ANAND MOHAN
v.
STATE OF BIHAR
(Criminal Appeal Nos. 1804-1805 of 2009 etc.)

JULY 10, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – ss. 147, 302/149, 307/149 and 302/109 – Prosecution of 36 accused – Murder of District Magistrate – In funeral procession of political leader who was murdered by unknown criminals – By brother of the deceased leader, at the instigation of the accused – FIR by Police Officer – Ten of the fourteen witnesses near the place of occurrence deposing that only A-1 exhorted the shooter and not A-2, A-3 and A-4 – Trial court convicting A-1 to A-7 of all the charges – A-1, A-3 and A-4 sentenced to death and A-2, A-5, A-6 and A-7 sentenced to life imprisonment – Rest of the accused acquitted – High Court acquitting all the accused u/ss. 147 and 302/149, acquitting A-2, A-3 and A-4 u/s. 302/109, and convicting A-1 u/s. 302/109 – A-1 sentenced to life imprisonment – Appeal by A-1 against conviction and by the State against acquittal order and against the order reducing sentence of A-1 – Held: Prosecution case against A-1 supported by prosecution witness – High Court rightly acquitted A-1 to A-7 u/s. 302/149 rejecting the prosecution case that there was unlawful assembly with the object of killing the deceased – The majority of the prosecution witnesses did not support the prosecution case that A-2, A-3 and A-4 exhorted the shooter while supported the case that A-1 exhorted the shooter – A-1 also not able to prove that he was not at the place of occurrence, the burden to prove which was on him – He did not take such plea u/s. 313 Cr.P.C. – Therefore, A-2 to A-4 rightly acquitted u/s. 302/109 and A-1 rightly convicted thereunder – As the District Magistrate was

killed as an occupant of a car by chance, on account of mob fury and since the accused was not the assailant himself, RI for life is appropriate – Code of Criminal Procedure, 1973 – s. 313 – Evidence Act, 1872 – s. 103.

Evidence – Evidence of exhortation, is a weak piece of evidence – Therefore, unless the evidence in this regard is clear, cogent and reliable, no conviction for abetment can be recorded – Penal Code, 1860 – s. 109.

36 accused including the appellants-accused No. 1, were prosecuted u/ss. 147, 302/149, 307/149, 302/109. The prosecution case was that 'C' a political leader was murdered by certain unknown criminals. His funeral procession was led by A-1 (an MLA), A-2 (an M.P), A-3 and few others in their respective vehicles. A-1, A-2 and A-3 had given speeches instigating the crowd to take revenge of the murder and teach the administration a lesson. When the procession moved further, the shouts 'Maro Maro' were heard from the midst of the procession. When the informant (a police official on duty) reached there, found that car of the District Magistrate of some other district had turned turtle and the District Magistrate was lying on the ground. A-1, A-2, A-3 and some others were there provoking 'B' the brother of 'C' to kill the Magistrate and take revenge. 'B' fired at the Magistrate and fled away. The Magistrate succumbed to the injuries, in the Hospital. In the meantime 15 persons, including A-1 and A-2 were arrested. The informant had sent information about the incident through wireless, soon after the incident. The informant later sent a typed report about the incident which was lodged as FIR.

Trial Court convicted A-1 to A-7 u/ss. 147, 302/149, 307/149 and 327/149 IPC; further convicted A-1, A-2, A-3 and A-4 u/s. 302/109 IPC, and rest of the accused were acquitted of all the charges. A-1, A-3 and A-4 were

sentenced to death. A-2, A-5, A-6 and A-7 were sentenced to life imprisonment.

High Court held that the prosecution was not able to establish a case of unlawful assembly with common object of causing death of the deceased, hence none of the accused is liable to be convicted u/ss. 147 and 302/ 149; that A-1 alone was responsible for exhorting the lone shooter to kill the deceased and hence, he alone was guilty of the offence u/s. 302/109 IPC. However, the court sentenced A-1 to R1 for life. Hence the present appeals by A-1 against his conviction, and by the State against the acquittal of A-2 to A-7 and against conversion of death sentence of A-1 to life imprisonment.

The appellant-accused *interalia* contended that the information sent through wireless disclosed the first account of occurrence and therefore should have been treated as the FIR and not the typed report of the information which was sent later; that High Court having held that FIR was doubtful, should have disbelieved the entire prosecution case; that as per the medical evidence the deceased was shot in a standing position belies the evidence of prosecution witnesses who stated that the deceased was shot when he was lying injured on the ground; and that High Court did not take into consideration the evidence of PW17 and PW21 the driver and the bodyguard of the deceased, who did not support the prosecution case.

Dismissing the appeals, the Court

HELD: 1.1 It is clear from the language of sub-section (1) of Section 154 Cr.P.C. that every information relating to the commission of a cognizable offence whether given in writing or reduced to writing shall be signed by the person giving it. Hence, the person who gives the information and who has to sign the information has to

choose which particular information relating to the commission of a cognizable offence is to be treated as an FIR. In the present case, PW-14, the informant has chosen not to treat the wireless message but the subsequent typed information as the FIR and the police has also not treated the wireless message but the subsequent typed information as the FIR. Moreover, the wireless message sent soon after the incident was cryptic and did not sufficiently disclose the nature of the offence committed much less the identity of the persons who committed the offence. Unless and until more information was collected on how exactly the deceased was killed, it was not mandatory for either PW-14 to lodge the same as FIR or for the Officer Incharge of a Police Station to treat the same as an FIR. The trial court and the High Court have rightly treated the subsequent typed written information lodged by PW-14 and not the wireless message as the FIR. [Para 28] [26-E-H; 27-A-B, F]

Sheikh Ishaque and Ors. v. State of Bihar **(1995) 3 SCC 392: 1995 (2)SCR 692;** *Binay Kumar Singh and Ors. v. State of Bihar* **(1997) 1 SCC 283: 1996 (8)) Suppl. SCR 225 – relied on.**

1.2. On the basis of all the evidence on record, the High Court did not accept the version of the prosecution that the FIR was lodged at 10.10 p.m. on 05.12.1994 and has instead rightly held that the evidence creates a reasonable suspicion about the FIR being ante-dated and ante-timed. [Para 29] [28-F-G]

1.3. If the date and time of the FIR is suspicious, the prosecution version is not rendered vulnerable but the court is required to make a careful analysis of the evidence in support of the prosecution case. In the present case, soon after the incident, information was sent from the place of the incident to the District

Headquarters that the people mixed with the funeral procession have injured the deceased by a revolver and fled towards Hajipur by different vehicles. At least this part of the prosecution case which finds place in the subsequent typed FIR lodged by PW-14 cannot be discarded as false. [Paras 30 and 31] [29-F-G, H; 30-A-B]

State of M.P. v. Mansingh and Ors. **(2003) 10 SCC 414: 2003 (2) Suppl. SCR 460 – relied on.**

Ganesh Bhavan Patel v. State of Maharashtra **(1978) 4 SCC 371;** *Marudanal Augusti v. State of Kerala* **(1980) 4 SCC 425;** *Awadesh v. State of M.P.* **AIR 1988 SC 1158: 1988 (3) SCR 513 – referred to.**

Erram Santosh Reddy and Ors. v. State of Andhra Pradesh **(1991) 3SCC 206;** *Amar Singh v. Balwinder Singh and Ors.* **(2003) 2 SCC 518: 2003 (1) SCR 754;** *Bhagaloo Lodh and Anr. v. State of Uttar Pradesh* **(2011) 13 SCC 206: 2011 (6) SCR 1037;** *Om Prakash v. State of Haryana* **(2006) 2 SCC 250: 2006 (1) SCR 423 – cited.**

2. The High Court rightly rejected the contention of the prosecution that A-1 to A-7 were liable for conviction u/s. 302/149 IPC. The High Court also has not accepted the entire version of the FIR lodged by PW-14 and has rejected the case of the prosecution in the FIR that there was an unlawful assembly and that A-1 to A-7 were part of that unlawful assembly with the object of killing the deceased. From the evidence on record and the circumstances it is not established that even the members of such mob shared the common object of killing the deceased. The High Court has also held that there were no allegations that the processionists were carrying any arms and there was insufficient evidence about the exact behaviour of the assembly at the scene of occurrence. The High Court has further held that the statements of the driver and the bodyguard of the

deceased show that the attack on the car of the deceased and its occupants was a sudden act of the mob which had gathered to watch the funeral procession. The High Court has thus held that the processionists, who were going with the dead body on motor vehicle, did not have any common object and therefore did not constitute an unlawful assembly and hence A-1 to A-7 could not be held liable for the offence under Section 302/149 IPC on the ground that they were members of an unlawful assembly which had the object of killing the deceased or any other person. [Para 32] [30-C-H; 31-B-D]

3. Evidence of exhortation is, in the very nature of things, a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. Since the majority out of the fourteen prosecution witnesses comprising both civilian and police personnel accompanying the procession do not support the prosecution version that A-2, A-3 and A-4 also exhorted the shooter to shoot at the deceased, it will not be safe to convict A-2, A-3 and A-4 for the offence of abetment of the murder of the deceased. Therefore, the High Court was right in acquitting A-2, A-3 and A-4 of the charge under Section 302/109 IPC. [Para 34] [32-F-H; 33-A]

Jainul Haque v. State of Bihar **AIR 1974 SC 45 – relied on.**

4.1. Where a criminal court has to deal with the evidence pertaining to the commission of offence involving large number of offenders and large number of victims, it is usual to adopt a test that the conviction could be sustained only if it is supported by two or three or

more witnesses who give a consistent account of the incident. In the present case, ten out of the fourteen witnesses who were accompanying the procession and were near the place of occurrence have given a consistent version that A-1 exhorted the shooter to shoot at the deceased. PW-1, PW-3, PW-4, PW-6, PW-7, PW-8, PW-9, PW-10, PW-11 and PW-14, have consistently deposed that A-1 exhorted to shoot at the deceased. The remaining four witnesses may be at the place of occurrence but for some reason or the other may not have heard the exhortation by A-1 to shoot at the deceased. Hence, just because four of the fourteen witnesses have not deposed regarding the fact of exhortation by A-1, it cannot be held that the ten witnesses have falsely deposed that A-1 had exhorted to shoot at the deceased. [Para 35] [33-B-E]

Masalti v. State of U.P. **1964 (8) SCR 133 – relied on.**

4.2. It cannot be held that the medical evidence is such as to entirely rule out the truth of the evidence of the prosecution witnesses that the deceased was shot when he was lying injured on the ground. The evidence of the ten witnesses who have deposed that the deceased was shot when he was lying injured on the ground cannot be discarded on the ground that the medial evidence establishes that the bullets were fired when the deceased was in the standing position. [Para 36] [33-F-G]

Abdul Sayeed v. State of Madhya Pradesh **(2010) 10 SCC 259: 2010(13) SCR 311;** *Budh Singh v. State of U.P.* **AIR 2006 SC 2500: 2006 (2) Suppl. SCR 715 – cited.**

4.3. Both PW-17 and PW-21, the driver and the bodyguard respectively were silent with regard to exhortation by A-1, A-2, A-3 and A-4 to shoot at the deceased. It appears that PW-17 and PW-21 were not aware of any shooting incident at all and they were under

the impression that the deceased had been injured by the assault of the mob after he was pulled out from the car. PW-17 and PW-21, do not seem to know what exactly happened after they were pulled out from the car and beaten up by the mob. On the basis of their evidence, the court cannot discard the evidence of ten other witnesses that the deceased was shot with the revolver on the exhortation of A-1 when the medical evidence established that the cause of death of the deceased was on account of the bullet injuries on the deceased and not the assault by the mob. Moreover, PW-17 and PW-21 may not have supported the prosecution case but their evidence also does not belie the prosecution case that the deceased was shot on the exhortation by A-1. [Para 37] [35-F; 36-C-F]

4.4. The prosecution has been able to adduce evidence through its witnesses that at the time of shooting of the deceased, A-1 was at the spot and was exhorting to shoot at the deceased. If A-1 wanted the court to believe that at the time of the incident, he was in the car in the front of the procession and not at the spot, he should have taken this defence in his statement under Section 313 Cr.P.C. and also produced reliable evidence in support of this defence. Section 103 of the Evidence Act, 1872 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. If A-1 wanted the court to reject this prosecution version as not probable, burden was on him to lead evidence that he was not at the spot and did not exhort to shoot at the deceased. Since he has not discharged this burden, the High Court was right in holding that A-1 was guilty of the offence under Section 302/109 IPC. [Para 38] [36-H; 37-A-D]

4.5. The High Court has rightly held that though the

deceased was a District Magistrate, he was killed in another district as an occupant of a car by chance, on account of mob fury and exhortation by A-1 and firing by a person and as A-1 was not the assailant himself, death sentence would not be the appropriate sentence. This was not one of those rarest of rare cases where the High Court should have confirmed the death sentence on A-1. A-1 was liable for rigorous imprisonment for life. [Para 39] [37-E-F]

Girja Prasad v. State of M.P. **(2007) SCC 625;** *Sikandar Singh and Ors. v. State of Bihar* **(2010) 7 SCC 477: 2010 (8) SCR 373;** *Virendra Singh v. State of Madhya Pradesh* **(2010) 8 SCC 407: 2010 (9) SCR 772;** *Rizan and Anr. v. State of Chhattisgarh* **(2003) 2 SCC 661: 2003 (1) SCR 457– cited.**

Case Law Reference:

(1991) 3 SCC 206	**Cited**	**Para 15**
2003 (1) SCR 754	**Cited**	**Para 15**
2010 (13) SCR 311	**Cited**	**Para 16**
(2007) SCC 625	**Cited**	**Para 17**
2010 (8) SCR 373	**Cited**	**Para 18**
2010 (9) SCR 772	**Cited**	**Para 18**
2003 (1) SCR 457	**Cited**	**Para 19**
2011 (6) SCR 1037	**Cited**	**Para 20**
2006 (2) Suppl. SCR 715	**Cited**	**Para 23**
2006 (1) SCR 423	**Cited**	**Para 25**
1995 (2) SCR 692	**Relied on**	**Para 28**
1996 (8) Suppl. SCR 225	**Relied on**	**Para 28**

2003 (2) Suppl. SCR 460	**Relied on**	**Para 30**
(1978) 4 SCC 371	**Referred to**	**Para 30**
(1980) 4 SCC 425	**Referred to**	**Para 30**
1988 (3) SCR 513	**Referred to**	**Para 30**
AIR 1974 SC 45	**Relied on**	**Para 34**
1964(8) SCR 133	**Relied on**	**Para 35**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1804-1805 of 2009.

From the Judgment & Order dated 10.12.2008 of the High Court of Judicature at Patna in Death Reference No. 12 of 2007 and in Criminal Appeal (DB) No. 1345 of 2007.

WITH

Crl. Appeal Nos. 1536, 1537, 1538, 1539, 1540, 1541, 1542 & 1806 of 2009.

Ram Jethmalani, Surinder Singh, Nagendra Rai, Ranjit Kumar, Ashok Kumar Singh, Kumar Ranjan, Shantanu Sagar, Kripa Shankar Pd., M.P. Jha, Mohit Kumar Shah, Shilpi Shah, Tungesh, Gopal Singh, Samir Ali Khan, Manish Kumar, Anant Sharma, Deepak Prabhakaran, Shaikh Chand Saheb, Vijendra Kumar, M.P. Jha, Ram Ekbal Roy, Harshvardhan Jha, Dileep Pillai, Baban Kumar Sharma, Chandan Ramamurthi, Hari Shankar K., for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. These are all appeals by way of special leave under Article 136 of the Constitution against the common judgment of the Patna High Court in Death Reference No.12/2007 and Criminal Appeals (DB) Nos. 1282, 1308, 1318, 1327, 1345, 1354 of 2007.

FACTS

2. The facts are that a typed report was lodged by Mohan Rajak, Deputy Superintendent of Police (East), Muzaffarpur (for short 'the informant') on 05.12.1994 at 22.10 hours (10.10 p.m.) at PS Sadar, District Muzaffarpur (East), which was treated as FIR. The prosecution case in the FIR briefly was as follows: On the night of 04.12.1994, certain unknown criminals had murdered Shri Kaushlendra Kumar Shukla @ Chhotan Shukla and his associates at NH-28 and the *post mortem* on Chhotan Shukla and the other deceased persons was done on 05.12.1994 at the SKM College Hospital. The supporters of Chhotan Shukla belonging to the Bihar Peoples Party gathered in large numbers at the hospital. Considering the possibility of breakdown of law and order, the officers of the civil and police administration remained present with armed force and *lathi* force at the hospital. After the *post mortem,* the dead bodies were taken in a procession to the house of Chhotan Shukla. The procession was led by Arun Kumar Singh, Ramesh Thakur, Shashi Shekhar Thakur, Ram Babu Singh, Harendra Kumar, Vijay Kumar Shukla @ Munna Shukla and others and was escorted by the officers of the civil and police administration. When the procession reached the house of Chhotan Shukla, Anand Mohan, MLA, and Lovely Anand, M.P., and others who were present there, offered flowers to the dead body of Chhotan Shukla. At about 3.30 p.m., the dead body of Chottan Shukla was taken in a procession to his ancestral house in village Jalalpur under Lalganj Thana in Vaishali district where about 5000 people gathered. Thereafter, the procession was led by Anand Mohan, Lovely Anand, Professor Arun Kumar Singh, Akhlak Ahmad, Harender Kumar, Rameshwar Wiplavi and others and they were all in different vehicles. Anand Mohan and Lovely Anand were sitting in their Contessa car. An Ambassador car and a white coloured Gypsy were moving in front of the procession. When the procession reached the Bhagwanpur Chowk, the dead body of Chottan Shukla was kept for a while and Anand Mohan, Lovely Anand and Professor

Arun Kumar Singh gave speeches instigating the crowd to take revenge of the murder of Chhotan Shukla and others by murder and to teach the administration a lesson if it created any hurdle. After listening to the speeches, the people became aggressive. The procession then moved from Bhagwanpur Chowk towards Ram Dayal Nagar through the National Highway. At about 4.15 p.m. when the procession came near Khabra Village on the National Highway, the shouts *"Maro Maro"* were heard from the midst of the procession. When the informant along with other officers reached the place from where the shouts were being heard, they found that on the right hand side of the road the Ambassador car of the District Magistrate, Gopalganj, G. Krishnaiyyah (coming from the opposite direction) had turned turtle and the District Magistrate was lying on the ground. They also saw Anand Mohan, Lovely Anand, Professor Arun Kumar Singh and some others were loudly provoking Bhutkun Shukla (brother of Chhotan Shukla) to kill the District Magistrate and take revenge. Thereafter, Bhutkun Shukla drew out a revolver from his waist and fired three shots and then escaped into the crowd. The District Magistrate got wounded. Looking at the gravity of the situation, the Sub-Divisional Officer (East) ordered *lathi* charge and the police and other officers present started charging *lathi* at the crowd. The District Magistrate, Gopalganj, was sent in a Gypsy to the SKM College Hospital for treatment. Information was sent through wireless to the District Headquarters of Vaishali District about the incident. In the meantime, the assailants fled to Hajipur and the informant and the Sub-Divisional Officer (East) chased the assailants and reached Hajipur where they found 15 persons including Anand Mohan and Lovely Anand caught by the Hajipur police. All the 15 persons were arrested and their vehicles were seized. After the informant came back to Muzaffarpur, he got information that the District Magistrate, Gopalganj, died at the SKM College Hospital.

3. Pursuant to the FIR, investigation was carried out by the police and a charge-sheet was filed against 36 accused

persons. The learned Chief Judicial Magistrate, Muzaffarpur, committed the case to the Sessions Court. The Sessions Court framed charge under Section 147 and Sections 302/149 of the Indian Penal Code (for short 'the IPC') against all the 36 accused persons (A-1 to A-36) for being members of unlawful assembly with the common object of committing the murder of the District Magistrate, Gopalganj, G. Krishnaiyyah, (for short 'the deceased') as well as the charge under Section 307/149 IPC for being a member of the unlawful assembly with the common object of attempting to commit murder of the photographer, the bodyguard and the driver of the deceased. All the 36 accused persons were also charged for the offence under Sections 302/109 for abetting the commission of the murder of the deceased. Anand Mohan, Lovely Anand and Professor Arun Kumar Singh (A-1, A-2 and A-3 respectively) were further charged under Sections 302/114 IPC.

4. At the trial, the prosecution examined as many as 25 witnesses. PW-1 to PW-14 were police officials who claimed to be with or behind the procession till the incident occurred. PW-15, PW-16 and PW-23 were doctors who proved the injury reports and the *post mortem* report. PW-17 and PW-21 are the driver and the bodyguard of the deceased. PW-18 and PW-19 are the Director and employee of the Forensic Science Laboratory, Patna, who collected the blood-stained earth and broken pieces of glass from the place of occurrence. PW-20 is the Executive Magistrate who accompanied the procession. PW-22 is the Assistant Sub-Inspector, Muzaffarpur District, who investigated the case from 14.12.1994 to 16.12.1994. PW-25 is the Additional S.P. Muzaffarpur who investigated the case for a few hours and PW-24 is the second investigating officer. The defence also examined twelve witnesses at the trial.

5. The Additional Sessions Judge-I, Patna (for short 'the trial court') found Anand Mohan, Lovely Anand, Professor Arun Kumar Singh, Akhlak Ahamad, Vijay Kumar Shukla @ Munna Shukla, Harendra Kumar @ Harendra Pd. Sahi and Shashi

Shekhar Thakur (A-1, A-2, A-3, A-4, A-5, A-6 and A-7 respectively) guilty of the offences under Sections 147, 302/149, 307/149 and 427/149 of the IPC. The trial court also held Anand Mohan, Lovely Anand, Professor Arun Kumar Singh and Akhlak Ahamad (A-1, A-2, A-3 and A-4 respectively) guilty of the offence of abetment to commit murder under Sections 302/109 IPC. The trial court acquitted the remaining accused persons A-8 to A-36 of all the charges. After hearing on the question of sentence, the trial court sentenced A-1, A-3 and A-4 to death for the offence under Sections 302/149 and 302/109 of the IPC and further sentenced them for one year R.I. for the offence under Section 147 IPC, 5 years R.I. for the offence under Section 307/147 IPC and one year R.I. for the offence under Section 427/149 IPC and all the sentences were to run concurrently. The trial court, however, sentenced A-2 to life imprisonment for the offences under Sections 302/149 and 302/109 IPC and a fine of Rs.25,000/-, for one year R.I. for the offence under Section 147 IPC, 5 years R.I. for the offence under Section 307/149 IPC and one year R.I. for the offence under Section 427/149 IPC and all the sentences were to run concurrently and in default of payment of fine she was to undergo simple imprisonment for a period of two years. The trial court sentenced A-5, A-6 and A-7 for life imprisonment for the offence under Section 302/149 IPC and to pay fine of Rs.25,000/- each, R.I. for five years for the offence under Section 307/149 IPC, R.I. for one year for the offence under Section 147 IPC and R.I. for one year for the offence under Section 427/149 IPC and in default of payment of fine to undergo simple imprisonment for two years and all the sentences were to run concurrently.

6. The sentence of death on A-1, A-3 and A-4 were referred to the High Court. Criminal appeals were also filed by the convicts before the High Court. The High Court held in the impugned common judgment that the prosecution has not been able to establish a case of unlawful assembly with common object of causing death of the deceased, or any other person

and thus there could be no conviction under Sections 147 and 302/149 IPC. The High Court, however, held on the basis of evidence of PW-1, PW-3, PW-4, PW-9, PW-10 and PW-14 that A-1 had exhorted the lone shooter to kill the deceased and hence he alone was guilty of the offence of abetment of murder under Section 302/109 IPC. Accordingly, the High Court acquitted A-2 to A-7 of all the charges and sustained the conviction of A-1 but converted the sentence of death on A-1 to one of rigorous imprisonment for life.

7. Aggrieved, A-1 has filed Criminal Appeal No.1804-1805 of 2009 challenging the impugned judgment of the High Court in so far as it sustained his conviction under Section 302/109 IPC and imposed the punishment of rigorous imprisonment for life. The State of Bihar has filed Criminal Appeal Nos. 1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1806 of 2009 challenging the impugned judgment of the High Court insofar as it acquitted A-2 to A-7 and insofar as it converted the death sentence on A-1 to life imprisonment.

CONTENTIONS

8. Mr. Ram Jethmalani, learned senior counsel appearing for A-1 submitted that the occurrence took place at 4.15 P.M. on 05.12.1994 and soon thereafter information was sent through wireless to the District Headquarter, Vaishali District about the incident and hence this information was the real FIR and would disclose the first account of the occurrence. He vehemently argued that this wireless message sent soon after the incident to the District Headquarters of District Vaishali clearly stated that the people who got mixed with the funeral procession of the cremation of Chhotan Shukla have injured the deceased by shooting him with a revolver and fled towards Hajipur by different vehicles and this was the real FIR of the case but the High Court has not even applied its mind to this real FIR of the case.

9. He submitted that instead of this wireless message, a

typed report of the informant PW-14 has been treated as the FIR. He argued that this typed report of PW-14 treated as FIR is stated to have been lodged in the Sadar P.S. at 22:10 hrs. (10.10 P.M.) on 05.12.1994, but the evidence of PW-11 would show that the informant PW-14 returned to Muzaffarpur only after 2.00 A.M. on 06.12.1994. He submitted that the High Court has also noticed in the impugned judgment that the FIR mentioned the name of Dy.S.P.-Dhiraj Kumar as the Investigating Officer who joined after leave on duty on 06.12.2004 and took up investigation at 8.15 A.M. from the first I.O. PW-25 He argued that all these facts clearly establish that not only the FIR was ante-dated and ante-timed as 05.12.1994, 10.10 P.M. but also fabricated by PW-14 making false allegations against A-1 and against the members of his political party on the instructions of political superiors. He contended that the High Court having held that there was evidence to suspect that the FIR was ante-dated and ante-timed should have also come to the conclusion that the entire prosecution case as stated in the FIR by PW-14 was false.

10. Mr. Jethmalani next submitted that the High Court has rightly rejected the prosecution version that there was an unlawful assembly with the object of murdering the deceased and, therefore, the offences under Section 147 and 302/149 were not made out against any of the accused persons. He contended that having come to this finding, the High Court could not have held A-1 guilty of the offence of abetting the murder under Section 302/109 IPC on the ground that A-1 had incited Bhutkun Shukla to commit the murder. He submitted that almost all the prosecution witnesses have stated that the deceased was shot by Bhutkun Shukla when he was lying injured on the ground, but the medical evidence establishes that he was shot when he was in a standing position and thus the prosecution witnesses have not actually seen the incident nor heard any exhortation by A-1 to Bhutkun to kill the deceased. He argued that the High Court having recorded the finding that PW-11 was a false witness could not have believed the other witnesses

supporting the case that was put forward by PW-11 in his evidence. He relied on the station Diary entry Nos. 92, 94, 97 and 102 of the Police Station of PW-11 to show that PW-11 was not even there in the procession accompanying the dead body of Chhotan Shukla but had gone for some investigation at the University where he was stationed as a police officer.

11. He argued that the High Court failed to realize that A-1 along with his wife A-2 were in a white Contessa Car which was almost at the front of the procession behind the police car and the Tata Maxi carrying the dead bodies of Chhotan Shukla and another, whereas the shouts of "*maro maro*" came from the rear of the procession and the witnesses have all deposed that when they reached there they found that the Car was over-turned and the deceased was lying injured on the ground. He submitted that the deceased was, therefore, dead before A-1 Anand Mohan could come from his Contessa car to the place of occurrence and the entire prosecution story that Bhutkun was incited by A-1 to kill the deceased must necessarily be false.

12. Mr. Jethmalani submitted that the High Court failed to appreciate the following circumstances:

(i) There is no evidence that A-1 knew the deceased and, therefore, when the car of the deceased came from the opposite direction and crossed the Contessa Car in which A-1 was sitting he did not know that it was the deceased who was sitting in the car and there was no reason for him to incite any one to kill him;

(ii) There is no evidence that A-1 got out of his Contessa Car which was in front of the procession and went towards the rear of the procession to incite the killing of the deceased;

(iii) The provocative speech attributed to A-1 were at Bhagwanpur Chowk and the police officers are the only witnesses who have deposed with regard to such

provocative speech by A-1 and their deposition that the speech was provocative was the opinion of the police officers and hence the High Court rightly did not rely on the provocative speech of A-1 to convict him;

(iv) There were discrepancies in the evidence of witnesses with regard to the exhortation by the accused persons to Bhutkun to shoot and thus the High Court should have rejected the story of the prosecution that A-1 incited Bhutkun to shoot the deceased;

(v) The prosecution story that the procession wanted to seek vengeance on the administration is falsified by an independent witness PW-12 (Tara Razak), the SDO who accompanied the procession;

(vi) The High Court did not take into consideration the evidence of PW-17 and 21, the driver and the body guard of the deceased, who did not support the prosecution case.

He submitted that had the High Court considered these circumstances, it would have acquitted A-1 of all the charges.

13. Mr. Ranjeet Kumar, learned senior counsel appearing for the State of Bihar, submitted that the court must appreciate the facts which have led to the occurrence in this case. He submitted that Chhotan Shukla was a candidate in the ensuing State Assembly elections on behalf of the Bihar Peoples Party of which A-1 and A-2 were leaders and on 04.12.1994 Chhotan Shukla and his four associates were killed by some unknown persons in Muzaffarpur. He submitted that the gathering on 05.12.1994 at the SKM College Hospital where the bodies of Chhotan Shukla and others were taken for *post mortem* was of people belonging to the Bihar Peoples Party and the procession which accompanied the dead bodies of Chhotan Shukla and others was a show of political strength displayed by A-1 and A-2 and his political associates. He submitted that

the provocative speeches delivered by A-1, A-2 and others of the Bihar Peoples Party at the Bhagwanpur Chowk aroused the emotions in the crowd of almost 5000 people to take revenge by bloodshed and this was the cause for the violence on the car of the deceased which was coming from the opposite direction when the procession reached Village Khabra. He submitted that the violent crowd pulled out the occupants of the car, beat them, overturned the car and finally Bhutkun Shukla shot the deceased on the exhortation of A-1 to A-4 because the deceased represented the State administration. He submitted that the High Court has not appreciated these background facts which led to the murder of the deceased and has acquitted A-2 to A-7 and has sustained only the conviction of A-1 under Section 302/109 IPC.

14. In reply to the submissions of Mr. Jethmalani that the wireless message sent to the District Headquarters, Vaishali district soon after the incident on 5.12.1994 was the real FIR, Mr. Ranjeet Kumar submitted that the wireless message was very cryptic and could not be treated as an FIR. He cited the decision of this Court in *Binay Kumar Singh and others v. State of Bihar* [(1997) 1 SCC 283] in which it has been held that the officer in-charge of the police station is not obliged to accept as FIR any nebulous information received from somebody which does not disclose any authentic cognizable offence and it is open to the officer in-charge to collect more information containing details of the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation.

15. On the delay in lodging the FIR, he referred to the evidence of the informant, PW-14, to show that he had to first send the deceased in the Gypsy car for treatment to the SKM College Hospital and he had to go to Hajipur to arrest the accused persons and only after the accused persons were taken to custody at Hajipur, he came back to Muzaffarpur and prepared the typed report and lodged the same as FIR in the

Sadar P.S. at about 10.00 P.M. in the night. He submitted that there was thus sufficient explanation for the delay in lodging the FIR. He cited *Erram Santosh Reddy and others v. State of Andhra Pradesh* [(1991) 3 SCC 206] in which there was a delay of six hours in lodging the FIR and the prosecution explained that the police had to raid, effect recoveries and thereafter submit a report in the concerned police station and on these facts this Court held that no adverse inference could be drawn because of the delay in lodging the FIR. He submitted that in *Amar Singh v. Balwinder Singh & Ors.* [(2003) 2 SCC 518] this Court has held that a delay of 26 hours in lodging the FIR from the time of the incident was fully explained from the evidence on record and, therefore, no adverse inference could be drawn against the prosecution.

16. Mr. Ranjeet Kumar submitted that the medical evidence did not altogether make the ocular evidence improbable. He argued that the ocular evidence of different witnesses categorically states that Bhutkun Shukla came out from the crowd and fired 3 shots and PW-16, who conducted the *post mortem,* has stated that there were three bullet injuries in the body of the deceased. He submitted that no one can predict how a human body would respond to the first bullet shot and therefore from the nature of the bullet injuries in the body of the deceased who was shot from a very close range, one cannot conclude that the deceased could not have been shot after he fell on the ground as contended by Mr. Jethmalani. He cited the decision of this Court in *Abdul Sayeed v. State of Madhya Pradesh* [(2010) 10 SCC 259] for the proposition that ocular testimony has greater evidentiary value vis-à-vis medical evidence. He submitted that in the present case the medical evidence does not go so far as to rule out the truth of the ocular evidence.

17. He submitted that the oral evidence in this case is consistent that A-1, A-2, A-3 and A-4 not only delivered provocative speeches against the administration and aroused

the emotions of the crowd to resort to bloodshed but also exhorted Bhutkun Shukla to shoot at the deceased who represented the State administration. He referred to the evidence of PWs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 who have deposed about the provocative speeches and exhortation of A-1 to A-4. He cited *Masalti v*. *State of U.P.* [1964(8) SCR 133] wherein this Court has held that where a criminal court has to deal with the evidence pertaining to the commission of offence involving large number of offenders and large number of victims, it is usual to adopt a test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. He also referred to the decisions of this Court in *Binay Kumar Singh and others v. State of Bihar* (supra) and *Abdul Sayeed v*. *State of Madhya Pradesh* (supra) in which the test laid down in *Masalti v*. *State of U.P.* (supra) has been reiterated. He submitted that unfortunately the High Court disbelieved the police witnesses and preferred to rely on the evidence of only the civilian officials and acquitted A-2 to A-7 of all the charges and sustained only the conviction of A-1 although there was sufficient evidence against A-2 to A-7. He cited *Girja Prasad v. State of M.P.* [(2007) SCC 625] wherein it has been held by this Court that it is not the law that police witness should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence.

18. He submitted that the High Court also acquitted A-1 to A-7 of the charges under Sections 147 and 302/149 IPC on the ground that there was no unlawful assembly with common object to commit the murder of the deceased or any other person. He cited the decisions of this Court in *Sikandar Singh and others v. State of Bihar* [(2010) 7 SCC 477] and *Virendra Singh v. State of Madhya Pradesh* [(2010) 8 SCC 407] to contend that the A-1 to A-7 had formed an unlawful assembly with the common object of murdering the deceased and the other occupants of the car at the spur of the moment.

19. He relied on the decision of this Court in *Rizan and Another v. State of Chhattisgarh* [(2003) 2 SCC 661] to argue that normal discrepancies in evidence are likely to occur due to normal errors of observations, normal errors of memory due to lapse of time and due to mental disposition such as shock and horror at the time of occurrence but these discrepancies do not make the evidence of a witness untrue and it is only the material discrepancy which affect the credibility of a party's case. He submitted that had the High Court overlooked the minor and normal discrepancies in the evidence of different witnesses who had given their account of the incident as observed by them from different places at the spot at the time of occurrence it would have come to the conclusion that the witnesses gave a consistent account of the involvement of A-1 to A-7 in committing the offence under Sections 302/149 and 302/109 IPC. He submitted that High Court, therefore, could not have set aside the findings of the trial court and should have sustained also the death sentence on A-1, A-3 and A-4.

20. Mr. Surinder Singh, learned senior counsel appearing for the respondents in Criminal Appeals Nos. 1536, 1537, 1538, 1540, 1541 and 1542 of 2009, submitted in reply that the fact that the FIR was not lodged soon after the incident at 4.15 P.M. on 05.12.1994 indicates that the informant and all other officers accompanying the procession had no inkling whatsoever as to who committed the murder of the deceased. He cited the decision of this Court in *Bhagaloo Lodh and Another v*. *State of Uttar Pradesh* [(2011) 13 SCC 206] in which it has been held that prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding the truth of its version and where there is a delay in lodging the FIR without any explanation a presumption can be raised that the allegations in the FIR were false and that it contains a coloured version of the events that had taken place. He also relied on *Awadesh v*. *State of M.P.* [AIR 1988 SC 1158], in which this Court found that the FIR was lodged belatedly because the names of the assailants were not

known and a lot of deliberation took place before lodging the FIR and this Court held that the prosecution has failed to prove its case beyond reasonable doubt. He also cited *Ganesh Bhavan Patel v. State of Maharashtra* [(1978) 4 SCC 371] in which this Court has held that the inordinate delay in the registration of the FIR and further delay in recording the statement of material witnesses caused a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story. He submitted that in *Marudanal Augusti v. State of Kerala* [(1980) 4 SCC 425] this Court gave the benefit of doubt to the accused and acquitted him after it found that the FIR was fabricated and brought into existence long after the occurrence.

21. He submitted that the High Court was right in coming to the conclusion that no case of unlawful assembly was established against A-1 to A-7. He argued that the speeches made at Bhagwanpur Chowk were not provocative but rhetorical and in any case since an Executive Magistrate was also present all through along with the procession the Court could not come to the conclusion that the accused persons constituted an unlawful assembly either at Bhagwanpur Chowk where the speeches were delivered or at Khabra where the incident took place.

22. He referred to the evidence of PW-12 & PW-13 who were sub-divisional officers and to the evidence of PW-21 who was the bodyguard of the deceased to show that these independent witnesses have not said anything about the exhortation by A-1 to A-7 to Bhutkun to kill the deceased. He also submitted that the evidence of the prosecution witnesses are not consistent on the point as to who exhorted Bhutkun to kill the deceased and, therefore, the decision of this Court in *Masalti v*. *State of U.P (supra)* does not apply to the facts of the present case. He submitted that in *Jainul Haque v*. *State of Bihar* [AIR 1974 SC 45] this Court has held that evidence of exhortation is in the very nature of things a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that

person an exhortation to the assailant to assault the victim and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. He submitted that considering the proposition of law laid down in this decision, and considering the fact that there are discrepancies with regard to who exhorted Bhutkun to shoot at the deceased, the conviction of A1-A7 would not be unsafe.

23. He submitted that if as has been deposed by the prosecution witnesses the deceased was lying on the ground when Bhutkun shot at him, then the first injury on the deceased could not have at all been caused by shooting and, therefore, the witnesses were lying. He cited *Awadesh v*. *State of M.P. (supra)* in which this Court did not believe the prosecution witnesses because of the opinion of the doctor that the person who had caused the injuries on the deceased was at a higher level than the deceased and this opinion was wholly inconsistent with the testimony of the eye-witnesses and the medical expert's opinion corroborated other circumstances which indicated that the eye-witnesses had not seen the actual occurrence. He also relied on *Budh Singh v. State of U.P.* [AIR 2006 SC 2500] in which this Court has held that from the medical evidence it appeared that the direction of the injury was from upwards to downwards and this belies the statements of prosecution witnesses that the accused and the deceased were in a standing position and were quarrelling with each other.

24. He finally submitted that the High Court lost sight of the fact that although the procession started from Muzaffarpur and the speeches were delivered at Bhagwanpur Chowk the incident took place at Khabra Village and the car could have been overturned and deceased could have been shot not by any person coming in the procession but by a person from amongst the crowd of Khabra Village who had gathered to see the procession.

25. Mr. Nagendra Rai, learned senior counsel appearing

for the respondent in Criminal Appeal No.1539 of 2009 (A-4 Akhlak Ahmad), submitted that it has come in evidence that the Chief Minister of Bihar was present at the SKM College and Hospital, Muzaffarpur. He cited the decision of this Court in *Om Prakash v. State of Haryana* [(2006) 2 SCC 250], in which this Court considered the presence of Dy. S.P. at the place of occurrence for about three hours and also considered the fact that there was no explanation for the long delay in lodging the FIR and gave the benefit of doubt to the accused persons. He also relied on *Ganesh Bhavan Patel v. State of Maharashtra* (supra) wherein this Court took into consideration the delay in registration of the FIR as a circumstance for acquitting the accused of the charges.

26. He submitted that the High Court has rightly held that there was no unlawful assembly with the object of murdering the deceased or any other person. He submitted that the accused persons could not have shared the object of Bhutkun to kill the deceased and, therefore, there was no "common object" which is a necessary ingredient of an unlawful assembly and hence the offences under Section 147 and 302/149 IPC have not been made out against the accused persons.

27. He also referred to the evidence of PWs 12, 13 and 20 to show they have not supported the prosecution case that the killing of the deceased took place before them and they have stated in their evidence that when they reached the spot, the shooting incident had already taken place. He submitted that even PW-1 has stated that no police personnel had reached the spot where the shooting took place. He argued that PW-21, the bodyguard of the deceased who is the most material witness had not supported the case of the prosecution that A-1, A-2, A-3 and A-4 had exhorted Bhutkun to shoot at the deceased. He submitted that it is difficult to believe that the police personnel would not have prevented the killing of the deceased if the killing was about to take place in their presence. He finally submitted that the photographer, who

accompanied the deceased, though a material witness, has not been examined in Court and an adverse inference should be drawn against the prosecution for withholding the photographer from giving evidence in Court.

FINDINGS

28. The first question that we have to decide is whether the wireless message sent soon after the incident on 05.12.1994 is the real FIR as contended on behalf of the defence or whether the typed report subsequently lodged by PW-14 in the Muzaffarpur Sadar Police Station is the FIR as contended on behalf of the prosecution. Sub-section (1) of Section 154 Cr.P.c. which provides for the First Information Report is quoted hereinbelow:

> "(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf."

It will be clear from the language of sub-section (1) of Section 154 Cr.P.C. that every information relating to the commission of a cognizable offence whether given in writing or reduced to writing shall be signed by the person giving it. Hence, the person who gives the information and who has to sign the information has to choose which particular information relating to the commission of a cognizable offence is to be treated as an FIR. In the present case, PW-14, the informant has chosen not to treat the wireless message but the subsequent typed information as the FIR and the police has also not treated the wireless message but the subsequent typed information as the FIR. Moreover, the wireless message sent

soon after the incident on 05.12.1994 stated only that the people mixed with the crowd of funeral procession for the cremation of Chottan Shukla have injured the deceased by shooting him with revolver and have fled towards Hajipur by different vehicles. This wireless message was cryptic and did not sufficiently disclose the nature of the offence committed much less the identity of the persons who committed the offence. Unless and until more information was collected on how exactly the deceased was killed, it was not mandatory for either PW-14 to lodge the same as FIR or for the Officer Incharge of a police station to treat the same as an FIR. Such cryptic information has been held by this Court not to be FIR in some cases. In *Sheikh Ishaque and Others v. State of Bihar* [(1995) 3 SCC 392] Gulabi Paswan gave a cryptic information at the police station to the effect that there was a commotion at the village as firing and brick batting was going on and this Court held that this cryptic information did not even disclose the commission of a cognizable offence nor did it disclose who were the assailants and such a cryptic statement of Gulabi Paswan cannot be treated to be an FIR within the meaning of Section 154 Cr.P.C. Similarly, in *Binay Kumar Singh and others v. State of Bihar* (supra) information was furnished to the police in Ex.10/3 by Rabindra Bhagat that the sons of late Ram Niranjan Sharma along with large number of persons in his village have set fire to the houses and piles of straws and have also resorted to firing. This Court held that Ex.10/3 is evidently a cryptic information and is hardly sufficient to discern the commission of any cognizable offence therefrom. In our considered opinion, therefore, the trial court and the High Court have rightly treated the subsequent typed written information lodged by PW-14 and not the wireless message as the FIR.

29. The second question that we are called upon to decide is whether the typed report of PW-14 which has been treated as the FIR was lodged at 10.10 p.m. on 05.12.1994 as claimed by prosecution or was actually lodged at the Muzaffarpur Sadar Police Station in the morning of 16.12.1994 as contended by

the defence. We have perused the evidence of PW-14, the informant. He has stated that after the deceased was injured by a person with his revolver at about 4.15 p.m. on 05.12.1994, the mob starting escaping from the main road to Lalganj and some people ran towards Hajipur and he along with others followed the mob and reached Hajipur at 6 O' Clock and went to the Circuit House and stayed there for one hour and then left for Muzaffarpur at 7 O' Clock. In the impugned judgment, the High Court did not accept this evidence of PW-14 that he left Hajipur for Muzaffarpur at 7.00 P.M. as it found that most of the other witnesses had admitted that they left Hajipur at 9.00 P.M. and PW-11 had admitted that he left Hajipur at 12.00 in the midnight so as to reach Muzaffarpur at 2.00 A.M. in the night along with others. Though PW-11 has stated in his evidence that all the people returned from Hajipur Circuit House at 7 O' Clock, he has also stated in his evidence that he was with the SDO till 12 in the midnight and he went to Garoul, Hajipur, and after apprehending the accused he returned to Muzaffarpur. PW-11 has further stated that he returned to the Sadar Police Station at Muzaffarpur at 2 O' Clock at night and the DM, SP, SDO, DSP (PW-14) and other officers also returned with him. Hence, the High Court has held that PW-14 along with other officers including PW-11 reached Muzaffarpur at 2.00 pm in the night. After reaching the Sadar Police Station at Muzaffarpur, PW-14 has taken some more time to lodge the lengthy typed written FIR. PW-14 has stated that for lodging the FIR at the Muzaffarpur Sadar Police Station he took help from all the officers present and in fact took the statements of 4-5 officers. He has stated that he made a typed FIR and he took half an hour to complete the statement and it took one hour to lodge the FIR. On the basis of all these evidence on record, the High Court did not accept the version of the prosecution that the FIR was lodged with the Muzaffarpur Sadar Police Station at 10.10 p.m. on 05.12.1994 and has instead held that the evidence creates a reasonable suspicion about the FIR being ante dated and ante timed. We do not find any error in this finding of the High Court.

30. We now come to the main contention on behalf of the defence that the High Court should have totally discarded the prosecution story once it held that the evidence creates a reasonable suspicion about the FIR being ante-dated and ante-timed. In none of the cases cited by the defence, we find that this Court has discarded the entire prosecution story only on the ground that the FIR was ante dated and ante timed. In *Ganesh Bhavan Patel v*. *State of Maharashtra* (supra) relied on by the defence this Court considered the inordinate delay in recording the statements of witnesses under Section 161 Cr.P.C. and other circumstances along with the fact that the FIR was lodged belatedly without proper explanation and then held that the prosecution case was not reliable. Again, in *Marudanal Augusti v. State of Kerala* (supra) cited by the defence, this Court disbelieved the prosecution story not because of unexplained delay in the dispatch of the FIR to the Magistrate only but also because the FIR which contained graphic details of the occurrence with the minutest details did not mention the names of the witnesses and there were other infirmities to throw serious doubt on the prosecution story. In *Awadesh v. State of M.P.* (supra) relied on by the defence, besides finding that the delay in lodging the FIR was suspicious, this Court also found that the empty cartridges were recovered from the place of occurrence one day after the incident and the medical evidence established that the witnesses had not actually seen the incident and considering all these circumstances this Court held that the prosecution had not proved the case beyond reasonable doubt. This Court has, on the other hand, held in *State of M.P. v. Mansingh and others* [(2003) 10 SCC 414] that if the date and time of the FIR is suspicious, the prosecution version is not rendered vulnerable but the court is required to make a careful analysis of the evidence in support of the prosecution case. Thus, we will have to make a careful analysis of the evidence in this case to find out how far the prosecution case as alleged in the FIR is true.

31. In the present case, the fact remains that soon after

the incident at about 4.15 P.M. on 05.12.1994 information was sent from the place of the incident to the District Headquarters of Vaishali district that the people mixed with the funeral procession for the cremation of Chottan Shukla have injured the deceased by a revolver and fled towards Hajipur by different vehicles. At least this part of the prosecution case which finds place in the subsequent typed FIR lodged by PW-14 in the early hours of 06.12.1994 cannot be discarded to be false and the court will have to decide on the basis of evidence as to who amongst the people in the funeral procession for cremation of Chottan Shukla are responsible for the injury caused to the deceased.

32. In fact, the High Court also has not accepted the entire version of the FIR lodged by PW-14 and has rejected the case of the prosecution in the FIR that there was an unlawful assembly and that A-1 to A-7 were part of that unlawful assembly with the object of killing the deceased. The High Court has held in the impugned judgment that the mob which surrounded the car of the deceased caused damage to the car by throwing brickbats and caused injuries to its occupants after pulling them out and had turned into an unlawful assembly but from the evidence on record and the circumstances it is not established that even the members of such mob shared the common object of killing the deceased. The High Court has further held that some of the processionists who were in the vehicles close to the place of occurrence could have come out from their vehicles to find out the reasons for the commotion but when nobody was even aware that the deceased would be passing through the place such persons cannot be held to be members of unlawful assembly actuated by the common object of killing the deceased. The High Court has also held that there were no allegations that the processionists were carrying any arms and there was insufficient evidence about the exact behaviour of the assembly at the scene of the occurrence. The High Court has further held that the driver and the bodyguard of the deceased have stated in their evidence that the car could

not pass on the left side of the road because of presence of a mob on the flank of the road while the funeral procession was moving and this shows that the attack on the car of the deceased and its occupants was a sudden act of the mob which had gathered to watch the funeral procession near Khabra Village. The High Court has found that the driver and the bodyguard of the deceased have not said anything in their evidence on what led to the anger of the mob and instead they had been anxious to show that they had committed no mistake due to which the deceased was killed. The High Court has thus held that the processionists, who were going with the dead body on motor vehicle, did not have any common object and therefore did not constitute an unlawful assembly and hence A-1 to A-7 could not be held liable for the offence under Section 302/149 IPC on the ground that they were members of an unlawful assembly which had the object of killing the deceased or any other person. In our considered opinion, the High Court rightly rejected the contention of the prosecution that A-1 to A-7 were liable for conviction under Section 302/149 IPC.

33. The High Court after carefully scrutinizing the evidence of the witnesses has also discarded the prosecution story in the FIR lodged by PW-14 that A-2, A-3 and A-4 had exhorted Bhutkun Shukla to kill the deceased. The High Court has held that none of the eye-witnesses of Category-II comprising the civil officials, the driver and the bodyguard, namely, PW-12, PW-13, PW-17 and PW-21 have supported the allegations of exhortation by A-1 to A-7 and out of the Category-I witnesses comprising Police Personnel, PW-5 and PW-9 have not heard anyone exhorting Bhutkun Shukla to kill the deceased. The High Court has further held that out of the seventeen alleged eye-witnesses, six witnesses do not speak of exhortation and out of the remaining eleven prosecution witnesses, six witnesses namely, PW-1, PW-3, PW-4, PW-9, PW-10 and PW-14, have said that only A-1 exhorted Bhutkun Shukla to shoot at the deceased. Accordingly, the High Court has recorded the finding that only A-1 exhorted the lone shooter to kill the

deceased and was guilty of the offence of abetment under Section 109 IPC and was liable for punishment under Section 302/109 IPC for the murder of the deceased and A-2, A-3 and A-4 have to be acquitted of the charges under Section 302/109 IPC.

34. We have gone through the evidence of the witnesses and we find that this finding of the High Court that A-2, A-3 and A-4 cannot be held guilty of the offences under Section 302/109 IPC is based on a correct appreciation of evidence of the prosecution witnesses. Out of fourteen witnesses who accompanied the procession, only four witnesses, namely, PW-6, PW-7, PW-8 and PW-11 have said that A-2 along with A-1 exhorted Bhutkun Shukla to shoot at the deceased, whereas the remaining eight do not say that A-2 also exhorted Bhutkun Shukla to shoot at the deceased. Similarly, out of the fourteen witnesses who accompanied the procession, only PW-7 and PW-8 have spoken of exhortation by A-3 to Bhutkun Shukla to shoot at the deceased and the remaining eleven witnesses have not said that A-3 also exhorted Bhutkun Shukla to shoot at the deceased. Again out of the fourteen witnesses examined by the prosecution, only PW-7 and PW-11 have said that A-4 also exhorted Bhutkun Shukla to shoot at the deceased, but the remaining twelve witnesses have not said that A-4 also exhorted Bhutkun Shukla to shoot at the District Magistrate. This Court has held in *Jainul Haque v. State of Bihar* (supra) that evidence of exhortation is in the very nature of things a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. Since the majority out of the fourteen prosecution witnesses comprising both civilian and police personnel accompanying the procession do not support the prosecution version that A-2, A-3 and A-4 also exhorted Bhutkun Shukla to

shoot at the deceased, it will not be safe to convict A-2, A-3 and A-4 for the offence of abetment of the murder of the deceased. In our view, therefore, the High Court was right in acquitting A-2, A-3 and A-4 of the charge under Section 302/ 109 IPC.

35. In *Masalti vs. State of U.P.* (supra), this Court has held that where a criminal court has to deal with the evidence pertaining to the commission of offence involving large number of offenders and large number of victims, it is usual to adopt a test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In this case, ten out of the fourteen witnesses who were accompanying the procession and were near the place of occurrence have given a consistent version that A-1 exhorted Bhutkun Shukla to shoot at the deceased. PW-1, PW-3, PW-4, PW-6, PW-7, PW-8, PW-9, PW-10, PW-11 and PW-14, have consistently deposed that A-1 exhorted Bhutkun Shukla to shoot at the deceased. The remaining four witnesses may be at the place of occurrence but for some reason or the other may not have heard the exhortation by A-1 to Bhutkan to shoot at the deceased. Hence, just because four of the fourteen witnesses have not deposed regarding the fact of exhortation by A-1, we cannot hold that the ten witnesses have falsely deposed that A-1 had exhorted Bhutkun to shoot at the deceased.

36. We have also considered the submission of the defence that these witnesses have deposed that the deceased was shot by Bhutkun Shukla when he was lying injured on the ground but the medical evidence establishes that the bullets were fired when the deceased was in the standing position and on this ground the evidence of these ten witnesses who have deposed with regard to exhortation by A-1 to Bhutkun Shukla to shoot at the deceased should be discarded. We find that PW-16, Dr. Momtaj Ahmad who carried out the *post mortem* on the dead body of the deceased on 05.12.1994 at 4.40 P.M. has

described in his evidence the following three *ante mortem* injuries on the body of the deceased:

> "(1)(a) Due oval wound 1/3" in diameter with inverted margin and burning of the area on lateral side of the left eye brow.
>
> (b) lacerated injury internal cavity deep with inverted margin was found on central part of forehead just above eye brow 3" x 1.2" into internal cavity from which fractured piece of frontal bone and brain material was prodding out.
>
> On dissection the two wound were found interconnected.
>
> (ii) One oval wound ¼" in diameter with inverted margin was found at left cheek.
>
> On dissection maxilla and mandible were found fractured and tongue and inner part of lower lip was found lacerated. The projectile after entering the left cheek and damaging above organs have passed away from oval cavity.
>
> (iii) One oval wound with interverted margin and singling and burning of the margin ¼" in diameter was found on right parietal region of head;
>
> (b) One oval wound 1.3" x ½'' into internal cavity deep with everted margin was found on left parietal region of head.
>
> On dissection two wounds were found interconnected with facture of skull bone into so many pieces and laceration of brain tissue."

PW-16 has further stated in his evidence that out of these 3 wounds, 2 were on the left side and one on the right side of the body. In his cross examination, PW-16 has stated:

> "34. The projectile may travel in the body even in standing or sleeping position.

38. Injury No.II indicates that the patient may be able to move his face. From my postmortem report it appears that only after causing injury No.II the other injury No.III was caused. After sustaining injury No.III the one could not be moved and as such injury No.1 might not have been inflicted. On parity of logic vice versa is also correct. Thus injury No.(i) was caused before injury No.II (Volunteers that instead of definite was or were, if they should be read may and might)"

The evidence of PW-16 is clear that the projectile may travel in the body even in standing or sleeping position. PW-16 has stated that injury No.I may have been caused and thereafter injury No.II may have been caused. Moreover, injury No.II indicates that the deceased may have been able to move his face. He has also stated that from the postmortem report it appears that only after causing injury No.II the other injury No.III may have been caused. Thus, the argument of Mr. Ranjeet Kumar that after the injury No.II on his left cheek, the deceased may have turned his face and thereafter injury No.III on the left parietal region of his head may have been caused cannot be rejected. We cannot, therefore, hold that the medical evidence is such as to entirely rule out the truth of the evidence of the prosecution witnesses that the deceased was shot when he was lying injured on the ground.

37. We may now deal with the contention of the defence that the High Court did not take into consideration the evidence of PW-17 and PW-21, who were the driver and the bodyguard of the deceased respectively, and who did not support the prosecution case. We have gone through the evidence of PW-17 (driver) who has stated that the people participating in the procession surrounded the car of the deceased and were shouting '*maro maro'* and that they pulled out the deceased and the bodyguard and then began to assault them, but he escaped and hid behind the vehicle and after a gap of five to six minutes when he returned he found the procession was not there but

the police was present there with their vehicles and he saw the deceased lying on the road in injured condition and the car of the deceased was lying inverted and thereafter the deceased was carried to the Hospital in the police vehicle and he also went in the same vehicle to the Hospital and later on he came to know that the deceased was dead. We have also gone through the evidence of PW-21 (bodyguard) who has deposed that the crowd was shouting '*maro maro'* and they beat him, the driver as well as the deceased and turned the vehicle and they sustained injuries and after some time the police came over there and the stampede started and police sent the deceased and him to the Hospital and he came to know that the deceased was dead. Both PW-17 and PW-21, therefore, are silent with regard to exhortation by A-1, A-2, A-3 and A-4 to Bhutkun to shoot at the deceased. It appears that PW-17 and PW-21 were not aware of any shooting incident at all and they were under the impression that the deceased had been injured by the assault of the mob after he was pulled out from the car. PW-17 and PW-21, in our considered opinion, do not seem to know what exactly happened after they were pulled out from the car and beaten up by the mob. On the basis of their evidence, the Court cannot discard the evidence of ten other witnesses that the deceased was shot by Bhutkun with the revolver on the exhortation of A-1 when the medical evidence established that the cause of death of the deceased was on account of the bullet injuries on the deceased and not the assault by the mob. Moreover, PW-17 and PW-21 may not have supported the prosecution case but their evidence also does not belie the prosecution case that the deceased was shot by Bhutkun on the exhortation by A-1.

38. We now come to the submission of Mr. Jethmalani that as A-1 was sitting in a Contessa car which was in the front of the procession and as the killing of the deceased took place in the middle of the procession, the evidence of the eye-witnesses should be discarded as not probable. The prosecution has been able to adduce evidence through its

witnesses that at the time of shooting of the deceased, A-1 was at the spot and was exhorting Bhutkun Shukla to shoot at the deceased. If A-1 wanted the Court to believe that at the time of the incident he was in the Contessa car in the front of the procession and not at the spot, he should have taken this defence in his statement under Section 313 Cr.P.C. and also produced reliable evidence in support of this defence. Section 103 of the Indian Evidence Act, 1872 provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The prosecution by leading evidence through its several witnesses has established that A-1 was at the place of occurrence and had exhorted Bhutkun Shukla to shoot at the deceased. If A-1 wanted the Court to reject this prosecution version as not probable, burden was on him to lead evidence that he was not at the spot and did not exhort Bhutkun Shukla to shoot at the deceased. Since he has not discharged this burden, the High Court was right in holding that A-1 was guilty of the offence under Section 302/109 IPC.

39. Regarding the sentence, the High Court has held that though the deceased was a District Magistrate, he was killed in another district as an occupant of a car by chance on account of mob fury and exhortation by A-1 and firing by Bhutkun Shukla and as A-1 was not the assailant himself, death sentence would not be the appropriate sentence. We agree with this view of the High Court and we are of the view that this was not one of those rarest of rare cases where the High Court should have confirmed the death sentence on A-1. In our considered opinion, A-1 was liable for rigorous imprisonment for life.

40. In the result, we do not find any merit in either the appeal of A-1 or the appeals of the State and we accordingly dismiss all the criminal appeals.

K.K.T. Appeals dismissed.

NITIN GUNWANT SHAH
v.
INDIAN BANK & ORS.
(SLP (Civil) No. 22785 of 2010)

JULY 10, 2012

[ALTAMAS KABIR, GYAN SUDHA MISRA AND J. CHELAMESWAR, JJ.]

Constitution of India, 1950 – Article 136 – Suit by petitioner against owners of the disputed property for declaration as a monthly tenant – Petitioner also claims to have entered into agreement of Leave and Licence with the owners of disputed property – Suit dismissed for non-prosecution – Suit by Bank against owners of the property for recovery of dues from them and on failure to pay the dues, permission sought to sell the property in dispute and to utilize the sale proceeds for satisfaction of the dues – Bank also made the petitioner a party to the suit and sought his eviction from the property declaring him a trespasser – Suit of Bank transferred to Debts Recovery Tribunal – Tribunal allowed claim of the Bank qua the owners of property – However, refused to decide the claim qua the petitioner as it lacked jurisdiction to give such relief – Petitioner filing second suit, 13 years after dismissal of his first suit, against the owners of property and the Bank, seeking the same relief and declaration as sought in the first suit – Second suit still pending – Attachment warrant issued in respect of the property for recovery of dues – Petitioner's objection, that sale should be subject to his tenancy right, rejected – Writ petition of petitioner disposed of holding that if petitioner would not get any interim protection in his second suit, he could be dispossessed – On appeal, held: ***Per Chelameswar, J:*** *The petitioner, though in possession, the nature of his right to be in possession, mode of acquiring the possession and legal character of his possession are yet to be decided – The same*

can be decided by appropriate forum in appropriate proceeding – Such determination not permissible in exercise of jurisdiction under Article 136 – The person in possession as a tenant, or a licencee or a trespasser can be evicted only in accordance with the procedure established by Law – The procedure for eviction of such person is provided under CPC and alternative procedure is provided under ss. 25, 29 of 1993 Act and also Rules 39, 40, 41, 42 and 43 under Income Tax Rules – In the instant case, the sale of the property of the judgment-debtors (owners of property) is in pursuance of the procedure established by law – Petitioner's possession of the disputed property cannot be protected in exercise of jurisdiction under Article 136 – Bank is at liberty to proceed with the sale of the property – Petitioner, even if loses possession of the property, can seek restitution of possession, if he succeeds in the suit for declaring him as tenant – ***Per Kabir, J:*** *The second suit by the petitioner was barred u/O. 23 r. 1(4) CPC – The petitioner who abandoned his first suit for declaration as tenant cannot take advantage of the lapse viz. suit of Bank was transferred to Tribunal who had no jurisdiction to adjudicate upon declaring the petitioner as trespasser – Code of Civil Procedure, 1908 – Or. 21 r. 98 and Or. 23 r. 1(4) – Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – ss. 25 and 29 – Income Tax Certificate Proceedings Rules, 1962 – rr. 39, 40, 41, 42 and 43.*

Petitioner's claim was that he entered into a 'Leave and Licence' agreement dated 6.5.1989 with respondent Nos. 4 and 5, whereby the property in dispute was given on lease to the petitioner. On 23.2.1990, he took the possession of the property. A few days thereafter, the petitioner filed Suit No. 1719/190 before Small Causes Court against respondent Nos. 4 and 5 for a declaration that he was a monthly tenant in respect of the disputed property. The Court, by an interim order directed both the parties to maintain *status quo*. However, the Suit was dismissed by order dated 19.2.1993 for non-prosecution.

In the meantime, the respondent-Bank filed suit No. 3038/1992 in the High Court against respondent Nos. 2 to 5 and the petitioner. The case of the Bank was that respondent No. 4 had taken overdraft facility from the Bank and had failed to pay the amount. The Bank sought for the recovery of the amount. It also sought a declaration that the amount claimed was secured by a mortgage of the property (property in dispute) by a deed dated 27.9.1989 and in failure, property in dispute to be sold and sale proceeds to be applied towards the satisfaction of the claim of the Bank. The Bank further prayed for a decree of eviction against the petitioner who was in possession of the property, on the ground that he was a trespasser without any right, title or interest. The suit was transferred to Debts Recovery Tribunal, after the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, came into force. The Tribunal by its order dated 19.6.2002 allowed the claim of the Bank qua respondent Nos. 2 to 5. But dismissed the case qua the petitioner holding that it lacked jurisdiction to adjudicate the dispute between the petitioner and the Bank.

After about 13 years from the date of dismissal of suit No. 1719/1990, the petitioner filed Suit No. 1389/2006 against respondent Nos. 4 and 5 and also the respondent-Bank, seeking the same declaration and relief. This suit is still pending.

An attachment warrant was issued in respect of the property for recovery of due amount to the respondent-Bank. The petitioner filed objection to that, and prayed that the fact that an encumbrance by way of tenancy existed on the property, should be notified in the sale proclamation. Petitioner's objection was rejected. In appeal against the order, tribunal by interim order directed not to evict the petitioner and that sale be made subject to the occupancy rights of the petitioner. By final

order, the appeal was dismissed. Further appeal there-against was also dismissed by Appellate Tribunal. Challenging that order, petitioner filed writ petition, which was disposed of by High Court.

Petitioner approached this court by way of present petition. This Court by an interim order directed *status quo* for a specified period. As the interim order was not extended further, the Bank filed application before Debts Recovery Tribunal seeking direction to petitioner to deliver possession of the property and the same was allowed. This court again directed *status quo.*

Dismissing the petition, the Court

HELD: <u>Per Chelameswar, J. (for himself and Gyan Sudha Misra, J.)</u>

1. This is a typical case of the abuse of the process of the legal system by unscrupulous litigants. The petitioner claims to be a tenant in the property in dispute. No doubt, the petitioner is in possession of the property in dispute. However, the nature of his right to be in possession, the mode of his acquiring the possession, and the legal character of his possession are yet to be ascertained. The only certain fact is that the petitioner has been in possession of the property in dispute as on the date of the filing of the original suit No.3038 of 1992 in the High Court of Bombay by the first respondent-Bank. Of course, the petitioner asserts that he was inducted into possession of the property in dispute on 23rd February, 1990 allegedly the brothers-in-law of the fourth respondent. No forum so far examined the accuracy of such an assertion, both regarding the date, the alleged delivery of possession and also regarding the alleged relationship of the persons who are said to have given possession to the petitioner. [Para 23] [57-F-H; 58-A-B]

2. The case of the petitioner, regarding the legal character of the possession of the property in dispute itself is not consistent. The agreement dated 6th May, 1989 alleged to have been executed by respondents Nos.4 and 5, in favour of the petitioner (whose authenticity is yet to be established) is styled as an Agreement of "Leave and Licence". On the other hand, reading the document as a whole, gives an impression that the parties did not intend the document to be creating any tenancy or a lease. However, right from the plaint in Suit No.1719/1990, the petitioner started describing himself as a tenant of the property. But the case of the Bank has been consistent from the beginning that the petitioner is a trespasser. Ultimately, these are all questions to be determined on an examination of all the materials, by an appropriate forum in an appropriate proceeding. Whether a person in possession of immovable property is a tenant or a licencee or a trespasser, he cannot be evicted except in accordance with the procedure established by law. [Para 24] [58-B-D; G-H; 59-A-B]

3. The respondent-Bank initially chose to seek a decree of eviction against the petitioner on the ground that he is a trespasser in the property in dispute by filing Suit No.3038/1992 apart from seeking various other reliefs against respondent Nos. 4 and 5 in the said suit. However, such a suit came to be transferred in its entirety by an act of the High Court, relying upon Section 31 of the Act 51 of 1993 to the tribunal, constituted under the abovementioned Act. While allowing the claim of the respondent-Bank for recovery of the amount due from respondent Nos. 4 and 5, the tribunal reached the conclusion that the suit, insofar as the petitioner herein is concerned, is not amenable to the jurisdiction of the tribunal. In such case, in the normal course, that part of the suit insofar as it pertains to the relief against the

petitioner shall be deemed to be pending before the High Court. This legal position was not examined either by the counsel appearing for the Bank nor the tribunal or for that matter even the High Court before transferring the above-mentioned suit. The result is that the exact legal status of the petitioner vis-à-vis the property in dispute is not examined by any court so far. All submissions made before this Court seek an examination of the issue. Such an examination is not permissible in this Court for the first time in exercise of the jurisdiction under Article 136 of the Constitution of India. It requires the establishment of basic facts which requires the framing of evidence. [Para 27] [60-A-E]

4. Adjudication of civil disputes and enforcement of the rights of the parties to the dispute in terms of the adjudication are matters provided for under CPC, the procedure established by law. The person entitled in law to the possession of any immovable property, which is in the occupation of some other persons whether a tenant, licencee or trespasser can evict such tenant, licencee or trespasser by obtaining a decree for eviction from a competent civil court. [Para 25] [59-B-C]

5. Attachment and sale of immovable properties of a person, who is adjudged to be owing some amount to another person is one of the modes of securing the repayment of such judgment debt. When an immovable property of the judgment-debtor is brought to sale in order to recover the amounts adjudicated to be due, the possibility of such a property being in the possession of a third party, either pursuant to some legal right or otherwise is recognised by law. Law also recognises the possibility of such a third party objecting to or resisting his dispossession in the process of delivering the possession of the property to the purchaser in the execution proceedings. When such resistance is offered,

law also contemplates an examination whether the resistance is justified or not. Depending upon the conclusion arrived at such an examination, the third party's possession is either protected or he is evicted. Elaborate provisions have been made in this regard under Order 21 CPC. However, the legislature can create special/alternative procedure for the eviction of either a judgment-debtor or a third party. [Para 26] [59-D-G]

6. The scheme of the provisions u/ss. 25 and 29 of 1993 Act and Rules provisions 39, 40, 41, 42 and 43 of the Income Tax Certificate Proceedings Rules, 1962 clearly establish an alternative procedure for the eviction of a person (3rd party to the proceedings) in occupation of a property which is brought to sale pursuant to a Recovery certificate issued under the 1993 Act. The possibility of a person other than the judgment-debtor, being in possession of the property of the judgment-debtor is recognised even under Order 21 and under Rule 98 CPC. It provides for the eviction of such persons in an appropriate case where it is found that the person in possession is not legally entitled for the same. The Rules under the Income Tax Act which are adopted for the purpose of the Recovery of debts due to the financial institutions and Banks under the 1993 Act also provide a similar authority of law. The law further provides under Rule 47 that any person so evicted is entitled to file a separate suit to establish his legal claim. Obviously, such a right is acknowledged in recognition of the fact that an enquiry of the claim of the third party under the Rules is summary in nature by a Quasi Judicial Forum and therefore, an examination of the issue by a Judicial Forum would adequately protect the interests of such third party or the purchaser, as the case may be. [Para 36] [65-A-E; 66-A]

7. It is in pursuance of the above mentioned

procedure established by law, the property of the judgment-debtors (respondent Nos. 4 & 5) is sought to be sold. The petitioner's insistence that such a sale should be subject to his rights of the alleged tenancy is ill-conceived. The rules no doubt enable the petitioner to object to his dispossession on whatever grounds he believes are available to him. The Recovery Officer is obliged to examine the tenability of such objections and take an appropriate decision. If such a decision is adverse to the interests of the petitioner, the petitioner is entitled to file a suit and seek an adjudication of his right to protect his interest. Whether the petitioner is a tenant or a trespasser is a matter to be decided in such a suit. The petitioner had already approached the High Court by filing Suit No. 1389 of 2006, wherein one of the prayers is for a declaration that the petitioner herein is a monthly tenant of respondent Nos. 4 and 5. [Para 37] [66-A-E]

8.The issue whether the petitioner is a tenant or a trespasser is to be examined in the said suit. As of today, his assertion that he is a tenant is refuted by the statutory authority. Even if such a conclusion is an erroneous conclusion, the same can be corrected in the suit No. 1389/2006, subject to the maintainability of the suit on any one of the grounds available to the respondent-Bank. [Para 38] [66-F, G-H; 67-A]

9. Interference in exercise of the jurisdiction under Article 136 of the Constitution with the impugned judgment and protecting the petitioner's possession in the property in dispute would only delay the sale of the property in dispute thereby effectively postponing the recovery of the amounts due to the respondent-Bank indefinitely. The respondent-Bank is a Nationalised Bank dealing with the moneys of the general public. On the other hand, the petitioner is not absolutely remediless even if he loses the possession of the property in dispute

pursuant to the recovery proceedings initiated by the respondent-Bank. The petitioner can always seek restitution of the possession of the property in dispute in the event of his success in Suit No. 1389 of 2006. Therefore, there is no reason to interfere with the judgment under appeal. The respondents are at liberty to proceed with the sale of the property in dispute and hand-over the possession of the property to the purchaser, after evicting the petitioner. [Paras 39, 40 and 41] [67-B-E]

Per Altamas Kabir, J.(supplementing)

1. The second suit, being Suit No.1389/2006, filed by the petitioner, against Respondent Nos. 4 and 5 and the respondent-Bank, for the same declaration that was sought in the earlier suit, being R.A.No. 1719 of 1990, and which was dismissed for non-prosecution, is barred under Order XXIII Rule 1 Sub-rule (4) CPC. The said question has a definite bearing on the grant of an interim order, as prayed for by the petitioner. [Para 2 & 3] [68-A-D, G]

2. The suit filed by the respondent-Bank against respondent Nos. 4 and 5, for recovery of the dues also sought a declaration against the petitioner as the fifth defendant in the suit, that he was a trespasser in the suit premises without any right, title or interest and also prayed for a decree for his eviction therefrom. With the enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the suit filed by the respondent-Bank came to be transferred to the Debt Recovery Tribunal. The Court and the parties overlooked the fact that in the suit relief had also been prayed for against the petitioner for declaring him as a trespasser in the suit property and for his eviction therefrom, which relief the Debts Recovery Tribunal was not competent to give. On account of such a lapse on the part of all

concerned, the relief sought by the respondent-Bank against the petitioner for declaration of his status vis-à-vis the suit property and his eviction therefrom, remained undecided. The petitioner, who abandoned his suit for declaration that he was a tenant of the suit premises, cannot at this stage of the proceedings, be allowed to take advantage of such lapse, in view of the provisions of Sub-rule (4) of Order XXIII Rule 1 CPC. [Paras 4, 5 and 6] [68-H; 69-A-F]

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 22785 of 2010.

From the Judgment & Order dated 30.6.2010 of the High Court of Judicature at Bombay in Writ Petition No. 1747 of 2009.

Bhaskar P. Gupta, Arunabh Chowdhury, Anupam Lal Das, Raktim Gogoi, Vaibhav Tomar for the Petitioner.

Sudhir Chandra Agarwal, Himanshu Munshi, Prithvi Pal for the Respondents.

The Judgments of the Court was delivered by

CHELAMESWAR, J. 1. Respondent No. 5 is the wife of respondent No.4. Both are said to be the residents of Florida, USA. It is asserted by all the parties to the present proceedings that the property in dispute, a flat in Amar Jyoti Cooperative Society, 28-C, Ridge Road, Malabar Hills, Mumbai, is owned by respondents 4 and 5 (hereinafter referred to as the property in dispute).

2. The petitioner claims that he entered into an agreement dated 6th May, 1989 styled as "Leave and License" Agreement by which the respondents 4 and 5 agreed to lease the property in dispute to the petitioner.

3. Admittedly, the petitioner was not put in possession of

the property in dispute immediately on the execution of the abovementioned agreement. As regards the possession of the petitioner, it is stated by the petitioner in Writ Petition No. 1747/ 2009 from out of which the instant appeal arises as follows:

> "At the time of execution of the said Agreement, the Respondent Nos. 4 & 5 informed the Petitioner that they intended to go to U.S.A. for an extended visit and they needed some time to make the necessary arrangements mainly for their furniture and articles. The Respondent Nos. 4 and 5, therefore, requested the Petitioner to allow them some time to do so before they would hand over the physical possession of the said premises. The Petitioner agreed to this, as he was helpless in the matter. Apparently, the Respondent Nos. 4 & 5 delayed their arrangements. Finally on or about 2nd February, 1990, the Petitioner was informed by one Yogesh M. Kamani and one Madhubai A. Gandhi, both the brothers-in-law of the Respondent No.4 that the Respondent Nos. 4 & 5 had removed their articles and the keys which were with them. They suggested that the Petitioner take the keys and take over the possession of the said premises. These two persons were known to the Petitioner and had been introduced to him by the Defendant No.4. They also told Petitioner that they were holding authority from the Respondent Nos. 4 & 5 and that the Respondent Nos. 4 & 5 had left for U.S.A. the previous day but had done so hurriedly and therefore had not contacted the Petitioner before their departure. *Accordingly on 23rd February 1990, they gave the keys of the flat to the Petitioner and the Petitioner shifted into the said premises* with his family and articles and continues to reside there and be in exclusive possession, enjoyment, use and occupation thereof till today."
>
> (emphasis supplied)

4. It appears from the record that respondent No. 4 owed

certain amounts to the 1st respondent bank on account of an over draft facility extended to him and certain other transactions (the details of which are not necessary for the present purpose). It appears that such liabilities were incurred for the benefit of the second respondent, a sole propriety concern owned by the HUF of which the fourth respondent is said to be the karta. It appears that respondents 4 and 5 executed several documents in favour of the 1st respondent in connection with the above transaction including a deed dated 27.09.1989 creating a mortgage over the property in dispute in favour of the 1st respondent Bank.

5. As the amounts due to the Bank under the above mentioned transaction were not repaid, the first respondent filed a suit No.3083/1992 in the High Court of Bombay against respondents 2 to 5 and also the petitioner herein for the recovery of an amount of Rs.33,71,862/- alongwith interest and various other reliefs. The first respondent, inter alia, sought a declaration that the amounts claimed and due to the first respondent are secured by "a valid and subsisting mortgage" of the property in dispute and further prayed that in the event of failure of the respondent 4 and 6 herein to repay the amount due to the first respondent Bank before the date of redemption to be fixed by the Court, "the property in dispute be sold and the sale proceeds be applied towards the satisfaction of the claim of the Bank".

6. The petitioner herein is the fifth defendant in the said suit. In so far as the petitioner is concerned, the 1st respondent sought a declaration that the petitioner is a trespasser without any right, title or interest in the disputed property and further prayed for a decree for eviction of the petitioner.

> "(g) that it be declared by the Hon'ble Court that defendant No.5 has no right, title or interest in the said flat described in Exhibit 'A' hereto or any party thereof and that the use, occupation and possession of Defendant No.5 of the said flat described in Exhibit 'A' hereto is wrongful and illegal and amounts to trespass.
>
> (h) that defendant No.5 be ordered and decreed to quit, vacate and hand over quiet, vacant and peaceful possession of the said flat described in Exhibit 'A' hereto to Defendants Nos. 3 and/or the plaintiffs."

7. In the abovementioned suit, the first respondent Bank obtained an ex parte ad interim order dated 1st October, 1992. By the said order, the Court took note of the fact that the petitioner herein is residing in the disputed premises but under doubtful authority and therefore appointed a receiver. The relevant portion of the order reads as follows:-

> "Malabar Hill, Bombay, which is under mortgage under indenture dated 27th September 1989. The said indenture says that the mortgagors viz. Defendants Nos. 3 and 4 are residing in the said flat. Again in a writ petition filed by defendants Nos. 3 and 4 on 8th February 1990, there is a mention that defendants Nos. 3 and 4 are residing therein. Through the correspondence *the plaintiffs have come to know that the 5th Defendant is occupying the said flat under the leave and licence agreement dated 6th May, 1989. According to plaintiffs this is a sham and bogus document.* At the same time writ petition does not mention that defendants Nos. 3 and 4 have not been residing in the suit flat. Prima facie case made out. Ad-interim in terms of prayer (a) except the bracketed portion. Court Receiver is directed to allow the 5th defendant to occupy the flat only if the 5th defendant is ready and willing to occupy the same as the Receiver's agent on usual terms and conditions. Ad-interim relief also in terms of prayer (b) of the Draft Notice of Motion except the bracketed portion.
>
> Court Receiver to act on the ordinary copy of this order certified by the Associate as true copy.
>
> Certified copy expedited."

8. Pursuant to the said order, the receiver appointed by the Court visited the disputed property on 23rd October, 1992, took formal possession of property in dispute and allowed the petitioner herein to continue in possession of the property after obtaining an undertaking from him in terms of the order of the Court (dt. 1.10.1992).

9. The petitioner further executed an agreement dated 7.1.1997 containing various terms and conditions subject to which he would continue in possession of the property in dispute as an agent of the receiver. The ex parte interim order dated 1.10.1992 appointing the Receiver came to be confirmed by an order dated 13th June, 1997.

10. The recovery of Debts due to Banks and Financial Institutions Act, 1993 hereinafter referred to as the 1993 Act for the sake of convenience, made by the Parliament came into force w.e.f. 24.06.1993. The abovementioned Suit No.3083/1992 was transferred to the Debts Recovery Tribunal, Mumbai (constituted under Section 3 of the said Act) in compliance of the requirement of law under Section 31 and the same was renumbered as OA No.3585/2000. The petitioner herein filed his written statement before the Debts Recovery Tribunal and questioned the Tribunal's jurisdiction to grant any relief against the petitioner. However, respondents 4 and 5 did not appear and contest the proceedings before the Debts Recovery Tribunal. As a result, the claim of the Bank came to be allowed by an order dated 19.6.2002 declaring that the defendants 1 to 4 (respondents 2 to 5 herein) are jointly and severally liable to pay the amount claimed by the Bank with interest and such payment is secured by a valid mortgage of the property in dispute and further directed the respondents 2 to 5 to make the payment "within a period of three months for avoiding the sale of the mortgaged property". The Tribunal, however, dismissed the abovementioned OA in so far as the petitioner herein is concerned, holding in substance that it lacked jurisdiction to adjudicate the dispute between the petitioner and the respondent-Bank.

11. Aggrieved by the dismissal of the said OA in so far as the petitioner is concerned, the first respondent Bank preferred an appeal No. 76/2002 before the Debt Recovery Appellate Tribunal, Mumbai which was also dismissed by an order dated 5.4.2004. The matter was further carried by the first respondent Bank in Writ Petition No.9337/2004 before the High Court of Bombay which also came to be dismissed by an order dated 14.2.2005 of a Division Bench.

12. Pursuant to the order of the Debts Recovery Tribunal dated 19.6.2002 against respondents 2 to 5 herein, the first respondent Bank initiated proceedings for recovery of the amount specified in the recovery certificate issued under Section 19(22) dated 16.09.2002.

13. Though the petitioner claims to have taken possession of the property in dispute on *23rd February, 1990,* within a couple of weeks thereafter, he filed a suit bearing RAD Suit No.1719/1990 on the file of the Small Causes Court, Mumbai against respondents 4 and 5 herein for a declaration that the petitioner is a monthly tenant in respect of the property in dispute and other reliefs. During the pendency of the said suit, he also sought an interim injunction restraining respondents 4 and 5 and their servants, agents etc. from dispossessing him from the disputed property. The Small Cause Court issued an ad interim order dated 9.3.1990 directing both the parties to maintain status quo till 14.3.1990. However, the said RAD Suit No.1719/1990 came to be dismissed on 19.2.1993 for non-prosecution. The petitioner allowed the said dismissal order to become final and 13 years thereafter filed a fresh RAD Suit No.1389/2006 against respondents 4, 5 and also the 1st respondent Bank once again for a declaration that he is a monthly tenant of the disputed property and respondents 4 and 5 herein and their servants, agents and persons claiming through them be restrained from dispossessing the petitioner. In the said suit, the petitioner no doubt disclosed the filing of the earlier suit, i.e. RAD Suit No.1719/1990 and dismissal of the same for

default. However, the burden of the song in the fresh plaint is that such a default occurred earlier on an erroneous legal advice by his erstwhile counsel who appeared in the earlier suit. The petitioner herein also filed an application in the RAD Suit No.1389/2006 seeking an interim injunction restraining the defendants from disturbing his possession over the disputed premises. The said application was dismissed by an order dated 21st August, 2010. Consequent upon the said dismissal, the first respondent Bank filed an application dated 26.8.2010 (in OA No.3583/2000) before the Debts Recovery Tribunal-II, Mumbai seeking a direction to the petitioner herein to deliver physical possession of the disputed premises. In the meanwhile, this Court granted an interim order in favour of the petitioner on 7.9.2010 directing the parties to maintain status quo for a period of six weeks or until further orders whichever is earlier.

14. The property in dispute is brought to sale for the recovery of amount found due by the Debt Recovery Tribunal's order dated 19.6.2002 and consequent recovery certificate. An attachment warrant came to be issued by the Recovery Officer on 4th September, 2005 attaching the property in dispute. The petitioner herein filed objections. The substance of the objection is that the 1st respondent Bank has no right to secure vacant possession of the property in dispute from the petitioner herein. Consequently the respondent Bank cannot sell the property free from all incumberances. He, therefore, prayed that the fact that an incumberance by way of tenancy exist on the property in dispute should be notified in the sale proclamation.

15. The first respondent Bank filed its reply. The matter was listed before the Recovery Officer on more than one occasion and finally the application of the petitioner herein was dismissed for default on 20th July, 2007. The petitioner thereafter filed a miscellaneous application before the Recovery Officer praying that the order dated 20.7.2007 be set aside with a further prayer that during the pendency of the said application,

the terms of the sale of the property in dispute shall not be finalised. The said application was dismissed by the order of the Recovery Officer dated 9th January, 2008.

16.Aggrieved by the same, the petitioner herein carried the matter in appeal (Appeal No.11/2008). By an interim order dated 14th March, 2008, the Tribunal directed as follows:

"O R D E R

(A) The Recovery Officer is directed not to evict Appellant from suit property till further order.

(B) The Recovery Officer is permitted to sale suit property subject to occupancy rights of the Appellant till further order."

17. By a final order dated 10th June, 2009, the said appeal came to be dismissed.

18. Aggrieved by the said dismissal, the petitioner herein carried the matter in a further appeal before the Debts Recovery Appellate Tribunal, Mumbai in Appeal No. 186/2009. The said appeal was also dismissed by an order dated 21st July, 2009 which was in turn challenged by the petitioner in a writ petition No. 1747/2009 before the Bombay High Court.

19. By the order under appeal before us dated 30th June, 2010, the Bombay High Court disposed of the writ petition. The operative portion of the order reads as follows:-

"11. Considering the peculiar facts of the case, we direct that the Court of Small Causes should dispose of applications at Exhibit-19 and 21 in R.A.D. Suit No.1389 of 2006 pending before it as expeditiously as possible and within a period of eight weeks from today. Till the application is disposed of, the 1st respondent/bank will not dispossess the petitioner to unable to secure any interim protection in the pending suit, he can be dispossessed in

execution of the Recovery certificate by the 1st respondent/ bank and the Recovery Officer will be entitled to enforce the certificate and sell the property/flat for recovery of the dues mentioned therein.

12. The petition stands disposed of in the above terms. All concerned to act on the authenticated copy of this order."

20. Aggrieved by the order dated 13th June, 2010 of the Bombay High Court, the petitioner herein approached this Court by way of the instant special leave petition. On 7.9.2010, this Court passed an interim order which has already been taken note of at para 11. Since the order was limited for a specified period in operation and as there was no further extension of the interim order, the respondent Bank filed an application on 13th December, 2011 before the Debts Recovery Tribunal-II, Mumbai once again seeking a direction to the petitioner herein to deliver the possession of the property in dispute. The said application was allowed by an order of the Debts Recovery Tribunal-II, Mumbai dated 4.1.2012 directing the petitioner to hand over possession of the portion of the dispute property. Thereupon the petitioner moved this Court in I.A. No.3/2011 and this Court by an order dated 6th January, 2012 directed that "till 6th February, 2012, the parties are once again directed to maintain status quo with regard to the flat in question".

21. It is argued by Mr. Bhaskar P. Gupta, learned senior counsel for the petitioner -

(i) that the petitioner is a tenant of the property in dispute and, therefore, he cannot be evicted except in accordance with the procedure established by law;

(ii) that the petitioner is not either a debtor or a guarantor of any debt due to the 1st respondent Bank and, therefore, the Debts Recovery Tribunal would be without any jurisdiction (as rightly held by the tribunal) to order the

eviction of the petitioner. Consequently, the Recovery Officer cannot evict the petitioner in the purported exercise of the recovery certificate;

(iii) that the petitioner acquired the tenancy rights in the property in dispute at a point of time prior to which the landlord of the petitioner incurred the liabilities due to the bank and the mortgage created by the landlord is much later than the tenancy agreement between the petitioner and his landlord (respondent No.4). Therefore, it cannot be said that the petitioner's tenancy is subject to the rights of the mortgagee (the respondent Bank);

(iv) assuming for the sake of arguments that the petitioner is not a tenant but only a trespasser, as contended by the respondent Bank, even then the petitioner is required to be evicted from the property in dispute by the procedure established by law. The recovery certificate issued by the Debts Recovery Tribunal is not a procedure established by law for evicting 'a trespasser' (petitioner);

(v) that in view of the pendency of his suit RAD No.1389/ 2006, the petitioner cannot be evicted until the said suit is adjudicated upon.

22. On the other hand, it is argued by learned counsel for the respondent Bank:

(i) that the conduct of the petitioner in allowing his Suit RAD No.1719/1990 to be dismissed for non-prosecution and filing a fresh Suit for the same relief 13 years thereafter while he is comfortably squatting in the property would disentitle the petitioner from raising an objection that until the fresh suit RAD No.1389/2006 is decided, his possession cannot be disturbed;

(ii) the registered mortgage in favour of the respondent Bank for the property in dispute was created on 27.9.1989

whereas the petitioner entered possession of the property, even according to his own assertion, on 23rd February, 1990, i.e. after a lapse of four months after the mortgage is created.

(iii) the alleged Leave and License Agreement itself is a bogus and sham transaction.

(iv) the petitioner's possession is clearly that of a trespasser.

(v) The mortgage in question is in the nature of an English mortgage. In the mortgage deed the respondent No.4 clearly asserted that he was in the possession of the property in dispute. Therefore, he could not have legally inducted any person into possession of the property in dispute after the execution of the mortgage.

(vi) Lastly, the learned counsel submitted that in view of the language and Scheme of the 2nd Schedule to the Income Tax Act, which are made applicable to the recovery proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, more specifically Rule 40 therein, the Recovery Officer is entitled to evict the petitioner, though the petitioner is not either a debtor to the bank or a guarantor to any debtor to the bank irrespective of the fact whether he is a trespasser or a tenant to the property in dispute.

23. In our opinion, this is a typical case of the abuse of the process of the legal system by unscrupulous litigants. The petitioner claims to be a tenant in the property in dispute. No doubt, the petitioner is in possession of the property in dispute. However, the nature of his right to be in possession, the mode of his acquiring the possession and the legal character of his possession are yet to be ascertained.. The only certain fact is that the petitioner has been in possession of the property in dispute as on the date of the filing of the original suit No.3038

of 1992 in the High Court of Bombay by the first respondent Bank. Of course, the petitioner asserts that he was inducted into possession of the property in dispute on 23rd February, 1990 by one Yogesh M. Kamani and Madhubai A. Gandhi, allegedly the brothers-in-law of the fourth respondent. No forum so far examined the accuracy of such an assertion, both regarding the date, the alleged delivery of possession and also regarding the alleged relationship of the persons who are said to have given possession to the petitioner.

24. On the other hand, the case of the petitioner regarding the legal character of the possession of the property in dispute itself is not consistent. The agreement dated 6th May, 1989 alleged to have been executed by respondents 4 and 5 in favour of the petitioner (whose authenticity is yet to be established) the document is styled as an Agreement of "Leave and Licence". It purports to grant a "licence" in favour of the petitioner of the property in dispute to use and occupy the same on a "monthly compensation" of Rs.2000/- and for a period not exceeding "11 months commencing from 15th day of August, 1989" with a further specific stipulation which reads (in the copy filed before this Court) as follows:

> "… this writing shall only be construed as a tenancy agreement or lease nor otherwise creating any other right or interest in the said premises in favour of the Licencee. It is not at all the intention of the parties hereto who on the contrary merely a leave and Licence Agreement and/or arrangement so as to allow the licencee for the purpose of residential accommodation."

The above extract, as it is, does not convey any meaning to us. Whether the extract is an accurate copy of the original document or not is doubtful. On the other hand, reading the document as a whole gives an impression that the parties did not intend the document to be creating any tenancy or a lease. However, right from the plaint in RAD Suit No.1719/1990, the petitioner started describing himself as a tenant of the property.

But the case of the Bank has been consistent from the beginning that the petitioner is a trespasser. Ultimately, these are all questions to be determined on an examination of all the material by an appropriate forum in an appropriate proceeding. Whether a person in possession of immovable property is a tenant or a licencee or a trespasser, he cannot be evicted except in accordance with the procedure established by law.

25. Adjudication of Civil disputes and enforcement of the rights of the parties to the dispute in terms of the adjudication are matters provided for under the Code of Civil Procedure—procedure established by law. The person entitled in law to the possession of any immovable property, which is in the occupation of some other persons whether a tenant, licencee or trespasser can evict such tenant, licencee or trespasser by obtaining a decree for eviction from a competent civil court.

26. Attachment and sale of immovable properties of a person, who is adjudged to be owing some amount to another person is one of the modes of securing the repayment of such judgment debt. (see Section 51 Order 21 of Civil Procedure Code). When an immovable property of the judgment debtor is brought to sale in order to recover the amounts adjudicated to be due, the possibility of such a property being in the possession of a third party either pursuant to some legal right or otherwise is recognised by law. Law also recognises the possibility of such a third party objecting to or resisting his dispossession in the process of delivering the possession of the property to the purchaser in the execution proceedings. When such resistance is offered, law also contemplates an examination whether the resistance is justified or not. Depending upon the conclusion arrived at such an examination, the third party's possession is either protected or he is evicted. Elaborate provisions have been made in this regard under Order 21 of Code of Civil Procedure. However, the legislature can create special/alternative procedure for the eviction of either a judgment debtor or a third party such as the one discussed above from immovable property.

27. The first respondent Bank initially chose to seek a decree of eviction against the petitioner on the ground that he is a trespasser in the property in dispute by filing OS No.3038/1992 apart from seeking various other reliefs against respondents 4 and 5 in the said suit. However, such a suit came to be transferred in its entirety by an act of the Bombay High Court relying upon Section 31 of the Act 51 of 1993 to the tribunal constituted under the abovementioned Act. While allowing the claim of the respondent Bank for recovery of the amount due from respondents 4 and 5, the tribunal reached the conclusion that the suit, insofar as the petitioner herein is concerned, is not amenable to the jurisdiction of the tribunal. In which case, in the normal course, that part of the suit insofar as it pertains to the relief against the petitioner shall be deemed to be pending before the Bombay High Court. Unfortunately, this legal position was not examined either by the counsel appearing for the Bank nor the tribunal or for that matter even the Bombay High Court before transferring the abovementioned suit. The result is that the exact legal status of the petitioner vis-à-vis the property in dispute is not examined by any court so far. All submissions made before us seek an examination of the issue. We are of the opinion such an examination is not permissible in this Court for the first time in exercise of the jurisdiction under Article 136 of the Constitution of India. It requires the establishment of basic facts which requires the framing of evidence.

28. Be that as it may. The fact situation as on today is that the findings of the tribunal established under the abovementioned Act is that the respondent Bank is entitled to recover the amounts claimed by it in the abovementioned suit (which came to be renumbered as OA No. 3583/2000 or transfer from the High Court to the tribunal). The operative portion of the tribunal's order in so far as it is relevant for this purpose reads as follows:

"A. The application is allowed with costs against

Defendant no.1 to 4 and is rejected with costs against Defendant No.5.

(A) The Defendant No.1 to 4 do jointly and severally pay to the applicant an amount of Rs. 33,62,694.76 (Rs. Thirty Three Lacs Sixty Two Thousand Six Hundred Ninety Four and paise Seventy Six only) with interest @ 18% p.a. with quarterly rest on Rs. 33.09,797.59 paise (Rs. Thirty Three Lacs Nine Thousand Seven Hundred Ninety Seven and Paise Fifty Nine only) from the date of filing original application till full realisation.

(B) It is declared that the above outstandings are secured by validly and legally created mortgage of flat No.14 aadmg.683 sq.ft. on IIIrd floor of building known as Amar Jyoti CS No. 255 of Malabar Hill, Mumbai-6.

The mortgagor may pay the outstanding amount within three months for avoiding the sell of the mortgaged property.

(C) xxxx xxxx xxxx xxxx

(D) Issue recovery certificate as per above terms and serve copies of judgment on the parties."

29. Once such a determination is made, the Presiding Officer of the tribunal is required to issue a certificate under Section 19(22)[1] for the recovery of the amount of debt specified in the said certificate addressed to the Recovery Officer[2]. Such a certificate, as we have already taken note of, came to be

1. Sec. 19(22) The Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

2. Sec. 2(K)—"Recovery Officer" means a Recovery Officer appointed by the Central Government for each Tribunal under sub-section (1) of section 7.

issued. Thereafter the amounts due are required to be recovered by following an appropriate procedure established by law. The question is what is that procedure established by law.

30. Section 25 of the Act 51 of 1993 prescribes various modes of recovery of the amounts indicated in the certificate. One of them is attachment and sale of immovable property of the judgment debtor.

"S.25. The Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:-

(a) attachment and sale of the ***immoveable property of the defendant:"

Section 29 of the Act 51 of 1993 declares that the provisions of the Second and Third Schedule of Income Tax Act, 1961 apply with necessary modifications for the recovery of the amounts due under the Act 51 of 1993.

"29 Application of certain provisions of Income-tax Act

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962 , as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

31. The Second Schedule of the Income Tax Act read with the Income Tax Certificate Proceedings Rules, 1962, for short

'the 1962 Rules', prescribe the procedure for recovery of the amounts due pursuant to a certificate issued under Section 222 of the Income Tax Act. Part III of the Second Schedule prescribes the procedure for the attachment and sale of immovable property. Rule 92 thereof enables the making of the Rules. In the purported exercise of the powers granted thereunder, the Income Tax Certificate Proceedings Rules, 1962 were made.

32. Rules 39[3] and 40[4] of the 1962 Rules recognise that the property which is brought to sale towards the recovery of the amounts due under the certificate could be in the occupation of either the defaulter or persons other than the defaulter either claiming through the defaulter or independently. Rule 40 more

3. **39. Delivery of Immovable property in occupancy of defaulter:-**

(1) Where the immovable property sold is in the occupancy of the defaulter or of some person on his behalf or of some person claiming under a title created by the defaulter subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 65 of the principal rules, the Tax Recovery Officer shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom the purchaser may appoint to receive delivery on his behalf in possession of the property, and if need be, by removing any person who refuses to vacate the same.

(2) For the purposes of sub-rule(1), if the person in possession does not afford free access, the Tax Recovery Officer may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the purchaser, or any person whom the purchaser may appoint to receive delivery on his behalf, in possession.

4. **40. Delivery of immovable property in occupancy of tenant:-**

where the immovable property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 65 of the principal rules, the Tax Recovery Officer shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some consplcuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the defaulter has been tranferred to the purchaser.

specifically deals with the property brought to sale being in the occupation of "a tenant or other person entitled to occupy".

33. Rule 41[5] deals with resistance to the delivery of possession of the property in execution of the recovery certificate. It stipulates that the purchaser is entitled to make an application to the Tax Recovery Officer complaining of resistance. Thereupon the Recovery Officer is obliged to investigate the matter and adjudicate whether the resistance was justified or not.

34. Both Rule 39 and Rule 42 stipulate that where the Recovery Officer is satisfied that the resistance is not justified he shall take necessary steps for putting the purchaser in possession of the property. On the other hand, under Rule 43[6], if the Recovery Officer comes to the conclusion that the resistance is justified, the application of the purchaser is required to be dismissed.

35. Rule 47[7] stipulates that any person other than the defaulter against whom an order under Rule 42 is passed is

5. **41 Resistance or obstruction to possession of immovable property:-**

(1) Where the purchaser of immovable property sold in execution of a certificate is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Tax Recovery Officer complaining of such resistance or obstruction within thirty days of the date of such resistance or obstruction.

(2) The Tax Recovery Officer shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

6. **43. Resistance or obstruction by bona fide claimant:-**

Where the Tax Recovery Officer is satisfied that the resistance or obstruction was occasioned by any person (other than the defaulter) claiming in good faith to be in possession of the property on his own account or on account of some person other the defaulter the Tax Recovery Officer shall make an order dismissing the application.

7. **47 Right to file a suit:-**

Any party not being a defaulter against whom an order is made under rule 42 or rule 43 or rule 45 may institute a suit in a civil court to establish the right which he claims to the present possession of the property.

entitled to file a civil suit to establish his right for possession of the property.

36. The scheme of the above provisions clearly establishes an alternative procedure for the eviction of a person (3rd party to the proceedings) in occupation of a property which is brought to sale pursuant to a Recovery certificate issued under the 1993 Act. We have already taken note that there is a possibility of a person other than the judgment debtor being in possession of the property of the judgment debtor is recognised even under Order 21 of the Civil Procedure Code and under Rule 98. It provides for the eviction of such persons in an appropriate case where it is found that the person in possession is not legally entitled for the same[8]. The Rules under the Income Tax Act which are adopted for the purpose of the Recovery of debts due to the financial institution and Banks under the 1993 Act also provide a similar authority of law. The law further provides under Rule 47 that any person so evicted is entitled to file a separate suit to establish his legal claim. Obviously, such a right is acknowledged in recognition of the fact that an enquiry of the claim of the third party under the Rules is summary in nature by a Quasi Judicial Forum and therefore,

8. O.XXI R. 98 Orders after adjudication—(1) Upon the determination of the questions referred to in rule 101, the court shall, in accordance with such determination and subject to the provisions of sub-rule(2),--

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstance of the case, it may deem fit,

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

an examination of the issue by a Judicial Forum would adequately protect the interests of such third party or the purchaser, as the case may be.

37. Coming to the facts of the case on hand, it is in pursuance of the above mentioned procedure established by law the property of the judgment debtors (respondents 4 & 5) is sought to be sold. The petitioner insists that such a sale should be subject to his rights of the alleged tenancy. The petitioner herein is not resisting the delivery of possession but hindering the process of the sale itself. His application before the Recovery Officer praying that the proclamation of sale should indicate that the sale of the property in dispute would be subject to the tenancy rights of the petitioner, in our view is ill-conceived. The rules no doubt enable the petitioner to object to his dispossession on whatever grounds he believes are available to him. The recovery officer is obliged to examine the tenability of such objections and take an appropriate decision. If such a decision is adverse to the interests of the petitioner, the petitioner is entitled to file a suit and seek an adjudication of his right to protect his interest. Whether the petitioner is a tenant of a trespasser is a matter to be decided in such a suit. The petitioner had already approached the Bombay High Court by filing RAD Suit No. 1389 of 2006, wherein one of the prayers is for a declaration that the petitioner herein is a monthly tenant of respondents 4 and 5 herein of the property in dispute.

38. The issue whether the petitioner is a tenant or a trespasser is to be examined in the said suit. As of today, his assertion that he is a tenant is refuted by the statutory authority. Admittedly, the Interlocutory Application filed by the petitioner in RAD Suit No. 1389 of 2006 seeking interim protection of his possession of the property in dispute was dismissed. The objections of the petitioner were considered and refuted by the Recovery Officer and the tribunal in exercise of the statutory powers and confirmed by the High Court. Even if such a conclusion is an erroneous conclusion, the same can be

corrected in the suit No. 1389/2006 subject, of course, to the maintainability of the suit on any one of the grounds available to the respondent bank.

39. For the above-mentioned reasons, interference in exercise of the jurisdiction under Article 136 with the judgment under appeal and protecting the petitioner's possession in the property in dispute would only delay the sale of the property in dispute thereby effectively postponing the recovery of the amounts due to the respondent-bank indefinitely. The first respondent-bank is a Nationalised Bank dealing with the moneys of the general public.

40. On the other hand, the petitioner is not absolutely remediless even if he loses the possession of the property in dispute pursuant to the recovery proceedings initiated by the respondent-bank. The petitioner can always seek restitution of the possession of the property in dispute in the event of his success in RAD Suit No. 1389 of 2006.

41. We, therefore, see no reason to interfere in the judgment under appeal. The special leave petition is dismissed. The respondents are at liberty to proceed with the sale of the property in dispute and handover the possession of the property to the purchaser after evicting the petitioner herein.

42. We make it clear that the petitioner can seek restitution in the event of his success in RAD Suit No. 1389/2006.

ALTAMAS KABIR, J. 1. I have had the privilege of going through the judgment prepared by my learned brother Chelameswar, J., and I entirely agree with the reasoning and the conclusion arrived at therein. However, in my view, two aspects of the matter relating to the second suit filed by the petitioner herein need to be highlighted.

2. There is no denying the fact that the status of the petitioner in regard to the suit premises is yet to be decided, but, as has been indicated by my learned brother, the petitioner

cannot take advantage of the fact that he has been in possession of the same, without his status being determined. The petitioner had filed a suit, inter alia, for declaration of his status as a monthly tenant in respect of the suit property, being R.A. No.1719 of 1990, in the Small Causes Court, Mumbai, against the Respondent Nos. 4 and 5 herein. He also obtained an interim order on 9th March, 1990, directing the parties to maintain status-quo till 14th March, 1990. The said suit came to be dismissed on 19th February, 1993, for non-prosecution. The petitioner allowed the said dismissal to become final and 13 years later filed a fresh suit, being RAD Suit No.1389/2006, against the Respondent Nos. 4 and 5 and the respondent Bank, for the same declaration that he was a monthly tenant of the disputed property. As indicated by my learned brother, in the plaint of the second suit, the petitioner had disclosed the fact regarding the filing of the earlier suit and the dismissal thereof on ground of default. Prima facie, the second suit is barred under Order XXIII Rule 1 Sub-rule(4) of the Code of Civil Procedure, which, inter alia, provides as follows:

> "(4) Where the plaintiff-
>
> (a) abandons any suit or part of claim under sub-rule (1), or
>
> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),
>
> he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

3. The said question will no doubt be considered when the second suit is taken up for hearing, but the same, in my view, has a definite bearing on the grant of an interim order, as prayed for by the petitioner.

4. In addition to the above, it has also to be noted that on account of the failure of the Respondent Nos. 4 and 5 to pay

the dues of the Bank, the Bank brought a suit for recovery of the said amount, along with interest, being Suit No.3083 of 1992, in the Bombay High Court, against the Respondent Nos. 2 to 5 and prayed for an order to be passed for the property in dispute to be sold and for the sale proceeds to be applied to the satisfaction of the claim of the Bank.

5. Furthermore, in the said suit, the Bank also sought a declaration against the petitioner herein, as the fifth defendant in the suit, that he was a trespasser in the suit premises without any right, title or interest and also prayed for a decree for his eviction therefrom. Unfortunately, with the enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the suit filed by the Bank came to be transferred to the Debt Recovery Tribunal, Bombay, in terms of Section 31 of the new Act and the same was numbered as OA No.358 of 2000. The Court and the parties appear to have overlooked the fact that in the suit relief had also been prayed for against the petitioner for declaring him as a trespasser in the suit property and for his eviction therefrom, which relief the Debts Recovery Tribunal was not competent to give.

6. On account of such a lapse on the part of all concerned, the relief sought by the Bank against the petitioner for declaration of his status vis-à-vis the suit property and his eviction therefrom, remained undecided. The petitioner, who abandoned his suit for declaration that he was a tenant of the suit premises, cannot at this stage of the proceedings, be allowed to take advantage of such lapse, in view of the provisions of Sub-rule (4) of Order XXIII Rule 1 CPC, and I fully agree with my learned brother that no interference is called for with the judgment under scrutiny.

7. The Special Leave Petition is accordingly dismissed, with the directions given by my learned brother.

K.K.T. S.L.P. disimissed.

AJAY PANDIT @ JAGDISH DAYABHAI PATEL & ANR.
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 864 of 2006)

JULY 17, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 – ss. 419, 420, 302, 307, 397, 342 and 328 – Cheating, Murder and attempt to murder – Two separate incidents – Accused luring the victims to send them to America for better prospects – Extracting money from them – Instead of sending them to America, murdered one person in first incident and in the second incident murdered one and attempted to murder two – First case based on circumstantial evidence – Eye-witnesses (victims) in the second incident – Conviction and life imprisonment by trial court – High Court confirming the conviction and enhancing the sentence to death – On appeal, held: Conviction justified – In the fist case, the witness proved the chain of links in the case – In the second case also the evidence of victim eye-witness, other witnesses and documentary evidence have proved the prosecution case – However, the High Court enhanced the sentence to death without following the procedure u/s. 235(2) Cr.P.C. and without taking into consideration the relevant factors while awarding death sentence – Therefore, death sentence set aside and matter remitted to High Court to decide the sentence by following s. 235(2) – Code of Criminal Procedure, 1973 – s. 235(2) – Sentence.

The appellant-accused was prosecuted for two murders in two separate incidents. He used to lure the vulnerable into his trap for sending them to America for better prospects in life.

The first incident relates to the murder of deceased

'N' which took place in February 1994. Prosecution case was that PW5 (sister of the deceased) and PW6 (brother-in-law of the deceased) were acquainted with the accused. They wanted the accused to send the deceased to America. Accused demanded Rs. 2,50,000/- for this. Initially Rs. 1,10,000/- was required to be paid. After payment of the initial amount, the accused asked PW6 to send the deceased to Bombay, Railway Station with return ticket of the accused and asked for further amount of Rs. 3500/- for medical expenses and for arranging visa. PW6 reached Bombay with the deceased. PW6 leaving the deceased in the company of the accused, left for his home. The deceased did not reach home. The accused informed that the deceased had already left for America. In November, 1994, PW6 came to know through newspaper reports that the accused was arrested for an incident of attempt to murder and murder three persons. PW6 went to the police. Police showed him photograph of the unidentified person found in a hotel room in the evening of 9.2.1994. According to police, the accused had booked the hotel room on 8.2.1994. He left the hotel in the evening keeping the room locked and did not return. When the room was opened with duplicate key for cleaning on 9.2.1994, dead body of deceased 'N' was found.

In the second incident case, the accused had three persons in his net aspiring for better prospects in America i.e. PW1, PW5 and the deceased 'J'. PW1 and PW5 were husband and brother of the deceased respectively. The accused called them to Bombay, booked two rooms in his name for them in a hotel. The accused received money from the victims for completing other formalities. The accused then gave one capsule and two tablets each to the three victims and asked them to take it before medical checkup. After taking the medicine the victims started feeling drowsy and sleeping

sensation. The deceased went to her room, when PW1 and PW5 lied down, the accused administered an injection in the abdomen of PW1. In the midnight, when PW1 and PW5 regained consciousness, they alerted the hotel manager and found the deceased dead in her room.

The trial court convicted the accused u/ss. 420 and 302 IPC in the first case. In the second case, the trial court convicted the accused u/ss. 420, 302, 307, 397, 342 and 328 IPC. In both the cases, life imprisonment was given for the offence u/s. 302 IPC. High Court confirmed the conviction of the accused, but enhanced the sentence from life imprisonment to death, in view of the ghastly manner, the accused murdered both the accused and poisoned PWs 1 and 5 in the second case. Hence the present appeal.

Partly allowing the appeal and remitting the matter to High Court, to decide the question of sentence, the Court

HELD: 1.1. The conviction awarded by the High Court, stands confirmed. In the first incident, PW 5 and PW 6 proved the chain and links from the stage of acquaintance with the accused till the stage of the deceased 'N' being seen in the custody or company of the accused, for the purpose of sending the deceased 'N' to America. PW 6 was cross-examined at length but the defence could not demolish his evidence or the evidence of other witnesses including that of PW5. Evidence, in this case, proved beyond reasonable doubt that it was the accused who lured the deceased for sending him to America. Facts would clearly indicate that it was the accused who had extracted money giving false hopes. The deceased was also seen by PW 6 last, in the company of the accused. PW 6 had also made payment to the accused for medical expenses. [Paras 11 and 34] [82-F-H; 94-D-E]

1.2. PW 1 to PW 4 were all attached to Hotel from the room of which the dead body of the deceased was found. PW 1 is an independent witness – Manager of the Hotel. He narrated what had happened at his Hotel. PW 1 also saw the deceased in the company of the accused. He saw the accused taking the deceased 'N in Room No. 103 and later coming back alone leaving the hotel without handing over the key at the reception counter. Nothing had been brought out in the cross-examination of these witnesses to contradict what he had stated. [Para 12] [83-A-C]

1.3. Sister of the accused was also examined in this case as PW 14, she had narrated, in detail, the professional and other details of the accused. The evidence of the rest of the witnesses had also been elaborately dealt with by the High Court. [Para 13] [83-C-D]

2.1. The *modus operandi* adopted by the accused in the second incident was also almost the same as adopted in the first case. The victim 'J'(deceased) was poisoned by the accused at Hotel room. PW 1 and PW 5 husband and brother of the deceased respectively were direct victims of the accused who fortunately survived. They narrated, in detail, what transpired prior to the incident. The details of the money paid to the accused for sending them to America had been elaborately stated in their oral evidence. Nothing was brought out in their cross-examination to discredit their version. There was no reason for these witnesses to depose falsely against the accused and they have no motive in doing so. Evidence of PW 1 and PW 5 are consistent and have not been shaken at all by the defence. No doubt has been created about the veracity of their testimony. They were the direct victims and were also the eye-witnesses to the entire transaction and nothing was brought out to discredit their evidence. [Para 14] [83-E-H; 84-A-C]

2.2. PW 2, PW 4 and PW 14 were the staff members of the hotel. They had narrated, in detail, the manner in which the accused booked the room, paid the amount, took the three witnesses to both the rooms. The hotel witnesses identified the accused in the court as well as in the identification parade. The prosecution examined PW 8 panch witnesses before whom the accused voluntarily gave statement u/s. 27 of the Evidence Act which led to the discovery of huge cash amount, cheques, promissory notes and various articles like passports, rubber stamps etc. [Para 15] [84-C-E]

2.3. In view of the oral evidence and the documents produced in this case, there is no reason to take a different view from that of the trial court and the High Court on conviction. [Para 16] [84-F]

3.1. The High Court has only mechanically recorded what the accused said and no attempt was made to elicit any information or particulars from the accused or the prosecution which are relevant for awarding a proper sentence. The accused, of course, was informed by the court, of the nature of the show-cause-notice i.e. whether the life sentence awarded by the trial court be not enhanced to death penalty. No genuine effort was made by the court to elicit any information either from the accused or the prosecution as to whether any circumstance existed which might influence the court to avoid and not to award death sentence. Awarding death sentence is an exception, not the rule, and only in rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts, even if the accused has kept totally silence in such situations. In the instant case, the High

Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Cr.P.C. [Para 33] [93-F-H; 94-A-D]

3.2. In such circumstances, the death sentence awarded by the High Court is set aside and the matter is remitted to the High Court to follow Section 235(2) Cr.P.C. in accordance with the principles laid down. [Para 34] [94-D-E]

Santa Singh v. State of Punjab **(1976) 4 SCC 190: 1977 (1) SCR 229;***Rajesh Kumar v. State through Government of NCT of Delhi* **(2011) 13 SCC 706;** *Dagdu and Ors. v. State of Maharashtra* **(1977) 3 SCC 68: 1977 (3) SCR 636;** *Muniappan v. State of Tamil Nadu* **AIR 1981 SC 1220: 1981 (3) SCR 270;** *Allauddin Mian and Ors. v. State of Bihar* **(198) 3 SCC 5: 1989 (2) SCR 498;** *Malkiat Singh v. State of Punjab* **(1991) 4 SCC 341: 1991 (2) SCR 256 – relied on.**

Bachan Singh v. State of Punjab **(1980) 2 SCC 684 – referred to.**

Case Law Reference:

1977 (1) SCR 229	**Relied on**	**Paras 21,27**
(2011) 13 SCC 706	**Relied on**	**Para 21**
(1980) 2 SCC 684	**Referred to**	**Para 22**
1977 (3) SCR 636	**Relied on**	**Para 28**
1981 (3) SCR 270	**Relied on**	**Para 29**
1989 (2) SCR 498	**Relied on**	**Para 30**
1991 (2) SCR 256	**Relied on**	**Para 31**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 864 of 2006.

From the Judgment & Order dated 22.12.2005 of the High Court of Judicature at Bombay in Criminal Appeal No. 46 of 2000 and 789 of 2001.

Sushil Karanjakar, K.N. Rai for the Appellants.

Shankar Chillarge, A.G.A., Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Death sentence has been awarded by the High Court of Bombay to Ajay Pandit @ Jagdish Dayabhai Patel for double murder, in separate incidents, one for the murder of Nilesh Bhailal Patel and another for the murder ofJayashree. The Bombay High Court heard both the appeals - Criminal Appeal No. 46 of 2000 and Criminal Appeal No. 789 of 2001 together and rendered acommon judgment on 22nd December, 2005 confirming the order of conviction and enhancing the sentence of life imprisonment to death and ordered to be hanged till death against which this appeal has been preferred.

2. The accused Ajay Pandit @ Jagdish Dayabhai Patel was a dentist by profession, known as Doctor Jagdish Patel at his Dhabasi Mohalla, District Kheda, Gujarat. He possesses a degree in Dental Hygienist and Dental Mechanic (D.H.D.M.) from the Gujarat University. Professional income was not sufficient for him to lead a lavish and luxurious life, he had other evil and demonic ideas in mind, to make quick and easy money. Self publicity was given of his make-belief contacts with the officials of the American Embassy by which he lured the vulnerable into his net, for sending them to America for better prospects in life. Several persons fell in his net like Nilesh and Jayashree and few others narrowly escaped from theclutches of death.

3. We may first deal with the facts arising out of the judgment of the Bombay High Court in Criminal Appeal No. 46 of 2000 in which the High Court, convicted the accused under Section 419 of the Indian Penal Code (for short 'the IPC) and sentenced to suffer R.I. for one year, under Section 420 of the IPC, R.I. for two years and fine, under Section 302 of the IPC life imprisonment with fine which was converted to death.

4. Doctor Jagdish Patel - the accused had developed contacts with a family of one Dilip Manilal Patel and he used to visit their house at Bhayandar and Kandivali since 1993. During those visits, the accused used to boost that he had contacts with the officials of the American Embassy which kindled hopes in the minds of Dilip Patel and his family members and they decided to send Nilesh Bhailal Patel, cousin brother of Smt. Sarala Patel, wife of Dilip Patel, to America using the accused's alleged influence in the American Embassy. A deal was struck and the accused demanded an amount of Rs.2,50,000/- for realization of their dream. Negotiations took place and the amount was reduced to Rs.1,10,000/- as an initial payment, and the balance was to be paid after getting Nilesh employment in America. Dilip Patel in October 1993 paid Rs.60,000/- to the accused and the balance amount of Rs.50,000/- was paid by Mahendra Bhailal Patel, brother of the deceased - Nilesh to the accused. Noticing that even after payment of money, the accused was not fulfilling his promises, various meetings and phone calls took place between the accused and the family of Nilesh. The accused reiterated his promise and later asked Dilip Patel to send Nilesh to Bombay Central Railway Station on 8.2.1994 with return ticket of the accused. The accused had also requested Dilip Patel a further amount of Rs.3500/- towards medical expenses and also for arranging visa. Dilip Patel had assured the accused that he himself would be coming to Bombay with the required amount. As promised, Dilip Patel reached Bombay in the afternoon of 8.2.1994 and found the accused waiting at Bhulabhai Desai Road near the American Consulate. The

accused told Dilip Patel that the necessary papers had been submitted to the Consulate and asked to leave the place. Dilip Patel accordingly left the place and that was the last time, Dilip Patel saw Nilesh in the company of the accused that was around 3 o' clock. In the evening of 8.2.1994 at about 5 o' clock, Dilip Patel received a phone call from the accused stating that the formalities had been completed and Nilesh would be coming home late in the night. Dilip Patel reached home but not Nilesh. Dilip Patel contacted the accused in the morning of 9.2.1994 and he was informed by the accused that Nilesh was waiting upto 5.30PM on the previous day at Bombay Central Railway Station and that he would be back. Dilip Patel contacted the accused on several occasions to know whereabouts of Nilesh. Meanwhile an attempt was made by the accused through one Tikabhai to inform Dilip Patel that Nilesh had already left for America.

5. Dilip Patel in November 1994 read in a local newspaper Sandhya Jansatta of a news item of an incident of attempt to murder and murder by administering some tablets to three persons by one Doctor by name Jagdish. Dilip Patel also read in Mid Day Evening Daily dated 5.11.1994 about arrest of Dr. Jagdish Patel - the accused. On the basis of this information, Dilip Patel approached Gamdevi Police Station on 13.11.1994 and narrated the entire story to the police. The statement was accordingly recorded and a photograph of the dead body of unidentified person found in Room No. 103 of the Hotel Aradhana at Nana Chowk in the evening of 9.2.1994 was also shown. In the evening of 8.2.1994, the accused had booked Room No. 103 on the first floor of that Hotel. The accused left the Hotel about 7.45PM in the evening of 8.2.1994 keeping the room locked and he did not return. On 9.2.1994, for the purpose of cleaning the room, it was opened with a duplicate key and the dead body of Nilesh was found. The dead body was sent for post-mortem but prior to that police completed other formalities, finger print experts also did their job, articles received were sent to the Forensic Laboratory, C.A. report was

obtained. Till August 1994, there was no trace of the suspect and the investigation was continuing. In fact on 30.8.1994, case was classified as true but not detected. The accused was, however, arrested by Malabar Hill Police in C.R. No. 278/94 for murdering one woman - Jayashree and for the attempted murder of two other persons at Hotel Kemps Corner. The accused was identified by Dilip Patel, his wife Sarala Patel and Mahendra Patel - brother of the deceased - Nilesh. This was the brief background of the first case.

6. We will now refer briefly to the facts of the second case which came up before the Bombay High Court vide Criminal Appeal No. 789 of 2001. In the second case, Dr. Jagdish Patel had three persons in his net aspiring for better prospects in America. One Kaushikbhai Sanabhaiu Patel was leading a normal family life with his wife Jayashree at Labhvel, District Anand, in the State of Gujarat. One Jagdish @ Harishbhai Patel was the cousin brother of Jayashree. All the three were also dreaming better prospects in America. In fact, they had contacted Joy Travel Agency for the said purpose in October 1994. Kaushikbhai was told by the owner of Joy Travels that the expenses of sending one person to America would be around Rs.7,23,000/-. Kaushikbhai paid Rs.20,000/- to the travel agent for himself and Jagdish. While he was nurturing the idea of going to America, the accused seized that opportunity and got acquainted with Kaushikbhai and Jagdish. The accused promised that he would realize their dreams for which he demanded a huge sum. Kaushikbhai expressed his inability to the accused to pay such huge amount for a person to go to America and consequently withdrew his request. The accused, however, could prevail upon him by suggesting that he would arrange a loan for him for the time being through one Ramchandra and he only need to purchase the tickets. On the accused initiative, Ramchandra visited the house of Kaushikbhai on 1.11.1994 and gave Rs.4,00,000/- to him, as instructed by the accused, by way of loan.

7. Kaushikbhai, his wife - Jayashree and Jagdish then boarded the train to Bombay Central from Baroda Railway Station. Few of their relatives were present at the Railway Station, Baroda to see them off to Bombay. Accused reached Bombay Central Railway Station in the early hours of 2.11.1994 and all the three along with the accused went to the Hotel Kemps Corner and two Rooms Nos. 202 and 206 were booked in the name of the accused. The accused informed them that all the requisite formalities had been completed and a Doctor, who was supposed to issue the medical certificate, would be coming at 4.30 pm on the same day to the hotel for medical check-up. The accused demanded money for completing other formalities, Rs.60,000/- was received from Kaushikbhai and Rs.40,000/- was received from Jagdish. A cheque drawn on Punjab National Bank, Anand for Rs.14,50,000/-, one promissory note of Rs.8,50,000/- and Rs.4,37,000/- were given to the accused by Kaushikbhai. Later, the accused gave one capsule and two tablets each to Kaushikbhai, Jayashree and Jagdish which they were asked to take before the medical check-up, which they did. Later, Jayashree went to Room No. 202 and Kaushikbhai and Jagdish remained in Room No. 206. Kaushikbhai and Jagdish started feeling drowsiness and a sleeping sensation and they lied down on the bed. The accused then administered an injection on the abdomen of Kaushikbhai who went fast asleep. Jagdish by that time was already fast asleep and that was the last time, they saw the accused. In the mid-night, Kaushikbhai regained consciousness, he felt some foul play and alerted the Hotel Manager and they went to the room of Jayashree and got the room opened, but Jayashree was found dead. Intimation was given to Malabar Hill Police Station and complaint of Kaushikbhai was recorded. Police arrested the accused in November 1994.

8. The trial court as well as the High Court had elaborately discussed the various steps taken by the investigating agency to unravel the truth and hence, we are not dealing with those facts in detail. The prosecution in the case of death of Nilesh

examined 17 witnesses. PW1 to PW4 are the employees of the hotel and PW5 and PW6 are the relatives of the deceased - Nilesh. We have also gone through the evidence of other witnesses critically and it is unnecessary to repeat what they have said, since the trial court as well as the High Court had elaborately discussed the evidence given by those witnesses.

9. So far as the death of Nilesh is concerned, there was no eye witness to the incident and the guilt of the accused could be brought out by the prosecution only by circumstantial evidence. The direct evidence of PW5 and PW6 preceded the death of Nilesh. Therefore, it is necessary to deal with their evidence. PW5 is the sister of the deceased - Nilesh by name Sarala Dilip Patel. She had deposed that she knew the accused since 1991. Further, she had deposed that in January 1993, the accused made a proposal about sending the deceased - Nilesh to America for which he demanded Rs.3,50,000/-. The evidence clearly indicates what had happened from 1993 till the death of Nilesh. She stated that after Nilesh had gone to Bombay, his whereabouts were not known. She had also deposed that on 27.3.1994, her husband lodged a complaint at Kandivali Police Station since Nilesh was found missing. Further, they had also noticed the news item appeared in various newspapers about the arrest of the accused in respect of some other case. On 13.11.1994, her husband had again lodged a complaint as to missing of Nilesh. She had also narrated the steps they had taken on coming to know that her brother - Nilesh was missing. Evidence given by this witness is consistent with the case of the prosecution and there is no reason to disbelieve the version of this witness.

10. PW6 Dilip Patel, the husband of PW5 - had deposed that he knew the accused since 1991 and the accused had come with the proposal for sending Nilesh to America stating that he had good connections with the officials of the American Embassy. Details of the amounts paid for the said purpose was also given, in detail, in his deposition. The details of the various

telephone calls he had with the accused before the incident as well as after the incident were minutely stated in his oral evidence. PW6 had also deposed that he had also gone to Bombay with cash as directed by the accused. Further, he had also deposed that on 8.2.1994, Nilesh had left his house for Bombay and that PW6 had also gone to Bombay since the accused asked him to meet at Opera house at 11.30AM on 8.2.1994. PW6, it was stated, saw the accused and Nilesh near the bus stop of Blobe Radio. The accused told him that at about 3.00 pm on 8.2.1994 he had submitted the papers before the Embassy and asked PW6 to leave the place stating that Consulate would not like the presence of too many persons. PW 6, therefore, left the place leaving behind the accused and Nilesh. Nilesh did not return home, search was made and a complaint was lodged on 28.3.1994 at Kandivali Police Station. On 6.9.1994, notice was sent through advocate to Kandivali Police Station. PW 6 also stated that he had met accused at village Borsad Chaukadi and the accused gave evasive answers. Later, PW 6 came across a news item in Sandhya Jansatta wherein reference was made to one Dr. Jagdish who had committed murder and attempted to commit murder of few other persons. News item also appeared in other newspapers as well.

11. PW 6 was cross-examined at length but the defence could not demolish his evidence or the evidence of other witnesses including that of PW5. Evidence, in this case, proved beyond reasonable doubt that it was the accused who lured Nilesh for sending him to America. Facts would clearly indicate that it was the accused who had extracted money giving false hopes. The deceased was also seen by PW 6 last, in the company of the accused. PW 6 had also made payment to the accused for medical expenses. PW 5 and PW 6, therefore, proved the chain and links from the stage of acquaintance with the accused till the stage of Nilesh being seen in the custody or company of the accused, for the purpose of sending Nilesh to America.

12. The prosecution had examined PW 1 to PW 4 to prove the subsequent events and the steps taken. PW 1 to PW 4 were all attached to Hotel Aradhana or guest house of Aradhana. PW 1 is an independent witness - Manager of the Hotel Aradhana. He narrated what had happened at his Hotel. PW 1 also saw the deceased in the company of the accused. He saw the accused taking Nilesh in Room No. 103 and later coming back alone leaving the hotel without handing over the key at the reception counter. Nothing had been brought out in the cross examination of these witnesses to contradict what he had stated.

13. Sister of the accused was also examined in this case as PW 14, she had narrated, in detail, the professional and other details of the -accused. The evidence of the rest of the witnesses had also been elaborately dealt with by the High Court. Learned counsel appearing for the accused had also not seriously attacked the findings and reasoning given by the trial court as well as the High Court in ordering conviction and his thrust was on the quantum of sentence awarded, and later death penalty.

14. We have already indicated the modus operandi adopted by the accused in the second case was also almost the same. Few facts of this case have already been dealt in the earlier paragraphs of this judgment and hence, we may directly come to the evidence of the key witnesses in this case. Jayashree - the victim was poisoned by the accused at Hotel Kemps Corner.PW 1 and PW 5 were direct victims of the accused who fortunately survived. PW 1 was the husband and PW 5 was the brother of Jayashree - the deceased. PW 1 and PW 5 had narrated, in detail, what transpired prior to the incident. The details of the money paid to the accused for sending them to America had been elaborately stated in their oral evidence and the same had been extensively dealt with by the trial court as well as the High Court, hence, we are not repeating the same. They were cross-examined, at length, by

the defence. Nothing was brought out to discredit their version. There was no reason for these witnesses to depose falsely against the accused and they have no motive in doing so. Evidence of PW 1 and PW 5 are consistent and have not been shaken at all by the defence. No doubt has been created about the veracity of their testimony. PW 1 and PW 5 were the direct victims and were also the eye witnesses to the entire transaction and we have critically gone through the evidence adduced by PW 1 and PW 5 and nothing was brought out to discredit their evidence.

15. The prosecution examined sixteen witnesses - PW 2, PW 4, PW 14 were the staff members of the hotel Kemps Corner - they had narrated, in detail, the manner in which the accused booked the room, paid the amount, took the three witnesses to both the rooms. The hotel witnesses identified the accused in the court as well as in the identification parade. The prosecution examined PW 8 panch witnesses before whom the accused voluntarily gave statement u/s 27 of the Evidence Act which led to the discovery of huge cash amount, cheques, promissory notes and various articles like passports, rubber stamps etc.

16. PW 6 was a Doctor who examined PW 1 and PW 5 and found they were under the influence of sedatives and in a drowsy condition. We have also gone through, critically, the oral evidence and the documents produced in this case and found no reason to take a different view from that of the trial court and the High Court on conviction. We have also gone through the statement under section 313 Cr.P.C. made by the accused in both the cases which was of total denial of the crime. The accused, a professional, wanted to make quick and easy money and in that process lured people giving false hopes of sending them to America utilizing his alleged contacts with the American Embassy. The accused, though educated, brought discredit to his profession and to the dentist community in general. Education and professional standing had no influence

on the accused and his only motto was to make quick money and for achieving the same, he would go any extent and the Dentist turned killer gave no value to the human life. The Dentist took away the life of two human beings as if he was uprooting two teeth.

17. Nilesh - the deceased, victim in the first case was an unmarried boy of 25 years and yet to become mature enough to know the world around him. All the hopes dashed on the eventful day when he was murdered in a brutal manner not only by inflicting injuries by deadly weapon on vital parts of the body but also injuries on the testis causing him immense suffering and pain.

18. Jayashree, the deceased - victim was administered excessive tablets by the Dentist turned killer and Jayashree died of that in the night of that fateful day. The medical evidence clearly indicates that Kaushikbhai, Jayashree and Jagdish had taken one capsule and two tablets. The accused had advised them to take the tablets prior to medical check-up so that they must get favorable medical certificates. Kaushikbhai and Jagdish started feeling drowsiness. Kaushikbhai was about to regain consciousness but the accused gave an injection on his abdomen. Kaushikbhai tried to avoid the injection but could not resist due to drowsiness and injection was administered due to which he went fast asleep. Unfortunately, Jayashree succumbed to the poison administered and died. The Bombay High Court noticing the ghastly manner in which the accused had murdered Nilesh as well as Jayashree and poisoned PW 1 and PW 5, considered it as a rarest of rare case warranting death sentence.

19. The High Court heard the arguments of the advocate for the accused as well as the prosecutor on the point as to whether the High Court could enhance the sentence of the accused from life to death. Having noticed that the High Court has the power to enhance the sentence from life imprisonment to death, the High Court issued a notice on 1.12.2005 to the

accused to show cause why the sentence of life imprisonment be not enhanced to death sentence. The operative portion of the order reads as follows:

> "We have heard the arguments of learned advocate for the petitioner as well as learned APP for the State for quite some time on two occasions. In exercise of suo-moto powers and on the basis of judgment of the Supreme Court, it will be necessary to hear the accused as to why his sentence should not be enhanced from life imprisonment to death. Therefore, the accused be produced by the Kalyan District Prison Authorities before this Court on 12th December 2005.
>
> Learned counsel to inform the Jailor, Kalyan District Prison authorities that the matter is kept on 12th December 2005."

20. The accused was produced before the Court on 12th December 2005 but the advocate representing the accused was absent. Consequently, the matter was adjourned to 13.12.2005. On 13.12.2005, the accused as well as his advocate were present and the Court on 13.12.2005 recorded the following statement of the accused which reads as follows:

> "(Accused understands English. He gives the statement in English. We are recording the same in his own language.) I am not involved in the case. The travel agent should also have been implicated in this case. I am not involved. I am not guilty. (Repeatedly the accused was informed by us about the nature of the show cause notice given. He made the aforesaid statement and he does not want to say any more.
>
> Matter adjourned to 22nd December, 2005 at 3.00 for Judgment. Accused to be produced on that day."

21. Mr. Sushil Karanjakar, learned advocate appearing for

the accused submitted that the High Court has not followed the procedure laid down under Section 235(2) of the Code of Criminal Procedure (for short 'the Cr.P.C.) before enhancing the sentence of life imprisonment to death. Learned counsel pointed out that having regard to the object and the setting in which the new provision of Section 235(2) was inserted in the 1973 Code, there can be no doubt that it is one of the most fundamental parts of the criminal procedure and non-compliance thereof will ex facie vitiate the order. In support of his contention, learned counsel placed reliance on the judgment of this Court in *Santa Singh v. State of Punjab;* (1976) 4 SCC 190 and a recent judgment in *Rajesh Kumar v. State through Government of NCT of Delhi;* (2011) 13 SCC 706.

22. Mr. Shankar Chillarge, learned counsel appearing for the State, submitted that in the facts and circumstances of this case, the High Court was justified in according maximum sentence of death penalty, since on facts, it was found to be a rarest of rare case and the test laid down by this Court in *Bachan Singh v. State of Punjab;* (1980) 2 SCC 684 has been fully satisfied. Learned prosecutor submitted this is a case of double murder and attempt to commit murder of two others and the manner in which the same was executed was gruesome. Further, it was pointed out that the procedure laid down under Section 235(2) Cr.P.C. was fully complied with and there is no reason to upset the conviction/ sentence awarded by the High Court.

23. We heard the learned counsel on either side on this point at length. The original file made available to this Court did not contain the copy of show cause notice dated 1.12.2005 issued by the High Court as well as the full text of the order passed by the High Court on 13.12.2005 recording the statement of the accused. We passed an order on 11.04.2012 to produce the original files to examine whether the High Court had followed the procedure laid down under Section 235(2) Cr.P.C. Records were made available and we went through

those records with great care. We have also perused the full text of the show cause notice dated 1.12.2005 issued by the High Court and the statement recorded by the High Court under Section 235(2) Cr.P.C. after summoning the accused.

24. We have to examine whether the High Court has properly appreciated the purpose and object of Section 235(2) Cr.P.C. and applied the same bearing in mind the fact that they are taking away the life of a human being.

25. Section 235 Cr.P.C. in its entirety is extracted for reference:

" 235. Judgment of acquittal or conviction -

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law."

The necessity of inserting sub-section (2) was highlighted by the Law Commission in its 41st Report which reads as follows:

"It is now being increasingly recognized that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. *One such deficiency is the lack of comprehensive information as to the characteristics and background of the offender. The aims of sentencing become all the more so in the absence of information on which the correctional process is to operate.* The public as well as the courts themselves are in the dark about the judicial approach in this regard. We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be

encouraged, and both the prosecution and the accused should be allowed to co-operate in the process."

The Law Commission in its Report had opined that the taking of evidence as to the circumstances relevant to sentencing should be encouraged in the process. The Parliament, it is seen, has accepted the recommendation of the Law Commission fully and has enacted sub-section (2).

26. The scope of the abovementioned provision has come up for consideration before the Apex Court on various occasions. Reference to few of the judgments is apposite. The courts are unanimous in their view that sub-section (2) of Section 235 clearly states that the hearing has to be given to the accused on the question of sentence, but the question is what is the object and purpose of hearing and what are the matters to be elicited from the accused. Of course, full opportunity has to be given to produce adequate materials before the Court and, if found, necessary court may also give an opportunity to lead evidence. Evidence on what, the evidence which has some relevance on the question of sentence and not on conviction. But the further question to be examined is whether, in the absence of adding any materials by the accused, has the Court any duty to elicit any information from whatever sources before awarding sentence, especially capital punishment. Psychological trauma which a convict undergoes on hearing that he would be awarded capital sentence, that is, death, has to be borne in mind, by the court. Convict could be a completely shattered person, may not be in his normal senses, may be dumbfound, unable to speak anything. Can, in such a situation, the court presume that he has nothing to speak or mechanically record what he states, without making any conscious effort to elicit relevant information, which has some bearing in awarding a proper and adequate sentence. Awarding death sentence is always an exception, only in rarest of rare cases.

27. In *Santa Singh* (supra), this Court has extensively dealt

with the nature and scope of Section 235(2) Cr.P.C. stating that such a provision was introduced in consonance with the modern trends in penology and sentencing procedures. The Court noticed today more than ever before, sentencing has become a delicate task, requiring an inter-disciplinary approach and calling for skills and talents very much different from those ordinarily expected of lawyers. In *Santa Singh,* (supra) the Court found that the requirements of Section 235(2) were not complied with, inasmuch as no opportunity was given to the appellant, after recording his conviction, to produce material and make submissions in regard to the sentence to be imposed on him. The Court noticed in that case the Sessions Court chose to inflict death sentence on the accused and the possibility could not be ruled out that if the accused had been given an opportunity to produce material and make submissions on the question of sentence, as contemplated by Section 235(2), he might have been in a position to persuade the Sessions Court to impose a lesser penalty of life imprisonment. The Court, therefore, held the breach of the mandatory requirement of Section 235(2) could not, in the circumstances, be ignored as inconsequential and it can vitiate the sentence of death imposed by the Sessions Court. The Court, therefore, allowed the appeal and set aside the sentence of death and remanded the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the accused to be heard. Further, in *Santa Singh,* the Court also held as follows:

> "The hearing contemplated by Section 235(2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the purpose of establishing the same."

28. The above issue again came up before this Court in

Dagdu & Ors. v. State of Maharashtra; (1977) 3 SCC 68; wherein the three Judges Bench,referring to the judgment in Santa Singh, held as follows:

> "The Court on convicting an accused must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that court to remedy the breach by giving a hearing to the accused on the question of sentence."

It further held as follows:

> "....for a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction....Remand is an exception, not a rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases"

29. Again in *Muniappan v. State of Tamil Nadu;* AIR 1981 SC 1220; this Court held as follows:

> "The obligation to hear the accused on the question of sentence which is imposed by Section 235(2) of the Criminal Procedure Code is not discharged by putting a formal question to the accused as to what he has to say on the question of sentence. The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence."

30. Later, in *Allauddin Mian & Ors. v. State of Bihar;* (1989) 3 SCC 5, this Court also considered the effect of non-compliance of Section 235(2) Cr.P.C. and held that the provision is mandatory. The operative portion of the judgment reads as follows:

> "The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the Courts are generally required to make the choice from a wide range of discretion in the matter of sentencing. To assist the Court in determining the correct sentence to be imposed the legislature introduced Sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the Court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the Court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality."

31. Later, three Judges Bench in *Malkiat Singh v. State of Punjab;* (1991) 4 SCC 341 indicated the necessity of adjourning the case to a future date after convicting the accused and held as follows:

> "On finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the Court facts and material relating to various factors on the question of sentence and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating

grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be."

32. This Court in a recent judgment in *Rajesh Kumar* (supra) examined at length the evaluation of sentencing policy and the concept of mitigating circumstances in India relating to the death penalty. The meaning and content of the expression "hearing the accused" under Section 235(2) and the scope of Sections 354(3) and 465 Cr.P.C. were elaborately considered. The Court held that the object of hearing under Section 235(2) Cr.P.C. being intrinsically and inherently connected with the sentencing procedure, the provisions of Section 354(3) Cr.P.C. which calls for recording of special reason for awarding death sentence, must be read conjointly. The Court held that such special reasons can only be validly recorded if an effective opportunity of hearing as contemplated under Section 235(2) Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence.

33. In our view, the principles laid down in the above cited judgments squarely applies on the question of awarding of sentence and we find from the records that the High Court has only mechanically recorded what the accused has said and no attempt has been made to elicit any information or particulars from the accused or the prosecution which are relevant for awarding a proper sentence. The accused, of course, was informed by the Court of the nature of the show-cause-notice. What was the nature of show cause notice? The nature of the show-cause-notice was whether the life sentence awarded by the trial court be not enhanced to death penalty. No genuine effort has been made by the Court to elicit any information either

from the accused or the prosecution as to whether any circumstance exists which might influence the Court to avoid and not to award death sentence. Awarding death sentence is an exception, not the rule, and only in rarest of rare cases, the Court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Cr.P.C.

34. In such circumstances, we are inclined to set aside the death sentence awarded by the High Court and remit the matter to the High Court to follow Section 235(2) Cr.P.C. in accordance with the principles laid down. The conviction awarded by the High Court, however, stands confirmed. The High Court is requested to pass fresh orders preferably within a period of six months from the date of the receipt of the copy of this order. The appeal is allowed to that extent.

K.K.T. Appeal partly allowed Matter remitted to High Court to decide the question of sentence.

SHYAMAL GHOSH
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 507 of 2007 etc.)

JULY 11, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

ss. 302, 201, 379, 411 r/w. s. 34 – Prosecution under – Of eight accused – For killing one person and disposing of the body, after cutting it, in gunny bags – Accused absconding immediately after the incident – Circumstantial evidence as well as eye-witnesses to different events – Recovery of weapon of offence and the vehicle used for carrying the mutilated body – Trial court convicting all the accused and sentencing them to death – High Court affirming the conviction except u/s. 379 and sentencing the accused to life imprisonment – On appeal, held: Order of High Court affirmed – The prosecution case is supported by the evidence of eye-witnesses who are reliable and trustworthy – Background of the accused, their conduct in absconding immediately after the incident and their statement u/s. 313 Cr.P.C. also supports prosecution case – The evidence establishes last seen together theory – Prosecution has also proved the chain of events – Code of Criminal Procedure, 1973 – s. 313.

s. 34 – Common intention – Applicability and nature of – Held: For applicability of this provision, two factors must be established i.e. common intention and participation in crime – The provision involves vicarious liability for the act of others – On facts, ingredients of presence of more than two persons, existence of common intention and commission of an overt act stand established.

Code of Criminal Procedure, 1973 – s. 162 Explanation – Contradiction and omission – What amounts to – Held: Omission of fact or a circumstance in the statement u/s. 161 Cr.P.C. may amount to contradiction – However, the question whether the omission amounts to contradiction is a question of fact in each case – The concept of contradiction in evidence cannot be stated in absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is contradiction or material contradiction – Criminal jurisprudence.

Criminal trial – Contradictions and omissions in evidence – Effect on prosecution case – Held: Minor contradictions, inconsistencies or embellishments of trivial nature which do no affect the case of the prosecution cannot be a ground to reject the prosecution in its entirety – Serious contradictions and omissions materially affecting the prosecution case to be understood in clear contra-distinction to marginal variations in the statements of witnesse.

Witnesses:

Hostile witness – Held: Statement of hostile witness can also be relied upon, to the extent it supports prosecution case.

Related witness – Mechanical rejection of the evidence of witness related to the deceased would relate to failure of justice – However, the court has to be careful in evaluating such evidence.

Evidence – Onus to prove – Murder case – Circumstantial evidence – Last seen together – Held: Once the last seen together theory comes into play, the onus to explain as to what happened to the deceased after they were last seen, is on the accused.

Test Identification Parade – Nature of – Failure to hold – Effect of – Held: Identification Parade is a tool of investigation

– It is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence – Its purpose is to test and strengthen the trustworthiness of the evidence – This rule of prudence is subject to exceptions – Failure to hold TI Parade, does not by itself render the evidence of identification in court inadmissible or unacceptable.

Investigation – Held: Defects in investigation, by itself cannot be a ground for acquittal.

Words and Phrases – ' Common Intention' – Meaning of, in the context of s. 34 IPC.

Appellants-accused along with other accused were prosecuted for causing death of one person. The prosecution case was that the deceased had constructed some shop on his land. The accused persons demanded Rs. 40,000/- from the deceased towards 'Tola Mastani Salami' for the construction of the shops. The deceased refused to succumb to the demand and therefore, the accused threatened to murder him.

On the day of the incident, at 9.00 P.M., the deceased had gone to one 'Ç' in respect of his business, on a bicycle. From there, he retuned to his house at 10.00P.M. On the way, he was restrained by the accused. The accused killed him by strangulation. Thereafter, they cut the body into pieces with a sharp cutting weapon and after putting the same in gunny bags, carried them in a van in the night of the following day and left the same at some place. PW 15 saw those gunny bags and reported the matter to the police. FIR was lodged and case was registered u/ss. 302/201/34IPC against unknown miscreants.

The wife and brother of the deceased, had lodged a Missing Diary Report. They were called to the police

station to identify the dead body. Driver of the van was arrested. The van was recovered on the basis of his statement. All the accused were arrested on different dates. The cycle used by the deceased was recovered.

The accused were charged u/ss. 302, 201, 379, 411 r/w. s. 34 IPC. Trial court found them guilty of all the charges and sentenced them to death. High Court maintained their conviction except u/s.379/34 IPC, answered the death reference in the negative and awarded R1 for life and fine of Rs. 5000/-. The present appeals were filed by four of the accused.

The appellants *interalia* contended that the present case, being a case of circumstantial evidence, does not complete chain of events; that the prosecution case was not reliable because PWs 13 and 23 turned hostile; that the crucial witnesses PWs 8, 17 and 19 did not name the appellant-accused 'SH'; that there was delay in recording evidence of the witnesses; that conviction could not be based on the evidence of related witnesses; that the accused were not named in the FIR; that the appellant-accused was not identified in TI Parade; and therefore, conviction was not justified. They also contended that s. 34 IPC is not attracted as there was no common intention and participation by all the accused.

Dismissing the appeals, the Court

HELD: 1.1. It is not correct to say that the complete chain of circumstantial evidence having not been established, the accused are entitled to acquittal. This is not purely a case of circumstantial evidence. There are eye-witnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in gunny bags into Maruti Van. Evidence establishing the

'last seen together' theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW8, PW17 and PW19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent, it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/plausible explanation in this regard. [Para 42] [139-E-H; 140-A-C]

Mousam Singha Roy and Ors. v. State of W.B. **(2003) 12 SCC 377 – referred to.**

1.2. The statements of PWs 8, 17, 19, 7, 9 and 11 completely establish that the deceased was last seen with the accused and they were responsible for assaulting and strangulating him and they were also witnessed loading the parts of the human dead body into the Maruti van. Resultantly, as per the prosecution, both the vital circumstances i.e. commission of murder as well as disposal of the body of the deceased have been proved. [Para 25] [125-F-G]

1.3. The evidence of PWs 4, 6, 8, 17, 19, 7,9,11, 2, 1, PW 16 (doctor) and PW10 completes the chain of events and establishes the case of the prosecution beyond any reasonable doubt. The facts, right from the departure of the deceased from his house to recover money, upto the recovery of mutilated body of the deceased, have been

proved by different witnesses, including some eye-witnesses. [Para 32] [131-A-B]

1.4. Application of the 'last seen theory' requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eye-witnesses to the strangulation of the deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW-17 is the witness to the altercation between the accused and the deceased. PW-8 is the witness to the strangulation of the deceased by the accused persons. Besides, PW-7, PW-9 and PW-11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti Van by the accused. Thus, these facts have been established by independent witnesses. As far as the death of the deceased is concerned, there was hardly any time gap between the two incidents, i.e. the last seen alive and the fact of death of the deceased becoming known. All the events occurred between 11.00 p.m. to 12.00 a.m. at midnight of 29th September, 2003. [Paras 51, 53 and 54] [144-C; 145-B-D, G-H]

S.K. Yusuf vs. State of West Bengal **(2011) 11 SCC 754: 2011 (8) SCR 83 – relied on.**

Mohd. Azad @ Samin vs. State of West Bengal **(2008) 15 SCC 449: 2008 (15) SCR 468;** *State through Central Bureau of Investigation vs. Mahender Singh Dahiya* **(2011) 3 SCC 109: 2011 (1) SCR 1104 – referred to.**

1.5. The conduct of the accused persons i.e. absconding immediately after the date of the occurrence is important. They had left the village and were not available for days together. Absconding in such a manner and for such a long period is a relevant consideration. Even if it is assumed that absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run away for fear of being falsely involved in criminal cases, but in the present case, in view of the circumstances it is clear that absconding of the accused not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them. [Para 41] [138-G-H; 139-A-B]

Rabindra Kumar Pal @ Dara Singh v. *Republic of India* **(2011) 2 SCC 44 – relied on.**

1.6. There are recoveries of the weapon of offence as well as the vehicle which was used by the accused persons for carrying the mutilated body parts of the deceased person. Further, the recovery of the cycle that was owned by the deceased provides a definite link as it was recovered in furtherance to the statement of three accused. The recoveries affected by the Investigating Officer, PW28 can hardly be questioned in fact and in law. [Para 28] [126-F-H]

1.7. The mere fact that the two witnesses viz. PW 13 and PW 23 had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove, stand already fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW23 was witness to the

recovery of the Maruti Van along with PW24, PW25 and PW26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of the driver of the van that the vehicle had been recovered. Other witnesses have proved that the said vehicle was used for carrying the gunny bags containing the mutilated parts of the dead body of the deceased. PW13 is a witness who was at the railway station rickshaw stand along with other two witnesses namely PW9 and PW11 who have fully proved the fact as eye-witnesses to the loading of the gunny bags into the Maruti van. Secondly, even the version given by PW13 and PW23 partially supports the case of the prosecution, though in bits and pieces. Their statements have partially supported the case of the prosecution. It is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. [Para 33] [131-G-H; 132-A-C; E-F]

Govindaraju @ Govinda v. *State by Sriramapuram P.S. and Anr.* **(2012) 4 SCC 722 – relied on.**

1.8. No doubt when the court has to appreciate evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind.

Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements. [Paras 37 and 38] [135-C; 136-C-D]

Brathi alias Sukhdev Singh v. State of Punjab **(1991) 1 SCC 519: 1990 (2) Suppl. SCR 503 – relied on.**

State of Orissa v. Brahmananda Nanda **(1976) 4 SCC 288;** *Maruti Rama Naik v. State of Maharashtra* **(2003) 10 SCC 670 – referred to.**

1.9. Of course, there are certain discrepancies in the investigation inasmuch as the Investigating Officer failed to send the blood stained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/ lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not sending the gunny bags to the FSL cannot be said to be fatal to the case of prosecution in the circumstances of the present case. 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. [Para 40] [137-D-G-H; 138-A]

C. Muniappan v. State of Tamil Nadu **(2010) 9 SCC 567: 2010 (10) SCR 262;** *Sheo Shankar Singh v. State of*

Jharkhand and Anr. **(2011) 3 SCC 654: 2011 (4) SCR 312 – relied on.**

1.10. If the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the courts. The explanation offered by Investigating Officer on being questioned on the aspect of delayed examination by the accused has to be tested by the court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the Investigating Officer being pre-occupied in serious matters, the Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc. In the present case, it has come in evidence that the accused persons were absconding and the Investigating Officer had to make serious effort and even go to various places for arresting the accused. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the Investigating Officer. [Paras 37 and 38] [135-A-B-D-H; 136-A-C]

Banti alias Guddu v. State of M.P. **(2004) 1 SCC 414:**

2003 (5) Suppl. SCR 119; *State of U.P. v. Satish* **(2005) 3 SCC 114: 2005 (2) SCR 1132 – relied on.**

1.11. The appellant-accused took the plea that he was not named in the FIR, was not identified in police custody and was also not named by PW8 in his statement, and that since none of the accused was named in the FIR, it was a case of blind murder at that stage and was so registered by the police. It is true that the appellant-accused was not named by PW8, had only named six accused persons. All the three eye-witnesses to altercation and strangulation viz. PW8, PW17 and PW19 named some of the accused persons while did not name others specifically. However, they identified all the accused persons in the court as the persons who were present at the time of the mischief, altercation and strangulation of the deceased. In the present case, the prosecution has been able to establish its case beyond reasonable doubt. [Paras 45 and 46] [141-A-D; 142-A]

Tika Ram v. State of Madhya Pradesh **(2007) 15 SCC 760 – relied on.**

1.12. From the content of Ext. 10 (FIR), *per se,* it is not evident as to by whom and how the offence was committed. It is a settled principle of law that FIR is not a substantive piece of evidence. However, during the course of investigation, the story leading to the commission of the crime got unfolded and pointed towards the guilt of the accused with certainty. [Para 14] [120-C-D]

2.1. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to

reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution. Another settled rule of appreciation of evidence is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety. [Para 47] [142-B-G]

2.2. In terms of the explanation to Section 162 Cr.P.C. which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation reveals that if a significant omission is made in a

statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. [Para 48] [142-H; 143-A-C]

Sunil Kumar Sambhudayal Gupta (Dr.) vs. State of Maharashtra **(2010) 13 SCC 657;** *Subhash vs. State of Haryana* **(2011) 2 SCC 715: 2010 (15) SCR 452 – relied on.**

2.3. The basic element which is unambiguously clear from the explanation to Section 162 CrPC is use of the expression 'may'. It is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially. [Para 49] [143-D-G]

2.4. It is true that there is some variation in the timing given by the eye-witnesses. PW8, PW17 and PW19 as to when they had seen the scuffling and strangulation of the deceased by the accused. Similarly, there is some variation in the statement of PW7, PW9 and PW11. Certain variations are also pointed out in the statements of PW2,

PW4 and PW6 as to the motive of the accused for commission of the crime. Every variation may not be enough to adversely affect the case of the prosecution. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. It is a settled principle of law that the court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. There is no material or serious contradiction in the statement of these witnesses which may give any advantage to the accused. [Para 34] [132-G-H; 133-A-B; 134-B-C]

3.1. CrPC does not oblige the investigating agency to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. [Para 57] [146-E-H]

Munshi Singh Gautam v. State of M.P. **(2005) 9 SCC 631: 2004 (5) Suppl. SCR 1092;** *Sheo Shankar Singh v State of Jharkhand and Anr.* **(2011) 3 SCC 654: 2011 (4) SCR 312 – referred to.**

3.2. Identification Parade is a tool of investigation and

is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case. [Para 58] [147-B-C]

3.3. Non-identification of the appellant-accused by the driver of the van is inconsequential in the present case. Firstly, for the reason that the driver of the van was never examined as a witness in the court and even his statement under Section 164 CrPC has not been relied upon by any court while convicting the accused. Secondly, not only one, but all the witnesses i.e. PW-7, PW-8, PW-9, PW-11, PW-17 and PW-19, duly identified the accused in Court and they did so without any demur or hesitation. The driver was a person who himself was under a threat and was asked to take the gunny bags for their disposal. [Para 59] [147-F-G]

4.1. Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the Section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase 'common intention' means a pre-oriented plan and acting in pursuance to the plan,

thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to the facts of a given case. [Para 64] [155-D-G]

Nand Kishore v. State of Madhya Pradesh **(2011) 12 SCC 120: 2011 (7) SCR 1152;** *Lallan Rai and Ors. v. State of Bihar* **(2003) 1 SCC 268: 2002 (4) Suppl. SCR 188;** *Dharnidhar v. State of Uttar Pradesh and Ors.* **(2010) 7 SCC 759: 2010 (8) SCR 173 – relied on.**

4.2. The ingredients of more than two persons being present, existence of common intention and commission of an overt act stand established in the present case. The statements of the witnesses clearly show that all the eight accused were present at the scene of occurrence. They had demanded money and extended threat of dire consequences, if their demand was not satisfied. Thereafter, they had altercation with the deceased and the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place. Thus, all these acts obviously were in furtherance to the common intention of doing away with the deceased, if he failed to give them Rs. 40,000/- as demanded. The offence was committed with common intention and collective participation. The various acts were performed by different accused in presence of each one of them. In other words, each of the accused had common intention. [Para 65] [155-H; 156-A-D]

Case Law Reference:

(2012) 4 SCC 722	**Relied on**	**Para 33**
(1976) 4 SCC 288	**Referred to**	**Para 35**

(2003) 10 SCC 670	**Referred to**	**Para 35**
1990 (2) Suppl. SCR 503	**Relied on**	**Para 36**
2003 (5) Suppl. SCR 119	**Relied on**	**Para 36**
2005 (2) SCR 1132	**Relied on**	**Para 36**
2010 (10) SCR 262	**Relied on**	**Para 40**
2011 (4) SCR 312	**Relied on**	**Para 40**
2010 (11) SCR 1064	**Referred to**	**Para 41**
(2011) 2 SCC 44	**Relied on**	**Para 41**
(2003) 12 SCC 377	**Referred to**	**Para 43**
(2007) 15 SCC 760	**Relied on**	**Para 46**
(2010) 13 SCC 657	**Relied on**	**Para 48**
2010 (15) SCR 452	**Relied on**	**Para 48**
2011 (8) SCR 83	**Relied on**	**Para 50**
2008 (15) SCR 468	**Referred to**	**Para 51**
2011 (1) SCR 1104	**Referred to**	**Para 51**
2004 (5) Suppl. SCR 1092	**Referred to**	**Para 57**
2011 (4) SCR 312	**Referred to**	**Para 57**
2011 (12) SCC 120	**Relied on**	**Para 61**
2002 (4) Suppl. SCR 188	**Relied on**	**Para 63**
2010 (7) SCC 759	**Relied on**	**Para 64**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 507 of 2007.

From the Judgment & Order dated 5.2.2007 of the High Court at Calcutta in C.R.A. No. 724 of 2005.

WITH

Crl. Appeal Nos. 1369 of 2007 & 539-540 of 2011.

Pradip Ghosh, J.K. Das, Yadunandan Bansal, Rauf Rahim, Subhasish Bhowick, Tanmay K. Ghosh, Swati Yadav, P.P. Nayak, Sudarshan Rajan, Md. Qamar Ali, Jayashree Narasimhan, Abhijit Sengupta, B.P. Yadav, Prakash Kumar, Chanchal Kumar Ganguli, R.Bhuyan, Raja Chatterjee, Sampa Sengupta, H.K, Puri for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Eight accused, namely, Panchanan Tarafdar @ Chotka, Uttam Das, Dipak Das @ Mou, Manoranjan Debnath @ Behari, Bishu Saha @ Chor Bishu, Satyajit Das @ Sadhu, Ganesh Das and Shyamal Ghosh, were charged with offences under Sections 302, 201, 379, 411 read with Section 34 of the Indian Penal Code, 1860 (for short, the 'IPC'). All these accused were found to be guilty of the offences with which they were charged by the Trial Court vide its judgment dated 13th September, 2005. After hearing them on the quantum of sentence, vide order dated 14th September, 2005, finding the offence to be that in the category of rarest of the rare cases, the Trial Court awarded sentence of death to all the accused persons for the offence under Section 302 IPC and directed that they be hanged by neck till they are dead, subject to confirmation by the Calcutta High Court. For the offence under Section 201 IPC, they were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.5,000/- each, in default to further undergo simple imprisonment for one year and for the offence under Section 379 IPC to undergo imprisonment of three years and fine of Rs.1,000/- each in default to undergo six months simple imprisonment.

2. Aggrieved by the judgment of conviction and order of sentence passed by the Trial Court, all the accused preferred

five different appeals before the High Court and prayed for setting aside the judgment of the Trial Court and their consequential acquittal. The High Court, vide its judgment dated 5th February, 2007, while answering the death reference in the negative, acquitted all the accused persons of the offence under Section 379 read with Section 34 IPC. However, while sustaining their conviction under Section 302 read with Section 34 IPC, the Court awarded them rigorous imprisonment for life and to pay a fine of Rs.5,000/- each in default to undergo rigorous imprisonment for two years each. The High Court maintained the sentence imposed upon the accused by the Trial Court under Section 201 read with Section 34 IPC.

3. The legality and correctness of the judgment of the High Court dated 5th February, 2007 has been challenged before this Court by accused Shyamal Ghosh in Criminal Appeal No.507 of 2007, Manoranjan Debnath @ Behari in Criminal Appeal No.1369 of 2007 and Panchanan Tarafdar @ Chotka and Uttam Das in Criminal Appeal Nos.539-540 of 2011.

4. Since all these appeals arise from a common judgment of the High Court, it will be proper for this Court to deal with all these appeals in a common judgment. At the very outset, we may notice that even the contentions raised on behalf of different accused in their respective appeals are by and large the same. Therefore, it will be proper for this Court to deal with all the appeals collectively, more so, when they are based upon common questions of facts and law.

5. Now, we may refer to the case of the prosecution which has resulted in filing of the present appeals. In the present case, the First Information Report (FIR), Exhibit 12, was lodged at P.S. Khardah on 1st October, 2003 by one Apu @ Sukalyan Mukherjee, PW15, wherein he stated that on 30th September, 2003 at around 10.00 p.m., he had seen two gunny bags containing severed head and other mutilated body parts of a human body opposite Tapan Santra's garden near Dangadingla Electric Tower at Patulia Barabagan by the side of Barrakpore Dum Dum Highway. Since he suspected some

foul play, he reported the matter and requested for investigation thereof in accordance with law. On the basis of this information, a case being case No.332/03 under Sections 302/201/34 IPC was registered against unknown miscreants and the Investigating Officer, S.I. Bholanath Dey, PW28 started the investigation and rushed to the spot where the said gunny bags had been noticed. He completed the inquest over the mutilated dead body in presence of the witnesses. On 1st October, 2003 itself, wife of the deceased Smt. Lily Bhattarcharjee, PW4, and elder brother of the deceased, Arindam Bhattacharjee, PW6, came to the police station and identified the mutilated dead body to be that of Archideb Bhattacharjee who was stated to have been missing since 29th September, 2003.

6. Further, the case of the prosecution reveals that on 29th September, 2003, at about 9.00 p.m. the victim Archideb Bhattacharjee had started from his house on his Avon bicycle to visit one Chandan Dey of Ghola Gouranganagor for making tagada in connection with his business and he started back therefrom at about 11.00 p.m. for returning to his home but on his way back, he was restrained by the accused persons near Goshala Field at about 11.30 p.m. and was assaulted by them. The accused persons strangulated him and ultimately he was murdered by them on the midnight of 29th/30th September, 2003. With the intention to cause disappearance of evidence of the said murder, the accused persons subsequently severed the head, legs, hands and body of the corpse by a sharp cutting weapon and after putting the same in gunny bags, carried it in a Maruti Van at about 9.00 p.m. on the following day i.e. 30th September, 2003 and left the same at Pathulia Danga-dingla by the side of Barrackpore Dum Dum Highway near the Electric Tower and in front of the garden of Tapan Santra. Subsequently, as already noticed, at about 10.00 p.m. on that day these two sacks containing the dismembered and beheaded corpse were noticed by PW15 who then reported the matter to the Police.

7. Since Archideb Bhattacharjee did not return to his home

after visiting Chandan Dey on the night of 29th September, 2003, his wife and elder brother had gone to the house of Chandan Dey at Ghola where they came to know that at about 11.00 p.m. he had left for his own home after collecting the money from him. Having come to know of that fact, the wife and brother of the deceased went to the Police Station and lodged a missing diary report being G.D. No.1163 dated 30th September, 2003 whereafter, as already noticed, they were called to the Police Station for identifying the dead body of Archideb Bhattarcharjee on 1st October, 2003. During the course of investigation, it was also revealed that before the date of occurrence, the eight accused persons led by Uttam Das, Panchanan and Mou @ Dipak had demanded Rs.40,000/- from Archideb Bhattarcharjee towards 'Tola Mastani Salami' in relation to construction of six shop rooms on his own land for letting the same. Archideb had refused to succumb to this illegal demand. The accused persons had then threatened him with dire consequences. Archideb Bhattarcharjee was once called to the premises of the local East Bengal Bayam Samiti Club also where he was threatened. The accused persons had also visited the house of Archideb several times for demanding money and, lastly, they had come to the house of Archideb on 27th September, 2003 and threatened that if their demand of Rs.40,000/- was not fulfilled within one day, they would murder him.

8. On 1st October, 2003, the driver of the Maruti Van, namely, Manik Das was arrested by the Police on the basis of a telephonic information that dead body of the deceased was carried in the said Maruti Van. Manik Das then made a statement to the Police and the Maruti Van was recovered on 13th October, 2003 from the car parking place of Sushil Chakraborty at Kalitala Ghosh Para. The said Manik Das also made a statement under Section 164 of the Code of Criminal Procedure, 1973 (for short, the 'CrPC) before the Court of competent jurisdiction. Accused Uttam Das, Dipak Das @ Mou and Manoranjan Debnath @ Behari, who were absconding

were apprehended at Delhi with the help of the Police at Tilak Marg Police Station. These three accused persons were brought to Calcutta by the Investigating Officer and upon being produced before the Court on 16th October, 2003, they were remanded to police custody by the Court. During their custody and at their statement, the Avon Cycle which was driven by the deceased, was recovered from an abandoned place near Agarpara Railway Station. On 4th November, 2003, accused Bishu Saha was arrested by the police from Highland, Sodhpur and produced before the Court. He was taken into custody. Later on, even the other accused, namely, Shyamal Ghosh and Satyajit Das were arrested from Sodhpur. However, despite its best efforts, the Police was not able to arrest accused Ganesh Das and Panchanan Tarafdar @ Chotka and declared them absconders. Charge sheet against all other six accused was filed. However, at a subsequent stage, even the said two absconding accused were arrested by the Police and produced before the Court and they also were charged with the same offences.

9. Thus, all the accused were charged with the afore-stated offences and subjected to face trial before the Court of competent jurisdiction. After evidence of the prosecution was closed, the incriminating material was put to the accused and their statements under Section 313 of the Cr.P.C. were recorded. As already noticed, thereafter, the accused were convicted by the Trial Court and upon appeal before the High Court, they were acquitted of the offence under Section 379 IPC but sentenced to life imprisonment for the offence under Section 302 read with Section 34 IPC and were also sentenced for other offences, as indicated supra.

10. It will be appropriate to refer to the contentions raised before this Court by the learned counsel appearing for the respective accused persons. The contentions are:

i. The crucial witnesses of the prosecution, particularly

PW8, Binode Mallick, PW17, Amal Ray and PW19, Kali Das have not named accused Shyamal Ghosh. Besides, these witnesses are not reliable and their statements could not form the basis of conviction of the accused persons. In fact, PW17, Amal Ray is a tutored witness as he was in police custody for three days before his statement was recorded.

ii. The present case being a case of circumstantial evidence does not establish the complete chain of events so as to substantiate the conviction of the accused.

iii. PW9, Haru Das, has not named any of the accused and the disposal of the dead body which is a material circumstance has not been proved in accordance with law and, therefore, the conviction of the accused persons is ill-founded.

iv. Accused Shyamal Ghosh was not identified in the test identification parade and only accused Satyajit Das @ Sadhu's identity could be established. As such, Shyamal Ghosh is not even proved to be connected with the commission of the crime.

v. The driver of the Maruti Van, Manik Das was never produced before the Court for cross-examination and, therefore, statement under Section 164 of the CrPC of the said witness is inconsequential.

vi. The evidence against the accused is very weak and nothing has been recovered from the accused Shyamal Ghosh. Since no specific role is attributable to Shyamal and even to other accused persons, the conviction under Section 302 read with Section 34 IPC is not sustainable, particularly against accused Shyamal.

vii. There has been considerable delay, varying from

3 days to 20 days, in recording the statement of the prosecution witnesses and, as such, the possibility of the witnesses not speaking the truth cannot be ruled out. These witnesses were informed about what statement to make prior to recording of their respective statements.

viii. PW8, Binode Mallick and PW19, Kali Das cannot be believed as they are chance witnesses. Statement of PW8 was recorded after a delay of 21 days. He did not disclose the name of anyone.

ix. Conduct of the prosecution witnesses including the family members of the deceased is abnormal. No Police report was lodged despite a specific case of the prosecution that the accused persons had come to the house of the deceased on a number of occasions for demanding money and had even threatened to murder the deceased.

x. The fact that the prosecution has failed to establish the time of death of the deceased would lead to one irresistible conclusion that the prosecution has not been able to establish its case beyond reasonable doubt.

xi. The statement of the accused under Section 313 of the CrPC cannot be used against the accused. Reliance by the courts below upon such statement is, therefore, improper and illegal.

xii. The recoveries effected from the accused persons, if any, including even that from Manoranjan Debath @ Behari, are contrary to law and are, therefore, inadmissible. In fact, the seizure memos were got signed on blank papers.

xiii. There is no common intention and participation by

all the accused persons. Resultantly, the ingredients of Section 34 IPC are not satisfied.

11. While collectively responding to the above arguments raised on behalf of the different accused persons, the learned counsel appearing for the State contended that there existed a clear motive for committing the crime, i.e., demand of money.

12. The present case is not a case of circumstantial evidence *simpliciter*. According to the case of the prosecution, there are eye-witnesses to different events that had taken place. These witnesses are reliable and trustworthy. They are neither tutored nor stalked or interested witnesses. The background of the accused persons, their conduct in absconding immediately after the occurrence and statement of the accused under Section 313 CrPC fully support the case of the prosecution. Even if some witnesses had turned hostile or there existed certain minor defects in the investigation, the accused persons cannot derive any advantage therefrom. According to the learned counsel, defective investigation normally would not prove fatal to the case of the prosecution and even delay in examination of witnesses *per se* would not render statement of a witness unreliable. Once the entire prosecution evidence is cumulatively examined, the ingredients of Section 34 IPC are fully satisfied.

Prosecution Evidence

13. Before we proceed to dwell upon the merits or otherwise of the contentions raised before us, it will be necessary for the Court to examine the entire prosecution evidence at a glance.

14. In the present case, the investigative machinery was set into motion by two different facts. Firstly, Exhibit 15, which is the missing diary report lodged by the wife of the deceased Lily Bhattacharjee PW4, and brother of the deceased Arindam Bhattacharjee, PW6 on 30th September, 2003 and secondly,

the FIR, Ext. 12, lodged by PW15, Apu @ Sukalyan Mukherjee on 1st October, 2003. No action appears to have been taken on the former while the Investigating Officer commenced his investigation on the basis of the latter.

According to PW15, on 30th September, 2003 at about 10.00 p.m. when he went to the Electric Tower situated at Dangla Disla by the side of Barrackpore Dum Dum Express, Patulia Barabagan in front of garden of Tapan Santra he noticed two bags containing different parts of a human dead body upon which he informed the police and lodged a complaint at Khardah Police Station. One Indrajit Sen had written the complaint, Exhibit 10, which bore the signatures of PW15 at Exhibit 10/1**.** If one looks at the content of Ext. 10, *per se,* it is not evident as to by whom and how the offence was committed. It is a settled principle of law that FIR is not a substantive piece of evidence. However, during the course of investigation, the story leading to the commission of the crime got unfolded and pointed towards the guilt of the accused with certainty.

15. According to PW4 and PW6, the deceased used to earn his livelihood through private tuitions and also used to deal in clothing. The elder brother of the deceased was employed in a private firm and both of them had built six shop rooms on their own land in front of the house where they were residing, for the purpose of letting out. Particularly according to PW4, Uttam Das, Mou @ Dipak Das, Chhotka @ Panchanan Tarafdar had demanded Rs.40,000/- from her husband towards 'Mastani Salami'. The deceased had expressed his inability to pay the said amount. Thereafter, Uttam Das, Mou and Chotka had called the deceased to the club premises of West Bengal Bayan Samiti. The deceased went there and agreed to pay a sum of Rs.2,000/- which was not accepted by the accused and they threatened the deceased with dire consequences, if their demand of Rs.40,000/- was not satisfied. Uttam Das, Panchanan @ Chotka, Ganesh Sadhu, Shyamal Ghosh, Dipak Das Chor Bishu, Manoranjan came to the house of the

deceased two or three times and threatened even her mother-in-law, the deceased and his brother with dire consequences if the demand was not fulfilled. According to this witness, on 27th September, 2003, Uttam Das along with his associates had come to their house and extended a similar threat. They informed about this incident to political leaders, party officers and to the people and were assured of proper help by them. On 29th of September, 2003 at about 9.p.m., the deceased went to the house of Chandan Dey at Ghola Gouranganagar by an Avon cycle to collect money in connection with his business. He did not return at night. Therefore, they went to Chandan's house on the next morning and came to know that the deceased had come there in the night and after collecting money, he had returned therefrom on that very day. This resulted in lodging of the afore-noted missing diary report at the Ghola Police Station by PW6. On 1st October, 2003, PW4 and PW6 both were called to the Police Station to identify the dead body which, as noted above, had been recovered as per the statement of PW15. It may be noticed that according to PW4 the deceased was wearing four rings, HMT watch and was carrying cash and other papers with him on the night of 29th September, 2003. After identifying the body at the Police Station, it was clear that the accused persons had, after murdering the deceased, cut the body of the deceased into pieces and packed the same in gunny bags with an intention to destroy the evidence. PW4 and PW6 both identified the apparels of the deceased as well as the accused persons in Court. PW4 also stated that she had identified the accused persons even at the Police Station.

16. Now, we have to examine the prosecution evidence as to the manner in which the occurrence took place and the statements of the witnesses that are relevant for that purpose. PW8, Binode Mallick, is stated to be an eye-witness to the assault caused by the accused upon the deceased. This witness stated that at the relevant time he was running a tea stall near Sandhya Cinema Hall at Khardah and also supplied

biscuits to the shops at Panchanantala Market and Bhanur More. On 29th September, 2003 at about 12.00 a.m in the night, he was returning to his home from Panchanan Tala, after making tagada. When he reached near Goshala Field he saw that Uttam, Chotka, Mou, Chorbisu, Sadhu and Ganesh were assaulting a fat person, whom he knew as Archideb Bhattacharjee, by strangulating him with a *gumcha* and were taking the deceased towards Goshala Field. He asked them the reason for the same and they told him to leave the place as it was their internal matter. The deceased was saying 'save me save me'. PW8 then left that place. After two days he came to know that the said person had been murdered and his body had been cut into pieces and was left near the Kalyani Road Highway. The witness identified the accused persons as the ones who were doing the mischief on that night. In his cross-examination, he clearly denied the suggestion that he was deposing falsely or that he had any friendship or intimacy with the accused persons. The witness also stated that he did not know the name of the deceased prior to the date of occurrence and, in fact, he came to know of the same from the television after two days of the incident. In his cross-examination, he also stated that about 10.45 p.m., he had reached Bhanur More and within 5-10 minutes, he reached Panchanan Tala Market and had spent nearly an hour at Panchanan Tala Market for collecting money from the said shop owners and after getting payment he started for his home.

17. PW 17, Amal Ray, is another witness to the altercation that took place between the deceased and Uttam Das and his associates including Shyamal, Sadhu, Bihari, Ganesh, Manoranjan, Mou. According to this witness, he had seen the altercation between them. When he was watching the incident, he was asked to leave the place by the accused persons, which he did and thereafter on the next day, he heard about the death of Archideb Bhattacharjee. His statement was recorded by the Police three days after the incident. This witness also identified the accused in the Court. In his cross-examination, he

specifically denied the suggestion that he had not witnessed the incident in question.

18. The next witness whose statement has a direct bearing on this aspect is PW19, Kali Das, who is a resident of Nandan Kanan. This witness stated before the Court that on 29th September, 2003 at about 11.30 p.m. while he was returning from Rashmoni More, he found that a *Jhamela* was going on near Battalla of Nandan Kanan in between Archided and Uttam, Panchanan, Bisu, Bihari, Chotka, Mou and scuffling was going on between them. Uttam and Bishu threatened him, therefore, he left the place. Two days after the incident, he learnt about the recovery of body parts of Archideb Bhattacharjee. He also identified all the accused in the Court. It needs to be noticed that according to this witness, all the persons whom he had seen on that night were present in the Court and he identified them.

19. In his statement, he had not specifically given the name of Shyamal Ghosh and Ganesh. In his cross-examination, he admitted that he was taken into police custody at about 10 a.m. on the next date and was released by the Police after four days. He admitted that he did not give the names of the accused persons' father to the police. He further stated that he had not gone to the Police Station on 29th September, 2003 to report about the *Jhamela*. Moreover, the Investigating Officer in his statement as PW28 had stated that on 1st October, 2003, he had examined Arindam Bhattacharjee at Police Station and he had also examined various relations of the deceased. He denied that Amal Ray, PW17 was in custody. In fact, according to him when he was going on his way to meet Amal Ray, he had the occasion to meet him and had examined him but did not bring him to the Police Station.

20. This is the direct evidence in relation to the altercation (*Jhamela*) between the accused and the deceased and the subsequent strangulation of the deceased. The necessary inference that follows is that on the day of the incident, the

deceased was killed and his body was disposed of, as stated by the prosecution witness noted above, by cutting the same into pieces, putting it in gunny bags and abandoning these bags at a deserted place.

21. The next circumstance in the chain of events is the evidence relating to dismembering of the corpse and its disposal by the accused persons. Let us examine that evidence now.

22. PW7, Prakash Chowdhury, is a witness to this incident. According to him, on 30th September, 2003, at about 9.00 p.m. he was returning along Goshala field Bhanur More after making tagada in connection with his business. While returning, he found Uttam and Mou standing by the side of a Maruti Van and then Sadhu, Chotka, Chorbisu, Shyamal and Manoranjan were taking inside the said steel coloured Maruti Van, parts of human dead body contained in gunny bags. He identified the accused persons in the court. He further stated that his statement was recorded by the Police, 20 to 22 days after the date of the incident. In his cross examination, certain doubts were created about the manner in which he was conducting his business, i.e., sale and distribution of electric bulbs.

23. PW9, Haru Das, is a rickshaw puller and he parks his rickshaw at the Rickshaw stand at Bhanuthakures More. According to him, two days prior to the day of Durga Pooja nearly two years back, when he was sitting at the rickshaw stand, he saw that a steel coloured Maruti Van stopped near Goshala field and four-five bags containing parts of a human body were being loaded in the Maruti Van from the side of Goshala field by accused Uttam, Mou, Chotka, Bisu, Ganesh and Bihari. All the accused persons who were present in the Court were identified by this witness. According to this witness, the accused persons used to travel in his rickshaw and paid the exact fair. After putting the body into the van, the van went away towards Rashmoni More. The witness specifically stated that subsequently, he was threatened by Uttam Das and his

associates by saying that if he disclosed anything to anybody, his family would be destroyed. This witness was subjected to a lengthy cross-examination but nothing material came out in the cross examination.

24. PW-11, Someraw Orang is another rickshaw puller. He stated that he along with Tarapada Sahadeb and Haru was at the Rickshaw stand of Bhanuthakur More. According to him, a Maruti car had stopped there and Uttam and Mou were standing by the side of the car and Chotka, Bisu, Manoranjan and Ganesh, were loading the bags containing the bloody parts of human body into the said car from Goshala field. Thereafter, the car went towards Rashmoni More with the accused persons. He identified all the accused persons present in the Court. He stated that he knew the accused persons for long. He came to know of the murder 20-22 days after the date of incident. In his cross-examination, he stated that he could not tell the number of the Maruti car and he had not seen that car again. He denied that he had been tutored by the Police and he was making the statement under the influence of the police. He admitted that he carried liquor in his rickshaw, as a government liquor shop was situated at Sodhpur and he went there, and sometimes he also drank liquor.

25. According to the prosecution, the statements of these witnesses completely establish that the deceased was last seen with the accused and they were responsible for assaulting and strangulating him and they were also witnessed loading the parts of the human dead body into the Maruti van. Resultantly, as per the prosecution, both the vital circumstances i.e. commission of murder as well as disposal of the body of the deceased have been proved.

26. PW-2 Jhantu Dey, the brother-in-law of the deceased also appeared as a witness and stated that his brother-in-law had built six shop rooms on their land which was near to his house. On 15th August, 2003, Uttam, Manoranjan, Ganesh Dipak Das, Shyamal, Chotka, Bisu and Sadhu demanded Rs.

40,000/- from the deceased but the deceased refused. Then Uttam threatened that if the said money was not paid he would not allow Archideb to enjoy and use the said property. PW-2 is also a witness to the recovery of the chopper which was recovered on the statement of accused Bishu who brought out the chopper from the bush in the field and admitted that they had cut the body of the deceased with the chopper. PW-2 proved his signatures on the Seizure List Ext. 1/1 and also identified in the Court the persons who had threatened the deceased.

27. PW1 Sunil Chakraborty and PW3 Mritunjoy Chanda were also witnesses to the recovery of the Chopper and the corresponding seizure memo, Exhibit 1/3. PW1 had signed the seizure memo and admitted his signatures as Exhibit 1. The signatures of PW3 were admitted by him at Exhibit 1/2. Both these witnesses identified the accused persons present in the Court. The Maruti Van, Exhibit 13/2 was recovered in presence of PW23, PW24, PW25 and PW26. Further, the Avon cycle was recovered in presence of PW21 and PW22. PW21 stated that a cycle was seized from a place near Agarpara Railway Station under the seizure list and it was recovered at the instance of three persons who led the police to the place of recovery. He admitted his signatures as Exhibit 4/1. The cycle was exhibited as Mat. Exhibit II. The signatures on the seizure memo attached to the cycle were exhibited as Exhibit 5/1.

28. These are the recoveries of the weapon of offence as well as the vehicle which was used by the accused persons for carrying the mutilated body parts of the deceased person. Further, the recovery of the cycle that was owned by the deceased provides a definite link as it was recovered in furtherance to the statement of the accused, namely, Uttam Das, Dipak Das and Manoranjan Debnath. The recoveries affected by the Investigating Officer, PW28 can hardly be questioned in fact and in law.

29. Now, let us examine the evidence of the doctor who

conducted the post mortem on the body of the deceased. Dr. Jnanprokash Bandhopadhyay was examined as PW16. According to this witness, he was the medical officer attached to R.G. Kar Medical College and Hospital. On 1st October, 2003, he was posted at Barrackpore Police base hospital. He performed post mortem on the dead body of one Archideb Bhattacharjee, as identified by the Constable who had brought the body of the deceased. In fact, some parts of the human body had been sent for post mortem. He examined the injuries inflicted upon the deceased's body and connected each injury to the organ that had been severed from the body. He opined that all the body parts were of a single person. The injuries showed evidence of ante mortem vital reaction. The cause of death was due to effect of strangulation by ligature. He prepared the post-mortem report as Exhibit 11 with his signature as Exhibit 11/1. It will be useful to refer to certain part of the statement of this witness that reads as under :

"On that date I held post-mortem on the dead body of one Archideb Bhattacharjee identified by constable No.4260 Brojogopal Ghosh in connection with Khardah P.S. U.D. Case No.89 dated 01.01.2003 and Khardah P.S. Case No.332 under Section 302/201/34 Indian Penal Code dated 01.10.2003. Actually following parts of the dead body were sent for post-mortem. 1. One decapitated head. 2. One beheaded body with P.M. amputation of both arms, left leg from hip and right leg from knew. 3. One left arm. 4. One right arm. 5. One left leg from knew. 6. One right leg from knew 7. One left thigh, all parts were arranged in anatomical order. The body parts were in state of moderate decompositions with bloating body feature. On examination I found flowing post-mortem injuries.

1. Incised chop would (I.C.W) placed transversely over neck adjacent to hiad. 2. Winch below symphysis menti and along with nape of the neck at the level between c.2 and c-3 vertebrae measuring 6.8" x 6.3" x through and

through all the structure of the neck. 2. I.C.W., placed over neck adjacent to 4.4" above sterna notch placed transversely at the (torn) between C-2 and C-3 vertgorae measuring 6.8" x 6.3" x through and through all the structure of the neck.

Injury No.1 and 2 fitted anatomically and snugly. 3. I.C.W. 6.2" x 4.3" x 2.2 all the structures and shoulder joint cavity over right shoulder. 4. I.C.W. 6.2" X 4.7" X through and through all the structures and shoulder joint cavity over upper end of right arm.

Injury No. 3 and 4 fitted anatomically and snugly. 5. I.C.W., 5.9" X 4.7" through and through all the structures all the shoulder joint cavity over left shoulder. No.6 I.C.W. 5.8" X 4.6" X through and through all the structures and shoulder joint cavity over upper and of left arum.

Injury No.5 and 6 filled anatomically and snugly. No.7 I.C.W. over left hip 8.5 "8" X through and through all the structure and left hop joint cavity. 8. I.C.W. 8.4" X 8" X through and through all the structure and left hip joint cavity over upper and of left thigh. Injury No.7 an 8 fitted anatomically and snugly. 9. I.C.W. left knew joint towards thigh 5.8" X 5.5" X through and through all the structure and left knee joint cavity10. I.C.W. left knee joint towards leg 5.8" X 5.5" X through and through all the structure and left knee joint cavity. Injury No.9 and 10 fitted anatomically and snugly. 11. I.C.W. right knee towards thigh 5.6" X 5.5" X through and through all the structure and right knee joint cavity. 12. I.C.W. right knee towards leg 5.6" X 5.5" X through and through all the structure and right knee joint cavity. 12. Injury No.11 and 12 fitted anatomically and snugly. N 13. Incised wound 3" X 0.8" X muscle over right side of check and lower lip. No.14. I.C.W. 3.5" X 0.7" X muscle placed transversely over right side of back of knee at the level of tip of right mastoid process. 15. Lacerated wound 3." X 1.2" X muscle over left 4 and 5 intercostals space 5.6" from

interior midland. All the injuries mentioned should no evidence of Ante mortem vital reaction. All the body parts were of a single persons. Ante mortem injury No.1 one continuous ligature one (LM) 12" X 1.4" completely encircling the neck was placed transversely low down around the neck adjacent to the body 1.6" above sterna notch and 1.8" above tip of C-7 spinal process. The area over the LM was less decomposed then the rest of the body and skin over the L.M. was brownish. On dissection extensive extra vacation of blood is noted in the S.C. tissue and muscle of neck. Bruising was also noted in and around the trached cartilages with fracture and displacement of thyroid cartilages and tracheal rings. No.2. Abrasion 1.5" X 0.8" over left malar prominent No.4 Abrasion over right anterion superior iliac spine measuring 0.8" X 0.6". No.5 Bruise 4.8" X 2.5" over back of left arm 2.5" above left elbow joint. 6. Bruise 2.6" X 2" over ulnar aspect of righ wrist. 7. Haematoma scalp 3.5" X 2" X appromie 0.2" over left fronto parietal region the 1.6" from midline. The injures showed evidence of ante mortem vital reaction.

In my opinion death was due to the effects of strangulation by ligature, as noted above – ante mortem and homicidal in nature.

This is the report of post-mortem prepared by me with my handwriting. It bears my signature and seal. This report of post-mortem is marked as Ext.11 the signature is marked s Ext. 11/1.

The post-mortem injuries mentioned above may be caused by this type of moderately heavy sharp cutting."

30. The Investigating Officer was examined as PW28. Upon receiving the information from PW15, he was entrusted with the investigation of the case. According to this witness, when he reached the spot, he found that a beheaded dead body whose hands and legs were separated, was lying by the

left side of the Barrackpore Dum Dum Highway. He conducted the inquest at the spot and prepared the Inquest Report Exhibit 3/4. He seized the gunny bags containing mutilated parts of the body of the deceased. He also recovered an empty blood stained *gumcha* and other articles vide Exhibit 16. On 1st October, 2003, he conducted a raid in the area of Nandan Kanan in search of accused Uttam Das, Mou and Manoranjan Debnath but could not apprehend them. He recorded the statements of various witnesses. The mutilated body parts were sent to the Police hospital. On 11th October, 2003, he along with the force started for Delhi with production warrant and thereupon he arrested three accused. He recovered the Avon bicycle, while the Maruti Van was recovered by SI, Anjan De, PW26, who had taken up investigation of the case under instructions of I.C. Khardah, during temporary absence of PW28. Thereafter, according to this witness, he held raids in search of the associate accused but they could not be traced. PW28 prayed for issuance of WA and WPA against Chotka @ Panchanan Tarafdar, Chor Bisu @ Bisu Bisu @ Datta @ Das, Sadhu @ Satyajit Das, Shyamal Ghosh and Ganesh Das. The same were allowed. On 9th November, 2003, he held raid at Nandan Kanan and surrounding area but could not trace the absconding accused. On 21st November, 2003, he apprehended accused Shyamal Ghosh and Sadhu @ Satyajit Das from Sodhpur. He also took into custody photographs along with negatives thereof from photographer Ashok Sen on 7th October, 2003 and prepared seizure list marked as Exhibit 7/1. Thereafter he filed the charge sheet.

31. Another witness of some significance is PW10, Chota Orang who stated that about one and a half years back, a part of a dead body severed from its head, hands and legs was left in front of his house near Kalyani Highway Road by someone. The Police had come to the place and prepared a report. He had put his signatures on the said report which he duly accepted in Court as Exhibit 3/1.

32. This is the evidence that completes the chain of events and establishes the case of the prosecution beyond any reasonable doubt. The facts, right from the departure of the deceased from his house to the place of Chandan Dey to recover money upto the recovery of mutilated body of the deceased, have been proved by different witnesses, including some eye-witnesses.

33. It was contended that some of the witnesses had turned hostile and have not supported the case of the prosecution. In this regard, reference has been made to PW13 and PW23. PW13 admitted that he was a rickshaw puller of rickshaw No. 4. He also stated that he was not examined by the police. It was at that stage that the learned prosecutor sought permission of the Court to declare him hostile, which leave was granted by the Court. This witness stated that there were 10 rikshaw pullers at Nandan Kanan and he used to park his rikshaw from 7.00 a.m. to 10.00 a.m. at that stand, while in the afternoon, he used to park his rikshaw at the Sodhpur Railway Station. He denied having seen the accused persons loading the gunny bags into the Maruti Van and also receded completely from his statement made under Section 161 of the CrPC. The other witness is PW23 who was a witness to the recovery of the Maruti Van. According to this witness, the Maruti Van was parked in his parking lot. However, on 30th November, 2003 Manik Das had taken out the vehicle from the parking and again returned at mid night. With regard to his signature on the seizure memo which he accepted as Exhibit 13, he took up the plea that he was made to sign blank papers.

The mere fact that these two witnesses had turned hostile would not affect the case of the prosecution adversely. Firstly, it is for the reason that the facts that these witnesses were to prove already stand fully proved by other prosecution witnesses and those witnesses have not turned hostile, instead they have fully supported the case of the prosecution. As per the version of the prosecution, PW23 was witness to the recovery of the

Maruti Van along with PW24, PW25 and PW26. All those witnesses have proved the said recovery in accordance with law. They have clearly stated that it was upon the statement of Manik Das that the vehicle had been recovered. Other witnesses have proved that the said vehicle was used for carrying the gunny bags containing the mutilated parts of the dead body of the deceased. Firstly, PW13 is a witness who was at the railway station rickshaw stand along with other two witnesses namely PW9 and PW11 who have fully proved the fact as eye-witnesses to the loading of the gunny bags into the Maruti van. Secondly, even the version given by PW13 and PW23 partially supports the case of the prosecution, though in bits and pieces. For example, PW23 has stated that the driver of the Maruti Van was Manik Das and also that he had taken out the vehicle from the parking lot at about 9.30 p.m. on the day of the incident and had brought it back after mid-night. He also stated that this car was being driven by Manik Das. Similarly, PW13 also admitted that other rickshaws were standing at the stand. This was the place where PW9 and PW11 had seen the loading of the gunny bags into the Maruti Van. In other words, even the statements of witnesses PW13 and PW23, who had turned hostile, have partially supported the case of the prosecution. It is a settled principle of law that statement of a hostile witness can also be relied upon by the Court to the extent it supports the case of the prosecution. Reference in this regard can be made to the case of *Govindaraju @ Govinda* v. *State by Sriramapuram P.S. & Anr.* [(2012) 4 SCC 722].

34. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses in as much as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW8, PW17 and PW19. Similarly, there is some variation in the statement of PW7, PW9 and PW11. Certain variations are also pointed out in the statements of

PW2, PW4 and PW6 as to the motive of the accused for commission of the crime. 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. The variations pointed out as regards the time of commission of the crime are quite possible in the facts of the present case. Firstly, these witnesses are rickshaw pullers or illiterate or not highly educated persons whose statements had been recorded by the Police. Their statements in the Court were recorded after more than two years from the date of the incident. It will be unreasonable to attach motive to the witnesses or term the variations of 15-20 minutes in the timing of a particular event, as a material contradiction. It probably may not even be expected of these witnesses to state these events with the relevant timing with great exactitude, in view of the attendant circumstances and the manner in which the incident took place. To illustrate the irrelevancy of these so called variations or contradictions, one can deal with the statements of PW2, PW4 and PW6. PW4 and PW6 have stated that the deceased had constructed shops along with his brother for the purpose of letting out and it was thereupon that the accused persons started demanding a sum of Rs.40,000/- from the deceased and had threatened him of dire consequences, if their demand was not satisfied. PW2 has made a similar statement. However, he has stated that Uttam Das and the accused persons had threatened the deceased that if the said money was not paid, they would not allow the deceased to enjoy and use the said shops built by him. This can hardly be stated to be a contradiction much less a material contradiction. According to the witnesses, two kinds of dire consequences were stated to follow, if the demand for payment of money made by the accused was not satisfied. According to PW4 and PW6, they had threatened to kill the deceased while according to PW2, the accused had threatened that they would not permit the accused to enjoy the said property.

Statements of all these witnesses clearly show one motive, i.e., illegal demand of money coupled with the warning of dire consequences to the deceased in case of default. In our view, this is not a contradiction but are statements made bona fide with reference to the conduct of the accused in relation to the property built by the deceased and his brother. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

35. The learned counsel appearing for the appellants contended that PW2, PW4 and PW6 are interested witnesses as they are close relations of the deceased person. Further it is contended that the statements of PW8, PW17 and PW19 had been recorded after considerable delay, varying from 3 to 22 days and for these reasons the case of the prosecution suffers from patent lacuna and defects. This evidence, therefore, could not be taken into consideration by the Court to convict the accused. On the contrary, the accused are entitled to acquittal for these reasons. Reliance has been placed upon *State of Orissa v. Brahmananda Nanda* [(1976) 4 SCC 288] and *Maruti Rama Naik v. State of Maharashtra* [(2003) 10 SCC 670].

36. On the contra, the submission on behalf of the State is that the delay has been explained and though the Investigating Officer was cross-examined at length, not even a suggestion was put to him as to the reason for such delay and, thus, the accused cannot take any benefit thereof at this stage. Reliance in this regard on behalf of the State is placed on *Brathi alias Sukhdev Singh v. State of Punjab* [(1991) 1 SCC 519] *Banti alias Guddu v. State of M.P.* [(2004) 1 SCC 414] and *State of U.P. v. Satish* [(2005) 3 SCC 114].

37. These are the issues which are no more *res integra*. The consistent view of this Court has been that if the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the Courts. This is the view expressed in the case of *Banti* (supra). Furthermore, this Court has also taken the view that no doubt when the Court has to appreciate evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice [*Brathi* (supra)]. In the case of *Satish* (supra), this Court further held that the explanation offered by Investigating Officer on being questioned on the aspect of delayed examination by the accused has to be tested by the Court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses.

38. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the Investigating Officer being pre-occupied in serious matters, the Investigating Officer spending his time in arresting the accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc. In the present case, it has come in evidence that the accused persons were absconding and the Investigating Officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The Investigating Officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused.

Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW2, PW4, PW6, and the doctor, PW16, another material witness, had been recorded at the earliest. The Investigating Officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the Investigating Officer. In the present case, the examination of the interested witnesses was inevitable. They were the persons who had knowledge of the threat that was being extended to the deceased by the accused persons. Unless their statements were recorded, the investigating officer could not have proceeded with the investigation any further, particularly keeping the facts of the present case in mind. Merely because three witnesses were related to the deceased, the other witnesses, not similarly placed, would not attract any suspicion of the court on the credibility and worthiness of their statements.

39. Some emphasis has been placed by the learned counsel appearing for the appellants upon some patent defects in the prosecution case and the abnormal conduct of the prosecution witnesses. According to the counsel, it is very unnatural that related witnesses like PW2, PW4 and PW6 had not informed the police when they lodged the missing diary report with the Police Station that there was demand for money by the accused and that they had threatened the deceased with dire consequences if that demand was not satisfied. Furthermore, it is pointed out that nothing was sent by the Investigating Officer to the Forensic Science Laboratory (FSL) to provide any scientific link to the commission of the offence or corroboration of the case of the prosecution. The contention is that these are material defects and should normally result in acquittal of the accused.

40. We are not impressed by this contention of the learned

counsel appearing for the appellants. We have already noticed above that the question of disbelieving the interested witnesses (family members of the deceased) does not arise. Their statements are reliable and trustworthy. The fact that they did not inform the Police while lodging the missing diary report about the illegal demand for money by the accused persons and that the accused had also threatened the deceased with dire consequences, is not a material omission. All the family members must have been under great mental stress as their husband/brother had not returned home. It is also not factually correct to say that nothing of this kind was mentioned by these related witnesses to the police at any stage. The Investigating Officer, PW28, had specifically stated in his statement "Jhantu Dey stated to me that on 15.8.03 Uttam Das, Dipak Das, Manoranjan Debnath, Ganesh, Chotka, Chor Bisu, Shyamal, Sadhu, demanded Rs.40,000/- from Archideb Bhattacharjee in his presence". Of course, there are certain discrepancies in the investigation inasmuch as the Investigating Officer failed to send the blood stained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the Court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not sending the gunny bags to the FSL cannot be said to be fatal to the case of prosecution in the circumstances of the present case. Of course, it would certainly have been better for the prosecution case if such steps were taken by the Investigating Officer. In *C. Muniappan* v. *State of Tamil Nadu* [(2010) 9 SCC 567], this Court has clearly stated the principle that 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. Similar view was taken by this Court in the case of *Sheo Shankar Singh v. State of Jharkhand and Another* [(2011) 3 SCC 654] wherein the Court held that failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the court would determine in the peculiar facts and circumstances of each case. Similarly, failure to make reference to the FSL in the circumstances of the case is no more than a deficiency in the investigation of the case and such deficiency does not necessarily lead to a conclusion that the prosecution case is totally unworthy of credit.

41. As we are discussing the conduct of the prosecution witnesses, it is important for the Court to notice the conduct of the accused also. The accused persons were absconding immediately after the date of the occurrence and could not be arrested despite various raids by the police authorities. The Investigating Officer had to go to different places, i.e., Sodhpur and Delhi to arrest the accused persons. It is true that merely being away from his residence having an apprehension of being apprehended by the police is not a very unnatural conduct of an accused, so as to be looked upon as absconding *per se* where the court would draw an adverse inference. *Paramjeet Singh v. State of Uttarakhand* [(2010) 10 SCC 439] is the judgment relied upon by the learned counsel appearing for the appellant. But we cannot overlook the fact that the present case is not a case where the accused were innocent and had a reasonable excuse for being away from their normal place of residence. In fact, they had left the village and were not available for days together. Absconding in such a manner and for such a long period is a relevant consideration. Even if we assume that absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent persons may run

away for fear of being falsely involved in criminal cases, but in the present case, in view of the circumstances which we have discussed in this judgment and which have been established by the prosecution, it is clear that absconding of the accused not only goes with the hypothesis of guilt of the accused but also points a definite finger towards them. This Court in the case of *Rabindra Kumar Pal @ Dara Singh v. Republic of India* [(2011) 2 SCC 490], held as under :

> "**88.** The other circumstance urged by the prosecution was that A-3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under Section 8 of the Evidence Act, 1872 should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite some time till he was arrested which fact has not been disputed by the defence counsel. We are satisfied that before accepting the contents of the two letters and the evidence of PW 23, the trial Judge afforded him the required opportunity and followed the procedure which was rightly accepted by the High Court."

42. Then it was also contended that circumstantial evidence is a very weak evidence and in the present case, the complete chain having not been established, the accused are entitled to acquittal. This argument again does not impress us. Firstly, we have discussed in some details that this is not purely a case of circumstantial evidence. There are eye-witnesses who had seen the scuffling between the deceased and the accused and the strangulation of the deceased by the accused persons and also the loading of the mutilated body parts of the deceased contained in gunny bags into Maruti Van. Evidence establishing the 'last seen together' theory and the fact that after altercation and strangulation of the deceased which was witnessed by PW8, PW17 and PW19, the body of the deceased was recovered in pieces in presence of the witnesses, have been fully established. To a very limited extent,

it is a case of circumstantial evidence and the prosecution has proved the complete chain of events. The gap between the time when the accused persons were last seen with the deceased and the discovery of his mutilated body is quite small and the possible inference would be that the accused are responsible for commission of the murder of the deceased. Once the last seen theory comes into play, the onus was on the accused to explain as to what happened to the deceased after they were together seen alive. The accused persons have failed to render any reasonable/plausible explanation in this regard.

43. Even in the cases of circumstantial evidence, the Court has to take caution that it does not rely upon conjectures or suspicion and the same should not be permitted to take the place of legal proof. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. {Ref. *Mousam Singha Roy and Others v. State of W.B.* [(2003) 12 SCC 377]].

44. Accused Ganesh, in his statement under Section 313 Cr.P.C., admitted the fact that he was absconding even till the charge-sheet was filed in the Court declaring him absconding and thereafter, he surrendered at the Police Station after charges were framed. On a specific question as to what he had to say in this regard, except saying that it was correct, he gave no further explanation. This piece of evidence points towards lack of bona fides on the part of this accused. It may also be noticed that all the accused only stated that they did not know anything. However, they did not dispute the period during which they were stated to be absconding. This again is a circumstance which, seen in the light of the prosecution evidence, points towards the guilt of the accused.

45. Another argument advanced on behalf of accused

Shyamal Ghosh is that he was not named in the FIR, was not identified in police custody and was also not named by PW8 in his statement. As far as naming Shyamal Ghosh in the FIR is concerned, none of the accused was named in the FIR, which was recorded on the statement of PW15. PW15 had only informed about the recovery of the gunny bags containing the human body parts. Thus, it was a case of blind murder at that stage and was so registered by the police. Coming to the fact that this accused was not specifically named by PW8 in his statement before the Court, we may notice that it is true that Shyamal Ghosh was not named by the said witness. PW8 had only named six accused persons but it is also to be noted that when he identified the accused persons present in the Court, he specifically stated "the persons who were doing the mischief in that night are present in Court today (identified)". PW17 had seen the altercation immediately preceding the strangulation of the deceased and he has clearly named Shyamal Ghosh in his statement. Of course, this witness also had named six persons and according to this witness, the accused persons had asked him to leave the place which he then did. PW19 had also similarly named six persons while not specifically naming the accused Shyamal but he also stated in his examination, "The persons whom I saw in that night all are present in Court today (identified)".

46. This clearly shows that all the three eye-witnesses to altercation and strangulation named some of the accused persons while did not name others specifically. However, they identified all the accused persons in the Court as the persons who were present at the time of the mischief, altercation and strangulation of the deceased. This Court in the case of *Tika Ram* v. *State of Madhya Pradesh* [(2007) 15 SCC 760), while rejecting the argument that the name of the accused is not mentioned in the FIR held that this would not by itself be sufficient to reject the prosecution case as against this accused. The court further held that where the prosecution is able to establish its case, such omission by itself would not be sufficient

to give benefit of doubt to the accused. In the present case, as already discussed, the prosecution has been able to establish its case beyond reasonable doubt.

47. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

48. In terms of the explanation to Section 162 Cr.P.C.

which deals with an omission to state a fact or circumstance in the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation reveals that if a significant omission is made in a statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (*Sunil Kumar Sambhudayal Gupta (Dr.) Vs. State of Maharashtra* [(2010) 13 SCC 657] and *Subhash Vs. State of Haryana* [(2011) 2 SCC 715].

49. The basic element which is unambiguously clear from the explanation to Section 162 CrPC is use of the expression 'may'. To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially.

50. Then, it is also contended and of course with some vehemence that where the prosecution is relying upon the last seen theory, it must essentially establish the time when the

accused and deceased were last seen together as well as the time of the death of the deceased. If these two aspects are not established, the very application of the 'last seen theory' would be impermissible and would create a major dent in the case of the prosecution. In support of this contention, reliance is placed upon the judgment of this Court in the case of *S.K. Yusuf v. State of West Bengal* [(2011) 11 SCC 754].

51. Application of the 'last seen theory' requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. This Court in para 21 of *Yusuf's* case (supra) while referring to the case of *Mohd. Azad @ Samin v. State of West Bengal* [(2008) 15 SCC 449] and *State through Central Bureau of Investigation Vs. Mahender Singh Dahiya* [(2011) 3 SCC 109], held as under:-

> **"21.** The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide *Mohd. Azad* v. *State of W.B* and *State v. Mahender Singh Dahiya*)"

52. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the Court to examine that where the last seen together and the time when the deceased was found dead is short, it inevitably leads to the

inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.

53. In the facts of the present case, the factor of time does not play such a significant role because it is a case where there were eye-witnesses to the strangulation of the deceased by the accused, and therefore, it may not be expected of the prosecution to show the time of last seen and death, by leading independent evidence. PW-17 is the witness to the altercation between the accused and the deceased. PW-8 is the witness to the strangulation of the deceased by the accused persons. Besides, PW-7, PW-9 and PW-11 are witnesses to the loading of the gunny bags containing human body parts in the Maruti Van by the accused. Thus, these facts have been established by independent witnesses. None of these witnesses is a relation or a witness inimical towards the accused. It has come on record that the occurrence had taken place on 29th September, 2003 at midnight. There may be some variation (5 to 10 minutes) in the time stated by different witnesses as to when the occurrence took place. From their statements, it is clear that by and large, they have given approximately the same time with reasonable variation, which is primarily for the reason that the accused persons and deceased were seen by the witnesses at different places. We have already held that these discrepancies do not amount to any material contradiction. Thus, the time of death stands clearly established between 11.30 pm to 12.00 am on 29th/30th September, 2003. Thereafter, it was the act of disposal of the body of the deceased which attracts the offence under Section 201 IPC.

54. As far as the death of the deceased is concerned, there was hardly any time gap between the two incidents, i.e. the last seen alive and the fact of death of the deceased becoming known. All the events occurred between 11.00 p.m. to 12.00 a.m. at midnight of 29th September, 2003. Thus, the contention raised on this ground is entirely without any merit.

55. On behalf of accused Shyamal, it was also contended that despite the identification parade being held, he was not identified by the witnesses and also that the identification parade had been held after undue delay and even when details about the incident had already been telecasted on the television. Thus, the Court should not rely upon the identification of the accused persons as the persons involved in the commission of the crime and they should be given the benefit of doubt.

56. The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

57. It is equally correct that the CrPC does not oblige the investigating agency to necessarily hold the Test Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. Reference can be made to *Munshi Singh Gautam v. State of M.P.*[(2005) 9

SCC 631], *Sheo Shankar Singh v State of Jharkhand and Anr.* [(2011) 3 SCC 654].

58. Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case.

59. In the present case, certainly Shyamal Ghosh, accused was not identified at the time of Test Identification Parade held on 28th November, 2003. However, Sadhu @ Satyajit Das was identified. PW-14 is the learned Judicial Magistrate who had recorded the statement of Manik Das under Section 164 CrPC as well as held the Identification Parade on 28th November, 2003. Other accused were neither subjected to Identification Parade nor could the question of identifying them arise. The mere fact that Shyamal Ghosh accused was not identified by Manik Das is not of great relevancy in the present case. Firstly, for the reason that Manik Das was never examined as a witness in the court and even his statement under Section 164 CrPC has not been relied upon by any court while convicting the accused. Secondly, not only one, but all the witnesses i.e. PW-7, PW-8, PW-9, PW-11, PW-17 and PW-19, duly identified the accused in Court and they did so without any demur or hesitation. Manik Das was a person who himself was under a threat and was asked to take the gunny bags for their disposal near the Barrackpore Dum Dum Highway. Thus, we are of the considered view that non-identification of Shyamal Ghosh by Manik Das is inconsequential in the present case.

60. We may notice at this stage that having returned a

finding that prosecution has been able to prove its case beyond reasonable doubt on the strength of the oral and documentary evidence produced by the prosecution, without taking into consideration the statement of Manik Das made under Section 164 CrPC., it is not necessary for us to examine whether the statement of Manik Das under Section 164 CrPC is admissible in evidence and what its evidentiary value is. The question of law is whether the statement recorded under Section 164 CrPC can be relied upon by the prosecution in a given case or not. We leave this question open.

61. Lastly, it was contended that the provisions of Section 34 IPC are not attracted in the present case as the prosecution has not been able to prove either common intention or participation of the accused persons in the commission of the crime. Resultantly, they could not have been held guilty of the offence under Section 302 read with Section 34 IPC. Before we discuss the evidence relevant to this aspect of the case, let us examine the law in relation to ingredients and application of Section 34 IPC.

62. In a very recent judgment of this court in the case *Nand Kishore v. State of Madhya Pradesh* [(2011) 12 SCC 120], this Court discussed the ambit and scope of Section 34 IPC as well as its applicability to a given case as under :

> "**20.** A bare reading of this section shows that the section could be dissected as follows:
>
> (*a*) Criminal act is done by several persons;
>
> (*b*) Such act is done in furtherance of the common intention of all; and
>
> (*c*) Each of such persons is liable for that act in the same manner as if it were done by him alone.
>
> In other words, these three ingredients would guide the court in determining whether an accused is liable to be

convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word "done". It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and "mens rea" as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several

persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. (Refer to *Brathi v. State of Punjab*.)

23. Another aspect which the court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh and Nand Kishore got together outside their house and as is evident from the statements of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial court and the High Court would not call for any interference.

24. The learned counsel appearing for the appellant had relied upon the judgment of this Court in *Shivalingappa Kallayanappa v. State of Karnataka* to contend that they could not be charged or convicted for an offence under Section 302 with the aid of Section 34 IPC. The said judgment has rightly been distinguished by the High Court in the judgment under appeal. In that case, the Supreme Court had considered the role of each individual and recorded a finding that there was no common object on the part of the accused to commit murder. In that case, the Court was primarily concerned with the common object falling within the ambit of Section 149 IPC. In fact, Section 34 IPC has not even been referred to in the aforereferred judgment of this Court.

25. Another case to which attention of this Court was invited is *Jai Bhagwan* v. *State of Haryana*. In that case also, the Court had discussed the scope of Section 34 IPC and held that common intention and participation of the accused in commission of the offence are the ingredients which should be satisfied before a person could be convicted with the aid of Section 34 IPC. The Court held as under: (SCC p. 107, para 10)

> "*10*. To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

26. The facts of the present case examined in the light of the above principles do not leave any doubt in our minds that all the three accused had a common intention in commission of this brutal crime. Each one of them participated though the vital blows were given by Dinesh Dhimar. But for Mahesh catching hold of the arms of the deceased, probably the death could have been avoided. Nand Kishore showed no mercy and continued pelting stones on the deceased even when he collapsed to the ground. The prosecution has been able to establish the charge beyond reasonable doubt."

63. In the case of *Lallan Rai and Others v. State of Bihar* [(2003) 1 SCC 268], this Court noticed the dominant feature for attracting the applicability of Section 34 IPC and dealt with the case where the contention was that several persons may have similar intention, yet they may not have common intention in furtherance to which they participated in an action. The court noticed as under:-

> "**17.** In para 44 of the judgment in *Suresh* this Court (the majority view) stated: (SCC pp. 689-90)
>
> > "*44*. Approving the judgments of the Privy Council in *Barendra Kumar Ghosh* and *Mahbub Shah cases* a three-Judge Bench of this Court in *Pandurang v. State of Hyderabad* held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a pre-arranged plan and thus a common intention even if several persons simultaneously attack a man and

each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and 'incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis'. Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence."

18. In *Suresh* this Court while recording the dominant feature for attracting Section 34 has the following to state: (SCC p. 686, para 39)

"*39*. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as 'the Code') is the element of participation in absence resulting in the ultimate 'criminal act'. The 'act' referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the

separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous."

19. For true and correct appreciation of legislative intent in the matter of engrafting of Section 34 in the statute-book, one needs to have a look into the provision and as such Section 34 is set out as below:

"34. *Acts done by several persons in furtherance of common intention*.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

20. A plain look at the statute reveals that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It is trite to record that such consensus can be developed at the spot. The observations above obtain support from the decision of this Court in *Ramaswami Ayyangar v. State of T.N.*

21. In a similar vein the Privy Council in *Barendra Kumar Ghosh v. King Emperor* stated the true purport of Section 34 as below: (AIR p. 6)

"[T]he words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, 'act' includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally cooperates in the

commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'."

22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused — though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor."

64. Upon analysis of the above judgments and in particular the judgment of this Court in the case of *Dharnidhar v. State of Uttar Pradesh and Others* [(2010) 7 SCC 759], it is clear that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the Section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase 'common intention' means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to the facts of a given case.

65. The ingredients of more than two persons being present, existence of common intention and commission of an overt act stand established in the present case. The statements of the witnesses clearly show that all the eight accused were

present at the scene of occurrence. They had demanded money and extended threat of dire consequences, if their demand was not satisfied. Thereafter, they had altercation with the deceased and the deceased was strangulated by the accused persons and then his body was disposed of by cutting it into pieces and packing the same in gunny bags and abandoning the same at a deserted place near the Barrackpore Dum Dum Highway. Thus, all these acts obviously were in furtherance to the common intention of doing away with the deceased, if he failed to give them Rs. 40,000/- as demanded. The offence was committed with common intention and collective participation. The various acts were performed by different accused in presence of each one of them. In other words, each of the accused had common intention. Thus, we find that the argument on the application of Section 34 IPC advanced on behalf of the accused is without any substance.

66. For the reasons afore-stated, we see no reason to interfere with the judgment of the High Court either on merits or on the quantum of sentence. Therefore, the appeals are dismissed.

K.K.T. Appeals dismissed.

DAYAL SINGH & ORS.
v.
STATE OF UTTARANCHAL
(Criminal Appeal No. 529 of 2010)

AUGUST 3, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Criminal Trial – Defective/improper investigation – Dereliction of duty and acts of omission – By PW6, the Investigating officer (SI) and PW3, the government medical officer, who prepared the post mortem report – Held: In the case at hand where one person had died allegedly due to sustained lathi blows, the report prepared by PW3 was a deliberate attempt to disguise the investigation – PW3 created a serious doubt as to the very cause of death of the deceased – If PW3 was not able to record a finding with regard to the cause of death, he was expected to record some reason in support thereof, particularly when it was not a case of death by administering poison – PW3 not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, ex facie, was incorrect and stood falsified by the unimpeachable evidence of eye witnesses placed by the prosecution on record – PW3's report was also in conflict with the statement of PW6 and the inquest report prepared by him – Similarly, PW6 also failed in performing his duty in accordance with law – Firstly, for not recording the reasons given by PW3 for non-mentioning of injuries on the post mortem report, which had appeared satisfactory to him – Secondly, for not sending to the FSL the viscera and other samples collected from the body of the deceased by PW3 who allegedly handed over the same to the police, and their disappearance – There was clear callousness and irresponsibility on the part of PWs 3 and 6

– The lapses on their part were a deliberate attempt to prepare reports and documents in a designedly defective manner to misdirect the investigation to favour the accused – Directions issued to authorities concerned to take disciplinary or other action against PW3 and PW6, irrespective of the fact whether they were in service or had since retired – Penal Code, 1860 – s.302 r/w s.34 and s.323 r/w s.34.

Criminal Trial – Defective/improper investigation – Effect of – Held: Merely because in the murder trial in issue, the Investigating Officer (PW3) and the Government Medical Officer (PW6) failed to perform their duties in accordance with the requirements of law, and there was some defect in the investigation, it will not be to the benefit of the accused-appellants to the extent that they would be entitled to an order of acquittal on this ground – Despite acts of default/omission on the part of PWs 3 and 6, the prosecution proved its case beyond reasonable doubt – The lower courts rightly ignored the deliberate lapses of PWs 3 and 6 – The consistent statement of the eye-witnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, established the case of the prosecution beyond reasonable doubt.

Criminal Trial – Investigation – Professional standards – Held: Police officers and doctors, by their profession, are required to maintain duty decorum of high standards.

Criminal Trial – Fair trial – Duty of the Court – Held: The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape – Both are public duties of the judge – During the course of the trial, the Presiding Judge is expected to work objectively and in a correct perspective – Where the

prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served.

Penal Code, 1860 – s.302 r/w s.34 – Four persons armed with lathis went to the fields of the deceased – They first hurled abuses at him and without any provocation started assaulting him with the lathis they were carrying – Despite efforts to stop them by the wife and son of the deceased, they did not stop and assaulted them also – Thereupon, they kept on assaulting the deceased until he fell down dead on the ground – Conviction of accused-appellants u/s.302 – Justification of – Held: Justified – Three injuries were noticed on the body of the deceased including a protuberant injury on the head, which presumably resulted in his death – The accused persons had gone together armed with lathis with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased – They had no provocation – Thus, the intention to kill is apparent – It is not a case which would squarely fall under Part II of s.304.

Evidence – Medical evidence – Contradictions between medical and ocular evidence – Effect – Held: It is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused – But where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused – Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

Evidence – Expert evidence – Value of – Held: The Courts, normally, look at expert evidence with a greater sense of acceptability, but are not absolutely guided by the report of the experts, especially if such reports are perfunctory,

unsustainable and are the result of a deliberate attempt to misdirect the prosecution – The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the expert but that of the Court – The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not.

Witnesses – Interested witness – Testimony of – Held: An eye-witness version cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relation or friend of the deceased – Where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the Court to discard the statements of such related or friendly witness.

Words and Phrases – "dereliction of duty" and "misconduct" – Difference between – Explained – Held: Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law – Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite – One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion – Service Law.

The prosecution case was that the four accused-appellants armed with *lathis* went to the fields of the deceased 'P', hurled abuses at him and thereafter started assaulting him with the *lathis* they were carrying and that

when the son and wife of 'P' (PW2 and PW4 respectively) intervened to protect 'P', they too were assaulted with the *lathis*. It was alleged that PW5 and one other person saw the occurrence and when they challenged the accused-appellants, the latter ran away. 'P' died on the spot while PW2 and PW4 received injuries.

The trial court ignored the purported acts of default and omission by PW3 (the government medical officer who conducted post-mortem) and PW6 (the Investigating Officer- SI) and the apparent conflict in the eye-witness version of the evidence and the medical evidence, and convicted the appellants under Section 302 r/w Section 34 IPC as well as under Section 323 r/w Section 34 IPC by placing reliance upon the evidence of the prosecution eye-witnesses and other corroborative evidence. The conviction was confirmed by the High Court.

In the instant appeal, the following questions arose for consideration- (1) Where acts of omission and commission, deliberate or otherwise, are committed by the investigating agency or other significant witnesses instrumental in proving the offence, what approach, in appreciation of evidence, should be adopted; (2) Depending upon the answer to the above, what directions should be issued by the courts of competent jurisdiction and (3) Whenever there is some conflict in the eye-witness version of events and the medical evidence, what effect will it have on the case of the prosecution and what would be the manner in which the Court should appreciate such evidence.

Dismissing the appeal both on merits and also on the quantum of sentence, the Court

HELD:1.1. In the instant case, there were three eye-witnesses to the occurrence. Out of them, two were injured witnesses, namely PW2 and PW4. PW2 is the son

of the deceased 'P' and PW4 is the wife. Presence of these two witnesses at the place of occurrence is normal and natural. The presence of PW2, PW4 and PW5 cannot be doubted. The statement made by them in the Court is natural, reliable and does not suffer from any serious contradictions. Once the presence of eye-witnesses cannot be doubted and it has been established that their statement is reliable, there is no reason for the Court to not rely upon the statement of such eye witnesses in accepting the case of the prosecution. The accused persons had come with pre-meditated mind, together with common intention, to assault the deceased and all of them kept on assaulting the deceased till the time he fell on the ground and became breathless. [Para 9] [180-A-B, E-G]

1.2. An eye-witness version cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relation or friend of the deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statements. But where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the Court to discard the statements of such related or friendly witness. [Para 10] [180-H; 181-A-C]

1.3. The plea that in the face of the expert medical evidence that no external or internal injuries were found on the body of the deceased, the statement of the eye-witnesses cannot be believed and the accused persons are entitled to acquittal, is liable to be rejected. No doubt the post mortem report (Exhibit Ka-4) and the statement

of PW3 does show/reflect that he had not noticed any injuries upon the person of the deceased externally or even after opening him up internally, but the fact of the matter is that the father of PW2 had died. How he suffered death is explained by three witnesses, PW2, PW4 and PW5, respectively. Besides this, the statement of the investigating officer, PW6, also clearly shows that the body of the deceased contained three apparent injuries. He recorded in his investigative proceedings that the accused had died of these injuries and was found lying dead at the place of occurrence. It is not only the statement of PW-6, but also the Panchas in whose presence the body was recovered, who have endorsed this fact. The course of events as recorded in the investigation points more towards the correctness of the case of the prosecution than otherwise. [Para 12] [183-B-F]

1.4. Merely because PW3 and PW6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. [Para 13] [183-H; 184-A-B]

Dharnidhar v. State of Uttar Pradesh **(2010) 7 SCC 759: 2010 (8) SCR 173;** *Mano Dutt & Anr. v*. *State of UP* **(2012 (3) SCALE 219;** *Satbir Singh & Ors. v. State of Uttar Pradesh* **(2009) 13 SCC 790: 2009 (3) SCR 406 and** *C. Muniappan v. State of Tamil Nadu* **AIR 2010 SC 3718 : (2010) 9 SCC 567: 2010 (10) SCR 262 – relied on.**

2.1.The Investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in

their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. It is possible that despite such default/omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. [Para 16] [185-B-E]

2.2. The present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the Court. It cannot be considered a case of *bona fide* or unintentional omission or commission. It is not a case of faulty investigation simplicitor but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot free. [Para 17] [186-A-B]

2.3. PW3 certainly did not act with the requisite professionalism. He even failed to truthfully record the post mortem report, Exhibit Ka-4. His report is contradictory to the evidence of the three eye-witnesses who stood the test of cross-examination and gave the eye-version of the occurrence. It is also in conflict with the statement of PW6 as well as the inquest report (Exhibit Ka-6) prepared by him where he had noticed that there were three injuries on the body of the deceased. It is clear that the post mortem report is silent and PW3 did not even

notice the cause of death. If he was not able to record a finding with regard to the cause of death, he was expected to record some reason in support thereof, particularly when it was not a case of death by administering poison. Similarly, the Investigating Officer has also failed in performing his duty in accordance with law. Firstly, for not recording the reasons given by PW3 for non-mentioning of injuries on the post mortem report, Exhibit Ka-4, which had appeared satisfactory to him. Secondly, for not sending to the FSL the viscera and other samples collected from the body of the deceased by PW3 who allegedly handed over the same to the police, and their disappearance. There is clear callousness and irresponsibility on their part and deliberate attempt to misdirect the investigation to favour the accused. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. [Paras 19, 20, 21] [188-F-H; 189-A-D]

2.5. Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. [Para 21] [189-D-E]

2.6. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialized persons. The police manual and even the provisions of the CrPC require the investigation to be

conducted in a particular manner and method which stands clearly violated in the present case. PW3 not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, *ex facie,* was incorrect and stood falsified by the unimpeachable evidence of eye witnesses placed by the prosecution on record. [Para 21] [189-F-H; 190-A-B]

2.7. In a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general. [Para 24] [191-F-G]

2.8. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well. [Para 28] [193-G-H; 194-A-B]

State of Punjab & Ors. v. Ram Singh Ex. Constable **(1992) 4 SCC 54: 1992 (3) SCR 634;** *Ram Bihari Yadav* and Others *v. State of Bihar & Ors.* **(1995) 6 SCC 31: 1995 (3)**

Suppl. SCR 197; *Sathi Prasad v. The State of U.P.* **(1972) 3 SCC 613;** *Dhanaj Singh @ Shera & Ors. v. State of Punjab* **(2004) 3 SCC 654: 2004 (2) SCR 938;** *Paras Yadav v. State of Bihar* **AIR 1999 SC 644: 1999 (1) SCR 55;** *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors*. **(2006) 3 SCC 374: 2006 (2) SCR 494;** *National Human Rights Commission v. State of Gujarat* **(2009) 6 SCC 767: 2009 (7) SCR 236;** *State of Karnataka v. K. Yarappa Reddy* **2000 SCC (Crl.) 61;** *Ram Bali v. State of Uttar Pradesh* **(2004) 10 SCC 598: 2004 (1) Suppl. SCR 195 and** *Karnel Singh v. State of M.P.* **(1995) 5 SCC 518: 1995 (2) Suppl. SCR 629 – relied on.**

3.1. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. [Para 29] [194-C-E]

3.2. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert

opinion is accepted, it is not the opinion of the medical officer but that of the Court. The purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. [Paras 30, 34] [194-G-H; 195-A-B; 198-F-G]

3.3. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the Court, it has to be well authored and convincing. PW3 was expected to prepare the post mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation. [Para 33] [198-D-F]

3.4. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise. [Para 34] [199-C-D]

Kamaljit Singh v. State of Punjab **2004 Cri.LJ 28 and** *Madan Gopal Kakad* v. *Naval Dubey & Anr.* **(1992) 2 SCR 921: (1992) 3 SCC 204: 1992 (2) SCR 921 – relied on.**

Forensic Science in Criminal Investigation & Trial (Fourth Edition) by B.R. Sharma and '*The New Wigmore A Treatise on Evidence – Expert Evidence*' **(2004 Edition) by David H. Kaye – referred to.**

4.1. In the case at hand, the trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post mortem report prepared by PW3. The consistent statement of the eye-witnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of *lathis*, inquest report, recovery of the *pagri* of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW3 and PW6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eye-witness which was reliable and worthy of credence has justifiably been relied upon by the court. [Para 35] [199-E-H]

4.2. Despite clear observations of the trial court, no action has been taken by the Director General, Medical Health, Uttar Pradesh. There is no justification for these lapses on the part of the higher authority. Thus, it is a fit case where this Court should issue notice to show cause why action in accordance with the provisions of the Contempt of Courts Act, 1971 be not initiated against him and he be not directed to conduct an enquiry personally and pass appropriate orders involving PW3 and if found guilty, to impose punishment upon him including deduction of pension. This direction was passed when PW3 was in service. His retirement, therefore, will be inconsequential to the imposing of punishment and the limitation of period indicated in the service regulations would not apply in face of the order of this Court. Similarly, the Director General of Police UP/Uttarakhand

also be issued notice to take appropriate action in accordance with the service rules against PW6, SI, irrespective of the fact whether he is in service or has since retired. If retired, then authorities should take action for withdrawal or partial deduction in the pension, and in accordance with law. [Paras 36, 37] [200-A-E]

5.1. From a cumulative appreciation of the evidence, it is clear that in the case herein four persons armed with *lathis* had gone to the fields of the deceased. They first hurled abuses at him and without any provocation started assaulting him with the *dang* (lathi) that they were carrying. Despite efforts to stop them by the the wife and son of the deceased, PW4 and PW2, they did not stop assaulting him and assaulted both these witnesses also. Thereupon, they kept on assaulting the deceased until he fell down dead on the ground. Three injuries were noticed by the Police on the body of the deceased including a protuberant injury on the head, which the Court is only left to presume has resulted in his death. In the absence of an authentic and correct post-mortem report (Exhibit Ka-4), the truthfulness of the prosecution eye-witnesses cannot be doubted. In addition thereto, the stand taken by the accused that they had suffered injuries was a false defence. Firstly, according to the doctor, CW2, it was injuries of a firearm, while even according to the defence, the deceased or his son were not carrying any gun at the time of occurrence. Secondly, they did not choose to pursue their report with the police at the time of investigation or even when the trial was on before the Trial Court. The accused persons had gone together armed with *lathis* with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased. They had no provocation. Thus, the intention to kill is apparent. It is not a case which would squarely fall under Part II of Section 304 IPC. Thus, the cumulative effect of

appreciation of evidence is that there is no merit in the present appeal. [Para 38] [200-G-H; 201-A-E]

5.2. The Director Generals, Health Services of UP/ Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the Trial Court. The above-said officials are hereby directed to take disciplinary action against PW3, whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which *ex facie* was incorrect and was in conflict with the inquest report (Exhibits Ka-6 and Ka-7) and statement of PW6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order of the trial Court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against PW3. Director Generals of Police UP/ Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by direction of the Court that such enquiry shall be conducted. It is held, declared and directed that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in

breach of professional standards and investigative requirements of law, during the course of the investigation by the investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the Courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired. [Para 39] [201-F-H; 202-A-H; 203-A-B]

Case Law Reference:

2010 (8) SCR 173	relied on	Para 9
(2012 (3) SCALE 219	relied on	Para 11
2009 (3) SCR 406	relied on	Para 11
2010 (10) SCR 262	relied on	Para 13
1992 (3) SCR 634	relied on	Para 21
1995 (3) Suppl. SCR 197	relied on	Para 21
(1972) 3 SCC 613	relied on	Para 22
2004 (2) SCR 938	relied on	Para 22
1999 (1) SCR 55	relied on	Para 23
2006 (2) SCR 494	relied on	Para 23
2009 (7) SCR 236	relied on	Para 25
2000 SCC (Crl.) 61	relied on	Para 26
2004 (1) Suppl. SCR 195	relied on	Para 27
1995 (2) Suppl. SCR 629	relied on	Para 27
2004 Cri.LJ 28	relied on	Para 29
1992 (2) SCR 921	relied on	Para 30

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 529 of 2010.

From the Judgment & Order dated 17.3.2008 of the High Court of Judicature of Uttarakhand at Nainital in Crl. Appeal No. 2050 of 2001 (Old No. 1324 of 1990.

Vineet Dhanda, Puneet Dhanda, J.P. Dhanda, Raj Rani Dhanda for the Appellants.

Ratnakar Dash, Rajeev Dubey, Kamlendra Mishra, Jatinder Kumar Bhatia, Ajai K. Bhatia for the Respondent.

The Judgment & Order of the Court was delivered by

SWATANTER KUMAR, J. 1. Settled canons of criminal jurisprudence when applied in their correct perspective, give rise to the following questions for consideration of the Court in the present appeal:

(a) Where acts of omission and commission, deliberate or otherwise, are committed by the investigating agency or other significant witnesses instrumental in proving the offence, what approach, in appreciation of evidence, should be adopted?

(b) Depending upon the answer to the above, what directions should be issued by the courts of competent jurisdiction?

(c) Whenever there is some conflict in the eye-witness version of events and the medical evidence, what effect will it have on the case of the prosecution and what would be the manner in which the Court should appreciate such evidence?

2. The facts giving rise to the questions in the present appeal are that the fields of Gurumukh Singh and Dayal Singh were adjoining in the village Salwati within the limits of Police

Station Sittarganj, district Udham Singh Nagar. These fields were separated by a *mend* (boundary mound). On 8th December, 1985, Gurumukh Singh, the complainant, who was examined as PW2, along with his father Pyara Singh, had gone to their fields. At about 12 noon, Smt. Balwant Kaur, PW4, wife of Pyara Singh came to the fields to give meals to Pyara Singh and their son Gurumukh Singh. At about 12.45 p.m, the accused persons, namely, Dayal Singh, Budh Singh & Resham Singh (both sons of Dayal Singh) and Pahalwan Singh came to the fields wielding *lathis* and started hurling abuses. They asked Pyara Singh and Gurumukh Singh as to why they were placing earth on their *mend,* upon which they answered that *mend* was a joint property belonging to both the parties. Without any provocation, all the accused persons started attacking Pyara Singh with *lathis*. Gurumukh Singh, PW2, at that time, was at a little distance from his father and Smt. Balwant Kaur, PW4, was nearby. On seeing the occurrence, they raised an alarm and went to rescue Pyara Singh. The accused, however, inflicted *lathi* injuries on both PW2 and PW4. In the meanwhile, Satnam Singh, who was ploughing his fields, which were quite close to the fields of the parties and Uttam Singh (PW5) who was coming to his village from another village, saw the occurrence. These two persons even challenged the accused persons upon which the accused persons ran away from the place of occurrence. Pyara Singh, who had been attacked by all the accused persons with *lathis* fell down and succumbed to his injuries on the spot. Few villagers also came to the spot. According to the prosecution, *pagri* (Ex.1) of one of the accused, Budh Singh, had fallen on the spot which was subsequently taken into custody by the Police. Gurumukh Singh, PW2, left the dead body of his deceased father in the custody of the villagers and went to the police station where he got the report, Exhibit Ka-3, scribed by Kashmir Singh in relation to the occurrence. The report was lodged at about 2.15 p.m. on 8th December, 1985 by PW2 in presence of SI Kartar Singh, PW6. FIR (Exhibit Ka-4A) was registered and the investigating machinery was put into motion. The two injured witnesses,

namely, PW2 and PW4 were examined by Dr. P.C. Pande, PW1, the medical officer at the Public Health Centre, Sittarganj on the date of occurrence. At 4.00 p.m., the doctor examined PW2 and noticed the following injuries on the person of the injured witness vide Injury Report, Ex. Ka-1.

PW-2

"1. Lacerated wound of 5 cm X 1 cm and 1 cm in depth. Margins were lacerated. Red fresh blood was present over wound. Wound was caused by hard and blunt object. Wound was at the junction of left parietal and occipital bone 7 cm from upper part of left ear caused by blunt object. Advised X-ray. Skull A.P. and lateral and the injury was kept under observation.

2. Contusion of 6 cm X 2.5 cm on left side of body 3 cm above the left ilic crest. Simple in nature caused by hard and blunt object."

According to the Doctor, the injuries were caused by hard and blunt object and they were fresh in duration.

On 8.12.1985 at 7.30 p.m. Dr. P.C. Pande (PW1) examined the injuries of Smt. Balwant Kaur PW4 and found the following injuries on her person vide injury report Ex.Ka.2:

PW-4

1. Contusion 6 cm X 3 cm on left shoulder caused by hard and blunt object.

2. Contusion of 5 cm X 2 cm on lateral side of middle of left upper arm. Bluish red in colour caused by hard and blunt object.

3. Contusion of 4 cm X 2 cm on left parietal bone 6 cm from left ear caused by hard and blunt object.

According to Dr. Pande, these injuries were caused by hard and blunt object and the duration was within 12 hours and the nature of the injuries was simple. According to Dr. Pande the injuries of both these injured persons could have been received on 8.12.1985 at 12.45 p.m. by lathi."

3. As noted above, according to Dr. Pande, the injuries were caused by a hard and blunt object and duration was within 12 hours. Thereafter, SI Kartar Singh, PW6, proceeded to the place of occurrence in village Salwati. He found the dead body of Pyara Singh lying in the fields. In the presence of *panchas*, including Balwant Singh, PW8, he noticed that there were three injuries on the person of the deceased, Pyara Singh and prepared Inquest Report vide Ex. Ka-6 recording his opinion that the deceased died on account of the injuries found on his body. After preparing the site plan, Ext. Ka-10, he also wrote a letter to the Superintendent, Civil Hospital, Haldwani for post mortem, being Exhibit Ka-9. The dead body was taken to the said hospital by Constable Chandrapal Singh, PW7. Dr. C.N. Tewari, PW3, medical officer in the Civil Hospital, Haldwani, performed the post mortem upon the body of the deceased and did not find any ante-mortem or post-mortem injuries on the dead body. On internal examination, he did not find any injuries and could not ascertain the cause of death. Further, he preserved the viscera and gave the post-mortem report, Exhibit Ka-4. After noticing that there was no injury or abnormality found upon external and internal examination of the dead body, the doctor in his report recorded as under:

"Viscera in sealed jars handed over to the accompanying Constables.

Jar No.1 sample preservative saline water.

Jar No.2 Pieces of stomach

Jar No.3 Pieces of liver, spleen and kidney.

Death occurred about one day back.

Cause of death could not be ascertained. Hence, viscera preserved."

4. It appears from the record that the deceased's viscera, which allegedly was handed over by doctor to the police, was either never sent to the Forensic Science Laboratory (for short, the 'FSL') for chemical examination, or if sent, the report thereof was neither called for nor proved before the Court. In fact, this has been left to the imagination of the Court.

5. The accused persons, at about 5.45 p.m. on the same day, lodged a written report at the same Police Station, which was received by Head Constable Inder Singh, who prepared the check report Exhibit C-1 and made appropriate entry. The case was registered under Section 307 of the Indian Penal Code, 1860 (IPC) against PW2, Gurumukh Singh. Dayal Singh was arrested in furtherance of the FIR, Exhibit Ka-4A. He was also sent for medical examination and was examined by Dr. K.P.S. Chauhan, CW2. After examining the said accused at about 7.45 p.m., the doctor found two injuries on his person and prepared the report (Exhibit C-4). According to Dr. Chauhan, the injuries on the person of the accused could have been received by a firearm object and injuries were fresh within six hours.

6. The investigating officer completed the investigation and filed charge sheet (Exhibit Ka-11) against the accused persons on 15th January, 1986. It may be noticed that in furtherance to Exhibit C-2, neither any case was registered nor any charge-sheet was presented before the Court of competent jurisdiction. The accused also took no steps to prove that report in Court. They also did not file any private complaint.

7. Considering the ocular and other evidence produced by the prosecution, the learned Trial Court vide its judgment of conviction and order of sentence, both dated 29th June, 1990, found the accused persons guilty of offences under Section 302 read with Section 34 IPC as well as under Section 323 read

with Section 34 IPC. The Trial Court, while dealing with the arguments of the accused for application of Section 34, as well as the submission that the witnesses had not attributed specific role to the respective accused persons, held as under:

"The attack was premeditated and the accused had come fully prepared to do the overt act. The injury was caused on the head of the deceased which is a vital part of the body at which it was aimed by employing lathi, it was clear that the accused persons had intended to cause death by giving blow on vital part of the body of the deceased. After receiving the injuries, the deceased fell down and even thereafter he was attacked by the accused persons and he died on the spot immediately. This all goes to show that the accused persons who all were armed with lathis and had attacked in furtherance of their common intention by surrounding Sri Pyara Singh. At that juncture when the occurrence took place suddenly and the witnesses were at some distance it was quite natural for the witnesses not to have noted as to whose lathi blow caused the injuries on Sri Pyara Singh and also on the injured persons. It was thus quite natural in such circumstances for the witnesses not to have noted the minute details of the incident. The Hon'ble Supreme Court has held in 1971 Cri.L.J. 1135 *Har Prasad vs. State of Madhya Pradesh* that in view of the large number of accused involved in the occurrence it is quite natural for the prosecution witnesses to get a bit confused. In fact, no cross-examination was made on this respect of the case which has been discussed by me above. The fact that the accused persons had gone to the place of occurrence fully armed with lathis and immediately on the basis of 'mend' started attacking the deceased Sri Pyara Singh indicates that they had gone there with premeditation and prior concert. All the four accused were physically present at the time of the commission of offence. The criminal act was done by the accused persons and they all had shared the common intention by engaging in

that criminal enterprise for which they had come fully prepared. The prosecution has succeeded in showing the existence of common purpose or design. All the accused persons were confederates in the commission of the offence and they had participated in that common intention. Each of the accused person is liable for the fact done in pursuance of that common purpose of design. The acts done by the accused persons are similar as they all had come prepared armed with lathis and lathi blows were struck on the deceased Sri Pyara Singh by the accused persons in furtherance of their common intention. Each of them is liable for the blows struck with lathi on the deceased and also on the injured persons. It is proved beyond all reasonable doubt that lathi blow was struck on the head of Sri Pyara Singh which was a vital part and he died on the spot due to injuries. Whoever may have struck that lathi blow, each of the accused person is liable for the lathi blows struck on the vital part of the deceased. Since the ladhi blow was struck on the head of the deceased which is a vital part, the offence amounts to murder (See 1972 SCC (Cri) 438 *Gudar Dusadh Vs. State of Bihar*). The death of Sri Pyara Singh was caused in the occurrence and it is proved to the hilt and beyond all reasonable doubt that he died on the spot on account of lathi blows inflicted on him. It is nobody's case that he died natural death. The accused persons have committed offence punishable under Section 302/34 I.P.C. for committed offence punishable under Section 323/34 I.P.C. for causing voluntary hurt to Sri Gurumukh Singh and Smt. Balwant Kaur."

8. The above judgment of the Trial Court was assailed by the accused persons in appeal before the High Court. The High Court, vide its judgment dated 17th March, 2008, dismissed the appeal and affirmed the judgment of conviction and order of sentence passed by learned Trial Court giving rise to the present appeal.

9. From the narration of the above facts, brought on record by the prosecution and proved in accordance with law, it is clear that there are three eye-witnesses to the occurrence. Out of them, two are injured witnesses, namely PW2 and PW4. PW2 is the son of the deceased and PW4 is the wife. Presence of these two witnesses at the place of occurrence is normal and natural. According to PW4, she had gone to the place of occurrence to give food to her husband and son around 12 noon, which is the normal hour for lunch in the villages. The son of the deceased had come to the field with his father to work. They were putting earth on the *mend* which was objected to by the accused persons who had come there with *lathis* and with a premeditated mind of causing harm to the deceased. Upon enquiry, the deceased informed the accused persons that the *mend* was a joint property of the parties. Without provocation, the accused persons thereupon started hurling abuses upon Pyara Singh and his son, and assaulted the deceased with *lathis*. PW2 and PW4 intervened to protect their father and husband respectively, but to no consequence and in the process, they suffered injuries. In the meanwhile, when the accused persons were challenged by PW5 and Satnam Singh, who were close to the place of occurrence, they ran away. The presence of PW2, PW4 and PW5 cannot be doubted. The statement made by them in the Court is natural, reliable and does not suffer from any serious contradictions. Once the presence of eye-witnesses cannot be doubted and it has been established that their statement is reliable, there is no reason for the Court to not rely upon the statement of such eye witnesses in accepting the case of the prosecution. The accused persons had come with pre-meditated mind, together with common intention, to assault the deceased and all of them kept on assaulting the deceased till the time he fell on the ground and became breathless.

10. This Court has repeatedly held that an eye-witness version cannot be discarded by the Court merely on the ground that such eye-witness happened to be a relation or friend of the

deceased. The concept of interested witness essentially must carry with it the element of unfairness and undue intention to falsely implicate the accused. It is only when these elements are present, and statement of the witness is unworthy of credence that the Court would examine the possibility of discarding such statements. But where the presence of the eye-witnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence and the occurrence itself, it will not be permissible for the Court to discard the statements of such related or friendly witness. The Court in the case of *Dharnidhar v. State of Uttar Pradesh* [(2010) 7 SCC 759] took the following view :

> "**12.** There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case. In *Jayabalan v. UT of Pondicherry (2010) 1 SCC 199*, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24)
>
> > "*23*. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.
> >
> > *24*. From a perusal of the record, we find that the evidence of PWs 1 to 4 is clear and categorical in reference to the frequent quarrels between the deceased and the appellant. They have clearly and consistently supported the prosecution version with regard to the beating and the ill-treatment meted out to the deceased by the appellant on several occasions which compelled the deceased to leave the appellant's house and take shelter in her parental house with an intention to live there permanently. PWs 1 to 4 have unequivocally stated that the deceased feared threat to her life from the appellant. The aforesaid version narrated by the prosecution witnesses viz. PWs 1 to 4 also finds corroboration from the facts stated in the complaint."

13. Similar view was taken by this Court in *Ram Bharosey v. State of U.P. AIR 1954 SC 704*, where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same."

11. Similar view was taken by this Court in the cases of *Mano Dutt & Anr. v. State of UP* [(2012 (3) SCALE 219] and *Satbir Singh & Ors. v. State of Uttar Pradesh* [(2009) 13 SCC 790].

12. With some vehemence, it has then been contended on

behalf of the appellant that the post mortem report and the statement of PW3, Dr. C.N Tewari, specifically state that no external or internal injuries were found on the body of the deceased. In other words, no injury was either inflicted by the accused or suffered by the deceased. In face of this expert medical evidence, the statement of the eye-witnesses cannot be believed. The expert evidence should be given precedence and the accused persons are entitled to acquittal. This argument is liable to be rejected at the very outset despite the fact that it sounds attractive at first blush. No doubt the post mortem report (Exhibit Ka-4) and the statement of PW3 Dr. C.N. Tewari, does show/reflect that he had not noticed any injuries upon the person of the deceased externally or even after opening him up internally. But the fact of the matter is that Pyara Singh died. How he suffered death is explained by three witnesses, PW2, PW4 and PW5, respectively. Besides this, the statement of the investigating officer, PW6, also clearly shows that the body of the deceased contained three apparent injuries. He recorded in his investigative proceedings that the accused had died of these injuries and was found lying dead at the place of occurrence. It is not only the statement of PW-6, but also the Panchas in whose presence the body was recovered, who have endorsed this fact. The course of events as recorded in the investigation points more towards the correctness of the case of the prosecution than otherwise. Strangely, Dayal Singh and other accused persons not only took the stand of complete denial in their statement under Section 313 of the Code of Criminal Procedure, 1973 (CrPC) but even went to the extent of stating that they had no knowledge (*pata nahin)* when they were asked whether Pyara Singh had died as a result of injuries.

13. We have already discussed above that the presence of PW2, PW4 and PW5 at the place of occurrence was in the normal course of business and cannot be doubted. Their statements are reliable, cogent and consistent with the story of the prosecution. Merely because PW3 and PW6 have failed

to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. Reference in this regard can usefully be made to the case of *C. Muniappan v. State of Tamil Nadu* {AIR 2010 SC 3718 : (2010) 9 SCC 567}.

14. Now, we will deal with the question of defective or improper investigation resulting from the acts of omission and/or commission, deliberate or otherwise, of the Investigating Officer or other material witnesses, who are obliged to perform certain duties in discharge of their functions and then to examine its effects. In order to examine this aspect in conformity with the rule of law and keeping in mind the basic principles of criminal jurisprudence, and the questions framed by us at the very outset of this judgment, the following points need consideration:

(i) Whether there have been acts of omission and commission which have resulted in improper or defective investigation.

(ii) Whether such default and/or acts of omission and commission have adversely affected the case of the prosecution.

(iii) Whether such default and acts were deliberate, unintentional or resulted from unavoidable circumstances of a given case.

(iv) If the dereliction of duty and omission to perform was deliberate, then is it obligatory upon the court to pass appropriate directions including directions in regard to taking of penal or other civil action against such officer/witness.

15. In order to answer these determinative parameters, the Courts would have to examine the prosecution evidence in its

entirety, especially when a specific reference to the defective or irresponsible investigation is noticed in light of the facts and circumstances of a given case.

16. The Investigating Officer, as well as the doctor who are dealing with the investigation of a criminal case, are obliged to act in accordance with the police manual and the known canons of medical practice, respectively. They are both obliged to be diligent, truthful and fair in their approach and investigation. A default or breach of duty, intentionally or otherwise, can sometimes prove fatal to the case of the prosecution. An Investigating Officer is completely responsible and answerable for the manner and methodology adopted in completing his investigation. Where the default and omission is so flagrant that it speaks volumes of a deliberate act or such irresponsible attitude of investigation, no court can afford to overlook it, whether it did or did not cause prejudice to the case of the prosecution. It is possible that despite such default/ omission, the prosecution may still prove its case beyond reasonable doubt and the court can so return its finding. But, at the same time, the default and omission would have a reasonable chance of defeating the case of the prosecution in some events and the guilty could go scot-free. We may illustrate such kind of investigation with an example where a huge recovery of opium or poppy husk is made from a vehicle and the Investigating Officer does not even investigate or make an attempt to find out as to who is the registered owner of the vehicle and whether such owner was involved in the commission of the crime or not. Instead, he merely apprehends a cleaner and projects him as the principal offender without even reference to the registered owner. Apparently, it would *prima facie* be difficult to believe that a cleaner of a truck would have the capacity to buy and be the owner, in possession of such a huge quantity, i.e., hundreds of bags, of poppy husk. The investigation projects the poor cleaner as the principal offender in the case without even reference to the registered owner.

17. Even the present case is a glaring example of irresponsible investigation. It, in fact, smacks of intentional mischief to misdirect the investigation as well as to withhold material evidence from the Court. It cannot be considered a case of *bona fide* or unintentional omission or commission. It is not a case of faulty investigation simplicitor but is an investigation coloured with motivation or an attempt to ensure that the suspect can go scot free. This can safely be gathered from the following:

(a) The entire investigation, including the statement of the investigating officer, does not show as to what happened to the viscera which was, as per the statement of PW3, handed over to the Constable, PW7, who, in turn, stated that the viscera had been deposited in the Police Station Malkhana. In the entire statement of the Investigating Officer, there is no reference to viscera, its collection from the hospital, its deposit in the Malkhana and whether it was sent to the FSL at all or not. If sent, what was the result and, if not, why?

(b) Conduct of the Investigating Officer is more than doubtful in the present case. In his statement, he had stated that he noticed three injuries on the body of the deceased. He also admitted that in the post mortem report, no internal or external injuries were shown on the body of the deceased. According to him, he had asked PW3 in that regard but the reply of the doctor was received late and the explanation rendered was satisfactory. Firstly, this reply or explanation does not find place on record. There is no document to that effect and secondly, even in his oral evidence, he does not say as to what the explanation was.

(c) In his statement, PW3, Dr. C.N. Tewari, stated that he did not find any external or internal injuries even

after performing the post mortem on the body of the deceased. This remark on the post mortem report apparently is falsified both by the eye-witnesses as well as the Investigating Officer. It will be beyond apprehension as to how a healthy person could die, if there were no injuries on his body and when, admittedly, it was not a case of cardiac arrest or death by poison etc., more so, when he was alleged to have been assaulted with *dandas* (*lathi*) by four persons simultaneously. In any case, the doctor gave no cause for death of the deceased and prepared a post mortem report which *ex facie* was incorrect and tantamount to abrogation of duty. The Trial Court while giving the judgment of conviction, noticed that medico-legal post mortem examination is a very important part of the prosecution evidence and, therefore, it is necessary that it be conducted by a doctor fully competent and experienced. The Court also commented adversely upon the professional capabilities and/or misconduct of Dr. C.N. Tewari, as follows:

"Whatever may have been the reasons but it is quite evident that Dr. C.N. Tewari failed in his professional duty and he did not perform post mortem examination properly after considering the inquest report and the police papers sent to him. If his finding deferred from the finding of the Panchas he should have informed his superior officers in that regard so that another opinion could have been obtained before the disposal of the dead body. The evidence leaves no room for doubt that Sri Pyara Singh was attacked with lathis as alleged by the prosecution and he received three injuries already referred to above which were mentioned in the inquest report (Ex.Ka-6)….

The case of the prosecution cannot be thrown on account of the gross negligence and apathy of the Medical Officer

Dr. C.N. Tewari who had performed autopsy on the dead body of Sri Pyara Singh. Since the Medical Officer Dr. C.N. Tewari had conducted in a manner not befitting the medical profession and prepared post mortem report against facts for reasons best known to him and was negligent in his duty in ascertaining the injuries on the body of the deceased, hence it is just and proper that *the Director General, Medical health U.P. be informed in this regard for taking necessary action and for eradicating such practices in future."*

(Emphasis supplied)

18. From the record, it is evident that the learned counsel appearing for the State was also not aware if any action had been taken against Dr. C.N. Tewari. On the contrary, Mr. Ratnakar Dash, learned senior counsel appearing for Dr. C.N. Tewari, informed us that no action was called for against Dr. C.N. Tewari as he had authored the post mortem report and given his evidence truthfully and without any dereliction of duty. He also informed us that since Dr. C.N. Tewari is now retired and is not well, this Court need not pass any further directions.

19. We are not impressed with this contention at all. We have already noticed that PW3, Dr. C.N. Tewari, certainly did not act with the requisite professionalism. He even failed to truthfully record the post mortem report, Exhibit Ka-4. At the cost of repetition, we may notice that his report is contradictory to the evidence of the three eye-witnesses who stood the test of cross-examination and gave the eye-version of the occurrence. It is also in conflict with the statement of PW6 as well as the inquest report (Exhibit Ka-6) prepared by him where he had noticed that there were three injuries on the body of the deceased. It is clear that the post mortem report is silent and PW3 did not even notice the cause of death. If he was not able to record a finding with regard to the cause of death, he was expected to record some reason in support thereof, particularly when it is conceded before us by the learned counsel for the

parties, including the counsel for Dr. C.N. Tewari that it was not a case of death by administering poison.

20. Similarly, the Investigating Officer has also failed in performing his duty in accordance with law. Firstly, for not recording the reasons given by Dr. C.N. Tewari for non-mentioning of injuries on the post mortem report, Exhibit Ka-4, which had appeared satisfactory to him. Secondly, for not sending to the FSL the viscera and other samples collected from the body of the deceased by Dr. C.N. Tewari, who allegedly handed over the same to the police, and their disappearance. There is clear callousness and irresponsibility on their part and deliberate attempt to misdirect the investigation to favour the accused.

21. This results in shifting of avoidable burden and exercise of higher degree of caution and care on the courts. Dereliction of duty or carelessness is an abuse of discretion under a definite law and misconduct is a violation of indefinite law. Misconduct is a forbidden act whereas dereliction of duty is the forbidden quality of an act and is necessarily indefinite. One is a transgression of some established and definite rule of action, with least element of discretion, while the other is primarily an abuse of discretion. This Court in the case of *State of Punjab & Ors. v. Ram Singh Ex. Constable* [(1992) 4 SCC 54] stated that the ambit of these expressions had to be construed with reference to the subject matter and the context where the term occurs, regard being given to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires maintenance of strict discipline. The consequences of these defaults should normally be attributable to negligence. Police officers and doctors, by their profession, are required to maintain duty decorum of high standards. The standards of investigation and the prestige of the profession are dependent upon the action of such specialized persons. The police manual and even the provisions of the CrPC require the investigation to be conducted in a particular manner and method which, in our

opinion, stands clearly violated in the present case. Dr. C.N. Tewari, not only breached the requirement of adherence to professional standards but also became instrumental in preparing a document which, *ex facie,* was incorrect and stood falsified by the unimpeachable evidence of eye witnesses placed by the prosecution on record. Also, in the same case, the Court, while referring to the decision in *Ram Bihari Yadav* and Others *v. State of Bihar & Ors.* [(1995) 6 SCC 31] noticed that if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice.

22. Now, we may advert to the duty of the Court in such cases. In the case of *Sathi Prasad v. The State of U.P.* [(1972) 3 SCC 613], this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the Court to see if the evidence given in Court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in the case of *Dhanaj Singh @ Shera & Ors. v. State of Punjab* [(2004) 3 SCC 654], held, "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

23. Dealing with the cases of omission and commission, the Court in the case of *Paras Yadav v. State of Bihar* [AIR 1999 SC 644], enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in

the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. In the case of *Zahira Habibullah Sheikh & Anr. Vs. State of Gujarat & Ors*. [(2006) 3 SCC 374], the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of *Bentham,* who states that witnesses are the eyes and ears of justice. The Court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. *Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in proper administration of justice must be given as much importance if not more, as the interest of the individual accused. The courts have a vital role to play.* (Emphasis supplied)

24. With the passage of time, the law also developed and the dictum of the Court emphasized that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

25. Reiterating the above principle, this Court in the case of *National Human Rights Commission v. State of Gujarat* [(2009) 6 SCC 767], held as under:

"The concept of fair trial entails familiar triangulation of

interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

26. In the case of *State of Karnataka v. K. Yarappa Reddy* [2000 SCC (Crl.) 61], this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the Investigating Officer could be put against the prosecution case. This Court, in Paragraph 19, held as follows:

"19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the Court be

influenced by the machinations demonstrated by the Investigating Officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

27. In *Ram Bali v. State of Uttar Pradesh* [(2004) 10 SCC 598], the judgment in *Karnel Singh v. State of M.P.* [(1995) 5 SCC 518] was reiterated and this Court had observed that 'in case of defective investigation the court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective'.

28. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the

course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well.

29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab* [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the

data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. See *Madan Gopal Kakad v. Naval Dubey & Anr.* [(1992) 2 SCR 921 : (1992) 3 SCC 204]}.

31. Profitably, reference to the value of an expert in the eye of law can be assimilated as follows:

> "The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the *ipse dixit* of an expert. Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of

> reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based."
>
> [See: *Forensic Science in Criminal Investigation & Trial* (Fourth Edition) by B.R. Sharma]

32. The purpose of expert testimony is to provide the trier of fact with useful, relevant information. The overwhelming majority rule in the United States, is that an expert need not be a member of a learned profession. Rather, experts in the United States have a wide range of credentials and testify regarding a tremendous variety of subjects based on their skills, training, education or experience. The role of the expert is to apply or supply specialized, valuable knowledge that lay jurors would not be expected to possess. An expert may present the information in a manner that would be unacceptable with an ordinary witness. The common law tried to strike a balance between the benefits and dangers of expert testimony by allowing expert testimony to be admitted only if the testimony were particularly important to aiding the trier of fact. Even in United States, if the helpfulness of expert testimony is substantially outweighed by the risk of unfair prejudice, confusion or waste of time, then the testimony should be excluded under the relevant Rules, and State equally balanced. Expert testimony on any issue of fact and significance of its application has been doubted by the scholars in the United States. Even under the law prevalent in that country, the opinion of an expert has to be scientific, specific and experience based. Conflict in expert opinions is a well prevalent practice there. While referring to such incidence David H. Kaye and other authors in '*The New Wigmore A Treatise on Evidence – Expert Evidence'* (2004 Edition) opined as under :

"The district court opinion reveals that one pharmacologist asserted "that Danocrine more probably than not caused plaintiff's death from pulmonary hypertension," but it describes the reasoning behind this opinion in the vaguest of terms, referring only to "extensive education and training in pharmacology" and an unspecified "scientific technique" that "relied upon epidemiological, clinical and animal studies, as well as plaintiff's medical records and medical history…" The nature of these studies and their relationship to the patient's records is left unstated. The district court incanted the same mantra to justify admitting the remaining testimony. It asserted that the other experts "similarly base their testimony upon a careful review of medical literature concerning Danocrine and pulmonary hypertension, and plaintiff's medical records and medical history."

The court of appeals elaborated on the testimony of two of the experts. The physician "was confident to a reasonable medical certainty that the Danocrine caused Mrs. Zuchowicz's PPH" because of "the temporal relationship between the overdose and the start of the disease and the differential etiology method of excluding other possible causes." Yet the "differential etiology" here was barely more than a differential diagnosis of PPH. The causes of PPH are generally unknown and it appears that the only other putative alternative causes considered were drugs other than Danocrine. It is not at all clear that such a "differential etiology" is adequate to support a conclusion of causation to any kind of a "medical certainty." The pharmacologist, not being a medical doctor, testified "to a reasonable degree of scientific certainty . . . [that] the overdose of Danocrine, more likely than not, caused PPH. . . ." He postulated a mechanism by which this might have occurred: "I) a decrease in estrogen; 2) hyperinsulinemia, in which abnormally high levels of insulin circulate in the body; and 3) increase in free testosterone and

progesterone . . . that . . . taken together, likely caused a dysfunction of the endothelium leading to PPH."

In sum, plaintiff's experts did not know what else might have caused the hypertension, and they offered a conjecture as to a causal chain leading from the drug to the hypertension. This logic would be more than enough to justify certain clinical recommendations—the advice to Mrs. Zuchowicz to discontinue the medication, for example. But is it enough to allow an expert not merely to testify to a reasonable diagnosis of PPH, or "unexplained pulmonary hypertension," as the condition also is known, but also be able to propound a novel explanation that has yet to be verified, even in an animal model?"

33. The Indian law on Expert Evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the Court, it has to be well authored and convincing. Dr. C.N. Tewari was expected to prepare the post mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.

34. We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the Court in arriving at a final conclusion. Such report is not binding upon the Court. The Court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the Court

has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the Court. The assistance and value of expert opinion is indisputable, but there can be reports which are, *ex facie,* incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eye-witnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye version given by the eye-witnesses, the Court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the Court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.

35. Reverting to the case in hand, the Trial Court has rightly ignored the deliberate lapses of the investigating officer as well as the post mortem report prepared by Dr. C.N. Tewari. The consistent statement of the eye-witnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of *lathis*, inquest report, recovery of the *pagri* of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW3 and PW6 are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eye-witness which was reliable and worthy of credence has justifiably been relied upon by the court.

36. Despite clear observations of the Trial Court, no action has been taken by the Director General, Medical Health, Uttar Pradesh. We do not see any justification for these lapses on the part of the higher authority. Thus, it is a fit case where this Court should issue notice to show cause why action in accordance with the provisions of the Contempt of Courts Act, 1971 be not initiated against him and he be not directed to conduct an enquiry personally and pass appropriate orders involving Dr. C.N. Tewari and if found guilty, to impose punishment upon him including deduction of pension. Admittedly, this direction was passed when Dr. C.N. Tewari was in service. His retirement, therefore, will be inconsequential to the imposing of punishment and the limitation of period indicated in the service regulations would not apply in face of the order of this Court.

37. Similarly, the Director General of Police UP/ Uttarakhand also be issued notice to take appropriate action in accordance with the service rules against PW6, SI Kartar Singh, irrespective of the fact whether he is in service or has since retired. If retired, then authorities should take action for withdrawal or partial deduction in the pension, and in accordance with law.

38. Lastly, the learned counsel for the appellant had, of course, with some vehemence, argued that the offence even if committed by the appellant, would not attract the provisions of Section 302 IPC and would squarely fall within the ambit of Part II of Section 304 IPC. In other words, he prays for alteration of the offence to an offence punishable under Part II of Section 304 IPC. We are concerned with a case where four persons armed with *lathis* had gone to the fields of the deceased. They first hurled abuses at him and without any provocation started assaulting him with the *dang* (lathi) that they were carrying. Despite efforts to stop them by the the wife and son of the deceased, PW4 and PW2, they did not stop assaulting him and assaulted both these witnesses also. Thereupon, they kept on

assaulting the deceased until he fell down dead on the ground. Three injuries were noticed by the Police on the body of the deceased including a protuberant injury on the head, which the Court is only left to presume has resulted in his death. In the absence of an authentic and correct post-mortem report (Exhibit Ka-4), the truthfulness of the prosecution eye-witnesses cannot be doubted. In addition thereto, the stand taken by the accused that they had suffered injuries was a false defence. Firstly, according to the doctor, CW2, it was injuries of a firearm, while even according to the defence, the deceased or his son were not carrying any gun at the time of occurrence. Secondly, they did not choose to pursue their report with the police at the time of investigation or even when the trial was on before the Trial Court. The accused persons had gone together armed with *lathis* with a common intention to kill the deceased and they brought their intention into effect by simultaneously assaulting the deceased. They had no provocation. Thus, the intention to kill is apparent. It is not a case which would squarely fall under Part II of Section 304 IPC. Thus, the cumulative effect of appreciation of evidence, as afore-discussed, is that we find no merit in the present appeal.

39. Having analyzed and discussed in some elaboration various aspects of this case, we pass the following orders:

(A) The appeal is dismissed both on merits and on quantum of sentence.

(B) The Director Generals, Health Services of UP/ Uttarakhand are hereby issued notice under the provisions of the Contempt of Courts Act, 1971 as to why appropriate action be not initiated against them for not complying with the directions contained in the judgment of the Trial Court dated 29th June, 1990.

(C) The above-said officials are hereby directed to take disciplinary action against Dr. C.N. Tewari, PW3,

whether he is in service or has since retired, for deliberate dereliction of duty, preparing a report which *ex facie* was incorrect and was in conflict with the inquest report (Exhibits Ka-6 and Ka-7) and statement of PW6. The bar on limitation, if any, under the Rules will not come into play because they were directed by the order dated 29th June, 1990 of the Court to do so. The action even for stoppage/reduction in pension can appropriately be taken by the said authorities against Dr. C.N. Tewari.

(D) Director Generals of Police UP/Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by direction of the Court that such enquiry shall be conducted.

(E) We hold, declare and direct that it shall be appropriate exercise of jurisdiction as well as ensuring just and fair investigation and trial that courts return a specific finding in such cases, upon recording of reasons as to deliberate dereliction of duty, designedly defective investigation, intentional acts of omission and commission prejudicial to the case of the prosecution, in breach of professional standards and investigative requirements of law, during the course of the investigation by the

investigating agency, expert witnesses and even the witnesses cited by the prosecution. Further, the Courts would be fully justified in directing the disciplinary authorities to take appropriate disciplinary or other action in accordance with law, whether such officer, expert or employee witness, is in service or has since retired.

40. The appeal is accordingly dismissed.

B.B.B. Appeal dismissed.

O R D E R

Today, by a separate judgment, we have directed that action be taken against PW 3 Dr. C.N. Tewari and PW 6 SI Kartar Singh. The Director General of Police and Director General, Health of State of Uttar Pradesh and/or Uttarakhand whoever is the appropriate authority, to take action within three months from today and report the matter to this Court. List for limited purpose on 15th October, 2012.

SATYAPRATA SAHOO & ORS.
v.
STATE OF ORISSA & ORS.
(Civil Appeal Nos.5705-06 of 2012)

AUGUST 3, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Education – Medical College – Admission/Entrance to PG Medical courses – State of Odisha – Seats earmarked for in-service category candidates – Weightage marks to in-service category candidates applying through the direct category route who had rendered service in rural/tribal/ backward areas – Challenged – Held: If on the strength of such weightage, the in-service candidates encroach upon the open category, i.e direct admission category, then such encroachment or inroad or appropriation of seats earmarked for open category candidates (direct admission category) would definitely affect the candidates who compete strictly on the basis of the merit – Purpose and object for giving weightage to in-service candidates who have rendered rural/ tribal service is laudable, but they have to come through the proper channel i.e. the channel exclusively earmarked for in-service candidates and not through the channel earmarked for candidates in the open category – Further, seats earmarked for the open category by way of merit were few in number and encroachment by the in-service candidates into the open category would violate clause 9(1)(a) of the MCI regulations, which says students for PG medical courses shall be selected strictly on the basis of the inter se academic merit i.e. on the basis of the merit determined by the competent test – Candidates of in-service category cannot encroach upon the open category, so also vice-versa – In view of the stand taken by the Medical Council of India that seats for post-graduate courses cannot be increased, direction given to the

State of Odisha or their undertakings to take back the in-service candidates into their service and permit them to serve in the rural/tribal areas so that they can compete through the category of in-service candidates in the 50% seats earmarked for them – The State of Odisha, the Medical Council of India and respondents 1 to 4 directed to take urgent steps to re-arrange the merit list and to fill up the seats of the direct category, excluding in-service candidates who got admission in the open category on the strength of said weightage, and give admission to the open category candidates strictly on the basis of merit – Postgraduate Medical Education Regulations, 2000 – Clause 9(2)(d), third proviso – Indian Medical Council Act, 1956 – ss.10-A and 11(2).

The appellants had appeared in the entrance examination as 'direct candidates' (Open Category) and qualified purely on merit for admission to Post-Graduate (Medical) Selection 2012, Odisha in the Government Medical Colleges in Odisha. The Prospectus for Post-Graduate (Medical) Selection, 2012, Odisha dealt with availability of seats both in the category of direct as well as in-service candidates. Clause 11.2 of the Prospectus stipulated additional weightage for candidates who were in employment of Government of Odisha/Government of Odisha undertaking/Government of India Public Undertaking located in Odisha and had worked in Rural/ Tribal/Backward areas while applying through the category of direct candidates.

The appellants challenged the validity of Clause 11.2 of the Prospectus submitting that it was violative of Article 14 of the Constitution; and also prayed for quashing the Medical Council of India ('MCI') Notification No. 51210 of 17.11.2009 (which provided weightage marks to in-service candidates applying through the direct category) on the ground that it was a clear encroachment and appropriation of seats earmarked for the direct category

candidates to be filled up purely on merit, subject to rule of reservation. The appellants' challenge was repelled by the single Judge of the High Court as well as the Division Bench and therefore the instant appeals.

The main controversy in this case is whether candidates from direct admission category have to be selected strictly on the basis of their inter-se academic merit or whether it is legal to dilute the merit to the extent as indicated in the third Proviso to Clause 9(2)(d) of the Postgraduate Medical Education Regulations, 2000. By virtue of third proviso to Clause 9(2)(d) and clause 11.2 of the Prospectus, candidates who fall under the in-service category are given a weightage through which they can make an in-road into the direct candidates category while retaining their rights to get admission for P.G. Course through in-service category.

The appellants lament that already 66% reservation is there in the State for P.G. Admissions, including all reservations and only 34% seats are available for direct unreserved category on merit and if third proviso to Clause 9(2)(d) of the M.C.I. Regulation and Clause 11.2 of the Prospectus are given effect to, then those seats would be occupied by the in-service candidates large in number and candidates who comes strictly on the basis of merit through the competitive examination will have to stand out.

Allowing the appeals, the Court

HELD: 1.1. This Court in various judgments has acknowledged the fact that weightage could be given for doctors who have rendered service in rural/tribal areas but that weightage is available only in in-service category, to which 50% seats for PG admission has already been earmarked. If on the strength of that weightage, they encroach upon the open category, i.e direct admission

category, then such encroachment or inroad or appropriation of seats earmarked for open category candidates (direct admission category) would definitely affect the candidates who compete strictly on the basis of the merit. [Para 23] [223-E-F]

1.2. The purpose and object for giving weightage to in-service candidates who have rendered rural/tribal service is laudable and their interest has been taken care of by the Medical Council of India as well as the prospectus issued for admission to the various medical colleges in State of Odisha but they have to come through the proper channel i.e. the channel exclusively earmarked for in-service candidates and not through the channel earmarked for candidates in the open category. The in-service candidates are also free to compete through the open category just like any other who fall under that category. Further, those who get admission in post graduate courses through the open category have to execute a bond stating that they would serve rural/ tribal areas after completion of their post-graduation. In fact, weightage is given to those candidates who have rendered service in rural/tribal areas when they compete for admission to PG (Medical) Courses in in-service category for whom 50% seats are earmarked. [Para 24] [223-G-H; 224-A-C]

1.3. There is another fallacy in Clause 11.2 read with Clause 6.2.1 of the prospectus. Clause 6.2.1 of the prospectus says in-service candidate is one who at the time of application is in the employment in Government of Odisha and has completed a length of 5 years of service which include all categories of employment like contractual/temporary/ad-hoc/regular by 31st December 2011. Therefore, a doctor who is doing rural service on contract or on temporary basis or on ad hoc basis by 31st December 2011 will also get the benefit. At the same time,

the candidates who pass out MBBS either in regular service or in contractual / temporary/ ad hoc in a private hospital even though serving in a remote/tribal areas would not get that benefit even though those doctors are also rendering the same service. Every doctor who goes out of medical college after MBBS would not get an opportunity to serve in a rural/ tribal area by way of contractual/temporary/ad-hoc or regular service offered by the State of Odisha or a public sector. Few may fall in that category for various reasons and they get an advantage and those who get that advantage of course can, claim weightage when they are being considered in the in-service category. [Para 25] [224-D-G]

1.4. Further, the seats earmarked for the open category by way of merit are few in number and encroachment by the in-service candidates into that open category would violate clause 9(1)(a) of the MCI regulations, which says students for PG medical courses shall be selected strictly on the basis of the inter se academic merit i.e. on the basis of the merit determined by the competent test. Direct category or open category is a homogeneous class which consists of all categories of candidates who are fresh from college, who have rendered service after MBBS in Government or private hospitals in remote and difficult areas like hilly areas, tribal and rural areas and so on. All of them have to complete on merit being in the direct candidate category, subject to rules of reservation and eligibility. But there can be no encroachment from one category to another. Candidates of in-service category cannot encroach upon the open category, so also vice-versa. [Para 26] [224-H; 225-A-D]

1.5. Except State of Odisha and, to some extent, State of Tamil Nadu, none of the other States in India, has incorporated such a clause in any of their prospectus for admission to the graduate medical courses and students

who fall under the open category in those States are, therefore, not affected by such weightage. [Para 27] [225-D-E]

State of M.P. & Ors. v. Gopal D. Tirthani & Ors. **(2003) 7 SCC 83: 2003 (1) Suppl. SCR 797;** *Dr. Snehelata Patnaik & Ors. v. State of Orissa & Ors.* **(1992) 2 SCC 26: 1992 (1) SCR 335;** *State of U.P. and Others. v. Pradip Tandon and Others*. **(1975) 1 SCC 267: 1975 (2) SCR 761** *Dinesh Kumar (Dr.) (II) v. Motilal Nehru Medical College* **(1986) 3 SCC 727: 1986 (3) SCR 345 – referred to.**

2.1. The question is how to mould the reliefs, especially when one cannot, in the facts and circumstance of the case, direct the State of Odisha and the Medical Council of India to increase the seats so as to accommodate the appellants. Section 10A of the MCI Act provides that admissions can be made by Medical Colleges only within sanctioned capacity for which permission under Section 10A/recognition under Section 11(2) has been granted. Seats which are legitimately due to the appellants are being occupied by the candidates from in-service category. Though it would not be possible to increase the seats, however, candidates who are meritorious should get admission. [Paras 28, 31 and 32] [225-F; 226-G; 227-B]

2.2. The appellants had approached the High Court of Orissa on 13.01.2012 i.e soon after the prospectus was issued and the declaration of the provisional merit list took place on 10.04.2012 subsequent to the filing of the writ petition. The Single Judge rendered the judgment before the results were declared on 23.03.2012 and the Division Bench dismissed the appeal on 09.04.2012. The first counseling was conducted between 21.04.2012 to 23.04.2012. Since the appellants had approached the court on 13.01.2012 and the matter was sub judice before a court of law and this proceeding is only a continuation

of the writ petition filed by them on 13.01.2012, the admissions given to the in-service candidates necessarily would be subject to the outcome of the petitions pending before the court of law. Therefore, non-impleadment of few of those candidates in these proceedings would not affect the legitimate claim raised by the appellants. [Para 33] [227-C-F]

2.3. The contesting respondents submitted that they are undergoing studies from May 2012 onwards and, at this distance of time, if they are displaced, that will cause serious injustice to them since they have already left the government service/public sector undertakings for joining the post graduate course. In view of the stand taken by the Medical Council of India that seats for post-graduate courses cannot be increased, direction is given to the State of Odisha or their undertakings to take back the in-service candidates into their service and permit them to serve in the rural/tribal areas so that they can compete through the category of in-service candidates in the 50% seats earmarked for them for admission to the post-graduate course. [Para 34] [227-G-H; 228-A-B]

State of Punjab and Others v. Renuka Singla and Others **(1994) 1 SCC 175: 1993 (3) Suppl. SCR 866;** *Medical Council of India v. State of Karnataka* **(1998) 6 SCC 131: 1998 (3) SCR 740;** *Mriduldhar (Minor) and another v. Union of India and Others* **(2005) 2 SCC 65: 2005 (1) SCR 380 – referred to.**

3. This Court is inclined to set aside the judgment of the Division Bench as well as Single Judge by quashing the proviso to clause 9(2)(d) of the MCI regulations to the extent indicated above as well as clause 11.2 of the prospectus issued for admission to the Post Graduate Medical Examination 2012 in the State of Odisha. The State of Odisha, the Medical Council of India and respondents 1 to 4 are directed to take urgent steps to

re-arrange the merit list and to fill up the seats of the direct category, excluding in-service candidates who got admission in the open category on the strength of weightage, within a period of one week and give admission to the open category candidates strictly on the basis of merit. [Para 35] [228-C-D]

Case Law Reference:

2003 (1) Suppl. SCR 797	**referred to**	**Paras 4,8,20, 21,22**
1992 (1) SCR 335	**referred to**	**Paras 4, 22**
1975 (2) SCR 761	**referred to**	**Para 22**
1986 (3) SCR 345	**referred to**	**Para 22**
1993 (3) Suppl. SCR 866	**referred to**	**Para 28**
1998 (3) SCR 740	**referred to**	**Para 29**
2005 (1) SCR 380	**referred to**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5705-5706 of 2012.

From the Judgment & Order dated 9.4.2012 of the High Court of Orissa at Cuttack in W.A. No. 120 and 121 of 2012.

Shyam Diwan, Indu Malhotra, Amarjit Singh Bedi, Avijit Patnaik, Neha Kapoor for the Appellants.

Krishnan Venugopal, Nidesh Gupta, Kaushik Mishra, Jayant Mohan, Amit Kumar, Atul Kumar, Rekha Bakshi, Avijit Mani Tripathi, Sanjeeb Panigrahi, L. Nidhiram Sharma, Siddhartha Chowdhury, Somanath Padhan, Anagha S. Desai, Kirti Renu Mishra, Apurva Upmanyu for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The appellants, who have appeared in the Entrance Examination for Post-Graduate (Medical) Selection 2012, Odisha are challenging the validity of Clause 11.2 of the Prospectus for selection of candidates for Post-Graduate (Medical) Courses in the Government Medical Colleges of Odisha for the Academic Year, 2012, as violative of Article 14 of the Constitution of India.

3. The appellants appeared in the entrance examination as 'direct candidates' (Open Category) and have qualified purely on merit for admission to Post Graduate (Medical) Courses 2012 in the Government Medical Colleges in Odisha. The Prospectus issued for Post-Graduate (Medical) Selection, 2012, Odisha deals with the availability of the seats both in the category of direct as well as in-service. Clause 4 of the Prospectus gives the category-wise details of the seats for P.G. (Medical) Courses in three Government Medical Colleges in Odisha for the Academic Year 2012. For the category MD/MS Course, in-service category, 87 seats are available and for direct category, 86 seats are available, totaling 173 seats. Appellants, who fall under the category of direct candidates, as already indicated, are aggrieved by Clause 11.2 of the Prospectus which stipulates an additional weightage for candidates who are in employment of Government of Odisha/ Government of Odisha undertaking / Government of India Public Undertaking located in Odisha and had worked in Rural/Tribal/ Backward areas while applying through the category of direct candidates. Additional weightage of 10% of marks secured in the P.G. Entrance Examination per year of completion of service in Rural/Tribal/Backward areas, subject to the maximum of 30% of marks secured in the entrance examination, in service to be given to those candidates who apply through direct category.

4. Appellants submit that the above clause is wholly arbitrary, discriminatory and goes contrary to the ratio laid down by this Court in *State of M.P. & Ors. V. Gopal D. Tirthani &*

Ors. (2003) 7 SCC 83 and *Dr. Snehelata Patnaik & Ors. V. State of Orissa & Ors.* (1992) 2 SCC 26. Appellants have also prayed for quashing the Medical Council of India (in short 'MCI') Notification No. 51210 of 17.11.2009 providing weightage marks to in-service candidates applying through the direct category, which according to the appellants, is a clear encroachment and appropriation of seats earmarked for the direct category candidates which has to be filled up purely on merit, subject to rule of reservation. Appellants' challenge was repelled by the learned single Judge of the Orissa High Court as well as the Division Bench. Hence, these appeals.

5. Shri Shyam Diwan, learned senior counsel appearing for the appellants submits that providing additional weightage marks to in-service candidates who had rendered service in Rural/Tribal/Backward areas while considering their applications for admission through the direct candidate category amounts to making an artificial differentiation between a homogenous class i.e. direct candidates and in-service candidates. Learned senior counsel pointed out that on account of additional weightage benefit given to the doctors who have rendered less than five years of service in Rural/Tribal/Backward areas both in Government of Odisha or Public Sector Undertakings owned by the State Government, will be an advantageous position and that would amount to drawing an artificial differentiation between a homogeneous class i.e. direct candidates and in-service candidates and also within the in-service candidates, which action would be hit by Article 14 of the Constitution of India.

6. Learned senior counsel also pointed out that the same further amounts to providing horizontal reservation within the seats meant for in-service candidates. Learned senior counsel pointed out that the admission through direct candidates route be made purely on merit on the basis of the common entrance examination and not on the basis of the additional weightage granted to a few doctors who had the advantage of serving in

Rural/Tribal/Backward areas while in employment in Government of Orissa, Public Sector Undertakings owned by the State Government.

7. Mrs. Indu Malhotra, learned senior counsel, also submitted that such candidates can always come through the in-service category, a normal route for admission to PG (Medical) Course. Learned senior counsel pointed out that additional weightage is always available to them when they come through the in-service category route, however, the same cannot be extended to them while applying for admission as direct category candidates, lest they may make an inroad into the direct category, which is arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

8. Shri Krishnan Venugopal, learned senior counsel contesting on behalf of the respondents, on the other hand, submitted that there is no illegality in Clause 11.2 of the Prospectus which gives additional weightage to in-service candidates who fall under the direct candidates route, as well as third proviso added after clause 9(2)(d) of the Post Graduate Medical Education (Amendment) Regulations 2000 as amended by Post Graduate Medical Education (Amendment) Regulation 2009 (Part II) vide Notification dated 17.11.2009. Learned senior counsel pointed out that classification of candidates as per Clause 6 and sub-clauses providing weightage marks to such in-service candidates as per Clause 11.2 of the Prospectus, cannot be termed as discrimination between direct and in-service candidates and amongst the in-service candidates. Learned senior counsel also pointed out that the weightage marks given to in-service candidates who have rendered service in Rural/Tribal/Backward areas and qualified in the entrance examination, cannot be termed as "horizontal reservation" as it is only the weightage of marks given for rendering service to the people in Rural/Tribal/Backward areas, in view of the law laid down by this Court in *Gopal D. Tirthani* (supra).

9. Shri Kirti R. Mishra, learned senior counsel appearing on behalf of the 4th respondent, submitted that the prospectus has been issued strictly in accordance with the Notification No. 51210 dated 17.11.2009 issued by the Medical Council of India, whereby additional weightage marks given as an incentive for determining the merit in the entrance examination passed for P.G. admission. Learned senior counsel submitted that the weightage in marks is given as an incentive at the rate of 10% of the marks obtained up to maximum of 30% of the marks obtained for each year of service rendered in remote or difficult areas. It was also pointed out that the additional benefit is an incentive only and by awarding such an incentive, there is no violation of Article 14 of the Constitution of India.

10. Learned counsel appearing for the MCI referred to the counter affidavit filed on its behalf and submitted that the third proviso to Regulation 9(2)(d) of the Post Graduation Regulation, 2000 (as amended) does not provide for or contemplate any separate channel of entry for in service candidates in admission to P.G. Degree Courses like that provided for P.G. Diploma Courses. The proviso only provides that a weightage may be given at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto the maximum of 30% of the marks obtained in the entrance examination and has secured minimum required percentage of marks for government service rendered in remote/difficult areas.

We heard counsels on either side at length.

11. Medical Council of India, in exercise of its powers conferred by Section 33 read with Section 20 of the Indian Medical Council Act, 1956, framed the Postgraduate Medical Education Regulations, 2000. Clause 9 of the Regulations 2000 deals with the selection of the postgraduate students. Clause 9(1) was substituted in terms of Notification published in the Gazette of India on 20.10.2008 and the same now reads as follows:

> "9(1)(a) Students for Post Graduate medical courses shall be selected strictly on the basis of their Inter-se Academic Merit.
>
> (b) 50% of the seats in Post Graduate Diploma Courses shall be reserved for Medical Officers in the Government service, who have served at least three years in remote and difficult areas. After acquiring the PG Diploma, the Medical Officers shall serve for two more years in remote and/or difficult areas."

12. Clauses 9(1)(a) and 9(1)(b) when read together would indicate that 50% seats are earmarked for direct category candidates and 50% seats are earmarked for in service category. Clause 9(1)(a) clearly states that students for post graduate medical courses shall be selected strictly on the basis of their inter-se academic merit and Rule 9(1)(b) states that 50% of the seats stand reserved for in service candidates who have at least three years service in remote and difficult areas.

13. The methodology to be adopted for determining academic merit is provided in Clause 9(2), which is relevant for our purpose and hence extracted hereunder:

> "9(2) For determining the 'Academic Merit', the University/Institution may adopt the following methodology:-
>
> (a) On the basis of merit as determined by a 'competitive test' conducted by the state government or by the competent authority appointed by the state government or by the university/group of universities in the same state; or
>
> (b) On the basis of merit as determined by a centralized competitive test held at the national level; or
>
> (c) On the basis of the individual cumulative performance at the first, second and third MBBS

examinations provided admissions are University wise. Or

(d) Combination of (a) and (c)

Provided that wherever 'Entrance Test' for postgraduates admission is held by a state government or a university or any other authorized examining body, the minimum percentage of marks for eligibility for admission to postgraduate medical course shall be 50 percent for general category candidates and 40 percent for the candidates belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes.

Provided further that in Non-Governmental institutions fifty percent of the total seats shall be filled by the competent authority notified by the State Government and the remaining fifty percent by the management(s) of the institution on the basis of Inter-se Academic Merit."

14. However, the following proviso was added after clause 9(2)(d) in terms of Gazette Notification published on 17.11.2009 and the same reads as follows:

"Further provided that in determining the merit and the entrance test for postgraduate admission weightage in the marks may be given as an incentive at the rate of 10% of the marks obtained for each year in service in remote or difficult areas upto the maximum of 30% of the marks obtained."

15. Above Clause 9, therefore, stipulates the methodology to be adopted for determining the inter-se academic merit of candidates who fall under direct category and of those candidates who ultimately fall under 50% seats reserved for in-service candidates. Clause 9(1)(a) clearly stipulates that students for postgraduate medical courses shall be selected strictly on the basis of "inter-se academic merit". The main

controversy in this case is whether the candidates from direct admission category has to be selected strictly on the basis of their inter-se academic merit or whether it is legal to dilute the merit to the extent as indicated in the third Proviso to Clause 9(2)(d). Candidates who fall in the direct candidates category, whether they are fresh from the college or serving elsewhere, either on Government service or under public-sector undertakings, working in rural/Tribal area or otherwise or doctors who are serving in private hospitals or nursing homes etc. situate in remote or difficult area, all fall in that direct category and all of them have to take a common entrance examination and admission criteria is only comparative merit. When the comparative merit is the only criteria in the open category, the question is whether a weightage can be given exclusively to those candidates who are in service of State of Odisha/Government of Odisha undertaking, whether contractual/temporary/ad-hoc/regular on the ground that they had worked in rural/tribal/backward areas. It may be noted that 50% seats have already been earmarked for such category of candidates which they can always claim depending upon the inter-se merit after complying with other eligibility criteria. Question is whether those in-service candidates can appropriate seats from the open category where seats are only few.

16. Clause 11.2 in the Prospectus issued by the P.G. (Medical) Selection Committee 2012, giving additional weightage to those in-service candidates, reads as follows:

"11.2 Those in-service candidates who have qualified in the Entrance Examination and worked in Rural/ Tribal/Backward areas shall be awarded an additional weightage of 10% of the marks secured in the P.G. Entrance Examination per year of completion service (in Rural/Tribal/Backward areas), subject to maximum of 30% of marks secured in entrance examination, vide MCI Notification No.51210/ dt.17.11.2009 (In Form No.Appendix-III(A))."

Candidates fall under the Direct Category is provided under Clause 6 of the Prospectus, which reads as follows:

"6. CATEGORY OF CANDIDATES:

6.1. A Direct Candidate is one who at the time of application:

6.1.1 Is son/daughter/spouse of a person who has served in Defence Service for minimum of 5 years by 31st December, 2011.

6.1.2 Is either unemployed or in the employment of Government of Odisha, but not completed five years of service which includes all categories of employment like contractual/temporary/ad-hoc/regular by 31st December, 2011

6.1.3 in the employment of Govt. of Orissa Public Sector Undertaking/Govt. of India Public Sector Undertaking located in Odisha. The employer has to sponsor the candidates for entire period & must submit the sponsorship certificate as in Appendix III."

Clause 6.2 deals with In-service candidate which reads as follows:

"6.2 *An In-service candidate* is one who at the time of application:

6.2.1 Is in the employment of Government of Odisha and has completed a length of 5 years of service which includes all categories of employment like contractual/temporary/ ad-hoc/ regular by 31st December, 2011, excluding at-a-stretch leave of any kind, of 30 days or more. However, the maternity leave is exempted from this exclusion and shall be counted towards the length of five years of service.

Note: In-service and Direct candidates in employment

under Government of Odisha at the time of application are advised to submit their applications along with the required documents directly to the Convenor, P.G. (Medical) Selection Committee – 2012, under intimation to their Employer. Copy of such intimation is to be attached."

17. Clauses 6.1, 6.2 and 11.2, quoted above, clearly recognize two categories of candidates i.e. "direct" and "in-service". "Direct" is a very wide category (open category) where students for P.G. Medical Courses shall be selected strictly on the basis of inter-se academic merit, as determined by a competitive test and in-service is a restricted category of candidates who are in service of the State Government/State owned undertakings. The details of the availability of seats are provided in Clause 4 of the prospectus which is as follows:

"Category-wise Distribution of Seats

Category MD/MS Course	Unre-served						**Total**
		ST (12%)	SC (8%)	PH (3%)	Defence (3%)	Green-card (5%)	
In-servicc	62	10	7	3	0	5	**87**
Direct	59	11	7	2	3	4	**86**
Total	121	21	14	5	3	9	**173**

18. Seats in the direct category are also reserved for members of SC/ST communities and also to those SC/ST candidates migrated from their state of origin subject to certain conditions. Clause 6.4 reserves seats for children or spouse of service/Ex-service personnel (Defence). Clause 6.5 states that seats are reserved for physically handicapped candidates also subject to rules governing them. In other words, several

reserved candidates have also to be accommodated in the 50% Open Category. 50% seats ear marked for the in-service candidates is kept intact, for which in-service candidates can always aspire and if they satisfy the condition of rural/Tribal service, they will definitely get weightage.

19. Now by virtue of third proviso to Clause 9(2)(d) and clause 11.2 of the Prospectus candidates who fall under the in-service category are given a weightage through which they can make an in-road into the direct candidates category while retaining their rights to get admission for P.G. Course through in-service category. Appellants lament that already 66% reservation is there in the State for P.G. Admissions, including all reservations and only 34% seats are available for direct unreserved category on merit and if third proviso to Clause 9(2)(d) of the M.C.I. Regulation and Clause 11.2 of the Prospectus are given effect to then those seats would be occupied by the in-service candidates large in number and candidates who comes strictly on the basis of merit through the competitive examination will have to stand out.

20. This Court in *Gopal D. Tirthani* (supra) upheld the allocation of 20% seats for in-service candidates and held that weightage can be given to in-service candidates for their having rendered specified number of years of service in rural/ tribal areas which is not hit by Article 14 of the Constitution of India. This Court held that allocation of 20% of seats in Post Graduation in the University of Madhya Pradesh for in-service candidate is not a reservation, it is a separate and exclusive channel of entry or source of admission, validity thereof cannot be determined on the constitutional principles applicable to communal reservations. Having so said, the Court held as follows:

> "33. ……Firstly, it is a case of post-graduation within the State and not an All-India quota. Secondly, it is not a case of reservation, but one of only assigning weightage for service rendered in rural/tribal areas. Thirdly, on the view of the law we have taken hereinabove, the assigning of weightage for service rendered in rural/tribal area does not at all affect in any manner the candidates in open category. ……."

21. Therefore, in *Tirthani* case, it has been categorically held that it is permissible to assign a reasonable weightage to services rendered in rural/tribal areas by the in-service candidates for the purpose of determining inter se merit within the class of in-service candidates who have qualified in the pre-PG test by securing the minimum qualifying marks as prescribed by the Medical Council of India. Regulation 9 framed by the Medical Council of India was also noticed by this Court so also the existence of two categories: (1) direct category (open category) candidates and (2) in-service category candidates. Weightage given for rendering service in rural/tribal areas, so far as in-service candidates, was upheld noticing that the assigning of weightage for service rendered in rural/tribal areas would not affect in any manner the candidates in open category.

22. We may, in this connection, refer to few earlier judgments in the matter of giving weightage to in-service candidates although those decisions were also considered in *Tirthani* case. In *State of U.P. and Others. v. Pradip Tandon and Others.* (1975) 1 SCC 267, reservation in favour of people in "hill areas" and Uttarakhand was held to be constitutionally valid as they were socially and educationally backward classes of citizens. Reservation in favour of "rural areas" was found difficult to accept as it was sought to be justified on the test of poverty as the determining factor of social backwardness. This Court held that rural element did not make a class by itself because it could not be accepted that the rural people were necessarily poor or socially and educationally backward just as the urban people were not necessarily rich. What was being dealt with in Pradip Tandon case was a reservation and not a weightage. Later in *Dinesh Kumar (Dr.) (II) v. Motilal Nehru*

Medical College (1986) 3 SCC 727, the two-Judges Bench examined a scheme of examination for admission to postgraduate courses suggested by the Government of India stipulating a weightage equivalent to 15 per cent of the total marks obtained by a student at the All-India Entrance Examination, being given if he had put in a minimum of 3 years of rural service. In that case, of course, this Court observed that it was eminently desirable that some incentive should be given to the doctors to go to the rural areas because there was concentration of doctors in the urban areas and the rural areas appeared to be neglected. The observation made in Dinesh Kumar case was considered by three-Judges Bench of this Court in *Dr. Snehelata Patnaik* (supra) and this Court opined that the authorities might well consider giving weightage upto maximum of 5 per cent of marks in favour of in-service candidates who had done rural service for five years or more, the determination of which have to be made by the authorities.

23. We have referred to the above mentioned judgments only to indicate the fact that this Court in various judgments has acknowledged the fact that weightage could be given for doctors who have rendered service in rural/tribal areas but that weightage is available only in in-service category, to which 50% seats for PG admission has already been earmarked. The question is whether, on the strength of that weightage, can they encroach upon the open category, i.e direct admission category. We are of the view that such encroachment or inroad or appropriation of seats earmarked for open category candidates (direct admission category) would definitely affect the candidates who compete strictly on the basis of the merit.

24. The purpose and object for giving weightage to in-service candidates who have rendered rural/tribal service is laudable and their interest has been taken care of by the Medical Council of India as well as the prospectus issued for admission to the various medical colleges in State of Odisha but they have to come through the proper channel i.e. the channel

exclusively earmarked for in-service candidates and not through the channel earmarked for candidates in the open category. The in-service candidates are also free to compete through the open category just like any other who fall under that category. Further, it is also relevant to note those who get admission in post graduate courses through the open category have to execute a bond stating that they would serve rural/tribal areas after completion of their post-graduation. In fact, weightage is given to those candidates who have rendered service in rural/tribal areas when they compete for admission to PG (Medical) Courses in in-service category for whom 50% seats are earmarked.

25. We also find another fallacy in Clause 11.2 read with Clause 6.2.1 of the prospectus. Clause 6.2.1 of the prospectus says in-service candidate is one who at the time of application is in the employment in Government of Odisha and has completed a length of 5 years of service which include all categories of employment like contractual/temporary/ad-hoc/ regular by 31st December 2011. Therefore, a doctor who is doing rural service on contract or on temporary basis or on ad hoc basis by 31st December 2011 will also get the benefit. At the same time, the candidates who pass out MBBS either in regular service or in contractual / temporary/ ad hoc in a private hospital even though serving in a remote/tribal areas would not get that benefit even though those doctors are also rendering the same service. Every doctor who goes out of medical college after MBBS would not get an opportunity to serve in a rural/ tribal area by way of contractual/temporary/ad-hoc or regular service offered by the State of Odisha or a public sector. Few may fall in that category for various reasons and they get an advantage and those who get that advantage of course can, claim weightage when they are being considered in the in-service category.

26. We notice that the seats earmarked for the open

category by way of merit are few in number and encroachment by the in-service candidates into that open category would violate clause 9(1)(a) of the MCI regulations, which says students for PG medical courses shall be selected strictly on the basis of the inter se academic merit i.e. on the basis of the merit determined by the competent test. Direct category or open category is a homogeneous class which consists of all categories of candidates who are fresh from college, who have rendered service after MBBS in Government or private hospitals in remote and difficult areas like hilly areas, tribal and rural areas and so on. All of them have to complete on merit being in the direct candidate category, subject to rules of reservation and eligibility. But there can be no encroachment from one category to another. Candidates of in-service category cannot encroach upon the open category, so also vice-versa.

27. We find, except State of Odisha and, to some extent, State of Tamil Nadu, none of the other States in India, has incorporated such a clause in any of their prospectus for admission to the graduate medical courses and students who fall under the open category in those States are, therefore, not affected by such weightage.

28. Medical Council of India in the counter affidavit raised some objections for giving admissions beyond the sanctioned admission capacity. Reference was made to Section 10A of the MCI Act which provides that admissions can be made by Medical Colleges only within sanctioned capacity for which permission under Section 10A/recognition under Section 11(2) has been granted. This Court in *State of Punjab and Others v. Renuka Singla and Others* (1994) 1 SCC 175 held that the High Court or the Supreme Court cannot be generous or liberal in issuing such directions which in substance amount to directing the authorities concerned to violate their own statutory rules and regulations, in respect of admissions of students. Technical education, including medical education, requires infrastructure to cope with the requirement of giving proper

education to the students, who are admitted. Taking into consideration, the infrastructure, equipment, staff, the limit of the number of admissions is fixed by the Medical council of India.

29. Further, in *Medical Council of India v. State of Karnataka* (1998) 6 SCC 131, this Court held the number of students admitted cannot be over and above that fixed by the Medical Council as per the Regulations and that seats in medical colleges cannot be increased indiscriminately without regard to proper infrastructure as per the Regulations of the Medical Council.

30. In *Mriduldhar (Minor) and another v. Union of Indiaand Others* (2005) 2 SCC 65, this Court held as follows:

> "Having regard to the professional courses into consideration, it deserves to be emphasized that all concerned including Governments, State and Central both, MCI/DCI, colleges, new or old, students, Boards, universities, examining authorities etc. are required to strictly adhere to time schedule wherever provided for; there should not be mid-stream admission; admission should not be in excess of sanctioned intake capacity or in excess of quota of any one, whether Stare or Management. The carrying forward of any unfilled seats of one academic year to next academic year is also not permissible."

31. It is unnecessary to multiply the judgment rendered by this Court, on this point, the question is how to mould the reliefs, especially when we cannot, in the facts and circumstance of the case, direct the State of Odisha and the Medical Council of India to increase the seats so as to accommodate the appellants. Seats which are legitimately due to the appellants are being occupied by the candidates from in-service category.

32. Contention was raised by learned counsel, appearing for some of the in-service candidates who got admission that

they shall not be displaced since they have already left their jobs from the State Government service or the State owned undertakings after having got admission for P.G. (Medical) Course. But, going by the stand taken by MCI and on the basis of the decided cases of this Court, it would not be possible to increase the seats, however, candidates who are meritorious should get admission.

33. Contention was raised that all the affected candidates were not made parties to the writ petition and, therefore, without hearing them, no orders shall be passed against them thereby depriving them of their seats. Learned counsel for the appellants has stated that they had approached the High Court of Orissa on 13.01.2012 i.e soon after the prospectus was issued and the declaration of the provisional merit list took place on 10.04.2012 subsequent to the filing of the writ petition. Learned Single Judge rendered the judgment before the results were declared on 23.03.2012 and the Division Bench dismissed the appeal on 09.04.2012. The first counseling was conducted between 21.04.2012 to 23.04.2012. Since the appellants had approached the court on 13.01.2012 and the matter was sub judice before a court of law and this proceeding is only a continuation of the writ petition filed by them on 13.01.2012, we are, of the view, that the admissions given to the in-service candidates necessarily would be subject to the outcome of the petitions pending before the court of law. Therefore, in our view, non-impleadment of few of those candidates in these proceedings would not affect the legitimate claim raised by the appellants.

34. Learned counsel appearing for the contesting respondents submitted that they are undergoing studies from May 2012 onwards and, at this distance of time, if they are displaced, that will cause serious injustice to them since they have already left the government service/public sector undertakings for joining the post graduate course. In view of the stand taken by the Medical Council of India that seats for post-

graduate courses cannot be increased, we are inclined to give a direction to the State of Odisha or their undertakings to take back the in-service candidates into their service and permit them to serve in the rural/tribal areas so that they can compete through the category of in-service candidates in the 50% seats earmarked for them for admission to the post-graduate course.

35. We are, therefore, inclined to allow this appeal and set aside the judgment of the Division Bench as well as learned Single Judge by quashing the proviso to clause 9(2)(d) of the MCI regulations to the extend indicated above as well as clause 11.2 of the prospectus issued for admission to the Post Graduate Medical Examination 2012 in the State of Odisha. The State of Odisha, the Medical Council of India and respondents 1 to 4 are directed to take urgent steps to re-arrange the merit list and to fill up the seats of the direct category, excluding in-service candidates who got admission in the open category on the strength of weightage, within a period of one week from today and give admission to the open category candidates strictly on the basis of merit.

36. Appeals are allowed and the judgments of the High Court are set aside accordingly.

B.B.B. Appeals allowed.

RAVI KAPUR

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1838 of 2009)

AUGUST 16, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 – ss. 279, 337, 338 and 304A – Prosecution under – Motor accident – Resulting in many deaths and injuries to many – Eye-witnesses to the incident –Driver-accused identified by the witnesses – Acquittal by trial court – Conviction by High Court – On appeal, held: Evidence of the witnesses are consistent and supported by unchallenged documentary evidence – Minor variations in the statements of witnesses are not material – Applying the principle of res ipsa loquitur, it can be inferred that it was a serious accident causing many deaths – Therefore conviction justified.

*Code of Criminal Procedure, 1973 – s. 313 – Nature and purpose of – Held: Provisions of s. 313 are not mere formality or purposeless – The provision has dual purpose to discharge **firstly** to put the entire material parts of the incriminating evidence before the accused and **secondly** to provide opportunity to accused to explain his version of the case.*

Criminal Trial – Contradictory statements – Evidentiary value – Held: The contradictions have to be material and substantial so as to adversely affect the prosecution case.

Test Identification Parade – Necessity to hold – Held: Necessity depends on the facts and circumstances of the case – Court identification is as good identification in the eyes of law – It is not always necessary that it must be preceded

by TI Parade.

Negligence – Determination of – Held: Negligence is not an absolute but relative term – Determination of existence of negligence per se or whether the course of conduct amounts to negligence, would depend upon the attending and surrounding facts – While determining the question of negligence and contributory negligence, court to adopt the parameter of 'reasonable care'.

Motor Vehicles Act, 1988 – s. 133 – Non-serving of notice under – Whether would adversely affect the prosecution u/ss. 279,337, 338 and 304A IPC – Held: On facts, no prejudice caused to the accused by non-serving thereof.

Appeal – Appeal against acquittal – Interference with – Propriety of – Held: Normally, the appellate court should be reluctant to interfere with the judgment of acquittal – But this is not an absolute rule – On facts, High Court rightly interfered with acquittal order passed by trial court as the same suffered from errors of law and in appreciation of evidence.

Doctrines:

Doctrine of reasonable care – Applicability of.

Doctrine of *res ipsa loquitur* – Applicability of, to accident cases.

Words and Phrases:

'Rash and negligent driving' – Meaning of.

'Negligence' – Meaning of.

'Culpabale rashness' and 'Culpable negligence' – Meaning of.

Prosecution was initiated against the appellant-accused u/ss. 279, 337, 338 and 304-A IPC. The prosecution case was that PW2 made statement (Ex.P-

2) to the police that when he and his family were going to attend marriage of their relative, the jeep in which his family members were boarded and which was going ahead of his jeep, collided with a bus which was coming at a very high speed, resulting in many deaths. He named the appellant-accused as the driver of the bus. According to him the accused took the bus towards large pits in the agricultural fields, and after parking the bus ran away. There were four eye-witnesses to the incident.

Trial court by its order dated 24.6.1999 convicted the accused. But after the matter was remanded by Special Judge on the issues of non-holding of Test Identification Parade and non-examination of the doctor, the trial court by its order dated 11.6.2006, acquitted the accused. It held that the prosecution failed to prove its case and that in absence of notice u/s. 133 Motor Vehicles Act, it could not be proved that the accused was actually driving the bus at the relevant time. High Court convicted the accused.

In appeal to this Court, appellant contended that High Court exceeded its jurisdiction in reversing the judgment of acquittal; that there was no evidence to identify or link the accused with the commission of the offence; and that there was no evidence to prove that he drove the bus rashly and negligently.

Dismissing the appeal, the Court

HELD: 1.1. Rash and negligent driving has to be examined in the light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in the light of the attendant circumstances. A person who drives a vehicle on the road, is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle

whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of the language of Section 279 IPC. That is why the legislature in its wisdom has used the words 'manner so rash or negligent as to endanger human life'. The preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under Section 279 IPC is attracted. [Para 10] [248-E-H]

1.2. 'Negligence' means omission to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable person guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence *per se* or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the Court. In a given case, even not doing what one was ought to do can constitute negligence. [Para 11] [249-A-C]

1.3. The Court has to adopt another parameter, i.e., 'reasonable care' in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian

on the road and this duty attains a higher degree when the pedestrian happen to be children of tender years. [Para 12] [249-D]

1.4. The other principle that is pressed in aid by the courts in such cases is the doctrine of *res ipsa loquitur*. This doctrine serves two purposes – one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is *prima facie* evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of *res ipsa loquitur* in cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in the IPC that the vehicle is driven in a manner dangerous to public life. Where a person does such an offence, he is punished as per the provisions of Section 184 of the Act. The courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents. 'Culpable rashness' is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (*luxuria*). 'Culpable negligence' is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case, the mere fact of accident is *prima facie* evidence of such

negligence. This maxim suggests that on the circumstances of a given case the *res* speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. [Para 13] [249-G-H 250-A-E]

*'An Exhaustive Commentary on Motor Vehicles Act, **1988**'* **by JusticeRajesh Tandon, First Edition, 2010 – referred to.**

1.5. The doctrine of *res ipsa loquitur* is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. Either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at a subsequent stage where it is not clear as to how and due to whose negligence the accident occurred. The factum of accident having been established, the Court with the aid of proper evidence may take assistance of the attendant circumstances and apply the doctrine of *res ipsa loquitur.* The mere fact of occurrence of an accident does not necessarily imply that it must be owed to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than providing an outright demonstration thereof. Elements of this doctrine may be stated as : (1) The event would not have occurred but for someone's negligence. (2) The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event and (3)

Accused was negligent and owed a duty of care towards the victim. [Para 18] [255-A-F]

Mohd. Aynuddin alias Miyam v. State of A.P. **(2000) 7 SCC 72: 2000(2) Suppl. SCR 15;** *Thakur Singh v. State of Punjab* **(2003) 9 SCC 208 – relied on.**

Alister Anthony Pareira v. State of Maharashtra **(2012) 2 SCC 648;** *Naresh Giri v. State of M.P.* **(2008) 1 SCC 791:2007 (11) SCR 987 – referred to.**

2.1. It cannot be said that there are contradictions in the statements of the witnesses and the site plan Exhibit P29/P3 does not exhibit any negligence on behalf of the appellant. The bus in question was certainly involved in the accident, in fact, there is no serious dispute that the accident between the jeep and the bus took place at the place of occurrence. Applying the principle of *res ipsa loquitur*, **it can safely be inferred that it was a serious accident that occurred at a turning point in which number of people had died. After the accident, the bus driver moved the bus away to a different point. [Para 27] [259-B-E]**

2.2. There is consistency in the statement of the witnesses that the accused was driving the vehicle and after parking the vehicle at a place away from the place of occurrence, he had run away. The statements of these witnesses which are fully supported by the documentary evidence, Exhibit P2, to which there was hardly any challenge during the cross-examination of PW11. There is no serious or material contradiction in the statements of the prosecution witnesses much less in Exhibit P2, the *parcha* statement of PW2. Minor variations are bound to occur in the statements of the witnesses when their statements are recorded after a considerable lapse from the date of occurrence. The Court can also not ignore the fact that these witnesses are not very educated persons. The truthfulness of the witnesses is also demonstrated

from the fact that PW1, even in her examination-in-chief, stated that she was unconscious and did not see the driver. Thus, the three witnesses, i.e., PW1, PW2 and PW4 have given a correct eye account of the accident. Their statements are worthy of credence and there is no occasion for the Court to disbelieve these witnesses. [Para 28] [259-G-H; 260-A-C]

2.3. It is a settled principle that the variations in the statements of witnesses which are neither material nor serious enough to affect the case of the prosecution adversely, are to be ignored by the courts. [Para 28] [260-D]

State v. Saravanan and Anr. **(2008) 17 SCC 587: 2008 (14) SCR 405;** *Sunil Kumar Sambhudayal Gupta v. State of Maharasthtra* **(2010) 13 SCC 657: 2010 (15) SCR 452 – relied on.**

2.4. It is also a settled principle that statements of the witnesses have to be read as a whole and the court should not pick up a sentence in isolation from the entire statement and ignoring its proper reference, use the same against or in favour of a party. The contradictions have to be material and substantial so as to adversely affect the case of the prosecution. [Para 28] [260-E-F]

Atmaram and Ors. vs. State of Madhya Pradesh **(2012) 5 SCC 738 – referred to.**

2.5. The statements of the witnesses who met with an accident while travelling in a vehicle or those of the people who were travelling in the vehicle driven nearby, should be taken and understood in their correct perspective, as it is not necessary that the occupants of the vehicle should be looking in the same direction. They might have been attracted only by the noise or the disturbance caused by the actual impact resulting from the accident itself. [Para 29] [260-G-H; 261-A]

2.6. It was not necessary to hold the test identification parade of the appellant for two reasons. Firstly, the appellant was already known to the passersby who had recognized him while driving the bus and had stated his name and, secondly, he was duly seen, though for a short but reasonable period, when after parking the bus, he got down from the bus and ran away. [Para 33] [264-G-H; 265-A]

2.7. In the present case, the accused was seen by PW2 and PW4. These witnesses also identified the accused in the Court. It is not the case of the accused that he had been shown to the witnesses prior to his being identified in the Court. The Court identification itself is a good identification in the eyes of law. It is not always necessary that it must be preceded by the test identification parade. It will always depend upon the facts and circumstances of a given case. In one case, it may not even be necessary to hold the test identification parade while in the other, it may be essential to do so. Thus, no straightjacket formula can be stated in this regard. [Para 32] [262-G-H; 263-A]

Nageshwar Shri Krishna Ghobe v. State of Maharasthra **(1973) 4 SCC 23: 1973 (2) SCR 377;** *Myladimmal Surendran and Ors. v. State of Kerala* **(2010) 11 SCC 129: 2010 (10) SCR 916;** *Shyamal Ghosh v. State of West Bengal* **2012 (6) SCALE 381 – relied on.**

Mulla and Anr. v. State of Uttar Pradesh **(2010) 3 SCC 508: 2010 (2) SCR 633;** *Amit v. State of Uttar Pradesh* **(2012) 4 SCC 107 – referred to.**

3.1. The High Court has rightly rejected the plea that the Court should draw adverse inference against the prosecution as the investigating officer did not serve notice under Section 133 of Motor Vehicles Act upon the owner of the vehicle. The plea was rejected on the basis that the driver of the vehicle was identified at the place

of occurrence and even passersby had informed the prosecution witnesses that the driver-accused was the owner of the vehicle. The name of the accused was duly recorded in the FIR itself. This fact remained undisputed. It was also argued that the accused was not driving the vehicle, though it was not disputed that he is the registered owner of the vehicle in question. If that be so, when the statement of the accused under Section 313 of the Cr.P.C. was recorded by the Trial Court, except denial, he did not state anything further. For reasons best known to the accused, instead of stating as to whom he had given his vehicle for being driven on that date, he preferred to maintain silence and denied the case of the prosecution. [Para 34] [265-B-D]

3.2. It is true that the prosecution is required to prove its case beyond reasonable doubt but the provisions of Section 313 Cr.P.C. are not a mere formality or purposeless. They have a dual purpose to discharge, firstly, that the entire material parts of the incriminating evidence should be put to the accused in accordance with law and, secondly, to provide an opportunity to the accused to explain his conduct or his version of the case. To provide this opportunity to the accused is the mandatory duty of the Court. If the accused deliberately fails to avail this opportunity, then the consequences in law have to follow, particularly when it would be expected of the accused in the normal course of conduct to disclose certain facts which may be within his personal knowledge and have a bearing on the case. [Para 35] [265-E-G]

3.3. No prejudice has been caused to the accused by non-serving of the notice under Section 133 of the Act and, in any case, the accused cannot take any advantage thereof. [Para 36] [265-H; 266-A]

4. No doubt, the Court of appeal would normally be

reluctant to interfere with the judgment of acquittal but this is not an absolute rule. In the present case, there were more than sufficient reasons for the High Court to interfere with the judgment of acquittal recorded by the trial court. It was not a case of non-availability of evidence or presence of material and serious contradictions proving fatal to the case of the prosecution. There was no plausible reason before the trial court to disbelieve the eye account given by PW2 and PW4 and the court could not have ignored the fact that the accused had been duly identified at the place of occurrence and even in the court. The trial court has certainly fallen in error of law and appreciation of evidence. Once the trial court has ignored material piece of evidence and failed to appreciate the prosecution evidence in its correct perspective, particularly when the prosecution has proved its case beyond reasonable doubt, then it would amount to failure of justice. In some cases, such error in appreciation of evidence may even amount to recording of perverse finding. The trial court had first delivered its judgment on 24th June, 1999 convicting the accused of the offences. However, on appeal, the matter was remanded on two grounds, i.e., considering the effect of non-holding of test identification parade and not examining the doctor. Upon remand, the trial court had taken a different view than what was taken by it earlier and vide judgment dated 11th May, 2006, it had acquitted the accused. This itself became a ground for interference by the High Court in the judgment of acquittal recorded by the trial court. From the judgment of the trial court, there does not appear to be any substantial discussion on the effect of non-holding of the test identification parade or the non-examination of the doctor. On the contrary, the trial court passed its judgment on certain assumptions. None of the witnesses, not even the accused, in his statement, had stated that the jeep was at a fast speed but still the trial court recorded a finding that the jeep was at a fast speed

and was not being driven properly. The trial court also recorded that a suspicion arises as to whether the accused was actually driving the bus at the time of the accident or not and identification was very important. The trial court could ignore the statement of the eye-witnesses, particularly when they were reliable, trustworthy and gave the most appropriate eye account of the accident. The judgment of the trial court, therefore, suffered from errors of law and in appreciation of evidence both. The interference by the High Court with the judgment of acquittal passed by the trial court does not suffer from any jurisdictional error. [Paras 37, 38 and 39] [266-B; 269-E-H; 270-A-G]

State of U.P. v. Banne and Anr. **(2009) 4 SCC 271;** *State of Haryana v. Shakuntala and Ors.* **2012 (4) SCALE 526 – relied on.**

Case Law Reference:

(2012) 2 SCC 648	Referred to	Para 15
2007 (11) SCR 987	Referred to	Para 16
2000 (2) Suppl. SCR 15	Relied on	Para 17
(2003) 9 SCC 208	Relied on	Para 19
2008 (14) SCR 405	Relied on	Para 28
2010 (15) SCR 452	Relied on	Para 28
(2012) 5 SCC 738	Referred to	Para 28
1973 (2) SCR 377	Relied on	Para 29
2010 (2) SCR 633	Referred to	Para 30
(2012) 4 SCC 107	Referred to	Para 30
2010 (10) SCR 916	Relied on	Para 31
2012 (6) SCALE 381	Relied on	Para 32

(2009) 4 SCC 271	**Relied on**	**Para 37**
2012 (4) SCALE 526	**Relied on**	**Para 37**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1838 of 2009.

From the Judgment & Order dated 12.8.2008 of the High Court of Rajasthan at Jaipur Bench, in S.B. Crl. Appeal No. 589 of 2007.

P.S. Patwalia, Shankar Divate for the Appellant.

Suryanarayana Singh, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur, dated 12th August, 2008.

2. The facts giving rise to the present appeal in brief are :

One Sukhdev Singh, PW2, had informed and made a statement, parcha bayan, Ex.P2, to the police at the police station M.I.A. Alwar on 20th April, 1991 stating that at about 9.15 a.m. on that very day, he was going in a jeep to Govindgarh from Alwar to attend the marriage of his brother-in-law, Joga Singh. When they reached Baggad Tiraya, one jeep bearing no. RNA-638 was also going ahead of his jeep and in the said jeep, his wife, Chet Kaur, daughter Rinki, father-in-law, Lahori Singh, mother-in-law, Gita and paternal uncle father-in-law (Fufi sasur) Niranjan Singh and his wife Kailashwati and his brother-in-law Multan Singh and his son Tinku were travelling. A maruti car was also going ahead of them. Bus No. RNA 339 was coming from Baggad Tiraya side at a very high speed. The driver of the Maruti car immediately turned his car to one side to save himself and the bus crashed into the jeep bearing no. RNA-638. As a result of this fatal accident, Chet Kaur, Rinki, Geeta and the jeep driver died on the spot. The condition of

the other occupants of the jeep, particularly Lahori Singh, Niranjan Singh, Kailashwanti and Tinku was very critical and they were admitted to the hospital where they later died. According to this witness, the bus was being driven by Ravi Kapur who took the bus towards large pits in the agricultural fields and after parking the bus there, he ran away from the spot.

3. On the basis of Ex.P2, a case under Section 304-A of the Indian Penal Code, 1860 (for short, the 'IPC') was registered against the accused Ravi Kapur. The Investigating Officer, PW11, conducted the investigation, prepared the site plan, Ex.P3, and recorded the statement of various witnesses. A chargesheet [report under Section 173 of the Code of Criminal Procedure, 1973 (for short the 'Cr.P.C.')] was filed against the accused under Sections 279, 337, 338 and 304-A IPC. The court framed charges against the accused and he was put to trial.

4. The prosecution examined as many as 11 witnesses including four eye-witnesses, doctors and the Investigating Officer himself. Upon closing of the case of the prosecution, all the incriminating evidence against the accused was put before him and his statement under Section 313 of the Cr.P.C. was recorded wherein he took the stand of complete denial and stated that the case of the prosecution was false. The trial court, vide its judgment dated 11th May, 2006, held that the prosecution has not been able to prove its case beyond reasonable doubt and the accused was entitled to an order of acquittal. Consequently, the Court acquitted the accused Ravi Kapur of all the above-mentioned charges. At this stage itself, we may refer to the relevant extract of the judgment of the trial court, which is the reasoning for acquitting the accused:

> "Now only 3 witnesses remain to be considered in the instant case, viz., P.W.2-Sukhdev Singh; P.W.4-Multan Singh and P.W.11-Sohan Lal who is the investigating officer. The Court has to consider testimonies adduced by

these witnesses and has to see whether it is proved from the statements of these witnesses that accused was driving the bus rashly and negligently and hit the jeep or not and whether accused Ravi Kapur was driving the said bus no.RNA-339 at the time of the accident or not? In this regard, P.W.2-Sukhdev Singh who is also the person who lodged first information report has stated in his parcha statement Ex.P2 (sic) that one Maruti Van was gone ahead of jeep which had met with the accident and his jeep was behind the said jeep involved in accident. All these three vehicles were on one side of the road and were at a distance of 20 Ft. from each other. One bus came no. RNA-339 towards them near Bagar tiraha and this bus was driven rashly and negligently and directly hit the jeep. However, the Maruti car which was ahead of accident jeep and the jeep in which he was travelling and which was behind the accident jeep, escaped in the said accident by bus. Both these vehicles swerved towards kuchha side of the road. This witness has mentioned in his first information report that driver of the Bus no.RNA-339 hit the jeep with intention to kill the persons travelling in the accidented jeep. He has further stated that he identified the driver of the bus and he was accused Ravi Kapur. He was identified by the passers-by also and they also disclosed his name. Therefore, now this Court has to see whether facts disclosed by this witness in his parcha statement – first information report, stand fully proved or not? Conclusion which can be drawn from perusal of examination in chief of this witness is that this witness has stated in statement before court that Maruti car was ahead of all and the jeep in which he was sitting was behind the Maruti car and the jeep which met with the accident was in behind (sic) the above vehicles. Therefore, in the circumstances there is contradiction in the statements of this witness given by him in his parcha statement and in court with regard to fact as to whether the accidented jeep was in front or rear of the aforesaid vehicles. In his statement in court he states that

the jeep in which he was sitting was behind the accidented jeep and he himself was sitting behind driver's seat. Therefore, in such circumstances it cannot be safely accepted that this witness has actually seen the accident. Because there are material self-contradictions regarding the fact as to whether the jeep of this witness was ahead or behind the accidented jeep….

