**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 21st OF NOVEMBER, 2022

CRIMINAL APPEAL No. 467 OF 2012

Between:-

1. LALLA @ DHARMENDRA SON OF JAGANNATH, AGED 20 YEARS, VEGETABLE VENDOR, RESIDENT OF BHURE BABA KI BASTI, CHATTRI BAZAR, GWALIOR (M.P.)
2. ILLU @ RAMENDRA SON OF JAGANNATH, AGED 27 YEARS, LABOURER, RESIDENT OF CHHATRI MANDI, BHURE BABA KI BASTI, LASHKAR, GWALIOR (M.P.)

……..APPELLANTS

**(BY SHRI RAJU SHARMA WITH SHRI ANOOP NIGAM ADVOCATE FOR APPELLANT NO.1
SHRI RAJU SHARMA ADVOCATE FOR APPELLANT NO.2.)**

AND

**STATE OF MADHYA PRADESH
POLICE STATION JANAKGANJ,
DISTT. GWALIOR**

.....RESPONDENT

(BY SHRI C.P. SINGH ADVOCATE FOR STATE)
(BY SHRI D.R. SHARMA, ADVOCATE FOR COMPLAINANT)

CRIMINAL APPEAL No. 531 OF 2012

Between:-

GOPAL PAL AGED 39 YEARS, SON OF RAM SINGH PAL, RESIDENT OF BHURE BABA BASTI, CHATTRI BAZAR, LASKHAR, DISTT. GWALIOR (M.P.)

(SHRI ANOOP NIGAM, ADVOCATE FOR APPELLANT)

AND

STATE OF MADHYA PRADESH POLICE STATION JANAKGANJ, DISTT. GWALIOR

.....RESPONDENT

(BY SHRI C.P. SINGH ADVOCATE FOR STATE)
(BY SHRI D.R. SHARMA, ADVOCATE FOR COMPLAINANT)

CRIMINAL APPEAL No. 711 OF 2012

Between:-

MONU MARATHA, SON OF CHANDRAKANT MARATHA, AGED 29 YEARS, LABOURER, RESIDENT OF BHURE BABA BASTI, CHATTRI MANDI, LASKHAR, DISTT. GWALIOR (M.P.)

(SHRI A.K. JAIN, ADVOCATE FOR APPELLANT)

AND

**STATE OF MADHYA PRADESH
POLICE STATION JANAKGANJ,
DISTT. GWALIOR**

.....RESPONDENT

**(BY SHRI C.P. SINGH ADVOCATE FOR STATE)
(BY SHRI D.R. SHARMA, ADVOCATE FOR COMPLAINANT)**

CRIMINAL APPEAL No. 770 OF 2012

Between:-

**CHIMPPI @ NARENDRA SINGH YADAV,
SON OF GOPAL SINGH AGED 28 YEARS,
LABOURER, RESIDENT OF BHURE
BABA BASTI, CHATTRI MANDI,
LASKHAR, DISTT. GWALIOR (M.P.)**

(SHRI ANOOP NIGAM, ADVOCATE FOR APPELLANT)

AND

**STATE OF MADHYA PRADESH
POLICE STATION JANAKGANJ,
DISTT. GWALIOR**

.....RESPONDENT

**(BY SHRI C.P. SINGH ADVOCATE FOR STATE)
(BY SHRI D.R. SHARMA, ADVOCATE FOR COMPLAINANT)**

Heard on : 10th- November -2022
Delivered on : 21st –November -2022

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

JUDGEMENT

1. All the four Criminal Appeals No. 467/2012, 531/2012,711/2012 and 77/2012 arise out of judgment and sentence dated 7-5-2012 passed by Special Judge (Atrocities), Gwalior in Special Sessions Trial No. 105/2011, by which the Appellants have been convicted and sentenced for the following offences :

S. No.	Appellant	Conviction under Section	Sentence
1	Lalla @ Dharmendra	148 of IPC	1 year R.I. and fine of Rs. 1000/- in default 1 month S.I.
		302/149 of IPC	Life Imprisonment and fine of Rs. 10,000/- in default 4 months S.I.
		25(1-B)(a) of Arms Act	1 year R.I. and fine of Rs. 1,000/- in default 1 month S.I.
		27 Arms Act	7 years R.I. and fine of Rs. 1,000/- in default 1 month S.I.
2	Chimppi @ Narendra	148 of IPC	1 year R.I. and fine of Rs. 1000/- in default 1 month S.I.
		302/149 of IPC	Life Imprisonment and fine of Rs. 10,000/- in default 4 months S.I.
		25(1-B)(a) of Arms Act	1 year R.I. and fine of Rs. 1,000/- in default 1 month S.I.
		27 Arms Act	7 years R.I. and fine of Rs. 1,000/- in default 1 month S.I.

3	Gopal Pal	148 of IPC	1 year R.I. and fine of Rs. 1000/- in default 1 month S.I.
		302/149 of IPC	Life Imprisonment and fine of Rs. 10,000/- in default 4 months S.I.
		25(1-B)(a) of Arms Act	1 year R.I. and fine of Rs. 1,000/- in default 1 month S.I.
		27 Arms Act	7 years R.I. and fine of Rs. 1,000/- in default 1 month S.I.
4	Illu @ Ramendra	148 of IPC	1 year R.I. and fine of Rs. 1000/- in default 1 month S.I.
		302/149 of IPC	Life Imprisonment and fine of Rs. 10,000/- in default 4 months S.I.
5	Monu Maratha	148 of IPC	1 year R.I. and fine of Rs. 1000/- in default 1 month S.I.
		302/149 of IPC	Life Imprisonment and fine of Rs. 10,000/- in default 4 months S.I.

All sentences shall run concurrently.

2. The facts, necessary for disposal of present appeal in short are that on 4-1-2011, at 20:20, the complainant Nihal Chauhan, lodged an FIR in Police Station Janakganj on the allegations that at about 8:00 PM, he and his brother Ravindra were standing in front of a handpump situated in Chhatri Mandi. At that time, his brother Pinkad came on his motor cycle alongwith Girish as his pillion rider. As soon as Pinkad move ahead after having talks with them, the accused Gopal Pal, Chimppi Yadav, Lalla with country made pistol and Monu and Illu with Sword and Katar came there and stopped the motor cycle of Pinkad. Gopal scolded him

by alleging that he is a Mehtar and his mind has grown and therefore, he will be killed today. Thereafter, all the five accused persons started assaulting his brother Pinkad. Gopal, Chimppi and Lalla fired gun shots whereas Monu and Illu assaulted him by Sword and Katar. Pinkad fell down near the handpump. Blood started oozing out. A gun shot injury is clearly visible on his temporal region. It was further alleged that the Appellants have committed the offence because of enmity on the allegations of teasing. He further alleged that they have witnessed the incident in the light of street light. They tried to save him, and when the Appellants tried to attack them also, then they ran away from the spot. It was further alleged that the appellants have went away from the spot, and the complainant and his brother Ravindra have come to the police station along with the dead body of Pinkad.

3. Accordingly, the police registered the FIR. Merg intimation was also recorded. The dead body was shifted to mortuary. On the next day, the dead body was sent for post-mortem. The statements of the witnesses were recorded. Spot map was prepared. Blood stained and plain earth were seized from the spot. The complainant moved another application by alleging that one Dhapole @ Puran Kushwaha had also assaulted the deceased by fists and blows. Accordingly, Dhapole @ Puran Kushwaha was also impleaded as sixth accused. The Appellants were arrested. Weapons were seized. The police after concluding the investigation, filed charge sheet against the Appellants and co-accused Dhapole for offence under Sections 302,341,147,148,149 of IPC and under Section 3(2)(5) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, as well as under Section 25/27 of Arms Act.

4. The Trial Court framed charges under Sections 147,148,302 read with 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, or in the alternative under Section 302/149 of IPC read with Section 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act against Appellant Monu, co-accused Puran @ Dhapole, and Illu @ Ramendra. Against Lalla @ Dharmendra, Gopal, and Chimppi @ Narendra, charges under Sections 25(1-B)(a) and 27 of Arms Act were also framed apart from the charges under Sections 147,148,302 read with 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, or in the alternative under Section 302/149 of IPC read with Section 3(2)(v) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act.

5. The Appellants and co-accused Dhapole @ Puran abjured their guilt and pleaded not guilty.

6. The Prosecution, in support of its case, examined Girish (P.W.1), Nihal Singh (P.W.2), Ravindra (P.W.3), Ranjeet Balmik (P.W.4), Ajay Shrivastava (P.W.5), Raju (P.W.6), Arun Kumar (P.W.7), Ajit Pawar (P.W.8), Harnam Singh (P.W.9), Ashok Rathore (P.W.10), Shiv Pratap Singh (P.W.11), R.K. Jain (P.W.12), Dr. J.N. Soni (P.W.14 [should have been P.W. 13]), and Vijay Bahadur Singh (P.W.15[should have been P.W.14]).

7. The Appellants and co-accused Dhapole @ Puran did not examine any witness in their defence.

8. The Trial Court by the impugned judgment and sentence has acquitted the co-accused Dhapole @ Puran and convicted the Appellants for the offences mentioned above.

9. Challenging the judgment and sentence passed by the Court below, it is submitted by the Counsel for the Appellants, that although the incident had taken place in the mid of the market, but no independent witness has been examined. In the spot map, the electric pole has not been shown, therefore, it is clear that there was no light on the spot. The prosecution witnesses are close relatives of the deceased therefore, they are interested witnesses. The FIR is ante-dated and ante-timed. Medical evidence doesnot support the Ocular evidence.

10. Per contra, the Counsel for the State and the complainant have supported the prosecution case as well as also the findings recorded by the Trial Court.

11. Heard the learned Counsel for the Parties.

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

13. Dr. J.N. Soni (P.W.14) has conducted the post-mortem of the dead body of Pinkad and found following injuries :

Ante-mortem injuries present over the body :

(i) Gun shot injury wound present over left molar (bone) region 1.5x1 cm vertically oval and upper end slight medially, surrounded by burn area and tattooing for 3.5 cm superiorly and 2.5 cm wide for rest of the sides.

(ii) Exit wound present 13 cm above the naion and 2 cm left to mid line 1.5 cm x 1 cm anterio posteriorly margins everted and brain matter oozes out.

(iii) Lacerated wound 7 cm above the left eye 4 x 1.5 cm

vertical bone deep.

(iv) Stab wound on left buttock medially nearly at mid 2 x o.5 cm vertical 4 inch deep.

(v) Abrasion 8 cm above nasion in midline 2 cm x 2 cm red in colour.

Internal examination

Scalp ecchymosed fracture of skull into multiple pieces behind coronal suture present. Underneath injury no.2 and 3. sub-dural (illegible) and epidural hemorrhage present all over the brain. Brain lacerated in the (illegible) of firearm and under injury no.3.

Death was due to shock and hemorrhage as a result of head injury. Injury has been caused by fire arm and sufficient to cause death in ordinary course of nature.

Duration of death is within 6 hours to 24 hours since P.M.

Death – Homicidal in nature.

14. The Post-mortem report is Ex. P.39.

15. Dr. J.N. Soni (P.W. 14) was cross-examined. In cross-examination, he stated that he did not receive the copy of FIR and *Lash Panchnama* along with dead body. Weapons seized in the case were never brought before him. In view of tattooing, it appears that gun shot was fired from a close range of 3-4 inches. The deceased had only one entry wound. Injury no. 3 could have been caused by fall. Injury no. 4 could have been caused by sharp knife. Smell of alcohol was present. Fracture which was found underneath injury no. 3 could have been caused by hard and blunt object. The injury no. 4 could have been caused by a double edged

weapon. It is difficult to find out as to whether the weapon by which injury no. 4 was caused was either straight or was curved.

16. From the evidence of Dr. J.N. Soni (P.W. 14), it is clear that the death of deceased Pinkad was homicidal in nature.

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

Eye-witnesses

18. Girish (P.W.1), Nihal (P.W.2), and Ravindra (P.W.3) are the eye-witnesses.

19. Girish (P.W.1) was the pillion rider whereas the deceased Pinkad was driving the motor cycle. According to this witness, he was the friend of the deceased Pinkad. The incident is of 4-1-2011 which took place at 8:00 P.M. He and the deceased Pinkad came on a motor cycle and reached in front of the handpump of Chhatri Mandi. Ravindra (P.W.3) and Nihal (P.W.2) were standing there. Pinkad had some talk with them. Thereafter, Ravindra told Pinkad that mother is calling him therefore, he must go to house. Thereafter, as soon as they reached in front of the handpump, the Appellant Gopal, Lalla Kushwaha, Chimppi Yadav came there with their country made pistols and Monu was having sword and Illu was having Katar whereas Dhapole @ Puran was bare handed. Gopal scolded Pinkad that his mind has grown much and therefore, he would be killed. Thereafter, all the three appellants fired gun shots. This witness jumped from the motor cycle. Monu assaulted the deceased by sword whereas Illu assaulted by Katar. Dhapole assaulted him by lathi. When Ravindra and Nihal tried to save Pinkad, then the Appellants also tried to attack them as a result they ran away. Pinkad was mercilessly

beaten as a result he fell down and the appellants ran away. Thereafter, this witness went to the handpump and found that there was excessive bleeding from head and body. He saw a gun shot mark on the temporal region of the deceased. Thereafter, he, Ravindra and Nihal took him to the police station. The dead body was sent to the hospital. He further claimed that in the Court also, Gopal has extended a threat to him and also apprehended that he too would also be killed by the Appellants.

20. Nihal (P.W.2) is aged about 18 years and is the complainant and real brother of the deceased Pinkad. He stated that on 4-1-2011, he and his brother Ravindra were standing near Chhatri Gate. At that time, his brother Pinkad came from the side of *Nag Devta Temple*. The deceased had a talk with this witness. Thereafter, he moved further. Gopal, Chimppi and Lalla were having country made pistols whereas Illu was having Katar and Monu was having sword. Puran was also accompanying them. Gopal scolded his brother Pinkad that his mind has grown too much, therefore, he would be killed. Accordingly, all the accused persons attacked his brother. This witness and his brother tried to save him, but the accused tried to attack them also, therefore, they went in hiding. Pinkad was on a motor cycle and Girish (P.W.1) was the pillion rider. Gopal, Chimppi and Lalla had fired gun shots, whereas Illu and Monu Maratha had assaulted by Katar. Puran had also assaulted. The deceased had suffered a gun shot injury on his temporal region. However, this witness was unable to say that who caused gun shot injury and stated that only the accused persons can clarify the same. Thereafter, this witness went to police station to lodge FIR, Ex. P.1. He had given the information regarding death of his brother and merg intimation is Ex.

P.2. The safina form is Ex. P.3 and Naksha Panchnama is Ex. P.4. On 15th he had given a written application to the police and clarified that since he was terrified therefore, he could not disclose the name of Puran. The accused persons had old enmity with the deceased. The police had prepared spot map, Ex. P.6. The Police had seized blood stained and plain earth from the spot, vide seizure memo Ex. P.7.

21. Ravindra (P.W.3) is also the real brother of Pinkad and is an eye-witness. He has stated that on 4-1-2011, it was 8:00 P.M. He was standing in front of Chhatri Mandi Gate, along with his brother Nihal. At that time, his brother Pinkad came on a motor cycle from the side of *Nag Devta Temple* and Girish was the pillion rider. As soon as Pinkad moved forward after having talks with this witness, Gopal Pal, Lalla Kushwaha, Chimppi Yadav, Monu Maratha, Illu Kushwaha and Puran came. Gopal, Chimppi and Lalla were having country made pistols, whereas Monu was having sword and Illu was having Katar. The accused persons fired at Pinkad whereas Illu assaulted by Katar and Monu assaulted by sword. Gopal had scolded his brother that his mind has grown too much, therefore, he would be killed. His brother had suffered gun shot injury on his temporal region. Gun shot injury was caused by Gopal and Chimppi and Lalla had also fired gun shots. After noticing the firing, he and his brother Nihal went in hiding. After 5-7 minutes, the accused persons went away. Thereafter, he saw that excessive bleeding was going on from the body of his brother and accordingly, they went to police station. Nihal had lodged the report. Thereafter, the police sent the dead body to dead house. His brother had died on the spot itself. Safina Form was issued, Ex. P.3, Naksha Panchnama, Ex. P.4 also bears his signatures.

The police had seized blood stained and plain earth from the spot.

22. All the three witnesses were cross-examined in detail. However, during the course of arguments, the Counsel for the appellants had referred to some part of their cross-examination only, which shall be considered in the forthcoming paragraphs.

Whether FIR is an ante-dated and ante-timed document ?

23. By referring to the evidence of Girish (P.W.1), it is submitted that in para 14 of his cross-examination, he has admitted that they had staged *Dharna* by putting the dead body in front of the Police Station Janakganj and the *Dharna* continued till 10:00 P.M. However, he denied that on the next day also, they had staged *dharna*. He denied that he was not aware of the names of the assailants. He admitted that the Senior Police Officers had assured that FIR would be lodged and only thereafter, the *Dharna* was called off. The dead body was sent to mortuary in the night of the date of incident itself.

24. However, in para 32 of his cross-examination, a suggestion was given to this witness that the FIR was lodged near the Auto on which they had taken the deceased to Police Station. He stated that the deceased was taken to hospital by the same Auto, on which they had taken the deceased to Police Station. He had stayed in the police station for near about ½ to 1 hour. On the very same day, the police had not recorded the statement.

25. However, no such suggestion was given to Nihal (P.W.2) and Ravindra (P.W.3) with regard to agitation or *Dharna*.

26. By referring to the evidence of Shiv Pratap Singh (P.W.11), it is submitted that in fact no FIR was lodged at 8:20 P.M. Shiv Pratap Singh

(P.W.11), who is the investigating officer has stated that on 4-1-2011, he received the information of crime no. 1/2011 on 4-1-2011 itself. In para 16 of his cross-examination, he stated that thereafter, he went to the spot and stayed there for about 15 minutes. Thereafter, he went back to Police Station Janakganj and about 30 minutes thereafter, the family members of the deceased came along with the dead body, and created ruckus. He admitted that he did not investigate the matter on 4-1-2011. He admitted that except the statements of four witnesses, he did not record the statement of any other witness. In para 26 of his cross-examination, he admitted that he had received the information at about 8:30-8-45 P.M. Immediately thereafter, he went to the spot. He reached on the spot at about 9:00-9:15 P.M. He did not prepare the spot map, as nobody was there. The place of incident is about 100-150 Meters away from Police Station Janakganj. When he reached on the spot, 2-3 police personals, who were on duty in Police Station Janakganj, were standing on the spot and the shops were closed. Those police personals informed him that some people have taken away the deceased on an Auto but could not inform that where the dead body was taken. After he came back to the police station, the dead body was brought to the police station and people were creating ruckus and they were suggested to lodge the FIR and thereafter, the FIR was lodged. He denied that on 4-1-2011, he did not go to the spot or to the police station. The dead body was sent for post-mortem and two police personals were deputed for protecting the spot. The dead body was taken by the same auto. On the next day i.e., 5-1-2011, he reached to the spot at 1:00 P.M. Prior to that he had gone to dead house and Safina form was issued and *Lash Panchnama* was

prepared. The family members of the deceased were again creating ruckus by putting the dead body at Bada and had jammed the traffic. The traffic jam continued till 12:30 P.M. He admitted that in the *Lash Panchnama,* crime no. is not mentioned. He denied that the FIR was lodged on 5-1-2011 under the pressure of the family members and members of the society of deceased.

27. Vijay Bahadur Singh (P.W.15) is the scribe of the FIR. He has stated that on 4-1-2011, the complainant Nihal (P.W.2) came to the police station along with his brother Ravindra and lodged the FIR, Ex. P.1. The copy of the FIR was sent to the concerning Court. Shri Shiv Pratap Singh (P.W.11) was CSP Lashkar. He could not disclose the time at which ruckus was created by the family members of the deceased. He denied for want of knowledge that the family members of the deceased were complaining that the police has not registered the FIR as per their information. He also denied for want of knowledge that Senior Police Officers had assured the family members and politicians that the FIR will be registered as per the information of the family members. He denied that FIR, Ex. P.1 is not the same FIR which was lodged by the complainant on 4-1-2011. He denied that FIR was not written on 4-1-2011 at 8:20 P.M. He denied that FIR was written after 9:00 P.M. He denied that FIR was not lodged by the complainant Nihal Singh. He denied that FIR was lodged on the next day therefore, the copy of the same was sent to the Court belatedly.

28. Thus, it is submitted by the Counsel for the Appellants that the FIR in question is ante-dated and ante-timed document.

29. Considered the submissions made by the Counsel for the

Appellants.

30. Girish (P.W.1), Shiv Pratap Singh (P.W.11) and Vijay Bahadur Singh (P.W. 15) are the witnesses, who have stated that ruckus was created by the family members of the deceased, however, no such suggestion was given to Nihal (P.W.2) and Ravindra (P.W.3).

31. So far as the evidence of Shiv Pratap Singh (P.W.11) in para 27 of cross-examination is concerned, this Court is of the considered opinion, that no inference can be drawn that FIR was lodged only after ruckus was created by the family members of the deceased.

32. Shiv Pratap Singh (P.W.11) in para 1 of his examination-in-chief has stated that he got the information about crime no.1/2011 and thereafter he went to the spot and he reached there by 8:30-8:45 P.M. Thus, it is clear that FIR was already lodged prior to 8:30 P.M., otherwise, there was no question of getting information regarding crime no. 1/2011. It is not out of place to mention here that Shiv Pratap Singh (P.W.11) who had conducted the investigation was posted as CSP, Lashkar, therefore, his office was not in Police Station Janakganj. Thus, it was not possible for him to know as to what has transpired in the police station Janakganj, prior to 8:30 P.M as he went directly to the spot. As per his cross-examination in para 27, when he reached on the spot, 2-3 police personals, posted in Police Station Janakganj were already there who informed that some persons have taken the dead body in an Auto. It is the case of the prosecution itself, that Girish (P.W.1), Nihal (P.W.2) and Ravindra (P.W.3) went to the police station, along with the dead body of Pinkad and lodged the report at 8:20 P.M. Thus, if Shiv Pratap Singh (P.W.11) did not find the dead body as well as the witnesses on the spot,

then it was natural, because the witnesses had already went to the police station along with the dead body. It is further stated by Shiv Pratap Singh (P.W.11) that when he went to Police Station Janakganj, the witnesses and the dead body was not there and they came to the Police Station after 30 minutes of his arrival. Nihal (P.W.2) in para 12 of his cross-examination, has stated that the police personals sent the dead body to dead house. Girish (P.W.1) has stated that after the FIR was lodged, the dead body was taken to Hospital in the same auto. Ravindra (P.W. 3) has stated in para 25 of his cross-examination, that after the FIR was lodged, the dead body was taken to the hospital. Thus, it is clear that after lodging the FIR, the dead body was taken to the hospital, therefore, if Shiv Pratap Singh (P.W.11) did not find the witnesses and the dead body in the police station at the first instance, then also, said circumstance was natural, as the witnesses had already left for hospital after lodging the FIR.

33. It is next contended by the Counsel for the Appellants that Shiv Pratap Singh (P.W.11) has stated that after 30 minutes of his arrival in the police station, the family members of the deceased came along with the dead body and created ruckus and only after they were suggested to lodge the FIR, the FIR was lodged, thus, it is clear that FIR was lodged after 9:00 P.M.

34. Considered the submissions.

35. The defence itself has given suggestion to Vijay Bahadur Singh (P.W.15) that ruckus was being created on the allegations that the police has not recorded the FIR as per their information. Thus, it appears that since, the complainant and the family members of the deceased had a

grievance that FIR has not been lodged as per their information, therefore, they were protesting. It is not out of place to mention here that the name of Dhaople @ Puran was subsequently added on the written complaint made by the complainant Nihal (P.W.2).

36. Thus, it is clear that in the night of the incident itself, there was some agitation in front of the police station, however, the defence did not seek any explanation from the complainant Nihal (P.W.2) and Ravindra (P.W.3) as no suggestion in this regard was given to them. Only the complainant Nihal (P.W.2) and Ravindra (P.W.3) were the best persons to tell as to how they came back to the police station along with the dead body, but having failed to do so, this Court is of the considered opinion, that merely because Shiv Pratap Singh (P.W.11) has stated that after he reached the Police Station, the family members of the deceased came along with the dead body and started agitating, and thereafter, FIR was lodged, is not sufficient to hold that the FIR, Ex. P.1 is an ante-dated and ante-timed document. It is not out of place to mention here that Shiv Pratap Singh (P.W.11) is not the scribe of FIR, Ex. P.1. According to the prosecution, agitation was going out outside the police station. Shiv Pratap Singh (P.W.11) is also not the S.H.O. of Police Station Janakganj, Although he was present in the police station. Vijay Bahadur Singh (P.W. 15)is the scribe of the FIR, Ex. P.1. He has specifically stated that he had lodged the FIR at 8:20 P.M. Shiv Pratap Singh (P.W.11) has also stated in para 1 of his examination-in-chief that only after the FIR was lodged, he came to know about the incident and then he went to the police station. Thus, if the evidence of Vijay Bahadur Singh (P.W.15) is read along with the entire evidence of Shiv Pratap Singh (P.W.11), it

cannot be held that the FIR, Ex. P.1 was not lodged at 8:20 P.M.

37. It is well-settled principle of law that while appreciating the evidence, the Court must read the entire evidence and should not give its conclusion on a stray sentence. The Supreme Court in the case of **Dharmendrasinh v. State of Gujarat,** reported in **(2002) 4 SCC 679** has held as under:

> **14.** In our view the High Court taking into account the observations made in the decision referred to above came to the conclusion that otherwise reliable statement of the witness PW 3 Ashaben could not be discarded or discredited and even though there had been any fault or negligence in conducting the investigation, that too by itself, is not sufficient to dislodge the prosecution case as a whole. The chances of making some embellishment here and there in the statement are not ruled out even in cases of otherwise truthful and reliable witnesses. The concept of *falsus in uno and falsus in omnibus* has been discarded long ago. Therefore in such circumstances the court may have to scrutinize the matter a bit more closely and carefully to find out as to how far and to what extent the prosecution story as a whole is demolished or it is rendered unreliable. For this purpose the statement of the witnesses will have to be considered along with other corroborating evidence and independent circumstances so as to come to a conclusion that the contradiction in the statement of a witness could be considered as an embellishment by the witness under one or the other belief or notion or it is of a nature that the whole statement of the witness becomes untrustworthy affecting the prosecution case as a whole. The same principle will apply to a faulty or tainted investigation. Other relevant facts and circumstances cannot be totally ignored altogether. While appreciating the matter, one of the relevant considerations would be that chances of false implication are totally eliminated and the prosecution story as a whole rings true and inspires confidence. In such circumstances, despite the contradictions of the defective or tainted investigation, a conviction can safely be recorded.

38. The Supreme Court in the case of **Achhar Singh v. State of H.P., (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.

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

> **19.** While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the

> case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence.....

40. Thus, it is held that the FIR, Ex.P.1 cannot be held to be an ante-dated and ante-timed document on the basis of evidence of Shiv Pratap Singh (P.W.11) and Vijay Bahadur Singh (P.W.15).

Non-compliance of Section 157(1) of Cr.P.C.

41. It is next contended by the Counsel for the Appellants that the prosecution has failed to prove that on what date the copy of the FIR was sent to the concerning Magistrate. By referring to the evidence of Vijay Bahadur Singh (P.W.15), it is submitted that although in examination-in-chief, this witness had claimed that the copy of the FIR was sent to the concerning Magistrate, but in para 5 of his cross-examination, he clearly stated that he doesnot know that FIR, Ex. P.1 was sent to which Magistrate, on what date and with which dispatch number. He also expressed his ignorance about the date on which the copy of FIR was received by the Magistrate. He further admitted that in FIR, Ex. P.1, the date and dispatch number of sending copy of FIR Ex. P.1 is not mentioned. However, he stated that the copy was sent by a Head Constable. It is submitted that neither the acknowledgment of receipt of copy of FIR has been filed, nor the Head Constable has been examined. Therefore, it is clear that the FIR in question is an ante-dated and ante-timed FIR.

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

43. It is true that the prosecution has not proved the compliance of

Section 157(1) of Cr.P.C., but the only question for consideration is that whether the prosecution case can be thrown only on this ground?

44. The Supreme Court in the case of **Leela Ram v. State of Haryana, (1999) 9 SCC 525** has held as under :

> **8.** Before however, proceeding with the matter on the counts as above, it would be convenient to note another aspect of the matter, namely, the observations pertaining to the investigation by the investigating agency. It is now a well-settled principle that any irregularity or even an illegality during investigation ought not to be treated as a ground to reject the prosecution case and we need not dilate on the issue excepting referring to a decision of this Court (vide *State of Rajasthan* v. *Kishore*).

45. 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.

14. The learned Senior Counsel invited our attention to the judgments of this Court in *Balaka Singh* v. *State of Punjab* and *Datar Singh* v. *State of Punjab* in which this Court highlighted the importance of dispatch of special report to the Ilaqa Magistrate. There is no dispute with the proposition that it is the duty of the Station House Officer to dispatch special report to the Ilaqa Magistrate as is required under Section 157(2) of

the Code of Criminal Procedure. But there may be variety of factors and circumstances for the delay in dispatch of FIR and its receipt by the local Magistrate. The existence of FIR and its time may become doubtful in cases where there is no satisfactory and proper explanation from the investigating agencies.

15. In *Budh Singh* v. *State of U.P.* this Court while making reference to the Regulations made by the State of U.P. in terms of the U.P. Police Act held the Regulations to be statutory in nature. The Regulations provide the procedure as to how and in what form the information relating to commission of a cognizable offence when given to an officer in charge of a police station is to be recorded and sent to superior officers. The Regulations are procedural in nature which are meant for the guidance of the police. The Regulations do not supplant but supplement the provisions of the Code of Criminal Procedure.

46. The Supreme Court in the case of **Jafarudheen Vs. State of Kerala** reported in **2002 SCC onLine 495** has held as under :

28. The jurisdictional Magistrate plays a pivotal role during the investigation process. It is meant to make the investigation just and fair. The Investigating Officer is to keep the Magistrate in the loop of his ongoing investigation. The object is to avoid a possible foul play. The Magistrate has a role to play under Section 159 of Cr.PC.

29. The first information report in a criminal case starts the process of investigation by letting the criminal law into motion. It is certainly a vital and valuable aspect of evidence to corroborate the oral evidence. Therefore, it is imperative that such an information is expected to reach the jurisdictional Magistrate at the earliest point of time to avoid any possible antedating or antetiming leading to the insertion of materials meant to convict the accused contrary to the truth and on account of such a delay may also not only gets bereft of the advantage of spontaneity, there is also a danger creeping in by the introduction of a coloured version, exaggerated account or concocted story as a result of deliberation and consultation. However, a mere delay by itself cannot be a sole factor in rejecting the prosecution's case arrived at after due

> investigation. Ultimately, it is for the Court concerned to take a call. Such a view is expected to be taken after considering the relevant materials."

47. Section 157(1) is an external check. The prompt lodging of FIR and immediate dispatch of copy of FIR to the Magistrate, would certainly rule out the possibility of deliberations and over-implications, but non-compliance of Section 157(1) of Cr.P.C., would not *ipso facto*, make the FIR ante-dated and ante-timed or lodged after due deliberations. This Court cannot lose sight of the fact that it is not the duty of the first informant to ensure that the copy of FIR is promptly sent to the concerning Magistrate. It is the duty of the investigating officer to ensure the compliance of the same, and if any lethargy/negligence is shown by him, then the evidence of the first informant cannot be rejected on that ground only, unless and until, the Court also comes to a conclusion that the other evidence led by the prosecution is also not trustworthy. The Supreme Court in the case of **State of U.P. v. 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.....

48. In case, if the provisions of Section 157(1) of Cr.P.C. are not complied with at all or there is a delay in sending the copy of the FIR to the concerning Magistrate, then a heavy duty is cast upon the Court to consider the entire prosecution story very minutely with a pinch of salt and then to find out as to whether the ocular and medical evidence which

has come on record is reliable and credible or not?

49. It is well-settled principle of law that defective investigation should not be the sole criteria to disbelieve the prosecution story. The Courts must adopt an analytical approach to appreciate the evidence.

50. The Supreme Court in the case of **Zahira Habibulla H. Sheikh v. State of Gujarat,** reported in **(2004) 4 SCC 158** has held as under :

> **61.** In the case of a defective investigation the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See *Karnel Singh* v. *State of M.P.*)
>
> **62.** In *Paras Yadav* v. *State of Bihar* it was held that if the lapse or omission is committed by the investigating agency designedly or because of negligence, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of courts getting at the truth by having recourse to Sections 311, 391 of the Code and Section 165 of the Evidence Act at the appropriate and relevant stages and evaluating the entire evidence; otherwise the designed mischief would be perpetuated with a premium to the offenders and justice would not only be denied to the complainant party but also made an ultimate casualty.
>
> **63.** As was observed in *Ram Bihari Yadav* v. *State of Bihar* if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice in the hands of courts. The view was again reiterated in *Amar Singh* v. *Balwinder Singh*.

51. Thus, it is held that the FIR, Ex. P.1 was not an ante-dated and

ante-timed document.

Related and Interested witnesses and non-examination of Independent witnesses

52. It is next contended by the Counsel for the Appellants that Girish (P.W.1) is the friend of the deceased, whereas Nihal (P.W.2) and Ravindra (P.W.3) are real brother of the deceased Pinkad, therefore, it is clear that the prosecution has relied upon the evidence of related and interested witnesses and no independent witness was examined, irrespective of fact that the incident took place in the mid of the market. Further, it is submitted that since, the prosecution has alleged that there was an enmity between the parties, therefore, the witnesses are not reliable.

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

54. Admittedly, an old enmity was going on between the deceased and accused persons. But a witness cannot be disbelieved merely on the ground of enmity. Enmity is always a double edged weapon. On one hand, if it provides a motive to falsely implicate the accused, then on the other hand, it also provides motive for committing the offence. The Supreme Court in the case of **Kunwarpal v. State of Uttarakhand,** reported in **(2014) 16 SCC 560** has held as under :

> **16.** According to the complainant there was litigation between them and the accused persons leading to enmity. PW 3 Atmaram has also stated that there was litigation between them and it culminated in the occurrence. Animosity is a double-edged sword. While it can be a basis for false implication, it can also be a basis for the crime (*Ruli Ram* v. *State of Haryana* and *State of Punjab* v. *Sucha Singh*).….

55. The Supreme Court in the case of **State of U.P. v. Kishan Chand,**

reported in **(2004) 7 SCC 629** has held as under :

> **9.** The submission of the counsel for the accused that the testimony of PWs cannot be acted upon as they are interested witnesses is to be noted only to be rejected. By now, it is well-settled principle of law that animosity is a double-edged sword. It cuts both sides. It could be a ground for false implication and it could also be a ground for assault. Just because the witnesses are related to the deceased would be no ground to discard their testimony, if otherwise their testimony inspires confidence.....

56. So far as the related witness is concerned, it is suffice to mention that Relationship alone cannot be a ground to disbelieve a witness. There is a difference between a "Related witness" and "Interested witness".

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

> **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."

58. 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)
>
> > "[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."

> 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.

59. 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."

60. 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)
>
> "*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*."

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.

61. 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.*)

62. 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.

63. 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.....

64. 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.

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

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

> possible eyewitness in the circumstances of a case cannot be said to be "interested"."

14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, wherein this Court observed: (AIR p. 366, para 26)

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. State (UT of Pondicherry): (SCC p. 213, para 23)

"23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

66. Thus, it is clear that a witness cannot be disbelieved only on the ground that he is a "related witness". However, his evidence requires minute scrutiny.

67. So far as the question of non-examination of independent witness

is concerned, it is suffice to mention here that there cannot be a hard and fast rule, that corroboration by an independent witness is necessary. Further more, it is clear from the evidence of Shiv Pratap Singh (P.W.11) that when he reached on the spot, all the shops were already closed. Thus, it is clear that immediately after the incident, the shopkeepers after closing down their shops, had left the scene of occurrence. Furthermore, the Appellants are the residents of the same area, therefore, no one would like to pick up enmity with a criminal. The Supreme Court in the case of **Mahesh v. State of Maharashtra,** reported in **(2008) 13 SCC 271** has held as under :

> **5.** As regards non-examination of the independent witnesses who probably witnessed the occurrence on the roadside, suffice it to say that testimony of PW Sanjay, an eyewitness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non-examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned trial Judge for discarding and disbelieving the testimony of PWs 4, 5, 6 and 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. PW Prakash Deshkar has also admitted that he had lodged complaint to the police about the incident on the basis of which FIR came to be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well settled that in such cases many a times, independent witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons sometimes are not inclined to become witnesses in the case for a variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the

relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny.

68. The Supreme Court in the case of **Nagarjit Ahir v. State of Bihar,** reported in **(2005) 10 SCC 369** has held as under :

> **12.** It was then submitted that in spite of the fact that a large number of persons had assembled at the bank of the river at the time of occurrence, the witnesses examined are only those who are members of the family of the deceased or in some manner connected with him. We cannot lose sight of the fact that four of such witnesses are injured witnesses and, therefore, in the absence of strong reasons, we cannot discard their testimony. The fact that they are related to the deceased is the reason why they were attacked by the appellants. Moreover, in such situations though many people may have seen the occurrence, it may not be possible for the prosecution to examine each one of them. In fact, there is evidence on record to suggest that when the occurrence took place, people started running helter-skelter. In such a situation it would be indeed difficult to find out the other persons who had witnessed the occurrence. In any event, we have the evidence of as many as 7 witnesses, 4 of them injured, whose evidence has been found to be reliable by the courts below, and we find no reason to take a different view.

69. The Supreme Court in the case of **State of A.P. v. S. Rayappa,** reported in **(2006) 4 SCC 512** has held as under :

> **8.** Regarding non-examination of an independent witness PW 9 K. Bhupal Singh, the investigating officer stated that on that day he went to the place of incident and inquired about the witness but none came forward to reveal about the case due to fear. He has also stated that due to double murder in the town in a single day there was terror in public and he imposed Section 144. In such a situation surcharged with tension and fear psychosis it is not expected of any witness to come and depose about the incident even though they may have seen. Non-examination of independent witnesses, in such a situation, would be no ground to discard the otherwise creditworthy testimony of PW 1 and PW 2, which inspires confidence.

70. The Supreme Court in the case of **Sadhu Saran Singh v. State of U.P.,** reported in **(2016) 4 SCC 357** has held as under :

> As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilised people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the court as they find it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy.

71. The Counsel for the Appellants have relied upon the judgment passed by the Supreme Court in the case of **Kanakarajan Vs. State of Kerala** reported in **(2017) 13 SCC 597** in which it has been held as under :

> **19.** We feel that non-examination of credible independent witnesses in this case is very much fatal to the prosecution's case. Particularly when it is their own case that there were several shops and houses in the vicinity and several people were present. It is not necessary that in each and every case on the ground of non-examination of independent witnesses the case of the prosecution has to be brushed aside; if the evidence of prosecution witnesses is consistent, cogent and corroborated by other evidence it can be safely relied upon, but it is not so in the case at hand.....

72. Further, in the case of **Noor Aga Vs. State of Punjab** reported in **(2008) 16 SCC 417,** the Supreme Court has held as under :

> **110.** It is accepted that when the appellant allegedly opted for being searched by a Magistrate or a gazetted officer, Kuldip

> Singh called K.K. Gupta, Superintendent, Customs (PW 2) and independent witnesses Mohinder Singh and Yusaf. Whereas K.K. Gupta was examined as PW 2, the said Mohinder Singh and Yusaf were not examined by the prosecution. There is nothing on record to show why they could not be produced. Their status in life or location had also not been stated. It is also not known as to why only the said two witnesses were sent for. The fact remains that they had not been examined. Although examination of independent witnesses in all situations may not be imperative, if they were material, in terms of Section 114(*e*) of the Evidence Act, an adverse inference could be drawn.
>
> **111.** In a case of this nature, where there are a large number of discrepancies, the appellant has been gravely prejudiced by their non-examination. It is true that what matters is the quality of the evidence and not the quantity thereof but in a case of this nature where procedural safeguards were required to be strictly complied with, it is for the prosecution to explain why the material witnesses had not been examined. The matter might have been different if the evidence of the investigating officer who recovered the material objects was found to be convincing. The statement of the investigating officer is wholly unsubstantiated. There is nothing on record to show that the said witnesses had turned hostile. Examination of the independent witnesses was all the more necessary inasmuch as there exist a large number of discrepancies in the statement of official witnesses in regard to search and seizure of which we may now take note.

73. Thus, it is clear that non-examination of Independent witnesses cannot be said to be always fatal to the prosecution case and the facts and circumstances of each and every case are to be considered. As already held, in the present case, all the accused persons are the local residents of the area. Now a days, no independent witness generally comes forward under the apprehension of picking up enmity with any of the party or he wants to stay from the investigation and Court proceedings. Under these

circumstances, where the incident took place in the mid of market, and the market was closed immediately after the incident, and no body was there on the spot, this Court is of the considered opinion, that non-examination of any independent witness would not give any dent to the evidence of prosecution witnesses.

Light Pole not shown in the spot map

74. It is submitted by the Counsel for the Appellants that since, no light pole has been shown in the spot map, therefore, it is clear that there was no light on the spot and identification of accused was not possible.

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

76. It is not the case of the Appellants that the incident took place at an isolated place. On the contrary, the undisputed fact is that the incident took place in the mid of the market. The eye-witnesses were standing at a nearby place. Girish (P.W.1) was the pillion rider and was with the deceased. Thus, he had every opportunity to see the assailants from a very close range. The Appellants are also the resident of same vicinity. It is the case of the prosecution also, that there was an old enmity between the deceased and the Appellants. The deceased was on a motor cycle which too has a headlight. In the spot map, Shops have been shown on one side of the place of incident. The market was open at the time of incident. Therefore, it is clear that there were other sources of light also. Furthermore, since, the incident took place in the mid of market, then it cannot be said that no electric pole would have be there. The eye-witnesses have specifically stated about the electric pole. If the investigating officer, has not shown the electric pole on the spot, then at

the most, it can be said that it was the outcome of defective investigation, and there cannot be any hard and fast rule that in case of defective investigation, the benefit must go to the accused only. It is the duty of the Court to analyze and appreciate the evidence very critically. 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:
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> > "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."

Recovery of weapon of offence

77. Shiv Pratap Singh (P.W.11) has stated that Lalla and Illu were arrested on 6-1-2011 and memorandum of Lalla, Ex.P.10 and memorandum of Illu, Ex. P.11 were recorded. Double barrel country made pistol was seized from the possession of Lalla by seizure memo Ex. P.12 and Katar was seized from Illu vide seizure memo Ex. P.13. On 17-1-2011,Chimppi was arrested and his memorandum, Ex. P.19 was recorded and one .315 bore country made pistol was seized vide seizure

memo Ex.P.20. On 29-1-2011, Gopal was arrested and his memorandum, Ex. P.14 was recorded and one .315 bore country made pistol was seized from his possession vide seizure memo Ex.P.16. Similarly, Monu Maratha surrendered on 15-3-2011 and his memorandum, Ex.P.22 was recorded and sword was seized vide seizure memo Ex. P.23. All the seizure witnesses have also supported the prosecution case. The seized fire arms were sent to armorer Harnam Singh (P.W. 9) who has stated that all the three firearms were received by him in sealed conditions and all of the them were found to be in working condition and smell of explosive was present. His report is Ex. P.26.

78. It is true that Country made pistol seized from Gopal were sent for forensic examination and the report from F.S.L. was also received, but unfortunately, no question was put to the Appellants in this regard in their statements under Section 313 of Cr.P.C. Since, no opportunity was given to the Appellants to explain the FSL report, therefore, the same cannot be used against them. The Supreme Court in the case of **Bhalinder Singh v. State of Punjab,** reported in **(1994) 1 SCC 726** has held as under:

> **12.** So far as the last piece of circumstantial evidence about the alleged false explanation of the appellant is concerned, suffice it to say that it cannot be used against the appellant, not only for the reason that it was not put to him in his statement recorded under Section 313 CrPC but also for the reasons that the mere false explanation, assuming that it was given by the appellant, cannot become basis for conviction of the appellant. The prosecution has to establish its case and stand on its own legs. Weakness of the defence cannot be used as a circumstance in favour of the prosecution.

79. The Supreme Court in the case of **Samsul Haque v. State of**

Assam, reported in **(2019) 18 SCC 161** has held as under :

> **21.** The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to Accused 9, and the statement recorded under Section 313 CrPC. To say the least it is perfunctory.
>
> **22.** It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in *Asraf Ali* v. *State of Assam*. The relevant observations are in the following paragraphs : (SCC p. 334, paras 21-22)
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> > "*21*. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.
> >
> > *22*. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh* v. *State (Delhi Admn.)* while dealing with Section 342 of the

> Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."
>
> **23.** While making the aforesaid observations, this Court also referred to its earlier judgment of the three-Judge Bench in *Shivaji Sahabrao Bobade* v. *State of Maharashtra*, which considered the fallout of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 CrPC, the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed.

80. Thus, the FSL report is excluded from consideration. However, recovery of weapons from the Appellants is proved.

Whether the weapons seized from the possession of Appellants were used in commission of crime?

81. It is submitted by the Counsel for the Appellants that in absence of F.S.L. report as well as in absence of any query report by the Doctor with regard to the nature of weapons, it is clear that the prosecution has failed to prove that the weapons seized from the possession of the Appellants were used in the commission of offence, therefore, the prosecution story should be disbelieved.

82. It is true that the prosecution has failed to connect the weapons seized from the possession of the Appellants with the crime, therefore, at the most, it can be said that the weapons used for committing crime,

could not be seized by the police.

83. Now the only question for consideration that what would be effect of non-seizure of weapon of offence.

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

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

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

> **17.** The deceased had sustained a gun-shot injury with a point of entry and exit. The non-recovery of the weapon of offences would therefore not discredit the case of the prosecution.....

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

> **8.** Learned counsel further pointed out that the country-made firearm alleged to have been used by the appellant was not recovered by the police and the same was not sent to the police station. The learned counsel submitted that the investigation was not properly done and that the appellant is entitled to the benefit of doubt. In our view, this plea is not tenable. The house of the appellant was searched immediately after the incident, but the police could not recover the weapon of offence from his house. It appears that the appellant had succeeded in concealing the weapon before the police could

search his house. In our opinion, the fact of non-recovery of the weapon from the house of the appellant does not enure to his benefit.

87. Thus, non-recovery of weapon of offence would not make the direct ocular evidence vulnerable.

Whether Ocular Evidence is corroborated by Medical Evidence.

88. It is submitted by the Counsel for the Appellants, that the Medical Evidence doesnot corroborate the Ocular Evidence. According to prosecution case, Chimppi, Gopal and Lalla had fired gun shots, but only one gun shot injury was found on the temporal region of the deceased Pinkad. One stab wound was found on left buttock and one Lacerated wound was found on the left eye of the deceased, apart from one abrasion. Thus, it is clear that at least one hard and blunt object was used, but according to the prosecution witnesses, Illu was having Katar and Monu Maratha was having Sword. Therefore, it is clear that the Medical Evidence doesnot support the Ocular Evidence.

