**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

&

HON'BLE SHRI JUSTICE RAJEEV KUMAR SHRIVASTAVA

ON THE 5th OF AUGUST, 2022

CRIMINAL APPEAL No. 379 of 2012

Between:-

1. **SURESH CHANDRA PATHAK S/O PRABHUDAYAL PATHAK, AGED 61 YEARS (DEAD).**
2. **BANTI ALIAS NOGENDRA S/O SURESH CHANDRA PATHAK, AGED 32 YEARS, RESIDENTS OF JWALA KA PURA, LUXMI BAI COLONY, LASHKAR, GWALIOR AT PRESENT C.P. COLONY, MORAR, GWALIOR MADHYA PRADESH.**
3. **KHEMRAJ ALIAS KHEMU PATHAK S/O SURESH CHANDRA PATHAK, AGED 28 YEARS, RESIDENT OF JWALA KA PURA, LUXMIBAI COLONY, GWALIOR MADHYA PRADESH.**

…....APPELLANTS

(BY SHRI R.K. SHARMA - SENIOR ADVOCATE WITH SHRI SANJAY GUPTA, SHRI M.K. CHOUDHARY AND MS. BHAVYA SHARMA - ADVOCATES)

AND

THE STATE OF MADHYA PRADESH, THROUGH POLICE STATION PADAV, DISTRICT GWALIOR

MADHYA PRADESH.

.....RESPONDENT

(BY SHRI A.K. NIRANKARI– ADVOCATE)

(SHRI SUSHIL GOSWAMI – ADVOCATE FOR THE COMPLAINANT)

CRIMINAL APPEAL No. 401 of 2012

Between:-

PAWAN PATHAK, S/O SURESH CHANDRA PATHAK, AGED 31 YEARS, RESIDENT OF JWALA KA PURA, LUXMIBAI COLONY, GWALIOR MADHYA PRADESH.

….....APPELLANT

(BY SHRI R.K. SHARMA - SENIOR ADVOCATE WITH SHRI SANJAY GUPTA, SHRI M.K. CHOUDHARY AND MS. BHAVYA SHARMA - ADVOCATES)

AND

THE STATE OF MADHYA PRADESH, THROUGH POLICE STATION PADAV, DISTRICT GWALIOR MADHYA PRADESH.

.....RESPONDENT

(BY SHRI A.K. NIRANKARI– ADVOCATE)

(SHRI SUSHIL GOSWAMI – ADVOCATE FOR THE COMPLAINANT)

Reserved on : 28th of July, 2022
Delivered on : 5th of August, 2022

This criminal appeal coming on for final hearing this day, ***Hon'ble Shri Justice G.S. Ahluwalia,*** *passed the following:*

JUDGEMENT

1. By this common judgment, Cr.A. Nos.379 of 2012 and 401 of 2012 shall be decided.

2. Both the Criminal Appeals have been filed against the Judgment and Sentence dated 3-5-2012 passed by 2nd Additional Sessions Judge, Gwalior in S.T. No.340/2011 by which the Appellants have been convicted and sentenced for the following offences :

Appellant	Conviction	Sentence
Suresh Chandra Pathak	302/34 of IPC,	Life Imprisonment and fine of Rs.10,000/- in default 6 months R.I.
Banti@ Nogendra	302/34 of IPC	Life Imprisonment and fine of Rs.10,000/- in default 6 months R.I.
Khemraj @ Khemu	302/34 of IPC,	Life Imprisonment and fine of Rs.10,000/- in default 6 months R.I.
	30 of Arms Act	6 months R.I. and fine of Rs.2,000/- in default 1 month R.I.
	307 of IPC	4 years R.I. and fine of Rs.5,000/- in default 6 months R.I.
Pawan Pathak	302 of IPC	Life Imprisonment and fine of Rs.10,000/- in default 6 months R.I.
	30 of Arms Act	6 months R.I. and fine of Rs.2,000/- in default 1 month R.I.
	201 of IPC	2 years R.I. and fine of Rs.3,000/- in default 4 months R.I.

All sentences shall run concurrently.

3. It is not out of place to mention here that Appellant Suresh Chandra Pathak has died during the pendency of the appeal, therefore, by order dated 20th-July-2022, Appeal filed by Suresh Chandra Pathak has been **dismissed as abated**.

4. The necessary facts for disposal of present appeal in short are that on 16-4-2011, at about 14:15, the complainant Mukesh Chandra Pathak lodged an FIR, alleging that under the orders of the Civil Court, demarcation proceedings were being carried out by the Court Commissioner. Some excessive part of property was found in possession of Suresh Chandra Pathak and therefore, he got annoyed and called his son Pawan and Khemraj by his son Banti. Pawan came on the spot along with licensed mouzer of Suresh Chandra Pathak and Khemraj came along with .12 bore *Katta*. Suresh Chandra exhorted to kill and accordingly, Pawan fired a gunshot causing injury on the chest of father of complainant, as a result, he fell down. Another gunshot was fired, but it missed. Khemu also fired two gunshots. Since the complainant bent down, therefore, he narrowly escaped. Rakesh and Shailesh Sharma were also with him, who have seen the incident, whereas the complainant ran towards the back side in order to save his life. Rakesh and Brijmohan took his father to Sahara Hospital, but his father has expired on the way and he has been declared dead. He has come to police station after sending the dead body to mortuary for Post-mortem.

5. On this report, the police registered the offence. The post-mortem of the dead body was got done. The Appellants were arrested. Both the firearms were seized. Spot map was prepared. The statements of

witnesses were recorded. Police after completing the investigation, filed charge sheet for offence under Sections 302, 307, 34, 201 of IPC and under Section 30 of Arms Act.

6. The Trial Court framed charge under Section 302/34 of IPC against Banti @ Nogendra, under Section 302/34, 307 of IPC and under Section 30 of Arms Act against Khemraj @ Khemu, and under Sections 302, 201 of IPC and under Section 30 of Arms Act against Pawan Pathak.

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

8. The prosecution examined Mukesh Pathak (P.W.1), Shailesh Sharma (P.W.2), Rakesh Pathak (P.W.3), Rishabh Pathak (P.W.4), Dharamvir Singh (P.W.5), Megh Singh Yadav (P.W.6), Surendra Singh (P.W.7), Anand Kumar Yadav (P.W.8), Sughar Singh (P.W.9), Ratiram Singh Chokoriya (P.W.10), Dashrath Singh (P.W.11), Hariom Sharma (P.W.12), P.S.Tomar (P.W.13) and Dr. Heeralal Manjhi (P.W.14).

9. The Appellants did not examine any witness in their defence.

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

11. Challenging the conviction and sentence passed by the Court below, it is submitted by the counsel for the appellants that there is nothing on record to suggest that Appellant No.2 Banti @ Nogendra was sharing any common object. As per FIR, he was merely asked to call Pawan and Khemraj. If Pawan and Khemraj came along with firearms, then the Appellant No.2, cannot be held vicariously liable for the same. Rishabh (P.W.4) is not named in the FIR. All the witnesses are closely related to each other or are the employees/friends of Mukesh Chandra Pathak (P.W.1). FSL report does not take the prosecution case any

further. Copy of FIR was sent on 18-4-2011, which indicates that FIR is an ante-dated and ante-timed document. There are major omissions and contradictions in the evidence of the witnesses.

12. *Per contra*, the Counsel for the State has supported the prosecution case and also supported the findings recorded by the Trial Court.

13. Heard the learned Counsel for the Parties.

14. Before adverting to the facts of the case, this Court would like to consider as to whether the deceased Ramesh Chandra Pathak died a homicidal death or not?

15. Dr. Heeralal Manjhi (P.W.14) had conducted post-mortem of dead body of Ramesh Chandra Pathak and found following injuries on his body :

Description of antemortem injury

(i) **Firearm entry wound** situated anteriorly over chest below mid of left clavicle rounded in shape 1.75 cm in diameter. 146 cm above left heal anteriorly after damaging second, third and fourth ribs and left lung, left scapula. **Exited out from exit wound** vertically oval in shape 3.5 x 1.5 cm in size posteriory 140 cm above left heal 6 cm medial to lateral border of left scapula.

(ii) Abrasion present on 16 cm below the right knee reddish brown in colour and .5 x .5 in shape.

Death was due to shock and hemorrhage as a result of injury to chest. Injury has been caused by firearm from distance shot.

Homicidal in nature.

Duration of death within 24 hours since P.M. Examination.

The Post-mortem report is ex. P.18.

16. This witness was cross-examined. In cross-examination, he stated that crime number and merg number were not mentioned on the application. He stated that he cannot say that injury was caused by which weapon and clarified that only a ballistic expert can explain it. This witness was not in a position to say about the angle of injury. The gunshot was fired from a distance of more than 3 fts. The post-mortem report was sent on 16-4-2011 itself along with articles which were sealed. He denied that the post-mortem report and the sealed articles were sent on next day. He admitted that no firearm was sent to this witness. The injury no.2 could have been caused due to fall after sustaining gunshot injury. The injuries were caused within 24 hours of Post-mortem examination.

17. Thus, it is clear that the death of Ramesh Chandra Pathak was homicidal in nature.

18. Now the next question for consideration is that whether the Appellants are the author of the offence or not?

19. Mukesh Pathak (P.W.1), Shailesh Sharma (P.W.2), Rakesh Pathak (P.W.3), Rishabh Pathak (P.W.4) are the eye-witnesses of the incident.

20. Mukesh Pathak (P.W.1) has stated that the Appellants are known to him. The incident took place on 16-4-2011 at about 1:30 P.M. One civil suit was pending between Suresh Chandra Pathak (Dead Appellant) and Ramesh Chandra Pathak (Deceased). Therefore, under the orders of the Civil Court, Commission proceedings were to take place. Accordingly, Court Commissioner Anand Yadav had come to the disputed place. Suresh Chandra, his son Banti and Khemu were present along with their

Advocate Bharat Agrawal, whereas this witness, Deceased Ramesh Chandra and Manish Sharma, Advocate were present. Rakesh, Rishabh and Shailesh Sharma were also present on the spot. The Commissioner started his proceedings. Initially the Commission proceedings were started from the house of Suresh Chandra. First of all, ground floor, first floor and thereafter, roof of the house of Suresh Chandra was inspected. At the time of spot inspection, Appellant Khemu, Banti, Suresh Chandra, Rishabh (P.W.4), this witness, Shailesh Sharma (P.W.2) and other Advocates were present. Some portion of the house of Suresh Chandra was found to be in excess, as a result, the Appellants started getting aggressive. The copy of the order dated 5-4-2011 issued by the Civil Court is Ex. P.1. Thereafter, the Commission proceedings started on the land owned by Ramesh Chandra. At that time, Suresh, Banti and Khemu started abusing and went towards their house. Appellant Banti pushed his father Ramesh Chandra. Suresh, Banti and Khemu said that Khemu and Pawan be called and guns be brought. Pawan and Khemu were called by Suresh along with weapons. Pawan was having licensed mouzer gun of Suresh, whereas Khemraj came along with 12 bore *Adhiya.* At that time, Suresh and Banti instigated them to kill. Suresh pointed towards Ramesh Chandra and accordingly, Pawan and Khemraj fired at them. Pawan fired from mouzer gun. First gunshot hit on the chest of his father. Blood started oozing out and he fell down. Second gunshot was fired by Pawan, which hit the wall and damaged the pipe. When he tried to save his father, Khemraj fired at him twice, but he escaped unhurt. He moved backward to save himself. Thereafter, the Appellants ran away along with their weapons. The incident was witnessed by this witness, Rakesh,

Rishabh and Shailesh. Thereafter, his uncle Brijmohan also came on the spot after hearing the gunshot noise. His father was taken to the hospital by his brother Rakesh and uncle Brijmohan. This witness also followed them. His father was declared dead. Thereafter, he came to Padav police station and lodged the report. Merg intimation is Ex. P.2. The FIR is Ex. P.3. All the four Appellants had fired with an intention to kill them and in fact killed his father. Gunshots were also fired at him with an intention to kill him, but fortunately he survived. On the instigation by Suresh and Banti that the complainant party is to be killed, Pawan and Khemraj had fired gunshots. The spot map, Ex. P.4 was prepared by the police. The Appellants are politically influential persons and number of criminal cases are pending against them and in some of the cases, they have been convicted. After the incident, they are pressurizing him to enter into compromise. Since, an application under Section 231(2) of Cr.P.C. was filed by Appellant Pawan Pathak, therefore, the cross-examination was deferred.

21. In cross-examination, this witness admitted that the incident took place in Jwala Ka Pura Colony which is 1000 ft.s away from Padav Police Station. The colony Jwala Ka Pura was named after the name of his great grandfather. His grandfather Prabhudayal were two brothers. Prabhudayal had five sons, namely, Ramesh Chandra (Deceased), Suresh Chandra (Dead Appellant), Prakash, Mahesh and Brijmohan. Thereafter, he claimed that Prakash is not his uncle, but the name of his uncle is Omprakash. He admitted that Ramesh Chandra has three sons namely, this witness, Rakesh and Vinkesh. He admitted that he and Rakesh are witness. He further admitted that Rishabh (P.W.4) is his son. He admitted

that suit filed by Suresh Chandra was decreed. He also clarified that subsequently, the judgment and decree passed by Trial Court was set aside by the Appellate Court and the matter was remanded back. This witness was also asked about other civil litigations which were instituted by his father against Suresh Chandra. A question was put to this witness that on 6-11-1992, demarcation was done, in which his uncle Mahesh Chandra Pathak had died. However, this witness refused to answer this question by claiming that it is an irrelevant question. Thereafter, he admitted that for the murder of his uncle Mahesh Pathak, report was lodged by his father Ramesh Chandra (Deceased), against Advocate Subhash Chandra Jain, Jagdish Gautam, Pramod Gautam, Pushpendra Singh, Hanumant Singh, Rahul Gautam and others and were convicted. He further claimed that his father Ramesh Chandra, this witness, his brother Rakesh and uncle Ramswaroop were the witnesses. He admitted that Hanumant Singh, Subhash Chandra Jain, Pushpendra were acquitted, but claimed on his own that Jagdish Gautam, Pramod Gautam and Devilal were convicted and Rahul Gautam was convicted by JJB. He admitted that in appeal, Devilal and Jagdish Gautam were held guilty for offence under Section 323 of IPC, whereas Pramod Gautam was sentenced for the period undergone. However, he claimed that his father Ramesh Chandra and the State have filed SLP which is pending before Supreme Court. He denied for want of knowledge that all the accused are on bail. He further claimed that all the accused persons have shifted from their residence. He denied that prior to the date of incident, Devilal, Jagdish Gautam and Pramod Gautam were residing in Jwala Ka Pura, but admitted that Pramod Gautam and Jagdish Gautam were

residing in Jwala Ka Pura. He denied for want of knowledge that 6 criminal cases are pending against him, but claimed that false FIRs were lodged against him. A question was put to him that Crime No.398/91 for offence under Section 324 of IPC, Crime No. 419/92 for offence under Section 324 of IPC, Crime No.205/2007 for offence under Sections 341, 294, 323, 560 of IPC, Crime No.298/2005 for offence under Sections 341, 294, 323, 506/34 of IPC, Crime No.187/2001 for offence under Sections 307/336 of IPC and Crime No.341/2008 for offence under Section 336 of IPC were registered and in reply to this question he stated that since, he had applied for arms license therefore, in connivance with the Appellants, false information were given. He also claimed that the Appellants are involved in criminal activities, therefore, they have good understanding with police. He further stated that Appellants are engaged in the offence of selling *Doda Chura*, illegal liquor, gambling, cyber crime and also run a hotel with the help of police. He also claimed that he had told the police that Rishabh (P.W.4) was also present on the spot, but if that fact is not mentioned in Ex. P.2 and P.3, then he cannot explain the same. Court Commissioner had remained on the spot till 1:15 to 1:30 P.M. He claimed that he had informed the police that at the time of spot inspection, Khem, Banti and Manish were present but could not explain as to why this fact is not mentioned in FIR, Ex. P.3, Merg intimation, Ex. P.2 and Police Statement, Ex. D.1. He admitted that in FIR, Ex. P.3 and Police Statement, Ex. D.1, it is mentioned that only Appellant Suresh Chandra had got annoyed and it is not mentioned that others Appellants had also got annoyed/aggressive. He also could not explain as to why the allegation that appellants started hurling abuses when the commission

proceedings in respect of land owned by his father began is not mentioned in FIR, Ex. P.3, Merg Intimation, Ex. P.4 and Police Statement, Ex. D.1. He also could not explain as to why the allegation that while abusing, the Appellants went towards their house and Banti pushed his father is not mentioned in his FIR, Ex. P.3, Merg Intimation, Ex. P.2 and his police statement, Ex. D.1. He also could not explain as to why the allegation that Suresh, Banti and Khemu had said that Khemu and Pawan be called from house and guns be brought is not mentioned in FIR, Ex. P.3, merg intimation, Ex. P.2 and Police Statement, Ex. D.1. He also could not explain as to why the allegation that on the instigation by Suresh, Pawan and Khemu were called along with weapons, is not mentioned in FIR, Ex. P.3, merg intimation, Ex. P.2 and Police Statement, Ex. D.1. He also could not explain as to why the allegation that Khemraj came along with *Adhiya* is not mentioned in FIR, Ex. P.3. He also could not explain as to why the allegation that Banti had instigated to kill is not mentioned in FIR, Ex. P.3, merg intimation, Ex. P.2 and Police Statement, Ex. D.1. He also could not explain as to why the allegation that at the instigation of Suresh and Banti and after Suresh pointed towards the complainant party, gunshots were fired by Pawan and Khemraj is not mentioned in FIR, Ex. P.3, merg intimation, Ex. P.2 and Police Statement, Ex. D.1. He stated that two gunshots were fired by Pawan. First gunshot hit on the chest of his father and second gunshot hit the pipe. He also could not explain as to why the allegation that Khemraj had fired two gunshots from 12 bore gun is not mentioned in FIR, Ex. P.3, merg intimation, Ex. P.2 and Police Statement, Ex. D.1. A question was put to him that at the time of preparation of spot map, whether he

had pointed out the place from where Khemraj had fired a gunshot, **then it was replied by him that he had pointed the place, which is mentioned as "2" in the spot map, Ex. P.4. He further clarified that the Appellant Pawan and Khemraj had fired from the place shown as "2" in the spot map, as they were standing side by side. He also admitted that in the spot map, Ex. P.4, the place where this witness was standing is not shown.** He also admitted that the place from where Rakesh (P.W.3), Rishabh (P.W.4) and Shailesh (P.W.2) had witnessed the incident is also not mentioned in spot map, Ex. P.4. He denied that at the time of incident, the Appellant Khemraj was not present on the place. He denied that FIR was not lodged on the very same day, and it was lodged on the next day. He also admitted that dispute arose at the time of inspection of roof of the house of Suresh Chandra (Dead Appellant). Suresh had called Pawan and Khemraj by his son Banti. He claimed that when hot talk took place, no other resident of the locality was present except the complainant party and the accused party. He claimed that at the time, when his father sustained gunshot injury, except the Appellants and complainant party, nobody else was present on the spot. He admitted that after his father was taken to Sahara Hospital, he was declared dead and accordingly, he went to the police station and did not inform the Doctor. He denied that the Appellants have been falsely implicated after due deliberations with family members. He stated that he is residing at a place which is approximately 1200 ft.s away from the place on incident. He admitted that the place of incident is not visible from his house. Pathak *Bhojnalaya* is approximately 1 km away from the place of incident.

22. Shailesh Sharma (P.W.2) also is an eye-witness. He has stated that Mukesh Pathak (P.W.1) is known to him. An order of appointment of commissioner was passed in the suit instituted by Suresh Chandra against Ramesh Chandra and direction was issued to remain present on 16-4-2011 at 11:00 A.M. Accordingly, at 11-11:30 A.M., he, Appellants Suresh Chandra, Khemu @ Khemraj, Banti, their advocate Bharat Agrawal, Ramesh Chandra, Mukesh Pathak (P.W.1), Manish, Rishabh (P.W.4) and Rakesh (P.W.3) were present on the spot. Thereafter, the proceedings of commission were initiated. Initially, the house of Suresh Chandra was measured. Since, excess property was found therefore, Suresh Chandra got furious. Thereafter, all of them came downstairs and measurement of the property in possession of Ramesh Chandra was done. Suresh Chandra, Banti started abusing on the spot itself. Banti had scuffle with Ramesh Chandra also. Thereafter, Suresh Chandra instructed Banti to bring gun from his house and also to call Pawan and Khemraj. Thereafter, Banti came back along with Pawan and Khemraj. Pawan was having .315 bore mouzer gun, whereas Khemraj was having *Adhiya.* Thereafter, Suresh and Banti pointed towards Ramesh Chandra and instigated to kill. Pawan fired a gunshot causing injury on the chest of Ramesh Chandra, as a result, he fell down. Second gunshot fired by Pawan hit the pipe. As soon as Mukesh Pathak (P.W.1) moved towards Ramesh Chandra, then Khemu fired twice at Mukesh Pathak (P.W.1), but he escaped unhurt. Thereafter, Rakesh and Brijmohan took the deceased to Sahara hospital, where he was declared dead. The incident was witnessed by this witness. After sometime, the police party reached on the spot. Two fired cartridges were seized from the spot, blood was also

seized vide seizure memo Ex. P.5 from the place, where Ramesh Chandra had sustained injury. Some of the relatives of the Appellants had tried to pressurize him.

23. This witness was cross-examined. In cross-examination, this witness stated that it is incorrect to say that he is an Advocate in the civil suit which is pending between Ramesh Chandra Pathak and Suresh Chandra Pathak. He had no instructions to remain present at the time of demarcation. He had gone to the place of incident, just in order to meet Mukesh Chandra Pathak. He claimed that he had told the investigating officer that he had gone to the place of incident in order to have some discussion with Mukesh Pathak, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. His house is about 1 Km away from the house of Mukesh Pathak (P.W.1). He used to consult Mukesh Pathak but he had come in contact with Mukesh Pathak (P.W.1) about 10-15 days back only. He was not working with Mukesh Pathak (P.W.1). He admitted that after the incident, he had appeared in some cases along with Mukesh Pathak (P.W.1). He also claimed that he had informed the police that on 11-11:30 A.M. he, Suresh Chandra Pathak, his son Khemu @ Khemraj, Banti, their Advocate Bharat Agrawal, deceased Ramesh Chandra Pathak, his son Mukesh (P.W.1) who is also an Advocate by profession, Advocate Manish, Rakesh (P.W.3) and Rishabh (P.W.4) were also present on the spot, but could not explain as to why this fact is not mentioned in his police statement Ex. D.3. He also claimed that Suresh Chandra Pathak was objecting to the measurement which was being recorded by the Court Commissioner, but could not explain as to why this fact is not mentioned in his police statement, Ex.

D.3. He also claimed that he had informed the police that during demarcation proceedings itself, Suresh Chandra Pathak had started abusing, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. He also claimed that Banti had pushed Ramesh Chandra Pathak, as a result, he had sustained injury on his knee, but stated that since, police had not enquired, therefore, did not inform the police. He denied that while going to the Court directly from his house, he will not pass in front of the Padav Police Station. He also claimed that he had informed the police that Suresh Chandra Pathak had directed his son Banti to bring gun from his house, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. He also claimed that as soon as Khemu and Pawan Pathak reached on the spot, Suresh Chandra and Banti instigated them by pointing towards Ramesh Chandra that he should be killed, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. Ramesh Chandra had sustained only one gunshot injury. The assailant had fired from a distance of 25-30 ft.s. He claimed that gunshot was fired by Pawan Pathak. When Ramesh Chandra Pathak fell down on the ground, Mukesh Pathak moved forward, and then Khemu @ Khemraj fired from his 12 bore *Adhiya* twice, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. He admitted that no .12 bore fired cartridge was seen on the spot. He claimed that fired cartridge would have come out of the gun only if third gunshot was fired. He admitted that Mukesh Pathak (P.W.1) did not receive any injury in the incident. He denied that Khemu was not present on the spot. The police station Padav is about 500 meters away from the place of incident.

Rakesh (P.W.3), Brijmohan had taken the deceased either on scooter or motorcycle. He had informed the police about the place from where he had witnessed the incident. He also could not disclose the names of the persons who were pressurizing him to change his evidence.

24. He further claimed that he was not an advocate in any case with Mukesh Pathak. He is not aware of the number of civil suits which are pending between Mukesh Pathak and other persons. He also expressed his ignorance about the number of cousin brothers of Mukesh Pathak (P.W.1). He also expressed his ignorance about the fact that how many members of Mukesh Pathak (P.W.1) are having licensed guns. He came to know about the licensed gun of Suresh Pathak as he had asked to bring his licensed gun, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. He also expressed his ignorance about the fact that whether the order of demarcation was issued by Trial Court or Appellate Court. Suresh Chandra got annoyed when the demarcation of ground floor was going on. Thereafter, he said that Suresh Chandra got annoyed on his roof. He further stated that initially Khemraj was also present on the roof, but thereafter, he went back to his house, whereas Banti was there. He claimed that he had informed the police that when demarcation of roof of Suresh Chandra took place and it was found that he has encroached upon additional land, then he got annoyed, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. He also claimed that when demarcation of the disputed land started, then Suresh Chandra had also called Khemraj and Pawan by his son Banti, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.3. Since, he

was required to lodge one report on behalf of his one neighbour, therefore, he had gone to meet Mukesh Pathak (P.W.1). However, he could not disclose the name of his neighbour. He also could not disclose the offence for which FIR was to be lodged. He denied that he is senior to Mukesh Pathak (P.W.1). He also admitted that although he does not have his independent source of income, but since, his father have lot of property, therefore, he is surviving on the same. He did not go to the hospital along with Ramesh Chandra Pathak. Since, he had already received an information about the death of Ramesh chandra therefore, did not go to Sahara Hospital.

25. Rakesh Pathak (P.W.3) has stated that Court Commissioner was appointed accordingly, on 16-4-2011, the Court Commissioner had come. He, his father Ramesh, brother Mukesh (P.W.1), Shailesh Sharma (P.W. 2), Manish Sharma and Rishabh (P.W.4) were present on the spot from their side and Suresh Chandra Pathak, Banti Pathak, Khemraj Pathak and their Advocate were present from other side. The Court Commissioner, initially demarcated the ground floor, thereafter first floor and then roof of the house of Suresh Chandra Pathak. Since, an excessive part was found in possession of Suresh Pathak, therefore, Suresh Pathak and Banti got annoyed and started hurling abuses and came downstairs. When the demarcation of their land started, Banti Pathak pushed his father, as a result, he collided with pillar, and sustained injury on his leg. This was objected by them. Thereafter, Suresh Chandra and Banti challenged them that now they will see them. Thereafter, they started going towards their house, but they were continuously abusing. Suresh instigated his son Banti to call Khemu and Pawan along with his licensed gun.

Accordingly, Pawan came along with licensed mouzer of Suresh Chandra and Khemraj came along with licensed *Adhiya.* Suresh and Banti instigated Pawan and Khemraj to kill them and accordingly, Pawan started firing on his father. First shot fired by Pawan, hit on the chest of his father and accordingly, he fell down. Second gunshot was fired which hit on the wall. His brother Mukesh Pathak (P.W.1) shouted, then Khemraj fired at Mukesh Pathak twice. After noticing that Khemraj is firing, his brother Mukesh ran towards his house and saved himself by taking shelter of the house, otherwise, he too would have been killed. Thereafter, Suresh, Pawan and Banti asked Khemraj to run as Ramesh has died and thereafter, all the assailants ran away from the spot along with their weapons. He took his father along with his uncle Brijmohan to Sahara Hospital, where he was declared dead. This witness was cross-examined.

26. In cross-examination, he admitted that he sits in the lodge and it his duty to make entry of the customers visiting the lodge. He claimed that for the last several days, he was not going to the lodge. He denied that he is deliberately not giving any information about the register of the lodge, as the details of the customers on the date of incident are in his handwriting. He admitted that as per the Court, he, his brother Mukesh (P.W.1), Shailesh Sharma (P.W.2), Manish Sharma and Rishabh (P.W.4) were not directed to remain present at the time of commission. He had seen Shailesh Sharma (P.W.2) for the first time on the date of incident only. He also claimed that he had informed the police that at the time commission, Banti Pathak, Khemraj and their Advocate were also present along with Suresh Chandra, but could not explain as to why this fact is

not mentioned in his police statement, Ex. D4. He stated that Banti and Khemraj were present on the spot as they were called by Suresh Chandra Pathak. He also claimed that he had informed the police that Suresh Chandra Pathak had called his son Banti and Khemraj. He claimed that Banti and Khemraj were called to help in demarcation proceedings but Khemraj went back, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that he did not help in demarcation proceedings as Suresh Chandra Pathak was continuously taking objections, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that Banti had also got annoyed, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that he had informed the police that after the demarcation of their land started, Banti had pushed his father, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He denied that because of ruckus created by them, the Commissioner, had gone back. He claimed that after his father had collided with pillar, he did not see that on which part of his body he had sustained injury, but he was limping. However, he could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that after his objection, Suresh and Banti had challenged them, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He admitted that after the challenge, they got frightened, but still they continued to stand in the street. He claimed that he had informed the police that while Suresh Chandra and Banti were going back to their street, Suresh Chandra had asked Banti to call Pawan and Khemraj with his licensed gun, but could

not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that he had informed the police that all the four accused were residing in the same house, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that he had informed the police that only at the instance of Banti, Pawan and Khemu had come with licensed weapons, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He also claimed that he had informed the police that Banti and Suresh had instigated that no one should be spared, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. At the time of instigation, he was standing 10-15 steps behind his father. At the time of instigation, Suresh and Banti were about 30-32 ft.s away. He also admitted that gunshot was fired from one end and his father was standing on the other end. He denied that gunshot was fired from a distance of 70 ft.s. He had seen that Pawan and Khemraj have come along with firearms, but he was not suspecting that they would open fire. When Pawan had pointed the gun towards Ramesh, he was walking slowly towards his house. When first gunshot was fired, he took shelter to hide himself and did not try to save his father. **A note has been appended by the Court to the effect that the witness is giving irrelevant answers in a state of excitement, and accordingly he was asked to remain calm.**

27. He further stated that after the assailants ran away from the spot, his brother Mukesh came nearer to his father to see him. They were not sure, as to whether their father has expired or not. He took him to the hospital. He claimed that second gunshot was fired which hit on the

wall. His brother Mukesh Pathak (P.W.1) shouted, then Khemraj fired at Mukesh Pathak twice. After noticing that Khemraj is firing, his brother Mukesh ran towards his house and saved himself by taking shelter of the house, otherwise, he too would have been killed, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.4. He took his father on a motorcycle. His uncle Brijmohan (not examined) was driving the motorcycle, his father was sitting in the middle, whereas he was sitting behind his father. Blood was oozing out from the wound. Motorcycle had also got stained with blood and his clothes were also stained with blood. He stated that neither the police demanded his clothes, nor he gave the same to them. He stated that cremation was done at about 5 P.M., but in the meanwhile he did not give his statement, but further clarified that although he had given the information, but the statement was not recorded. The house of Suresh Chandra Pathak is about 55-60 ft.s away from the disputed property. He admitted that his grandfather Prabhudayal is still alive. He also admitted that he has not read the Commissioner report. He admitted that his bothers, namely, Mukesh Pathak and Vikesh Pathak are Advocates. He admitted that on 12-4-2011, there was a function of the child of Banti. He had attended that function. He denied for want of knowledge that one demarcation proceedings had taken place about 18-19 years back in which his uncle Mahesh Pathak had lost his life whereas his father Ramesh Chandra and Mukesh Pathak had got injured along with his uncle Ramswaroop Pathak. He admitted that he was an eye-witness of the incident. The murder of Mahesh Pathak had taken place at a place which is only 200 meters away from the present place of incident. He also admitted that one

or two criminal cases were registered against him, but claimed that they were false. He had taken his father on the motorcycle of one Panditji, but could not disclose the name of Panditji. From Sahara Hospital he took the dead body of his father to Big hospital. Police personnel had also accompanied him. He stayed in the Big hospital, till the dead body of his father was not handed over to him. He denied that he was not present on the spot. Spot map was prepared in his presence, and he had informed them about the place from where he had witnessed the incident. He also admitted that the place of incident is not visible from his lodge.

28. Rishabh Pathak (P.W.4) is the son of Mukesh Pathak (P.W.1). He has also narrated the story in same line. He stated that Anand Kumar Yadav, Court Commissioner had come for inspection of open place. At that time, he, Rakesh (P.W.3), Mukesh Chandra Pathak (P.W.1), his grandfather Ramesh Chandra Pathak, Suresh Chandra Pathak, his both sons, namely, Khemu and Banti as well as Advocate Manish Sharma and uncle Shailesh Sharma (P.W.2) were present and the incident was seen by them. He further stated that initially the demarcation of the house of Suresh Chandra Pathak was done. When demarcation of roof was done, then some portion of **Complainant party** was found to be in excess, therefore, Suresh Chandra Pathak got annoyed and started abusing. His father tried to pacify the situation by suggesting that the matter shall be resolved. Then, Suresh Chandra instructed his son Banti to call Pawan and Khemraj. They came along with licensed guns of Suresh Chandra. Pawan was having .315 bore mouzer whereas Khemraj was having .12 bore *Adhiya*. Suresh Chandra instigated to kill, therefore, Pawan with an intention to kill, fired gunshot which hit on the chest of his grandfather

Ramesh Chandra Pathak. Second gunshot fired by Pawan hit the wall. Thereafter, Banti pointed towards Mukesh and instructed Khemraj to kill him, therefore, Khemraj fired two gunshots. When his father tried to rescue his grandfather, one gunshot went in air and another hit the pipe. Thereafter, all the accused persons ran away. He further stated that the police had seized blood stained and plain earth from the spot vide seizure memo Ex. P.5. Safina form, Ex. P.6 was issued and Naksha Panchayatnama, Ex. P.7 was prepared. This witness was cross-examined.

29. In cross-examination, he stated that he is the student of class Xth. His School hours are from 8:30 to 1:30 P.M., but claimed that for no reasons, he was not going to school for the last 3-4 days. He expressed his ignorance about the number of civil cases of his grandfather Ramesh Chandra Pathak. He also expressed his ignorance about the measurement done by the Commissioner. He admitted that his father Mukesh Pathak is in possession of the file of the case, however, denied that he has read his statement. He further stated that in the examination-in-chief, he has wrongly stated that some part of the **complainant party** was found in excess. He admitted that the evidence of his father Mukesh Pathak (P.W.1) and uncle Rakesh Pathak (P.W.3) has already been recorded. He also admitted that his father Mukesh Pathak (P.W.1) is in possession of the copy of their deposition sheets. The Court Commissioner had come at 11-11:30 A.M., and he was with him for the entire time. He further stated that after the demarcation of the house of Suresh Chandra, his house was also demarcated. He could not disclose that till what time, the demarcation of his house continued. He had seen Shailesh (P.W.2) for the first time on the date of incident. He is residing with his father Mukesh

Pathak (P.W.1), whose office is also in the house. He does not know as to whether Shailesh (P.W.2) is an Advocate or not? He also claimed that he had informed the police that at the time of demarcation, Khemu and Banti were also there, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.5. He further stated that earlier the office of his father was near the railway line which was demolished by the State, but could not disclose as to why it was demolished. He denied that his father Mukesh Pathak (P.W.1) had encroached upon the land of the Railway. He also claimed that he had informed the police that Advocate Manish Sharma and Shailesh (P.W.2) were also on the spot, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.5. The dispute started on the roof of the house of Suresh Chandra Pathak. He stated on his own that some property of the **complainant party** was found to be in excess. He denied that he has read the deposition of his father Mukesh Pathak (P.W.1) and Rakesh (P.W.3). He claimed that he had informed the police that after coming downstairs, Suresh Chandra went towards the street and called his sons Pawan and Khemraj along with weapons by his son Banti, but could not explain as to why this fact is not mentioned in his police statement, Ex. D.5. He could not disclose that at which place he was standing. He further stated that Mukesh (P.W.1) and Rakesh (P.W.3) were also standing on the spot. When Suresh had called Pawan and Khemraj by his son Banti, he was standing at a distance of 10-12 steps from him. Suresh was abusing at that time. He stated that Suresh was standing towards the street and thereafter, he clarified on his own, that Suresh was standing at the place where dead body of Ramesh Chandra was lying. He stated that

Suresh Chandra had gone towards the assailants. He claimed that he had not informed to the police that Suresh Chandra had instructed his son Banti to go to his house and call Pawan and Khemraj, but could not explain as to how said fact is mentioned in his police statement, Ex. D.5. He further claimed that he does not recollect as to whether he had informed the police that Pawan had fired gunshots on the instigation by Suresh Chandra and the first gunshot hit on the chest of Ramesh Chandra and second gunshot hit on the wall. His police statement Ex. D.5 was read over to him and could not explain as to why this fact is not mentioned in the same. He further claimed that he does not recollect that after two gunshots were fired by Pawan, whether Banti had pointed out towards his father Mukesh and had instigated that he too should be killed is mentioned in his police statement, Ex. D.5 or not. His police statement, Ex. D.5 was read over to him, and he could not explain as to why this fact is not mentioned. He could not disclose the height at which the bullet had hit the wall/pipe. He did not see as to whether his grandfather has expired or not because he was very frightened. His father did not take his grandfather to the hospital, whereas Rakesh (P.W.3) had taken him. He claimed that three fingers of his father are already amputated but claimed that he can drive car and motorcycle. His house is at a distance of 100-150 steps away from the spot. He could not explain as to whether his father Mukesh was present or not, but claimed that he was frightened. He denied that his father had run away after the gunshots were fired. He admitted that his father had run away towards the back side. He went to mortuary where he met with police. His signatures were also obtained. He denied that he is deposing in accordance with the directions of his

father. He claimed that after the demarcation proceedings started Khemraj had went away, but could not explain as to why this fact is not mentioned in his police statement,Ex. D.5. He admits that he calls Shailesh Sharma (P.W.2) as his uncle. **He admitted that Shailesh Sharma (P.W.2) is standing near the witness box.** He admitted that he did not raise any alarm at the time of incident. He did not give any first aid to his grandfather. The gunshot was fired from the distance of 25-30 ft.s and at that time he was 12-14 steps away from his grandfather. Immediately after sustaining the gunshot injury, his grandfather had fallen down. The place at which his grandfather had fallen down is neither visible from the lodge nor from his house. He had seen two cartridges on the spot, but had not seen any pellet or bullet. **The Court also noticed that Mukesh Pathak (P.W.1) was interfering continuously, therefore, he was directed not to create any hurdle in recording of evidence.** He further stated that second gunshot had hit the wall.

Related and Interested witnesses

30. It is submitted by the Counsel for the Appellants that Mukesh Pathak (P.W.1) is the son of the deceased, Shailesh Sharma (P.W.2) is the friend of Mukesh Pathak (P.W.2), Rakesh (P.W.3) is son of deceased, and Rishabh Pathak (P.W.4) is the son of Mukesh Pathak (P.W.1). Mukesh Pathak (P.W.1) has stated in para 27 of his cross-examination, that various criminal cases were registered against him at the instance of the Accused persons. In para 28 of his cross-examination, he has also stated that the Appellants are engaged in illegal trade of Doda Chura, Gambling, liquor, Cyber Crime, etc, and he had made lot of complaints

against them. Thus, it is clear that the complainant party and the accused party were on inimical terms, although they belong to same family. The deceased Ramesh Chandra Pathak and Accused Suresh Chandra Pathak were real brothers whereas the Appellants Pawan, Banti and Khemraj are cousin brothers of Mukesh Pathak (P.W.1) and Rakesh Pathak (P.W.3).

31. It is submitted that the witnesses are interested and related witnesses, therefore, they are not reliable.

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

33. The Supreme Court in the case of **Mahavir Singh v. State of M.P.,** reported in **(2016) 10 SCC 220** has held as under :

> **18.** The High Court has attached a lot of weight to the evidence of the said Madho Singh (PW 9) as he is an independent witness. On perusal of the record, it appears that the said person already had deposed for the victim family on a number of previous occasions, that too against the same accused. This being the fact, it is important to analyse the jurisprudence on interested witness. It is a settled principle that the evidence of interested witness needs to be scrutinised with utmost care. It can only be relied upon if the evidence has a ring of truth to it, is cogent, credible and trustworthy. Here we may refer to chance witness also. It is to be seen that although the evidence of a chance witness is acceptable in India, yet the chance witness has to reasonably explain the presence at that particular point more so when his deposition is being assailed as being tainted.
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> **19.** A contradicted testimony of an interested witness cannot be usually treated as conclusive.

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

> **18.** Further, the High Court has also concluded that these witnesses were interested witnesses and their testimony was

not corroborated by independent witnesses. We are fully in agreement with the reasons recorded by the High Court in coming to this conclusion.

19. In *Darya Singh* v. *State of Punjab*, this Court was of the opinion that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities must be taken into account. This is what this Court said: (AIR p. 331, para 6)

"*6*. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. … But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. … If the criminal court is satisfied that the witness who is related to the victim was not a chance witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised."

20. However, we do not wish to emphasise that the corroboration by independent witnesses is an indispensable rule in cases where the prosecution is primarily based on the evidence of seemingly interested witnesses. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement.

21. Further, in *Raghubir Singh* v. *State of U.P.*, it has been held that: (SCC p. 84, para 10)

"*10*. … the prosecution is not bound to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need to be produced without

> unnecessary and redundant multiplication of witnesses. … In this connection general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind."

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

> **31.** In this regard reference to a passage from *Hari Obula Reddy* v. *State of A.P.* would be fruitful. In the said case, a three-Judge Bench has ruled that: (SCC pp. 683-84, para 13)
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> "[it cannot] be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."
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> It is worthy to note that there is a distinction between a witness who is related and an interested witness. A relative is a natural witness. The Court in *Kartik Malhar* v. *State of Bihar* has opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

36. The Supreme Court in the case of **Raju v. State of T.N.,** reported in **(2012) 12 SCC 701** has held as under :

> **20.** The first contention relates to the credibility of PW 5 Srinivasan. It was said in this regard that he was a related witness being the elder brother of Veerappan and the son of Marudayi, both of whom were victims of the homicidal attack. It was also said that he was an interested witness since Veerappan (and therefore PW 5 Srinivasan) had some enmity

with the appellants. It was said that for both reasons, his testimony lacks credibility.

21. What is the difference between a related witness and an interested witness? This has been brought out in *State of Rajasthan* v. *Kalki*. It was held that: (SCC p. 754, para 7)

"*7.* … True, it is, she is the wife of the deceased; but she cannot be called an 'interested' witness. She is related to the deceased. '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'."

22. In light of the Constitution Bench decision in *State of Bihar* v. *Basawan Singh*, the view that a "natural witness" or "the only possible eyewitness" cannot be an interested witness may not be, with respect, correct. In *Basawan Singh*, a trap witness (who would be a natural eyewitness) was considered an interested witness since he was "concerned in the success of the trap". The Constitution Bench held: (AIR p. 506, para 15)

"*15.* … The correct rule is this: if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused person."

23. The wife of a deceased (as in *Kalki*), undoubtedly related to the victim, would be interested in seeing the accused person punished—in fact, she would be the most interested in seeing the accused person punished. It can hardly be said that she is not an interested witness. The view expressed in *Kalki* is too narrow and generalised and needs a rethink.

24. For the time being, we are concerned with four categories

of witnesses—a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorisation of a witness, the issue really is one of appreciation of the evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required.

25. In the present case, PW 5 Srinivasan is not only a related and interested witness, but also someone who has an enmity with the appellants. His evidence, therefore, needs to be scrutinised with great care and caution.

26. In *Dalip Singh* v. *State of Punjab* this Court observed, without any generalisation, that a related witness would ordinarily speak the truth, but in the case of an enmity there may be a tendency to drag in an innocent person as an accused —each case has to be considered on its own facts. This is what this Court had to say: (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 generalisation. 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."

27. How the evidence of such a witness should be looked at was again considered in *Darya Singh* v. *State of Punjab*. This Court was of the opinion that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities taken into account. It was observed that where the witness shares the hostility of the victim against the assailant, it would be unlikely that he would not name the real assailant but would substitute the real assailant with the "enemy" of the victim. This is what this Court said: (AIR p. 331, para 6)

"*6.* There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. … [I]t may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested

witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

28. More recently, in *Waman* v. *State of Maharashtra* this Court dealt with the case of a related witness (though not a witness inimical to the assailant) and while referring to and relying upon *Sarwan Singh* v. *State of Punjab*, *Balraje* v. *State of Maharashtra*, *Prahalad Patel* v. *State of M.P.*, *Israr* v. *State of U.P.*, *S. Sudershan Reddy* v. *State of A.P.*, *State of U.P.* v. *Naresh*, *Jarnail Singh* v. *State of Punjab* and *Vishnu* v. *State of Rajasthan* it was held: (*Waman case*, SCC p. 302, para 20)

"*20.* It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinise their evidence meticulously with a little care."

29. The sum and substance is that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related and interested witness may have some enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying a standard of discerning scrutiny. However, this is only a rule of prudence and not one of law, as held in *Dalip Singh* and pithily reiterated in *Sarwan Singh* in the following words: (*Sarwan Singh case*, SCC p. 376, para 10)

"*10.* … The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration."

37. The Supreme Court in the case of **Jodhan v. State of M.P.,**

reported in **(2015) 11 SCC 52** has held as under :

> **24.** First, we shall deal with the credibility of related witnesses. In *Dalip Singh* v. *State of Punjab*, it has been observed thus: (AIR p. 366, para 25)
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> "*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*."
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> In the said case, it has also been further 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. 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."
>
> **25.** In *Hari Obula Reddy* v. *State of A.P.*, the Court has ruled that evidence of interested witnesses per se cannot be said to be unreliable evidence. Partisanship by itself is not a valid ground for discrediting or discarding sole testimony. We may fruitfully reproduce a passage from the said authority: (SCC pp. 683-84, para 13)
>
> "*13*. … an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should

be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

26. The principles that have been stated in number of decisions are to the effect that evidence of an interested witness can be relied upon if it is found to be trustworthy and credible. Needless to say, a testimony, if after careful scrutiny is found as unreliable and improbable or suspicious it ought to be rejected. That apart, when a witness has a motive or makes false implication, the court before relying upon his testimony should seek corroboration in regard to material particulars.

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

24. On the issue of appreciation of evidence of interested witnesses, *Dalip Singh* v. *State of Punjab* is one of the earliest cases on the point. In that case, it was held as follows: (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. 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."

25. Similarly, in *Piara Singh* v. *State of Punjab*, this Court held: (SCC p. 455, para 4)

"*4*. … It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the

evidence is creditworthy there is no bar in the Court relying on the said evidence."

26. In *Hari Obula Reddy* v. *State of A.P.*, a three-Judge Bench of this Court observed: (SCC pp. 683-84, para 13)

"*13*. … it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

27. Again, in *Ramashish Rai* v. *Jagdish Singh*, the following observations were made by this Court: (SCC p. 501, para 7)

"*7*. … The requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are .true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witness is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See *Anil Rai* v. *State of Bihar*, *State of U.P.* v. *Jagdeo*, *Bhagaloo Lodh* v. *State of U.P.*, *Dahari* v. *State of U.P.*, *Raju* v.

State of T.N., *Gangabhavani* v. *Rayapati Venkat Reddy* and *Jodhan* v. *State of M.P.*)

39. 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.

40. 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.....

41. 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.

42. 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)

43. "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."

43. In the present case, Mukesh Pathak (P.W.1), Rakesh Pathak are brothers (P.W.3) whereas Rishabh Pathak (P.W.4) is the son of Mukesh Pathak (P.W.1). Shailesh Sharma (P.W.2) also appears to be friend of Mukesh Pathak (P.W.1) and his conduct during the trial also indicates that he was interested witness. During the recording of evidence of Rishabh Pathak (P.W.4), Shailesh Sharma (P.W.2) was standing near to the witness box, whereas he was not supposed to do so and Mukesh Pathak (P.W.1) was creating all sorts of hurdles in recording of evidence of Rishabh Pathak (P.W.4) and this conduct of Mukesh Pathak (P.W.4) has also been noted down by the Trial Court. Thus, it is clear that the evidence of Mukesh Pathak (P.W.1), Shailesh Sharma (P.W.2), Rakesh Pathak (P.W.3) and Rishabh Pathak (P.W.4) is required to be examined very minutely.

44. The evidence of Rishabh Pathak (P.W.4) has also been challenged on the ground that he was not named in the FIR. It is suffice to mention here that merely because a witness has not been named in FIR, would not necessarily become doubtful witness. The FIR is not an encyclopedia and does not require that all the witnesses should be named. The Supreme Court in the case of **State of M.P. v. Mansingh,** reported in **(2003) 10 SCC 414** has held as under :

> **10.** One of the circumstances highlighted by the High Court to discard the evidence of PW 8 is non-mention of his name in the FIR. As stated by this Court in *Chittar Lal* v. *State of Rajasthan* evidence of the person whose name did not figure in the FIR as a witness does not perforce become suspect. There can be no hard-and-fast rule that the names of all witnesses, more particularly eyewitnesses, should be indicated in the FIR. As was observed by this Court in *Shri Bhagwan* v. *State of Rajasthan* mere non-mention of the name of an eyewitness does not render the prosecution version fragile.

45. The Supreme Court in the case of **Pramod Mahto v. State of Bihar** reported in **(2003) 9 SCC 215** has held as under :

> **5.**....Learned counsel relying on the said case of *Jaggo*[1] as also another case of the judgment of this Court in *Ganesh Bhavan Patel* v. *State of Maharashtra* submitted that non-mentioning of the names of PWs 1 and 5 in the FIR and delay in examining the said witnesses makes the presence of these eyewitnesses doubtful. It is seen from the complaint that it does not contain the names of the eyewitnesses apart from PW 2. But then the complaint refers to other unnamed witness as being present. That apart, it is also seen from the records that the investigation in this case started only on the midday of 18th and it is only in the course of investigation the IO came to know that PWs 1 and 5 are also eyewitnesses. In these circumstances, we cannot draw any adverse inference merely because the names of PWs 1 and 5 are not mentioned in the FIR or on the fact that their statements were recorded belatedly.

46. The Supreme Court in the case of **Nirpal Singh v. State of Haryana,** reported in **(1977) 2 SCC 131** has held as under :

> **10.** The last of the eyewitnesses is PW 22 Rattan Singh whose evidence has also been believed by the Sessions Judge who observed as follows:
>
> > "The fact that his name was not recorded in the first information report in a way shows that it was not a case of planned first information report otherwise his name would have been mentioned therein. After going through the statement of Ratan PW I feel inclined to hold that it also inspires confidence and is true."
>
> The High Court also came to a similar finding as follows:
>
> "Because of his disinterestedness the evidentiary value of the testimony of Rattan Singh deserves a considerable weight."
>
> Counsel for the appellants vehemently contended that as the name of Rattan Singh was not mentioned in the first information report, although the eyewitnesses Sadhu Ram and Inder Kaur have categorically stated that another Rattan Singh

> of Siria was present at the occurrence, the Court should hold that Rattan Singh is a made-up witness. To begin with, this is essentially a question of fact which was fully noticed by the two courts of fact and in spite of that the courts of fact have believed the evidence of PW 22 Rattan Singh. Secondly, the mere fact that his name was not given in the FIR, though of some relevance, would not be sufficient by itself to entail rejection of the testimony of this witness. We must realise that five persons had been killed and the informant Sadhu Ram must have been stunned and stupefied at the ghastly murders that took place in his presence and had picked up sufficient courage to run to the Police Station to lodge the FIR. It may be that in view of that agitated mental condition he may have omitted to mention the name of Rattan Singh. The mere fact that Rattan Singh s/o Siri, Ram is not mentioned in the FIR does not establish that Rattan Singh PW 22 could not have seen the occurrence. It is possible that both these persons may have witnessed the occurrence and the informant mentioned the name of one and not the other.

47. Thus, so far as the non-mentioning of the name of Rishabh Pathak (P.W.4) in the FIR is concerned, it is suffice to mention here that testimony of an eye-witness cannot be rejected only on the ground that he was not named in the FIR.

48. Since, the allegations against all the three Appellants are different, therefore, it would be appropriate to consider their case separately.

Banti

49. In the FIR, Ex. P.3, Police Statement of Mukesh Pathak, Ex.D.1, Police Statement of Shailesh Sharma, Ex. D.3, Police Statement of Rakesh, Ex. D.4, and Police Statement of Rishabh Pathak, Ex. D.5, it was alleged that when part of property was found to be in excess, Suresh Chandra called Pawan and Khemraj by Banti. Thereafter, the presence of Banti or any participation in the act of firing is not alleged. Thus, it is

clear that the only role assigned to Banti was that Suresh Chandra had called his son Pawan and Khemraj by his son Banti. Banti is undisputedly real son of Suresh Chandra. According to FIR, Ex. P.3, when Suresh Chandra had called his sons by Banti, no fight had started. Thus, even if it is presumed that Banti went to bring his brothers Pawan and Khemraj, but he was not aware of the fact that such an incident can take place. Further, it was not alleged either in FIR, Ex. P.3 or in the Police Statement of Mukesh Pathak, Ex. D.1, Police Statement of Shailesh Sharma, Ex. D.3, Police Statement of Rakesh, Ex. D.4, and Police Statement of Rishabh Pathak, Ex. D.5 that Banti also came back along with Pawan and Khemraj. Thus, originally the police case was that Banti was sent by Suresh Chandra for calling his other sons, but one thing is clear that by that time, no fight had started. Thus, there is no question of any common intention at the relevant time. Thereafter, even the presence of Banti is not mentioned.

50. However, in the Court evidence, major improvements were made by the witnesses. It was alleged that Suresh Chandra had instructed Banti to call Pawan and Khemraj with guns. When Pawan and Khemraj came to the spot along with firearms, then Banti and Suresh Chandra instigated that Ramesh Chandra should be killed. Banti had also pushed Ramesh Chandra. All the witnesses were confronted with the aforesaid omissions in the FIR, Ex. P.3 and in their police statements, Ex. D.1, D.3, D.4 and D.5. none of the witness could explain as to why those allegations were not mentioned in the their respective police statements.

51. Now the question is that whether aforementioned improvements can be said to be major contradictions or not?

52. It is well established principle of law that minor contradictions would not make the evidence of the witness unreliable. Thus, the contradictions should be of major in nature. The Supreme Court in the case of **S. Govindaraju v. State of Karnataka,** reported in **(2013) 15 SCC 315** has held as under :

> **23.** It is well settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not affect the core of the case of the prosecution, must not be made a ground for rejection of evidence in its entirety. The trial court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same, without providing justifiable reasons for doing so. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witnesses also make material improvements before the court in order to make the evidence acceptable, it would not be safe to rely upon such evidence. The discrepancies in the evidence of eyewitnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, the witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with the other evidence available or with a statement that has already been recorded, then in such a case, it cannot be held that the prosecution has proved its case beyond reasonable doubt.

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

> **Discrepancies in evidence**
> **29.** It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be

> considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. (See *Rammi* v. *State of M.P.*, *Leela Ram* v. *State of Haryana*, *Bihari Nath Goswami* v. *Shiv Kumar Singh*, *Vijay* v. *State of M.P.*, *Sampath Kumar* v. *Inspector of Police*, *Shyamal Ghosh* v. *State of W.B.* and *Mritunjoy Biswas* v. *Pranab*.)

54. Thus, the only question for consideration is that whether the improvement goes to the root of the case or not?

55. As already held that according to FIR, Ex. P.3 and police statements of witnesses, Ex. D.1, D.3, D.4 and D.5, the role and presence of the Appellant Banti is mentioned at the stage when no fight had started. No one was armed with firearm. There was no possibility of any firing. Thus, at that time, if Suresh Chandra, the father of Banti had instructed his son Banti to call his other sons Pawan and Khemraj, then it cannot be presumed that Banti was aware of the fact that his brothers may come along with firearm and firing would take place. Even presence of Banti after the arrival of Pawan and Khemraj, is not mentioned. However, in the Court evidence, the eye-witnesses namely Mukesh Pathak (P.W.1), Shailesh Sharma (P.W.2), Rakesh (P.W.3) and Rishabh

Pathak (P.W.4) improved their version and assigned additional role to Banti, so as to implicate him with the aid of Section 34 of IPC. It is not out of place to mention here that Mukesh Pathak (P.W.1) and Shailesh Sharma (P.W.2) are Advocates by profession and they are aware of niceties of law. They were aware of the fact that on the basis of allegations which were made in FIR, Ex. P.3 and their police statements, they may not be able to implicate Banti with the aid of Section 34 of IPC. Thus, the omission of any other allegation against Banti in FIR, Ex. P.3, and the police statements of witnesses, Ex. D.1, D.3, D.4 and D.5, is a major omission which goes to the root of the case. Thus, it is held that even if Banti was sent to call his brothers and since by that time no fight had started, it cannot be said that Banti was sharing any common intention to kill Ramesh Chandra Pathak.

Khemraj

56. It is the prosecution case, that Pawan and Khemraj came along with their weapons i.e., Pawan was having .315 bore licensed gun, whereas Khemraj was having .12 bore licensed *Adhiya.* It is alleged that after Ramesh Chandra fell down, Mukesh Pathak (P.W.1) went to rescue his father and at that time, two gunshots were fired by Khemraj with an intention to kill Mukesh Pathak (P.W.1), but Mukesh Pathak escaped unhurt.

57. Now the only question for consideration is that whether Khemraj was present on the spot, and whether he fired any gunshot at Mukesh Pathak (P.W.1) or not?

58. There are major discrepancies in the FIR, Ex. P.3, Police Statement of Mukesh Pathak, Ex.D.1, Police Statement of Shailesh

Sharma, Ex. D.3, Police Statement of Rakesh, Ex. D.4, and Police Statement of Rishabh Pathak, Ex. D.5 and their Court evidence. According to FIR, Ex. P.3, and Police Statements of witnesses, Ex. D.1, D.3, D.4 and D.5, Khemraj came on the spot along with Pawan, whereas in the Court evidence, it was alleged that Khemraj was present at the time of demarcation along with his father Suresh Chandra and Banti. He went away only when Suresh Chandra got annoyed on the roof of his house. Thus, an attempt was made to assign knowledge to Khemraj about the dispute which allegedly took place. Furthermore, the role of firing assigned to Khemraj does not find support from the spot map. According to Mukesh Pathak (P.W.1), the Appellant Khemraj and Pawan were standing at place shown as "2" in the spot map, Ex. P.4, whereas Ramesh Chandra Pathak suffered gunshot injury on the other side of the lane and the direction of bullet was diagonally opposite to the place from where the gunshot was fired. According to Mukesh Pathak (P.W.1), when he went to save his father, then gunshots were fired twice by Khemraj. Shailesh Sharma (P.W.2) has stated that as soon as Mukesh Pathak (P.W.1) moved towards his father, Khemraj fired at him twice. Rakesh Pathak (P.W.3) has stated that when gunshots were fired at Mukesh Pathak (P.W.1), he took shelter of the house. However, Rakesh Pathak (P.W.3) could not point out the place where Mukesh Pathak (P.W.1) was standing, but claimed that he was on the spot. **At that time, the Court has put a note that the witness is getting excited and is giving irrelevant answers and therefore, he was directed to answer properly**. Thus, it is clear that Rakesh Pathak (P.W.3) was not in a position to specifically mention the place at which Mukesh Pathak

(P.W.1) was standing. Rishabh Pathak (P.W.4) has stated that after gunshot injury was suffered by his grandfather, he fell down and the moment, his father-Mukesh Pathak (P.W.1) went to save him, gunshots were fired by Khemraj. Thus, it is clear that the witnesses wanted to project that when Mukesh Pathak (P.W.1) was near Ramesh Chandra Pathak, gunshots were fired at him. From the spot map, Ex. P.4, it is clear that behind the place where Ramesh Chandra had fallen, there are houses. Even the second gunshot fired by Pawan had hit the wall. According to Mukesh Pathak (P.W.1), Khemraj was also standing along with Appellant Pawan. According to Mukesh Pathak (P.W.1) and spot map, Ex. P.4, Ramesh Chandra Pathak was diagonally opposite to Appellants Pawan and Khemraj. Gunshots were fired from a distance of 25-30 ft.s. Thus, if the gunshot fired by Pawan can hit the wall of house of Ramswaroop thereby damaging pipe, then the gunshots fired by Khemraj also should have hit the wall. But no gunshot mark was found on any wall of the house of Ramswaroop Pathak which is shown as "7" in the spot map, Ex. P.4.

59. Further more, the report of Court Commissioner, Anand Yadav, Ex. P.16 is very important. The Commissioner report, Ex. P.16 reads as under:-

न्यायालय प्रथम अतिरिक्त व्यवहार न्यायाधीश वर्ग – 2, ग्वालियर

प्रकरण क्रमांक– 51 ए/10 ई.दी.

सुरेश चन्द्र ––––– वादी
बनाम
रमेश चन्द्र आदि ––––– प्रतिवादीगण

कमिश्नर प्रतिवेदन

51

———————————

श्रीमान जी,

उपरौक्त प्रकरण मे कमिश्नर प्रतिवेदन निम्न प्रकार हैः–

1 – यह कि, न्यायालय के आदेश के पालन मे दिनांक 16.04.2011 को प्रातः 11 बजे वादग्रस्त स्थान स्थित ज्वाला का पुरा, लक्ष्मीबाई कालोनी के पास लश्कर ग्वालियर पर कमिश्न कार्यवाही हेतु पहुचा मौके पर वादी सुरेश चन्द्र एवं उनके अभिभाषक श्री भरत अग्रवाल उपस्थित मिले, लगभग 15–20 मिनिट पश्चात प्रतिवादी क्रमांक 1 रमेश चन्द्र एवं उनके अभिभाषक श्री मनीष शर्मा एडवोकेट भी उपस्थित हो थे।

2 – यह कि उभय पक्ष द्वारा ग्रस्त स्थान एवं वादी के भवन की पहचान कर कमिशन कार्यवाही प्रारंभ की गई। सर्वप्रथम वादी के भवन निर्माण की नाप तौल की गई। तथा तल मंजिल व प्रथम मंजिल एवं छत के उपर से निरीक्षण कर आवश्यक नोटिग की गई, एवं मानचित्र बनाये गये जो क्रमशः परिशिष्ट – अ, ब, एवं स, से अंकित किये गये है।

3 – यह कि वादी के भवन के निरीक्षण के पश्चात जो भवन के मुख्य दरवाजे से निकल कर वादग्रस्त स्थान जो कि वादी के भवन की पूर्व दिशा की ओर स्थित है व प्लाट के रूप मे है कि नाप तौल आरम्भ की गई इसी दोरान उभय पक्ष के मध्य किसी बात को लेकर मूह बाद हो गया। जिसे सुन कर आस–पास के लोग इकट्ठे हो गये। मेरे द्वारा एवं उभय पक्ष के अभिभाषक गण द्वारा समझाने का प्रयत्न किया गया किन्तु कोई भी पक्ष किसी की बात सुनने को तैयार नही था, और धीरे–धीरे विवाद बढने लगा। और गाली गलोच होने लगी काफी प्रयास करने के पश्चात भी विवाद शांत नही हुआ और वादी व प्रतिवादी क्रमांक 1 व अन्य लोग जिसमे सम्भवतः वादी एवं प्रतिवादी क्रमांक 1 के परिवार के लोग भी थे। मुह वाद करते हुए वादग्रस्त स्थल का दक्षिण दिशा वाले रास्ते की और अपने भवनों के तरफ चले गये। जब 10–15 मिनट तक उभय पक्ष की तरफ विवाद शांत नही हुआ तो उभय पक्ष के अभिभाषकगण द्वारा व्यक्त किया गया कि, विवाद शांत नहीं हो रहा है व कोई भी कुछ सुनने को तैयार नही है इस कारण कमिशन कार्यवाही आगे हो पाना सम्भव नहीं है कमिशन कार्यवाही को स्थगित कर दिया जावें। ऐसा कह कर अभिभाषकगण मोके से चले गये उपरोक्त कारण वश कमिशन कार्यवाही 1:10 मिनट पर स्थगित कर दी गई।

4 – यह कि मेरे मत मे कमिशन कार्यवाही बिना पुलिस सहायता के हो पाना सम्भव नही है। कमिशन फीस अदा नही की गई है जो दिलाई जावे।

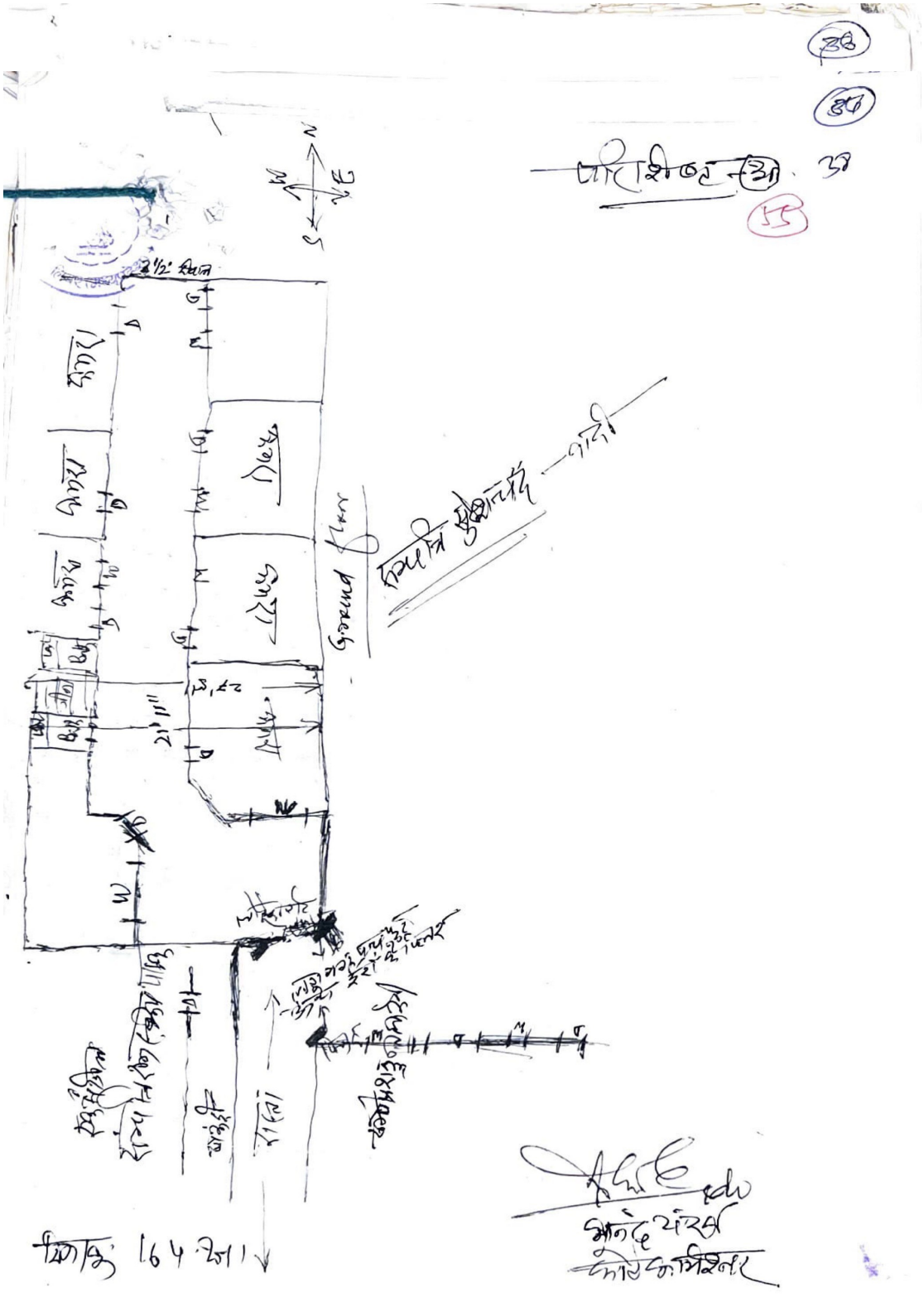
अतः उपरोक्तानुसार कमिशन प्रतिवेदन श्रीमान के अवलोकनार्थ प्रस्तुत है।

दिनांक – 19.04.2011

भवदीय
आनन्द यादव
एडवोकेट
कोर्ट कमिशनर

संलग्न :–

1. कमिशन कार्यवाही के दौरान बनाये गये परिशिष्ट अ, ब, स, के मानचित्र।
2. कमीशन वारन्ट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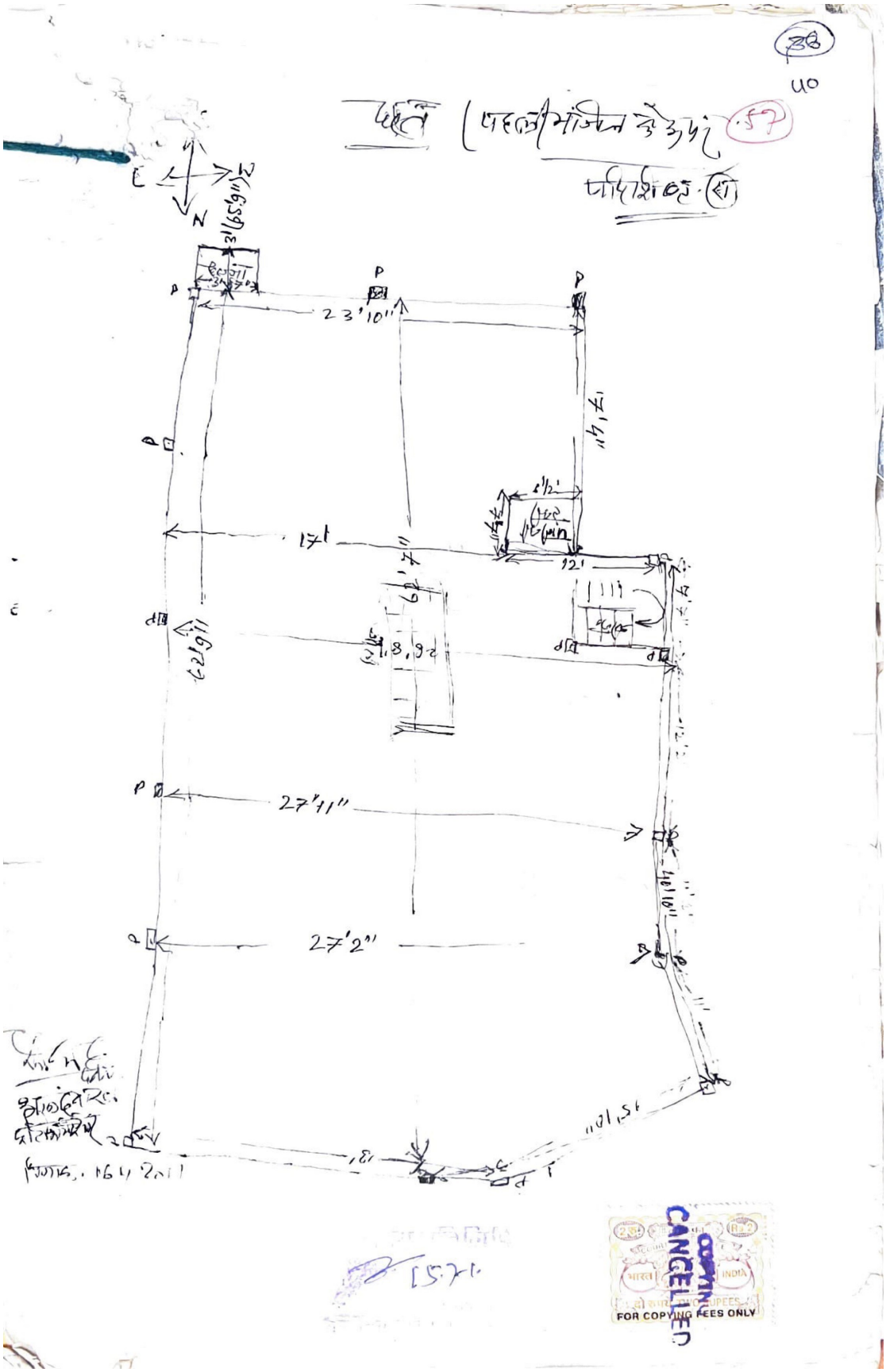
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60. Further, Anand Kumar Yadav (P.W.8) in his evidence has stated that he went to Jawala Ka Pura at 11:00 A.M. When he reached there, Suresh Chandra Pathak and his lawyer were there. After 10-15 minutes, Ramesh Chandra and his lawyer Manish Sharma also came there. Thereafter, this witness started demarcation of the house of Suresh Chandra Pathak. Necessary measurements were written by him and also prepared map and thereafter, he came downstairs. Thereafter, he started measurement of adjoining vacant plot. When he was measuring the road, at that time, hot talk started between the parties. The litigants went towards the southern directions, whereas he, Manish and Bharat Agrawal were standing there. They stood there for 10-15 minutes. He and Manish tried to pacify the situation, but none of them was ready to listen. Thereafter at 1:10 P.M. he suspended the proceedings of Commission and went back to his house. Bharat Agrawal also went away. Thereafter, he filed his commission report before the Trial Court, Ex. P.16. This witness was cross-examined.

61. In cross-examination, he stated that when hot talk started and did not stop inspite of his efforts, then Suresh Chandra went towards his house. About 15-20 persons had gathered there at the time of hot talk. He tried to convince them, but they were quarreling with each other. No dispute had started at the time of measurement of the house of Suresh Chandra Pathak. The dispute arose only when the measurement of road had begun.

62. Thus, it is clear from the evidence of Anand Kumar Pathak (P.W.8), the dispute arose only when he started measurement of road and thereafter, he stayed there for 10-15 minutes. Suresh Chandra had also

went towards his house. He suspended the proceedings of commission only when none of the party was ready to listen. Anand Kumar Yadav (P.W.8) is an independent witness.

63. Whereas according to the prosecution witnesses, the dispute arose on the roof of the house of Suresh Chandra. Thereafter, they came downstairs. They went towards the southern direction and gunshots were fired by Pawan and Khemraj. It is clear from the spot map, Ex. P.4, that Khemraj was allegedly standing in front of his house, and Ramesh Chandra had fallen at a place which is diagonally opposite to the place at which Khemraj was allegedly standing and it is on the other side of the street. According to the prosecution, the gunshot was fired from the distance of 25-30 ft.s. However, Anand Kumar Yadav (P.W.8) has not stated that any firing took place in his presence. According to Anand Kumar Yadav (P.W.8) that at about 1:10 P.M., he suspended the Commission proceedings, and thereafter, he stayed there for 10-15 minutes. Bharat Agrawal, the Counsel of Suresh Chandra also went back. Thus, it is clear that firing did not take place immediately after the witnesses came downstairs from the house of Suresh Chandra Pathak. Anand Kumar Yadav (P.W.8) has not stated that he had seen Khemraj with gun. Even Anand Kumar Yadav (P.W.8) has stated that Suresh Chandra Pathak had also gone back to his house.

64. Although the FIR, Ex. P.3 was lodged by Mukesh Pathak (P.W.1) at 14:15, whereas the incident took place at around 13:30, but the question is as to whether gunshots were fired on this witness or not? As already held that two gunshots allegedly fired by Khemraj had missed this witness. According to the prosecution, when this witness had moved

towards his father, gunshots were fired at him by Khemraj, but none of the gunshot hit the wall of Ramswaroop. Furthermore, the spot map is also silent about the place at which Khemraj was standing. Even the investigating officer has stated that Mukesh Pathak (P.W.1) had not disclosed the place where Khemraj was standing, although Mukesh Pathak (P.W.1) has claimed that Khemraj and Pawan were standing side by side at serial no.2 shown in the spot map, Ex. P.4.

65. Furthermore, it is clear that the bullet fired by Pawan had travelled from one end of street to another end where Ramesh Chandra was standing. This is possible only when the street was empty, otherwise, it would have hit somebody else and would not have travelled to the another end of the street. Therefore, the story which has been narrated by the witnesses does not inspire confidence with regard to the role assigned to Khemraj. Therefore, without doubting the presence of Mukesh Pathak (P.W.1) on the spot, it is held that, he did not move towards his injured father, and no gunshots were fired at him by Khemraj. Furthermore, it is clear from the evidence of Rakesh Pathak (P.W.3) that Mukesh Pathak (P.W.2) moved towards his father only after the assailants had run away from the spot. It appears that after noticing the gunshots fired by Pawan, Mukesh Pathak (P.W.1) took shelter behind the house in order to save him and never moved towards his father and no gunshot was fired by Khemraj with an intention to kill Mukesh Pathak (P.W.1).

66. Furthermore, there is discrepancy with regard to the presence of Khemraj on the spot. In the FIR, Ex. P.3 and Police Statements, Ex. D.1, D.3, D.4 and D.5, it was alleged that Khemraj came to the spot only after he was called by his father by Banti, whereas there is an improvement in

the Court evidence, and the witnesses started claiming that Khemraj was present at the time of measurement of the house of Suresh Chandra Pathak and thereafter he went away.

67. Since, the parties were on inimical terms, therefore, there is every possibility, that the prosecution witnesses Mukesh Pathak (P.W.1), Shailesh Sharma (P.W.2), Rakesh Pathak (P.W.3) and Rishabh Pathak (P.W.4) have tried to falsely implicate Khemraj also, who is the real brother of co-accused Pawan.

68. Thus, it is held that the prosecution has failed to prove the guilt of Khemraj beyond reasonable doubt.

Pawan Pathak

69. It is submitted by the Counsel for the Appellants that once, this Court has found that the prosecution witnesses are not reliable qua Banti and Khemraj, therefore, it is clear that they are also not reliable qua Pawan Pathak also.

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

71. It is well established principle of law that the Latin Maxim *Falsus in uno, falsus in omnibus* has no application in India. The effort of the Court should be to remove grain from chaff. The Supreme Court in the case of **Achhar Singh v. State of H.P.,** reported in **(2021) 5 SCC 543** has held as under :

> **25.** It is vehemently contended that the evidence of the prosecution witnesses is exaggerated and thus false. *Cambridge Dictionary* defines "exaggeration" as "the fact of making something larger, more important, better or worse than it really is". *Merriam-Webster* defines the term "exaggerate" as to "enlarge beyond bounds or the truth". The *Concise Oxford*

English Dictionary defines it as "enlarged or altered beyond normal proportions". These expressions unambiguously suggest that the genesis of an "exaggerated statement" lies in a true fact, to which fictitious additions are made so as to make it more penetrative. Every exaggeration, therefore, has the ingredients of "truth". No exaggerated statement is possible without an element of truth. On the other hand, *Advanced Law Lexicon* defines "false" as "erroneous, untrue; opposite of correct, or true". *Concise Oxford English Dictionary* states that "false" is "wrong; not correct or true". Similar is the explanation in other dictionaries as well. There is, thus, a marked differentia between an "exaggerated version" and a "false version". An exaggerated statement contains both truth and falsity, whereas a false statement has no grain of truth in it (being the "opposite" of "true"). It is well said that to make a mountain out of a molehill, the molehill shall have to exist primarily. A court of law, being mindful of such distinction is duty-bound to disseminate "truth" from "falsehood" and sift the grain from the chaff in case of exaggerations. It is only in a case where the grain and the chaff are so inextricably intertwined that in their separation no real evidence survives, that the whole evidence can be discarded.

26. The learned State counsel has rightly relied on *Gangadhar Behera* to contend that even in cases where a major portion of the evidence is found deficient, if the residue is sufficient to prove the guilt of the accused, conviction can be based on it. This Court in *Hari Chand* v. *State of Delhi* held that: (*Hari Chand case*, SCC pp. 124-25, para 24)

> "*24*. … So far as this contention is concerned it must be kept in view that *while appreciating the evidence of witnesses in a criminal trial especially in a case of eyewitnesses the maxim falsus in uno, falsus in omnibus cannot apply and the court has to make efforts to sift the grain from the chaff. It is of course true that when a witness is said to have exaggerated in his evidence at the stage of trial and has tried to involve many more accused and if that part of the evidence is not found acceptable the remaining part of evidence has to be scrutinised with care and the court must try to see*

whether the acceptable part of the evidence gets corroborated from other evidence on record so that the acceptable part can be safely relied upon."

(emphasis supplied)

27. There is no gainsaid that homicidal deaths cannot be left to *judicium dei*. The court in its quest to reach the truth ought to make earnest efforts to extract gold out of the heap of black sand. The solemn duty is to dig out the authenticity. It is only when the court, despite its best efforts, fails to reach a firm conclusion that the benefit of doubt is extended.

72. 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.

73. The Supreme Court in the case of **Swaran Singh v. State of Punjab,** reported in **(2000) 5 SCC 668** has held as under :

> **28.** The appellants' contention that because the eyewitnesses' account of the involvement of Mittar Pal was not accepted by either of the courts, therefore their evidence was suspect, is a non sequitur. Merely because one portion of the evidence of PW 3 and PW 4 is disbelieved does not mean that the courts were bound to reject all of it.....

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

> **19**.....The evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a "partisan" or "interested" witness may lead to failure of justice. It is well known that principle "*falsus in uno, falsus in omnibus*" has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.
>
> **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.

75. Thus, the evidence of witnesses cannot be discarded qua the

Appellant Pawan Pathak, merely on the ground that those witnesses have been found to be unreliable qua the other Appellants.

76. The allegations against Pawan Pathak right from the FIR, Ex. P.3 till the Court evidence has remained the same and could not be shaken by the defence. The Appellant Pawan Pathak is alleged to have caused gunshot injury on the chest of Ramesh Chandra Pathak, as a result, he died. Another gunshot fired by Pawan had hit a pipe of the house of Ramswaroop and three broken pieces of bullet were also recovered from the said place by the investigating officer. Thus, the role assigned to the Appellant Pawan has remained unshaken.

Whether the prosecution witnesses Mukesh Pathak (P.W.1), Shailesh Sharma (P.W.2), Rakesh (P.W.3) and Rishabh Pathak (P.W.4) were present on the spot or not?

77. It is submitted by the Counsel for the Appellants, that although Mukesh Pathak (P.W.1) was having car and a motorcycle, but the deceased Ramesh Chandra Pathak was taken on a motorcycle of one unknown Panditji, which clearly shows that Mukesh Pathak (P.W.1) was not present on the spot, otherwise, the complainant party would have taken the deceased on the car.

78. Considered the submissions.

79. According to Mukesh Pathak (P.W.1) his house is situated in Gandhi Nagar, Jwala Ka Pura and as per para 92 of his cross-examination, his house is at a distance of approximately 1200 ft.s away from the spot. It is possible that this witness might not have come on his car, because no such question was put to him in this regard. Once a person has suffered a gunshot injury, then the every attempt of the

witnesses would be to somehow take him to the hospital so that his life can be saved. Furthermore, Sahara Hospital is also situated at a nearby place. Therefore, if the witnesses took Ramesh Chandra Pathak on a motorcycle which was available on the spot, then it cannot be said that such an act of the witnesses was not correct. Furthermore, the witnesses are the residents of same locality. The colony was named after the name of predecessor of the witnesses. Thus, it is clear that if one Panditji permitted the witnesses to use his motorcycle for taking the injured/deceased Ramesh Chandra Pathak to Sahara Hospital, then it cannot be said that Mukesh Pathak (P.W.1) was not present on the spot, for the only reason that he did not waste his time for bringing his car, in order to take his father to the hospital.

Ante dated and Ante timed FIR

80. It is submitted by the Counsel for the Appellants that the incident took place on 16-4-2011, whereas the copy of the FIR was sent to the jurisdictional Magistrate on 18-4-2011, therefore, it is clear that the FIR was lodged after two days.

81. Considered the submissions.

82. In para 91 of the cross-examination, the defence had given a suggestion to Mukesh Pathak (P.W.1) that he had lodged the FIR on the next date of incident, which was denied by this witness. However, during the course of arguments, it was submitted by the Counsel for the Appellants that the FIR was lodged on 18-4-2011. The only basis for making such a suggestion was that the copy of the FIR was sent to the jurisdictional Magistrate on 18-4-2011.

83. It is well established principle of law that mere delay in sending

the copy of FIR to the jurisdictional Magistrate is not fatal to the prosecution case.

84. The Supreme Court in the case of **Pala Singh v. State of Punjab,** reported in **(1972) 2 SCC 640** has held as under :

> **8.** Shri Kohli strongly criticised the fact that the occurrence report contemplated by Section 157 CrPC was sent to the Magistrate concerned very late. Indeed, this challenge, like the argument of interpolation and belated despatch of the inquest report, was developed for the purpose of showing that the investigation was not just, fair and forthright and, therefore, the prosecution case must be looked at with great suspicion. This argument is also unacceptable. No doubt, the report reached the Magistrate at about 6 p.m. Section 157 CrPC requires such report to be sent forthwith by the police officer concerned to a Magistrate empowered to take cognizance of such offence. This is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159. But when we find in this case that the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to our notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. It is not the appellant's case that they have been prejudiced by this delay.

85. The Supreme Court in the case of **Mahmood v. State of U.P.,** reported in **(2007) 14 SCC 16** has held as under :

> **10.** This Court while construing Section 157 of the Code of Criminal Procedure in *Anil Rai* v. *State of Bihar* observed that: (SCC p. 335, para 20)
>
> "*20*. [The said provision] is designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction under Section 159 of the Code of

Criminal Procedure. But where the FIR is shown to have actually been recorded without delay and investigation started on the basis of the FIR, the delay in sending the copy of the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable."

11. This Court further took the view that the delay contemplated under Section 157 of the Code for doubting the authenticity of FIR is not every delay but only extraordinary and unexplained delay. We do not propose to burden this short judgment of ours with various authoritative pronouncements on the subject since the law is so well settled that delay in dispatch of FIR by itself is not a circumstance which can throw out the prosecution case in its entirety, particularly in cases where the prosecution provides cogent and reasonable explanation for the delay in dispatch of FIR.

12. The same principle has been reiterated by this Court in *Alla China Apparao* v. *State of A.P.* wherein this Court while construing the expression "forthwith" in Section 157(1) of the Code of Criminal Procedure observed that: (SCC pp. 445-46, para 9)

"*9*. … it is a matter of common experience that there has been tremendous rise in crime resulting in enormous volume of work, but increase in the police force has not been made in the same proportion. In view of the aforesaid factors, the expression 'forthwith' within the meaning of Section 157(1) obviously cannot mean that the prosecution is required to explain every hour's delay in sending the first information report to the Magistrate, of course, the same has to be sent with reasonable dispatch, which would obviously mean within a reasonably possible time in the circumstances prevailing. Therefore, in our view, the first information report was sent to the Magistrate with reasonable promptitude and no delay at all was caused in forwarding the same to the Magistrate. In any view of the matter, even if the Magistrate's Court was close by and the first information report reached him within six hours from the time of its lodgement, in view of the

increase in workload, we have no hesitation in saying that even in such a case it cannot be said that there was any delay at all in forwarding the first information report to the Magistrate."

13. It is not possible to lay down any universal rule as to within what time the special report is required to be dispatched by the Station House Officer after recording FIR. Each case turns on its own facts.

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

16. The purpose and scope of Section 157 CrPC has time and again been considered by this Court in large number of cases.

17. The learned counsel for the appellant has relied on State of Rajasthan v. Daud Khan, Sheo Shankar Singh v. State of U.P. and Bijoy Singh v. State of Bihar.

18. In State of Rajasthan in paras 27 and 28, this Court has laid down as follows: (SCC pp. 620-21)

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

'30. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding the FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of the FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 4.00 p.m. on 13-6-1979 and was forwarded on the very next day viz. 14-6-1979. Further, a perusal of the impugned judgments of the High Court as well as of the trial court discloses that no case of any prejudice was shown nor even raised on behalf of the

appellants based on alleged violation of Section 157 CrPC. Time and again, this Court has held that unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating (sic) effect on the case of the prosecution. Therefore, the said submission made on behalf of the appellants cannot be sustained.

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

"62. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in Pala Singh v. State of Punjab wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

63. Applying the above ratio in Pala Singh to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that

aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was [567] subsequently followed in Sarwan Singh v. State of Punjab, Anil Rai v. State of Bihar and Aqeel Ahmad v. State of U.P."'

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

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

87. The Supreme Court in the case of **Anjan Dasgupta v. State of W.B.,** reported in **(2017) 11 SCC 222** has held as under :

22. The FIR as well as the inquest report both mentioned the accused Anjan Dasgupta. The inquest report has not been questioned on any account. The offence, having been committed at around 4-5 p.m., registration of the FIR at the police station between 7.30 to 8.00 p.m. does not cause any reason to draw any adverse inference, more so, when after the occurrence, the deceased was taken to the nearby nursing home where he was declared dead and body remained there till the inquest was over. Another circumstance, which has been heavily relied upon by the trial court and reiterated before us by the learned counsel for the appellant is the dispatch of the

> FIR to the Magistrate with delay. This Court in *Pala Singh* v. *State of Punjab* has held that delay in forwarding the FIR to the court is not fatal in a case in which investigation has commenced promptly on its basis.

88. The Supreme Court in the case of **Balvir Singh Vs. State of M.P.** reported in **(2019) 15 SCC 599** has held as under :

> ***Delay in FIR***
>
> **20.** For the occurrence on 11-3-1998 at 5.30 p.m., FIR No. 114/98 was registered on the same day at 6.00 p.m. As per the evidence of Constable Radhey Shyam (PW 10), FIR was handed over before the Court of JMFC, Bina on 12-3-1998. So far as the contention regarding delay in receipt of the FIR in the court is concerned, the trial court held that not sending the FIR immediately to the court after its registration, cannot be put against the prosecution case since after 5.30 p.m., the court timing gets over and in these circumstances, production of FIR before the court on the next day during the court timings does not indicate that the FIR is antedated. The case of the prosecution, in our view, cannot be doubted on the ground of delay in receipt of the FIR in the court.

89. If the facts of this case are considered, then it is clear that father of an Advocate was killed. The fact that post-mortem was also conducted immediately and cremation was also done on the very same, it is clear that police was busy in immediate investigation. 16-4-2011 was Saturday, and Sunday was the holiday. Therefore, if copy of FIR was received in the office of jurisdictional Magistrate on 18-4-2011, then it cannot be said that there was no justifiable explanation specifically in the light of the fact that other facts indicate that the FIR, Ex. P.3 was not ante dated and ante timed.

90. In the spot map, Ex. P.4, it is specifically mentioned that serial no. 10 is the house of accused Suresh Chandra Pathak. The spot map was prepared on 16-4-2011 itself at 14:30 P.M. Blood Stained blood and plain

earth, three broken pieces of bullet, 2 fired cartridges were seized from the spot on 16-4-2011 itself at 15:00. Lash Panchnama, Ex. P. 7 was also prepared on 16-4-2011. The dead body was sent for post-mortem on 16-4-2011 at 15:30. Post-mortem, Ex. P. 20 was conducted at 16:30. The dead body was also handed over on 16-4-2011 itself. All the above mentioned proceedings clearly indicate that the FIR, Ex. P.3 was lodged on 16-4-2011 itself and not on 18-4-2011 as suggested by the Appellant. Since Mukesh Chandra Pathak (P.W.1), Shailesh Sharma (P.W.2) are Advocates and are aware of niceties of Law, therefore, the possibility of over implication of some of the accused persons is not ruled out, specifically when both the parties were on inimical terms. However, the role assigned to the Appellant Pawan Pathak is constantly same right from the FIR, Ex. P.3 as well as police statements, Ex. D.1, D.3, D.4 and D.5 and the evidence of the witnesses in the Court.

91. Therefore, this Court is of the considered opinion, that mere delay in sending the FIR would not give any dent to the prosecution case, specifically when there is overwhelming evidence on record to suggest that the investigation had started immediately.

Non-sending of copy of merg to the S.D.O.(P) as required under Police Regulation 174.

92. It is submitted that the investigating officer has admitted that the copy of merg and other relevant documents were not sent to S.D.O.(P), therefore, it is clear that the FIR is ante-dated and ante-timed.

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

94. It has already been held in the previous paragraph that FIR, Ex. P.3

was lodged promptly which is evident from the investigation done by the police on 16-4-2011 itself. Thus, merely because the copy of merg and other documents were not sent to S.D.O.(P), then said faulty investigation done by the Investigation Officer would not give any dent to the prosecution case.

95. It is well-settled principle of law that defective investigation would not result in failure of prosecution, provided the evidence is trustworthy. The Supreme Court in the case of **Prithvi (Minor) v. Mam Raj,** reported in **(2004) 13 SCC 279** has held as under :

> **17.** A further reason for disbelieving the evidence of Prithvi is that, while Prithvi stated that he could see the assailants because there was light on the spot coming from a bulb fitted in an electric pole near the *chakki* of Birbal (which was situated about fifteen steps from the place of occurrence) the investigating officer (PW 36) when cross-examined said that he did not remember anything about it nor did he include any electric pole in his site plan. Assuming that this was faulty investigation by the investigating officer, it could hardly be a ground for rejection of the testimony of Prithvi which had a ring of truth in it. We may recount here the observation of this Court in *Allarakha K. Mansuri* v. *State of Gujarat*, SCC at p. 64, para 8, that:
>
> > "The defects in the investigation holding it to be shaky and creating doubts also appears to be the result of the imaginative thought of the trial court. Otherwise also, defective investigation by itself cannot be made a ground for acquitting the accused."

96. The Supreme Court in the case of **State of U.P. Vs. Jagdeo** reported in **(2003) 1 SCC 456** has held as under :

> **8.** Coming to the aspect of the investigation being allegedly faulty, we would like to say that we do not agree with the view taken by the High Court. We would rather like to say that assuming the investigation was faulty, for that reason alone the

> accused persons cannot be let off or acquitted. For the fault of the prosecution, the perpetrators of such a ghastly crime cannot be allowed to go scot-free.....

No independent witness was examined

97. It is submitted by the Counsel for the Appellants that the incident took place in the middle of the colony, and no independent witness was examined.

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

99. It is well-settled principle of law that mere non-examination of independent witness would not make the prosecution unreliable.

100. The Supreme Court in the case of **Ambika Prasad Vs. State (Delhi Admn.)** reported in **(2000) 2 SCC 646** has held as under :

> **12.** It is next contended that despite the fact that 20 to 25 persons collected at the spot at the time of the incident as deposed by the prosecution witnesses, not a single independent witness has been examined and, therefore, no reliance should be placed on the evidence of PW 5 and PW 7. This submission also deserves to be rejected. It is a known fact that independent persons are reluctant to be witnesses or to assist the investigation. Reasons are not far to seek. Firstly, in cases where injured witnesses or the close relative of the deceased are under constant threat and they dare not depose the truth before the court, independent witnesses believe that their safety is not guaranteed. That belief cannot be said to be without any substance. Another reason may be the delay in recording the evidence of independent witnesses and repeated adjournments in the court. In any case, if independent persons are not willing to cooperate with the investigation, the prosecution cannot be blamed and it cannot be a ground for rejecting the evidence of injured witnesses. Dealing with a similar contention in *State of U.P.* v. *Anil Singh* this Court observed: (SCC pp. 691-92, para 15)
>
> "In some cases, the entire prosecution case is doubted for

> not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable."

101. Thus, it is clear that the evidence of Mukesh Pathak (P.W.1), Rakesh Pathak (P.W.3) and Rishabh Pathak (P.W.4) qua the Appellant Pawan Pathak is reliable.

102. So far as Shailesh Sharma (P.W.2) is concerned, his presence on the spot is that of chance witness. It is true that the evidence of witness cannot be discarded merely on the ground that he was a chance witness, but the conduct of Shailesh Sharma (P.W.2) during the Trial, clearly shows that he is an interested witness and had no reason to remain present on the spot at the time Commission proceedings. The fact that Shailesh Sharma (P.W.2) was standing quite nearer to the witness box at the time of recording of evidence of Rishabh Pathak (P.W.4) was admitted by Rishabh Pathak (P.W.4) in para 26 of his cross-examination. The conduct of Shailesh Sharma (P.W.2) clearly indicates that he is vitally interested in the matter, otherwise, there was no reason for Shailesh Sharma (P.W.2) to stand quite nearer to the witness box at the time of recording of evidence. Further when this aspect came on record, it appears that Mukesh Pathak (P.W.1) started interfering in the recording of evidence of Rishabh Pathak (P.W.4) and this aspect of the matter was also recorded by the Trial Court in the deposition sheet itself. Thus, this Court is of the considered opinion, that Shailesh Sharma (P.W.2) is a

created witness and was not present at the time of incident.

Whether the act of Pawan would fall within the purview of culpable homicide not amounting to murder or not?

103. It is contended by the Counsel for the Appellants, that since, the incident took place all of a sudden, therefore, the act of the Appellant Pawan would be punishable for offence under Section 304 Part I of IPC.

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

105. Although it is the contention of the Counsel for the Appellants that according to the prosecution case, the incident is alleged to have taken place during the commission proceedings, but this Court has already come to a conclusion that the incident took place after the commission proceedings were over and by that time, the Court Commissioner and other Advocates for the parties had already left the place of incident. Since, the houses of the complainant party and accused party are situated in close vicinity, therefore, their presence on the spot is not unnatural, but one thing is clear that all general public had already disbursed and only thereafter the incident in question took place, because the gunshot was fired from a distance of 35-40 ft.s and the fact that the bullet travelled upto the opposite end of street, clearly means that the street was empty and there was no movement of persons. Thus, it is held that the incident did not take place in a heat of passion but in fact took place only after the persons had disbursed. Further no one from the complainant side was armed with weapon. There was no instigation by the complainant party.

106. The Supreme Court in the case of **Lavghanbhai Devjibhai**

Vasava v. State of Gujarat, reported in **(2018) 4 SCC 329** has held as under :

> **7.** This Court in *Dhirendra Kumar* v. *State of Uttarakhand* has laid down the parameters which are to be taken into consideration while deciding the question as to whether a case falls under Section 302 IPC or Section 304 IPC, which are the following:
> (*a*) The circumstances in which the incident took place;
> (*b*) The nature of weapon used;
> (*c*) Whether the weapon was carried or was taken from the spot;
> (*d*) Whether the assault was aimed on vital part of body;
> (*e*) The amount of the force used.
> (*f*) Whether the deceased participated in the sudden fight;
> (*g*) Whether there was any previous enmity;
> (*h*) Whether there was any sudden provocation.
> (*i*) Whether the attack was in the heat of passion; and
> (*j*) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

107. The Supreme Court in the case of **Ajmal Vs. State of Kerala** by **Judgment dated** passed in **Cr.A. No. 1838 of 2019** has held as under :

> 17. The distinctive features and the considerations relevant for determining a culpable homicide amounting to murder and distinguishing it from the culpable homicide not amounting to murder has been a matter of debate in large number of cases. Instead of referring to several decisions on the point reference is being made to a recent decision in the case of Mohd. Rafiq vs. State of M.P. , wherein **Justice Ravindra Bhatt**, speaking for the Bench, relied upon two previous judgments dealing with the issue as narrated in paragraph nos.11, 12 and 13 of the report which are reproduced below:
>
> > "11. The question of whether in a given case, a homicide is murder, punishable under section 302 IPC, or culpable homicide, of either description, punishable under section 304 IPC has engaged the attention of courts in this country for over one and a half century, since the enactment of the

IPC; a welter of case law, on this aspect exists, including perhaps several hundred rulings by this court. The use of the term “likely” in several places in respect of culpable homicide, highlights the element of uncertainty that the act of the accused may or may not have killed the person. Section 300 IPC which defines murder, however refrains from the use of the term likely, which reveals absence of ambiguity left on behalf of the accused. The accused is for sure that his act will definitely cause death. It is often difficult to distinguish between culpable homicide and murder as both involve death. Yet, there is a subtle distinction of intention and knowledge involved in both the crimes. This difference lies in the degree of the act. There is a very wide variance of degree of intention and knowledge among both the crimes.

12. The decision in State of Andhra Pradesh v Rayavarapu Punnayya & Anr notes the important distinction between the two provisions, and their differing, but subtle distinction. The court pertinently pointed out that: "12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of section 304.. 13. The academic distinction between "murder" and "culpable homicide not amounting to

murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of sections 299 and 300."

13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh. This court observed that: "29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls
under section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body;(iv) the amount of force employed in causing injury; (v) whether the act was in the course of

> sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger;(viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention.""

108. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the act of Pawan cannot be said to be a culpable homicide not amounting to murder.

109. Accordingly, the conviction of Pawan for offence under Section 302 of IPC is **upheld**. So far as the conviction of Pawan for offence under Section 201 of IPC is concerned, the firing pin of mouzer seized from the possession of Suresh Chandra Pathak, which was used by the Appellant Pawan, was found to be tampered. Therefore, the conviction of Pawan for offence under Section 201 of IPC is **upheld**. His conviction under Section 30 of Arms Act is also **upheld** as he had used the licensed mouzer gun of his father Suresh Chandra Pathak.

110. So far as the question of sentence is concerned, since, the minimum sentence for offence under Section 302 of IPC is Life Imprisonment, therefore, the sentence awarded by the Trial Court to Pawan does not call for any interference.

111. The Appellants Banti and Khemraj are acquitted of all the charges.

112. Ex consequenti, the judgment and sentence dated 3-5-2012 passed

by 2nd Additional Sessions Judge, Gwalior in S.T. No.340/2011 is hereby **affirmed qua the Appellant Pawan and is set aside qua the Appellants Banti and Khemraj.**

113. The Appellant Pawan Pathak is in jail. He shall undergo the remaining jail sentence.

114. The Appellants Banti and Khemraj are on bail. Their bail bonds are hereby discharged. They are no more required in the present case.

115. Let a copy of this Judgment be immediately provided to Pawan, free of cost.

116. The Registry is directed to immediately send back the record of the Trial Court along with copy of this Judgment for necessary information and compliance.

117. The Cr.A. No.379 of 2012 filed by Appellants Banti and Khemraj is hereby **Allowed.** Cr.A. No.401 of 2012 filed by Pawan is hereby **Dismissed.**

(G.S. AHLUWALIA)
JUDGE

(RAJEEV KUMAR SHRIVASTAVA)
JUDGE