HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case No.	**CRA. Nos.07/2012 & 2979/2013**
Parties Name	*Dheerendra Singh @ Dheeru & another* *Vs.* *State of Madhya Pradesh* *&* *Smt. Nirmala Patkar* *Vs* *State of Madhya Pradesh*
Date of Judgment	**05/09/2019**
Bench Constituted	**Justice Sujoy Paul &** **Justice B.K.Shrivastava**
Judgment delivered by	**Justice Sujoy Paul**
Whether approved for reporting	Yes
Name of counsels for parties	**CRA. No.07/2012** **For Appellants**: Shri S.C. Datt, Advocate with Shri Manish Tiwari, Advocate **For respondent-State**: Smt. M.P.S. Chuckal, Panel Lawyer **CRA. No.2979/2013** **For Appellants**: None **For respondent No.1-State**: Smt. M.P.S. Chuckal, Panel Lawyer **For respondent No.2, 4 & 6**: None **For respondent No.3**: Shri Hitendra Golhani, Advocate **For respondent No.5**: Shri D.S. Dubey, Advocate
Law laid down	**1.Section 157 Cr.P.C.** - Mere delay in sending the FIR to the Court will not vitiate investigation as a rule of thumb. It must be proved that delay or non-sending of FIR to the Court has caused prejudiced to the defence. If prosecution by leading cogent evidence established its case before the Court below and defence is unable to establish that FIR was ante time, merely because FIR was not sent to the Court will

	not cause any dent to the case of the prosecution. **2. Indian Evidence Act** – When several witnesses have been examined by the prosecution there are bound to be miner discrepancies in their evidence. Such discrepancies are natural unless discrepancies are material in nature, the story of prosecution cannot be disbelieved. **3. Evidence Act** – Case involving large number of offenders. The evidence of two or three witnesses who gave a consistent account of incident is sufficient to sustain conviction. **4. Child witness** – His statement needs to be considered with utmost care and caution. The evidence of a child witness must find adequate corroboration before it can be relied upon. **5. Interpretation of Statute** – The principle of law laid down will be the binding precedent. What has been actually decided will bind the Court and not what is logically flowing from it. The facts of the case decided by Supreme Court do not have any binding precedent. **6. Section 372 Cr.P.C.** - While deciding the appeal against acquittal, the following factors must be taken into account - *(i) Presumption of innocence in favour of an accused person is strengthened by order of acquittal passed by the trial court;* *(ii) Accused person is entitled to benefit of reasonable doubt when it deals with merit of appeal against acquittal;* *(iii) Though, powers of appellate court in considering appeals against acquittal are as extensive as its powers in appeals against convictions but appellate court is generally loath in disturbing the finding of fact recorded by the trial court. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified.* *(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view,*

	interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view.
Significant paragraph numbers	**32,33,35,36, 38,39,41,42,43, 50,51, 67**

JUDGMENT
05.09.2019

As per: Sujoy Paul, J.

This common Judgement will dispose of Criminal Appeal Number 2979/2013 and Criminal Appeal Number 07/2012.

1. The Criminal Appeal Number 07/2012 is directed against the judgement dated 24/11/2011 whereby the Appellants were convicted for committing offence under section 302, 148 read with section 149 of the Indian Penal Code (hereinafter referred to as IPC) and were directed to undergo rigorous imprisonment with fine of Rs. 1000 with default stipulation.

2. The Criminal Appeal Number 2979/2013 is filed by Complainant Smt. Nirmala Patkar against the impugned judgement dated 24/11/2011 passed in Sessions Case Number 78/2007, whereby, the Respondent Number 2 – 6 have been acquitted by the Court below.

Criminal Appeal Number 07/2012

3. The Appellants Dhirendra Singh alias Dheeru and Shailendra Singh alias Sheelu have filed this Appeal under section 374 (2) of the Cr.P.C against the aforesaid judgement dated 24/11/2011 passed in Sessions Trial Number 78/2007.

4. The story of the prosecution in brief is that on 09/12/2006 at around 11 a.m., Dinesh Patwa (the deceased) was present behind his house. The Appellants along with 5 other persons came there on motorcycles. The appellants were armed

with swords and 'Danda'/sticks. The accused persons assaulted him with the weapons they were carrying. The incident of assault was witnessed by Motilal (PW/13), Jang-Bahadur (PW/ 14), Archana PW 24, Rishu Patwa (PW/28) and other witnesses.

5. The Complainant Nirmala and sister-in-law (*Jethani)* cried for help and resultantly, the neighbours and villagers reached to the place of incident. The accused persons fled away. Because of the aforesaid incident of assault, the deceased Dinesh Patwa was seriously injured. An FIR regarding said crime was lodged by the Complainant Nirmala in Police station Raipur Karchulian as crime number 293/2006 under sections 147, 148, 307 read with section 149 of the IPC. The injured Dinesh Pawta was taken to hospital where he was declared dead by the doctors. The Incharge of the surgical ward doctor M.K. Tiwari sent the information to Police that Dinesh Patwa died at 5:35 PM. The body was kept at the morgue of the hospital. In turn, the Police station recorded the 'marg' intimation number 69/2006 under section 174 of the Cr.P.C.

6. During investigation, the witnesses were summoned. The Panchnama of the dead body was prepared in the presence of witnesses. The body was sent for post-mortem. Dr. S.K. Pathak and Dr. Yatnesh Tripathi conducted the post-mortem. After receiving the post-mortem report, P.S. Karchulian started the investigation of the matter. The spot map was prepared. The bloodstained and simple soil was recovered from the spot. The statements of Samar Bahadurm Nirmala Pawta, Anita, Rampratap, Sheshmani, Umakant, Hasmat and Jung Bahadur were recorded under section 161 of the Cr.P.C. The accused persons were also arrested by the Police. The memorandum statement of appellant Shailendra @ Sheelu was recorded and a sword was recovered from him as per information given by him.

The clothes of the deceased were also seized. A cartridge was seized from the place of incident. This statement of Moti Lal, Archana, Sunny Verma Kamlesh Patwa and Mahesh Tripathi were recorded. In addition, another spot map was prepared by the Patwari Mohd Iqbal Khan. Constable Prem Lal took the seized material to F.S.L. Sagar for examination. After receiving the F.S.L. report, and completion of the investigation, the charge sheet was filed in the Court of the Judicial Magistrate 1st class, Rewa on 20/03/2007. The matter was committed to the Sessions Court.

7. Before the Sessions Court, the accused persons abjured their guilt and contended they have been falsely implicated. As many as 8 defence witnesses entered the witness box and deposed their statements in support of the defence.

8. The Court below framed 2 questions and recorded the statement of 36 prosecution witnesses and 8 defence witnesses. After recording the evidence and hearing the parties, the impugned judgement dated 24/11/2011 was passed whereby the present Appellants were held guilty of committing offences under section 148 and 302/149 of the Indian Penal Code whereas, the other accused persons were acquitted.

9. Shri S.C. Datt, learned Senior Counsel for the appellants assisted by Shri Manish K Tiwari, urged that as per the prosecution story except the present Appellants, all the accused persons covered their faces by masks at the time of assault on Dinesh Patwa. The prosecution story is totally unbelievable that the present Appellants did not cover their face by masks. More so, when as per prosecution story itself, the present Appellants were residents of the same village in which the deceased Dinesh Patwa resided. In support of this contention, Shri Datt placed reliance on the judgements of the Hon'ble Supreme Court reported in

AIR 1956 SC 441 (Ram Shankar Singh & Others vs. State of U.P.) and AIR 1981 SC 1388 (Lakshman Prasad vs. State of Bihar).

10. The next contention of the learned Senior Counsel is that FIR was ante time and was totally untrustworthy. To buttress this contention, reliance is placed on the contradictions in the statements of prosecution witnesses and it was canvassed that Complainant Nirmala in fact did not visit the Police station to lodge the FIR. The Police upon receiving the phone call, reached to the place of incident. Thus, factum of lodging FIR is highly doubtful. Reliance is placed on the judgement of the Hon'ble Supreme Court in the case of ***Bir Singh & others vs. State of U.P.*** reported in ***1978 AIR SC 59, Mehraj Singh vs. State of Uttar Pradesh*** reported in ***(1994) 5 SCC 188*** **and** ***Thanedar Singh vs. State of M.P.*** reported in ***(2002) 1 SCC 487.***

11. Shri Datt, by taking this Court to the statement of witnesses argued that there are serious material inconsistencies amongst the statements of prosecution witnesses and it is not safe to accept that the FIR was lodged by Nirmala. Reliance is placed on the statements of Hasmat Ali (PW/8), Satya Prakash Tripathi (PW/11) and Sani Verma (PW/19).

12. Furthermore, by placing reliance on the statement of Dr. S.K. Pathak (PW/27), it is canvassed that as per the ocular evidence, the Appellants herein had assaulted Dinesh Patwa from the sharp side of the sward on more than one occasion. The said witnesses categorically deposed that sword entered the body of the deceased from the sharp side causing serious injuries and bleeding to the deceased.

13. It is urged that this ocular evidence does not match with the medical evidence. By taking this Court to the statement of Dr A.P.S Gaharwar (DW - 8) it is argued that on the body of the deceased, lacerated wounds were found. The ocular evidence is not supported by medical evidence. Since no sharp cut wounds were found on the person of the deceased as per the statement of Dr A.P.S Gaharwar (DW - 8) which could not be demolished during cross examination, there was no justification in not believing his statement by the Court below. Putting it differently, it is urged that the prosecution witnesses' statement that the Appellants assaulted the deceased by using the sharp side of the sword on his head and other parts of the body could not be corroborated by the medical evidence. Hence, the story of the prosecution is totally untrustworthy. The Court below has erred in overlooking this aspect in the impugned judgement. Reliance is placed on the judgements of the Hon'ble Supreme Court in the case of ***Smt. Nagindra Bala Mittra & Another vs. Sunil Chandra Roy reported in AIR 1960 SC 706, Makan Jivan & Others vs. The State of Gujarat reported in (1971) 3 SCC 297, Piara Singh vs. State of Punjab reported in (1977) 4 SCC 452, Purushottam & Another vs. State of M.P., Amar Singh vs. State of Punjab reported in (1987) 1 SCC 679 and Devatha Venkataswamy vs. P.P. High Court A.P.***

14. The learned Senior Counsel for the Appellants by taking this Court to the statement of the investigating officer Sunil Kumar Gupta (PW/35) urged that it cannot be doubted that as mandated in Section 157 of Cr.P.C. intimation of lodging the FIR was not sent to the Court of competent jurisdiction. By placing reliance on the judgement of this Court in ***Data Ram vs. State of M.P. 2007 (4) MPHT 303 and Chabbi Lal & Anr. vs. State of M.P. 2009 (1) JLJ 167*** and Apex Courts in ***Aqeel Ahmed vs. State of U.P. reported in (2008) 16 SCC 372*** and ***Shiv***

Lal vs. State of Chhattisgarh (2011) 9 SCC 561, it is argued that the omission to send the FIR to the Court has caused serious dent to the prosecution story. For this reason alone, the prosecution story has lost its credibility. Lastly, the learned Senior Counsel submitted that statements under section 161 of the Cr.P.C were recorded belatedly. Thus, the story of the prosecution is totally unreliable.

15. To elaborate, by taking this Court to the statements of prosecution witness, it was projected that such statements cannot bring home the guilt. Ram Pratap Sen (PW-1) deposed that although the incident of assault had taken place in the back side of the house of the deceased–Dinesh Patwa, he did not hear any shouting etc. nor had seen Sadhna, Nirmala and Veeneta, the family members of the deceased coming out of their houses. The statement of Ram Milan (PW-5) was relied upon to submit that he had deposed that he had seen the body of the deceased – Dinesh Patwa in the mortuary of Rewa Hospital wherein many persons were present. The dead body was covered by bandage. He was unable to state the actual places of the body where injuries were inflicted. The family members of the deceased did not inform him who assaulted the deceased and how he sustained injuries. The police persons present there were also asking the family members about the nature of incident and the name of the persons who had assaulted Dinesh Patwa but they did not narrate anything about this. Narmada Prasad Patel (PW/6) stated that he does not recognize Dhirendra @ Gudda and nothing was recovered from him. Hasmat Ali (PW/8) stated that on 09.12.2006, seven to eight persons came at the place of incident in motorcycles. Their faces were covered with mask. However, despite that Dhirendra @ Dhiru and Shailendra @ Shilu's faces were visible. He deposed the statement before police after four to six days from the date of incident.

16. Similarly, Babulal Patel (PW-10) stated that Police did not recover any weapon in his presence from Shailendra @ Shilu although in the recovery memo (Ex.P-22), he admitted existence of his signature. Satya Prakash Tripathi (PW-11) deposed that when he came out of village and approached the National Highway No.7, in seven to eight motorcycles, ten to fifteen persons crossed him, they were not carrying anything/weapons at that point of time. Since he had suspicion about their nature of movement, he informed the police station by telephone. He received information from police station that some incident had already taken place and Constable must have reached the place of incident by now. Later on, he came to know that Dinesh Patwa was assaulted.

17. Upendra Singh (PW/12) turned hostile. Motilal (PW/13) stated that Dhirendra and Shilu were sitting in the motorcycle and were carrying sword. He further stated that Shailendra and Dhirendra assaulted Dinesh Patwa by swords. The swords were used for assault from the sharp side of it because of which multiple injuries were caused to Dinesh Patwa on his head and other places of his body. This witness further stated that after the incident, Dinesh Patwa was taken to hospital. While putting his body in a Jeep, the Police from the Police Station Raipur Karchuliyan had already reached the place of incident. He did not lodge any report in Police Chowki adjacent to GMH Hospital where Dinesh was admitted for treatment.

18. The statement of Jang Bahadur (PW/14) was referred to show that he deposed that he telephoned the Police Station Raipur Karchuliyan and informed that he is speaking from house of Sarpanch of the village and a quarrel had taken place between Dinesh Patwa and 8-10 boys. This witness also stated that the boys who assaulted Dinesh Patwa have covered their faces by mask. Only their eyes

were visible and hence he was unable to identify the assailants. Shivnarayan (PW/15) stated that he could not recognize/identify the assailants because they had covered their faces by clothes. He further stated that he could not recognize the present appellants and has not seen the incident. Mahesh Prasad Tripathi (PW/17) although supported the prosecution story, admitted that why in his police statement, police has not recorded the name of the present appellants when the same was clearly narrated by him is not known to him.

19. Sheshmani Verma's statement (PW/18) was relied upon to submit that this witness was close friend of Kamlesh, brother of the deceased and, therefore, his statement is not trustworthy. Sunny Verma (PW/19) is a child witness. The deceased was his father. Shri S.C. Datt, learned senior counsel placed reliance on the note of the Court below recorded in the statement of this witness wherein it is mentioned that it appears that this child is a tutored witness. The statement of this witness is relied upon mainly to submit that as per his statement, his mother and aunt-Nirmal were present at the time of incident and from there, all of them took Dinesh to the hospital. During this period, his mother or aunt did not state the reason of death of Dinesh to police. The number of assaults by the sword mentioned by this witness were also highlighted in support of contention that the numbers of assaults so narrated by various witnesses contain glaring contradiction/inconsistency. Archana Verma's statement (PW/20) was referred to show that she informed the doctor that assault was made mainly by using sword and if doctor has written the name of weapon used as "rod", she cannot state the reason for the same. She further stated that her husband sustained injuries in his head and not on other parts of the body. She further deposed that she is unable to state how in Ex. D in "A to A" Part the name of weapon is written by police as

"*lathi*". She informed the police that weapon used for attack was a sword. Para 23 of her deposition was referred to submit that as per this statement, Dhiru was carrying a "*naked sword*" whereas Shilu was armed with "*danda*". She further stated that eight to ten attacks were made on the head of Dinesh from the sharp side of the sword. The other assailants also assaulted Dinesh by using swords. She was unable to recollect whether the police person recording her report was wearing read strip on the uniform or not. Similarly, she could not state how many rooms were there in the police station and who took her to the police station. She stated that a villager took her to the police station on a motorcycle. She went to police station to lodge report with her nephew Rishu (PW/28).

20. The brother of deceased Kamlesh Patwa (PW-25) stated that attack on deceased was by using sword by the present appellants. Thereafter, the appellant – Shilu took a rod and attacked on the back side of the head of Dinesh. He found ten to twelve wounds on the head of the deceased-brother. All such injuries were caused by sword. He remained present at the place of incident till police arrived. The learned counsel for the appellant also relied on the statement of Dr. S.K. Pathak (PW-27) to submit that ocular evidence is not supported by the medical evidence. The Doctor admitted that in the mid of right thigh of deceased, a cut injury was there. This cut occurred because of an operation to cure haematoma. He further deposed that attacks on the body of deceased were made by hard and blunt objects. In his body, there was no injury caused by a sharp weapon.

21. Rishu Patwa (PW-28) stated that appellant-Dhiru was carrying a "*sword*" whereas Shilu was armed with a "*rod*". Full name of his cousin – 'Sunny' in the School is Siddharth Patkar. The police report was lodged by her aunt – Nirmala

in her presence. The motorcycle on which she with her aunt went to police station was driven by a villager –Pappu Yadav.

22. Learned senior counsel placed heavy reliance on the statement of I.O. Sunil Kumar Gupta (PW35). This witness stated that along with relevant FIRs recorded previously, the concerned Constable had left for the Court at around 11.00 a.m. Thus, copy of the FIR of present case could not be sent to the said Court. He further admitted that FIR was not sent to the concerned Court by him. Consequently, he could not point out the relevant entry in "*roznamcha sanha*" (Ex.P-35) in this regard.

23. Learned counsel for the appellants also placed reliance on the statement of Arunoday Tripathi (DW-1). It is stated by this witness that in attendance register of the school, the name of Siddharth Patkar is mentioned and this student was present in the school on 09.12.2006, the date of incident. This statement is used by the appellants to show that story of prosecution that Sunny shouted and upon hearing his call, other PWs reached to the place of incident is factually incorrect because Siddharth @ Sunny was present in the school on the date of incident. Dr. A.P.S. Gaharwar's statement (DW/8) is heavily relied upon to submit that all injuries were caused by hard and blunt object and not by swords.

24. *Per contra*, Mrs. M. Chuckal, learned panel lawyer supported the impugned judgement. During the course of hearing, the Learned panel lawyer placed reliance on various statements of witnesses and prayed for upholding the impugned judgement. She urged that Dr. Gaharwar was neither the treating doctor of the deceased nor he had conducted the post-mortem. He, in clear terms admitted that his statement is based on the document prepared by the said doctors.

By placing reliance on exhibit D – 9 and other medical documents, she urged that the nature of wounds mentioned in the medical report completely tally with the ocular evidence. On the head of the deceased, certain wounds were sutured/stitched. This itself shows, those were incised wounds and not lacerated wounds. It is a matter of common knowledge that only incised wounds can be stitched and not the lacerated wounds.

25. No other point is pressed by the learned counsel for the parties.

26. We have bestowed our anxious consideration on the on the rival contentions and perused the record.

27. The Court below in Para 14 of the judgment, considered the statements of witnesses wherein inconsistent were canvassed regarding the number of injuries. The Court below opined that when a single person is being assaulted by a number of persons, it is difficult to state with exactitude as to how many attacks were made. Thus, inconsistency in this regard will not be fatal to the case of the prosecution.

28. The Court below did not agree with the argument of defence about the statement of Nirmala (PW-24) to the extent she could not state about the direction of main door of the police station and name of the person with whom she travelled to police station in a motorcycle for lodging the report. It was taken note of by the Court below that she travelled to lodge the report with Rishu (PW-28) and said witness has corroborated her statement. The Court below also considered the statement of Dr. M.K. Tiwari (PW-2), Dr. S.K. Pathak (PW-27) in great detail. The statement of PW-20 (Archana) who is an eye-witness was also considered and despite certain inconsistencies the Court below opined that she clearly deposed

that appellants had attacked her husband by sword. Similarly, statement of Satya Prakash Tiwari (PW-11), Motilal (PW-13), Jang Bahadur (PW-14), Amar Bahadur (PW-16) and Mahesh Tripathi (PW-17) were considered by the Court below. PW-17 deposed that appellants were seen by him after the incident, they were carrying swords and were saying that "*Dinesh Ko Nipta Diya Hai*" (We have finished Dinesh).

29. After considering the statements of witnesses, the Court below opined that the story of defence that FIR was lodged belatedly is not trustworthy. It cannot be said that FIR was lodged belatedly or was recorded ante-time.

30. The medical evidence supports the ocular evidence is the finding given by Court below. Relevant injuries found on the person of the deceased were reproduced by the Court below in Para 44 of the impugned judgment. On the strength of these injuries, the Court opined that such injuries can be caused by sword. The Court below disbelieved the statement of Dr. A.P.S. Gaharwar (PW-8) that injuries were caused by hard and blunt object. It is further held that as per FIR itself, name of both the weapons, namely "*danda*" and "*sword*" were clearly mentioned. Thus, it cannot be said that sword was later on added in the FIR. PW-Dr. S.K. Pathak's statement (PW/27) was considered in Para 48 of the impugned judgment.

31. The recovery memorandum (Ex.P-21) was considered whereby "*sword*" and "*danda*" were recovered from the appellant-Shilu. The Court below on the strength of judgment of Supreme Court opined that if the said weapons on which human blood is found were recovered from the possession of the appellants and they did not putforth any plausible defence as to how these weapon were

recovered from them, it will be an important and relevant circumstance against the appellants even if blood group is not matched.

32. The appellants contended that the FIR was ante-dated. As mandated in Section 157 Code of Criminal Procedure, the prosecution could not establish that FIR was "forthwith" sent to the concerned Court, hence the factum of lodging FIR is highly doubtful. Moreso when certain prosecution witnesses have deposed that they informed the concerned police station on telephone and police reached to the place of incident promptly. Since, FIR itself is under shadow of doubt, the entire investigation and trial founded upon it is also under dark shadow of doubt.

33. Before dealing with the rival contentions, it is apposite to refer to Section 157(1) of Code of Criminal Procedure, 1973 which reads as under :

> *"157. Procedure for investigation . - (1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender;*
>
> *(Emphasis supplied)*

34. In catena of judgments, it was held that Code of Criminal Procedure provides for certain internal and external checks, one of them being the receipt of a copy of the first information report by Magistrate concern. [See: ***2007 (13) SCC 501*** (***Ramesh Baburao Devaskar and others Vs. State of Maharashtra***)]. In ***2013 (12) SCC 316*** (***Rattiram and others Vs. State of Madhya Pradesh***), it was held that the purpose behind sending a copy of the FIR to the Magistrate concern is to

avoid any kind of suspicion being attached to the FIR. The Court may draw adverse inference against the prosecution if it is not convinced as regards the truthfulness of the prosecution version and trustworthiness of the witnesses.

35. Recently, a Division Bench of this Court in ***Man Singh Vs. State of M.P.*** (Cr. A. No.1485/1994) reported in ***2019 (2) MPLJ (Cri) 191*** considered the number of judgments of Supreme Court and culled out the principles in Para 47 of the said judgment. The purpose behind insertion of Section 157 Cr.P.C. is to keep the Magistrate informed about investigation of a cognizable offence to enable him to control the investigation and if necessary to give proper direction under Section 159 Cr.P.C. It is held to be an 'external check' on the working of the police agency.

36. In the considered opinion of this Court, if the judgments referred in ***Man Singh*** (supra) are considered in their true spirit, it can be safely concluded that delay in sending the report to concerned Court under Section 157 Cr.P.C. will not make the FIR as untrustworthy as a rule of thumb. If such delay is caused prejudice to the accused and creates a serious doubt on the factum of lodging the FIR itself at the appropriate time and if prosecution is unable to establish its case by leading cogent and credible evidence, the delay in dispatching the FIR may be detrimental to the case of the prosecution.

37. We are not oblivious of the fact that in the present case the argument of learned senior counsel for the appellants was that the prosecution has failed to establish that FIR was ever sent to the Court concerned. Interestingly, this point was not raised by appellants even feebly before the Court below. However, this point is no more *res integra*. In ***1995 MPLJ 439*** (***Naniya Vs. State of M.P.***), this

Court opined that there were six eye-witnesses against the appellants. It is not the case of defence that they were in any way on inimical terms with the accused persons and, therefore, the entire testimony of all the six eye-witnesses cannot be rejected merely because the fact of information being sent to the Magistrate under Section 157 Cr.P.C. has not been proved.

38. Similarly, in ***2002 (5) MPLJ 359*** (***State of M.P. Vs. Pattu @ Pratap Singh***) also it was held that "mere non-compliance of Section 157 Cr.P.C. shall not led to throwing out the case of the prosecution. Compliance of this provision is an external check provided in Code of Criminal Procedure to prevent ante-dating of FIR".

39. In the case of ***Pattu*** (supra), since there was nothing on record to establish that FIR was ante-dated, the Court did not believe the defence that FIR was ante-dated. In ***2004 (2) MPLJ 561 (Poor Singh & Others vs. State of M.P.)***, this Court opined that non-compliance of Section 157 Cr.P.C. is an infirmity which when coupled with other infirmities, might extend benefit of doubt to the accused. The case of the prosecution may not be thrown out merely for non-compliance of Section 157 of Cr.P.C.

40. In the instant case also, there is no evidence on record to show that wife of the deceased, sister-in-law of the deceased and Kamlesh (brother) were having any previous animosity with the appellants. They were eye-witnesses and deposed about the incident in great detail. They could identify the appellants and narrate the role played by them during the incident.

41. The judgments of Supreme Court in ***Data Ram, Aqeel Ahmed***, ***Thanedar Singh*** and ***Chhabilal (supra)*** are of no assistance to the appellants in the instant

case because no enmity between the appellants and the eye-witnesses could be established. Merely because certain columns of FIR were not filled up, it cannot be said that FIR was written ante-time. The *ratio decidendi* of judgments of Supreme Court while interpreting Section 157 Cr.P.C. is that mere violation of Section 157 will not make the FIR as untrustworthy as a straight jacket formula. It will only a circumstance which may create doubt or may cause dent on the story of prosecution, if prosecution has otherwise failed to establish its case by leading cogent evidence. Thus, we are unable to hold that FIR is untrustworthy in the instant case because copy thereof was not sent to the concerned Court. We say so because we are convinced that prosecution has led credible evidence to establish its case which will be considered hereinafter.

42. Nirmala (PW/24) in clear terms deposed that she lodged the report in the police station. Her statement was corroborated by Rishu (PW-28). In the cross-examination, there is nothing which may demolish their statements. If Nirmala could not recollect the name of person who was driving the motorcycle by which she travelled to Police Station for lodging report, it will not be fatal at all. Nirmala is an eye-witness to the incident in which his brother-in-law was assaulted by eight to ten persons by deadly weapons. She at that time must be in a state of fear and took assistance of a villager who took her alongwith her nephew to police station. During this turmoil, if she could not recollect the name of persons who took her to police station, it will not be a material flaw which will make her entire statement unbelievable. Although heavy reliance was placed by the appellants on statement of child witness namely Sunny, in our view, his statement wherein he deposed that during the incident of assault and till his father Dinesh was taken to hospital, his aunt Nirmala (PW/24) was continuously with her will not cause any

harm to the story of prosecution. This is trite that the statement of child witness needs to be considered with utmost care and caution/circumspection. The Court below recorded that this witness appears to have been tutored. The statement of child witness that during the incident and till taking his father Dinesh Patwa to hospital, her aunt Nirmala with him has not been corroborated by any other witness. In absence of any such corroboration, it is not safe to rely on his version. The Apex Court recently in ***(2019) 4 SCC 522 (Digamber Vaishnav vs. State of Chhattisgarh)*** opined that the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law. ***{See Panchhi v. State of U.P. (1998) 7 SCC 177, State of U.P. v. Ashok Dixit (2000) 3 SCC 70, State of Rajasthan v. Om Prakash (2002) 5 SCC 745 and Alagupandi v. State of T.N. (2012) 10 SCC 451}.*** Hence, this statement is of no assistance to appellants.

43. Another limb of argument of appellants was based on ***Ram Shankar Singh and Lakshman Prasad*** (supra). It was urged that as per prosecution story, the assailants had covered their faces by masks. This is unbelievable that two persons/appellants will not cover their faces by mask. Moreso, when they belong to same village to which deceased– Dinesh Patwa belonged. No doubt, in the factual backdrop of the aforesaid cases, the Apex Court opined that the normal human behaviour would be to cover the faces by mask. However, the said judgments were passed in the peculiar factual backdrop of said cases. This is trite that precedence is what is actually decided by Supreme Court and not what is logically flowing from it. A single fact may change the precedential value of a judgment. In other words, there is no precedence on facts, only legal principle laid down are binding. [See: ***2003 (1) SCC 289*** (***Ram Prasad Sharma Vs. Mani***

Kumar Subba and ors.), ***2005 (3) SCC 427*** (***Rekha Mukherjee Vs. Ashis Kumar Das and others***), 2018 (4) SCC 743 (***Jayant Verma and others Vs. Union of India***), 2018 (8) SCC 396 (***Shanti Bhushan Vs. Supreme Court of India through its Registrar and anr.***) and 2003 (2) SCC 111 (***Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. and ors.***)].

44. In our considered opinion, as a straight jacket formula, it cannot be said that in a given fact situation what will be the behaviour of a particular person. The behaviour may vary from person to person, situation to situation. Human behaviour in all situations cannot be described like edicts inscribed on a rock. *Plato* said Human behaviour flows from three main sources; desire, emotion and knowledge. It can be said that while physics and mathematics may tell us how the Universe began, they are not much use in predicting human behaviour. *Shailey* said human behaviour is like the clear sky. Hard to predict the timing, duration, frequency and intensity. Outbursts can only be imagined from the after effects. Another author said human behaviour is messy and unpredictable and unconcerned with convenient symmetries. In nutshell, in can be said that a change in human behaviour is also a human behaviour.

45. The eye witnesses have deposed that they could identify both the appellants. These statements could not be demolished during extensive cross-examination. Thus, we are unable to persuade ourselves with the argument of learned senior counsel that statements of eye-witnesses were unbelievable.

46. The appellants have taken pains to urge that the ocular evidence is not supported by medical evidence. We do not see any merit in this contention also. The Court below found following injuries on the person of the deceased:

(1) Three **cut wound** in the mid of left thighs sized 3x1/2 cm, 4x0.5 cm deep upto skin and 2x0.4 cm respectively all regular margin.

(2) **Cut Injury of** sized 4x0.2 cm on right calf region, on which blood clotted was present and Straddle injuries of size 3x0.5 mm transversally dorsal aspect of palm.

(3) Swollen contusion injury of size 6x5 cm of blue color obliquely placed on the right hand.

(4) Several contusion on the right to the chest started from second rib of size 3x2 cm, 5x2 cm, 4x2 cm and 3x1 cm respectively; all injuries were contusion injuries.

(5) Abrasion wound on the left frontal region which was 9 cm away from the left orbital wherein there were 4 silk thread were stitched of size was 4x3 cm.

(6) **Stitched wound** o the right frontoparietal region wherein there were 7 stitches of size were 7.6x7 cm obliquely placed.

(7) **Stitched wound** of size 10.2x8 cm on the right occipital region of skull at a distance of 4 inch from Nape of Neck transversely placed.

47. A bare perusal of description of injuries makes it clear like noon day that there were many injuries which were caused by sharp weapon. We also find substance in the argument of learned P.L. that Dr. S.K. Pathak (PW-27) admitted that head of the deceased was covered by bandage. Certain head injuries were found to have been stitched. It is only cut wound which can be stitched. The nature of injuries narrated by Dr. Pathak which are reproduced in Para 10 of the judgment also makes it clear that sharp cutting weapons were used because of which such injuries were caused. Dr. Pathak in his deposition clearly opined that the death was homicidal and was caused because of said injuries. Apart from this, it is relevant to note that in the post mortem report, the nature of injuries and the object, were mentioned. It was clearly mentioned that injuries were caused by sharp and hard object. After having recorded the said finding, it was no more open

for Dr. Pathak or Dr. A.P.S. Gaharwar to take a contrary stand during their deposition. The post mortem report in no uncertain terms makes it clear that certain cut injuries were found on the head of the deceased,which were caused by using a sharp and hard object.

48. In this view of the matter, in our view, the Court below has not committed any error in holding that injuries found on the person of the deceased were caused by the appellants.

49. As noticed, the argument of appellants was that there were serious discrepancies in the number of injuries shown by various prosecution witnesses. Similarly there are serious inconsistencies in the narration regarding the nature of weapons used by the appellants. In 1997 (4) SCC 192 (***Satbir Vs. Surat Singh and ors.***), it was held that "an incident where a number of persons assaulted three persons at once and the same time with different weapons, some contradictions as to who assaulted whom and with which weapon with what weapon, were not unlikely and such contradiction could not be made a ground to reject the evidence of eye-witnesses, if it was otherwise reliable". The statements of prosecution witnesses and particularly injured witnesses are trustworthy. Minor contradictions about use of a particular weapon by appellants will not cause any dent on the credibility of their statements.

50. Similarly, in ***2013 (4) SCC 607*** (***Subal Ghorai Vs. State of W.B***.), it was held that where several witnesses have been examined, there are bound to be minor discrepancies in their evidence. Such discrepancies are natural. The prosecution story cannot be rejected on that ground. [See: also ***1999 (9) SCC 525*** (***Leelaram Vs. State of Haryana and anr.***), ***1999 (8) SCC 649*** (***Rammi Vs. State***

of M.P.) and ***2012 (7) SCC 646*** (***Shyamal Ghose Vs. State of W.B.***)]. In Subal Ghorai's case (supra), it was further held as under :.

> *"In any case, the omissions are minor omissions pertaining to non-mentioning of weapons carried by the accused or not referring to the parts of the bodies of the deceased on which the assault was made. Some of the witnesses have omitted to mention the names of some of the accused. But, in our opinion, on the substratum of the prosecution story, there are no omissions or contradictions. While analysing the evidence, we have kept in mind the manner in which several accused persons armed with weapons attacked the deceased. In an attack of this type, in the nature of things, there are bound to be some omissions or discrepancies in the evidence of witnesses. Experience shows that witnesses do exaggerate and this Court has taken note of such exaggeration made by the witnesses and held that on account of embellishments, evidence of witnesses need not be discarded if it is corroborated on material aspects by the other evidence on record.*
>
> *12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment—sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."*
>
> *(Emphasis supplied)*

51. In a recent judgment reported in ***AIR 2018 SC 4011*** (***Menoka Malik and others Vs. State of W.B. and others***), the Apex Court again held that in a case involving large number of offenders, the evidence of only two or three witnesses who gave a consistent account of the incident is sufficient to sustain conviction. This judgment is based on the judgment of Supreme Court reported in ***AIR 1965 SC 202*** (***Masalti Vs. State of U.P***.).

52. As per principles laid down in the above judgment, since eye-witnesses, namely, Kamlesh, Rishu, Nirmala and Archana have clearly identified the appellants and deposed with necessary details that they used deadly weapons to assault the deceased – Dinesh because of which he died. Even if other prosecution witnesses have turned hostile or their statements are pregnant with certain inconsistencies/contradictions, it will not cause any dent to the story of the prosecution. Thus, we are of the considered opinion that the Court below has not committed any error of fact or law in holding the appellants as guilty on the basis of the evidence on record.

53. In view of the foregoing discussion, in our view, it is not a case where ocular evidence is not corroborated/supported by medical evidence. Hence, Judgments cited by Shri Dutt in this regard cannot be pressed into service in the instant case.

54. So far the statement of defence witness Dr. A.P.S. Gaharwar is concerned, it is not in dispute that said Doctor (DW-8) was neither a treating doctor nor the person who had conducted the post-mortem. Indeed, he clearly deposed that his statement is based on documents. The post-mortem report clearly shows that there were cut injuries caused by sharp weapons which were reproduced by the Court below in Para 9 of the impugned judgment. The statement of this defence witness, in our view, will not improve the case of the appellants.

55. The another point raised by the appellants was that certain statements of prosecution witnesses recorded under Section 161 Cr.P.C. were recorded belatedly. As per the admitted position, after the death of deceased - Dinesh, his body was kept on the main road of the village and a "*chhaka jam*" (*road block*)

was organized. The law and order situation was very bad and police was required to handle the same. The appellants have failed to establish: (i) what prejudice is caused to them if said statements were recorded belatedly and (ii) how recording of the said statement belatedly will cause dent to the story of prosecution. Thus, we are unable to mechanically hold that for this reason, impugned judgment can be interfered with. The Court below has rightly held that the human blood was found on the clothes of the appellants. The weapons used in the crime were recovered from the appellants. In their defence, they did not describe as to how human blood was found in their clothes and on the weapons recovered from them. The Court below also considered the post-mortem report wherein it is mentioned that injury were caused by sharp and hard object. After taking account of credible evidence, the Court below opined that prosecution has established its case beyond reasonable doubt. We do not see any infirmity in the said finding of the Court below.

56. In the result, the **Criminal Appeal No.07/2012 is dismissed**. As a consequence, the appellants shall undergo the remaining jail sentence imposed on them by the judgment dated 24.11.2011.

Criminal Appeal Number 2979/2013

57. This appeal is filed under section 372 of the Cr.P.C against the judgment dated 24.11.2011 whereby, the Court below acquitted the Respondent No. 2 to 6.

58. The stand of the appellant/complainant is that the prosecution led cogent evidence on the strength of which the Court below should have convicted all the accused persons. The Court below has failed to appreciate the evidence in its true perspective resulting in the acquittal of the Respondent No. 2 to 6 herein. It is

stated that proper appreciation of evidence will lead to an inevitable conclusion that all the accused persons had jointly assaulted the deceased Dinesh Patwa and therefore, all of them should have been held guilty under section 147, 302 and 149 of the Indian Penal Code.

59. *Per contra*, Shri Hitendra Gohlani, learned counsel for the Respondent number 3 placed reliance on the statement of Archana (PW/20) , she has stated that the Respondent number 3 was carrying a country made pistol (Katta) and he kept Kamlesh (PW 25) on the gunpoint. Kamlesh (PW/25) stated in clear terms that he does not recognise/identify the person who was carrying the Katta. The name of Respondent number 3 was not mentioned in the FIR lodged on 09/10/2006 and the statements recorded under section 161 of the Cr.P.C on 11/10/2006. Interestingly, the Respondent number 3 is a bus – owner. On the next date of the murder of Dinesh Patwa, his family members along with villagers laid his body on the main road of the village and blocked the road in protest. The bus of the Respondent number 3 was also stopped by the villagers and it was badly damaged by pelting stones. In turn, the Respondent number 3 lodged a report in the Police station about the said damage caused to his bus. In order to wriggle out of the said act of damaging the bus, the appellant included the name of the Respondent number 3 which is clearly an afterthought. Shri Golani has taken pains to contend that the Court below has not committed any error of fact or law in acquitting the Respondent number 3.

60. He further contends that if two views are possible, the one which favours the accused should be followed. In support of this contention, reliance is placed by the counsel on the judgement of the Hon'ble Supreme Court in ***(2007) 9 SCC 135***

(State of M.P. vs. Bachhudas @ Balram & Others) and (2014) 5 SCC 730 (Murlidhar @ Gidda & Another vs. State of Karnataka).

61. Shri D.S Dubey, learned counsel for the Respondent number 5 and Shri Krishna Datt, learned counsel for the Respondent number 6 also advanced almost similar contentions in support of these Respondents. It is common ground that as per judgement of the Supreme Court in ***Murlidhar*** (supra), the scope of judicial review against the judgement of acquittal is limited and if the present case is tested on the anvil of the acid test laid down in ***Murlidhar*** (supra), no fault can be found in the impugned judgement. In absence of any credible evidence, against the private Respondents, the Court below has rightly held that the prosecution has failed to prove its case beyond reasonable doubt against the Respondents.

62. Parties confined their arguments to the extent indicated above.

63. We have heard the parties at length and have produced the record.

64. It is apposite to mention here that both the criminal appeals decided by this common judgment are arising out of same incident of murder of Dinesh Patwa. The Court below found the charges as proved only against Dheerendra Singh @ Dheeru and Shailendra Singh @ Sheelu. In the present appeal, the appellants raised following grounds (i) the trial judge erred in holding that appellants alongwith unidentified persons assaulted the deceased. It should have been held that appellants had been falsely implicated; (ii) since co-accused Narendra, Mukesh, Prahlad and Krishna Dutt were acquitted by the Court below, the court erred grievously in law in placing reliance upon the same witnesses to convict the appellants; (iii) testimony of prosecution witnesses is grossly contrary in reliable and unworthy of any credit. Prosecution witnesses were closed relatives of

deceased and they projected a false case; (iv) there was no evidence as to which part of the body of the appellants received injuries.

65. Interestingly, appellant in this case is the complainant and not the accused/convicts. The grounds of appeal are casually drafted or appear to be outcome of a mechanical "cut, copy, paste" of another appeal preferred by convicts. This appeal filed by complainant is directed against the judgment of acquittal of private respondents herein. We wonder as to how this appeal is filed on aforesaid grounds.

66. However, in the interest of justice, we deem it proper to examine the contentions advanced before us. So far respondent No.3 Prabhat is concerned, the Court below in para 29 to 32 of the impugned judgment opined that the name of this person has been added later on. In the FIR and the statements recorded under Section 161 Cr.P.C., the name of Prabhat was not there. The bus of Prabhat was damaged on 10.12.2006 during 'chakkajam' and report thereto was lodged in police station vide Crime No.293/2006. *Rojnamcha Sanha* of the said complaint was filed as Exhibit D/14. The Court below specifically opined that PW/8, PW/11, PW/13, PW/14, PW/16, PW/17, PW/18, PW/19 and PW/22 have not taken the name of Prabhat in their statements. The statements of family members of deceased namely; Archna PW/20 and Kamlesh PW/25 were recorded on 11.12.2006, the next day of the day, Prabhat's bus was damaged i.e. 10.12.2006. Thus, Court below opined that possibility cannot be ruled out that Prabhat's name is added later on and this act is outcome of an afterthought.

67. As per the principle laid down in the case of ***Muralidhar*** and ***Bacchudas*** (supra), the appellate court while dealing with the appeal against the acquittal must bear in mind the following :

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

(Emphasis supplied)

68. Similarly, in ***Bacchudas*** (supra), it was held that interference in the judgment in a case of acquittal can be made provided there are compelling reasons for doing so. In our view, the Court below has taken into account the relevant piece of evidence in relation to Prabhat and rightly opined that no case is made out against him by the prosecution beyond reasonable doubt. The finding of Court below is plausible one. Hence, we give our stamp of approval to this finding whereby Prabhat was acquitted. So far respondent No.5 and 6 are concerned, the judgment of acquittal needs to be tested on the anvil of the principles laid down in ***Muralidhar*** *and* ***Bacchudas***(Supra). The Court below opined that name of Krishna Datt was not mentioned in the FIR. He was not identified in the Test Identification Parade. Similarly against Mukesh Singh, there is no cogent

evidence. The Court has considered the aspect of involvement of the private respondents herein with sufficient detail. No infirmity could be established while examining the findings given by the Court below. We are unable to hold that Court below has committed any error of law and fact which warrants interference by this Court in an appeal filed against the judgment of acquittal. Resultantly, Criminal Appeal No.2979/2013 is dismissed.

69. As analyzed above, both the Criminal Appeals No.07/2012 and 2979/2013 are dismissed. The appellants of Criminal Appeal No.07//2012 shall undergo their remaining part of sentence. Let a copy of this judgment be sent to the Court below.

(SUJOY PAUL)
JUDGE

(B.K. SHRIVASTAVA)
JUDGE

Biswal, YS & mohsin