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

90. This Court would like to consider the law governing the field. Three circumstances may arise i.e., 1st where the Medical Evidence fully corroborates the Ocular Evidence, 2nd where there are some discrepancies in the Medical Evidence and Ocular Evidence, and 3rd where Medical Evidence completely rules out the Ocular Evidence. It is well-settled principle of law that Ocular Evidence must be given preference over the Medical Evidence, unless and until the Medical Evidence completely rules out the possibility of Ocular Evidence. The Supreme Court in the case of **CBI v. Mohd. Parvez Abdul Kayuum,** reported in **(2019) 12**

SCC 1 has held as under: :

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

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

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

(emphasis supplied)

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

> "*33. The question before us, therefore, is whether the "medical evidence" should be believed or whether the testimony of the eyewitnesses should be preferred? There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence. This principle has more recently been accepted in* Gangabhavani *v.* Rayapati Venkat Reddy.
>
> * * *
>
> *36*. Similarly, a fact stated by a doctor in a post-mortem report could be rejected by a court relying on eyewitness testimony, though this would be quite infrequent. In *Dayal Singh* v. *State of Uttaranchal*, the post-mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased.

> This Court rejected the "medical evidence" and upheld the view of the trial court (and the High Court) that the testimony of the eyewitnesses supported by other evidence would prevail over the post-mortem report and testimony of the doctor. It was held: (SCC p. 286, para 41)
>
> '*41*. … [T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and 67 the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court.'"
>
> (emphasis supplied)

91. The Supreme Court in the case of **Baleshwar Mahto v. State of Bihar,** reported in **(2017) 3 SCC 152** has held as under :

> **11.** When we examine the matter in the aforesaid perspective we do not find any inconsistency between ocular evidence and the medical evidence. How medical evidence is to be collated with ocular evidence is described by this Court in *Kamaljit Singh* v. *State of Punjab* in the following fashion : (SCC p. 159, para 8)
>
> "*8.* It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term

> goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out. (See *Solanki Chimanbhai Ukabhai* v. *State of Gujarat*.) The position was illuminatingly and exhaustively reiterated in *State of U.P.* v. *Krishna Gopal*. When the acquittal by the trial court was found to be on the basis of unwarranted assumptions and manifestly erroneous appreciation of evidence by ignoring valuable and credible evidence resulting in serious and substantial miscarriage of justice, the High Court cannot in this case be found fault with for its well-merited interference."

92. The only reason assigned by the Counsel for the Appellants to discard the ocular evidence is that no one was armed with hard and blunt object but one lacerated wound was found.

93. Heard the learned Counsel for the Appellants.

94. One sword was seized from Appellant Monu Maratha. It is true that generally a sword has a sharp edge but by efflux of time, the blade may become blunt due to loss of sharpness, or the sword may not be having sharp edge at all. The Supreme Court in the case of **Putchalapalli Naresh Reddy v. State of A.P.,** reported in **(2014) 12 SCC 457** has held as under:

> **15.** In the first place, we find that other witnesses have given the same deposition. It is possible that the statement of the witness [PW 3] is slightly inaccurate or the witness did not see properly which side of the axe was used. It is equally possible that the sharp edge of the axe is actually very blunt or it was reversed just before hitting the head. It is not possible to say what is the reason.....

95. A Division Bench of this Court in the case of **Bhaggo bai Vs. State of M.P.** passed on **13-5-2022** in **Cr.A. No. 1116/2014(Gwalior Bench)** has held as under :

> 55. Thus, merely because Lacerated wounds were found on the skull of deceased Amar Singh, it cannot be said that there was material variance in the ocular and medical evidence, thereby completely ruling out the ocular evidence. Either the blade of the sword must have become blunt or the blunt part of the sword must have come in contact at the time of assault, therefore, the ocular evidence has to be given preference over the medical evidence. Thus, it is held that the evidence of witnesses cannot be discarded merely on the ground that although it was alleged that the Appellant Sodam had used a sword, but lacerated wound was found.

96. Thus, there is no variance in the ocular and medical evidence, and thus, the ocular evidence cannot be discarded.

Whether Appellants Lalla and Chimppi can be convicted with the help of Section 149 of IPC

97. It is submitted that according to the prosecution case, the Appellant Gopal, Lalla and Chimppi were armed with firearms and they used the same also, but only one gun shot injury was found on the dead body of the deceased and according to Ravindra (P.W.3), the said injury was caused by Gopal, therefore, the presence of Lalla and Chimppi on the spot and their participation is doubtful.

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

99. The FIR, Ex. P.1 was lodged promptly within a period of 20 minutes of the incident. The names of Lalla and Chimppi are specifically mentioned in the FIR. Specific role was attributed to them. It is well-settled principle of law that it is not necessary that in order to attract the provisions of Section 149 of IPC, each and every accused must cause an injury. The Supreme Court in the case of **Krishnappa v. State of Karnataka,** reported in **(2012) 11 SCC 237** has held as under :

> **20.** It is now well-settled law that the provisions of Section 149 IPC will be attracted whenever any offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or when the members of that assembly knew that offence is likely to be committed in prosecution of that object, so that every person, who, at the time of committing of that offence is a member, will be also vicariously held liable and guilty of that offence. Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. This principle ropes in every member of the assembly to be guilty of an offence where that offence is committed by any member of that assembly in prosecution of common object of that assembly, or such members or assembly knew that offence is likely to be committed in prosecution of that object. (*Lalji* v. *State of U.P.*, *Allauddin Mian* v. *State of Bihar*, *Ranbir Yadav* v. *State of Bihar*.)
>
> **21.** The factum of causing injury or not causing injury would not be relevant, where the accused is sought to be roped in with the aid of Section 149 IPC. The relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not. (*State of U.P.* v. *Kishan Chand* and *Deo Narain* v. *State of U.P.*)

100. Once, Girish (P.W.1), Nihal (P.W.2) and Ravindra (P.W.3) have been found to be reliable witnesses, and it is held that Lalla and Chimppi were not only the members of Unlawful Assembly and were not only present on the spot, but had also participated in the assault, then whether the gun shots allegedly fired by Lalla and Chimppi, hit the deceased or not, becomes immaterial.

101. No other argument is advanced by the Counsel for the Appellants.

102. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has

successfully proved the guilt of the Appellants beyond reasonable doubt. Therefore, the conviction of the Appellants recorded by the Trial Court is hereby **affirmed.**

103. So far as the question of sentence is concerned, the minimum sentence for offence under Section 302 of IPC is Life Imprisonment. Therefore, the sentence awarded by the Trial Court doesnot call for any interference.

104. *Ex consequenti*, the judgment and sentence dated 7-5-2012 passed by Special Judge (Atrocities), Gwalior in Special Sessions Trial No. 105/2011 is hereby **affirmed.**

105. The Appellant Illu @ Ramendra is on bail. His bail bonds are hereby cancelled. He is directed to immediately surrender before the Trial Court for undergoing the remaining jail sentence.

106. Other Appellants are in jail. They shall undergo the remaining jail sentence.

107. Let a copy of this judgment be immediately provided to the Appellants, free of cost.

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

109. The Cr.A.s No. 467/2012, 531/2012, 711/2012, and 770/2012 fail and are hereby **dismissed.**

(G.S. AHLUWALIA)
JUDGE

(RAJEEV KUMAR SHRIVASTAVA)
JUDGE