IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE HIRDESH

CRIMINAL APPEAL No. 1971 of 2014

BETWEEN:-

1. **SOHAN S/O KANIRAM, AGED ABOUT 38 YEARS, OCCUPATION: AGRICULTURE VILLAGE PIPALDA, P.S. SADALPUR, DISTRICT- DHAR (MADHYA PRADESH)**

2. **RADHESHYAM S/O TOLARAM RAJPUT, AGED ABOUT 47 YEARS, OCCUPATION: AGRICULTURIST VILLAGE- PIPALDA, P.S. SADALPUR, DISTRICT- DHAR (MADHYA PRADESH)**

.....APPELLANTS

(SHRI VIVEK SINGH – ADVOCATE FOR APPELLANT NO.1)
(SHRI MANOHAR SINGH CHOUHAN – ADVOCATE FOR APPELLANT NO.2)

AND

THE STATE OF MADHYA PRADESH, STATION HOUSE OFFICER THRU. P.S. AJK, DHAR (MADHYA PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI, LEARNED GOVERNMENT ADVOCATE FOR THE RESPONDENT/STATE)

RESERVED ON : 13.07.2023

PRONOUNCED ON : 13.09.2023

This appeal having been heard and reserved for orders, coming on

for pronouncement this day, Hon'ble Shri Justice Hirdesh pronounced the following:

J U D G M E N T

1. This criminal appeal under Section 374 (2) of Cr.P.C. has been preferred by the appellants being aggrieved by the judgment dated 19.11.2014 passed by Special Judge (SC/ST) Dhar in Special Session Trial No.54/09 whereby the trial court has convicted the appellants for the offence punishable u/S. 302 of IPC and sentenced them to undergo rigorous imprisonment for life with fine of Rs.5000/- and in default of payment of fine one month's additional R.I.

2. According to the prosecution story in short, PW-1 Balwant lodged a report Ex.P-1 at police station- Sadalpur at 06.30 a.m. stating that he was sleeping in the house with his brother Jagdish PW-2 and father-in-law Shankarlal PW-6 and in early morning at 04.00 a.m. he heard the voice of this father who was sleeping on the *Otla* (platform) outside of the house and saw that the appellants along with other co-accused persons- Mohan, Kaniram Balai, Babu, Ramchandra, Ghandshyam and Jitendra were assaulting his father (deceased) with swords. He further stated that his brother PW-2 Jagdish, his father-in-law PW-6 Shankarlal and Hariram PW-13 also saw the incident. On the basis of the report of PW-1 Balwant, police registered an F.I.R. After registering the F.I.R. police reached the spot and prepared crime detail form and *Laash (*dead-body*) Naksha Panchayatnama* (Ex.P-7) for sending the body of the deceased for postmortem. The police arrested the accused persons and after taking their statements u/S. 27 of the Evidence Act seized blooded sword *(Talwar)* from the appellants – Sohan and Radheshyam and recorded the statements of witnesses u/S. 161.

3. After completing the investigation, police filed charge-sheet before the

Magistrate and as the case was triable by session court, the same was transferred to the court of Sessions.

4. The appellants abjured their guilt and by taking the plea of innocence claimed for trial. In order to substantiate the prosecution case, the prosecution produced 14 prosecution witnesses. The trial court also recorded statements of accused u/S. 313 of Cr.P.C. The defence also examined four witnesses. After considering the evidence adduced by the parties, the trial court came to the conclusion that the appellants are guilty of the offence as mentioned above.

5. Learned counsel for the appellants submits that the judgment passed by the trial court is bad in law and contrary to the fact and evidence of the case. The evidence led by the prosecution witnesses suffer from serious infirmity. It is further submitted that the trial court has wrongly relied upon the testimony of PW-1 Balwant, PW-2 Jagdish and PW- 6 Shankarlal. It is further submitted that nobody has seen the incident and PW-1 saw the body of the deceased after the death. So names of the assailants were not disclosed in initial report nor it has been mentioned that anyone has seen the accused. It is further submitted that district scientific officer gave the report as below:-

> ''सूचनाकर्ता के अनुसार आज सुबह चार बजे करीबन मृतक अपने नये मकान मवेशी कोठे के सामने शेड में पलंग पर सोये थे सुबह चार बजे पिताजी ने आवाज लगाई की बेटा सुनोरे गॉव के लोग मारपीट कर रहे है तथा उसके बाद नीचे आकर देखा तो पिताजी मर चुके थे उसके पहले पिताजी ने अपराधियों के नाम भी बताये थे। रिपोर्ट करता हूं कार्यवाही की जाये।''

6. Learned counsel further submits that if PW-1 Balwant has seen the assailants, he must have disclosed their names before the district scientific officer and it is also stated that the report is anti-timed as explained by PW-5 Budhram Yadav (in-charge control room) in his cross-examination and

evidence shows that the deceased alone was sleeping in open place and unknown persons assaulted him and the alleged seized weapons do not connect the appellants with crime and the independent witnesses did not support the prosecution story and on the same evidence other accused persons have been acquitted. It is further submitted that the trial court has also committed error in not relying the testimony of defence evidence and documents. In support of his arguments, learned counsel for the appellants has cited following citations:-

(1) **State of Kerala Vs. M.M. Manikantan Nair,** 2001 (2) MPWN, 142**;**

(2) **Rammi @ Rameshwar Vs. State of M.P.,** 1999 (2) JLJ 354;

(3) **State of Maharashtra Vs. Narsingrao Gangaram Pimple, AIR 1984 SC 63.**

(4) **Meharaj Singh (L/Nk.) Vs. State of U.P.,** 1994 (5) SCC 188,

(5) **M/s Pankaj Jain Agencies Vs. Union of India and others,** 1995 (5) SCC, 198

(6) **Kansa Mehera Vs. State of Orissa,** 1987 (3) SCC, 480

(7) **Lallusingh S/o Jagdishsingh Samgar Vs. State of M.P.,** 1996 MPLJ, 452

(8) **Ramaiah @ Rama Vs. State of Karnataka,** 2014 Cr.L.R. (SC) 907

(9) **Dinesh Vs. State of Madhya Pradesh** (Criminal Appeal No.870/1996) by Supreme Court of India.

(10) **Ramesh @ Dabbu Vs. State of M.P.,** 2014 (2) JLJ 397

(11) **Sudarshan & Anr. Vs. State of Maharashtra,** 2014 Cr.L.R. (SC) 660

(12) **Mohd. Muslim Vs. State of Uttar Pradesh (Now Uttarakhand),** 2023 SCC OnLine SC 737

7. Learned counsel for the respondent/State, on the other hand, supported

the impugned judgment and prayed for dismissal of this appeal. He submitted that the eye witnesses PW-1 Balwant, PW-2 Jagdish and PW-6 Shankarlal have completely supported and established the case and the weapons seized from the appellants were having human blood and the allegation of mentioning the time in time column of the F.I.R. is just human error as stated by PW-5 and is not a manipulation. It is further submitted that prosecution witnesses have fully supported the case.

8. The appellant No.1 has filed an interlocutory application in this appeal i.e. **I.A. No.3260/2016** under Section 391 of Cr.P.C. on the following grounds:-

The aforesaid application in first para has described the prosecution case about the incident took place on 25.01.2009 stating that in F.I.R. (Ex.P/1) the time of lodging F.I.R. was initially written as 18.00 hours, thereafter it was scored off and was written as 6.30 in the morning.

The contention of the appellant is that as per the report nobody has seen the incident and Balwant (PW-1) saw the dead body and names of the assailants were disclosed by father (deceased) Babulal.It is also stated that the name of the assailants were not disclosed in the initial report nor it has been mentioned that anyone saw the occurrence. The report shows that PW-1 Balwant, PW-2 Jagdish and PW-6 Shankarlal are got up witnesses.

It is further stated that PW-5 Budhram Yadav, SHO of P.S.-Sadalpur who is alleged to have recorded Ex.P-1 has admitted that "यह सही है कि प्र.पी.1 में थाने पर सूचना प्राप्त होने का समय 18 लिखकर काटा गया है यह मेरे द्वारा ही काटा गया है" The admission of PW-5 shows that the F.I.R. is anti-timed and is not a genuine document, even though, as per PW-1 he left the village for lodging F.I.R. at about 8-8.30 a.m. for police station. The statement of PW-1 Balwant in para

38 proves that the F.I.R. could not have been lodged and Ex.P/1 shows that the F.I.R. was recorded at 18.30 P.M. and subsequently the time has been changed.

It has also been stated that the report of senior scientific officer dated 26.01 said to have been recorded on 25.01.2009 at 17.00 hours in which name of complainant has been shown to be Balwant PW-1, who is alleging himself to be eyewitness of the incident, but on the contrary in the FSL inspection report he has stated that at 4:00 in the morning he heard some noise of his father, when he came down he saw his father on the verge of death before that his father disclosed name of assailants. This goes to show that PW-1 Balwant is not an eyewitness to the incident and the F.I.R. is an anti-timed document.

It is also alleged in the application that the prosecution did not examine the senior scientific officer, hence, in the interest of justice his examination is very much necessary to unfold the narrative of the prosecution

This Court considering each and every point mentioned in the application (I.A. No.3260/2016) does not find any reason to call the senior scientific officer as a witness, hence, **I.A. No.3260/2016 is dismissed.**

9. Now the points of consideration before this Court is; **whether the findings of the trial court on conviction and sentence of the appellants u/S. 302 are erroneous in eye of law and facts**?

The first question arises **whether the death of Babulal is homicidal or not?**

Budhram PW-5, investigating officer, has stated in his evidence that after reaching the spot and preparing *Laash (*dead-body*) Naksha Panchayatnama* (Ex.P-7) in presence of witnesses, the dead-body was sent for postmortem. PW-4 Sanjay Joshi, Medical Officer, Dhar conducted

postmortem of the body of the deceased-Babulal and noticed following injuries on the body of the deceased:-

"1– कटा हुआ घाव सिर में दाहिने फ्रन्टो आक्सिीपीटल रीजन में जिसका आकार 13X5X5 सें0मी0 था।
2– दाहिना कान कटा हुआ था तथा कान का पिन्ना दो भागों में बटा हुआ था।
3– दाहिने कान के उपर पैराईटो आक्सिीपिटल रीजन में एक कटा हुआ घाव था जिसका आकार 3X3X3 सें0मी था।
4– सिर में सामने की ओर एक कटा हुआ घाव था जिसका आकार 6X2X2 सें0मी0 था।
5– दाहिने पैराईटल बोन में डिप्रेस्ड फ्रेक्चर था।
6– दाहिने हाथ में एक कटा हुआ घाव था जिसका आकार 3X2X2 सें0मी0 था।
7– दाहिनी मेक्जिला बोन में फ्रेक्चर था तथा वहा एक कटा हुआ घाव जिसका आकार 2X2X1 सें0मी0 था।
8– दाहिने स्केपूला बोन में फ्रेक्चर था एवं दाहिनी तरफ की 5वीं 6वीं, 7वीं एवं 8वीं पसलियों में फ्रेक्चर था।
9– दाहिनी भुजा की हड्डियों में फ्रेक्चर था व सूजन मौजूद थी।
10– दाहिनी जांघ पर एक कटा हुआ घाव था जिसका आकार 6X2X2 सें0मी0 था।
11– दाहिनी फीमर हड्डी में फ्रेक्चर था।
12– दाहिने घुटने पर कटा हुआ घाव था जिसका आकार 2X2X1 सें0मी0 था।
13– दाहिनी रेडिया अलना हड्डी में फ्रेक्चर था।
14– दाहिने कंधे पर सूजन थी जिसका आकार 6X1X1 सें0मी0 था।
15– दाहिने पुट्ठे पर एक कटा हुआ घाव था जिसका आकार 5X1X1 सें0मी0 था।
16– दाहिनी अमलाई को रीजन में सूजन थी जिसका आकार 10X2 सें0मी0 था।"

आंतरिक परीक्षण : –

दिनांक 20.4.2009 को थाना प्रभारी ए.जे.के.धार ने प्रकरण में जप्त शुदा तलवार मेरे पास जांच के लिए मेजकर यह क्वेरी की थी कि क्या मतक बाबूलाल को पहुॅची चोटें इससे आना संभावित है तो मैंने दोनो तलवारों को सील खोलकर उनका अवलोकन करने के बाद यह अभिमत दिया था

कि बाबूलाल को आई चोटें इस प्रकार के हथियार से आना संभाव्य है! तत्पश्चात मैंने दोनों तलवारों को सीलबंद करके उसे लेकर आने वाले अमरसिंह को सोप दी थी ।

दिनांक 20.04.2009 को थाना ए.जे.के.धार द्वारा क्वरी क्रमांक क्यू/09 द्वारा पत्र भेजकरा यह क्वेरी चाही थी कि जप्त शुदा हथियार से बाबूलाल को चोंटें आ सकतीं है व मृत्यु हो सकती है उक्त पत्र प्र.पी. –18 है जिसके प्रष्ठ भाग पर मैनें क्वेरी का जवाब लिखा है जो दिनांक 20.04.09 का है जिसके अनुसार मृतक बाबूलाल पिता लक्ष्मण उम्र 54 वर्ष निवासी ग्राम पिपल्दा थाना सादलपुर को शरीर पर आई विभिन्न चोंटें जप्त शुदा हथियार से आना संभव है । तथा शरीर पर उपस्थित घावों से आहत की मृत्यु होना संभव है । जप्त शुदा तलवारें नग – 2 को मैंने पुनः सीलबंध कर मेरे द्वारा हस्ताक्षर कर पुनः आरक्षक अमरसिंह ए.जे.के.धार को सौंप दी थी । तत्संबंध में मेरे द्वारा लिखित क्वेरी रिपोर्ट प्र.पी. –18–ए जिसके ए से ए भाग पर मेरे हस्ताक्षर है ।

PW-4 Sanjay Joshi, Medical Officer, Dhar stated that in his opinion the death of the deceased was due to injuries caused to the deceased and time of death was 12-13 hours in report Ex.P-5.

On perusal of the evidence of prosecution witnesses and *Laash (*dead-body*) Naksha Panchayatnama* (Ex.P-7) as well as report Ex.P-5 and taking into consideration the fact that there is no substantial cross-examination by the defence, **it is clearly proved that the death of the deceased was homicidal in nature.**

10. Now the point of determination is; **<u>whether both the appellants have caused death of Babulal by assaulting him by Sword *(Talwar)?*</u>**

At the outset, the statements of PW-1 Balwant, PW-2 Jagdish and PW-6 Shankarlal are required to be enunciated. PW-1 Balwant has deposed that he knew the appellants. On date 25.01.2009 in the night, he and his father-in-law Shankarlal and brother Jagdish were sleeping inside the house and his father was sleeping on *Otla* (platform) outside of the house. In the early morning

near about 3-4 O'clock, he heard the voice of his father shouting " *Are' Beta Ye Log Mujhe Maar Rahe Hain"* (O my son, these persons are assaulting me) then he along with his brother Jagdish and father-in-law Shankarlal came outside of the house and saw that the appellants and other co-accused persons were assaulting his father with Sword (*Talwar*), axe (*Kulhaadi*), *Dharia and Farsha*. On seeing this, he shouted and ran towards the accused persons then the accused persons ran away from the spot. PW-1 Balwant further stated that after that he went near his father and saw that head of his father was hacked and there were so many injuries on the body of his father. Due to those injuries, his father died. Accused persons assaulted his father due to enmity in relation to properties. He further stated that he saw all the accused in light of Chimni *(Chimni)* then he went to Police Station, Sadalpur and lodged report Ex.P-1.

11. PW-2 Jagdish and PW-6 Shankarlal also vindicated the prosecution story in the same way in their examination of chief. PW-3 Hariram and DW-5A Radheshyam did not not support the prosecution story. They were declared hostile by the counsel for the State and in cross examination they have stated that did not know anything about the incident and who has killed Babulal. Therefore, on perusal of the evidence of PW-3 and DW-5A it is clear that their statements do not help any side.

12. Learned counsel for the appellant further submit that no independent witness has supported the prosecution case. It is only vindicated by relatives and there are so many omissions and contradictions in the statements of their witnesses.

13. With regard to these aspects, in the case of **Chauda Vs. State of Madhya Pradesh,** 2019 ILR M.P. 471, a Division Bench of this Court has

held as – **an interested eye witnesses- presence of eye witnesses establishes their statement**.

> **"The appellants failed to rebut their testimony which was quite natural and without any material contradiction and omission the conviction can be based on the testimony of close relatives/interested witnesses. There is no material contradiction or omission between testimony of eye witnesses and medical evidence which must be relied upon. In this case it is held that if interested / relative witnesses are reliable then these evidence are not discarded merely on this ground."**

14. In the case of **Smt. Dalbir Kaur Vs. State of Punjab,** Cr.LJ 1976, the Apex Court has made following observations:-

> **"Interested witnesses are related witnesses and they are natural witnesses. They are not interested witnesses and their testimony can be relied upon."**

15. In the case of **Arjun Singh Vs. State of Chhattisgarh, 2017 Vol.2 MPLJ Cr. 305**, the Apex Court held the evidence of related witnesses has the evidentiary value, court has to scrutinize the evidences with care in each and every case is a rule of prudence and a rule of law. Facts of witnesses being related to victim or deceased are not by itself discredit evidence.

16. In the case of **Laltu Ghos Vs. State of West Bengal,** AIR (2019) SC 1058, the Apex Court has quoted as under:-

> " (a) 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.

(b) Actually in many cases, it is often that the offence is witnessed by a close relative of the victim / deceased, whose presence on the spot of the incident would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested."

17. Applying the aforesaid law, now the evidence of prosecution witnesses is discussed as under:-

The first argument of defence counsel is that the mandatory provision of Section 157 of Cr.P.C. is not followed because copy of F.I.R. has not been sent to the nearest Magistrate forthwith and no evidence was adduced by the prosecution for compliance of Section 157 of Cr.P.C. and the argument that F.I.R. is anti-timed and not genuine document because PW-5 Budhram SHO (Investigating Officer) accepted that there is tampering in the time column of Ex.P-1.

18. On perusal of the evidence of PW-1 it is revealed that he has accepted the fact that he might have gone to police station nearby 08:00-08:30 a.m. and after registering the F.I.R. police came with him on the spot. On perusal of the seizure memo Ex.P-8, Ex.P-63 and Ex.P-69 it is revealed that the time is mentioned as 09.15 and crime number was also mentioned and all other formalities of preparing *Naksha Panchayatnama* (Ex.P-7) was done before 06:00 pm and crime number was also mentioned in such documents and postmortem was done at 10.50 a.m. on 25.01.2009, therefore, tampering has not been done deliberately and it is just a human error.

19. In the case of **Meharaj Singh (L/Nk.) Vs. State of U.P.,** 1994 (5) SCC 188, the Apex Court has held that if there is no doubt in date and time in F.I.R., the delay in sending F.I.R. to the court of Magistrate is not fatal to the prosecution case. In the present case, the evidence of PW-1 and PW-5; and the prosecution document show that F.I.R. was lodged timely at 06.30 a.m., hence, this has no substance.

20. Learned counsel for the appellant further submits that after the incident police called Scene of Crime Unit for spot inspection on 25.01.2009 at 17.00 hours. According to that report, it is stated as under:-

> ''सूचनाकर्ता के अनुसार आज सुबह चार बजे करीबन मृतक अपने नये मकान मवेशी कोठे के सामने शेड में पलंग पर सोये थे सुबह चार बजे पिताजी ने आवाज लगाई की बेटा सुनोरे गॉव के लोग मारपीट कर रहे है तथा उसके बाद नीचे आकर देखा तो पिताजी मर चुके थे उसके पहले पिताजी ने अपराधियों के नाम भी बताये थे। रिपोर्ट करता हूं कार्यवाही की जाये।''

The aforesaid report which is marked by this Court as Ex.P-C is a summary report of the scene of offence in which he mentioned some of the facts narrated to him by PW-1. This document was submitted by the prosecution along with charge-sheet. It is not mandatory for the prosecution that he examines each and every witness and exhibits all the documents, therefore, this document Ex.P-C is not F.I.R. because F.I.R. (Ex.P-1) was lodged at 06.30 a.m. by PW-1 and Ex.P-C in summary report prepared by district scientific officer, therefore, this Ex.P-C does not give any help to defence.

21. Learned counsel for the appellants submits that there are so many contradictions and omissions in the evidence of PW-1 Balwant, PW-2 Jagdish

and PW-6 Shankarlal and they are interested/related witnesses so they are not reliable. On perusal of the evidence of PW-1 Balwant and PW-2 Jagdish, it was found that they were examined after 8 months of the incident and in their evidence, it is found that they have unrebutted substantially in their cross-examination. It is true that there are some omissions and contradictions in evidence of PW-1 but in in the case of **Rammi @ Rameshwar Vs. State of M.P.,** 1999 (2) JLJ 354, it has been held that in lengthy cross-examination some omissions and contradictions may be outcome of the evidence. The Apex Court in para 24 of the aforesaid judgment has held as under:-

> **"24 When eye-witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."**

So in view of the aforesaid discussion, in the opinion of this Court, these omissions and contradictions shall not affect the substantial part of the evidence of PW-1 which is supported by medical evidence.

22. Learned counsel further submits that that PW-6 Shankarlal is a chance witness. He is the father-in-law of PW-1. In the case of **S.L Tiwari Vs. State of U.P. , 2004 (11) SCC 410,** the Apex Court has held that "when an incident takes place in a street or in field in a village, evidence of passers-by who witnessed the incident, cannot be discarded or viewed with suspicious on

ground of they being mere chance witnesses, rather they can be described as independent witnesses". In the aforesaid case, the Apex Court in para No.7 has held as under:-

> **"7 - There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing an independent witness as 'chance witness' it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence. "**

23. Learned counsel for the appellants submit that PW-6 Shankarlal was not present in village – Pipalda and he was present in village – Bhilchauli**.** In the evidence DW-1 Dhan Singh has stated that on the date of incident i.e. 25.01.2009, PW-6 Shankarlal came to his house and stayed at night.

24. In the case of **State of Maharashtra Vs. Narsingrao Gangaram Pimple, AIR 1984 SC 63,** the Apex Court has held as under:-

"it is well settled that a plea of alibi must be proved with certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence."

25. On perusal of the evidence of PW-1 Balwant, PW-2 Jagdish and PW-6 Shankarlal, it is found that they are intact and PW-6 denied the suggestion given by defence that he was not present on the spot on the date of occurrence and also denied that he went to house of Dhan Singh (DW-1) on the date of occurrence and distance of village-Pipalda is near about 15 k.m. so possibility of presence of PW-6 Shankarlal cannot be completely excluded. After perusal of the evidence of DW-1 it is found that he is not reliable and his evidence was not supported by any document. In view of the aforesaid decisions of the Apex Court, it is found that after appreciation of evidence of PW-6 Shankarlal his presence on the spot is not doubtful and his evidence is not controverted in cross-examination so his evidence cannot be discarded.

26. Learned counsel further submits that the incident took place in odd hours at 4:00 a.m. and eye witnesses for the first time in the Court has spoken in paragraph 22 that they had seen the occurrence as they were carrying Kissan Torch with them and this fact has not been mentioned in the statement under Section 161 of Cr.P.C. and F.I.R. Ex.P-1. It is true that it is *Chimeny* (light lamp) which was not seized by the investigating officer and the fact that witnesses were carrying Kissan Torch was not also mentioned in their statements under Section 161 of Cr.P.C., this omission is not material omission in statements of prosecution witnesses and it is not necessary that each and every fact is mentioned in F.I.R. as well as in the statements under Section 161 of Cr.P.c. so this omission cannot help the appellants and for this reason liability and credibility of the witnesses shall not be discarded.

27. Learned counsel for the appellant submits that the Talwar was recovered from the open place so recovery of the Talwar was not proved. The Apex Court in the case of **State of Himachal Pradesh Vs. Jeet Singh, 1999 (4) SCC 370** has held that there is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others. It would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For Example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others. So the Apex Court's verdict is that the discovery of fact referred in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it.

28. In this case, the facts discovered by the police with the help of the disclosure statements and recovery of the incriminating articles on the strength of such statements are that it was the accused who concealed the Talawr at hidden place. So arguments advanced by the counsel for the appellants that the Talwar was recovered from open place has no substance.

29. In the present case, it is found that PW-1 Balwant, PW-2 Jagdish and PW- 6 Shankarlal are eye witnesses of this incident and on perusal of their evidence, it was found that they were not controverted in their cross-examination and their evidence were found reliable.

30. In the case of **Amit Vs. State of U.P., AIR 2012 SC 1433**, the Apex Court has held that interested witnesses must have some direct interest in having the accused somehow convicted for some extra extraneous reason and a near relative of the victim is not necessarily and interested witness. In the present case, evidence of PW-1 Balwant, PW-2 Jagdish and PW-6 Shankarlal are corroborated to each other and also supported by medical evidence. The same consideration has also been held in the case of **Nandaua @ Munda Vs. State of M.P., 2002 (2) JLJ, 416**.

31. Learned counsel for the appellants further stated that as per FSL report (Ex.P-18) on the sword seized from the appellant – Sohan, human blood was found but in the FSL report blood group has not been mentioned which renders the FSL report against the appellants and counsel for the appellant – Radheshyam submits that the sword seized from the appellant-Radheshyam was not sent to FSL and no blood was found on the sword seized from appellant-Radheshyam.

32. In the present case, FSL report is not the sole basis of the prosecution case and it is a corroborating piece of evidence and as the human blood was found on the sword seized from Sohan, it is the duty of the appellant-Sohan to disclose the fact as per the provision of Section 106 of the Evidence Act as to how and why the human blood was found on the sword recovered from him but the appellant- Sohan was unable to rebut this fact in defence and he has not said single word about it in his statement under Section 313 of Cr.P.C.,

therefore, even if the blood group is not mentioned in FSL report (Ex.P-18) the same will not give any help to the appellant – Sohan. All the above three prosecution witnesses have stated elaborately against the appellant – Radheshyam. Sword was seized from the appellant – Radheshyam after a long period of incident and no blood was found on the sword and the sword was not sent to FSL for scientific investigation. This fact will also not give any help to Radheshyam because eye witnesses have elaborately given evidence against him.

33. Learned counsel for the appellants further submit that the trial court has not considered the evidence of the appellants produced in the defence and the weightage of the defence witnesses must be given as equal of the prosecution witnesses.

On perusal of the record, it is found that the defence witnesses have not given any help to the appellants, therefore, this argument does not help the appellants.

34. Learned counsel for the appellants further submit that other four accused persons have been acquitted by the trial court though named by all the eye witnesses and the case of the appellants is on identical footing and the judgment of the trial court has become final as the State Government has not preferred any appeal.

It is true that the State Government has not preferred any appeal against the acquitted accused persons but this fact will not help any more to the present appellants and this Court has no right to comment on the point of not filing any appeal by the State Government against the acquitted accused persons.

35. Here, it has to be kept in mind that this Court is not testing the legality

of acquittal of accused persons. However, in this appeal on the basis of the evidence available on record, this Court is satisfied that the judgment of conviction passed by the learned trial Court is in accordance with law and facts. It is also well settled principle that the maxim "falsus in uno falsus in omnibus" has no application in India. Hon'ble Supreme Court in the case of Shaktilal Afdul Gaffar Khan Vs. Basant Raghunath Gogle reported in (2005) 7 SCC 749 has held as under :-

> **".....it is the duty of Court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence".**

36. In view of the aforesaid prepositions, the testimony of the witnesses cannot be discredited or wiped out only on the basis that other co-accused persons are acquitted on the same set of evidence. As such the aforesaid contention is also not liable to be accepted.

37. After taking into consideration all the grounds mentioned above and also looking to the fact that the prosecution witnesses Nos.1, 2 and 6 have completely supported the prosecution evidence and their evidence are supported by the medical evidence and the accused – Sohan and Radheshyam

are unable to rebut the evidence made against them. Therefore, this Court is of the considered opinion that the appellants are guilty of the offence so in view of the foregoing discussion, it is clear that the trial court has properly assessed the evidence available with the record and has rightly convicted and sentenced the appellants under the aforesaid sections of the Indian Penal Code and learned trial court has not committed any error by convicting the appellants for the aforesaid offence,

38. Hence, the conviction and sentence deserve to be maintained. Resultantly, the appeal filed by the appellants is dismissed and the conviction and sentence passed by the trial court is hereby upheld.

39. Let a copy of this judgment along with the records be sent to the concerned trial court for information and necessary compliance.

(S. A. DHARMADHIKARI)
JUDGE

(HIRDESH)
JUDGE

N.R.