

HIGH COURT OF MADHYA PRADESH
PRINCIPAL SEAT AT JABALPUR

Criminal Appeal No.1792/2003

1. Sakharam alias Bagad S/o Shivcharan Govara
2. Sukhlal S/o Jogilal
3. Baton S/o Tejlal
4. Somaji S/o Bhadu
5. Shivilal S/o Kashiram
6. Bhaulal S/o Maniram
7. Madhu S/o Rama

All R/o village Chhota Jagpura,
Police Station Bharveli, Tehsil and
District Balaghat ...Appellants.

Versus

State of M.P. Respondent

Shri V.P.Singh, learned counsel for the appellants.

Shri Vaibhav Tiwari, learned panel lawyer for the respondent/State.

Whether approved for reporting: Yes/No

Coram : Hon'ble Shri Justice Ravi Shankar Jha
Hon'ble Shri Justice Ashok Kumar Joshi

JUDGMENT

(Pronounced on 18/5/2017)

Per: Ashok Kumar Joshi J.

1. In this appeal filed under Section 374(2) of the Criminal Procedure Code, challenge is to the conviction and sentence recorded on 19.9.2003 by the First Additional Sessions Judge, Balaghat in Sessions Trial No.192/2002, whereby each of the original eight appellants has been convicted and sentenced

under Section 302/149 (on four counts) of the IPC for life imprisonment with a fine of Rs.500/- on each count and under Section 148 of the IPC to undergo rigorous imprisonment for one year. All the jail sentences of each appellant have been directed to run concurrently and in default of above mentioned fine, each appellant is directed to undergo one year rigorous imprisonment additionally. According to written information received from Central Jail, Jabalpur, original appellant No.5 Shobhelal S/o Saradhya had died on 4.4.2015 during treatment in Medical College, Jabalpur undergoing his life imprisonment.

2. Prosecution's case in brief is that before 15.8.2002, present appellant No.1 Sakharam alias Bagad had killed a dog of the family of 12 years old complainant Sunil Kumar (P.W.6). On this issue, quarrel had occurred between brothers of the complainant and appellant No.1 Sakharam alias Bagad and his friends. On the date of incident 15.8.2002 at about 4-30 p.m., when about 12 years old complainant Sunil Kumar (P.W.6) was at his house in village Chhota Jagpura with his parents and brothers, then appellant No.1 Sakharam alias Bagad and appellant No.2 Sukhlal each having tangia, appellants Madhu and Bhaulal each having an iron rod, appellant Somaji armed with axe and other appellants Baton, Sobhelal and Shivilal each having a stick in his hand came before the house of complainant and after giving abuses called the complainant's brothers to come out and appellants were saying that today you will be disposed of. Thereafter, complainant's mother Chandrakala and brothers Surendra

and Gajendra came out from their house to pacify the appellants, thereafter all appellants started beating of Chandrakala, Surendra and Gajendra with their arms. After hearing crying of injured, complainant's father Sukhlal came out from his house and after looking the beating of Chandrakala, Gajendra and Surendra on the spot started running towards the hill, then all appellants chased him and surrounded Sukhlal and gave heavy beating by iron rods, stick and other arms and the appellants killed above mentioned four members of complainant's family. Complainant Sunil Kumar had seen the incident when he was near a tree of mango, but after seeing the incident, he was much frightened and thus after running had entered into his house and got himself hidden in inner room of his house and after much time, he came out from the house, then saw that his mother, father and two brothers have died, but being frightened, he got hidden in the house. On next morning, when his sister-in-law Shakuntala (P.W.11 wife of deceased Surendra) met him, then complainant informed her about the incident.

3. The Sarpanch of Gram Jagpura, Jhankar Singh (P.W.10) and village Kotwar Devanand (P.W.7) after seeing dead bodies at 10.00 P.M. on spot informed at police station Bharveli in the mid-night that in above mentioned village, dead-bodies of Sukhlal, his wife and his two sons are lying in heavily injured conditions in front of their house and they suspected that unknown persons have committed the incident. Their information was registered at roznamcha sanha no.523

(Ex.P.47-A) on 16.8.2002 at 2-05 a.m. (mid-night). The relating S.H.O., Bharveli Ashish Singh Pawar (P.W.14) intimated the Police Superintendent about the incident and as the area being naxalites affected and due to heavy rain in the mid-night, on the next morning, the received information was confirmed. The S.H.O. of Police Station Bharveli Ashish Singh Pawar (P.W.14), thereafter reached with police force to the spot early in the morning on 16.8.2002. Four dead-bodies were lying in front of the house of the deceased persons. Within some time, small boy complainant Sunil Kumar and his sister-in-law (bhabhi) Shakuntala Bai came to him. Sunil Kumar intimated him about the incident, which was recorded by the A.S.H.O. in the form of dehati nalishi (Ex.P.36), which was sent to police station Bharveli for registration of crime. In presence of complainant, Ashish Singh (P.W.14) prepared a spot map (Ex.P.6) and took photographs of the scene of occurrence by government photographer and also got videography. The above mentioned investigator prepared different inquest memos (Ex.P-1 to Ex.P-4) separately in relation to each deceased. He also seized differently blood stained soil nearer to each dead-body and prepared seizure memos (Ex.P-9 to Ex.P-12) and by separate applications (Ex.P-48 to Ex.P-51), all the four dead-bodies were sent to District Hospital, Balaghat for post-mortem.

4. Dr.G.R.Brahma (P.W.4) on 16.8.2002 in above mentioned hospital conducted autopsy of these dead-bodies and recorded post-mortem reports (Ex.P.31 to Ex.P.34) about deceased Surendra, Chandrakala, Gajendra and Sukhlal

respectively.

5. Investigator Ashish Singh Pawar (P.W.14) on 17.8.2002 after receiving four sealed packets from the district hospital, Balaghat prepared seizure memos (Ex.P.14 and Ex.P.15). On 18.8.2002, appellants Shivilal and Bhaulal were arrested and on disclosure statement (Ex.P.46) of Shivilal and on the basis of this information after seizing relating articles, seizure memo (Ex.P-42) was prepared. On disclosure statement (Ex.P-44) of appellant Bhaulal, and after seizing relating articles, seizure memo (Ex.P.45) was prepared. The appellant Madhu was arrested on 19.8.2002 and on the basis of his disclosure statement (Ex.P.7), a stick was seized by seizure memo (Ex.P.8). With a draft (Ex.P-52) prepared in the office of the Police Superintendent, Balaghat, the seized articles were sent for chemical analysis to F.S.L., Sagar. During investigation, outline diagram (Ex.P-35) was got prepared from patwari Meghalal (P.W.5) after completing investigation, a charge-sheet was filed in the Court of Chief Judicial Magistrate, Balaghat, who committed the arisen criminal case to the Sessions Court, Balaghat and arisen Sessions Trial was transferred by the Sessions Judge to the above mentioned trial Court.

6. Each appellant denied the framed charges by the trial Judge under Sections 302/149 (on four counts) of the IPC and section 148 of the IPC. Fourteen prosecution witnesses were examined. It was defence of the appellants/accused persons before the trial Court that they were falsely implicated in the case. An additional specific defence was taken by the

appellant No.1 Sakharam alias Bagad that on the date of incident, when he returned back to his house finishing his labour work, then complainant Sunil had intimated him that his parents had been killed thereafter he gave food to the complainant and kept him in the night at his house and in the next morning, he handed over the complainant to the police. Appellant No.1 Sakharam alias Bagad and appellant No.4 Somaji also took defence under their relating examination under Section 313 of the Cr.P.C. that previously police officials were regularly visiting the house of the deceased persons and the deceased persons were informers of the police, who gave information about activities of naxalites to the police. A neighbourer of the deceased persons, Kanhaiya (D.W.1) was examined as defence witness for the accused persons before the trial Court, who deposed that he had seen that the murders of deceased were committed by eight to nine unknown persons who were wearing green coloured dress and having guns, barchhi and bhala. The trial Court after completing hearings believed on the eye witness account of complainant Sunil Kumar and evidence of investigator Ashish Singh Pawar (P.W.14) regarding some seizures on previous disclosure statements of some appellants and convicted and sentenced each appellant as stated hereinabove.

7. Learned counsel for the appellants vehemently contended that the statement of child witness Sunil Kumar (P.W.6) is substantially contradicted by his signed dehati nalishi (Ex.P.36) and placing reliance on the citations of **Mangilal**

and others Vs. State of M.P. (1990 J.L.J 401), **Chhakki Vs. State of M.P.** (1990 J.L.J 772), **Ishwar Singh Vs. State of U.P.** (AIR 1976 SC 2423), **Ram Narayan Vs. State of Punjab** (AIR 1975 SC 1727) and **Mohinder Singh Vs. State** (AIR 1953 SC 514), it has also been contended that the statement of Sunil Kumar (P.W.6) is contradicted by medical evidence in relation to used weapons by some appellants and being a child witness, his statement could not have been relied on looking to material contradictions between his statement and his dehati nalishi (Ex.P.36) and material exaggerations in its Court's statement and material omissions of important facts in his alleged dehati nalishi (Ex.P.36) and his police statement (Ex.D.1). It was also argued that as according to F.S.L. report (Ex.P.53), human blood was not found on any of the articles allegedly seized from appellants, their appeal should be allowed.

8. On the other hand, the learned panel lawyer for the respondent/State had supported the impugned judgment and contended that conduct of the child complainant Sunil Kumar (P.W.6) was natural and his evidence is totally supported by his signed dehati nalishi (Ex.P-36) and complainant's presence at his house could not be doubted, whereas the presence of the complainant is confirmed by the defence witness Kanhaiya (D.W.1).

9. It is not disputed that all the above mentioned four deceased persons' death were homicidal. Dr.G.R.Brahma (P.W.4) deposed that on 16.8.2002 on conducting post-mortem of the deceased Surendra, following external injuries

were found:-

(1) Abdomen of the deceased was open and intestine, liver, spleen and both kidneys were missing which might have been eaten by any animal.

(2) Lacerated wound of size 7 x 2 cms. over nose horizontally placed under which nasal bone was appearing broken, maxilla bone was also fractured, both eyes were entangled in skull cavity and on dissection, it was found that nasal bone has been broken in parts and some portions of maxilla bone were dislocated and the joints of jaws were also open.

(3) Lacerated wound of size 2.5 cm x 1 cm on left side of forehead into bone deep.

(4) Right clavicle bone was fractured.

10. In the opinion of doctor, all external injuries of Surendra were ante-mortem and caused by hard and blunt objects with sufficient force and on dissection of the dead-body, a laceration of 8 cm. long was found on left chest wall and ninth and tenth ribs were fractured and there was clotting of blood and the broken rib had inserted in left part of the heart and thus incised wound of size 1 x 1 cm. was found on left atrium of heart and some portions of lungs were found in thoracic cavity and heart was bloodless and there was 100 cc blood collected in thoracic cavity. In opinion of above mentioned doctor, reason of death of Surendra was assigned as shock because of injuries to vital organs and Surendra had died within a period of 36 to 48 hours before starting of post mortem. Dr.G.R.Brahma (P.W.4) proved relating post-mortem report of

deceased Surendra as Ex.P-31.

11. Dr.G.R.Brahma (P.W.4) found following external injuries on the dead-body of deceased Chandrakala:-

(1) A stabbed wound size 3 x 1 cms. on left side of the abdomen 6 cms. below the umbilicus and on its dissection, it was found that there was a wound of 1 x 1 cm in interior portion of the abdomen where blood and food particles were mixed.

(2) Right arm was found broken and deformed and on its dissection, it was found that there was a huge collection of blood.

(3) There was fracture of right humerus bone in its lower two third region.

(4) Lacerated wound size 5 x 3 cms on left ear pinna and on its dissection, clotting of blood was found and fracture of jaw of left mandible was found and fracture of parietal bone of skull and membrane of brain was also found inferior.

12. In opinion of Dr.G.R.Brahma (P.W.4), all the injuries of Chandrakala were ante-mortem and caused by hard and blunt and pointed weapons and reason of her death was assigned shock due to injuries to vital organs. She had died within 36-48 hours before starting of her post-mortem. Dr.G.R.Brahma (P.W.4) proved post mortem report in relation to deceased Chandrakala as Ex.P-32.

13. According to evidence of Dr.G.R.Brahma (P.W.4) on dead-body of deceased Gajendra, following injuries were found:-

(1) An incised wound of size 10x7 cms, over head was obliquely placed where internal fracture was present and there was laceration over membrane of the brain and brain was oozing out and right parietal bone was fractured.

(2) Lacerated wound of size 4 x 2 cms. over left eyebrow into bone deep

(3) Lacerated wound of size 2 x 1 cm. above the left eyebrow into bone deep.

(4) Incised and stabbed wound of size 4 x 1 cm on left side of the umbilicus and on dissection of abdomen, it was found that below stabbed wound, blood was clotted due to which a loop of the intestine had come out, over its one third portion, there was perforation.

14. In opinion of Dr.G.R.Brahma (P.W.4), all the injuries of Gajendra were ante-mortem and were caused by different hard, cutting and pointed weapons with sufficient force and in his opinion, Gajendra had died within 36 to 48 hours before starting of the post-mortem of his dead-body due to arisen shock because of the injuries to vital organs. Dr.G.R.Brahma (P.W.4) proved post mortem report in relation to deceased Gajendra as Ex.P-33.

15. On the same date, Dr.G.R.Brahma (P.W.4) found following injuries on the dead-body of Sukhlal:-

(1) Lacerated wound of size 6 x 4 cms, just above the right pinna of ear with crushing of pinna and depressing underline of skull bone in an area of 10 x 10 cms.

(2) Right arm was deformed and on its dissection, large haematoma (blood collection) was found beneath the

deformity site and there was fracture in the shaft bone and humerus bone.

(3) Left arm was deformed and on its dissection, large haematoma (blood collection) was found beneath the deformity site and there was fracture in upper 2/3rd portion of humerus bone.

16. In Dr.G.R.Brahma's opinion, all the injuries of deceased Sukhram were ante-mortem and on its dissection below external injury found near right ear, there was a large haematoma and beneath it, parietal bone was fractured and brain membrane was having lacerated, through which membrane was oozing and on further dissection, fracture was found at the joint of right mandible and jaw. In his opinion, injuries of Sukhlal were caused by different hard, sharp and blunt object with sufficient force and in his opinion, Sukhlal had died within a period of 36-48 hours before starting of his post-mortem. Dr.G.R.Brahma (P.W.4) also proved his post-mortem report as Ex.P.34.

17. It is clear from the medical evidence of Dr.G.R.Brahma (P.W.4) that all the four deceased persons' death was homicidal and this fact has not been challenged by the appellants' learned counsel. It would be significant to mention here that except Sunil Kumar (P.W.6), Dr.G.R.Brahma (P.W.4), constable Jitendra (P.W.2) patwari Meghalal (P.W.5), head-constable Indra Kumar (P.W.9) and investigator Ashish Singh Pawar (P.W.14), all other prosecution witnesses were declared hostile by the prosecution.

18. Sunil Kumar (P.W.6) stated before Court that he knew all the appellants. Sunil had also deposed that on 15.8.2002, he was at his home at about 4.00 p.m., then appellant Bagad alias Sakharam was abusing, then his brother Gajendra, after him his younger brother Surendra and Chandrakala went, then all the accused persons after running started beating of his brothers and mother and appellants had beaten them by rods, sticks and tangia and at that time, his father was returning to the house after answering the call of nature, then his father was also beaten by the appellants by rods and in the result of beating by the appellants, his parents and brothers had died, then the appellants chased him, but he got hidden behind his house and after much searching by the appellants, he could not be traced out by the appellants, then the appellants went away. Sunil Kumar (P.W.6) had deposed that he stayed in his house in the whole night and in the morning, police came to village with mukamdham (Patel) and dead-bodies were taken by the police through vehicles to Balaghat. Sunil Kumar (P.W.6) deposed that one month prior to the incident, their dog barked on the accused Bagad, then appellant Bagad alias Sakharam had cut all the four legs of their dog and thereafter their dog died and due to this, the quarrel had started and on the date of incident, he lodged a report to the police and after hearing Dehati Nalishi (Ex.P.36), he admitted that such report was lodged by him and he proved his signature also on it and also proved his signatures on spot map (Ex.P.5) prepared by the investigator and an another outline map (Ex.P.35) prepared by patwari. Sunil

Kumar (P.W.6) deposed in cross-examination (para 4) that Kanhaiya (D.W.1) was also seeing the incident and at the time of incident, he had seen barchhi in hand of accused Shobhelal.

19. The wife of deceased Surendra, Shakuntala Bai (P.W.11) deposed that on the date of incident, she had gone for her labour work to the place of relating farmer and after completing the duty hours at about 6:00 p.m. when she was returning to her house, in the way she was intimated that her all family members have been killed and she was advised not to return to her house, then she went to the house of mukadam Bhuwanlal (P.W.1) of village Manjara and in the whole night she stayed there and on this point, her evidence is supported by Bhuwanlal (P.W.1). Mahendra Katre (P.W.8) supported her evidence and deposed that on the date of incident, in the night at about 8.30 p.m., widowed wife of one young man intimated him after reaching to his house that four persons have been killed at her house. Mahendra Katre (P.W.8) deposed that in the same night, he reached to village Jagpura and saw the dead-bodies and thereafter sent information to the sarpanch and thereafter sent sarpanch to the relating police station.

20. Shakuntala (P.W.11) and Mahendra (P.W.8) deposed that in next morning at 8.00 a.m., Sunil (P.W.6) met them, but Sunil did not tell them anything about the incident. Much emphasis has been given by the learned counsel for the appellants on the deposition of Shakuntala Bai (P.W.11), who was declared hostile by the prosecution on the ground that

even the widowed wife of murdered elder brother of complainant had not supported the statement of Sunil Kumar (P.W.6)

21. After considering the total statement of Sunil Kumar (P.W.6), whose statement was recorded by the learned trial Court without administering the oath to him, it is clear that his statement is having material contradictions and inconsistencies on points that at the time of beginning of incident where his father was, wherefrom his father came to scene of occurrence, after seeing the incident, where complainant had hidden himself and whether the appellants have chased him or not and after the incident, where he remained in the whole night till coming of the police in next morning and on the point of weapon used by accused Shobhelal.

22. In reference to a child witness, it has been observed by a Division Bench of this Court in case of **Tulsi and others Vs. State of M.P.** [2008 (1) M.P.L.J. (Cri.) 676] as follows:-

â□□8. In Abbas Ali Shah Vs. Emperor reported in AIR 1933 Lahore 667, it has been observed that Children are a most untrustworthy class of witnesses, for, when of a tender age they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment; by hope of reward, and by desire of notoriety. When considering the evidence of child witnesses, these observations should not be lost sight of, although each case would depend upon its particular facts and circumstances. Similar observations have

been made in *Arun Lal Israel Vs. State*, AIR 1955 TC 6.

23. In the case of **Suraj Mal Vs. State (Delhi Administration)** (AIR 1979 SC 1408), the Apex Court said in para 2 that:

Para 2.....It is well settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on the evidence of such witnesses.

24. Similarly in the case of **State of U.P. Vs. Naresh** [2012 (1) M.P.L.J. (Cri.) (SC) 19], it has been observed in para 25 as follows:-

25. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the Court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the

witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State Represented by Inspector of Police Vs. Saravanan and anr., AIR 2009 SC 152; Arumugam Vs. State, AIR 2009 SC 331; Mahendra Pratap Singh Vs. State of U.P., (2009) 11 SCC 334; and Dr.Sunil Kumar Sambhudayal Gupta and ors. Vs. State of Maharashtra, JT 2010 (12) SC 287].

25. It appears that on each material point, Sunil Kumar's (P.W.6) statement given in Court is self-contradictory. His age at the time of recording of Court's statement is shown to be 12 years. Sunil Kumar (P.W.6) stated in examination-in-chief that the appellants assaulted his family members by rods, sticks and tangias whereas in his signed dehati nalishi (Ex.P.36), it was mentioned by him that appellants Sakharam alias Bagad and Sukhlal were having tangias, appellants Madhu and Bhaolal each

was having an axe and three appellants Baton, Shobhelal (now deceased) and Shivlal were having sticks (lathis), but in cross-examination (para 14), he stated that accused Shobhelal was having a barchhi and this fact was mentioned by him in his dehati nalishi report and police statement. but this fact is missing in his dehati nalishi (Ex.P.36) and police statement (Ex.D.1). Dr. G.R.Brahma (P.W.4) who conducted autopsy of all the four deceased persons deposed in his cross-examination (para 26) that two deceased persons Chandrakala and Gajendra each was having a stabbed wound, and these stabbed wounds would have been caused by some sharp edged and pointed weapons and these stabbed wounds could not be caused by an axe. Thus, it appears that to explain these stabbed wounds, Sunil Kumar (P.W.6) for the first time stated in Court that accused Shobhelal was having a barchhi, which is a pointed as well as sharp edged weapon. Thus, it appears that Sunil Kumar (P.W.6) has modified prosecution story in his Court's statement to be analogous to medical evidence to explain these stabbed wounds. Dr.G.R.Bramh (P.W.4) clearly stated in cross-examination that two deceased persons Sukhlal and Surendra were not having any injury caused by sharp edged and pointed weapon.

26. Sunil Kumar (P.W.6) in his Court's statement made improvements regarding reasons of the enmity of his deceased brothers with the appellants. In his dehati nalishi (Ex.P.36), it was mentioned that before some days from the date of incident, appellant no.1 Bagad alias Sakharam and his friends have killed their dog and due to this reason, there was quarrel among his brothers and appellant Bagad and his

friends. But in Court's statement, in para 15, Sunil Kumar (P.W.6) stated that since before the incident, all appellants were throwing stones over his house and due to this reason, there was previous enmity. Contrary to dehati nalishi (Ex.P.36) Sunil Kumar (P.W.6) stated before Court in para 3 that about one month prior to the incident, their dog barked on appellant No.1 Sakharam alias Bagad and appellant Bagad had severed all the legs of their dog and hence their dog had died and this was only reason of enmity. Contrary to dehati nalishi (Ex.P.36), Sunil Kumar (P.W.6) stated in Court that at the time of incident, the appellants had chased him, but after running he had hidden behind his house and thereafter the appellants made search for a long time, but he could not be traced out, thereafter the appellants went away whereas in dehati nalishi (Ex.P.36) he had mentioned that at the time of incident, he had after running hidden himself in a inner room of his house because he was much frightened.

27. Contrary to dehati nalishi (Ex.P.36), Sunil Kumar (P.W.6) stated in Court (para 13) that appellants have entered into his house to search him. If in consonance with his dehati nalishi (Ex.P.36), Sunil Kumar (P.W.6) had hidden himself in his house just after the incident, then the appellants would have easily found him. Thus, it is clear that Sunil Kumar (P.W.6) had made substantial changes in prosecution story at the time of his court's statement and thus has made the facts mentioned in dehati nalishi most suspicious. In cross-examination (para 13), he clearly stated that if facts are recorded in his dehati nalishi and police statement that after

some time from the incident, he had come out from his house and then found that his parents and both brothers have died, then these facts are totally wrong and he had not mentioned these facts. Sunil Kumar (P.W.6) deposed in para 14 that his parents, brothers and he himself had shouted at the time of the incident, but nobody came to save the deceased persons and their neighbour Kanhaiya (D.W.1) was also seeing the incident and all these facts were stated by him to the police, but all these facts are totally missing in his dehati nalishi (Ex.P.36) and police statement (Ex.D.1). In dehati nalishi and police statement, he stated that he remained in village after the incident, but he stated before the Court that he remained in his house in whole night, because if he would have come out from his house then the appellants would have killed him also. It is clear that Sunil Kumar (P.W.6) is not stable on any material fact and there are material improvement in his Court's statement in comparison to his dehati nalishi (Ex.P.36) and police statement (Ex.D.1).

28. It is clear from the evidence of the investigator Ashish Singh Pawar (P.W.14) and particularly from the map (Ex.P/35) prepared by patwari Meghalal (P.W.5) that just behind the house of murdered Sukhlal and Sunil Kumar (P.W.6), there are so many houses situated behind it, thus the statement of Sunil Kumar (P.W.6) that after chasing by the appellants, he had hidden behind his house at about 4.30 P.M. appears to be impossible. The unlawful assembly of murderers, who had killed both of his parents and two elder brothers would not have left him alive. Sunil Kumar's modified version that he

had hidden behind his house is totally falsified by his signed dehati nalishi (Ex.P.36) and police statement (Ex.D.1). Looking to all these material contradictions, improvements and omissions, the statement of Sunil Kumar (P.W.6) does not appear to be trustworthy.

29. The learned trial Judge has commented that the contradictions, inconsistencies and improvements regarding Court's statement of Sunil Kumar (P.W.6) are not material, but it is clear that contradictions, inconsistencies and improvements appearing in his Court's statement in comparison to dehati nalishi and police statement could not be termed as trivial, minor or unimportant. It has been held by the Apex Court in the case of **Bhagwan Singh and others Vs. State of M.P.** [2003 (2) J.L.J. 129] that where the statement of only eye witness, a child is full of infirmities, his sole testimony cannot be relied upon without adequate corroboration. In the same citation, in para 21 of Apex Court's decision, it has been observed as follows:-

â¶21. â¶!...Mere presence of children in the house at the time of the incident is no assurance to the case of the prosecution that the eldest child got up on hearing hue and cries and had not only seen the incident but also identified the accused. Taking into consideration child psychology, a lad of 6 years having seen his mother being assaulted would have raised a cry; but he says that he quietly went back to sleep. It is most unnatural even for a child that after witnessing his

mother being assaulted by known persons, he would go back to sleep to wake up late in the morning only when his maternal uncle Agyaram came to fetch him and his younger brothers to his father's village Alampur.â

30. In the case in hand, Sunil Kumar (P.W.6) stated in examination-in-chief that he remained in whole night alone in his house and at next morning, police came to village alongwith mukadam, then he peeped from the house and after seeing the police came out of his house at about 7.00 A.M. Sunil Kumar (P.W.6) stated in cross-examination (para 18) that after the incident in the night, sarpanch, kotwar and 10-12 persons of his village had come on scene of occurrence and had seen all the four dead-bodies and these persons had also come to his house, but they could not see him and at that time, he did not think about intimating sarpanch and other persons regarding accused persons, whereas according to his dehati nalishi (Ex.P.36) and police statement (Ex.D.1), after the incident, he remained in the village. Thus, it is clear that Sunil's conduct and statement in light of the above mentioned citations totally appears to be unbelievable and unnatural also.

31. It is well established that deposition of a witness who has made material improvement in his version is wholly unsafe unless it is corroborated by some other independent evidence that may probablize his version. Sunil Kumar (P.W.6) had clearly stated in his cross-examination that all the facts which he stated in Court's statement previously he had stated to the police, but above mentioned improvements are totally missing in his dehati nalishi (Ex.P.36) and police statement

(Ex.D.1). On the point when such omissions amount to contradictions, in the case of **Sampat Kumar Vs. Inspector of Police, Krishnagiri** [2012 (2) M.P.L.J. (Cri.) 77] in para 9, it has been observed as under:-

9. In Narayan Chetanram Chaudhary and anr. Vs. State of Maharashtra, AIR 2000 SC 3352, this Court held that while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not. This Court observed:

Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution become doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person.

32. Sunil Kumar's (P.W.6) statement is not supported by his sister-in-law Shakuntala Bai (P.W.11), who was declared hostile. According to evidence of Shakuntala Bai (P.W.11), Bhuwanlal

(P.W.1) resident of village Chhota Jagpura, Shakuntala Bai (P.W.11) after the incident stayed in the house of Bhuwanlal (P.W.1) who was resident of village Manjara because Bhuwanlal (P.W.1) was mukadam (Patel) of village at relevant time. Shakuntala Bai (P.W.11) deposed that on next morning, his little devar Sunil came with police to the house of mukadam of village Manjara and Sunil intimated her that his father and others were killed by anyone but Sunil (P.W.6) had not disclosed the names of murderers. Shakuntala Bai (P.W.11) was declared hostile by the prosecution, but even the departmental witness Sub-Inspector and Investigator Ashish Singh Pawar (P.W.14), who also recorded dehati nalishi (Ex.P.36) of Sunil Kumar (P.W.6) had not supported the statement of Sunil Kumar (P.W.6) on material points. Ashish Singh Pawar (P.W.14) deposed that in the mid-night of 15th and 16th August, 2002, village Jagpura sarpanch Jhankar Singh and Kotwar Devanand after reaching to police station Bharveli intimated that the dead-bodies of residents of his village Sukhlal and his wife and both of their sons are lying in front of their house, but as in the night, there was heavily raining and the area was naxalite affected, received intimation was verified in next morning at about 6.00 A.M. through police constable Jai Dayal and after verification, he had reached to the scene of occurrence, where he found that in a open ground in front of house of the deceased persons, four dead-bodies were lying and within few minutes, little boy of deceaseds' family, Sunil and Shakuntala Bai came nearer to him and the boy got lodged dehati nalishi (Ex.P.36), but Ashish Singh Pawar (P.W.14) clearly deposed in his cross-examination (para 25) that Sunil did not state to him that at the time of the incident, his

father was returning after answering the call of nature and similarly Sunil (P.W.6) had not stated in his report and police statement that the appellants had chased him and Sunil did not state that the appellants had entered into his house to search him and similarly Sunil did not disclose the facts that at the time of incident, his parents and he had cried and Kanhaiya had witnessed the incident and he had seen the barchhi in the hand of accused Shobhelal. Ashish Singh Pawar (P.W.14) clearly deposed in para 25 that he did not ask to Sunil that in the night where he remained and Sunil also did not state that where he stayed in the night. Investigator Ashish Singh Pawar (P.W.14) clearly stated that he did not know that wherefrom Sunil and Shakuntala had come to the scene of occurrence in next morning after his reaching there, but Sunil and Shakuntala had not come out from their house. Thus, it is clear that Sunil Kumar's Court's statement is even not supported by the departmental prosecution witness Ashish Singh Pawar (P.W.14) on material points.

33. In the light of citations of **Animireddy Venkataramana and others Vs. Public Prosecutor** [2008 (2) MPLJ (Cri.) 561 (SC)], **Badri Vs. State of Rajasthan** (AIR 1976 SC 560 and **Muluwa and others Vs. State of M.P.** (AIR 1976 SC 989), it is clear that the solitary statement of child witness Sunil Kumar (P.W.6) does not inspire confidence because of above mentioned material contradictions, inconsistencies, omissions and improvements and in absence of corroboration even of departmental prosecution witness investigator. In our considered opinion, the learned trial Court had erred in believing Sunil Kumar's (P.W.6) statement and overlooking of above mentioned infirmities

34. In the light of the above referred citations, it is clear that the statement of child witness Sunil Kumar (P.W.6) does not appear to be of category of wholly reliable and thus in our considered opinion, the learned trial Judge erred in placing reliance on his such infirm, exaggerated, self-contradictory and his unnatural statement.

35. In relation to recovery of various weapons and blood stained clothes of some of the appellants, on the basis of previous disclosure statements of relating appellants, the evidence of investigator Ashish Singh Pawar (P.W.14) is not corroborated by relating panch witnesses of relating disclosure statements and seizure memo Bhuwanlal (P.W.1), Hemlal (P.W.3), Lalchand (P.W.12) and Beniram (P.W.13). All these hostile declared panch witnesses deposed that none of the appellants gave any previous information regarding any recovery and in their presence, nothing was seized by the police from any of the appellants. Thus, it is clear that on the point of relating recovery from the appellants, the solitary evidence of I.O. Ashish Singh Pawar (P.W.14) is not supported by any of the panch witnesses. According to evidence of I.O. Ashish Singh Pawar (P.W.14), an axe was seized from appellant Somaji, a stick was seized from appellant Baton, a tangia was seized from appellant Sukhlal, another tangia and blood stained shirt were seized from appellant Sakharam alias Bagad, an iron rod was seized from appellant Bhaulal, a stick was seized from appellant Shivilal, another iron rod was seized from appellant Madhu and a stick was also seized from accused Shobhelal, but according to F.S.L. report (Ex.P.53) blood was not found on any of the seized sticks, iron rods, axe and two tangias. According to

evidence of Dr.G.R.Brahma (P.W.4), the recovered weapons of offence were not sent to him during investigation. Thus, as blood was not found on any of the seized weapons, the evidence of investigator Ashish Singh Pawar (P.W.14) relating to recovery of these articles is unable to establish any connection between relating appellants and the incident. Thus, the circumstantial evidence in the form of above mentioned seizure is inconclusive and immaterial in the case in hand. According to F.S.L. report, blood was found on allegedly seized shirt of appellant Sakharam alias Bagad, but its source could not be identified in the laboratory. Thus, it is not clear that the blood found on the shirt of appellant Sakharam alias Bagad was human blood or blood from any other source as according to statement of Sunil Kumar (P.W.6), before some days from the incident, appellant No.1 Sakharam alias Bagad had severed all the legs of their dog and thereafter killed their dog. Thus, allegedly found blood on the shirt could not establish any connection between the relating appellant Sakharam alias Bagad and the incident as blood source and its group could not be identified in the laboratory. Thus, it is clear that the circumstantial evidence relating to various seizures was unable to establish any link between any of the appellants and the incident of murder of four above mentioned persons.

36. In the light of the above mentioned referred citations, in our considered opinion, the learned trial Court erred in placing reliance on totally infirm, self-contradictory, exaggerated and unnatural evidence of child witness Sunil Kumar (P.W.6) and thereby convicting and sentencing all the appellants. In our considered opinion, no any framed charge was proved beyond reasonable

doubt against any of the appellants. Thus, the appeal filed by the appellants is worthy of acceptance.

37. In the result, the appeal filed by the appellants is allowed and their conviction and sentences recorded by the learned trial Court are set aside and each present appellant is acquitted from the offences punishable under Section 302/149 (on four counts) of the IPC and Section 148 of the IPC. All the appellants who are serving their sentences as imposed by the trial Court are directed to be released forthwith, if not wanted in any other case. A copy of this judgment be immediately sent to the concerned Jail Superintendent.

(Ravi Shankar Jha) (Ashok Kumar Joshi)
Judge Judge
18.5.2017 18.5.2017

C.