HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH

DIVISION BENCH

G.S. AHLUWALIA

&

RAJEEV KUMAR SHRIVASTAVA J.J.

Cr.A. No. 867 Of 2010

Ram Khiladi

Vs.

State of M.P.

Shri S.S. Kushwaha Counsel for the Appellant
Shri C.P. Singh, Counsel for the State

Date of Hearing	:	08-03-2022
Date of Judgment	:	15th-03-2022
Approved for Reporting	:	

Judgment

15th- March -2022

Per G.S. Ahluwalia J.

1. This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 30-9-2010 passed by 2nd Additional Sessions Judge, Morena in S.T. No.144 of 2009 by which the appellant has been convicted under Section 302 of IPC and

has been sentenced to undergo the Life Imprisonment and a fine of Rs. 1000/-. However, no default imprisonment has been awarded.

2. The undisputed facts are that apart from the appellant, Pankaj, Asharam and Sudhakar were also made an accused. Pankaj was tried along with the appellant Ram Khiladi and he has been acquitted. Asharam and Sudhakar were declared absconding. Asharam is reported to be dead, whereas Sudhakar is still absconding. The acquittal of co-accused Pankaj has not been challenged.

3. According to the prosecution story, the complainant Dinesh Sharma, lodged a report on 10-9-2003 at 23:30 on the allegations that at about 4:30 P.M., the appellant had purchased one pouch without making payment of the same and similarly, the daughter of the Appellant Ram Khiladi had also plucked ground gourd *(Louki*) from the field of the complainant and therefore, Ram Naresh went to the house of the Appellant Ram Khiladi for lodging his complaint. On this issue, the Appellant Ram Khiladi, co-accused Pankaj, Asharam and Sudhakar @ Lalu started abusing him. They also pelted stones. Thereafter, the appellant Ram Khiladi and co-accused Sudhakar brought their guns whereas the acquitted co-accused Pankaj brought a lathi. Accordingly, Ram Naresh, in order to save his life, went to the roof of the house of Appellant Ram Khiladi. The Appellant Ram Khiladi fired a gun shot causing injury on the back of Ram Naresh. Co-accused Sudhakar also fired a gun shot but it missed. The appellant Ram Khiladi ran away from the spot. Ram Naresh fell

down on the roof itself. Thereafter, the complainant tied cloth around the wound. The incident was witnessed by Suresh Sharma @ Banti, Babulal, Mahesh and Pawan. Ram Naresh was brought to Morena Hospital from where he was referred to Gwalior. Ram Naresh was declared dead at Gwalior. His dead body is lying in the Gwalior. Accordingly, it was alleged that Ram Naresh has been killed by the Appellant Ram Khiladi, Pankaj, Asharam and Lalu.

4. On this report, the Police Station Civil Lines, Morena registered F.I.R. in crime No. 390/2008. The merg information, Ex. P.2 was also recorded. The dead body was sent for post-mortem by Police Station Kampoo Distt. Gwalior. The statements of the witnesses were recorded. The blood stained and plain cement was seized from the roof of the house of the Appellant Ram Khiladi. The gun with fired cartridge was seized from the possession of the Appellant Ram Khiladi and the incriminating articles were sent to F.S.L., Sagar. The police of Police Station Civil Lines, Distt. Morena after completing the investigation filed charge sheet against the Appellant Ram Khiladi and co-accused Pankaj for offence under Section 302/34 of IPC, whereas charge sheet under Section 299 of Cr.P.C. was filed against co-accused Asharam and Sudhakar.

5. The Trial Court, by order dated 13-1-2010 framed charge under Section 302 of IPC against the Appellant Ram Khiladi and under Section 302/34 of IPC against the co-accused Pankaj.

6. The Appellant and acquitted co-accused Pankaj abjured their

guilt and pleaded not guilty.

7. The prosecution examined Dinesh Sharma (P.W.1), Pavan Sharma (P.W.2), Suresh (P.W.3), Mahesh (P.W.4), Daya Shankar (P.W.5), Rajveer Sharma (P.W.6), Murari Lal (P.W.7), D.S. Parihar (P.W.8), R.P. Sharma (P.W.9), Dr. Anup Gupta (P.W.10), and Dr. J.N. Soni (P.W.11).

8. The Appellant did not examine any witness in his defence.

9. The Trial Court, by the impugned judgment has acquitted the co-accused Pankaj but convicted the Appellant Ram Khiladi for offence under Section 302 of IPC and sentenced him to undergo the Life Imprisonment and a fine of Rs. 1000/- without any default imprisonment.

10. Challenging the judgment and sentence passed by the Court below, it is submitted by the Counsel for the appellant, that the houses of the Appellant and the deceased were not adjoining to each other. Their roofs are not connected with each other. If the prosecution story is accepted that some hot talk or quarrel took place between the deceased and Appellant, then instead of climbing to the roof of the house of the Appellant, he could have rushed outside the house, in order to save his life. There is nothing on record to suggest that Ram Naresh had sustained any gun shot injury on the roof of the house of the Appellant. There are material contradictions in Ocular and Medical Evidence. According to the prosecution case, the deceased Ram Naresh had sustained gun shot injury on his back, but

according to the Post-mortem report, the entry wound was found near Umbilicus and the exit wound was found on the back.

11. Per contra, the Counsel for the State has supported the findings recorded by the Trial Court.

12. Heard the learned Counsel for the parties.

13. Before adverting to the facts and circumstances of the case, this Court would like to find out as to whether the death of Ram Naresh was homicidal in nature or not?

