sent back along with a copy of this judgment for necessary information and compliance.

195. Accordingly, both the appeals i.e., Criminal Appeal No. 410 of 2010 filed by appellants Ahmed Sayeed, Samim, Anees and Shakeel

and Cr.A. No. 456 of 2010 filed by the State for enhancement of sentence are hereby **Dismissed.**

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge