HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH

DIVISION BENCH

G.S. AHLUWALIA

&

DEEPAK KUMAR AGARWAL J.J.

Cr.A. No. 724 of 2010

Rambabu & Ors.

Vs.

State of M.P.

Cr.A. No. 764 of 2010

Halkai & Ors.

Vs.

State of M.P.

Cr.A. No. 770 of 2010

Atmaram & Ors.

Vs.

State of M.P.

Shri R.K.S. Kushwaha Counsel for the Appellants in Cr.A. No. 724 of 2010 and 764 of 2010
Shri N.P. Dwivedi Senior Counsel with Shri Gagan Sharma, Counsels for Appellants in Cr.A. No. 770 of 2010
Shri C.P. Singh, Counsel for the State.
Shri M.K. Chaudhary, Counsel for the complainant.

Date of Hearing : 10-02-2022
Date of Judgment : 22-02-2022
Approved for Reporting : Yes

Judgment

22nd - February -2022

Per G.S. Ahluwalia J.

1. Cr.A. No. 724 of 2010 has been filed by Rambabu, Pola @ Jainarayan and Kailash, Cr.A. No. 764 of 2010 has been filed by Halkai and Rakesh, and Cr.A. No. 770 of 2010 has been filed by Atmaram, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Mahesh, Rajesh and Dinesh. The Appellants Raju and Jagmohan have died during the pendency of the appeal and therefore, their appeals have already been dismissed as **abated.**

2. All the three appeals have been filed under Section 374 of Cr.P.C. against the Judgment and Sentence dated 31st -Aug-2010 passed by 1st Additional Judge to the Court of Additional Sessions Judge, Sironj, Distt. Vidisha in S.T. No. 167 of 2005, by which the Appellants have been convicted under Section 148,302/149 of I.P.C. and have been sentenced to undergo 1 year R.I. for offence under

Section 148 of IPC and for Life Imprisonment and a fine of Rs. 5000/- with default imprisonment of 3 months R.I. for offence under Section 302/149 of IPC.

3. The prosecution story in short is that on 13-6-2005 at about 18:30, the complainant Datar Singh lodged a Dehati Nalishi alleging that in the afternoon, Babulal Sharma was beaten on account of old enmity and therefore, they had gone to Police Station. Since, buses were not plying therefore, they were going on motor cycles to Sironj Hospital along with Babulal for his medical examination. When they crossed village Chadholi and reached in front of Govt. park, the accused persons namely Atmaram, Mahesh, Pappu, Sanjeev, Kailash, Rakesh, Rambabu, Dinesh, Batol, Jagmohan, Raju, Pola all armed with sword and knives came on three motor cycles and waylaid them. Atmaram assaulted Babulal by knife in his stomach and thereafter, all started assaulting the deceased. The accused persons also chased and Mahesh and hurled a knife at him, but it did not hit him. At that time, Mukesh, Rajkumar, Suresh also came there and all the accused persons ran away. On this Dehati Nalishi, FIR was lodged.

4. The dead body of Babulal was sent for post-mortem, *Lash Panchnama* was prepared, Statements of witnesses were recorded, the seized articles were sent to F.S.L. After completing the investigation, the police filed charge sheet for offence under Sections 341, 294, 147, 148,149,302 of IPC and under Section 25 of Arms Act. The Appellant

Dinesh was absconding, however, he too was arrested during the pendency of the Trial, and accordingly, Supplementary charge sheet was also filed against him and some of the witnesses who were examined in his absence were recalled.

5. The Trial Court by order dated 7-1-2006 framed charges under Sections 148,302/149 of Cr.P.C. against the Appellants except Dinesh and by order dated 17-10-2006, framed charges under 148, 302/149 of IPC against Dinesh also.

6. Thereafter, Dinesh filed an application, claiming that he was juvenile on the date of incident, and accordingly, enquiry was done and by order dated 30-6-2007, it was found that Dinesh was not juvenile on the date of incident.

7. The appellants abjured their guilt and pleaded not guilty.

8. The prosecution examined Datar Singh (P.W.1), Rajkumar Sharma (P.W.2), Mukesh Sharma (P.W.3), Dr. Vivek Agrawal (P.W.4), Suresh Kumar Sharma (P.W.5), Mahesh Sharma (P.W.6), Rakesh (P.W.7), Sohan Lal Damade (P.W.8), Mohan Babu Sharma (P.W.9), Bhagirath (P.W.10), Man Mohan Ahirwar (P.W.11), Kailash Singh (P.W.12), and Ramesh Shukla (P.W.13).

9. The appellants examined Dr. Rakesh Saxena (D.W.1), Ashok Dubey (D.W.2), Hari Om Sharma (D.W.3), Avinash Tiwari (D.W.4), Raj Kumar Gour (D.W.5), Rajendra Singh Chouhan (D.W.6), Shyamlal Patel (D.W.7), Dr. Milind Rakede (D.W.8) and Dr. Rekha

Sharma (D.W.9).

10. The Trial Court, by impugned judgment has convicted and sentenced the appellants for the offences mentioned above.

11. Challenging the impugned judgment, it is submitted by the Counsels for the Appellants, that in fact none of the so-called eye witnesses had witnessed the incident. According to the prosecution, the deceased Babulal was beaten in the morning and he had allegedly sustained injury on the thumb, but in the post-mortem, no such injury was found. The police has falsely concocted the story and some unknown persons might have killed the deceased. Even otherwise, the prosecution has failed to prove that the Appellants Rakesh, Batol, Pappu, Sanjeev, Rajesh, Pola @ Jainarayan, Halkai and Dinesh were the members of Unlawful Assembly or were sharing any Common Object. It is further submitted that no statement of Appellant Rakesh was recorded under Section 313 of Cr.P.C. because no answers have been written in the questionnaire, which clearly shows that no question was put to Rakesh to explain the circumstances. Even otherwise, there are material omissions and contradictions in the evidence of the witnesses.

12. Per contra, the State Counsel has supported the findings recorded by the Trial Court, however, he fairly conceded that the questionnaire which was prepared for Rakesh doesnot contain any answers.

13. Heard the learned Counsel for the parties.

14. Before adverting to the facts of the case, this Court would like to consider the submissions made by the Counsel for the Appellant, that the questionnaire which was prepared under Section 313 of Cr.P.C., doesnot contain the answers of Rakesh.

15. This Court has gone through the original record, and it is clear that 222 questions were prepared requiring answers by Appellant Rakesh. However, Questions No. 1-3 and 220,221,222 contain answers. The remaining questionnaire is blank with no answers to the questions. However, the interesting thing is that the entire questionnaire runs in 29 pages. Each page contains the signature of the Appellant Rakesh as well as that of Shri G.S. Kakodia, Add. Sessions Judge, Sironj, Distt. Vidisha. Thus, it is clear that the signatures of Appellant Rakesh were obtained on blank Questionnaire and above all, the Presiding Judge, also signed each page of questionnaire without asking any question to the Appellant Rakesh.

16. It appears that the Trial Court, took the proceedings under Section 313 of Cr.P.C. in a most casual manner, as if, it is a mere ritual. The Trial Courts must realize that in a criminal jurisprudence, the accused is entitled to answer each and every circumstance alleged against him. Therefore, there should not be any lapse in putting questions to the accused under Section 313 of Cr.P.C., because if a circumstance is not put to the accused in his statement under Section

313 of Cr.P.C., then it has to be excluded from consideration.

17. The Supreme Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra,** reported in **(1984) 4 SCC 116** has held as under :

> **143.** Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court viz. Circumstances 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code, 1973 they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of *Hate Singh Bhagat Singh* v. *State of Madhya Pradesh* this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 of the old Code (corresponding to Section 313 of the Criminal Procedure Code, 1973), the same cannot be used against him. In *Shamu Balu Chaugule* v. *State of Maharashtra* this Court held thus: [SCC para 5, p. 440: SCC (Cri) p. 58]
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> > "The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him."
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> **144.** To the same effect is another decision of this Court in *Harijan Megha Jesha* v. *State of Gujarat* where the following observations were made: [SCC (Cri) p. 653, para 3]
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> > "In the first place, he stated that on the personal search of the appellant a *chedi* was found which was blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant...."

> **145.** It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, 1973 have to be completely excluded from consideration.

18. The Supreme Court in the case of **Ghulam Din Buch v. State of J&K,** reported in **(1996) 9 SCC 239** has held as under :

> **54.** The aforesaid does show that Hafeezullah was not asked, in any form, about his having entered into conspiracy with anybody. He was not even asked that the rates at which poles were carried by him were unreasonable or high. As these allegations/circumstances are the crux of the prosecution case insofar as he is concerned, the non-providing of opportunity to him to explain the same has rendered his conviction unsustainable.

19. The Supreme Court in the case of **Rautu Bodra v. State of Bihar,** reported in **1999 SCC (Cri) 1319** has held as under:

> **4.** Though the above findings of the trial court and the High Court are based on proper appreciation of the evidence, we are unable to sustain the conviction of the appellants in view of the grave error committed by the trial court, in that, while examining the appellants under Section 313 CrPC, it did not ask them to explain any of the circumstances appearing in the evidence against them. Indeed, except one question as to what they have got to say about the prosecution case, the trial court did not put any other question to the appellants. In the context of the facts of the instant case, it was obligatory on the part of the trial Judge, in view of Section 313 CrPC, to put questions to the appellants relating to the evidence of PW 6 and their going to the police station with the head of the deceased and the weapons of offence immediately after the occurrence. What would be the effect of such non-compliance was considered by a three-Judge Bench of this Court in *Sharad Birdhichand Sarda* v. *State of Maharashtra* and it was held, following earlier decisions of this Court, that the circumstances which are not put to the accused in his examination under Section 313 CrPC must be completely excluded from consideration because he did not

have any chance to explain them.

5. We have given our anxious consideration to the question whether in view of the above serious lacunae for which the conviction of the appellants is liable to be set aside, we should, considering the ghastly nature of the crime allegedly committed, remit the matter to the trial court, after setting aside their conviction, to further and properly examine them under Section 313 CrPC and then proceed with the trial from that stage. But having regard to the fact that since the alleged offence was committed, more than 15 years have elapsed and the appellants have already served more than 4 years of imprisonment, we feel, we will not be justified in resorting to such a course of action at this distant point of time. For the foregoing discussion, we are left with no other alternative but to allow this appeal and set aside the conviction and sentence recorded against the appellants. The appellants who are on bail are discharged from their bail bonds.

20. The Supreme Court in the case of **Ranvir Yadav v. State of Bihar,** reported in **(2009) 6 SCC 595** has held as under :

11. Above being the position the appeal deserves to be allowed. It is a matter of regret and concern that the trial court did not indicate the incriminating material to the accused. Section 313 of the Code is not an empty formality. There is a purpose behind examination under Section 313 of the Code. Unfortunately, that has not been done. Because of the serious lapse on the part of the trial court the conviction as recorded has to be interfered with.

21. The Supreme Court in the case of **State of U.P. Vs. Raghuvir** reported in **(2018) 13 SCC 732** has held as under :

11. Moreover, for relying upon the opinion of the ballistic expert, the High Court observed that no question was put to the accused under Section 313 CrPC about ballistic expert report (Ext. A-14). The object of Section 313 CrPC is to put a circumstance against the accused so that he may meet out the prosecution case and explain the circumstances brought out by the prosecution to implicate him in the commission of the offence. If any circumstance had not been put to the accused in his statement, the same shall be excluded from consideration. Of course, this is subject to a rider whether

omission to put the question under Section 313 CrPC has caused miscarriage of justice or prejudice to the accused.

22. Thus, it is clear that if no prejudice is caused to the accused, then non putting of that circumstance under Section 313 of Cr.P.C. may not have any adverse effect, but otherwise, if a circumstance is not put to the accused in his statement under Section 313 of Cr.P.C., then the said circumstance cannot be considered against him. However, the consequence of not putting any question to the Appellant Rakesh shall be considered at a later stage.

23. Before adverting to the facts of the case, this Court would like to consider as to whether the death of Deceased Babulal was homicidal in nature or not?

24. Dr. Vivek Agrawal (P.W.4) has conducted the post-mortem of the dead body of the deceased and found the following injuries :

(i) Incised wound 3 inch x 1inch x muscle deep, horizontally placed left side lower neck started from lateral border of sternocleidomastoid muscle horizontally back to nape of neck ;
(ii) Incised wound 4 inch x 1 inch x bone deep, obliquely placed about 3 inch below right nipple running downward and laterally towards midline ;
(iii) Incised wound 3 inch x 1 inch x muscle deep left infrascapular area horizontally placed ;
(iv) Abrasion 1 ½ inch x ¼ inch x SC over right cheek below right medial canthus of eye.
No other external injury seen.
The mode of death was hemorrhagic shock due to multiple incised wound. 12-18 hours prior to autopsy.

The post-mortem report is Ex. P. 5.

25. This witness was cross-examined. In cross-examination, he

admitted that in the requisition for Post-mortem, the police had not mentioned the names of the assailants. The weapons were not sent to him for examination as to whether the injuries sustained by the deceased, could have been caused by them or not? He further admitted that in case if a person is assaulted by 8-9 persons by fists and blows then the victim would suffer contusions, and in the post-mortem report, Ex. P.5, no contusions were found. He further stated that no injuries except those which are mentioned in the post-mortem report, Ex. P.5 were found. The injury no. 4 could have been sustained due to fall on hard surface. There was no injury which could have been caused by repeated blows by weapons. No injury in the abdominal region was found. No punctured wound was found. He admitted that the injury sustained by deceased could have been caused by double edged weapon. He further stated that the deceased could have survived, if the punctured wound which was found on left Carotid Artery had been tied. He further stated that it is possible that the death might have taken place within half an hour of sustaining injuries. This witness was once again examined in respect of Appellant Dinesh Sharma. In cross-examination, he stated that injury no. 4 could not have been caused by any sharp edged weapon and could have been caused by friction. No internal organ was damaged due to injury no. 2 and 3. Death takes place only if 1/3rd of blood is drained out. He further stated that he cannot say as to whether any

injury was caused by double edged weapon or not?

26. No question was put to this witness with regard to nature of death. Thus, it is clear that the prosecution has established beyond reasonable doubt, that the death of the deceased Babulal was homicidal in nature.

27. The next question for consideration is that whether the appellants have committed the offence or not?

28. For the sake of convenience, we can bifurcate the Appellants in two category i.e., the Appellants who had allegedly assaulted the deceased by weapons and the Appellants who had allegedly assaulted the deceased by fists and blows.

29. According to the Dehati Nalishi, Ex. P.1, the Appellant Atmaram assaulted the deceased by causing injury in the abdominal region of the deceased. As per the evidence of the witnesses, Appellants Atmaram, Rambabu, Kailash, and Mahesh caused injuries by sharp edged weapons whereas Halkai assaulted on the head of deceased by lathi, and all other appellants assaulted by fists and blows :

Appellants who used weapons either sharp or lathi

(a) Atmaram

(b) Kailash

(c) Mahesh

(d) Rambabu

(e) Halkai

Appellants who assaulted by fists and blows

(a) Pola @ Jai Narayan

(b) Raju (Dead)

(c) Rakesh

(d) Batol

(e) Pappu

(f) Sanjeev

(g) Rajesh

(h) Dinesh

(I) Jagmohan (Dead)

30. Datar Singh (P.W.1) is the eye-witness as well as the complainant who lodged FIR. This witness has stated that he had gone to village Deepnakheda at about 12-1:00 P.M. for casting his vote. He heard about some quarrel that Babulal and Rajkumar have been assaulted by Kalyan, Kailash, Pappu, Basori. Thereafter, he, Mukesh, Ramgopal and Rajkumar went to Police Station along with Babulal and lodged the report. There was no conveyance and by that time, Suresh, the son of Babulal also came there. The S.H.O. said that they may go by their vehicles for medical examination. Accordingly, they were going to Sironj. Babulal was sitting on his motor cycle, whereas Rajkumar and Mukesh were riding on another motor cycle along with Bhagirath. Ramgopal and Suresh were on the

third motor cycle. All the motor cycles were following each other by maintaining some distance. As soon as they reached in front of Govt. Park, the appellants Atmaram, Jagmohar, Pappu, Mahesh, Batol, Sanjeev, Dinesh, Halkai, Raju, Rakesh, Rambabu, Pola, Kailash total 13 persons were standing along with 2-3 motor cycles. Mahesh, Atmaram and Kailash were having knives, whereas Rambabu was having sword. Halkai was having lathi. As soon as they reached there, the appellants challenged and accordingly, this witness moved towards the ditch. Atmaram assaulted Babulal by knife on his abdominal region, whereas Mahesh assaulted on the neck of Babulal, Kailash assaulted on left side of back by knife, whereas Rambabu assaulted by sword on left side of neck and Halkai assaulted the deceased by lathi on his head. The remaining Appellants started assaulting Babulal by fists and blows. Thereafter, Mahesh hurled a knife towards this witness, therefore, he ran away. In the meanwhile, Rajkumar, Suresh, Mukesh, and Bhagirath also reached on the spot. Some of the appellants escaped on motor cycles whereas some of them ran away. Thereafter, one police jeep reached there and he lodged the Dehati Nalishi, Ex. P.1. The Lash Panchnama, Ex. P.2 was prepared. The spot map, Ex. P.3 was prepared. The blood stained and plain earth was seized vide seizure memo Ex. P.4. Babulal had died on the spot. This witness was cross-examined.

In cross-examination, this witness stated that earlier, the

deceased was the Sarpanch of Gram Panchayat Deepnakheda. He further admitted that during his tenure of Sarpanch, food grains at the subsidized rates were given to the beneficiaries. He denied that S.D.O., Sironj had caught the food grain which was meant to be distributed to the beneficiaries. However, he admitted that charge sheet was filed in the Court of J.M.F.C. against him, Secretary, Gram Panchayat and grain merchant Vinod. He further admitted that Atmaram is a witness in the said case. He further stated that a police jeep had come after 15-20 minutes of the incident, but he did not inform the police officers that Babulal has been killed in his presence. The jeep had come from the side of Sironj and went towards Chatholi. About 45 minutes thereafter, the S.H.O., Deepankheda also came on the spot. He wrote the Dehati Nalishi. It was 5-5:30 P.M. When he lodged the Dehati Nalishi, Ex. P.1, Suresh, Rajkumar, and Mukesh were present. He denied that Constable Bhagirath was not present. He could not explain as to why the name of Bhagirath as a witness is not mentioned in Dehati Nalishi, Ex. P.1. He denied Mahesh had not assaulted on the neck of the deceased Babulal, but could not explain as to why it is not mentioned in Dehati Nalishi, Ex. P.1. He could not explain as to why the assault by Kailash, Rambabu, Halkai has not been mentioned in his Dehati Nalishi, Ex. P.1. The ditch is about 4-5 ft.s below the road. Babulal was beaten in village Deepnakheda. He was told by Babulal about said incident. Babulal

had lodged the FIR (about the incident which took place in the earlier part of the day) in his presence. He admitted that Babulal had disclosed in Police Station Deepnakheda that he had sustained injuries on his hand, cheek and head. He further stated that he himself had seen the injuries. He further stated that he went nearer to Babulal after Rajkumar, Suresh and Mukesh also came on the spot. They reached on the spot within 2-3-4 minutes of the incident. Blood was oozing out of the injuries. The dead body was removed after 1:30-1:45 hours of the incident. The dead body was picked up by this witness, Suresh, Mukesh, Ramgopal and Rajkumar but their cloths did not get stained with blood. The dead body was shifted on the jeep of Babulal. He stated that since he was frightened, therefore, he did not notice the tyre marks of motor cycles. He could not see that which appellant ran on foot and which appellant escaped on motor cycle, as he was frightened. They had received the dead body on the next morning. He denied that the names of 12 persons were mentioned after due deliberations. He stated that there are two roads for going towards Sironj from Deepnakheda i.e., one from Chitholi and another from Patharia and bus plies on Patharia route. Only the members of Mandi can caste their votes. He denied that the food grains were caught on the report of Atmaram. He could not see that how many persons were sitting in the police jeep which had come from the side of Sironj. Since he was frightened, therefore, he did not

talk to the police. Bhagirath had informed on wireless. Police Jeep had stopped at the place of incident for a period of 10-15 minutes and thereafter went towards polling booth. He admitted that the road from Deekanakheda to Deepnakheda is *Kaccha* road and results in dust blowing. He further stated that the S.H.O. had told that since, the buses are not plying therefore, they may go by Chatholi route. When he reached on the spot, all the 13 accused persons were standing. The S.H.O. had given the requisition to Bhagirath for medical examination of Babulal. He admitted that Atmaram and his family members donot have a motor cycle. Blood had fallen on the ground where Babulal was lying and there were trails of blood from the place of incident upto the ditch, where his dead body was thrown. His motor cycle was lying about 2-3 steps away from the place where the dead body of Babulal was lying. He denied that on account of old enmity, the appellants have been falsely implicated. Thereafter, he was again examined and cross-examined on behalf of the appellant Dinesh. He admitted that he, Mukesh and Vinod had remained in jail for a period of 2 months in connection with case registered under Essential Commodities Act. He further admitted that Atmaram and Dinesh are the witnesses in the said case. He further admitted that after the registration of the offence, he was removed from the post of Sarpanch, Gram Panchayat, Deepnakheda and Mukesh was removed from the post of Secretary. Shri M.P. Shukla was the S.H.O. and he

had informed that buses are not plying and denied that buses were available. He took about 10-15 minutes to lodge the report.

31. Rajkumar Sharma (P.W.2) has also narrated the same prosecution story. He stated that after casting his vote in Mandi election, he was coming back to his house. Kailash, Pappu, Kalyan had a scuffle with Babulal and Batol assaulted on the neck of Babulal however, Babulal succeeded in saving by his hand as a result he sustained injuries. Kailash had assaulted by lathi on his cheek. He rushed to save Babulal, then Kailash also assaulted him by lathi as a result he lost his teeth. Thereafter, he went to the house of Babulal along with him. Datar Singh (P.W. 1) also came to the house of Babulal. Thereafter, he, Babulal, Datar Singh, Mukesh and Ramgopal went to Police Station Deepnakheda. After about 10-15 minutes, they reached police station Deepnakheda. By that time, Suresh, son of Babulal also reached there. Report was lodged by Babulal. Thereafter they were going to Sironj Hospital for medical examination. Babulal was sitting on the motor cycle of Datar Singh, whereas he, and police personell Bhagirath were sitting on the motor cycle of Mukesh. Suresh and Ramgopal were coming on the motor cycle of Suresh. Since, dust was blowing therefore, they were maintaining distance between two motor cycles. As soon as they reached Chatholi road, 13 persons were standing with 3 motor cycles. Those 13 accused persons are Atmaram, Pappu, Batol, Mahesh,

Sanjeev, Halkai, Rambabu, Rakesh, Kailash, Bhola, Raju, Dinesh. The motor cycle of Datar Singh (P.W.1) was at the front. His motor cycle was forcibly got stopped and the accused persons started scuffling with Babulal. Atmaram assaulted by knife in the abdomen of Babulal, whereas Mahesh assaulted on the neck. Rambabu assaulted by sword below the left ear, Halkai assaulted by lathi on the head, whereas Kailash assaulted on the back. The witnesses shouted therefore, the appellants ran away. After about 10-15 minutes, one police jeep came from the side of Sironj. The S.H.O., Police Station Deepnakheda also reached there about 30 minutes thereafter. Babulal had died on the spot. This witness was also cross-examined in detail.

In cross-examination, he stated that the knife of Atmaram was double edged. This witness was at a distance of 10 steps when Atmaram had assaulted. As the accused persons were having weapons, therefore, they did not try to intervene in the matter. Atmaram, Kailash and Mahesh were having knives, whereas Rambabu was having sword and Halkai was having Lathi. He further stated that he had informed the police that Rambabu had assaulted below the ear, but could not explain as to why said fact is not mentioned in his police statement, Ex. D.2. Babulal had sustained injuries while he was lying on the ground. He had not seen that all the appellants were having Sword, Knife, and lathis. He had seen weapons only in the hands of 5-6 persons. He was also sent for

medical examination as his teeth had broken. He further admitted that his uncle Ramgopal was also going to the hospital along with this witness. He denied that Babulal had not sustained any injury in the earlier incident. He further stated that initially assault was made while Babulal was standing and thereafter he fell down. They were instructed by S.H.O., that they may go via Chatholi road. Bhagirath had given the information of incident by wireless set. The dead body of Babulal was lying about 3 fts away from the road. The police personell who had come from Sironj side, did not see the dead body and went away after talking to Bhagirath.

32. Mukesh Sharma (P.W.3) has also stated that at about 2 P.M., Babulal was assaulted and accordingly, he also went to police station Deepnakheda to lodge the report. Rajkumar had also sustained injury in the said incident. Datar Singh (P.W.1) and Ramgopal had also gone for lodging FIR. After they reached police station, Suresh also came to the police station. After the report was lodged, the S.H.O., Police Station Deepnakheda instructed them to go to Sironj Hospital for medical examination. Since, no conveyance was available, therefore, they were instructed to go by their own motor cycles. The deceased Babulal was sitting on the motor cycle of Datar Singh, whereas he, Rajkumar and Bhagirath were sitting on his motor cycle. Suresh and Ramgopal were sitting on the motor cycle of Suresh. They left police station at about 4 P.M. when they reached village Chitholi

they started moving by maintaining distance as dust was blowing. The appellants were standing and they forced Datar Singh to stop the motor cycle. Atmaram assaulted in the abdomen of Babulal, whereas Mahesh assaulted on the neck. Kailash assaulted on the back, Rambabu assaulted on the neck and Halkai assaulted on the head. All the remaining accused persons started assaulting Babulal by fists and blows. He and Suresh, Bhagirath, Rajkumar and Ramgopal rushed to save Babulal and then all the accused persons ran away. After 10-15 minutes of the incident, one police jeep came on the spot from Sironj side. The said jeep was deployed for election purpose. Information was given by wireless set. About 45 minutes, the S.H.O., Police Station Deepnakheda also came on the spot and Dehati Nalishi was recorded. Lash Panchnama, Ex. P.2 was prepared. The blood stained and plain earth was seized vide seizure memo Ex. P.4.

In cross-examination, he admitted that all the accused persons are the family members of Atmaram. He was the Secretary of Gram Panchayat, Deepnakheda. Although he denied that food grains meant for poor persons were being sold in black market but admitted that on the report of C.M.O., a criminal case is pending in the Court of J.M.F.C. for offence under Sections 406, 408/34 of IPC. He admitted that Atmaram is a witness in the said case. He further stated that Rajkumar had also sustained injury in the incident, which took place in the earlier part of the day, but he had not seen his injury. He

further admitted that the remaining accused persons were bare handed. He further admitted that Rajesh is relative and all other appellants are the family members of Atmaram.

33. Suresh (P.W.5) is the son of the deceased. He reached to the police station at the time, when Babulal was lodging the report. This witness was also accompanying the deceased when they were going to Sironj Hospital. This witness has also narrated the same story. This witness was also cross-examined, but no discrepancy in the evidence of the witness could be pointed out. This witness has also stated that Atmaram had assaulted on the abdomen of Babulal by knife whereas Mahesh assaulted on neck by knife. Rambabu also assaulted below the left ear by sword, whereas Kailash assaulted by knife on the back of Babulal. Halkai assaulted on the head of Babulal and other accused persons assaulted by fists and blows. He denied that Atmaram had given a written report to District Magistrate that he has an apprehension. The photo copy of the said application was shown to this witness, which was denied by him for want of knowledge, but surprisingly, the said photo copy was marked as Ex. D.6. The Counsel for the appellants could not justify that when a document was denied by a witness, then how the said document can be exhibited unless and until its execution is proved.

34. Bhagirath (P.W. 10) is the police personell who was sent along with Babulal for getting him medically examined in Sironj Hospital.

At the beginning of the evidence, he was asked to identify Atmaram, but he wrongly identified Halkai as Atmaram. Thereafter, an objection was raised that since, all the accused persons are not present therefore, his examination may be deferred. Accordingly, recording of his evidence was deferred. Thereafter, on the next date of his examination, he rightly identified Atmaram. He stated that on 13-6-2005, he was posted in Police Station Deepnakheda. Babulal along with Datar Singh (P.W.1) and 4-5 persons came to the police station for lodging the FIR. Thereafter, they were sent to Sironj Hospital for medical examination. Since, Mandi elections were going on, therefore, buses were not plying. Accordingly, he was going to Sironj Hospital on the motor cycles of the witnesses. Datar Singh (P.W.1) and deceased Babulal were sitting on one motor cycle, whereas he, Mukesh and Rajkumar were sitting on one motor cycle. Suresh Sharma and Ramgopal were sitting on the motor cycle of Suresh. They started from Police Station at about 4:15 P.M. As soon as they reached in front of Govt. Park, Village Chitholi, 14-15 persons stopped the motor cycle and started assaulting by knives and sword. As soon as they reached on the spot, all the accused persons ran away. Since, the Mandi elections were going on, therefore, the TI was on patrolling. He also passed from the place of incident. He was informed about the incident. Thereafter, S.D.O.(P) and S.H.O. also came on the spot. The dead body of Babulal was sent for Post-

mortem. Datar Singh (P.W.1) had lodged the Dehati Nalishi on the spot. The 14-15 persons who were present on the spot are the same persons who are present in the Court. In cross-examination, he admitted that he was suspended as he had left Babulal alone. He further admitted that on 13-6-2005, he was posted in Police Station Deepnakheda and Atmaram had lodged the report and was sent to Sironj Hospital for medical examination. The report was written by Head Constable Kailash Singh.

35. On appreciation of evidence of eye-witnesses, it is clear that all the eye-witnesses are consistent that in the earlier part of the day, some fight took place and accordingly, Atmaram and the deceased Babulal lodged the report. The report lodged by Atmaram was at earlier point of time. Atmaram was also sent for medical examination. According to Bhagirath (P.W.10) Atmaram was taken by S.H.O. in police vehicle. The deceased Babulal, Datar Singh (P.W.1), Rajkumar (P.W.2), Mukesh (P.W.3), Suresh (P.W.5) and Bhagirath (P.W.10) were going on three motor cycles. Babulal was sitting on the motor cycle of Datar Singh (P.W.1), whereas Rajkumar (P.W.2), Bhagirath (P.W.10) were sitting on the motor cycle of Mukesh (P.W.3) and Suresh (P.W. 5) and Ramgopal were going on one motor cycle. Since, dust was blowing therefore, motor cycles were following each other by maintaining distance. The motor cycle of Datar Singh (P.W.1) was in the front. When the motor cycle of

Datar Singh (P.W.1) reached in front of the Govt. Park, it was forcibly got stopped and Atmaram assaulted Babulal by knife on his abdomen, whereas Mukesh assaulted by knife on his neck. Rambabu assaulted by sword below left ear. Kailash assaulted on the back of Babulal and Halkai assaulted on the head of Babulal by Lathi. It is alleged that all the other accused persons started assaulting by fists and blows. A knife was hurled by Mukesh towards Datar Singh (P.W.1), but it did not hit him. A police jeep which was already on patrolling, came from the side of Sironj and information was given from the wireless set installed in the jeep. Thereafter, Ramesh Shukla, S.I. who was incharge of Deepnakheda Police Station, also reached on the spot.

36. Kailash Singh (P.W. 12) has stated that he was posted as Head Constable in Police Station Deepnakheda. On 13-6-2005, he had sent Babulal to Sironj Hospital for medical examination along with requisition Ex. P.24. FIR, Ex. P.25 was registered by him for offence under Sections 147, 148,149 and 302 of IPC on the basis of Dehati Nalishi. On 13-6-2005, he had sent Police Constable Bhagirath for getting the medical examination of Babulal. The duty certificate, Ex. P.27 was issued. In cross-examination, he admitted that on 13-6-2005, at about 11 A.M., Atmaram had lodged a report, which is mentioned in Rojnamcha sanha no. 283. He had alleged that he was beaten by Mukesh, Dinesh, Madho and Vakil. He was sent to Sironj Hospital for medical examination along with constable Nawab Singh.

On the same day, at about 2:40 P.M., Babulal also lodged the report. In the report lodged by Babulal, there is no mention that Rajkumar too was beaten. In rojnamcha sanha No. 287, it is mentioned that S.H.O. had informed that some one has been killed in village Chatholi and accordingly, constable Prabhu Singh was sent with necessary documents. As per the duty certificate issued to Bhagirath, it is mentioned that the constable was sent at 15:00. In cross-examination, this witness proved that the report lodged by Atmaram is Ex. D.15 and its photo copy is Ex. D.15(c). As per Rojnamcha sanha no. 286, Atmaram was sent for medical examination, which is Ex. P. 16(c).

Whether the Medical Evidence is contrary to Ocular Evidence

37. It is submitted by the Counsel for the appellants, that according to the prosecution story, the deceased Babulal was beaten in the earlier part of the day and accordingly, he lodged the FIR according to which he had sustained injuries on his hand and cheek, but in the post-mortem report, no injury on the hand was found. Thus, it is submitted that the post-mortem report, Ex. P. 5, completely rules out the allegation of assault on Babulal on the earlier part of the day.

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

39. The post-mortem report, Ex. P.5 has already been reproduced in para 24 of this judgment and no injury on the hand of the deceased

Babulal was found. However, in the *Lash Panchnama*, Ex. P. 2, it is mentioned as under :

> अंगुलियां खून से लथपथ है दाहिने हाथ के अंगूठे व कलके वाली अंगुली के बीच मे चोट के निशान होकर खून निकला है।

40. Thus, it is clear that the Panchas had found injury in the right hand of the deceased Babulal, but the post-mortem report, Ex. P.5 is completely silent about that injury.

41. Further more, Kailash Singh (P.W.12) has proved the requisition form, Ex. P.24 for medical examination of Babulal. Constable Bhagirath was sent along with Babulal to Sironj Hospital, for medical examination of Babulal and the duty certificate is Ex. P.27. Thus, it is clear that Babulal was sent by the Police Station Deepnakheda for medical examination. Kailash Singh (P.W.12) is an independent witness being a police personell. He has no personal interest in preparing false documents. Similarly Bhagirath (P.W.10) is also an independent witness having no personal interest in the matter. Why they would create a false evidence to the extent mentioned above? Thus, it is clear that Babulal had sustained injury on his right hand, but it appears that either Dr. Vivek Agrawal (P.W.4) did not conduct the post-mortem properly or he has suppressed some facts.

42. It is submitted by the Counsel for the appellant that Since, Dr. Vivek Agrawal (P.W.4) is a prosecution witness, therefore, his evidence is binding on the prosecution.

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

44. The moot question for consideration is that whether the Court is bound by the medical opinion of the Doctor, or the Court can make the overall assessment of the evidence, in order to reach to the truth?

45. The Supreme Court in the case of **Dayal Singh Vs. State of Uttaranchal** reported in **(2012) 8 SCC 263** has held as under :

> **30.** With the passage of time, the law also developed and the dictum of the Court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.
>
> **31.** Reiterating the above principle, this Court in *NHRC* v. *State of Gujarat* held as under: (SCC pp. 777-78, para 6)
>
> "*6*. … '*35*. … The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The

courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators.' (*Zahira Habibullah case*, SCC p. 395, para 35)"

32. In *State of Karnataka* v. *K. Yarappa Reddy* this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p. 720)

"*19*. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

33. In *Ram Bali* v. *State of U.P.* the judgment in *Karnel Singh* v. *State of M.P.* was reiterated and this Court had observed that: (*Ram Bali case*, SCC p. 604, para 12)

"*12*. … In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would

> tantamount to playing into the hands of the investigation officer if the investigation is designedly defective."
>
> **34.** Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a "fair trial", the Court should leave no stone unturned to do justice and protect the interest of the society as well.

46. Thus, it is clear that the Court can make overall assessment to reach to a conclusion and is not bound by the evidence by prosecution. This Court has already held that in the *Lash Panchnama*, Ex. P.2, the witnesses have specifically stated that the fingers of the deceased Babulal are stained with blood and an injury in between the thumb and finger is visible. Further, Babulal was sent by the Police Station to Sironj Hospital for medical examination, and in the requisition for medical examination, Ex. P.24, it is mentioned that the injured claims to have sustained injury in the middle of thumb and finger. Thus, it is clear that either Dr. Vivek Agrawal (P.W.4) had conducted the post-mortem, Ex. P. 5 in a most causal manner or he has suppressed some thing.

47. Whatever it may be. This Court cannot ignore the description of injury in the *Lash Panchnama*, Ex. P.2 as well as in the requisition for medical examination, Ex. P.24. Both the documents were prepared either by the police personell or by the investigating officer and the *Panchas*. Thus, it is clear that non-mentioning of injury in the post-mortem report, Ex. P.5 by Dr. Vivek Agrawal (P.W. 4) would not give any dent to the prosecution story and the case of the prosecution that Babulal was beaten in the earlier part of the day, is held to be reliable.

48. It is next contended by the Counsel for the appellants that as per the prosecution case, the Appellant Atmaram had caused injury to the deceased Babulal on his abdominal region, whereas no injury in the abdominal region was found.

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

50. The injury no. 2 sustained by the deceased Babulal is as under :

> Incised wound 4 inch x 1 inch x bone deep, obliquely placed about 3 inch below right nipple running downward and laterally towards midline.

51. Thus, it is clear that the injury was placed 3 inches below right nipple running downward and laterally towards midline. The length of the injury was 4 inches x 1 inch x bone deep. Thus, it is clear that the injury no. 2 was situated near the abdominal region of the deceased and thus, it cannot be said that the evidence of the witnesses

with regard to injury caused by Atmaram was not corroborated by the medical evidence. Even otherwise, the law is settled that unless and until, the medical evidence completely rules out the ocular evidence, preference has to be given to the ocular evidence.

52. 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.

53. 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)

54. 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*, 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)

55. 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*.]

56. The Medical Evidence is merely a corroborative piece of evidence whereas the eye-witnesses are eyes and ears of the Court. In the present case, an injury was found near the abdominal region of the deceased starting from 3 cms below right nipple and going downwards and the length of the injury was 4 cm. Thus, it is held that the evidence of the prosecution witnesses is corroborated by medical evidence and their testimony cannot be rejected on the ground of variance in medical evidence.

57. It is next contended by the Counsel for the appellants that according to the witnesses, Mahesh had caused an injury on the neck of Babulal and Rambabu assaulted below the left ear of Babulal, but only one injury was found on the neck of the deceased Babulal therefore, the ocular evidence is ruled out by the medical evidence. It is further submitted that Dr. Vivek Agrawal (P.W.4) has stated that injury on the neck was not result of two assaults.

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

59. The injury no. 1 which was found on the left side of the neck reads as under :

> Incised wound 3 inch x 1inch x muscle deep, horizontally placed left side lower neck started from lateral border of sternocleidomastoid muscle horizontally back to nape of neck

60. The allegations against Mahesh are that he assaulted by knife on the neck and Rambabu assaulted by sword below the left side of neck of Babulal. The sternocleidomastoid muscle originates from two locations: the manubrium of the sternum and the clavicle. It travels obliquely across the side of the neck and inserts at the mastoid process of the temporal bone of the skull by a thin aponeurosis. The sternocleidomastoid is thick and narrow at its centre, and broader and thinner at either end. Thus, sternocleidomastoid muscle is connected with sternum and clavicle. One end of sternocleidomastoid muscle is below the ear and another end is at sternum after passing through the neck. Thus, not only an injury below the left ear of the deceased Babulal was found but it was also found on the neck of the deceased Babulal. This Court is not bound by the opinion expressed by the Doctor. This Court is required to consider as to whether the medical evidence is such which completely rules out the ocular evidence or not? As already pointed out, according to the prosecution case, two persons caused injuries on the neck and the corresponding injury was found on the body of the deceased. Merely because Dr. Vivek Agrawal (P.W. 4) has stated that injury no. 1was caused by single assault, would not be sufficient to discard the direct evidence specifically when this Court has already come to a conclusion that

Dr. Vivek Agrawal (P.W.4) was atleast negligent in conducting Post-mortem.

61. The allegation against Kailash is that he had caused injury on the back of Babulal and corresponding injury was found. Thus, it is held that there is no variation in the ocular and medical evidence.

Role of Atmaram, Kailash, Rambabu, and Mahesh

62. In Dehati Nalishi, Ex. P.1, it is alleged that Atmaram assaulted by knife on the abdomen of the deceased Babulal and the remaining accused persons assaulted the deceased and caused injuries which were dangerous to life. It is true, that no overtact was assigned to appellants Kailash, Rambabu, and Mahesh, but Datar Singh (P.W.1) in his evidence has explained that since, he was very much frightened, therefore, he did not narrate all the overt acts of the appellants in detail.

63. The explanation given by Datar Singh (P.W.1) appears to be plausible. If some one is killed in the presence of a witness, then it cannot be said that all the persons would react in an uniform manner. Few witnesses would certainly get frightened. Further more, it is well established principle of law that FIR is not an encyclopedia. The Supreme Court in the case of **Ravi Kumar v. State of Punjab,** reported in **(2005) 9 SCC 315** has held as under :

> 15.....It has been held time and again that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Evidence Act, 1872 (in short “the Evidence Act”) or

> to contradict him under Section 145 of that Act. It can neither be used as evidence against the maker at the trial if he himself becomes an accused nor to corroborate or contradict other witnesses. It is not the requirement of law that the minute details be recorded in the FIR lodged immediately after the occurrence. The fact of the state of mental agony of the person making the FIR who generally is the victim himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be kept in mind. The object of insisting upon lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed.
>
> (Underline supplied)

64. Since the mental agony of complainant is an important aspect which is also to be kept in mind while appreciating the FIR, therefore, the explanation given by Datar Singh (P.W.1) that he was very much frightened, cannot be said to be unrealistic.

65. Further, according to the prosecution, Atmaram had also sustained injuries in the incident, which took place in the earlier part of the day, therefore, he was sent to Sironj Hospital for medical examination. The deceased Babulal and witnesses were also going to Sironj Hospital for medical examination. The appellants have relied upon the M.L.C. of Atmaram, Ex. D.13C according to which a lacerated wound was found on the occipital region and the M.L.C. was done at 3:10 P.M., whereas the incident in question took place at 17:00. Thus, it is clear that Atmaram, Mahesh, Rambabu, and Kailash must be returning back from Sironj Hospital, and when they saw that Babulal and others are going towards Sironj, then they attacked

Babulal. Thus, the presence of Appellants Atmaram, Mahesh, Rambabu and Kailash on the place of incident is also possible.

Whether buses were plying on the date of incident.

66. It is the prosecution case, that buses were not plying because of Mandi Elections, therefore, the deceased Babulal and other witnesses were going on their motor cycles. However, it is contended by the Counsel for the Appellants that they have examined Ashok Dubey (D.W.2) to prove that buses were plying and the case of the prosecution that only because of non-availability of public conveyance, they were going on their motor cycles is false.

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

68. Ashok Dubey (D.W.2) claims himself to be Supervisor of Tirupati Travels. He has stated that three buses of Tirputai Travels operate on Bamori Shala to Sironj. The Third bus reaches Deepnakheda at 4 P.M. and on 13-6-2005, the buses were operational and in support of his contention, he has proved conductor sheet of all the three buses, which were marked as Ex. D 13 C and the original conductor sheets are Ex. D.13.

69. In cross-examination, this witness admitted that the conductor Sheets were prepared by the Conductor and he has obtained the conductor sheet from the owner of the Tirupati Travels. He further stated that after checking the passengers, he returns the conductor

sheet to the conductor. Thus, it is clear that the conductor sheets, Ex. D.13C were not prepared by him. The conductor who had prepared those sheets, Ex. D.13C has not been examined. He has admitted that the Conductors Pran Singh, Khemchandra and Rakesh are still alive and they are still working with them, but even then, they were not examined. Even the owner of the Tirupati Travels has not been examined. Thus, it is held that the Appellants have failed to prove that buses were plying on the date of incident.

Enmity

70. It is submitted by the Counsel for the Appellants that since, on the report of Atmaram, Datar Singh (P.W.1) and Mukesh (P.W.3) were prosecuted under Section 3/7 of Essential Commodities Act, and they had also remained in jail for 2 months and Datar Singh (P.W.1) was removed from the post of Sarpanch, whereas Mukesh (P.W.3) was also removed from the post of Secretary, Gram Panchayat, therefore, they have falsely implicated the Appellant Atmaram.

71. Considered the submissions made by the Counsel for the Appellants.

72. Enmity is a double edged weapon. If enmity provides a reason to falsely implicate a person, then it also provides a motive for committing offence. The Supreme Court in the case of **Kunwarpal v. State of Uttarakhand,** reported in **(2014) 16 SCC 560** has held as under :

> **16.** According to the complainant there was litigation between them and the accused persons leading to enmity. PW 3 Atmaram has also stated that there was litigation between them and it culminated in the occurrence. Animosity is a double-edged sword. While it can be a basis for false implication, it can also be a basis for the crime (*Ruli Ram* v. *State of Haryana* and *State of Punjab* v. *Sucha Singh*). In the instant case there is no foundation established for the plea of false implication advanced by the accused and on the other hand evidence shows that enmity has led to the occurrence.

73. Admittedly, animosity was going on between the parties. Even in the earlier part of the day, Atmaram was beaten and similarly, Babulal was also beaten. Both the parties had lodged FIRs against each other. Therefore, this Court is of the considered opinion, that the incident took place only because of animosity between the parties, and in view of specific allegations against Atmaram, it cannot be held that the Appellant Atmaram, was falsely implicated.

Whether Rambabu has proved his plea of alibi ?

74. The appellants have examined Rajkumar Goud (D.W.5). He has stated that he and the Appellant Rambabu are real brothers. Badriprasad who is family member of Babulal had expired and an invitation of 13th day ceremony was received.

75. However, this witness has not stated that Rambabu had attended the said 13th day ceremony. In cross-examination, he further admitted that condolence messages are never kept and after the written invitation is received, then either it is torn or a corner of the said invitation is torn. He admitted that the corner of the written

invitation, Ex. D6 is not torn. He also could not clarify the reasons for preserving the written condolences invitation.

76. In absence of any evidence that Rambabu had also attended the 13th day ceremony of Badriprasad, it is held that the Appellants have failed to prove plea of alibi of the Appellant Rambabu.

Role of Halkai

77. According to the prosecution witnesses, the Appellant Halkai gave a lathi blow on the head of deceased Babulal. No injury on head was found. Although, this Court has already come to a conclusion that Dr. Vivek Agrawal (P.W.4) was negligent in performing post-mortem, but the question for determination is that whether Dr. Vivek Agrawal (P.W. 4) had committed a mistake in not noticing the injury on the head of Babulal or Halkai has been falsely implicated.

78. The name of Halkai is not mentioned in the FIR. It is true that FIR is not an encyclopedia and each and every minute detail is not expected, but where only 5 accused persons (including Halkai) had assaulted the deceased Babulal by weapons, then non-mention of name of Halkai in the FIR assumes importance. The incident had taken place on 13-6-2005 and the statements of the witnesses were recorded on 14-6-2005 i.e., on the next day. The witnesses had ample opportunity to over implicate some other persons also. Further vide seizure memo Ex. P.16, a lathi was seized from Halkai on 7-7-2005,

however, in the seizure memo, it is not mentioned that any blood stains were there on the lathi or not? As per F.S.L. report, blood was found on the lathi but it was not sufficient for serum Examination. Thus, there is nothing on record to suggest that the blood found on the lathi seized from Halkai was having Human blood or not? Therefore, when the name of Halkai was not mentioned in the FIR, and his name figured for the first time on 14-6-2005 (i.e., on the next day) and the allegations of assault by Halkai by lathi on the head of deceased is also not corroborated by Medical evidence, this Court is of the considered opinion, that the prosecution has failed to prove the involvement of Halkai in the offence.

Role of Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh

79. All the witnesses have stated that these Appellants had assaulted the deceased by fists and blows. The witnesses have also stated that these Appellants were bare handed. Thus, the question is that whether the above mentioned Appellants were the members of Unlawful Assembly with Common Object or not?

80. Before considering the aforesaid aspect of the matter, this Court would like to consider the law governing the field.

81. 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
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> *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.
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> (Underline supplied)

82. 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)
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> "*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.

83. 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)
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> > "*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.'"

84. 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."

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."
>
> (emphasis in original)

85. 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.

86. Thus, it is clear that it is not necessary that each and every member of the Unlawful Assembly must play some overt act 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.

87. By referring to the judgment passed by Supreme Court in the case of **Kuldip Yadav and others Vs. State of Bihar** reported in **(2011) 5 SCC 324** 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.

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

89. 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.

90. 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?

91. As already held Atmaram was referred to Sironj Hospital for medical examination, and they were returning back. Thus, it is clear that even if the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh were along with the Appellants Atmaram, Mahesh, Rambabu and Kailash, then it cannot be said that they were the members of the Unlawful Assembly. In fact, it cannot be said that there was any Unlawful Assembly at all. But, an Assembly which was not Unlawful at the very inception, may become unlawful at the later stage. The Supreme Court in the case of **Kashiram v. State of M.P.,** reported in **(2002) 1 SCC 71** has held as under :

> 30.....An assembly though lawful to begin with may in the course of events become unlawful.....

92. Datar Singh (P.W.1) has admitted in para 9 of his cross-examination, that the Appellants Mahesh, Batol and Pappu are the brothers of the Appellant Atmaram, whereas Sanjeev and Dinesh are the sons of Appellant Atmaram. The Appellants Raju and Rakesh are the sons of Appellant Halkai. The Appellant Halkai is the cousin

brother of Atmaram. Mukesh Sharma (P.W.3) has also admitted that all the Appellants are the family members of Atmaram. Thus, even if the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh were present on the spot, then it was merely an innocent presence, as they were returning back from Sironj Hospital, after getting Atmaram medically examined.

93. The next question is that whether the Lawful Assembly became Unlawful or not?

94. As already pointed out, the only allegations are that the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh had assaulted the deceased Babulal by fists and blows. Dr. Vivek Agrawal (P.W.4) has stated that in case of assault by fists and blows, the deceased may have sustained contusions, but no contusion was found. Further more, according to the prosecution itself, the witnesses and the deceased Babulal were on three different motor cycles but as the dust was blowing, therefore, the motor cycles were following each other by maintaining some distance. It is also the case of the prosecution that when the other witnesses who were on other two motor cycles reached on the spot, all the Appellants ran away. Thus, it is clear that the witnesses namely Mahesh (P.W. 6), Rajkumar (P.W.2), Mukesh (P.W.3) Bhagirath and Suresh Kumar (P.W.5) had also reached on the spot,

within few minutes. Further, the Appellants were returning back from Sironj Hospital. The incident took place, only when they saw that Babulal and others are coming. Further, the prosecution has failed to prove beyond reasonable doubt, that the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh also participated in the incident by doing any overt act. Therefore, the allegations that the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh also assaulted the deceased Babulal by fists and blows appear to be unreliable, specifically when the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh are the members of the family of Atmaram and there presence on the spot was innocent one and was not constituting Unlawful Assembly. Thus, it is held that the prosecution has failed to prove that either the Appellants Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh where the members of Unlawful Assembly or they acted in furtherance of any Common Object.

95. Further more, as already pointed out, the Trial Court did not put any question to the Appellant Rakesh in his statement under Section 313 of Cr.P.C. The only questions which were put to Rakesh in his statement under Section 313 of Cr.P.C. were as under :

1. अ.सा. 1 दातार सिंह का कहना है कि तुम आरोपी को जानता है एवं

अनुपस्थित आरोपी राजेश को भी जानता है।

सही है।

2 इसी साक्षी का कहना है पिछले वर्ष जेठ के महीने की बात है उस दिन मण्डी चुनाव था एवं छठे महीने की 13 तारीख् थी

सही है

3. इसी साक्षी का कहना है कि उसने वोट डालने के बाद 12–1 बजे के आसपास झगडा सुना था कि बाबूलाल को राजकुमार को कल्याण, कैलाश,पप्पू, बसौरी, ने मार दिया था ।

पता नही

****

220. साक्षी आपके विरूद्व क्यो बोलते है

रंजिश के कारण झूठे कथन दे रहे है।

221. क्या आपको बचाव मे साक्ष्य देना है।

देना है।

222. आपको कुछ कहना है

मै धटना के समय ग्राम डोकना मे खडा मै मण्डी चुनाव होने से पोलिंग ड्यूटी पर सुबह 7 बजे से शाम 7.30 बजे तक रहा था। मुझे रंजिश के कारण झूठा फंसाया गया है।

96. Thus, it is clear that no explanation was sought from Rakesh under Section 313 of Cr.P.C. Thus, he is entitled for acquittal on that ground also.

97. Accordingly, it is held that the prosecution has failed to prove

the guilt of the Appellants Halkai, Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh, therefore, they are **acquitted of** all the charges.

98. The next question for consideration is that when the charge under Section 34 of IPC was not framed, then whether the Appellants Atmaram, Mahesh, Kailash and Rambabu can be convicted with the aid of Section 34 of IPC or not?

99. The Supreme Court in the case of **Mala Singh v. State of Haryana,** reported in **(2019) 5 SCC 127** has held as under :

> **32.** Four questions arise for consideration in this appeal:
>
> **32.1.** First, whether the High Court was justified in convicting the appellants under Section 302 read with Section 34 IPC when, in fact, the initial trial was on the basis of a charge under Section 302 read with Section 149 IPC?
>
> **32.2.** Second, whether the High Court was justified in altering the charge under Section 149 to one under Section 34 in relation to three accused (the appellants herein) after acquitting eight co-accused from the charges of Sections 302/149 IPC and then convicting the three accused (the appellants herein) on the altered charges under Sections 302/34 IPC?
>
> **32.3.** Third, whether there is any evidence to sustain the charge under Section 34 IPC against the three accused (the appellants herein) so as to convict them for an offence under Section 302 IPC?
>
> **32.4.** And fourth, in case the charge under Section 34 IPC is held not made out for want of evidence and further when the charge under Section 149 is already held not made out by the High Court, whether any case against the three accused persons (the appellants herein) is made out for their conviction and, if so, for which offence?
>
> **33.** Before we examine the facts of the case, it is necessary to take note of the relevant sections, which deal with alter of the charge and powers of the court/appellate court in such cases.

34. Section 216 CrPC deals with powers of the court to alter the charge. Section 386 CrPC deals with powers of the appellate court and Section 464 CrPC deals with the effect of omission to frame, or absence of, or error in framing the charge. These sections are quoted below:

"**216.** ***Court may alter charge***.—(1) Any court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the Prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

* * *

386. ***Powers of the appellate court***.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the appellate court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(*a*) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(*b*) in an appeal from a conviction—

(*i*) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a court of

competent jurisdiction subordinate to such appellate court or committed for trial, or

(*ii*) alter the finding, maintaining the sentence, or

(*iii*) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(*c*) in an appeal for enhancement of sentence—

(*i*) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a court competent to try the offence, or

(*ii*) alter the finding maintaining the sentence, or

(*iii*) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(*d*) in an appeal from any other order, alter or reverse such order;

(*e*) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the appellate court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal.

* * *

464. ***Effect of omission to frame, or absence of, or error in, charge***.—(1) No finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—

(*a*) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(*b*) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

35. A combined reading of Sections 216, 386 and 464 CrPC would reveal that an alteration of charge where no prejudice is caused to the accused or the prosecution is well within the powers and the jurisdiction of the court including the appellate court.

36. In other words, it is only when any omission to frame the charge initially or till culmination of the proceedings or at the appellate stage results in failure of justice or causes prejudice, the same may result in vitiating the trial in appropriate case.

37. The Constitution Bench of this Court examined this issue, for the first time, in the context of old Criminal Procedure Code in a case in *Willie (William) Slaney* v. *State of M.P.*

38. The learned Judge Vivian Bose, J. speaking for the Bench in his inimitable style of writing, held: (*Willie Slaney case*, AIR p. 124, para 23)

"*23*. … Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact: (*1*) the accused has "in fact" been misled by it "and" (*2*) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language."

39. In *Kantilal Chandulal Mehta* v. *State of Maharashtra*, this Court again examined this very issue arising under the present Code of Criminal Procedure with which we are concerned in the present case. Justice P. Jaganmohan Reddy, speaking for the Bench after examining the scheme of the Code held inter alia: (SCC p. 171, para 4)

"In our view *the Criminal Procedure Code* gives ample power to the courts to alter or amend a charge whether by the trial court or by the appellate court provided that the accused has not to face a charge for a new offence or is not prejudiced either by keeping him in the dark about that charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him."

40. Now coming to the question regarding altering of the charge from Section 149 to Section 34 IPC read with

Section 302 IPC, this question was considered by this Court for the first time in *Lachhman Singh* v. *State* where Fazl Ali, J. speaking for the Bench held as under: (AIR p. 170, para 13)

"*13*. It was also contended that there being no charge under Section 302 read with Section 34, Penal Code, the conviction of the appellants under Section 302 read with Section 149 could not have been altered by the High Court to one under Section 302 read with Section 34, upon the acquittal of the remaining accused persons. The facts of the case are however such that the accused could have been charged alternatively, either under Section 302 read with Section 149 or under Section 302 read with Section 34. The point has therefore no force."

41. This question was again examined by this Court in *Karnail Singh* v. *State of Punjab* wherein the learned Judge Venkatarama Ayyar, J. elaborating the law on the subject, held as under: (AIR p. 207, para 7)

"*7*. Then the next question is whether the conviction of the appellant under Section 302 read with Section 34, when they had been charged only under Section 302 read with Section 149 was illegal. The contention of the appellants is that the scope of Section 149 is different from that of Section 34, that while what Section 149 requires is proof of a common object, it would be necessary under Section 34 to establish a common intention and that therefore when the charge against the accused is under Section 149, it cannot be converted in appeal into one under Section 34. The following observations of this Court in *Dalip Singh* v. *State of Punjab* were relied on in support of this position: (AIR p. 366, para 24)

'*24*. Nor is it possible in this case to have recourse to Section 34 because the appellants have not been charged with that even in the alternative and the common intention required by Section 34 and the common object required by Section 149 are far from being the same thing.'

It is true that there is substantial difference between the two sections but as observed by Lord Sumner in *Barendra Kumar Ghosh* v. *King Emperor*, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. If the common object which is the subject-matter of the charge under Section 149 does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in

prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under Section 149 would be the same if the charge were under Section 34, then the failure to charge the accused under Section 34 could not result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter.

We do not read the observations in *Dalip Singh* v. *State of Punjab* as an authority for the broad proposition that in law there could be no recourse to Section 34 when the charge is only under Section 149. Whether such recourse can be had or not must depend on the facts of each case. This is in accord with the view taken by this Court in *Lachhman Singh* v. *State*, where the substitution of Section 34 for Section 149 was upheld on the ground that the facts were such

'that the accused could have been charged alternatively either under Section 302 read with Section 149, or under Section 302 read with Section 34' (AIR p. 170, para 13)."

42. The law laid down in *Lachhman Singh* and *Karnail Singh* was reiterated in *Willie (William) Slaney* wherein Vivian Bose, J. speaking for the Bench while referring to these two decisions, held as under: [*Willie (William) Slaney case*, AIR p. 129, para 49]

"*49*. The following cases afford no difficulty because they directly accord with the view we have set out at length above. In *Lachhman Singh* v. *State*, it was held that when there is a charge under Section 302 of the Penal Code read with Section 149 and the charge under Section 149 disappears because of the acquittal of some of the accused, a conviction under Section 302 of the Penal Code read with Section 34 is good even though there is no separate charge under Section 302 read with Section 34, provided the accused could have been so charged on the facts of the case.

The decision in *Karnail Singh* v. *State of Punjab* is to the same effect and the question about prejudice was also considered."

43. This principle of law was then reiterated after referring to law laid down in *Willie (William) Slaney* in *Chittarmal* v. *State of Rajasthan* in the following words: (*Chittarmal case*, SCC p. 273, para 14)

"*14*. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive

> criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh* v. *King Emperor*; *Mannam Venkatadari* v. *State of A.P.*; *Nethala Pothuraju* v. *State of A.P.* and *Ram Tahal* v. *State of U.P.*)"

100. Thus, if charge under Section 149 of IPC was framed, and if it is found that in fact less than 5 persons were involved in the offence, then still the accused persons can be punished with the aid of Section 34 of IPC.

101. Accordingly, the Appellants **Atmaram, Mahesh, Rambabu and Kailash** are held guilty for offence under Section **302/34** of IPC. However, they are acquitted of charge under Section 148 of IPC.

102. 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 required.

103. *Ex-consequenti,* the Judgment and Sentence dated 31st -Aug-2010 passed by 1st Additional Judge to the Court of Additional Sessions Judge, Sironj, Distt. Vidisha in S.T. No. 167 of 2005 is hereby **Affirmed** qua the Appellants Atmaram, Mahesh, Rambabu and Kailash and is **set aside** qua the Appellants Halkai, Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh.

104. The Appellants Halkai, Pola @ Jainarayan, Rakesh, Batol @ Makhanlal, Pappu @ Sitaram, Sanjeev, Rajesh and Dinesh are on bail. Their bail bonds and Surety bonds are hereby discharged. They are no more required in the present case.

105. The appellants Atmaram, Rambabu, Mahesh and Kailash are in jail. They shall undergo the remaining jail sentence.

106. Let a copy of this judgment be immediately provided to the appellants Atmaram, Rambabu, Mahesh and Kailash free of cost.

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

108. Accordingly, the Cr.A. No. 724/2010 is **Dismissed** qua the Appellant Rambabu and Kailash and Cr.A. No. 770/2010 is

Dismissed qua the Appellants Atmaram and Mahesh

whereas

the Criminal Appeals No. 764 of 2010, Cr.A. No. 724 of 2010 and Cr.A. No. 770/2010 filed by remaining Appellants are **Allowed.**

(G.S. Ahluwalia)
Judge

(Deepak Kumar Agarwal)
Judge