14. According to Prosecution story, the injured Ram Naresh was immediately taken to Distt. Hospital Morena, where he was medically examined by Dr. Anup Gupta (P.W.10) who found following injuries on his body :

> (i) One Entry Wound size 3x1 cm on back. Right side lower part. Bleeding present.
> (ii) Exit wound left para-umbilical region 3 x 1 cm size bundle loop protruded intestine.

The injured was referred to J.A. Hospital, Gwalior. The MLC is Ex. D.6. The information regarding injured person was given to police, vide Ex. D.5. (It is made clear that MLC and information to police were exhibited as D documents in the evidence of D.S. Parihar [P.W.8], therefore, these documents were marked as D documents). This witness was cross-examined. In cross-examination, it was stated by this witness that the injured had remained in his medical supervision for 15-20 minutes, thereafter, he was taken to Gwalior. X-ray could not be done. He had given first aid. The injured was not

admitted in Distt. Hospital Morena. The attender had taken away the prescriptions. He had not enquired from the injured or his attender as to how he sustained injuries. He further admitted that he was not informed about the name of assailant, therefore, it was not mentioned in his police intimation, Ex. D.5, however, he on his own clarified that he was not required to enquire about that. He further stated that Dr. J.N. Soni, H.O.D., Forensic Department is known to him. He had also taught him, and he is more experienced and knowledgeable person. He denied that he had not medically examined the injured. He denied that he has mentioned about entry and exit wound on his own after the patient had left the hospital.

15. Thus, according to Dr. Anup Gupta (P.W. 10) the entry wound was on the back and the exit wound on left para-umbilical region with intestines coming out.

16. Dr. J.N. Soni (P.W.11) had conducted the post-mortem of the deceased and found the following injuries :

> Dead body of an average built male aged about 39 years wearing (1) under wear (ii) *Gamchha* and (iii) Black threat with *taabij* present around the neck.
> Chest and abdomen and clothings, thigh stained with blood, **loops of intestine protruded out from the abdominal wound on left side of abdomen of umbilicus.**
> Eyes closed, corner hazy, mouth closed, fist semi open, feet planter flexed, rigor mortis present all over the body, hypostasis present on back and faint.
> (i) Gun shot entry wound present on left side of umbilicus 10 cm above anterior superior iliac supine, 4. 2.5 cm obliquely oval directing down wards medially wound extends on right side (Illegible) and exit wound present on right side lumber region 10 cm right to mid line 1.5 cm diameter, in entry wound margins is abraded while in exit

wound ragged and tissue comes out wound is 06 cm above the iliac creast and 3 cm below the level of entry wound.
Death was due to shock and hemorrhage as a result of abdominal injury. Injury has been caused by fire arm from distant shot. Injury is sufficient to cause death in ordinary course of nature.
Duration of death is 6 hours to 24 hours since P.M. Examination.
The post-mortem report is Ex. 16.

17. This witness was cross-examined and in cross-examination, he stated that the entry wound was on the abdomen and exit wound was on the back. The direction was upward to downward. The dead body was examined by him at 11:45 A.M. The dead body was identified by his brother and constable. The post-mortem was conducted within 40-60 minutes. He is working on the post of H.O.D., Forensic Medicine and Technology Department, J.R. Medical College, Gwalior from the month of September 2001 and he must have conducted 2-3 thousand post-mortem.

18. Thus, by referring to the post-mortem report, Ex. P.16, it is submitted by the Counsel for the appellant that since, the entry wound was on the abdomen and the exit wound was on the back, thus, it is clear that the deceased Ram Naresh had sustained injury from front, which is just contrary to the prosecution case, therefore the ocular evidence is liable to be disbelieved. It is submitted that according to the prosecution evidence, the deceased sustained gun shot injury while he was trying to climb on the roof of room constructed on the roof of the house, therefore, he should have suffered the gun shot from behind, but since, entry wound was found

on the abdomen of the deceased, therefore, the evidence that the deceased suffered gun shot injury while he was trying to climb on to the roof of room constructed on the roof of the house of Appellant is false.

19. Considered the submissions made by the Counsel of the appellant.

20. In M.L.C., Ex. D6, Dr. Anup Gupta (P.W. 10) has specifically mentioned that the loop of intestine is coming out of the abdomen. Similarly, in the post-mortem report, Ex. P.16, Dr. J.N. Soni (P.W. 11) has specifically found that the loop intestines was coming out from the abdominal wound on left side of umbilicus. It is not the findings of Dr. J.N. Soni (P.W.11) that the loop of intestine was protruding out from the back, although his finding in post-mortem report, Ex. P.16 is that the exit wound is on the back. It is a matter of common knowledge that the internal organs would come out of the exit wound only, due to the force of the bullet. If the entry wound was on the abdominal region, then the loop of intestine should have come out from the back and not from abdominal wound on left side of umbilicus i.e., so called entry wound. T**hus, it is clear that the M.L.C.,Ex. D.6 done by Dr. Anup Gupta (P.W. 10) according to which the entry wound was on the back and the exit wound was near the umbilicus was correct**. Even according to M.L.C., Ex. D.6, the loop of intestine was coming out of the exit wound i.e., near umbilicus.

21. Now the next question for consideration is that whether this anomaly created by Dr. J.N. Soni (P.W. 11) was a bonafide mistake or it was done deliberately in order to give undue advantage to the accused.

22. By giving wrong finding regarding entry and exit wound, Dr. J.N. Soni (P.W. 11) not only changed the scene of occurrence, but also changed the direction of gun shot injury. According to the prosecution story, when the deceased Ram Naresh was trying to climb on to the roof of room constructed on the first roof of house of Appellant, the Appellant Ram Khiladi had fired a gun shot while standing on the first roof of his house. Thus, the direction would be upward and not downward and the entry wound would be on the back. By changing the entry and exit wound, Dr. J.N. Soni (P.W.11) also changed the direction and if the post-mortem report, Ex. P.16 is accepted then it would mean, that some body standing at a higher place had caused injury to the deceased, whereas according to the prosecution story, the assailant was standing at a lower place. However, Dr. J.N. Soni (P.W. 11) forgot that if the wound near umbilicus was entry wound, then the loop of intestine cannot come out of the entry wound. Thus, it is clear that the post-mortem report, Ex. P.16 was incorrect one and in fact the deceased Ram Naresh had suffered injury on his back and the prosecution story finds corroboration from M.LC., Ex. D.6.

23. It is submitted that since, the post-mortem report, Ex. P.16 is a

prosecution document, and Dr. J.N. Soni (P.W.11) was not declared hostile, therefore, his evidence is binding on the prosecution.

24. Considered the submissions made by the Counsel for the Appellant.

25. 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.

26. 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.

27. Accordingly, it is held that the deceased Ram Naresh had sustained gun shot injury on his back which went through and through from the abdominal region of deceased near his umbilicus.

28. Thus, there is no contradiction in the ocular and medical evidence.

29. Now the next question for consideration is that whether the appellant is the perpetrator of offence or not?

Whether the roofs of the houses of Appellant and the Deceased are adjoining/connected to each other or are at a distance of 25 ft.s

30. It is submitted by the Counsel for the appellant that according to the spot map, Ex. P.3, the house of the deceased Ram Naresh has been shown to be adjoining to the house of the Appellant Ram Khiladi, but according to Dinesh Sharma (P.W.1) there is a gap of approximately 25 Ft.s between the house of the deceased and the Appellant, therefore, it is clear that there was no reason for the

deceased to rush to the roof of the house of the Appellant. If the deceased wanted to save his life, then he should have rushed towards the outside of the house of the Appellant.

31. Considered the submissions made by the Counsel for the Appellant.

32. The Appellant Ram Khiladi has taken the following stand in his statement under Section 313 of Cr.P.C. :

> हम धर पर नही थे हमारी अनुपस्थिती मे रामनरेश 10–5 गुण्डों को लेकर **अपने मकान जो हमारे मकान से बिलकुल पिछाडी लगा है से हमारी छत पर चढ आया** और आकर फायर किया जिससे धर की औरतो की जान जोखिम मे पड गई तब बाद पता चला के भगाने के लिये **किसी पडोसी ने फायर किया जो रामनरेश को लगा।**

33. Thus, from the defence taken by the Appellant Ram Khiladi, it is clear that he has admitted that the roof of the house of the Appellant is adjoining/connected to the roof of the house of the deceased and one can go to the roof of another house from roof of his house. Thus, the contention of the Counsel for the Appellant that there was a gap of approximately 25 ft.s between the houses of the appellant and the deceased is incorrect and hence rejected.

<u>Why the deceased went to the roof of the house of the Appellant and whether the deceased was found on the roof of the house of Appellant in an injured condition or not?</u>

34. Dinesh Sharma (P.W.1) has stated that the Appellant Ram Khiladi is known to him as he is also the resident of same village. The shop of the deceased Ram Naresh is situated in front of the house

of the Appellant. The appellant had brought a pouch from the shop of Ram Naresh. Thereafter, the daughter of the Appellant had stolen a ground gourd (Louki) from the field of this witness. Accordingly, the deceased went to the house of the Appellant for lodging his complaint. There hot talk took place and Asharam and Pankaj instigated to bring gun and to kill him. Accordingly, Ram Naresh ran away in order to save his life. He rushed to the roof their house. The appellant fired a gun shot and co-accused Sudhakar also fired a gun shot. Sudhakar was having the mouser gun of Keshav also known as Ramswaroop. The gun shot fired by Sudhakar had missed whereas the gun shot fired by the Appellant Ram Khiladi from his .12 gun hit on the back of the deceased as a result he fell down. Thereafter, he was taken to Morena hospital, where first aid was given by the Doctor and was referred to Gwalior. Ram Naresh died on the way to Gwalior and was declared dead in Hospital and the dead body was shifted to mortuary. Thereafter, this witness lodged FIR in Police Station Morena, Ex. P.1. Merg intimation is Ex. P.2 and Spot map is Ex. P.3. The Safina form is Ex. P.4 and *Lash Panchnama* is Ex. P.5. The dead body of Ram Naresh was received by this witness vide acknowledgment Ex. P. 6. This witness was cross-examined. In cross-examination, he stated that hot talk took place inside the house of the Appellant (Courtyard) and then the injured/deceased rushed to the roof of the house of the Appellant in order to save his life.

35. The Evidence of Pawan Sharma (P.W.2), Suresh (P.W.3)

Mahesh (P.W.4) is also to the same effect.

36. It was contended by the Counsel for the Appellant that if the deceased Ram Naresh was really interested in saving his life, then he should have rushed outside the house of Appellant and not to the roof of the house of Appellant.

37. The answer to the above mentioned submissions lie in the defence taken by the appellant himself. According to the appellant himself, the roof of his house and the house of deceased were connected with each other. Therefore, if the injured Ram Naresh, in order to save his life went to the roof of the house of the Appellant so that he can jump to his roof, then it cannot be said that the said act of the injured/deceased Ram Naresh was unnatural.

38. It is next contended by the Counsel for the appellant that the complainant Dinesh Sharma (P.W.1) in para 8 of his cross-examination has stated that one room is constructed on the first roof of the house of the Appellant and the deceased Ram Naresh had sustained gun shot injury on the roof of the room and not on the roof of the house. He further stated that there is no boundary/parapet wall around the roof of the room constructed on first roof of the house of the Appellant. However, there is nothing in the spot map, Ex. P.3 to show that there were any staircases to go to the roof of the room constructed on the first roof of the house of the Appellant.

39. Considered the submissions made by the Counsel for the Appellant.

40. D.S. Parihar (P.W. 8) is the investigating officer and he has specifically stated that he had seized blood stained cement and plain cement from the roof of the room which was constructed on the first roof of the house of the Appellant. This statement has not been challenged by the Appellant in cross-examination of this witness. Secondly, Pawan Sharma (P.W.2) has specifically stated that the injured Ram Naresh had rushed to the roof of the room by climbing over the stones which were kept over there and also by holding the *Chhajja* of the roof of the room. This witness has also stated that on the next day, the police had seized the blood stained and plain cement from the roof of the room vide seizure memo Ex. P.7. Pawan Sharma (P.W. 2) has also stated that the height of roof of the room is approximately 6-7 ft.s and he and the police had also gone to the roof of the room by climbing over the stones and holding the *Chhajja* of the room. (*Chhajja* is a part of the roof which hangs outside the walls of the room and any one catch hold of it).

41. Thus, it is clear that since, the height of the roof of the room was merely 6-7 ft.s and even the witnesses and the police went to the roof of the room by climbing over the stones and holding *chhajja* of the roof of the room, therefore, it is clear that it was not difficult to go to the roof of the room even without any staircases.

42. Thus, it is held that the deceased Ram Naresh sustained gun shot injury on the roof of the room which was constructed on the first roof/floor of the house of the Appellant.

How the injured Ram Naresh was rescued and whether Dinesh Sharma (P.W.1), Pawan Sharma (P.W.2), Suresh Sharma (P.W.3) and Mahesh (P.4) are reliable eye-witnesses.

43. It is next contended by the Counsel for the Appellant that according to the intimation given by Dr. Anup Gupta to the police, Ex. D.5, it is clear that the injured Ram Naresh was brought to the hospital by Vipin Sharma and not by Dinesh Sharma, or Pawan Sharma or Suresh Sharma or Mahesh. Thus, neither Dinesh Sharma (P.W.1) nor Pawan Sharma (P.W.2), Suresh Sharma (P.W.3) and Mahesh (P.4) are the eye-witnesses.

44. Mahesh (P.W. 4) has stated that Vipin Sharma is his nephew being the resident of same village. Vipin Sharma had met him in Morena Hospital. Thus, it is clear that if other villagers also went to hospital, then it cannot be said that the complainant Dinesh Sharma (P.W.1), Pawan Sharma (P.W.2), Suresh Sharma (P.W.3) or Mahesh (P.W.4) had not accompanied the injured or had not seen the incident.

45. All the eye-witnesses have stated that they rescued the injured from the roof of room constructed on the roof/first floor of the house of the Appellant and brought to his own house by crossing over the roofs and he was not brought through the main door of the house of the appellant. As already pointed out, the Appellant himself has admitted that the roof of the Appellant is connected and adjoining to the roof of the injured, therefore, the evidence of Dinesh Sharma (P.W.1), Pawan Sharma (P.W.2), Suresh Sharma (P.W. 3) and Mahesh

(P.W.4) to the effect that they brought down the injured from the roof of the room constructed on the roof of the house of the appellant and brought to his own house by crossing over the roof is reliable.

46. Further more, according to the prosecution, the incident took place at around 4:30 P.M. According to MLC, Ex. D.6, the injured Ram Naresh was medically examined at 5:05 P.M. and thereafter, he was referred to Gwalior. Morena is approximately 45 Km.s away from Gwalior, therefore, it appears that the witnesses might have reached Gwalior by 6-6:15 P.M. The injured must have been examined by the Doctors latest by 6:30 P.M. and thereafter, the dead body of the deceased was shifted to Mortuary. To complete the formalities, another 1 hour might have been taken and the FIR was lodged at Police Station Morena at 21:30 i.e., 9:30 P.M. Although the Merg No. 476/2008 which is an information given by Dr. J.P. Goyal to the police station Kampoo, Distt. Gwalior shows that an information was given that the deceased has been brought in a dead condition at 18:30, but the said document was not proved by the prosecution, although it was filed along with the charge sheet. Since, the merg no.476/2008 was not proved, therefore, the prosecution cannot take advantage of the same.

47. From Post-mortem report, Ex. P.16, it is clear that the clothings of the deceased were sealed, viscera was preserved for chemical examination, and was handed over to the Police Constable under sealed cover with sample of salt solution. Said articles were seized

vide seizure memo Ex. P.15 by R.P. Sharma. R.P. Sharma (P.W. 9) was posted in Police Station Kampoo Distt. Gwalior on the post of A.S.I. He has stated that on 10-9-2008 at 9 A.M., he received a merg intimation dated 11-9-2008. Accordingly, he issued safina form, Ex. P.4 in dead house and *Lash Panchnama* Ex. P.5 was prepared. A requisition, Ex. P.14 for post-mortem was given. After the post-mortem was done, the constable Angad Singh brought a sealed packet containing the clothings of the deceased, viscera, specimen seal, salt solution which were seized vide seizure memo Ex. P.15. On 11-9-2008, he handed over the dead body of the deceased to Dinesh Sharma, the brother of the deceased by receipt, Ex. P.6. From the Seizure memo Ex. P.15, it is clear that merg no. 476/2008 of Police Station Kampoo, Distt. Gwalior is mentioned.

48. Thus, it is clear that after the injured Ram Naresh was medically examined in Distt. Hospital, Morena at 5:05 P.M., the witnesses reached Hospital in Gwalior, where the injured Ram Naresh was declared dead. A merg intimation was given to Police Station Kampoo, Distt. Gwalior and the dead body was shifted to Mortuary. Since, the incident had taken place within the territorial jurisdiction of Police Station Civil Lines, Distt. Morena, therefore, the FIR was lodged in the said Police Station, although the FIR at serial no. 0 could also have been lodged in Police Station Kampoo, Distt. Gwalior, but merely because that was not done, it is not sufficient to hold that the FIR lodged in Police Station Civil Lines, Distt. Morena

was after thought or the complainant or the witnesses mentioned in the FIR were not the eye-witness.

49. Admittedly, the houses of the Appellant and the deceased are adjoining to each other with connecting roofs. The presence of Dinesh Sharma (P.W.1), Pawan Sharma (P.W.2), Suresh Sharma (P.W.3) on the spot has been explained. Dinesh Sharma (P.W.1) and Suresh Sharma (P.W.3) are real brothers of the deceased. Therefore, their presence in the house is natural. The injured was brought down from the roof of the room constructed on the roof of the house of Appellant and he was shifted to Hospital. Therefore, there is no reason to hold that Dinesh Sharma (P.W.1), Pawan Sharma (P.W.2) or Suresh Sharma (P.W.3) could not have witnessed the incident. Further Mahesh (P.W.4) has also stated that he had gone to the shop of the injured/deceased Ram Naresh and saw the incident. Since, the shop of the injured/deceased Ram Naresh is situated in front of the house of the Appellant, therefore, the incident could have been witnessed by Mahesh (P.W.4) also.

50. It is next contended by the Counsel for the Appellant that so far as Pawan Sharma (P.W.2) Mahesh (P.W.4) are concerned, they are chance witness, whereas Dinesh Sharma (P.W.1), and Suresh Sharma (P.W.3) are brothers of the deceased and are related witnesses, therefore, their evidence should not be relied.

51. Considered the submissions made by the Counsel for the Appellant.

52. It is well established principle of law that the evidence of a "related witness" cannot be discarded only on the ground of relationship. The Supreme Court in the case of **Rupinder Singh Sandhu v. State of Punjab**, reported in **(2018) 16 SCC 475** has held as under :

> 50. The fact that PWs 3 and 4 are related to the deceased Gurnam Singh is not in dispute. The existence of such relationship by itself does not render the evidence of PWs 3 and 4 untrustworthy. This Court has repeatedly held so and also held that the related witnesses are less likely to implicate innocent persons exonerating the real culprits.

53. The Supreme Court in the case of **Shamim Vs. State (NCT of Delhi)** reported in **(2018) 10 SCC 509** has held as under :

> 9. In a criminal trial, normally the evidence of the wife, husband, son or daughter of the deceased, is given great weightage on the principle that there is no reason for them not to speak the truth and shield the real culprit.............

54. The Supreme Court in the case of **Rizan v. State of Chhattisgarh**, reported in **(2003) 2 SCC 661** has held as under :

> **6.** We shall first deal with the contention regarding interestedness of the witnesses for furthering the prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
> **7**. In Dalip Singh v. State of Punjab it has been laid down as under: (AIR p. 366, para 26)
>
> > "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen

the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

8. The above decision has since been followed in Guli Chand v. State of Rajasthan in which Vadivelu Thevar v. State of Madras was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

"25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in — 'Rameshwar v. State of Rajasthan' (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

10. Again in Masalti v. State of U.P. this Court observed: (AIR pp. 209-10, para 14)

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. … The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hardand-

> fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."
>
> **11.** To the same effect is the decision in State of Punjab v. Jagir Singh and Lehna v. State of Haryana.

55. Why a "related witness" would spare the real culprit in order to falsely implicate some innocent person? There is a difference between "related witness" and "interested witness". "Interested witness" is a witness who is vitally interested in conviction of a person due to previous enmity. The "Interested witness" has been defined by the Supreme Court in the case of **Mohd. Rojali Ali v. State of Assam,** reported in **(2019) 19 SCC 567** as under :

> 13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki; Amit v. State of U.P.; and Gangabhavani v. Rayapati Venkat Reddy). Recently, this difference was reiterated in Ganapathi v. State of T.N., in the following terms, by referring to the three-Judge Bench decision in State of Rajasthan v. Kalki: (Ganapathi case, SCC p. 555, para 14)
>
> "14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."

> **14.** In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, wherein this Court observed: (AIR p. 366, para 26)
>
> > "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."
>
> 15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. State (UT of Pondicherry): (SCC p. 213, para 23)
>
> "23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

56. Thus, the evidence of Dinesh Sharma (P.W.1) and Suresh Sharma (P.W.3) cannot be rejected merely on the ground that they are the brothers of the deceased Ram Naresh.

57. So far as the evidence of Pawan Sharma (P.W.2) and Mahesh (P.W.4) is concerned, both the witnesses were named in the FIR, Ex. P.1. Pawan Sharma (P.W.2) has stated that he is a milk vendor and

had gone to supply milk to Keshav and Asharam. Thus, when this witness had gone to the house of the appellant for supplying the milk, then he cannot be said to be a chance witness. Further, this witness had claimed that he was supplying Milk to Keshav and Asharam (father of the appellant and co-accused who has expired), but in the cross-examination, the defence had put question to this witness regarding supply of Milk to Keshav and no question was put to this witness regarding supply of Milk to the father of the Appellant.

58. Similarly, Mahesh (P.W.4) has stated that he had gone to the shop of Ram Naresh. Since, the injured Ram Naresh was running a shop in front of the house of the Appellant, therefore, the presence of Mahesh (P.W.4) in the shop of the injured is also not unnatural.

59. The Supreme Court in the case of **State of U.P. Vs. Anil Singh** reported in **1988 Supp SCC 686** has held as under :

> 24. The reason given by the High Court for disbelieving the evidence of Chhotey Lal PW 2 is fanciful. PW 2 is a resident of the Village Astiya. The village is at a distance of two miles from Pukhrayan town. It will be seen from his evidence that he along with Baijnath and Manuwa Maharaj — all residents of the same village had gone to the town for their requirements. PW 2 wanted iron nails, Manuwa required vegetables and Baijnath had to purchase iron rods. After purchasing the respective goods, they proceeded towards their village. When they reached the tehsil, they came across 3-4-5 boys who told them that there was Bal Mela and cultural programme in the Normal School. It was natural for them to stay on to see the cultural programme. They came to their grain dealer. They kept their articles at his place and after some time they started towards the Normal School at about 7.30 or 7.45 p.m. When they were approaching the Khazanchi hotel, they saw the accused assaulting KK. The evidence of PW 2 receives corroboration from PW 1. He figures as an eyewitness in

the FIR. He cannot, therefore, be categorised as a chance witness.

(Underline supplied)

60. The Supreme Court in the case of **Dargahi v. State of U.P.,** reported in **(1974) 3 SCC 302** has held as under :

> 12. The prosecution has examined four witnesses of the occurrence and they have all supported the prosecution case. Out of the four eyewitnesses, Harihar Nath (PW 1) is the brother of Lachhman Prasad deceased. Harihar Nath admits enmity with the accused and that fact would make the Court scrutinise his evidence more closely. If that evidence can stand that test, it can be acted upon in spite of the inimical relations of Harihar Nath with the accused. Gur Saran PW and Behari PW, the other two eyewitnesses, have no enmity with the accused and we find no particular reason as to why they should depose falsely against the accused. The submission made on behalf of the appellants that Gur Saran and Behari are chance witnesses and that the Court should not therefore place much reliance upon their testimony, in our opinion, is not well founded. The occurrence took place on the road going to Fatehpur. In the very nature of things the occurrence could have been witnessed by the persons going on that road. In a sense any one going on the road in question at the time of the occurrence would be a chance witness but that fact by itself would not be enough to discredit his testimony.
>
> (Underline supplied)

61. The Supreme Court in the case of **Ramvir v. State of U.P.,** reported in **(2009) 15 SCC 254** has held as under :

> **14.** The eyewitnesses examined in the trial cannot be said to be chance witnesses as they were the residents of the same village and at about 6.15 p.m. these eyewitnesses were moving around, some were going to their agricultural field while some were coming from their respective agricultural fields. The incident had happened near a sugarcane crop which is near the agricultural field. The time 6.15 p.m., being broad daylight, the presence of the eyewitnesses at the place of occurrence is quite natural. The witnesses being the residents of the locality, their presence at the place of occurrence could not be considered unnatural. They had no cause to give false evidence. Accordingly, their testimonies cannot be discarded.

62. The Supreme Court in the case of **Harbeer Singh v. Sheeshpal,** reported in **(2016) 16 SCC 418** has held as under :

> **23.** The defining attributes of a "chance witness" were explained by Mahajan, J., in *Puran* v. *State of Punjab*. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

63. The Supreme Court in the case of **Jarnail Singh Vs. State of Punjab** reported in **(2009) 9 SCC 719** has held as under :

> **21.** In *Sachchey Lal Tiwari* v. *State of U.P.* this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and a passerby had deposed that he had witnessed the incident, observed as under:
>
> > If the offence is committed in a street only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there.
>
> The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.
>
> **22.** The evidence of a chance witness requires a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (*Satbir* v. *Surat Singh*, *Harjinder Singh* v. *State of Punjab*, *Acharaparambath Pradeepan* v. *State of Kerala* and *Sarvesh Narain Shukla* v. *Daroga Singh*). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (vide *Shankarlal* v. *State of Rajasthan*).
>
> **23.** Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident (vide *Thangaiya* v. *State of T.N.*).

64. The Supreme Court in the case of **Baby v. Inspector of Police,**

reported in **(2016) 13 SCC 333** has held as under :

> 30......The Court further explained that the expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

65. The Supreme Court in the case of **Vijendra Singh Vs. State of U.P.** reported in **(2017) 11 SCC 129** has held as under :

> **32.** Mr Giri, learned Senior Counsel for the appellant has also impressed upon us to discard the testimony of PW 3, Tedha, on the ground that he is a chance witness. According to him, his presence at the spot is doubtful and his evidence is not beyond suspicion. Commenting on the argument of chance witness, a two-Judge Bench in *Rana Partap* v. *State of Haryana* was compelled to observe: (SCC p. 329, para 3)
>
> > "*3*. … We do not understand the expression "chance witnesses". Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed on a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence."
>
> **33.** Tested on the anvil of the aforesaid observations, there is no material on record to come to the conclusion that PW 3 could not have accompanied PW 2 while he was going to the shed near the tubewell. What has been elicited in the cross-examination is that he was not going daily to the

> tubewell. We cannot be oblivious of the rural milieu. No adverse inference can be drawn that he was not going daily and his testimony that he had accompanied PW 2 on the fateful day should be brushed aside. We are convinced that his evidence is neither doubtful nor create any suspicion in the mind.
>
> **34.** Thus, the real test is whether the testimony of PWs 1 to 3 are intrinsically reliable or not. We have already scrutinised the same and we have no hesitation in holding that they satisfy the test of careful scrutiny and cautious approach. They can be relied upon.

66. Thus, Pawan Sharma (P.W.2) and Mahesh (P.W.4) have satisfactorily explained their presence on the spot. Their names as eye-witnesses have also been mentioned in the FIR. There is no delay in recording of their police statement. The incident had taken place on 10-9-2008 and the police statement of Pawan Sharma was recorded on 11-9-2008. Their evidence is corroborated by other eye-witnesses as well as medical evidence. The appellant could not point out any enmity with Pawan Sharma (P.W.2) and Mahesh (P.W.4) to indicate that they were interested witnesses. Thus, it is held that the presence of Pawan Sharma (P.W.2) and Mahesh (P.W.4) on the spot at the time of incident was natural and they are independent witnesses and reliable witnesses.

Non-recovery of Weapon of offence

67. It is next contended by the Counsel for the appellant that the prosecution has failed to prove the seizure of weapon of offence, therefore, non-recovery of weapon of offence would give a deep dent to the prosecution story.

68. Considered the submissions made by the Counsel for the

Appellant.

69. One .12 bore double barrel gun was seized from the possession of the Appellant Ram Khiladi. An arm license which is also in the name of the Appellant Ram Khiladi was seized and one fired cartridge of .12 bore gun was also seized from the appellant Ram Khiladi, vide seizure memo Ex. P.10. It is not out of place to mention here that the incident took place on 10-9-2008, whereas the appellant Ram Khiladi was arrested on 17-10-2008 vide arrest memo Ex. P.8. Dayashankar (P.W.5) and Murarilal (P.W.7) are the witnesses of seizure.

70. Dayashankar (P.W.5) has stated that the memorandum of the Appellant, Ex. P.9 was recorded and on production of .12 bore gun by the appellant Ram Khiladi, the same was seized by the police vide seizure memo Ex. P.10. One empty cartridge was also seized.

71. Similarly, Murarilal (P.W.7) is also a seizure witness. He has also stated that the Appellant Ram Khiladi was arrested vide arrest memo Ex. P.8 and his memorandum is Ex. P.9 and on his disclosure, a gun was seized vide seizure memo Ex. P.10. One empty cartridge was also seized. Thus, it is clear that the prosecution has proved beyond reasonable doubt that a .12 bore gun along with one empty cartridge was seized from the possession of the appellant.

72. The seized articles were sent to State Forensic Science Laboratory, Sagar by memo dated 22-12-2008, Ex. P.13 and the FSL report dated 13-3-2009 is Ex. P.17. As per FSL report, the .12 bore

gun was found in working condition and evidence of recent firing from both the barrels were found. Since, the percussion cap of the seized fired cartridge was found partially punctured, therefore, it could not be matched with the firing marks of the seized .12 bore gun. Thus, it is clear that some body (most probably the appellant himself) must have punctured the percussion cap of the fired cartridge so that the firing marks on the seized fired cartridge may not be compared with the .12 bore gun seized from the possession of the appellant. But merely because some body might have deliberately punctured the percussion cap, therefore, no adverse inference can be drawn against the appellant. Thus, in absence of any comparison of firing marks, this Court is of the considered opinion, that the prosecution has failed to prove that the .12 bore gun seized from the possession of the appellant was used in the commission of offence.

73. The next question for consideration is that whether the aforesaid aspect would give a deep dent to the prosecution case or not?

74. Merely because the firing marks on the percussion cap of the fired cartridge could not be compared due to partial puncture of percussion cap, it would not mean that the direct ocular evidence would render worthless.

75. The Supreme Court in the case of **Gulab Vs. State of U.P.** by judgment dated **9-12-2021** passed in **Cr.A. No. 81/2021** has held as under :

18 However, a three-judge Bench of this Court, in **Gurucharan Singh v. State of Punjab** , has analysed the precedents of this Court and held that examination of a ballistic expert is not an inflexible rule in every case involving use of a lethal weapon. 5 (1963) 3 SCR 585 PART C 18 Speaking through Justice P B Gajendragadkar (as the learned Chief Justice then was), this Court held:

> "41. It has, however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in support of this proposition, reliance has been placed on the decision of this Court in Mohinder Singh v. State [(1950) SCR 821] . In that case, this Court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. **It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or**

where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case.
Therefore, we do not think that Mr Purushottam is right in contending as a general proposition that in every case where a firearm is alleged to have been used by an accused person, in addition to the direct evidence, prosecution must lead the evidence of a ballistic expert, however good the direct evidence may be and though on the record there may be no reason to doubt the said direct evidence."

(emphasis supplied)

19 Similarly, a two-judge Bench of this Court in **State of Punjab v. Jugraj Singh** had noticed that surrounding circumstances in the prosecution case are sufficient to prove a death caused by a lethal weapon, without a ballistic examination of the recovered weapon. The Court, speaking through Justice R P Sethi, had noted:

"18. In the instant case the investigating officer has categorically stated that guns seized were not in a working condition and he, in his discretion, found that no purpose would be served by sending the same to the ballistic expert for his opinion. No further question was put to the investigating officer in cross-examination to find out whether despite the guns being defective the fire pin was in order or not. In the presence of convincing evidence of two eyewitnesses and other attending circumstances we do not find that the non-examination of the expert in this case has, in any way, affected the creditworthiness of the version put forth by the eyewitnesses."

76. The Supreme Court in the case of **Rakesh Vs. State of U.P.**, reported in **(2021) 3 SCC (Cri) 149** has held as under :

12. Now so far as the submission on behalf of the accused that as per the ballistic report the bullet found does not match with the firearm/gun recovered and therefore the use of gun as alleged is doubtful and therefore benefit of doubt must be given to the accused is concerned, the aforesaid

> cannot be accepted. At the most, it can be said that the gun recovered by the police from the accused may not have been used for killing and therefore the recovery of the actual weapon used for killing can be ignored and it is to be treated as if there is no recovery at all.......

77. Thus, the credible evidence of Dinesh Sharma (P.W.1), Pawan Sharma (P.W.2), Suresh Sharma (P.W.3) and Mahesh (P.W.4) cannot be discarded merely on the ground that the weapon which was used for commission of offence could not be recovered.

78. Further more, the appellant Ram Khiladi himself had admitted that the injured/deceased Ram Naresh had sustained gun shot injury on the roof of the house of the Appellant himself.

79. If the defence taken by the appellant Ram Khiladi is considered, then it is clear that if any incident had taken place on the roof of his own house, then the appellant or other co-accused persons should have immediately lodged a report. There is nothing on record to suggest that the Appellant or any other co-accused had ever informed the police that the injured/deceased Ram Naresh has suffered gun shot injury due to firing by some unknown neighbor. Thus, the defence that some unknown person had caused gun shot injury to the injured/deceased Ram Naresh cannot be said to be plausible and hence, the defence of "causing of injury by any unknown person" is hereby rejected.

80. It is next contended by the Counsel for the Appellant, that since, the witnesses have not been found reliable in respect of co-accused Pankaj, therefore, it is clear that the witnesses are not reliable

and therefore, they should be disbelieved.

81. Considered the submissions made by the Counsel for the Appellant.

82. The Latin Maxim *Falsus in uno falsus in omnibus* has no application in India. The Supreme Court in the case of **Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble,** reported in **(2003) 7 SCC 749** has held as under :

> **25.** It is the duty of the court to separate the grain from the chaff. Falsity of a particular material witness or a material particular would not ruin it from the beginning to end. The maxim "*falsus in uno falsus in omnibus*" has no application in India and the witnesses cannot be branded as liars. The maxim "*falsus in uno falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali* v. *State of U.P.*)
> **26.** The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because the witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate an exaggeration, embroideries or embellishment. (See *Sohrab* v. *State of M.P.* and *Ugar Ahir* v. *State of Bihar.*) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain

from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel* v. *State of M.P.* and *Balaka Singh* v. *State of Punjab*.) As observed by this Court in *State of Rajasthan* v. *Kalki* normal discrepancies in the evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi* v. *State of Bihar*, *Gangadhar Behera* v. *State of Orissa* and *Rizan* v. *State of Chhattisgarh*.

83. The Supreme Court in the case of **Kameshwar Singh v. State of Bihar,** reported in **(2018) 6 SCC 433** has held as under :

22. The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) is not being used in India. Virtually, it is not applicable to the Indian scenario. Hence, the said maxim is treated as neither a sound rule of law nor a rule of practice in India. Hardly, one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is the duty of the court to scrutinise the evidence carefully and, in terms of felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. Efforts should be made to find the truth. This is the very object for which courts are created. To search it out, the court has to disperse the suspicious cloud and dust out the smear of dust, as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So, it is a solemn duty of the courts,

> not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the court, within permissible limits to find out the truth. It means, on one hand that no innocent man should be punished, but on the other hand to see no person committing an offence should go scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. The evidence is to be considered from the point of view of trustworthiness and once the same stands satisfied, it ought to inspire confidence in the mind of the court to accept the evidence.

84. The Supreme Court in the case of **Mahendran v. State of T.N.,** reported in **(2019) 5 SCC 67** has held as under :

> 38....It is well settled that the maxim "*falsus in uno, falsus in omnibus*" has no application in India only for the reason that some part of the statement of the witness has not been accepted by the trial court or by the High Court. Such is the view taken by this Court in *Gangadhar Behera case*, wherein the Court held as under: (SCC pp. 392-93, para 15)
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> > "*15.* To the same effect is the decision in *State of Punjab* v. *Jagir Singh* and *Lehna* v. *State of Haryana*. Stress was laid by the appellant-accused on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of "*falsus in uno, falsus in omnibus*" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff 80 can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim "*falsus in uno, falsus in omnibus*" has no application in India and the witnesses cannot be branded as liars. The maxim "*falsus in uno, falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution.

All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See *Nisar Ali* v. *State of U.P.*) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See *Gurcharan Singh* v. *State of Punjab*.) The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab* v. *State of M.P.* and *Ugar Ahir* v. *State of Bihar*.) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel* v. *State of M.P.* and *Balaka Singh* v. *State of Punjab*.) As observed by this Court in *State of Rajasthan* v. *Kalki* normal discrepancies in evidence are those which are due to

normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in *Krishna Mochi* v. *State of Bihar*. Accusations have been clearly established against the appellant-accused in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned.

(emphasis in original)

39. Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed.

85. No other argument is advanced by the Counsel for the Appellant.

86. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has succeeded in establishing the guilt of the appellant Ram Khiladi. Accordingly, his conviction under Section 302 of IPC is **upheld.**

87. So far as the question of sentence is concerned, the minimum sentence is Life Imprisonment, therefore, the sentence of Life Imprisonment awarded by the Trial Court doesnot call for any interference. However, it was found that the Trial Court has not awarded any default imprisonment for non-payment of fine amount. Therefore, it is directed that in case of default of payment of fine amount of Rs. 1000/- (awarded by the Trial Court), the appellant shall

undergo the R.I. of 6 months.

88. With aforesaid observations, the judgment and sentence dated 30-9-2010 passed by 2nd Additional Sessions Judge, Morena in S.T. No.144 of 2009 is hereby **Affirmed.**

89. The appellant is in jail. He shall undergo the remaining jail sentence.

90. A copy of this judgment be immediately supplied to the Appellant, free of cost.

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

92. The appeal fails and is hereby **Dismissed.**

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge