

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE AMAR NATH (KESHARWANI)
CRIMINAL APPEAL No. 1495 OF 2015

BETWEEN:-

**KAMOD SINGH S/O LALSAHAB GUJAR,
AGED 27 YEARS, R/O DHINGASARA POLICE
STATION GADARWARA DISTRICT
NARSINGHPUR (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI SIDDHANT KOCHAR - ADVOCATE)

AND

**STATE OF MADHYA PRADESH THROUGH
POLICE STATION GADARWARA DISTRICT
NARSINGHPUR (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI A. N. GUPTA - GOVERNMENT ADVOCATE)

Reserved on	:	22/02/2023
Pronounced on	:	24/02/2023

*This Criminal Appeal has been heard and reserved for judgment, coming on for pronouncement this day, **Justice Sujoy Paul** pronounced the following :-*

J U D G M E N T

This appeal filed under Section 374(2) of the Criminal Procedure Code (hereinafter referred as “Cr.P.C.”) assails the judgment passed in Sessions Trial No.227/2012 by learned Second Additional Sessions Judge, Gadarwara, District Narsinghpur whereby the appellant was held guilty for committing offence under Section 302 of IPC and directed to undergo life imprisonment with fine and with default stipulation.

2. The prosecution story shows that Rambhola (PW-10) lodged a *Dehati Nalishi* (Ex.P/11) on 20/05/2012 stating that he resides in village Dhingasara. There was a quarrel between his father Kehar Singh and accused persons Kamod and Lalsahab. The quarrel had taken place an year ago relating to purchase of a cow. The accused persons abused his father and had animosity with him.

3. On 20/05/2012, he along with his father Kehar Singh was going towards village Kheri in order to give some money to Ramnarayan Paliya. His father was moving ahead and he was following his father by keeping some distance. When his father reached in front of house of Narbadiya Kalar, Bhaiyaji Gujar caught hold of his father, accused Kamod Singh assaulted his father on his head by means of an iron rod. His father fell down. Sahablal and Kamod again assaulted his father by means of *lathi* and rod. Kamod said that Kehar Singh has died and thereafter crushed the body of Kehar Singh by an auto rickshaw and fled away. Rambhola (PW-10) had seen this incident and immediately informed younger brother Bablu, Ramnarayan Paliya and Bhagwansingh

Rajput. After getting help from said persons, he took his father to Salichauka Hospital but Doctor declared him as dead. His father was carrying Rs.80,000/- which were not found by the complainant.

4. The investigation was conducted by Anil Ajmeriya (PW-14). The dead body was send for autopsy. *Lash Panchayatnama* (Ex.P/15) was prepared. Dr. S. K. Gupta (PW-5) conducted the post-mortem and prepared the report Ex.P/8. As many as 10 injuries were found on the person of deceased. The cause of death was shock and hemorrhage.

5. Mr. P. L. Vasnik (PW-15) prepared *Nazri Naksha* (Ex.P/10). Plain soil, blood stained soil and left leg's shoe of deceased was recovered through Ex.P/9. Case diary statement of Bablu, Manoj and Rambhola were recorded. The incriminating material were send to Forensic Science Laboratory (FSL). In turn, report of FSL (Ex.P/19) was received.

6. After completion of investigation, *challan* was filed. In due course, after committal, the matter reached to the Sessions Court. The accused persons abjured their guilt. Trial was conducted. In total, 15 prosecution witnesses entered the witness box whereas Ashok S/o Chandan Singh's (DW-1) testimony was recorded. The Court below framed three issues for its determination. After recording the evidence and hearing the parties, the impugned judgment dated 10/04/2015 has been passed which is subject matter of challenge in this appeal.

Contention of Appellant :

7. Shri Siddhant Kochar, learned counsel for the appellant submits that as per the story of prosecution, three accused persons

simultaneously assaulted Kehar Singh and he succumbed to the injuries. The Court below acquitted the remaining two accused persons and held the present appellant alone as guilty. This finding of Court below is founded upon the testimony of son of deceased i.e. Rambhola (PW-10). Rambhola is the solitary eye-witness against all the accused persons. Considering the similar evidence, the other persons have been acquitted and appellant alone has been held guilty.

8. By placing reliance on **AIR 1965 SC 277 (Ugar Ahir and Ors. Vs. State of Bihar)**, **(1975) 4 SCC 511 (Balaka Singh and Ors. Vs. The State of Punjab)**, **(1976) 1 SCC 20 (Bhagirath Vs. State of M.P.)** and **(2019) 8 SCC 342 (R. Jayapal Vs. State of Tamil Nadu and Anr.)**, it is urged that where it is not possible to separate the truth from falsehood and sift grain and chaff, it is impermissible to pick up and choose one accused person as guilty and acquit the others. The prosecution story is so inextricably mixed up that such separation was not possible. In this backdrop, the Court below should have discarded the entire story of prosecution.

9. Rambhola (PW-10) is the solitary and star witness of the prosecution. His testimony is criticized by contending that if his statement is carefully examined, it shows that the incident had taken place near the house of Narbadiya Kalar. Rambhola (PW-10) informed Bablu (PW-9) and Bhagwan Singh (PW-13) about the assault. They reached the place of incident and in their deposition, they stated that incident had taken place in the farm of Sundar Gujar.

10. The spot map (Ex.P/10) was meticulously referred by Shri Kochar to putforth the point that the dead body was found in the farm of Sundar Gujar which is far away from the farm of Narbadiya Kalar. Rambhola (PW-10) deposed that he had seen the incident from behind an *Imli* tree. The *Imli* tree as per spot map is also far away from the scene of crime.

11. To elaborate, it is further urged that the spot map shows that there is a T-Junction between Gram Dungariya and Gram Panagar. The road which travels from Panagar to Dungariya takes a turn on which *Imli* tree is situated. The Narbadiya Kalar's House is far away from the *Imli* tree and it is on the other side of the road and has a distance of more than 1½ furlong and therefore, it was not possible that Rambhola could have seen the incident from the place he claims to have seen the same.

12. The testimony of Rambhola is unreliable because his conduct is highly unnatural. A son who has seen his father to be beaten by the appellant would have rushed there to save him. Moreso, when as per impugned judgment, two other accused persons have been acquitted and therefore, the appellant alone was the person who was allegedly assaulting the father of Rambhola. Appellant was not carrying any deadly weapon. He was carrying an iron rod. Thus unnatural conduct of this witness make his statement unreliable. Reliance is placed on the Division Bench Judgment of this Court in **CRA.119 /2016 (Gaurav Pandey Vs. State of M.P.)**.

13. The spot map was referred for another purpose. It is submitted that distance between the farm of Narbadiya Kalar, *imli* tree and farm of Sundar Gujar is quite long and therefore, it is highly doubtful whether

Rambhola (P.W.10) had sufficient visibility from the place he was hiding. Thus, it is not safe to treat this person as an eye-witness.

14. Rambhola (P.W.10)'s statement shows that he deposed that he disclosed the names of assailants to police before post mortem was conducted. However, in the post mortem complaint, nobody's name is mentioned. This creates doubt about his testimony.

15. Rambhola (P.W.10) clearly deposed that when he took his injured father to hospital, his clothes also became blood stained because of blood of his father. However, no blood stained clothes of Rambhola (P.W.10) were seized. **State of Rajasthan v. Teja Singh and others (2001) 3 SCC 147** is relied upon to create a doubt on the presence of Rambhola (P.W.10) at the scene of crime.

16. Shri Siddhant Kochar has taken pains to contend that prosecution cannot be permitted to make out a new case altogether. If prosecution story was disbelieved by the Court below that three accused persons assaulted Kehar Singh and two out of them have been acquitted, the story would be that only one person i.e. the appellant had assaulted Kehar Singh. This does not match with the prosecution story. If this story of assault by appellant alone would have been projected since beginning, the appellant would have a different defence. Thus defence of appellant is also prejudiced because of a new case permitted to be set up by the Court below. Reliance is placed on **R. Jayapal v. State of Tamil Nadu and another (2019) 8 SCC 342**.

17. In the impugned judgment in para-45 and 46, the Court below has given a finding that Bhaiji (P.W.-1) and Rajendra (P.W.-2) initially

reached the scene of crime and therefrom they informed Manoj and Bablu. Both the said witnesses did not support the prosecution story and therefore, Court below opined that they perhaps wanted to save the accused persons, therefore, not disclosing the correct facts. However, in para-61 of impugned judgment, the Court below gave credence to the statements of Bhajji (P.W.-1) and Rajendra (P.W.-2). This is contradictory in nature and cannot sustain judicial scrutiny.

18. Shri Siddhant Kochar, learned counsel for the appellant summed up his argument by contending that Rambhola (PW-10) son of deceased is the solitary eye-witness to the incident. If his statement is examined on the anvil of site map (Ex. P/10), it will be clear that there is apparent discrepancy in the place of occurrence. Secondly, his conduct is unnatural. At the cost of repetition, it is argued that as per the impugned judgment, the appellant alone was held guilty and therefore it was appellant alone who had allegedly assaulted Kehar Singh, father of Rambhola (PW-10) by means of a rod. Rod is not a deadly weapon and in that event, the normal behavior of a son would have been to leave no stone unturned to save his father. On the contrary, Rambhola (PW-10) took refuge behind an *Imli* tree. This conduct of Rambhola (PW-10) makes his testimony totally unreliable.

19. The application for Post-Mortem does not contain the names of the persons. *Dehati Nalishi* was ante time. Blood stained cloths of Rambhola (PW-10) were not recovered despite his admission that he took his injured father on a motorcycle and during this exercise, his clothes were also blood stained. If his case diary statement and Court statement are read in juxtaposition on which he was confronted also, it

will be clear that there is clear omission that he witnessed the incident from behind an *Imli* tree.

20. The Court below has disbelieved the statement of Bablu (PW-9), Ramnarayan (PW-11) and Bhagwan Singh (PW-13) that they received phone call from Rambhola (PW-10).

21. Bablu (PW-9) clearly deposed that from *Imli* tree, it is not possible to witness the incident. The Patwari (PW-4) deposed that there were bushes between *Imli* tree and the place of incident and therefore it was not possible to witness the incident from behind *Imli* tree.

22. The attention of this Court is drawn to the statement of Ramnarayan (PW-11) and Bhagwan Singh (PW-13) to establish that Kehar Singh was taken to the Police Station and from there to hospital, till then he was alive. No efforts were made by the prosecution to record his dying declaration.

23. Shri Siddhant Kochar, learned counsel for the appellant has strenuously contended that there are serious contradiction/discrepancy in the statement of Rambhola (PW-10) in as much as he clearly recorded in *Dehati Nalishi* and said stand was consistent when his Court statement was recorded stating that incident had taken place near the house of Narbadiya Kalar. The spot map shows a different place about the incident which creates serious doubt on the prosecution story.

24. The statement of P.L Vasnik (PW-15) is relied upon to show that the *Nazri Naksha* talks about place of incident at Sundar Gujar's farm. Query report (Ex. P/26) is relied upon which indicates that injury No.1

could have been caused by a rod whereas injury Nos.2 to 5 could have been caused by means of *lathi*.

25. The rod was recovered from the place of incident. Indeed it was recovered after 11 days' from the place of incident from an open space and therefore, this recovery is also highly doubtful.

26. The Investigating Officer did not produce any malkhana register. Thus, safe custody of weapon allegedly recovered is not established.

27. The judgment of **Balwan Singh vs. State of Chhattisgarh and another 2019 (7) SCC 781** was relied upon to submit that there is no fixed formula. He submits that the FSL report (Ex.P/19) which shows that although human blood was found on the weapon/rod, the blood stains were disintegrated and blood group could not be matched. Thus, in the light of ratio of **Balwan Singh (Supra)**, the FSL report is of no assistance to the prosecution.

28. In Para -98 and 99 of impugned judgment, the Court below has assigned reasons for acquitting the other co-accused persons. On the basis of same evidence, other co-accused persons were acquitted whereas appellant was put to a comparative disadvantageous position by convicting him. This is totally impermissible in the light of judgments of Supreme Court cited herein-above.

29. Lastly, he again placed reliance on the statement of Patwari Sanjay Thakur (PW-4) and Bablu (PW-9) to canvass his submission that from the crossing/*Imli* tree, the scene of crime was not visible.

30. The *alternative* submission of Shri Kochar, learned counsel for the appellant is that the incident had taken place suddenly and during a scuffle, it took an ugly shape. At best, in a case of this nature, the offence under Section 304-I IPC could be made out.

Stand of Government Counsel :-

31. Shri A. N. Gupta, learned counsel for the State submits that *Dehati Nalishi* was promptly recorded which became foundation of the FIR. *Mauka Naksha* was prepared. The Investigating Officer was present. The Patwari Sanjay Thakur (PW-4) also prepared a *Nazri Naksha*. A conjoint reading of *Nazri Naksha* and *Mauka Naksha* makes it clear that place of incident is the road adjacent to Sunder Gujar's Farm. Rambhola (PW-10) was not resident of village Dungariya where incident had taken place. Thus, he was not aware of the geography of the said village and perhaps for this reason stated that the incident had taken place near Narbadiya Kalar's house. However, in fact there exists no such contradiction because Rambhola (PW-10) is a witness to *Nazri Naksha* wherein the place of incident is shown adjacent to Sunder Gujar's Farm. Thus, the artificial contradiction/discrepancy shown by learned counsel for the appellant deserves to be discarded.

32. Furthermore, it is submitted that in FSL report, human blood was found. In question No.111 asked under Section 313 of Cr.P.C., the appellant was expected to meet the reason as to how human blood came on the rod recovered from him. He gave a bald reply by stating 'it is wrong'.

33. Shri A. N. Gupta, learned Government Advocate submits that from the place of spot, the plain soil, blood stained soil and one shoe of deceased was recovered through Ex.P/9. The remaining shoe was recovered from his body at the time of post-mortem.

34. Dr. S.K. Gupta (PW-5) entered the witness box and gave necessary details of the injuries. A combined reading of statement of Autopsy Surgeon and the nature of injuries leaves no room for any doubt that injury no.1 was caused by appellant by means of an iron rod. In the peculiar facts of this case, the appellant's role was different than the role played by other persons. Since, it can be seen with utmost clarity about the role played by appellant, merely because other co-accused persons have been acquitted, appellant will not get any brownie points out of it. The appellant's role was established by prosecution with utmost clarity and therefore, it cannot be said that it is a case where wheat cannot be separated from the grain.

35. Lastly, it is submitted that Ex.P-20 shows that the informations received at that point of time were reduced in writing. If at that point of time, police did not inform the Doctor about the names of persons who assaulted Kehar Singh, it cannot be said that Ex.P/20 will give any benefit to the appellant. Moreso, when in Ex.P/20, it is clearly mentioned that cause of death is homicidal in nature.

36. In support of his submission, he placed reliance on **2022 SCC online M.P. 1419 (Suresh Ahirwar Vs. State of M.P.)**.

37. In rejoinder submission, Shri Kochar, learned counsel for the appellant placed reliance on the statement of Patwari Sanjay Thakur

(PW-4) wherein he stated that there were bushes between the place, Rambhola was standing and the place where incident had taken place. The place was not visible from *Imli* tree. In order to show the anomaly and contradictions regarding the place of incident, he placed reliance on a **Allahabad High Court Judgment** reported in **2019 SCC online All 4307 (Gautam Chaturvedi Vs. State of U.P.)**.

38. The parties confined their arguments to the extent indicated above.

39. We have heard the parties at length and perused the record.

Findings :-

40. **Inextricability of appellant's role:-** As noticed above, Shri Kochar placed reliance on the judgments of Supreme Court in **Ugar Ahir and others Vs. State of Bihar, Balaka Singh and others Vs. State of Punjab, Bhagirath Vs. State of Madhya Pradesh and R. Jayapal Vs. State of Tamil Nadu and another (supra)**, to bolster his submission that if the story of prosecution is based on the eye-witness account of Rambhola (PW-10) and other evidence is also common against all the accused persons, it was not possible to separate the role of present appellant. If the story of prosecution is disbelieved *qua* other accused persons, the appellant's case could not have been segregated. Thus, entire story of prosecution was liable to be discarded.

41. The ancillary argument was that if half of the story of prosecution is disbelieved, i.e. relating to involvement of other accused persons, on the basis of same set of evidence, the appellant could not have been held guilty

because such a decision would amount to accepting altogether a new story of the prosecution.

42. The common string in aforesaid judgments of the Supreme Court is that acquittal of an accused is permissible and on the basis of same set of evidence, another accused can be held guilty but this course is not available where the evidence can not be segregated in parts. It is profitable to refer to the relevant paragraphs of **2002 (6) SCC 81 (Krishna Mochi Vs. State of Bihar) :-**

‘51. ... It is the duty of the court to separate the grain from the chaff. Where the chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno, falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) has not received general acceptance in different jurisdiction nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called ‘a mandatory rule of evidence’. (See *Nisar Ali v. State of U.P.* [*Nisar Ali v. State of U.P.*, AIR 1957 SC 366 : 1957 Cri LJ 550]) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far

as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted.
(See *Gurcharan Singh v. State of Punjab*).

(Emphasis supplied)

This principle is reiterated in all the judgments which are referred in Para-40 of this judgment.

43. Thus, as a straitjacket formula it cannot be said that in no case, one accused person can be held guilty when other co-accused persons were exonerated on the basis of same set of evidence. The *litmus* test is whether the theory of separating the wheat from the grain can be pressed into service. If answer is in affirmative and sifting is possible, certainly one accused person's case can be segregated and he can be punished if evidence is otherwise creditworthy. In the light of this test, the factual backdrop and evidence of this matter needs to be examined.

44. Without commenting anything about correctness of the findings of the impugned judgment regarding acquittal of other co-accused persons, it is noteworthy that in Para-98 of the impugned judgment, the Court below opined that recovery of *lathi* from co-accused Lalsahab was proved but no injury by means of *lathi* on the person of deceased could be established and cause of death is the injury caused by means of rod by present appellant and by crushing the deceased by auto rickshaw by the present appellant.

45. Similarly, for other accused Bhaiyaji, the Court below opined that as per the prosecution's case, he caught hold of Kehar Singh from behind and

Bhaiyaji assaulted him from the front. This story was disbelieved by holding that had it been a case, the injury could have been caused on the head of Bhaiyaji, who caught hold of the deceased person. The injuries found on the person of deceased are as under :-

- (i) Lacerated wound 6 x 3 cm x bone deep over right frontal area of scalp with underlined frontal bone having multiple fractured and depressed segment of bone, crossing laceration on underlying maninges with subdural and subarachnoid hematoma present.
- (ii) Contusion with deformity 8 x 8 cm on left fore arm middle 1/3rd of fracture of radius and ulna bone.
- (iii) Contusion with deformity 8 x 6 cm lateral side of left upper arm. Upper 1/3rd with fracture humerus bone.
- (iv) Contusion with deformity 6 x 6 cm over 1/3rd of left arm with fracture in left humerus lower 1/3rd.
- (v) Contusion 4 x 3 cm dorsal aspect on left hand.
- (vi) Contusion 4 x 4 cm right knee in-front.

46. Let us examine the role of appellant, as per the prosecution story. The appellant was carrying an iron rod. The iron rod was indeed recovered from him. As per Rambhola (PW-10), the appellant assaulted Kehar Singh by means of a rod on his head. This oral statement is corroborated by the statement of Dr. S.K. Gupta (PW-8), who clearly deposed that injury no. 1 is caused by an iron rod and was sufficient in normal course to cause death of a person. The query report substantiates the case of the prosecution.

Thus, on this account, we are unable to persuade ourselves that the role of this appellant for all practical purposes was so interwoven with the role played by other accused person that it can not be segregated at all. Thus, the aforesaid judgments in **Ugar Ahir and others (supra)**, **Balaka Singh and others (supra)** and **Bhagirath Vs. State of Madhya Pradesh (supra)** and others having same ratio are of no assistance to the appellant.

Prejudice :-

47. On the strength of the judgment of the Supreme Court reported in **R. Jayapal (supra)**, it is submitted that accepting the case of prosecution *qua* appellant alone would mean that a new prosecution story is accepted and that will cause serious prejudice to the appellant. We do not see much merit in this contention in the facts and circumstances of this case. In criminal matters, on routine basis, cases travel to the Courts where number of accused persons were arraigned on the basis of same evidence but few are acquitted whereas some are convicted. This does not cause any prejudice to accused person who is convicted. It depends on the facts and circumstances and nature of evidence available against a particular accused person.

Testimony of PW-10 :-

48. The testimony of Rambhola (PW-10) was criticized by contending that he allegedly took his injured father to hospital when his father was profusely bleeding. In that course, the blood of father must have stained the clothes of Rambhola but no such clothes were recovered. Thus, it is highly doubtful whether Rambhola (PW-10) is an eye-witness. To support this argument, **(2001) 3 SCC 147 (State of Rajasthan vs. Teja**

Singh and others) was pressed into service. In **State of Rajasthan v. Arjun Singh, (2011) 9 SCC 115** it was held as under :-

“**18.** As rightly pointed out by the learned Additional Advocate General appearing for the State that mere non-recovery of pistol or cartridge does not detract the case of the prosecution where clinching and direct evidence is acceptable. **Likewise, absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place.**”

(Emphasis supplied)

This judgment was followed in **Manjit Singh v. State of Punjab, (2013) 12 SCC 746 :-**

“**33.** As far as non-seizure of the bloodstained clothes and bloodstains from the seat of the car are concerned, it does not create a dent in the prosecution version. In this context, the authority in *State of Rajasthan v. Arjun Singh [(2011) 9 SCC 115 : (2011) 3 SCC (Cri) 647]* can profitably be referred to. **In the said decision the Court has opined that absence of evidence regarding recovery of used pellets, bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place.** It has been further observed that **when there is ample unimpeachable ocular evidence and the same has received corroboration from the medical evidence, even the non-recovery of weapon does not affect the prosecution case.**”

(Emphasis supplied)

Interestingly, in **Teja Singh (supra)** no prosecution witness deposed against the accused therein. In the peculiar facts of that case, Supreme Court opined that non recovery of blood stained clothes is also fatal to

the prosecution. This is trite that an additional or different fact can make a world of difference between conclusions in two cases or between two accused in the same case. (See **(2003) 8 SCC 666** **Megh Singh v. State of Punjab**). This view was followed in **Gian Chand v. State of Haryana, (2013) 14 SCC 420**. Thus, in the facts and circumstances of the present case, non-recovery of blood stained clothes will not have any adverse impact on the credibility of the story of prosecution.

49. A doubt was sought to be created on the prosecution story by contending that during post mortem, if names of assailants were known to Rambhola (PW-10) and he had informed the police, why the names are missing in the relevant document. The said document Ex.P/20 shows that cause of death is mentioned as 'murder'. The *Dehati Nalishi* (Ex.P/11) was recorded on 20/05/2012 at 3:45 P.M. with quite promptitude which contains the names of accused persons. Thus, non-mentioning the names of accused persons in post-mortem application will not cause any dent on the prosecution story.

Place of Occurrence :

50. The testimony of Rambhola (PW-10) was relied upon along with the *Dehati Nalishi* wherein he stated that incident had taken place near the farm of Narbadiya Kalar. Learned counsel for the appellant has taken pains to repeatedly draw the attention of this Court to 'site map' wherein the incident has shown to have taken place adjacent to the farm of Sunder Gujar. In addition, it is argued that Narbadiya Kalar's house is in a diagonally opposite direction as per the site map compared to the

farm of Sunder Gujar. The distance is quite large from where one cannot witness the incident. As per Rambhola (PW-10), he had witnessed the incident from behind a *Imli* tree. The distance between the *Imli* tree and farm of Sunder Gujar is more than 500 meters and between these two places there were bushes.

51. The argument on the first blush appears to be attractive but lost much of its shine when examined minutely. In-fact, there are two maps on the record. The first map is *Nazari Naksha* in which Rambhola (PW-10) has put his signature as a witness. Pertinently, in this map, the place of incident is shown as Sunder Gujar's house. In the second site map dated 20.05.2012, Bablu (PW-9) and Manoj (PW-8) are the witnesses. It is also signed by P.L. Vasnik, (Investigating Officer). The common thing in both the maps aforesaid is that incident is shown to have taken place in Sunder Gujar's farm and not near Narbadiya Kalar's house.

52. The Court below in Para-84 of impugned judgment opined that since Rambhola (PW-10) was not a resident of village Dungariya, he was not aware about the owner of farm and might have erroneously mentioned the name of Narbadiya Kalar's house. Since the incident has taken place in Sunder Gujar's farm and Rambhola (PW-10) is a witness to '*Nazari Naksha*', the discrepancy pointed out fades into insignificance.

53. The secondary question springs out of 'spot map' is whether Rambhola (PW-10) could have witnessed the incident from a distance of 500 meters. No suggestion was given to Rambhola (PW-10) by the defence that from that distance he could not have seen the incident

because of bushes standing in between. The incident had taken place in broad day light near a road and therefore, we are unable to hold that Rambhola (PW-10) could not have seen the incident from that distance. Moreso, when spot map does not show existence of any bushes between *Imli* tree and Sunder Gujar's farm.

54. The next contention was that the conduct of Rambhola was unnatural. As per the evidence on record, Rambhola (PW-10) was at a distance of about 500 meters from his deceased father. Incident had taken place suddenly. The human behaviour cannot be measured on any golden scale. In a given fact situation of danger, the response may vary from person to person. One may be courageous enough to reach to the place of incident immediately and interfere in the matter, whereas another may hide to save himself and therefore, it cannot be said that conduct of Rambhola (PW-10) was unnatural. In the facts and circumstances of this case, the judgment of this Court in **Gaurav Pandey (Supra)** cannot be pressed into service.

55. So far judgment in **Gautam Chaturvedi (supra)** is concerned, in the said case, there was different factual account recorded in FIR and testimony of witnesses in the Court. In the peculiar facts of that case, the Court disbelieved the testimony and considered the 'spot map' in sufficient detail. The pivotal question is whether in this case, the prosecution has failed to establish the place of occurrence. At the cost of repetition, the place of occurrence is the same as per '*Nazri Naksha*' and 'spot map'. The only anomaly projected is that Rambhola (PW-10) deposed that incident had taken place near the house of Narbadiya Kalar. The Court below has given a plausible finding that this

discrepancy/contradiction in the name of spot is because Rambhola was not resident of that village where incident had taken place and therefore, it was not expected from him to narrate the place of incident with mathematical accuracy. When he is signatory to 'Nazri Naksha' wherein he has shown the place of occurrence as Farm of Sunder Gujar, it cannot be said that prosecution failed to establish the spot of occurrence. Thus, judgment of **Gautam Chaturvedi (supra)** is of no assistance to the appellant.

Recovery from open space :-

56. The iron rod was recovered from the appellant. Merely because it was recovered from an open place, its recovery does not become doubtful. It is profitable to refer to **(1994) 4 SCC 370 (State of Himachal Pradesh Vs. Jeet Singh)** wherein it was held as under :-

“26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is “open or accessible to others”. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows

where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.”

(Emphasis supplied)

57. The blood stained rod became subject matter of query and Dr. S.K. Gupta (PW-5) gave a definite opinion that injury No.1 could have been caused by an iron rod. The human blood was found on the iron rod as per the FSL report (Ex.P/19). The Court below confronted the FSL report by putting specific question No.111 and as noticed above, appellant gave an evasive reply. In absence of any justifiable explanation about existence of human blood, this is certainly relevant incriminating circumstance against the present appellant. The judgment of Supreme Court in **Balwan Singh (supra)** was again considered by Supreme Court in **AIR 2021 SC 4031 (Madhav v. State of Madhya Pradesh)**, wherein it was held as under :-

“32. Therefore, as pointed out by this Court in *Balwan Singh v. State of Chhattisgarh*, there cannot be any fixed formula that the prosecution has to prove, or need not prove that the blood groups match. **But the judicial conscience of the Court should be satisfied both about the recovery and about the origin of the human blood.**”

(Emphasis supplied)

In the instant case, the recovery and origin of human blood was established by the prosecution. This Court records its satisfaction about the recovery and origin of human blood.

58. In view of foregoing analysis, in our judgment, the role of appellant was certainly saggregatable from that of other accused persons. The prosecution has proved its case against this appellant beyond reasonable doubt. The Court below has considered the evidence on legal parameters. The Court below has taken a plausible view which does not warrant interference by this Court.

59. The alternative argument is regarding modification of offence from Section 302 to 304-I of IPC. The point raised is ponderable.

60. Learned counsel for the appellant fairly argued that Kehar Singh was taken on motorcycle from agricultural field of Sunder Gujar to hospital via police station. In that case, police ought to have recorded his dying declaration. We are not impressed by this contention for the simple reason that if a family member is badly injured, the first attempt of other family members will be to provide him immediate medical aid. In that course, Kehar Singh died. Non-recording of dying declaration does not have any adverse impact on the story of prosecution.

61. Learned counsel for the appellant raised doubt about custody of incriminating material/weapon between the period the material was recovered and the time when the same was sent to Forensic Science Laboratory (FSL) Sagar. P.L. Vasnik (PW-15)/Investigation Officer categorically deposed that during this period, the incriminating material was deposited in the 'Malkhana' of Police Station. Although he did not produce the 'Malkhana' register in the Court, this will not vitiated the story of prosecution.

62. The incident had taken place suddenly. The prosecution could not establish that there was any premeditation on the part of appellant. Appellant caused single injury. In absence of establishing any intention, the conviction of appellant deserves to be modified to Section 304-I of IPC and he must undergo actual sentence of 10 years (if not already undergone).

63. We find support in our view from the judgments of Supreme Court reported in **(2007) 12 SCC 718 (Gopal Vs. State of Maharashtra)** and **(2009) 12 SCC 260 (Buddu Khan Vs. State of Uttarakhand)**.

64. Resultantly, the conviction of appellant is modified to Section 304(Part-I) of IPC and he shall undergo the actual sentence of 10 years. If he has already undergone the said sentence and his presence in the custody is not required in any other matter, he be released forthwith.

65. The Criminal Appeal is **partly allowed** to the extent indicated herein-above.

(SUJOY PAUL)
JUDGE

(AMAR NATH (KESHARWANI))
JUDGE

manju/bks/sarathe