AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on 02.12.2022

Judgment Delivered on 12.12.2022

CRA No. 458 of 2020

1. Sanni Tharwani S/o Raj Kumar Tharwani Aged About 25 Years
2. Sagar Tharwani S/o Late Vijay Tharwani Aged About 29 Years
3. Vishal Tharwani S/o Late Vijay Tharwani Aged About 31 Years

All R/o Village Sindhi Colony, Police Station Civil Lines , Bilaspur, District Bilaspur Chhattisgarh ---- Appellants

Versus

1. State Of Chhattisgarh Through The Police Station, Civil Line, Bilaspur , District Bilaspur Chhattisgarh ---- Respondent

CRA No. 167 of 2020

1. Lakhan Dhimar S/o Ganga Prasad Dhimar Aged About 22 Years R/o Sindhi Colony, Police Station Civil Line, District Bilaspur, Chhattisgarh

---- Appellant

Versus

1. State of Chhattisgarh Through S.H.O. Civil Line, District Bilaspur, Chhattisgarh

---- Respondent

CRA No. 494 of 2020

1. Suraj Kartari S/o Shri Lalchand Kartari, Aged About 28 Years R/o Sindhi Colony, Police Station - Civil Line Bilaspur, District - Bilaspur Chhattisgarh

---- Appellant

Versus

1. State of Chhattisgarh, through the Station House Officer, Police Station - Civil Line Bilaspur, District - Bilaspur Chhattisgarh

---- Respondent

CRA No. 641 of 2020

1. Sunil @ Machchhar @ Lallu Son Of Rajesh Talreja (wrongly mentioned as Lallu Talreja) Aged About 22 Years Resident Of Sindhi Colony, Police Station-Civil Line, Bilaspur, District - Bilaspur (Chhattisgarh)

---- Appellant

Versus

1. State of Chhattisgarh through the Station House Officer, Police Station - Civil Line Bilaspur, District - Bilaspur (Chhattisgarh)

---- Respondent

CRA No.458 of 2020 :-

For Sanni Tharwani : Mr. Abhishek Sinha, Sr. Advocate with Mr. Pranjal Agrawal & Ms Vidhi Agrawal, Advocates

For Sagar Tharwani : Mr. Devershi Thakur & Mr. Pranjal Agrawal, Advocates

For Vishal Tharwani : Mr. Pranjal Agrawal & Mr. Vidhi Agrawal, Advocates

CRA No.167 of 2020 :-

For Lakhan Dhimar : Mr. Prafull N. Bharat, Sr. Advocate with Mr. Raj Kumar Gupta, Advocate

CRA No.494 of 2020 :-

For Suraj Kartari : Mr. Rajeev Shrivastava, Sr. Advocate with Shri Rishi Rahul Soni, Advocate

CRA No.641 of 2020 :-

For Sunil @ Machchhar @ Lallu Mr. Manoj Paranjape, Advocate with Mr. Anshul Tiwari, Advocate

For State : Mr. Raghvendra Verma, Govt. Advocate

For Objector in CRA No.167 of 2020 : Mr. Ashutosh Mishra, Advocate

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Hon'ble Shri Justice Goutam Bhaduri
Hon'ble Shri Justice N.K. Chandravanshi

CAV Judgment

Per Goutam Bhaduri, J.

1. All the appeals are being heard together, as the common thread passes through the issue.

2. The present appeals are arising out of judgment of conviction and order of sentence dated 04.01.2020 passed by the Additional Sessions Judge, Bilaspur in S.T.No.153/2018.

3. CRA No.458/2020 is preferred by Sanni Tharwani (A/1), Sagar Tharwani (A/5) & Vishal Tharwani (A/6). These accused persons have been convicted and sentenced as under:-

Conviction	Sentence
(Sanni Tharwani - A/1)	
U/s. 148 of IPC	R.I. for one year and fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 03 months.
U/s. 302/149 of IPC	R.I. for life and fine of Rs.5000/-, in default of payment of fine to further undergo S.I. for 03 months.
U/s. 25 (1) (1-B) (B) of Arms Act	R.I. for one year and fine of Rs.1000/-, in default of payment of fine to further undergo S.I. for 03 months.
(Sagar Tharwani - A/5 & Vishal Tharwani - A/6)	
U/s. 148 of IPC	R.I. for one year and fine of Rs.500/-, in default of payment of fine to further

	undergo S.I. for 03 months.
U/s. 302/149 of IPC	R.I. for life and fine of Rs.5000/-, in default of payment of fine to further undergo S.I. for 03 months.

4. CRA No.167/2020 is preferred by Lakhan Dhimar (A/2). He has been convicted and sentenced as under:-

Conviction	Sentence
U/s. 148 of IPC	R.I. for one year and fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 03 months.
U/s. 302/149 of IPC	R.I. for life and fine amount of Rs.5000/-
U/s. 25 (1) (1-B) (B) of Arms Act	R.I. for one year and fine amount of Rs.1000/-

5. CRA No.494/2020 is preferred by Suraj Kartari (A/3). He has been convicted and sentenced as under:-

Conviction	Sentence
U/s. 148 of IPC	R.I. for one year and fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 03 months.
U/s. 302 /149 of IPC	R.I. for life and fine amount of Rs.5000/-
U/s. 25 (1) (1-B) (B) of Arms Act	R.I. for one year and fine amount of Rs.1000/-

6. CRA No.641/2020 is preferred by Sunil @ Machchhar (A/4). He has been convicted and sentenced as under:-

Conviction	Sentence
U/s. 148 of IPC	R.I. for one year and fine of Rs.500/-, in default of payment of fine to further undergo S.I. for 03 months.
U/s. 302 /149 of IPC	R.I. for life and fine amount of Rs.5000/-
U/s. 25 (1) (1-B) (B) of Arms Act	R.I. for one year and fine amount of Rs.1000/-
U/s 27 (1) of the Arms Act	R.I. for three years and fine amount of Rs.3000/-

Brief facts :

7. As per the prosecution case, on 04.08.2018 at about 10.30 pm Akash Aagicha (PW-9) received a phone call from one Amit Nandwani (since deceased) that he is standing near Sindhi Colony Panchayat Bhawan and he called him. When he reached there, he saw the deceased was standing at his motorcycle near Panchayat Bhawan Sanni Tharwani (A/1), Suraj Kartari (A/3) Sunil Talreja (A/4), Sagar Tharwani (A/5) and Vishal Tharwani (A/6) were sitting. When Akash Aagicha (PW-9) was talking to the deceased at that time Sanni Tharwani (A/1) went out saying that he will come back within five minutes and thereafter, came with Lakhan Dhimar (A/2). Subsequent to it, behind the Panchayat Bhawan

Sanni Tharwani (A/1) came with a sword and said to the deceased that he talks too much; abused him by filthy language saying that I will kill you and started assaulting the deceased by way of sword. At that time, Lakhan Dhimar (A/2) took out a *gupti* and started assaulting the deceased and along with him Suraj Kartari (A/3), Sunil @ Machchhar (A/4), Sagar Tharwani (A/5) and Vishal Tharwani (A/6) in furtherance to carry out object also started assaulting the deceased by way of sword and *desi katta* (pistol). By such assault, the deceased fell down on the spot. At that time, Sunil Talreja (A/4) chased the witness Akash Aagicha with a sword and out of fear, he started running away. Thereafter, after some time when Akash Aagicha (PW-9) went to the place of occurrence, he saw there that Amit (deceased) was seriously assaulted having injuries on his head, back, both arms and chest and blood was oozing out. Thereafter he called one Anil and while the deceased was taken to Hospital for treatment he succumbed to the injuries on the way.

8. On the basis of information given by Akash (P.W.9), merg (Ex.P/2) was registered wherein the entire incident was narrated and thereafter FIR was registered. On the memorandum of accused, the weapon of offence i.e. sword, knife and air-pistol were seized. Investigation was carried and various statements of witnesses were recorded. From the spot, blood stained soil and plain soil were collected. Subsequently, the skin of the chest &

hand and clothes of the deceased were seized. After a few days, he accused were arrested and the spot map was prepared. Thereafter, the articles so seized were sent for FSL.

9. After investigation, the charge-sheet was filed before the Court of Chief Judicial Magistrate, Bilaspur and the matter was committed to the Sessions Judge for trial. In the trial all the accused persons abjured their guilt.

10. On behalf of the prosecution, as many as 27 witnesses were examined and the accused examined three witnesses in their defence.

11. The learned trial Court after evaluating the evidence, convicted and sentenced the accused persons as aforementioned.

Submission on behalf of Sanni Tharwani (A/1) :

12. Mr. Abhishek Sinha, learned senior counsel assisted by Pranjal Agrawal & Ms Vidhi Agrawal, Advocate would submit that :

- the trial Court erred in appreciating the evidence of the witnesses;
- the incident took place at 11.30 pm whereas the merg (Ex.P/2) was lodged at 11.45 pm and thereafter the FIR (Ex. P/3) was lodged at 11.55 pm on 4-8-2018 and as per the FIR, Akash Aagicha (PW-9) was the only eyewitness, however, the prosecution has subsequently added three

more eyewitnesses namely; Jeetu Nandwani @ Balla (PW-5), cousin brother of the deceased; Sanni Nandwani (PW-15), who came after the incident; and Pinki Nagwani (PW-17) who made the statement that she saw the accused persons running from the spot but subsequently in Court became an eye-witness.

- the conviction of the accused is made on the improved statement of Pinki Nagwani (PW-17);
- referring to the spot map (Ex.P/18), learned counsel would submit that Akash Aagicha (PW-9) stated that he had seen the incident from a hidden place but such place where from he had seen is not shown in the map. The statements of Nanak Khanduja & Nandu were not recorded, despite the fact that they are the residents of same place;
- referring to the law laid down by the Supreme Court in the matter of ***Pratap Singh and another v State of M.P.*** {(2005) 13 SCC 624}, learned counsel would submit that in the case of like nature the relevancy of spot map is of great significance;
- the trial Court has believed the statement of Pinki Nagwani (PW-17), despite the fact that in the statement (Ex.D/5) recorded under Section 161 CrPC she has not stated to the police that she has seen the incident;

- the names of other eyewitnesses, as claimed by the prosecution were not mentioned by Pinki Nagwani (PW-17) and in the statement under Section 161 CrPC neither she has stated any assault nor has stated that the accused were carrying any weapon, this witness has only stated that she saw the accused running;

- according to the learned counsel, the statement of Pinki Nagwani (PW-17) was recorded on 10-8-2018 at police station, however, there is no explanation by the prosecution with regard to such delay, so it creates a doubt on the entire occurrence of incident.

- in the statement Pinki Nagwani (PW-17) has not stated about any gunshot nor has narrated the fact in police statement and claimed to have made phone call to 108;

- the prosecution though stated the deceased was taken by Police to the Hospital but how the Police reached to the spot is not explained and Rojnamcha Sanha was not produced, so it creates a doubt.

- referring to the statement of Pinki Nagwani (PW-17) learned counsel would submit that she was examined on 8-5-2019 and for the first time she improved her version before the Court that she has stated to have seen the accused assaulting the deceased;

- learned counsel would submit that before the Court Pinki Nagwani (PW-17) stated that three gun shots were fired by the accused, but no bullet was found in the body of the deceased;

- It is stated that the doctor who conducted postmortem has not stated about gunshot injury, therefore, such ocular testimony when compared with the evidence of medical expert, the same becomes doubtful;

- referring to the report (Ex.P/1) of Armourer, learned senior counsel would submit that the gun, which was alleged to have used in the crime, was not in working condition as the trigger was damaged and, as such, the statement of Pinki Nagwani (PW-17) on which the conviction is based is erroneous;

- in fact, the postmortem report do not corroborate the fact of bullet injury nor any recovery of cartridge was made from the spot;

- learned counsel would submit that the medical report (Ex.P/22) would show that the deceased was brought dead to Apollo Hospital at 11.00 pm on 04-08-2018, consequently if the incident occurred was at 10.30 pm to 11.00 pm how the deceased would have been brought to Apollo Hospital at 11.00 pm, therefore, the inference of falsity of Pinki Nagwani (PW-17) comes to fore is

apparent;

- Pinki Nagwani (PW-17) does not say presence of Sanni Nandwani (PW-15), who claimed to be an eyewitness, took the deceased to hospital as such the statement was not genuine and trustworthy;

- the prosecution has launched the false case at the behest of Akash Aagachi (PW-9), who claimed to be an eyewitness; in fact this witness had previous animosity with the accused, which is proved by previous report and counter report.

- there is nothing on record to establish that as to what was the source of information and how the police came to know about the incident and hence the entire prosecution case is doubtful;

- referring to the statement of Investigating Officer Ravindra Mandavi (PW-22), learned counsel would submit that the spot map was prepared at the behest of Akash Aagachi (PW-9) and as per the statement of Investigating Officer, all the accused were arrested at Rajnandgaon, however, arrest memo (Ex.P/34) would show that the place of arrest was at Civil Line Police Station, Bilaspur on 10-8-2018;

- referring to the seizure memo (Ex.P/28), learned counsel

would submit that at the instance of Sanni Tharwani (A/1) sword was seized from graveyard (kabristan) of Sindhi Colony wherein two eyewitnesses namely; Mohd. Azim (PW-18) and Sandeep Dhansani (PW-19) have not fully supported the seizure;

- there is inconsistency in the statements of seizure witnesses namely; Mohd. Azim (PW-18) and Sandeep Dhansani (PW-19) with regard to place of seizure because Mohd. Azim (PW-18) stated that the sword was seized from the house whereas Sandeep Dhansani (PW-19) stated that it was from the graveyard (kabristan);

- It is further stated that when such articles were sent for FSL vide memo Ex.P/40 wherein it was mentioned that bloodstains were found, however, the FSL report would show that no bloodstains were found on the sword and hence the investigation is tainted and fabricated;

- referring back to the timing of FIR, learned counsel would submit that as per the records, the deceased was brought dead at Apollo Hospital at 11.00 pm and before that as per Akash Aagicha (PW-9), the victim called him in between 11.00 pm to 11.30 pm, thereafter he reached at 11.30 pm, which is evident from the FIR (Ex. P/3), therefore, when there is an inconsistency of occurrence with regard to the time, the call record should have been

placed before the Court, as the deceased was dead prior to 11.00 pm since he was brought dead at Apollo Hospital at 11 p.m. Neither the mobile was collected nor any call details were placed which draws inference that Akash Aagicha (PW-9) was not present on the spot at the time of incident;

- no further efforts have been made to record the statement of police van driver who took the deceased to hospital, therefore, there is suppression of material facts;
- referring to the statement of Dr. Manoj Jaiswal (PW-16) who conducted the autopsy, learned counsel would submit that according to his opinion cause of death was due to excessive hemorrhage due to extensive multiple incised wounds over skull including brain. According to the Doctor the deceased went in coma as a result of brain injury and, as such, it was not possible to come out of coma, whereas Jeetu Nandwani @ Balla (PW-5) and Sanni Nandwani (PW-15) have stated that the deceased has told them that accused have assaulted him so such statements are falsified;
- as per the statement of the Investigating Officer Ravindra Mandavi (PW-22) he received the case-diary on 05-08-2018, so how the statement of Akash Aagicha (PW-9) was recorded on 04-08-2018 becomes doubtful;

- further referring to statement of Jeetu Nandwani @ Balla (PW-5), learned counsel would submit that this witness came to know about the incident at about 11.00 pm, which was informed by Ravi Nagwani, who took him to the Hospital and tied T-Shirt on head of deceased, but no T-shirt containing blood stains has been seized, consequently it draws inference that false evidence was prepared and the accused have been inculpated for the offence done by others;

- referring to the decision rendered in the matter of ***Sunil Kundu and Another v State of Jharkhand*** {(2013) 4 SCC 422} and ***Shahid Khan v State of Rajasthan*** {(2016) 4 SCC 96}, learned counsel would submit that copy of Rojnamchasanha was not produced in respect of 04-08-2018, therefore, what was the information prevailing at the end of police is not proved;

- with respect to statement of Pinki Nagwani (PW-17), learned counsel placed reliance upon the decision rendered in ***State of Uttarakhand v Darshan Singh*** {(2020) 12 SCC 605} and would submit that certrain improvement was made by her in the Court statement, so the entire case of the prosecution is doubtful;

- further placing reliance upon the judgment rendered in

the matter of ***Sunil Kumar Sambhudayal Gupta (Dr.) and Others v State of Maharashtra*** {(2010) 13 SCC 657} learned counsel would submit that when no statement is made under Section 161 Cr.P.C., but it has been stated in the Court, there exists material contradiction, therefore, the same should not be accepted;

- learned counsel would submit that as to how the police arrived at the place of occurrence has neither been reflected in the merg (Ex.P/2) nor in the FIR (Ex.P/3);
- the evidence of Pinki Nagwani (PW-17), the eye witness, is not a trustworthy, as she improved her version in the Court statement;
- major inconsistency and material contradiction exist in ocular and medical evidence as the oral statement contains bullet injury, however, in the medical autopsy it has not been proved;
- since witnesses are relative witnesses who got examined by the prosecution the entire trial is vitiated and the particulars of seizure, time and place are also fabricated, therefore, the prosecution has failed to prove the case beyond reasonable doubt;
- with regard to the preponderance of probability, learned counsel would place reliance upon the decision rendered

by the Supreme Court in the matter of ***Kaliram v State of Himachal Pradesh*** {(1973) 2 SCC 808}; and

- learned counsel would lastly submit that taking into the statements of witnesses and the fabrication of documents, it is manifest that the learned trial Court has failed to appreciate the facts & circumstances of the case in its true perspective and hence a wrong finding has been recorded, therefore, the appeal in respect of Sanni Tharwani (A/1) be allowed.

Submission on behalf of Lakhan Dhimar (A/2) :

13. Mr. Prafull N. Bharat, learned senior counsel assisted by Mr. Rajkumar Gupta, Advocate, would submit that:-

- learned counsel would adopt the arguments advanced on behalf of Sanni Tharwani (A/1);

- according to learned senior counsel, there is inconsistency in the statement of witnesses and the wrong finding has been recorded by the trial Court;

- four persons were stated to be eye witnesses by the prosecution namely; Jeetu Nandwani @ Balla (PW-5), Akash Aagicha (PW-9), Sanni Nandwani (PW-15) and Pinki Nagwani (PW-17);

- the trial Court has believed the statement of Pinki

Nagwani (PW-17);

- by referring to statement (Ex. D/5) of Pinki Nagwani (PW-17) recorded under Section 161 Cr.P.C., learned counsel would submit that this accused (Lakhan Dhimar) has not been named by the witness;

- the witness (Pinki Nagwani (PW-17)) has only stated that she has not seen the actual assault but only saw the people running from the spot, thereafter, called on 108;

- the statement of Pinki Nagwani (PW-17) was recorded after period of six days from the date of incident i.e. on 10-08-2018 which is also fatal to the prosecution and this eye witness for the first time before the Court has narrated about the happening of incident;

- referring to the statement of Pinki Nagwani (PW-17), learned counsel would submit that the major improvement and contradiction exist in the Court statement because in the statement recorded under Section 161 Cr.P.C. nothing was stated before the Police, therefore, it cannot be believed that this witness has seen the incident;

- referring the statement of Jeetu Nandwani @ Balla (PW-5) learned counsel would submit that this witness is the

cousin brother of the deceased and as per the statement, when he went to the incident everything had happened and no one was present except him, therefore, how the accused Lakhan can be inculpated is a serious flaw committed by the learned trial Court;

- the evidence of Pinki Nagwani (PW-17) on which the trial Court has believed do not show that Akash Aagicha (PW-9) was there nor Akash has marked the presence of Pinki on the spot and as per the statement of Akash Aagicha (PW-9) he had made a report against Sanni Tharwani (A/1) stating that there was a previous dispute between the deceased and Sanni Tarwani, consequently Akash was also an implanted witness and the trial Court has rightly disbelieved the version of such witness;

- further supporting the finding in respect of Sanni Nandwani (PW-15) learned counsel would submit that according to his statement, he reached to the spot after the incident and admittedly he was not at the spot when the incident happened;

- referring to statement of Dr. Aman Sharma (PW-14) learned counsel would submit that according to the Apollo Hospital, the deceased was brought dead at 11.00 pm on 04-08-2018, so anywhere the presence of Lakhan

(A/2) has not been established and only evidence is recovery of weapon Bhujali vide Ex. P/26;

- referring to the FSL report (Ex. P/55) wherein *Bhujali* (knife) was marked as article 'C', learned counsel would submit that the report would show that no blood was found on *Bhujali*, consequently, the presence of Lakhan was not established as Pinki Nagwani (PW-17), on whose statement the accused persons have been convicted, has not stated anything against this accused;

- according to the learned counsel, there exists material omissions & contradictions;

- to buttress his contention, learned counsel would place reliance upon the decision rendered by the Supreme Court in the matter of ***Nagesar v State of Chhattisgarh*** {(2014) 6 SCC 672} and would submit that unless the presence of accused is established, Section 149 of IPC cannot be invoked;

- attacking conduct of the investigating officer Ravindra Mandavi (PW-22) learned counsel would submit that the statement of eyewitness were not recorded from 04-08-2018 to 09-08-2018 and what prevented him to record the statement is not clear, but the statement would show that there has been previous animosity of the deceased with

other person, therefore, all efforts have been made to shield the actual accused; and

- learned counsel would submit that since there is no evidence on record against Lakhan Dhimar (A/2), his appeal deserves to be allowed and he may be acquitted from the charges.

Submission on behalf of Suraj Kartari (A/3) :

14. Mr. Rajeev Shrivastava, learned senior counsel assisted by Mr. Rajkumar Gupta, learned counsel would submit that

- learned counsel would adopt the aforesaid arguments and in addition, he would submit that as per the prosecution case the sword was recovered on the basis of memorandum statement recorded at Kanan Pendari which consists of several over writings and renders doubtful and even when the sword was sent to FSL for examination, no blood was found on it;

- place of seizure is also different in memorandum statement and the seizure memo;

- Mohd. Azim (PW-18), who is a witness to the seizure memo, stated that the seizure was made from the house whereas in the memorandum the place was stated to be graveyard (Kabristan);

- in order to attract the provisions of Section 149 IPC there should have been sharing of thoughts otherwise the same cannot be invoked;

- deceased was taken into police van but no forensic examination of police van was made to ascertain as to whether blood stains were there or not and apart from it two police personnel took the deceased to hospital but they have not been examined;

- controverting the time of occurrence, learned senior counsel would submit that according to the prosecution the deceased called Akash Agachi (PW-9) at 11.30 PM but the call details and the location of it has not been obtained; and

- deceased had several enemies so instead of nabbing the real culprits this accused Sanjay Kartari (A/3) has been inculpated falsely and hence the appeal in respect of Sanjay Kartari (A/3) be allowed and he may be acquitted. It is further submitted that the circumstances which were used against accused were never put to the accused u/s 313 of Cr.P.C.

Submission on behalf of Sunil @ Machchhar (A/4) :

15. Mr. Manoj Paranjpe, learned counsel and Mr. Anshul Tiwari,

Advocate would submit that:-

- learned counsel would adopt the aforesaid arguments and in addition, he would submit that the conviction has been based on the sole testimony of Pinki Nagwani (PW-17) and Akash Agachi (PW-9), who claimed to be eye-witness whose evidence has been disbelieved, therefore, under Section 386 Cr.P.C. when the finding is in favour of the accused it would be a like nature of acquittal and the interference by the appellate Court should be minimum;

- with respect to the seizure made from this accused Sunil vide Ex. P/30, learned counsel would submit that three articles were recovered i.e. motorcycle, knife and air pistol No.T-3784, whereas as per the statement of Jugal Kishor Singh (PW-1), who examined the pistol the barrel number bears 3794, therefore, wrong pistol was sent for examination;

- with respect to recovery of knife, though the recovery shows that it contains the blood stains, but the FSL report Ex. P/55 the article ‘F’ do not show the presence of blood on it;

- as per the statement of Dr. Manoj Jaiswal (PW-16), the cause of death was due to injury on head and not any

bullet shot, as such, the recovery of air-pistol would be completely irrelevant;

- with respect to the injuries sustained by the deceased, learned counsel would submit that the postmortem report do not contain the bullet injury;

- referring to the statements of the seizure witnesses Mohd. Azim (PW-18) and Sandeep Dhansani (PW-19), learned counsel would submit that there is inconsistency in respect of place of seizure as one has stated that the seizure has been made from Mahayamaya Mandir Stand and the other has stated from near Ratanpur Mazar and hence the discrepancy in the memorandum and seizure exists consequently it becomes doubtful;

- learned counsel would submit that the statements of Jeetu Nandwani @ Balla (PW-5), Akash Agachi (PW-9) and Sanni Nandwani (PW-15) have been disbelieved and this finding of fact of the trial Court should not be overruled as the accused would step into the shoes of an acquittal appeal;

- to support his contention, learned counsel would place reliance upon the decisions rendered by the Supreme Court in ***Ravi Sharma v State (Government of NCT of Delhi) and Another*** {(2022) 8 SCC 536} and ***Betal***

Singh v State of M.P. {(1996) 8 SCC 205};

- further with regard to delay in recording the statement under Section 161 Cr.P.C., learned counsel would submit that the statement of Pinki Nagwani (PW-17) was recorded after six days from the date of incidence i.e. on 10-08-2018, therefore, that would also be fatal. He placed his reliance upon the decision rendered in ***Ganesh Bhavan Patel and Another v State of Maharashtra*** {(1978) 4 SCC 371}; and

- learned counsel would submit that the conviction is based on the statement of Pinki Nagwani (PW-17), which is also inconsistent and the trial Court has erred in its finding by recording the conviction and hence the appeal of accused Sunil @ Machchhar (A/4) be allowed and he may be acquitted from the charges.

Submission on behalf of Vishal Tharwani (A/6) :

16. Mr. Pranjal Agrawal & Ms. Vidhi Agrawal, learned counsel would submit that:-

- learned counsel would adopt the aforesaid arguments and in addition, he would submit that the conviction has been based on the sole testimony of Pinki Nagwani (PW-17);

- referring to 161 statement (Ex.D/5) of Pinki Nagwani

(PW-17), he would submit that this accused has been named by Pinki, based on which the trial Court convicted him;

- learned counsel would submit that in the first part of 161 statement Pinki has stated that people were running but Vishal was not there and in the later part which is hearsay name of Vishal was stated;

- referring to the Court statement of Pinki Nagwani (PW-17) learned counsel would submit that all the accused have been stated to be causing assault by weapons, but no weapon has been seized from Vishal and for the first time this accused has been named in the Court;

- placing reliance upon the decision rendered in ***Dudh Nath Pandey v State of Uttar Pradesh*** {(1981) 2 SCC 166} learned counsel would submit that the defence has examined three witnesses namely; Geeta Talreja (DW-1), Brijesh Washishth (DW-2) and Rajkumar Wadhwani (DW-3) and according to the defence witnesses at the alleged time of incident Vishal has gone to receive his family at some other place wherein those witnesses were also accompanied them, consequently, the statement of Pinki Nagwani (PW-17) that Vishal was not named earlier gets support and this witness named Vishal for the

first time in Court and as such it creates a doubt;

- the trial Court has not discussed any motive and by a mere presence with no arms, Section 149 IPC cannot be invoked;

- learned counsel placed reliance upon the decision rendered by this Court in the matter of ***Laxminarayan v. State of Chhattisgarh*** {AIR OnLine 2022 CHH 165}; and hence the appeal in respect of accused Vishal Tharwani (A/6) be allowed and he may be acquitted of the said charge.

Submission on behalf of Sagar Tharwani (A/5) :

17. Mr. Devershi Thakur & Mr. Pranjal Agrawal, learned counsel would submit that:-

- learned counsel would adopt the aforesaid arguments and in addition he would submit that neither any memorandum nor seizure was made from this accused and he has been convicted only on the basis of assumption. In respect of challenge to the statement of Pinki Nagwani (PW-17) he adopts the aforesaid arguments made by other counsel;

Submission on behalf of the State :

18. Mr. Raghvendra Verma, learned Government Advocate, while supporting the impugned judgment would submit that the statement of Pinki Nagwani (PW-17) remains unrebutted and minor contradictions would not material when witness was consistent with the happening of incident. Referring to statement of Pinki Nagwani (PW-17) he would submit that the eyewitnesses have proved the fact of happening of the incident which has been unchallenged in the cross-examination, therefore, the conviction by the trial Court is well merited warranting no interference of this Court. He would also submit that Pinki Nagwani (PW-17) has elaborated the facts which she had seen while the incident which cannot be termed as improvement and only on this count her statement cannot be discarded. He placed reliance upon the decision rendered in ***Yogesh Singh v Mahabeer Singh and Others*** {(2017) 11 SCC 195}.

19. We have heard learned counsel appearing for the parties at length and perused the record.

20. We are conscious of the fact that these appeals are against conviction and not acquittal. The Supreme Court recently in case of ***Ravi Sharma Versus State (Government of NCT of Delhi) (2022) 8 SCC 536*** at para 9 considering the appellate power and taking note of the precedents of various decisions reiterated the view of ***Chandrappa Vs. State of Karnataka (2007) 4 SCC 415*** and held that appellate court has full power to review, re-

appreciate and reconsider the evidence and observed that The Criminal Procedure Code, 1973 puts no limitation, restrictions or condition on exercise of such power and the appellate court on the evidence before it may reach its own conclusion, both on question on facts and law. Therefore, with such proposition we would like to deliberate on the evidential value of facts and statements adduced before the trial Court.

Discussion of evidence :

21. The prosecution has relied on four star witnesses i.e., P.W.5 Jeetu Nandwani, P.W.6 Ravi Nagwani who turned hostile, P.W.9 Akash Aagicha and P.W.17 Pinki Nagwani regarding occurrence of incident. With respect to eye-witness, Akash Agicha (P.W.9), the trial Court has disbelieved his statement. In the statement of P.W.9 before the Court and to the Police, he has deposed that on 04.08.2018, deceased Amit Nandwani called him at about 10.30 to 11.00 p.m., and asked him to come at Panchayat Bhawan. He reached to Sindhi Colony near Panchayat Bhawan within 5 minutes where all the appellants/ accused were standing and the deceased was sitting on his motor bike. After reaching to the spot while this witness was talking to Amit Nandwani, all of a sudden, Sanni Tharwani (A-1) challenged Amit Nandwani that he talks too much and he would be killed and at that time, Suraj Kartari (A-3), Sunil Talreja (A-4) and Vishal Tharwani (A-6) hurled abuses and surrounded victim Amit Nandwani. Thereafter they

all started assaulting him. He further deposed that accused has assaulted Amit with sword and Sunil Talreja abused the witness and chased him threatening that he will not leave him alive, at that time he (P.W.9) started running and called and informed the incident to Shibu Khan, Shahbaj Hussain Faridi and his brother Anil Aagicha by mobile and while doing so he (P.W.9) has gone to a hidden place i.e., lane from where, he watched the entire incident when the accused were assaulting Amit Nandwani. He has deposed that the accused assaulted on head, back and hand of deceased and also fired gun shot on the abdomen and hand. He stated that he does not know who has fired the gun shot. Thereafter, the police came to the spot and the accused fled from the scene. Thereafter, Jeetu Nandwani (P.W.5) and Sanni Nandwani (P.W. 15) took the deceased to the District hospital in Police Van and from there looking to the serious condition of the injured victim, he was referred to Apollo Hospital and before entering into Apollo Hospital, the victim died.

22. The merg intimation is marked as Ex.P-2 and the FIR is marked as Ex.P.3. A perusal of Ex.P.2 & P-3 shows that the merg intimation was reported at about 11.45 p.m., by Akash Aagicha (P.W.9) and the FIR was lodged at 23.55 p.m. wherein the time of incident was shown as 11.30 p.m and all the accused were named in it. A perusal of the merg and FIR both purports that Akash Aagicha (P.W.9) has made similar allegation. The statement of Akash

Aagicha u/s 161 Cr.P.C., is marked as Ex.D-3. It has been argued in the Court statement, the time of incident has not been disclosed. It has been further argued that the police had information about the crime and how the police has reached to the spot has not been revealed. However, no plausible defence exists as to why within a short span of time all the accused were named in Merg and FIR.

Place of eyewitness not depicted in spot map

23. It has been further argued that in the map which is prepared vide Ex.P.18, the position of witness was not shown from where he has seen the incident and where the actual incident happened. The reliance was placed on a decision rendered in ***Pratap Singh Versus State of M.P. (2005) 13 SCC 624*** to submit that when the statement is made by a witness that he has seen the incident and the map is produced , the position must have been shown how the witness could have seen the entire occurrence. The proposition laid down by the Supreme Court in *Pratap Singh's case (supra)* shows that in such a case, the existence of mound was present in the spot and the observation of the Court was that if the witness remained sitting, he could not have seen the occurrence from a mound. Whereas in the instant case, witness P.W.9 has made statement that he has seen the incident from lane. In Cross examination, this witness about place of incident has narrated the entire placement of building and surroundings, which do not suggest that there had been any obstruction to see the incident

from a distance. A perusal of Ex.P-2 merg statement, FIR (Ex.P-3) and 161 statement (Ex.D-3) recorded by the police shows the substantial incident and there is consistency in the statement. Therefore, merely because the position of the witness was not shown in map Ex.P.18, it cannot be considered as fatal to the prosecution case and the other evidence as also the circumstances are required to be examined.

24. With respect to presence of witness in the spot map/site plan, the Supreme Court in ***Central Bureau of Investigation Versus Mohd. Parvej Abdul Kayuum (2019) 12 SCC 1*** has observed that when witness is not shown in the spot map, the ocular evidence of the witness cannot be disregarded on the ground that he was not shown in the site plan or spot map. At paras 113 & 114, the Court held thus:

> **113**. With respect to not showing the presence at a particular spot of an eye-witness in the spot map, reliance has been placed by the prosecution on a decision of this Court in *Tori Singh v. State of U.P. AIR 1962 SC 399.* With respect to the spot map, it has been observed hat it would be based on hearsay of witness. Spot map would be admissible so far as it indicates all that the Inspector saw himself at the spot. Any mark put on the spot map on the basis of statements made by the witness to the Inspector would be inadmissible in view of the clear provisions of Section 162 CrPC. This Court has observed thus : (SCC pp.400-01) Para 7) -
>
> > "7. We are of opinion that neither of these arguments has any force. Let us first take the contention that it was most unlikely that the deceased would be hit on that part of the body where the injury was actually received by him, if he was at the spot marked in Ext. Ka-9. The validity of this argument depends mainly on the spot which has

been marked on the sketch-map, Ext. Ka-9 as the place where the deceased received his injuries. In the first place, the map itself is not to scale but is merely a rough sketch and therefore one cannot postulate that the spot marked on the map is in exact relation to the platform. In the second place, the mark on the sketch-map was put by the Sub-Inspector who was obviously not an eyewitness to the incident. He could only have put it thereafter taking the statements of the eyewitnesses. The marking of the spot on the sketch map is really bringing on record the conclusion of the Sub Inspector on the basis of the statements made by the witnesses to him. This, in our opinion, would not be admissible in view of the provisions of Section 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eyewitnesses told him that the deceased was at such and such place at the time when he was hit. The sketch-map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch-map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of Section 162 of the Code of Criminal Procedure as it will be no more than a statement made to the Police during investigation. We may in this connection refer to Bhagirathi Chowdhury v. King Emperor 1925 SCC OnLine Cal 91 : AIR 1926 Cal 550, where it was observed that placing of maps before the jury containing statements of witnesses or of information received by the investigating officer preparing the map from other persons was improper and that the investigating officer who made a map in a criminal case ought not to put anything more than what he had seen himself. The same view was expressed by the Calcutta High Court again in Ibra Akanda v. Emperor 1944 SCC OnLine Cal 12 : AIR 1244 Cal 339, where it was held that any information derived from witnesses during police investigation, and recorded in the index to a map, must be proved by the witnesses concerned and not by the investigating officer, and that if such information is sought to be proved by the evidence of the investigating officer, it would manifestly offend against Section 162 of the Code of Criminal Procedure."

> **114**. In *Pratap Singh v. State of M.P (2005) 13 SCC 624 :* it was held that even if the witnesses are not reflected in the site plan, that does not bar the prosecution to produce such witnesses during the trial. Since PW 55 has not been confronted with the site plan and no question had been asked to the witness, thus his ocular evidence cannot be discredited on the basis of the aforesaid omission".
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> (Emphasis applied)

25. With this view further when the statement of P.W.9 Akash Aagachi is examined, it is submitted that in Ex.P-2 the merg statement, the phone call was stated to be made at 11.10 p.m., whereas in FIR (Ex.P-3), the phone call has been stated to be made at 11.30 pm and in Ex.D-3 the statement u/s 161, no time has been shown. It is stated that deceased made phone call after 10.00 p.m. It is further submitted that no evidence of call details has been placed to corroborate and Ex.P.22 the certificate of Apollo Hospital shows that the deceased Amit Nandwani was brought dead by Sanni Nandwani at at 11 p.m., on 04.08.2018.

26. We cannot appreciate these submissions as the court has to examine whether the evidence when is read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus,

the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. In ***Karan Singh Vs. State of U.P., (2022) 6 SCC 52*** the Supreme Court further reiterated that discrepancies or improvements which do not materially affect the case of prosecution and are significant cannot be made the basis for doubting the case of prosecution. Paras 40 & 41 are relevant and quoted below:

> **40.** "In ***Kuriya v. State of Rajasthan, (2012) 10 SCC 433,*** this Court held : (SCC pp.447-48, Paras 30-32) :
>
> > **"30**. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with

reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in *Kathi Bharat Vajsur v. State of Gujarat, (2012) 5 SCC 724; Narayan Chetanram Chaudhary v. State of Maharashtra, (2000) 8 SCC 457; Gura Singh v. State of Rajasthan (2001) 2 SCC 205 and Sukhchain Singh v. State of Haryana (2002) 5 SCC 100*.

31. What is to be seen next is whether the version presented in the Court was substantially similar to what was said during the investigation. It is only when exaggeration fundamentally changes the nature of the case, the Court has to consider whether the witness was stating the truth or not. *[Ref. Sunil Kumar v. State (NCT of Delhi)] 2003 11 SCC 367.*

32. These are variations which would not amount to any serious consequences. The Court has to accept the normal conduct of a person. The witness who is watching the murder of a person being brutally beaten by 15 persons can hardly be expected to state a minute by minute description of the event. Everybody, and more particularly a person who is known to or is related to the deceased, would give all his attention to take steps to prevent the assault on the victim and then to make every effort to provide him with the medical aid and inform the police. The statements which are recorded immediately upon the incident would have to be given a little leeway with regard to the statements being made and recorded with utmost exactitude. It is a settled principle of law that every improvement or variation cannot be treated as an attempt to falsely implicate the accused by the witness. The approach of the court has to be reasonable and practicable. Reference in this regard can be made to *Ashok Kumar v. State of Haryana 2010 12 SCC 350 and Shivlal v. State of Chhattisgarh 2011 9 SCC 561*"

41. In *Shyamal Ghosh v. State of W.B., 2012 7 SCC 646* this Court held : (SCC pp. 666-67, paras 46 & 49)

> "46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused.… Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

Therefore, the statement of P.W.9 and the incident which goes to the heart of matter remains unshaken by Merg Ex.P-2 and FIR Ex.P-3 which were reported within a short span of time and similarly the statement was recorded immediately after the incident on 04.8.2018 within one hour of time. So while the statement of this witness is evaluated, in our opinion, he appears to be trust-worthy.

27. It has been contended by the accused that the statement of P.W.17 Pinki Nagwani is not trustworthy as she has improved her statement before the Court. Since the conviction is predominantly based by trial Court on the evidence of P.W.17 Pinki Nagwani, it would be relevant to have a glance at her statement made before the Court. Pinki (P.W.17) has stated in her examination-in-chief that she is residing in Sindhi Colony in front of Panchayat Bhawan

and the occurrence of incident is of 04th August, 2018 night at 10.30 to 11.00 and she used to walk at that time. She has deposed that on the date of incident at night she dropped her niece and came back to her house. At that time, when she was sitting in the house, she heard the voice from outside her house and after coming out, she saw that all the six accused were assaulting Amit Nandwani. She started shouting that why they are assaulting Amit Nandwani. She has further deposed that victim was assaulted at Sindhu Vidya Mandir near Panchayat Bhawan and thereafter, Amit Nandwani tried to save himself and rushed towards her for his rescue. At that time, all the accused assaulted Amit Nandwani with weapons and got him fell down. In such situation, injured Amit came near her house where the accused also came with weapons due to which she became scared. She has further categorically deposed that gun shot was fired by accused Sunil. Thereafter she called the Ambulance and Police. She has stated that subsequently police had recorded her statement in Police Station.

28. It has been argued on behalf of the accused that she (P.W.17) has not disclosed the incident immediately to the Police and her statement u/s 161 Cr.P.C (Ex.D-5) was recorded on 10.08.2018. The accused has placed reliance in ***Shahid Khan Versus State of Rajasthan (2016) 4 SCC 96*** to submit that when no explanation has been stated why the witness was not examined immediately

after the occurrence who saw the incident, the delay in recording the statement casts a serious doubt about their being eyewitnesses to the occurrence. It may suggest that the IO had deliberately marked the timings for the sake their convenience with a view to give a shape to the case and introduce the eyewitnesses.

29. Another submission is made that serious omission has been made by witness Pinki (P.W.17). In her statement (Ex.D-5) u/s 161 Cr.P.C., she has only stated that she saw 3 accused were fleeing away. Likewise, another submission is made that Doctor P.W.16 Manoj Jaiswal who conducted the autopsy test has not stated any injury caused by bullet shots in his PM report Ex.P-8. Therefore, the ocular evidence is not supported by the medical evidence and her statement is wrong. Reliance was placed in ***State of Uttarakhand Vs. Darshan Singh (2020) 12 SCC 605*** to contend that there was an improvement in the statement of P.W.17 and the oral evidence is negated by the medical evidence.

30. In order to find out the fact, the ocular evidence of P.W.9 Akash Aagicha read with statement P.W.17 Pinki Nagwani when is examined along with the Postmortem report (Ex.P-8), the postmortem report shows the following injuries:

(i) Deep incised wound 14cm x 3cm deep cutted facial bone (maxilla) starting from and below eye extends upto temporal.

(ii) Deep incised wound 11 x 3 x deep cutted mid fronto parietal bone obliquely placed.

(iii) Deep incised wound 8 x 3 x deep cutted left parietal bone.

(iv) Deep incised piece of scalp with tag of skin and skull bone 8 x 7 cm x deep cut brain matter.

(v) Palm outer aspect destroyed with missing and broken piece approx 5 x 3 cm.

(vi) Incised wound in between right index finger and thumb.

(vii) Skin and inter-costal membrane with outer below nipple (left) wounded ¾ x ¼ cm.

(viii) Few abrasion over thighs and lower leg.

(ix) Contusion over midarm right 3 ½ x 1 ½ cm with punctured wound nearby.

(x) Contusion X shaped deltoid region (left)

(xi) Abrasions back of index, middle and ring finger (left)

31. It has been held that Until the medical evidence completely makes the ocular evidence improbable, the ocular evidence will have primacy over the medical evidence. The Supreme Court in ***Bhajan Singh @ Harbhajan Singh Vs. State of Haryana (2011) 7 SCC 421*** held thus :

> **37.** In State of U.P. v. Hari Chand (2009) 13 SCC 542 this Court reiterated the aforementioned position of law : (SCC p.545, Para 1
>
> > "13. … In any even unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."
>
> **38.** Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystalised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes

so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. *(Vide Abdul Sayeed Vs. State of M.P (2010) 10 SCC 259)*

32. The Supreme Court in State of ***Uttarakhand Vs. Darshan Singh (Supra)*** has reiterated the evidentiary value of ocular testimony versus medical evidence. At para 43, the Court held as follows:

"43. In *Abdul Sayeed v. State of M.P. (2010) 10 SCC 259*, this Court discussed elaborately the case law on the subject of conflict between medical evidence and ocular evidence: (SCC pp. 272-74, paras 32-39)

"Medical evidence versus ocular evidence

32. In *Ram Narain Singh v. State of Punjab (1975) 4 SCC 497* this Court held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case.

33. In *State of Haryana v. Bhagirath (1999) 5 SCC 96* it was held as follows: (SCC p. 101, para 15)

'15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is

> open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.'

34. Drawing on *Bhagirath* case, this Court has held that where the medical evidence is at variance with ocular evidence,

'it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".'

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

> 21. … The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.'

[Vide *Thaman Kumar v. State (UT of Chandigarh) (2003) 6 SCC 380 and Krishnan* v. *State (2003) 7 SCC 56* at SCC pp. 62-63, para 21.]

36. In *Solanki Chimanbhai Ukabhai v. State of Gujarat 1983 2 SCC 174* this Court observed: (SCC p. 180, para 13)

> '13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. *Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.'*

37. A similar view has been taken in *Mani Ram v. State of U.P., 1994 supp. (2) SCC 289 Khambam Raja Reddy v. Public Prosecutor (2006) 11 SCC 239 and State of U.P. v. Dinesh (2009) 11 SCC 566*

38. In State of *U.P. v. Hari Chand (2009) 13 SCC 542* this Court reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)

> '13. … In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.'

39. Thus, the position of law in cases where there is a contradiction between medical

> evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."
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> (emphasis in original)

33. The Supreme Court in ***Ramanand Yadav v. Prabhu Nath Jha, (2003) 12 SCC 606*** has held as under :

> "17. So far as the alleged variance between the medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference."

34. The Supreme Court in ***Shamsher Singh Vs. State of Haryana (2002) 7 SCC 536*** held as under:

> "8. The authorities cited by the learned counsel for the appellant, on the point that when there is conflict between the medical evidence and the ocular evidence, the prosecution case should not be accepted, are of no held to him in this case. On deeper scrutiny of the evidence as a whole, it is not possible to throw out the prosecution case as either false or unreliable on the mere statement of the doctor that injuries found on the deceased could not be caused by a sharp-edged weapon. This statement cannot be taken in isolation and without reference to the other statement of the doctor that the injuries could be caused by Ext.P-9 Axe to disbelieve the evidence of the eye-witnesses. From the evidence available in this case, the possibility of the blunt head of the Axe or the stick portion coming in contact with the head of the deceased cannot be ruled out. These decisions cited

> by the learned counsel for the appellant are related to those cases where the medical evidence and the version of the eyewitnesses could not be reconciled or that the account given by the eye-witnesses as to the incident was highly or patently improbable and totally inconsistent with the medical evidence having regard to the facts of those cases and as such their evidence could not be believed."

Thus merely if the wound has not properly been written or described in the report, the ocular evidence cannot be discarded.

35. Injury No.7 shows that skin was ruptured in the left side of nipple area in size of 3/4 cm x 1/4 cm. Further P.W.16 the doctor has stated that one whole was found on the shirt which was recovered in the left pocket and in respect of Injury No.7, the skin and shirt was preserved and to confirm the presence of gun-powder, it was given to Police in a sealed box. The inquest report which was made immediately after Naksha Panchnama (Ex.P-7) refers that on the right hand, a bullet injury was found and the bullet had pierced through the hand and the bullet injury was found below the left chest. Ex.P-47 shows that the skin and the Pistol which were recovered subsequently were sent to the FSL by Ex.P-47 wherein the skin of the hand which was marked as 'H' and the skin over the chest was marked as 'I' and the Commander Target Pistol was marked as "G" were sent for FSL by the Police. The Air Pistol was fired successfully which is a report Ex.P-56 as also the skin of hand and chest sent for chemical analysis were found to be positive and conclusively it was opined that the Air Pistol A-22 caliber was in working condition and on report of the skin 'H' of

hand and 'I' skin of chest were affirmative with presence of 'lead metal. Therefore, the ocular statement of witnesses that apart from sword injury, bullet fire shots were made is affirmed by FSL, hence the medical evidence cannot be given a preference.

36. When the occurrence is witnessed by more than one witness, then there are bound to be some variances in their evidence. Sometimes variance takes place due to different approach of looking at the things. Parrot like evidence clearly indicate that the witnesses my be tutored. If the witnesses are natural witnesses, then there is bound to be some variance in the evidence of the witnesses. Unless and until some variance is of sch a nature, which makes it difficult to reconcile, minor variances in the evidence cannot be given importance in order to dislodge the prosecution story.

37. From the evidence of star witnesses P.W.9 Akash Aagicha and P.W.17 Pinki, it would appear that Akash (P.W.9) reached to the place of occurrence and thereafter accused started assaulting the deceased. At that time, another resident of the same area namely Pinki Nagwani (P.W.17) came out and saw the occurrence. Both the witnesses have stated that there had been assault and firing of gun shots. The gun shot injuries have been proved by the FSL report. Therefore, merely for the reason that the gun shot injury was not described properly in the post-mortem report, it cannot be stated that the ocular evidence was wrong.

38. In ***Dalbir Singh v. State of Haryana (2008) 11 SCC 425,*** a two-Judge Bench reproduced para 51 from ***Krishna Mochi v. State of Bihar (2002) 6 SCC 81*** wherein it has been stated that : *(Dalbir Singh Case, SCC pp.429-30, Para 13)*

> "13..... '51. …. 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 every thing) has not received general acceptance. …. nor has this maxim come to occupy the status of the 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."

39. The Supreme Court in ***Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195*** reiterated that on account of embellishments, evidence of witnesses need not be discarded if it is corroborated on material aspects by other evidence on record. At paras 37 & 38, the Court held thus :

> "37. Another reason for which the High Court disbelieved the prosecution story is the improvement made by P.W.2 in the story of beheading of the deceased. We find it difficult to agree with this conclusion of the High Court in the light of the judgment of this Court in ***Leela Ram v. State of Haryana (1999) 9 SCC 52*** wherein it was observed: *(SCC p.534, para 12)*
>
> > 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."

38. Similarly, ***in Subal Ghorai v. State of W.B.,(2013) 4 SCC 607*** this Court stated as follows: (SCC p. 627, Para 38)

> "38. … 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."
>
> (Emphasis supplied)

Therefore the statements of P.W.9 Akash Aagicha and P.W. 17 Pinki Nagwani cannot be discarded as a whole that being against the medical evidence especially when the statement of Akash Aagachi was recorded immediately after the occurrence. With respect to delay in recording the statement of Pinki,, it may happen that because of gruesome incident in her presence, she had time to recover from the shock of the incident and compose herself and therefore, if her statement was recorded at a later stage, the witness cannot be blamed. Further she being an eye witness and her presence at the scene being an inmate of the house situated just in front of place of occurrence, her evidence is trust-worthy.

40. The prosecution cited another witness Jeetu Nandwani (P.W.5) who reached to the spot after the incident. P.W.5 stated that the deceased was taken into Police Van to the hospital, but no forensic examination of Policeman or the blood stains have been placed. It is further submitted that there was enmity in between deceased and witness P.W.9 Akash Aagicha. With respect to P.W.17 Pinki, it is contended that she being a related witnesses, her statement cannot be given credence.

41. Now coming to enmity, P.W.11 Mohit Dhanwani in his statement at para 11 on a suggestion given by the accused has admitted the fact that there was also previous enmity in between Akash Aagicha (P.W.9) and deceased Amit Nandwani as quarrel and fighting took place between them.

42. So the deceased had also enmity with Akash Aagicha too. In such circumstances, when deceased had enmity with eye-witness too, the relation of accused and eye-witnesses would be at par with each other and the inference can be drawn. It has also been contended by accused that there is material contradiction about time of incident. According to Ex.D-1 which is a statement recorded u/s 161 Cr.P.C., P.W.5 Jeetu Nandwani has stated that received call from Ravi Nagwani at about 11 p.m, and when he reached the spot, the accused started running after seeing him. In another statement recorded on 05.8.2018 (Ex.D-2) he stated that he received call from Ravi Nagwani at around 10.45 p.m. Apart

from variance of time, this witness maintained the stand that the accused started fleeing after seeing the Police Vehicle. In examination-in-chief before the Court, he deposed that the incident occurred between 10.30 p.m. to 11.00 p.m and he received a call at 11.00 p.m., and only thereafter, went to the spot. So except certain time difference of half-an-hour, no major contradiction has come on record. The incident took place in a short span of time and it is not expected that each of the prosecution witness will watch the time minute-to-minute and incidentally in a given case Watches may not match with each other but those discrepancies will not discard the credibility of witnesses.

43. Further submission is that P.W. 5 is related to deceased Amit Nandwani and P.W. 9 Ajkash Aagicha has enmity with the deceased. When the suggestion itself was made by some of the accused, Akash Aagicha admitted that he had also enmity with the deceased. There is no reason as to why the accused will depose a false statement. The question comes to fore that even if the witnesses are stated to be relative why they should implicate some innocent persons. In the instant case, Akash Aagicha comes on same footing qua the relation with the deceased and accused. There is a difference between “related witness” and “interested witness”. Interested witness is a witness who is vitally interested in conviction of a person due to previous enmity. The “interested

witness" has been defined by the Supreme Court in ***Mohd. Rojali Ali v. State of Assam, reported in (2019) 19 SCC 567***. Therefore, the mechanical rejection of testimonies of P.W.5 Jeetu Nandwani and P.W.9 Akash Aagicha who are related to the deceased, is not permissible. However, the evidence of such witnesses should be examined minutely.

44. Enmity is a double edged weapon. On one hand, if enmity provides motive for false implication of the accused persons, then on the other hand, it also provides motive for committing offence. The Supreme Court in ***Sushil Vs. State of U.P., reported in 1995 Supp (1) SCC 363*** has held as under :

> "8.....It goes saying that enmity is a double edged weapon which cuts both ways. It may constitute a motive for the commission of crime and at the same time, it may also provide a motive for false implication.....

45. The Supreme Court in ***Matibar Singh v. State of U.P.***, ***(2015) 16 SCC 168*** has held thus :

> "14. …..The fact that there was previous enmity between the complainant's party and the rival group of which the accused happen to be members or sympathisers is a factor that need to be taken as adverse to the prosecution. Enmity is a double-edged weapon. It was because of the said enmity that the victim was assaulted while he was on his way to attend the function. The existence of such enmity lends support to the prosecution case rather than demolish the same....."

46. Further submission is made that there is no examination of independent witnesses in this case and the constable who took the deceased to hospital and to whom Akash Aagachi (P.W.9) made phone call has not been examined. The Supreme Court in

Mahesh v. State of Maharashtra (2008) 13 SCC 271 held thus:

> **54.** This Court in *Salim Sahab v. State of M.P. held that : (SCC pp 701 & 703, Paras 11 & 14-15*)
>
> **"11**..... [mere relationship] is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible."
>
> **14.** … In ***Masalti v. State of U.P***., this Court observed : (AIR pp. 209-10, Para 14)
>
> 'But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ….. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.'
>
> **15.** To the same effect are the decisions in *State of Punjab v. Jagir Singh; Lehna v. State of Haryana and Gangadhar Behera v. State of Orissa.*"

55. As regards non-examination of the independent witnesses who probably witnessed the occurrence on the roadside, suffice it to say that testimony of PW Sanjay, an eye-witness, who received injuries in the occurrence, if found to be trust worthy of belief, cannot be discarded merely for non-examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned trial Judge for discarding and disbelieving the testimony of PWs 4, 5, 6 & 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. P.W. Prakash Deshkar has also admitted that he had lodged complaint to the police about the incident on the basis of which FIR came to

be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well settled that in such cases many a time, independent witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons sometimes are not inclined to become witnesses in the case for a variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough Scrutiny."

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

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

48. The Supreme Court in case of ***Sadhu Saran Singh v. State of U.P., (2016) 4 SCC 357*** held thus :

"29. As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any

> independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilisd people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they find it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy."

49. The Submission of accused appellants is that the deceased was in such a state of mind that he could not have deposed and during the incident initially he became unconscious, therefore, he may not have stated any fact to P.W.5 Jeetu about-extra judicial confession and disclosure of names of accused even if is accepted but the fact remains that the statement of P.W.9 Akash Aagachi and statement of P.W.17 Pinki corroborates with each other which is also supported by the medical and FSL evidence and appearance of P.W-5 Jeetu Nandwani in crime scene who narrated that all the accused were fleeing from spot. The statements of P.W.5 were recorded after a day of incident on 05.08.2018. So this witness has corroborated the narrations made by P.W.9 and P.W.17. Consequently, even if there exists certain discrepancies about the time of incident in the statements made by witness, it cannot be given a preference to discard their statements.

50. Now coming to the seizure from accused Sunil @ Machhar, knife and Air Pistol No.3784 was seized by Ex.P-30. Dr. Manoj

Jaiswal (P.W.16) has stated that after seizure no blood stains were found on the knife. The ballistic report Ex.P-1 about Air Pistol shows that the trigger action was not working but further examination was proposed. When the said Air Pistol was sent for examination to FSL by Ex.P-56, it was found that the Pistol was working. Though in the memorandum, the recovery was stated to be at Mahamaya Mandir stand, but it was recovered near Ratanpur Majar, that would not be helpful to the accused as no evidence exists that those areas are far apart.

51. Likewise, from Sanni Tharwani (A-1), seizure of sword was made by Ex.P-28 from Sindhi Colony on the basis of memorandum of Ex.P-27. In the memorandum (Ex.P-27), he has stated that the sword was concealed at the graveyard. Statement of P.W.19 Sandeep Dhansani shows that the grave yard is in Sindhi Colony. So no discrepancy can be attached to such recovery to be fatal. Likewise from Suraj Kartari (A-3), sword was recovered near graveyard of Sindhi colony by Ex.P-32. Likewise, from Lakhan Dhimar (A-2), knife (Bhujali) was seized from Sindhi colony by Ex.P-6 and from Sunil Talreja, sword and Air Gun were recovered by Ex.P-30.

52. Certain lacunae were tried to be pointed out by the appellants that there are discrepancies in statement of memorandum wherein the place of recovery was other than disclosed in memorandum and blood stains were not found. With respect to place of recovery,

though much emphasis is given that recovery of sword and knife was from Sindhi colony house whereas in memorandum, it was disclosed to be at graveyard, but in statements of seizure witnesses P.W.18 and P.W.19 consistency remains about the place of recovery of weapon i.e., Sindhi colony wherein graveyard situates. Likewise, recovery of pistol from Ratanpur stand or *Majar* do not constitute a major discrepancies.

53. Further even if blood is not found on sieged weapon, it would not make any dent on prosecution version. In this context, in ***State of Rajasthan v. Arjun Singh (2011) 9 SCC 115,*** the Supreme Court held that absence of evidence regarding recovery of used pellets, blood stained clothes etc., cannot be taken or construed to be concluded that no crime had taken place. It has been further stated that when there is an ample unimpeachable ocular evidence and the same has been received corroboration from the medical evidence, even the non-recovery of weapon does not effect the prosecution case.

54. Another submission has been made that the accused cannot be convicted u/s 149 IPC since there is no evidence on record to draw a clear finding regarding the common object. The reliance was placed in ***Kuldip Yadav Versus State of Bihar (2011) 5 SCC 324*** as also the judgment rendered by this Court in ***Laxminarayana versus state of Chhattisgarh AIROnline 2022 Chh 165***. According to the prosecution case, there was a dispute

in between the accused-appellants and deceased. On the fateful day, the deceased was called at about 10.30 or 11.00 p.m,, near Panchayat Bhawan at Sindhi Colony. As per the statement of P.W.9, Akash Agachi which was corroborated by the statement of P.W.17 Pinki Nagwani who is resident of the same vicinity, all the accused assaulted the deceased with deadly weapons and also fired gun shots. In the spot map, it shows that near the Panchayat Bhawan where the deceased was called, it is an office premises. obviously the Office premises of Panchayat Bhawan would remain secluded at 10.30 p.m. in the night . When the deceased who reached there was assaulted by the appellants/accused, it can be obviously inferred that at such odd hours if some people have gathered and assembled at the outside public/government office, naturally it is an uncommon thing. The eye-witnesses have supported the presence of all the accused. The factum of not causing injury would not be relevant when the accused is roped in with the aid of Section 149 IPC. The relevant question to be examined by the Court is whether the accused were members of unlawful assembly who gathered at Panchayat Bhawan at odd hours with an intention to cause injury or not.

55. The Supreme Court in ***Daya Kishan v. State of Haryana, (2010) 5 SCC 81*** has held as under:

> 27. There are two essential ingredients of Section 149 viz. (*1*) commission of an offence by any member of an unlawful

assembly, and (*2*) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor would it be open to the court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction under Section 149 IPC, the essential ingredients of Section 149 IPC must be established.

56. Further in ***Vinubhai Ranchhodbhai Patel v. Ravibhai Dudabhai Patel (2018) 7 SCC 743***, the Supreme Court has held as under :

> **24.** To understand the true scope and amplitude of Section 149 IPC it is necessary to examine the scheme of Chapter VIII (Sections 141 to 160) IPC which is titled "Of the offences against the public tranquility". Sections 141 to 158 deal with offences committed collectively by a group of 5 or more individuals.
>
> **25.** Section 141 IPC declares an assembly of five or more persons to be an "unlawful assembly" if the common object of such assembly is to achieve any one of the five objects enumerated in the said section. One of the enumerated objects is to commit any offence. "The words falling under Section 141, clause third "or other offence" cannot be restricted to mean only minor offences of

trespass or mischief. These words cover all offences falling under any of the provisions of the Penal Code or any other law." The mere assembly of 5 or more persons with such legally impermissible object itself constitutes the offence of unlawful assembly punishable under Section 143 IPC. It is not necessary that any overt act is required to be committed by such an assembly to be punished under Section 143.

26. If force or violence is used by an unlawful assembly or any member thereof in prosecution of the common objective of such assembly, every member of such assembly is declared under Section 146 to be guilty of the offence of rioting punishable with two years' imprisonment under Section 147. To constitute the offence of rioting under Section 146, the use of force or violence need not necessarily result in the achievement of the common object. In other words, the employment of force or violence need not result in the commission of a crime or the achievement of any one of the five enumerated common objects under Section 141.

27. Section 148 declares that rioting armed with deadly weapons is a distinct offence punishable with the longer period of imprisonment (three years). There is a distinction between the offences under Sections 146 and 148. To constitute an offence under Section 146, the members of the "unlawful assembly" need not carry weapons. But to constitute an offence under Section 148, a person must be a member of an unlawful assembly, such assembly is also guilty of the offence of rioting under Section 146 and the person charged with an offence under Section 148 must also be armed with a deadly weapon.

28. Section 149 propounds a vicarious liability in two contingencies by declaring that (*i*) if a member of an unlawful assembly *commits an offence in prosecution of the common object of that assembly*, then every member of such unlawful assembly is guilty of the offence committed by the other members of the unlawful assembly, and (*ii*) even in cases where all the members of the unlawful assembly do not share

the same common object to commit a particular offence, *if they had the knowledge of the* fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object.

29. The scope of Section 149 IPC was enunciated by this Court in *Masalti*: (AIR p. 211, para 17)

> "*17*. … The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in *Baladin* assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

30. It can be seen from the above, Sections 141, 146 and 148 create distinct offences. Section 149 only creates a vicarious liability. However, Sections 146, 148 and 149 contain certain legislative declarations based on the doctrine of vicarious liability. The doctrine is well known in civil law especially in the branch of torts, but is applied very sparingly in criminal law only when there is a clear legislative command. *To be liable for punishment under any one of the provisions, the fundamental requirement is the existence of an unlawful assembly as defined under Section 141 made punishable under Section 143 IPC.*

31. The concept of an unlawful assembly as can be seen from Section 141 has two elements:

(*i*) The assembly should consist of at least five persons; and

(*ii*) They should have a common object to commit an offence or achieve any one of the objects enumerated therein.

32. For recording a conclusion, that a person is (*i*) guilty of any one of the offences under Sections 143, 146 or 148 or (*ii*) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an "unlawful assembly" consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.

33. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the basis of the overt acts committed by such individual members of the

> assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); *merely* on the ground that the injuries inflicted by such members are relatively less serious and non-fatal.
>
> **34.** For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence *by the members of the assembly* is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.
>
> **35.** The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with deadly weapons like axes and firearms and attack another person or group of persons, any member of the attacking group would have to be a moron in intelligence if he did not know murder would be a likely consequence."

57. Applying the above position of law to the the facts of the present case, the concept of unlawful assembly and common object can be seen. In sum and substance, examination of facts and evidence would show that when the deceased was called at an unusual place

near a public place i.e., Panchayat Bhawan when it remains closed, it is obvious that it would remain little secluded from usual time of public gathering. The deceased was not called for any fun-fare or for any celebration. The witnesses Akash Aagicha (P.W.9) and Pinki Nagwani (P.W.17) have categorically marked presence of all apart from corroborating evidence of Jeetu Nandwani (P.W.5) who reached there while the accused fled from the scene. The incident took place in front of house of P.W.17 and further P.W.9 who was called had also enmity with the deceased saw that accused appellants inflicted fatal blows on deceased by deadly weapons and by gun shots. The participation of accused armed with weapons and their presence at odd hours outside a secluded premises of common public place of Panchayat Bhawan would show that not only they were members of unlawful assembly but were also sharing the common object.

58. Yet another submission advanced by accused/appellants is that there is a defective investigation and the evidence of proper witnesses has not been recorded apart from the fact that the statements of witnesses were not promptly recorded. A perusal of the statement of P.W.17 on which the trial Court has believed would show that after the incident, her statement was recorded on 10.08.2018. But mere recording of the statement after sometime cannot be held to be fatal. If such a gruesome incident has occurred before a lady, it may happen that she would be examined

after she had time to recover from the shock of the incident and compose herself. Under these circumstances, any delay in recording statement of witness under Section 161 CrPC will not prejudice the prosecution. More so, if the statement was not recorded by the I.O., it is not expected that a lady who was an eye-witness to the incident occurred before her house would knock the door of the prosecution officer each and every day. On the other hand, if such an incident happens before one human being, he/she would be under the shock and fear, due to which, the witness may take some-time to recover from that incident.

59. Every improvement is not fatal to the prosecution case. In cases where an improvement creates a serious doubt about the truthfulness or credibility of the witness, the defence may take advantage. The Supreme Court in ***Bihari Nath Goswami v. Shiv Kumar Singh (2004) 9 SCC 186*** held that exaggerations *per-se* do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version when the entire evidence is put in crucible for being tested on the touchstone of credibility. In the instant case, P.W.17 has categorically stated that in front of place of incident where she was present her house is situated and nothing has been suggested to the I.O., about any deliberate marking of time or a shape to be given to the case. The statement of eyewitness was recorded at a later stage. Other witnesses P.W.9 & P.W.5 stood firm to the Statement of P.W.17

and the evidence of these witnesses supports each other.

60. Further the investigation is not the solitary area for judicial scrutiny in a criminal trial and the conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. The same proposition has been laid down by the Supreme Court in ***Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195***. Paras 30, 33, 34 & 36 are relevant here and quoted below :

> "30. **In *C. Muniappan v. State of T.N*. (2010) 9 SCC 567** this Court explained the law on this point in the following manner: (SCC p. 589, para 55)
>
> > "55.There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

33. As far as the evidence of PW 5 is concerned, the High Court found that it was illogical that the dress of a child who was living with her parents in a different establishment would be kept in the custody of someone-else who was living elsewhere, particularly in the light of the possessive attitude of children that urges them to cling to their most precious belongings. In this regard, it has been submitted by the counsel for the appellant that while the daily wears of PW 5 were kept at the tube-well, fancy clothes for occasions were kept at the village house. Be that as it may, we are not inclined to agree with this reasoning of the High Court. Without attempting to indulge in any form of notional psychoanalysis of the child witness (PW5), we wish to emphasise that she was not subjected to any cross-examination on this point and hence any form of conjecture on this point would be wholly improper on our part. However, the learned counsel for the respondents have submitted that PW 5 was a tutored witness relying upon the fact that she had not taken a bath before leaving the house with her father to purportedly attend a marriage ceremony. We find that this contention is wholly frivolous having no material bearing on the present case.

34. The learned counsel for the respondents has further sought to attack the testimony of this prosecution witness (PW 5) on the ground of delay in recording of her statement by the investigating officer. In support of this submission, the learned counsel has relied upon the judgments of this Court in *State of U.P. v. Ashok Dixit*, (2000) 3 SCC 70 *Vijaybhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel (2004) 10 SCC 583* and *Jagjit Singh v. State of Punjab (2005) 3 SCC 689*. However, we find that none of these cases help the case of the respondents since Vijaybhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel, does not pertain to the case of a child witness and in State of U.P. v. Ashok Dixit and Jagjit Singh v. State of Punjab, delay in recording of evidence was not per se held to be fatal to the prosecution case but the testimony of the child witness in each case was found to be incredible on account of material

> contradictions and lack of independent corroboration. We find that this is not the case here. In this context, we may note that the trial court has observed that PW 5 was cross-examined on practically every detail of the prosecution story and her statement corroborated every part thereof. Moreover, the delay in recording of the statement of PW 5 was not unexplained. It was rightly observed by the learned trial Judge that the delay was on account of the fact that the investigating officer wanted to assure himself of the veracity of her statement and hence, she was examined after she had time to recover from the shock of the incident and compose herself. Under these circumstances, any delay in examining this witness under Section 161 CrPC will not prejudice the prosecution.
>
> 36. A related contention raised on behalf of the respondents is that the story of marriage was introduced for the first time by the prosecution witnesses during trial and the same was not even proved. However, we must note the observations of the learned trial Judge which were to the effect that the statements of the prosecution witnesses under Section 162 CrPC were conspicuously silent on this part, thereby implying that the investigating officer did not care to inquire about it during investigation. Thus, in the light of the position of law examined above vis-à-vis effect of lapses in the investigation, we are not prepared to dispense with the accusation merely on this point especially when the trial court concluded that there was no material contradiction in the statements of PW 1 and PW 5."

61. In respect of accused appellants Sagar Tharwani (A-5) and Vishal Tharwani (A-6), it is contended that they have adduced the evidence of defence witnesses which would go to show that they were not physically present at the spot. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at

another place. The plea can, therefore, succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. The witnesses P.W.9 Akash and P.W.17 Pinki on the other hand stated the presence of accused Vishal and Sagar in the scene of crime. The photographs of CCTV footage though were produced, the admissibility of the same becomes a question with regard to their presence.

62. For the foregoing discussion, we are of the opinion that the prosecution has established the guilt of appellants beyond reasonable doubt and their conviction under various sections of IPC and the Arms Act as mentioned above are upheld.

63. In the result, we do not find any merit in all these appeals warranting interference. Accordingly, all the appeals preferred by all the appellants stand dismissed.

Sd/-

(Goutam Bhaduri)
Judge

Sd/-

(N.K. Chandravanshi)
Judge

Gowri / Rao

Head-notes

(1) Where the eye-witnesses account is found credible, the medical opinion pointing to alternative possibilities cannot be accepted as conclusive;

(1) जहॉ प्रत्यक्षदर्शी साक्षियों का अभिसाक्ष्य विश्वसनीय पाया जाता है, वहॉ वैकल्पिक संभावनाओं की ओर इंगित करने वाले चिकित्सकीय राय को निश्चायक सबूत के रूप में स्वीकार नहीं किया जा सकता।

(2) Eye-witness account cannot be branded as liar. The *maxim falsus in uno, falsus in omnibus* (false in one thing, false in every thing) has no application in India.

(2) प्रत्यक्षदर्शी साक्षी के अभिसाक्ष्य को झूठा नहीं कहा जा सकता। सूत्र 'एक बात में मिथ्या, तो सब में मिथ्या', भारत में लागू नहीं है।

(3) Non-examination of independent witness would not be fatal to prosecution case when the eye-witness account is available.

(3) जब प्रकरण में प्रत्यक्षदर्शी साक्षी का अभिसाक्ष्य उपलब्ध हो, तब स्वतंत्र साक्षी का परीक्षण न कराया जाना, अभियोजन पक्ष के लिए घातक नहीं होगा।

(4) Improvements exaggerated when do not create serious doubt about the truthfulness and credibility of witnesses, evidence can be accepted. Court can sift the chaff from the grain and find out the truth from testimony of witnesses.

(4) जब अतिश्योक्तिपूर्ण अभिवृद्धि साक्षियों की सत्यता एवं विश्वसनीयता के बारे में संदेह उत्पन्न नहीं करते हैं, तब साक्ष्य को स्वीकार किया जा सकता है। सत्य जानने हेतु न्यायालय साक्षियों के संपूर्ण अभिसाक्ष्य में से महत्वपूर्ण तथ्यों को पृथक कर सकती है।

(5) Investigation is not the solitary area for judicial scrutiny in criminal trials and conclusion of trial in the case cannot be allowed to depend solely on the probity of investigation.

(5) आपराधिक विचारण में न्यायिक जांच के लिये अन्वेषण एक मात्र क्षेत्र नहीं है, मामले के विचारण का निष्कर्ष मात्र अन्वेषण के आधार पर नहीं किया जा सकता।

(6) To constitute offence u/s 149 IPC, common object of unlawful assembly is normally gathered from circumstances such as time and place of gathering in a secluded area at odd hours.

(6) भारतीय दंड संहिता की धारा 149 के तहत अपराध के गठन हेतु विधि विरूद्ध जमाव का सामान्य उद्देश्य सामान्यतः परिस्थितियों से लगाया जाना चाहिए जैसे कि विषम समय में एकांत क्षेत्र में एकत्रित होने का समय व स्थान।