…In the circumstances it is not clear from the statements of this witness whether driver of the bus was negligent, what was the speed of the bus and accidented jeep was in its right side of the road. This witness also states that there was one jeep and a maruti car ahead the accidented jeep, but drivers of both these vehicles saved their vehicles from the bus and therefore the bus hit the jeep in which this witness was sitting. Court has to see that if driver of the bus was actually driving the bus rashly and negligently, then why he did not collide with the jeep and maruti car which were plying ahead the accidented jeep and why it collided with the accidented jeep. The court has also to consider whether the accident was due to over-taking of the jeep by the driver of the jeep. Because witnesses who appeared on behalf of prosecution have stated that right side of bus suffered moch. But prosecution has not filed any mechanical expert report nor has produced any expert witness in this regard which could have proved that the bus actually hit the jeep from front. It is also not clear whether any loss was caused to bus in front or not. Conclusion which can be drawn out from perusal of statement made by P.W.11-Sohan Lal/investigating officer in his cross examination, is that accident took place at a place where there was a turn/crossing on road and therefore both the drivers of the bus as well as jeep ought to have been careful and cautious. Moreover it is also not clear from statement of this witness that the bus had actually collided with the front portion of jeep. He has stated that accident could have been caused due to over-taking of the middle vehicle.

Whereas this witness ought to have been proved that the accident is a head-on collision between bus and jeep. Apart from this, this witness did not conduct identification proceedings of the accused because the persons present at the spot had told him that Ravi Kapur is the accused and he is the owner and driver of the bus. This witness has not clarified as to why he did not send any notice under Section 133 of M.V. Act to the owner of vehicle. Therefore, in these circumstances, it is apparent from statements of this witness that neither notice under Section 133 of M.V.Act was given to owner of the bus nor identification proceedings of accused were held. Although persons at the spot had told that Ravi Kapur was driver of the bus, but prosecution has not produced and examined any such independent witness who was present at the spot at the time of this accident who could have explained that Ravi Kapur was driving the bus no. RNA-339. Infact prosecution ought to have recorded the statements of eye witnesses and produced them in court which could have corroborated statement of P.W.2-Sukhdev that Ravi Kapur was driving Bus No.RNA-339 at the time of accident and also the identification proceedings of accused were very necessary because both the witnesses who have been produced by prosecution, have not identified accused Ravi Kapur or that the accident was caused to rash and negligent driver of the bus by Ravi Kapur. One of the witness has stated that he saw the driver running away from the spot, but he has not stated that he saw the driver of the bus hitting the jeep. Notice under Section 133 of the M.V. Act was very necessary which could have proved that Ravi Kapur was actually driving the bus no.RNA-339 at the time of accident. Moreover, none of the prosecution witnesses have explained that the bus was being driven rashly and negligently…."

5. The above findings recorded by the trial court were reversed by the High Court, which set aside the judgment of

acquittal. Upon appreciating the evidence, the High Court, vide its judgment dated 12th August, 2008, came to the conclusion that the judgment of the trial court was incorrect and while particularly dealing with the issue of grant of notice under Section 133 of the Motor Vehicles Act, 1988 (for short, 'the Act'), the Court held as under :

> "Now so far as notice under section 133 of the Motor Vehicles Act was concerned which was not served upon the owner, because the statement of PW.2 Sukh Dev Singh, Multhan Singh P.W.4 stated that the accused respondent was the driver and they have identified him on the spot as well as in the court also. In such situation, service of notice under section 133 of the Motor Vehicle upon the owner has no relevancy. As such, in the light of the statement of PW.2 Sukh Dev Singh and P.W.4 Multhan Singh no identification parade is necessary. The FIR Ex.P.1 shows that the name of the accused respondent has already mentioned."

6. The High Court convicted the accused under Section 304-A IPC and awarded him simple imprisonment for two years with fine of Rs.5000/-, in default of payment of fine, to undergo further imprisonment of six months. The Court also convicted the accused for offences under Sections 279 and 337 of the IPC, awarding him six months simple imprisonment with fine of Rs.1000/-, in default of payment of fine to undergo one month simple imprisonment and one month simple imprisonment with fine of Rs.500/-, in default of payment of fine to undergo 15 days rigorous imprisonment, respectively. Aggrieved from the judgment of conviction and order of sentence passed by the High Court, the present Special Leave Petition has been filed.

7. Mr. Patwalia, learned senior advocate appearing for the appellant, while raising a challenge to the judgment of the High Court, has prayed that the judgment of acquittal recorded by the Trial Court be restored and the judgment of the High Court be set aside. The learned counsel has raised the following

submissions:

(a) It is a settled principle of law that the Appellate Court should normally not interfere with the judgment of acquittal unless it is perverse and contrary to the evidence on record. The scope of an appeal against an order of acquittal is very limited and the High Court, in the present case, has exceeded its jurisdiction in reversing the judgment of acquittal passed by the Trial Court.

(b) There is no evidence on record to identify or link the accused with the commission of the offence, i.e., whether or not he was driving the said vehicle. In fact, according to the counsel, there is no direct evidence to show that the accused Ravi Kapur was driving the bus involved in the accident.

(c) Even if it is presumed that the accused was the person driving the bus at the relevant time, still there is no evidence to prove that he drove the bus rashly and negligently.

In absence of any evidence on these two counts, the appellant is entitled to acquittal.

8. While refuting the above-said arguments, the learned counsel appearing for the State has contended that there are eye-witnesses to the occurrence who have categorically stated the entire incident. After the case had been remanded by the Court of Special Judge, by order dated 28th October, 1999, in regard to the issue of non-holding the test identification parade and non-examination of the doctor, the Trial Court had disturbed its own earlier judgment of conviction dated 24th June, 1999 vide its above-mentioned judgment dated 11th May, 2006. This subsequent judgment of the Trial Court was challenged before the High Court. The High Court reversed the judgment of acquittal to that of conviction. This itself shows that there were apparent errors and complete lack of proper appreciation of

evidence in the later judgment of the Trial Court. Therefore, that judgment should not be restored by this Court. According to him, the statements of PW2, PW4 and PW11 clearly establish the case of rash and negligent driving by the accused. There is no material contradiction between the statements of the witnesses and the parcha statement, etc. The judgment of the High Court does not call for any interference by this Court.

9. Firstly, we would discuss the last contention raised on behalf of the appellant, as it relates to appreciation of evidence by this Court, particularly keeping in view the fact that the impugned judgment is a judgment of reversal against the judgment of acquittal.

10. In order to examine the merit or otherwise of contentions (b) and (c) raised on behalf of the appellant, it is necessary for the Court to first and foremost examine (a) what is rash and negligent driving; and (b) whether it can be gathered from the attendant circumstances. Rash and negligent driving has to be examined in light of the facts and circumstances of a given case. It is a fact incapable of being construed or seen in isolation. It must be examined in light of the attendant circumstances. A person who drives a vehicle on the road is liable to be held responsible for the act as well as for the result. It may not be always possible to determine with reference to the speed of a vehicle whether a person was driving rashly and negligently. Both these acts presuppose an abnormal conduct. Even when one is driving a vehicle at a slow speed but recklessly and negligently, it would amount to 'rash and negligent driving' within the meaning of the language of Section 279 IPC. That is why the legislature in its wisdom has used the words 'manner so rash or negligent as to endanger human life'. The preliminary conditions, thus, are that (a) it is the manner in which the vehicle is driven; (b) it be driven either rashly or negligently; and (c) such rash or negligent driving should be such as to endanger human life. Once these ingredients are satisfied, the penalty contemplated under Section 279 IPC is attracted.

11. 'Negligence' means omission to do something which a reasonable and prudent person guided by the considerations which ordinarily regulate human affairs would do or doing something which a prudent and reasonable person guided by similar considerations would not do. Negligence is not an absolute term but is a relative one; it is rather a comparative term. It is difficult to state with precision any mathematically exact formula by which negligence or lack of it can be infallibly measured in a given case. Whether there exists negligence per se or the course of conduct amounts to negligence will normally depend upon the attending and surrounding facts and circumstances which have to be taken into consideration by the Court. In a given case, even not doing what one was ought to do can constitute negligence.

12. The Court has to adopt another parameter, i.e., 'reasonable care' in determining the question of negligence or contributory negligence. The doctrine of reasonable care imposes an obligation or a duty upon a person (for example a driver) to care for the pedestrian on the road and this duty attains a higher degree when the pedestrian happen to be children of tender years. It is axiomatic to say that while driving a vehicle on a public way, there is an implicit duty cast on the drivers to see that their driving does not endanger the life of the right users of the road, may be either vehicular users or pedestrians. They are expected to take sufficient care to avoid danger to others.

13. The other principle that is pressed in aid by the courts in such cases is the doctrine of res ipsa loquitur. This doctrine serves two purposes – one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in

cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in the IPC that the vehicle is driven in a manner dangerous to public life. Where a person does such an offence he is punished as per the provisions of Section 184 of the Act. The courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents. 'Culpable rashness' is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). 'Culpable negligence' is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. [Ref. Justice Rajesh Tandon's *'An Exhaustive Commentary on Motor Vehicles Act,* 1988' (First Edition, 2010].

14. We have noticed these principles in order to examine the questions raised in the present case in their correct perspective. We may notice that certain doctrines falling in the realm of accidental civil or tortuous jurisprudence, are quite applicable to the cases falling under criminal jurisprudence like the present one.

15. Now, we may refer to some judgments of this Court which would provide guidance for determinatively answering such questions. In the case of *Alister Anthony Pareira v. State*

of Maharashtra [(2012) 2 SCC 648] where the driver of a vehicle was driving the vehicle at a high speed at late hours of the night in a drunken state and killed seven labourers sleeping on the pavement, injuring other eight, this Court dismissing the appeal, laid down the tests to determine criminal culpability on the basis of 'knowledge', as follows :

> "41. Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law—in view of the provisions of IPC—the cases which fall within the last clause of Section 299 but not within clause "Fourthly" of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under Section 304 Part II IPC. Section 304-A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description."

16. Again, in the case of *Naresh Giri v. State of M.P.* [(2008) 1 SCC 791], where a train had hit a bus being driven by the appellant at the railway crossing and the bus was badly damaged and two persons died, this Court, while altering the charges from Section 302 IPC to Section 304-A IPC, observed :

> "7. Section 304-A IPC applies to cases where there is no intention to cause death and no knowledge that the act done in all probability will cause death. The provision is directed at offences outside the range of Sections 299 and 300 IPC. Section 304-A applies only to such acts which are rash and negligent and are directly the cause of death

> of another person. Negligence and rashness are essential elements under Section 304-A.

8. Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder under Section 300. If a person wilfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When intent or knowledge is the direct motivating force of the act, Section 304-A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence; a person may cause death by a rash or negligent act which may have nothing to do with driving at all. Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-A discloses that criminality may be that apart from any mens rea, there may be no motive or intention still a person may venture or practise such rashness or negligence which may cause the death of other. The death so caused is not the determining factor.

9. What constitutes negligence has been analysed in Halsbury's Laws of England (4th Edn.), Vol. 34, Para 1 (p. 3), as follows:

"1. General principles of the law of negligence.—Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger; the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent, although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two."

13. According to the dictionary meaning "reckless" means "careless", regardless or heedless of the possible harmful consequences of one's acts. It presupposes that if thought was given to the matter by the doer before the act was done, it would have been apparent to him that there was a real risk of its having the relevant harmful consequences; but, granted this, recklessness covers a whole range of

states of mind from failing to give any thought at all to whether or not there is any risk of those harmful consequences, to recognising the existence of the risk and nevertheless deciding to ignore it."

17. In the case of *Mohd. Aynuddin alias Miyam v. State of A.P.* [(2000) 7 SCC 72], wherein the appellant was driving a bus and while a passenger was boarding the bus, the bus was driven which resulted in the fall of the passenger and the rear wheel of the bus ran over the passenger. This Court, drawing the distinction between a rash act and a negligent act held that it was culpable rashness and criminal negligence and held as under :

"7. It is a wrong proposition that for any motor accident negligence of the driver should be presumed. An accident of such a nature as would prima facie show that it cannot be accounted to anything other than the negligence of the driver of the vehicle may create a presumption and in such a case the driver has to explain how the accident happened without negligence on his part. Merely because a passenger fell down from the bus while boarding the bus, no presumption of negligence can be drawn against the driver of the bus.

9. A rash act is primarily an overhasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution."

18. In light of the above, now we have to examine if negligence in the case of an accident can be gathered from

the attendant circumstances. We have already held that the doctrine of res ipsa loquitur is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. It may also be noticed that either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at a subsequent stage where it is not clear as to how and due to whose negligence the accident occurred. The factum of accident having been established, the Court with the aid of proper evidence may take assistance of the attendant circumstances and apply the doctrine of res ipsa loquitur. The mere fact of occurrence of an accident does not necessarily imply that it must be owed to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than providing an outright demonstration thereof. Elements of this doctrine may be stated as :

> The event would not have occurred but for someone's negligence.

> The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event.

> Accused was negligent and owed a duty of care towards the victim.

19. In the case of *Thakur Singh v. State of Punjab* [(2003) 9 SCC 208], the petitioner drove a bus rashly and negligently with 41 passangers and while crossing a bridge, the bus fell into the nearby canal resulting in death of all the passengers. The Court applied the doctrine of res ipsa loquitur since admittedly the petitioner was driving the bus at the relevant time

and it was going over the bridge when it fell down. The Court held as under:

> "4. It is admitted that the petitioner himself was driving the vehicle at the relevant time. It is also admitted that bus was driven over a bridge and then it fell into canal. In such a situation the doctrine of res ipsa loquitur comes into play and the burden shifts on to the man who was in control of the automobile to establish that the accident did not happen on account of any negligence on his part. He did not succeed in showing that the accident happened due to causes other than negligence on his part."

20. Still, in the case of *Mohd. Aynuddin* (supra), this Court has also stated the principle :

> "8. The principle of res ipsa loquitur is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonably lead to the belief that in the absence of negligence the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrongdoer."

21. It has also been stated that the effect of this maxim, however, depends upon the cogency of the inferences to be drawn and must, therefore, vary in each case. In light of these principles, let us examine the facts of the present case and the evidence on record. The contention raised is that there is not even an iota of evidence to show that either the accused was driving the vehicle or, as alleged, he was driving the same rashly and negligently. The concerned police officer had recorded 'Parcha statement' (Exhibit P2) of Sukhdev, who in Court was examined as PW2. In furtherance to this statement, a First Information Report (FIR) was registered. It was stated in this document that on 20th April, 1991, Sukhdev was going from Alwar to Govindgarh sitting in the jeep to attend the marriage of his brother-in-law. It was at about 9.15 a.m. when

they reached near crossing of Bagad Tiraya, ahead of that jeep was one jeep RNA 638 in which his wife and other family members were travelling. One more Maruti van was running ahead of that jeep. A bus RNA 339 was approaching in fast speed from the side of Baggad. Maruti van which having saved itself took to the side and the driver of the Bus with an intention to kill the passengers collided with the jeep RNA 638. Chet Kaur, Rinki, Geeta and the driver died at the spot and the condition of the rest, i.e., Niranjan Singh, Lahori Singh, Kailash, Vainto and Tinku was serious. They were admitted to hospital. At the time of the accident, the bus was being driven by Ravi Kumar (Kapur) who was identified by the passersby who told his name to Sukhdev. Along with him, others sitting in the jeep also identified the bus driver. The driver parked the vehicle beneath the pit on the road and fled away. Upon his examination as PW2, this witness stated that the Maruti van got down on the kachha road side and even their own jeep was pulled to the kachha side but the third jeep collided with the bus from the front side. He identified that the accused person in the Court was driving the bus himself and confirmed his statement in parcha bayan (statement), Exhibit P2. He was subjected to a detailed cross-examination in which he admitted that he did not see the bus driver while sitting in the jeep, though he had seen the accused while the accused was getting down from the bus and that this fact was not in his statement (Exhibit P2) because he did not remember. The passersby had told him the name of the driver which was recorded in Exhibit P2. He stated that Exhibit P3, the site plan, was not prepared in his presence and his signatures were obtained in the hospital.

22. PW1, Ms. Sheela Gupta, stated that Joga Singh and relatives were going in another vehicle ahead of the vehicle in which she was travelling. It collided with the bus. She was unconscious and she did not see anybody or the driver of the bus.

23. PW3, Subhash Chawla, in his examination, admitted the accident but stated that he did not know the name of the

driver of the bus and also that the jeep behind him was giving horns and as soon as the jeep in the middle reached the accident took place. He was declared hostile.

24. PW4, Multan Singh, has also similarly stated the facts leading to the accident. He stated that he was sitting in the second jeep. According to him, the bus came with speed from the side of Delhi road. It was a private bus and it hit the jeep. The bus was coming on the wrong side and it hit the front of the jeep. He also got injuries on his head and back. When he got down and stood, he saw the driver running away. Though he was injured, he claims to have seen the driver and confirmed that the said driver was present in Court and identified the accused. In his cross-examination, he stated that on collision, he heard sound like cracker burst.

25. PW11, Sohan Lal, is the investigating officer who confirmed having written the 'parcha statement' in furtherance to which he proceeded to the site and thereafter recorded the FIR No.119/91 under Section 304 IPC. He prepared the site plan, Exhibit P29/P3 of the place of occurrence, prepared inquest reports and seized bus No.RNA 339 vide seizure memo Exhibit P31 and the jeep vide seizure memo Exhibit P32. In his cross-examination, he admitted that the place of occurrence was a turn around. He did not remember whether the jeep hit the front of the bus and it was not recorded in Exhibit P32 as to which portion of the jeep hit the bus. He stated, "I don't know whether driver Ravi Kapur was present at the spot or not. I don't know whether the bus passengers were there or not. But bus was there. I tried to inquire from the passengers but they had already left. Test identification of accused was not got done from the injured because all the people present at the spot had already told me about the accused".

26. According to the learned counsel appearing for the appellant, there are contradictions in the statements of these witnesses and the site plan Exhibit P29/P3 does not exhibit any negligence on behalf of the appellant. The appellant was not

driving the vehicle involved in the accident and as such he is entitled to acquittal.

27. We are not impressed with this contention. Firstly, the bus was seized vide seizure memo Exhibit P31 and was later on given on superdari to the owner of the bus, i.e., the accused. This bus was certainly involved in the accident, in fact, there is no serious dispute before us that the accident between the jeep RNA 638 and the bus RNA 339 took place at the place of occurrence. If one examines Exhibit P29/P3, it is clear that it was a narrow road which was about 18 ft. in width and the accident had occurred at a turning point of the road. The accident took place at point 8. The jeep in which number of people died remained stationed at or around point XA while the point 8 shows mud divider (dam-bandh), the accident had taken place at point 1 and point 8 where the bus was parked was at a distance which clearly show that the bus had been moved after the accident. Applying the principle of res ipsa loquitur, it can safely be inferred that it was a serious accident that occurred at a turning point in which number of people had died. After the accident, the bus driver moved the bus away to a different point. If what is submitted on behalf of the appellant had even an iota of truth in it, the most appropriate conduct of the bus driver would have been to leave the vehicle at the place of accident to show that he was on the extreme left side of the road (his proper side for driving) and the jeep which was trying to overtake the other vehicle had come on the wrong side of the road resulting in the accident. This would have been a very material circumstance and relevant conduct of the driver.

28. All the witnesses, PW1, PW2 and PW4, have so stated. There is consistency in the statement of the witnesses that the accused was driving the vehicle and after parking the vehicle at a place away from the place of occurrence, he had run away. We have no reason to disbelieve the statements of these witnesses which are fully supported by the documentary evidence, Exhibit P2, to which there was hardly any challenge during the cross-examination of PW11. We are unable to notice

any serious or material contradiction in the statements of the prosecution witnesses much less in Exhibit P2, the parcha statement of PW2. Minor variations are bound to occur in the statements of the witnesses when their statements are recorded after a considerable lapse from the date of occurrence. The Court can also not ignore the fact that these witnesses are not very educated persons. The truthfulness of the witnesses is also demonstrated from the fact that PW1, even in her examination-in-chief, stated that she was unconscious and did not see the driver. Nothing prevented her from making a statement that she had actually seen the accused. Thus, we have no hesitation in holding that the three witnesses, i.e., PW1, PW2 and PW4 have given a correct eye account of the accident. We find their statements worthy of credence and there is no occasion for the Court to disbelieve these witnesses. It is a settled principle that the variations in the statements of witnesses which are neither material nor serious enough to affect the case of the prosecution adversely are to be ignored by the courts. {Ref. *State v. Saravanan and Anr.* [(2008) 17 SCC 587]; and *Sunil Kumar Sambhudayal Gupta v. State of Maharasthtra* [(2010 13 SCC 657]}. It is also a settled principle that statements of the witnesses have to be read as a whole and the Court should not pick up a sentence in isolation from the entire statement and ignoring its proper reference, use the same against or in favour of a party. The contradictions have to be material and substantial so as to adversely affect the case of the prosecution. Reference in this regard can be made to *Atmaram & Ors. v. State of Madhya Pradesh* [(2012) 5 SCC 738].

29. In the case of *Nageshwar Shri Krishna Ghobe v. State of Maharasthra* [(1973) 4 SCC 23], this Court observed that the statements of the witnesses who met with an accident while travelling in a vehicle or those of the people who were travelling in the vehicle driven nearby should be taken and understood in their correct perspective as it is not necessary that the occupants of the vehicle should be looking in the same

direction. They might have been attracted only by the noise or the disturbance caused by the actual impact resulting from the accident itself. The Court held as under :

> "6. In cases of road accidents by fast moving vehicles it is ordinarily difficult to find witnesses who would be in a position to affirm positively the sequence of vital events during the few moments immediately preceding the actual accident, from which its true cause can be ascertained. When accidents take place on the road, people using the road or who may happen to be in close vicinity would normally be busy in their own pre-occupations and in the normal course their attention would be attracted only by the noise or the disturbance caused by the actual impact resulting from the accident itself. It is only then that they would look towards the direction of the noise and see what had happened. It is seldom — and it is only a matter of coincidence — that a person may already be looking in the direction of the accident and may for that reason be in a position to see and later describe the sequence of events in which the accident occurred. At times it may also happen that after casually witnessing the occurrence those persons may feel disinclined to take any further interest in the matter, whatever be the reason for this disinclination. If, however, they do feel interested in going to the spot in their curiosity to know some thing more, then what they may happen to see there, would lead them to form some opinion or impression as to what in all likelihood must have led to the accident. Evidence of such persons, therefore, requires close scrutiny for finding out what they actually saw and what may be the result of their imaginative inference. Apart from the eye-witnesses, the only person who can be considered to be truly capable of satisfactorily explaining as to the circumstances leading to accidents like the present is the driver himself or in certain circumstances to some extent the person who is injured. In the present case the person who died in the accident is obviously not

> available for giving evidence. The bhaiya (Harbansingh) has also not been produced as a witness. Indeed, failure to produce him in this case has been the principal ground of attack by Shri Pardiwala and he has questioned the bona fides and the fairness of the prosecution as also the trustworthiness of the version given by the other witnesses."

30. The learned counsel for the appellant, while relying upon the judgment of this Court in the case of *Mulla & Anr. v. State of Uttar Pradesh* [(2010) 3 SCC 508] and *Amit v. State of Uttar Pradesh* [(2012) 4 SCC 107], argued that none of the witnesses had actually seen the accused driving the vehicle and, therefore, in absence of the test identification parade, it has to be held that the accused was not driving the vehicle and that he was not identified. In the case of *Mulla* (supra), relied upon by the learned counsel, the Court had observed that it is desirable that a test identification parade should be conducted as soon as possible after the arrest of the accused to avoid any mistake on the part of the witnesses.

31. On the other hand, to contra this submission, the learned counsel appearing for the State relied on the judgment of this Court in the case of *Myladimmal Surendran & Ors. v. State of Kerala* [(2010) 11 SCC 129] to say that the test identification parade in the facts and circumstances of the case was not necessary and in any case no prejudice has been caused to the accused and holding of test identification parade is not always necessary.

32. In the present case, the accused had been seen by PW2 and PW4. In addition, they had also stated that the passersby had informed them that the accused was driving the bus and, in fact, he was the owner of the bus. One fact of this statement is established that the bus in question was given on superdari to the accused. It is also stated by these persons that after they had seen the accused, he had run away from the place where he parked the vehicle. These witnesses also identified the accused in the Court. It is not the case of the accused before

us that he had been shown to the witnesses prior to his being identified in the Court. The Court identification itself is a good identification in the eyes of law. It is not always necessary that it must be preceded by the test identification parade. It will always depend upon the facts and circumstances of a given case. In one case, it may not even be necessary to hold the test identification parade while in the other, it may be essential to do so. Thus, no straightjacket formula can be stated in this regard. We may refer to a judgment of this Court in the case of *Shyamal Ghosh v. State of West Bengal* [2012 (6) SCALE 381] wherein this Court has held that the Code of Criminal Procedure, 1973 (for short "Cr.P.C.) does not oblige the investigating agency to necessarily hold the test identification parade without exception. The Court held as under:

> "55. On behalf of accused Shyamal, it was also contended that despite the identification parade being held, he was not identified by the witnesses and also that the identification parade had been held after undue delay and even when details about the incident had already been telecasted on the television. Thus, the Court should not rely upon the identification of the accused persons as the persons involved in the commission of the crime and they should be given the benefit of doubt.
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> 56. The whole idea of a Test Identification Parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.
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> 57. It is equally correct that the CrPC does not oblige the investigating agency to necessarily hold the Test

> Identification Parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the Test Identification Parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is, however subjected to exceptions. Reference can be made to *Munshi Singh Gautam v. State of M.P.*[(2005) 9 SCC 631], *Sheo Shankar Singh v State of Jharkhand and Anr.* [(2011) 3 SCC 654].
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> 58. Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named accused in the case are actually the culprits. The Identification Parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case."

33. In our considered view, it was not necessary to hold the test identification parade of the appellant for two reasons. Firstly, the appellant was already known to the passersby who had recognized him while driving the bus and had stated his name and, secondly, he was duly seen, though for a short but reasonable period, when after parking the bus, he got down

from the bus and ran away.

34. Equally without merit is the contention on behalf of the appellant that the Court should draw adverse inference against the prosecution as the investigating officer did not serve notice under Section 133 of the Act upon the owner of the vehicle. The High Court has rightly rejected this contention on the basis that the driver of the vehicle was identified at the place of occurrence and even passersby had informed the prosecution witnesses that the driver, Ravi Kapur, was the owner of the vehicle. The name of the accused was duly recorded in the FIR itself. This fact remained undisputed. With some emphasis, it was even argued before us that he was not driving the vehicle, though it was not disputed that he is the registered owner of the vehicle in question. If that be so, when the statement of the accused under Section 313 of the Cr.P.C. was recorded by the Trial Court, except denial, he did not state anything further. For reasons best known to the accused, instead of stating as to whom he had given his vehicle for being driven on that date, he preferred to maintain silence and denied the case of the prosecution.

35. It is true that the prosecution is required to prove its case beyond reasonable doubt but the provisions of Section 313 Cr.P.C. are not a mere formality or purposeless. They have a dual purpose to discharge, firstly, that the entire material parts of the incriminating evidence should be put to the accused in accordance with law and, secondly, to provide an opportunity to the accused to explain his conduct or his version of the case. To provide this opportunity to the accused is the mandatory duty of the Court. If the accused deliberately fails to avail this opportunity, then the consequences in law have to follow, particularly when it would be expected of the accused in the normal course of conduct to disclose certain facts which may be within his personal knowledge and have a bearing on the case.

36. In our considered view, no prejudice has been caused

to the accused by non-serving of the notice under Section 133 of the Act and, in any case, the accused cannot take any advantage thereof.

37. Lastly, we may proceed to discuss the first contention raised on behalf of the accused. No doubt, the Court of appeal would normally be reluctant to interfere with the judgment of acquittal but this is not an absolute rule and has a number of well accepted exceptions. In the case of *State of UP v. Banne & Anr.* [(2009) 4 SCC 271], the Court held that even the Supreme Court would be justified in interfering with the judgment of acquittal of the High Court but only when there are very substantial and compelling reasons to discard the High Court's decision. In the case of *State of Haryana v. Shakuntala & Ors.* [2012 (4) SCALE 526], this Court held as under :

> "36. The High Court has acquitted some accused while accepting the plea of alibi taken by them. Against the judgment of acquittal, onus is on the prosecution to show that the finding recorded by the High Court is perverse and requires correction by this Court, in exercise of its powers under Article 136 of the Constitution of India. This Court has repeatedly held that an appellate Court must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to such accused under the fundamental principles of criminal jurisprudence, i.e., that every person shall be presumed to be innocent unless proved guilty before the court and secondly, that a lower court, upon due appreciation of all evidence has found in favour of his innocence. Merely because another view is possible, it would be no reason for this Court to interfere with the order of acquittal.
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> 37. In *Girja Prasad (Dead) By Lrs. v. State of M.P.* [(2007) 7 SCC 625], this Court held as under:-
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> > "28. Regarding setting aside acquittal by the High Court, the learned Counsel for the appellant relied

upon *Kunju Muhammed v. State of Kerala* (2004) 9 SCC 193, *Kashi Ram v. State of M.P.* AIR 2001 SC 2902 and *Meena v. State of Maharashtra* 2000 Cri LJ 2273. In our opinion, the law is well settled. An appeal against acquittal is also an appeal under the Code and an Appellate Court has every power to reappreciate, review and reconsider the evidence as a whole before it. It is, no doubt, true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the Trial Court. But that is not the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law, to reappreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence in consonance with the principles of criminal jurisprudence."

38. In *Chandrappa v. State of Karnataka* [(2007) 4 SCC 415], this Court held as under:-

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions",

"glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

39. In *C. Antony v. K.G. Raghavan Nair* [(2003) 1 SCC 1], this Court held :-

"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not

justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court. (See *Bhim Singh Rup Singh v. State of Maharashtra and Dharamdeo Singh v. State of Bihar.*)"

40. The State has not been able to make out a case of exception to the above settled principles. It was for the State to show that the High Court has completely fallen in error of law or that judgment in relation to these accused was palpably erroneous, perverse or untenable. None of these parameters are satisfied in the appeal preferred by the State against the acquittal of three accused."

38. In the present case, there are more than sufficient reasons for the High Court to interfere with the judgment of acquittal recorded by the Trial Court. Probably, this issue was not even raised before the High Court and that is why we find that there are hardly any reasons recorded in the judgment of the High Court impugned in the present appeal. Be that as it may, it was not a case of non-availability of evidence or presence of material and serious contradictions proving fatal to the case of the prosecution. There was no plausible reason before the Trial Court to disbelieve the eye account given by PW2 and PW4 and the Court could not have ignored the fact that the accused had been duly identified at the place of occurrence and even in the Court. The Trial Court has certainly fallen in error of law and appreciation of evidence. Once the Trial Court has ignored material piece of evidence and failed to appreciate the prosecution evidence in its correct perspective, particularly when the prosecution has proved its case beyond reasonable doubt, then it would amount to failure

of justice. In some cases, such error in appreciation of evidence may even amount to recording of perverse finding. We may also notice at the cost of repetition that the Trial Court had first delivered its judgment on 24th June, 1999 convicting the accused of the offences. However, on appeal, the matter was remanded on two grounds, i.e., considering the effect of non-holding of test identification parade and not examining the doctor. Upon remand, the Trial Court had taken a different view than what was taken by it earlier and vide judgment dated 11th May, 2006, it had acquitted the accused. This itself became a ground for interference by the High Court in the judgment of acquittal recorded by the Trial Court. From the judgment of the Trial Court, there does not appear to be any substantial discussion on the effect of non-holding of the test identification parade or the non-examination of the doctor. On the contrary, the Trial Court passed its judgment on certain assumptions. None of the witnesses, not even the accused, in his statement, had stated that the jeep was at a fast speed but still the Trial Court recorded a finding that the jeep was at a fast speed and was not being driven properly. The Trial Court also recorded that a suspicion arises as to whether Ravi Kapur was actually driving the bus at the time of the accident or not and identification was very important.

39. We are unable to understand as to how the Trial Court could ignore the statement of the eye-witnesses, particularly when they were reliable, trustworthy and gave the most appropriate eye account of the accident. The judgment of the Trial Court, therefore, suffered from errors of law and in appreciation of evidence both. The interference by the High Court with the judgment of acquittal passed by the Trial Court does not suffer from any jurisdictional error.

40. For the reasons afore-recorded, we find no merit in the present appeal. The same is dismissed accordingly.

K.K.T. Appeal dismissed.

SUBHASH KRISHNAN
v.
STATE OF GOA
(Criminal Appeal No. 1089 of 2010)

AUGUST 17, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 – s.120B r/w s.302, ss.342, 364, 504 r/w s.34 – Wrongful confinement and abduction followed by murder – Allegation that accused-appellant alongwith the other accused inflicted severe injuries on the victim in which process the victim lost his consciousness whereafter he was carried away in a Maruti van to a different place where he was hanged to death – Conviction of appellant – Challenge to – Held: Not tenable – Overwhelming evidence on record that appellant shared common intention alongwith the other accused – Clear cut, uncontroverted evidence of PW-21 owner of the Maruti van that it was appellant who took the Maruti van from him which was identified by PW-21 as the one used for the crime – PW-25, mechanic working in the garage of the deceased, made specific reference to the presence of appellant in the van when the accused persons visited the garage of the deceased to enquire about his whereabouts – PWs 14, 33, 16, 23 and 27 made specific reference to the overt act played by the appellant in the assault on the deceased with a big knife (talwar) –Appellant was identified by at least two witnesses PW-14 and 33 in the TIP – Evidence of five other eye witnesses, namely, PWs. 16, 23, 26, 27 and 34 in having identified him in the Court by making specific reference to the red colour shirt worn by him at the time of the occurrence fully corroborated the version of PWs-14 and 33 – Version of the eye witnesses that they were able to see the specific part played by different accused and, in particular, the

appellant who was using a talwar, cannot be rejected, in absence of any malafide attributed to the witnesses – Complicity of appellant in commission of the crime fully established by the prosecution.

Penal Code, 1860 – ss.342 and 364 r/w s.34 – Conviction of accused-appellant under – Justification – Held: Justified – Examining the conduct of the appellant along with the other accused in wrongfully restraining the victim by inflicting severe injuries on his body i.e. by causing as many as 36 injuries in which process the victim lost his consciousness whereafter he was shifted to a different place, where the victim was killed by hanging, every description of the offence under ss.342 and 364 with the aid of s.34 clearly made out.

Evidence – Identification – Test Identification Parade (TIP) – Procedure followed in holding of the TIP – Challenge to – Held: Not tenable – Accused-appellant was identified by at least two of the witnesses PW-14 and 33 in the TIP – Accused had raised objection to the effect that they were already shown by the police officials to the said witnesses, whereafter appellant had himself suggested that he be permitted to change his shirt which was allowed and he thereafter subjected himself to the TIP in which he was identified by PWs-14 and 33 without any hesitation – Nothing elicited in cross examination to hold that the whole of the TIP was not conducted in the manner it was to be held and that identification of the appellant was not proved in the manner known to law – Evidence of other eye witnesses, namely, PWs-16, 23, 26, 27 and 34 in having identified him in the Court by making specific reference to the red colour shirt worn by him at the time of the occurrence fully corroborated the version of PWs-14 and 33.

Evidence – Ocular evidence – Eye-witnesses – Appreciation of – Murderous assault with various weapons leading to death of a person – Many accused including the appellant – Occurrence allegedly took place for 4-5 minutes

– Distance between the place of occurrence and the point from which the eye witnesses statedly saw the occurrence more than 70 metres – Plea of accused-appellant that in view of the distance and the time factor, it was impossible for the eyewitnesses to have noted the participation of appellant and the other accused in the crime – Held: Not tenable – The occurrence had taken place at 4.30 in the evening when there would have been no difficulty for anyone to have a clear view – Even in the vicinity of 70 metres when about 8 persons were assaulting the deceased with sword, knife and danda on the road, in full public gaze, it would have definitely caught the eye of everyone standing thereat – Version of the eye witnesses that they were able to see the specific part played by different accused and, in particular, the appellant who was using a talwar, cannot be rejected, in absence of any malafide attributed to the witnesses – Merely because the incident happened within 4-5 minutes, it cannot be said that it was not possible for the witnesses to have noted the participation of the accused in the crime – As many as 36 injuries were found in the body of the deceased which were caused by the blunt side of the talwar, knife as well as danda – In inflicting so many injuries, the time taken would have been sufficient enough for the witnesses to have made an observation as to the role played by the accused in the crime – No scope for doubting the version of witnesses as regards the participation of the appellant in the crime.

Criminal Trial – Investigation – Abduction and wrongful confinement followed by murder – Procedure followed by PW-35 (the Investigating Officer) – Propriety of – Held: The procedure followed by PW-35 in having commenced the investigation based on Exhibit 96 (the complaint of PW-2) alongwith site inspection, the prior information received by him through phone about the alleged occurrence and every further steps taken by him in having recorded the statements of the other eye witnesses, the initiation taken by him for apprehending the vehicle in which the accused alleged to

have travelled, recovery of weapons from the vehicle, arrest of the accused including A-2 (the appellant), the recovery of the dead body at the instance of A-1, the step taken for getting the dead body examined through PW-9, the ascertainment of the injuries sustained by the accused themselves, gathering of the FSL reports on the materials seized from the accused as well as the deceased, considered in a sequence, disclose that the case of the prosecution as projected based on Exhibit 96 even in the absence of the cross examination of PW-2 in the peculiar facts and circumstances of this case was perfectly in order.

The prosecution case was that when deceased alongwith PW-2 and another person had gone to meet A-1 with a view to arrive at some settlement with regard to an issue relating to a love affair, the accused persons assaulted the deceased with knife, sword and bamboo stick (danda) and also gave him kick blows whereafter A-2 (appellant) brought a Maruti van to the spot in which the deceased was carried away in the dicky of the van. The Maruti van was intercepted by the police. A-1 was found driving the vehicle with the other accused persons in the van. A knife, sword, bamboo stick (danda) and a right foot chappal with bloodstains were recovered from the vehicle. At instance of A-1, the body of the deceased was subsequently discovered hanging from the branch of a tree. The blood stained clothes of the deceased and his left foot chappal with blood stains were statedly recovered along with his belongings, as well as, the nylon rope with which the body was found hanging. PW-9, the postmortem doctor, noted 36 injuries on the deceased. The FSL report relating to the bloodstains found on the various seized articles revealed the blood group of deceased.

Though, in all eight persons were accused of the alleged offences, A-7 and 8 were absconding and hence

only six accused persons were charge-sheeted for the offences under Section 120B read with Section 302, IPC, Sections 342, 364, 504 read with Section 34, IPC for the alleged abduction, wrongful confinement and killing of the deceased. A-5 and A-6 were acquitted by the trial Court giving benefit of doubt while A-1 to A-4 were acquitted of charges under Section 342, 504 and 364 read with Section 34 IPC. A-1 to 4 were, however, convicted for offences under Sections 120B, 302 read with Section 34, IPC and were imposed with the sentence of life imprisonment. A-1 to 4 preferred individual appeals. The State preferred cross-appeal against the acquittal of charges under Sections 342, 504 and 364 read with Section 34 IPC and the total acquittal of A-5 and A-6. By a common judgment, the High Court dismissed the appeal filed by the accused and the State appeal was partly allowed, whereunder the High Court held that the conviction of A-1 to A-4 would be for all the offences including offences under Sections 342 and 364 read with Section 34, IPC.

In the instant appeals preferred by A-2 (appellant), the following contentions were raised on his behalf viz. a) Exhibit 96, complaint of PW-2 was not proved; b) PW-2 having not offered himself for cross examination, his evidence in chief was of no value c) Though there was a specific overt act alleged against the appellant with the aid of talwar Exhibit 12, the medical evidence to the effect that there was no cut injury on the body of the deceased go to show that the appellant had nothing to do with the killing of the deceased; d)The name of the appellant was not mentioned in Exhibit 96; e) The appellant was a total stranger and his case should have, therefore, been equated to that of A-5 and A-6 and he should have been acquitted on that basis; f) The test identification parade was not held immediately after the occurrence apart from the fact that the procedure in holding the test

identification parade was not duly followed and the identification of the appellant by PWs-14 and 33 should not have, therefore, been relied upon; g) According to PW-35, the Investigating Officer, the place from where the eye witnesses stated to have seen the occurrence, namely, Marina store was admittedly 70 metres away from the place of occurrence and, therefore, the eye witnesses could not have seen the participation of the accused, in particular the appellant, in the crime; h) There was total repugnancy in the ocular vis-a-vis the medical evidence as regards the use of the weapon, having regard to the nature of injuries found on the body of the deceased; even according to the eye witnesses, the occurrence took place only for 4-5 minutes and from a distance of 70 metres, the eye witnesses could not have noted the persons with any certainty in order to identify them with regard to specific part played by them; i) In the test identification parade, identical persons were not kept and that a wrong procedure was followed in the holding of test identification parade; j) There were improvements in the statements of the eye witnesses as compared to the statement found in Section 161 CrPC; k) PW-23 referred to the bleeding injuries on A-2 in definite terms, whereas according to PW-9 as well as PW-15, no injury was found on A-2 and the only accused on whom knife injury was found was A-4; and therefore, the presence of the appellant and his involvement in the crime was not made out.

Dismissing the appeals, the Court

HELD:1.1. It is true that PW-2, the author of the complaint did not offer himself for cross examination. The High Court made extensive reference to the circumstances namely, the non-availability of PW-2 who was in abroad at the relevant point of time, when his cross examination was fixed and that no fault can be found with the prosecution since inspite of its best efforts, the

witness could not be produced. The High Court also noted that the trial Court, therefore, had no option than to ignore his evidence. The High Court then rightly pointed out that the whole purpose of the complaint was to ignite the investigation, that PW-35, the investigating officer after receipt of the complaint Exhibit 96 set the law in motion, sent the record of the complaint to the Magistrate apart from the commencement of the investigation based on the telephonic message regarding the ongoing assault without reference to either the victim or the accused involved in the assault. This Court fully agrees with the approach of the trial Court as confirmed by the High Court in proceeding with the case of the prosecution, ignoring the evidence of PW-2 while at the same time the factum of the nature of offence alleged in the complaint Exhibit -96 as proceeded with by the prosecution deserved to be considered in accordance with law. [Para 11] [294-D-H]

1.2. Apart from PW-2 who was the author of the complaint and also eye witness, there were nine other witnesses in the case who fully supported the case of the prosecution. Taking the totality of the above facts, it will be futile on the part of the appellant to contend that PW-2 did not offer himself for cross examination and, therefore, the whole genesis of the case should be thrown out of board. In the said background, the submission about the non-reference of the name of the appellant in Exhibit 96 pales into insignificance especially, when the complicity of the appellant in the commission of the crime was otherwise fully established by the prosecution. Therefore, the claim that the case of the appellant should be equated to that of A-5 and A-6 does not merit any consideration. [Para 12] [295-A-B-D-F]

1.3. Inasmuch as any crime alleged is against the society, it is the bounden duty of the Court to find out the

truthfulness or otherwise of the prosecution case allegedly based on initial information received and the steps taken in furtherance of its investigation for acceptance or otherwise of such information in order to determine the further course of action to be taken to unearth the details of the crime, the persons involved in the crime and ultimately ensure that the guilty are brought to book. When the case of the prosecution is brought to Court by placing all the materials, it is for the Court to examine the action taken by the investigating machinery in the anvil of the law in force and on being satisfied with the correctness of the procedure followed can proceed to find the proof of guilt and pass its judgment. In other words, the Courts should examine and find out whether the story of the prosecution as projected before the Court trying the offence merits acceptance. [Para 13] [296-A-E]

1.4. The procedure followed by PW-35 in having commenced the investigation based on Exhibit 96 along with site inspection, the prior information received by him through phone about the alleged occurrence and every further steps taken by him in having recorded the statements of the other eye witnesses, the initiation taken by him for apprehending the vehicle in which the accused alleged to have travelled, recovery of weapons from the vehicle, arrest of the accused including the appellant, the recovery of the dead body at the instance of A-1, the step taken for getting the dead body examined through PW-9, the ascertainment of the injuries sustained by the accused themselves, gathering of the FSL reports on the materials seized from the accused as well as the deceased, considered in a sequence, disclose that the case of the prosecution as projected based on Exhibit 96 even in the absence of the cross examination of PW-2 in the peculiar facts and circumstances of this case was perfectly in order and there is no good ground to reject the case of the prosecution. [Para 16] [297-F-H; 298-A-B]

Satish Narayan Sawant v. State of Goa **2009 (17) SCC 724; 2009 (14) SCR 464;** *State of Uttar Pradesh v. Bhagwant Kishore Joshi* **AIR 1964 SC 221: 1964 SCR 71 and** *H.N. Rishbud & Anr. v. State of Delhi* **AIR 1955 SC 196: 1955 SCR 1150 – relied on.**

Manzoor v. State of Uttar Pradesh **1982 (2) SCC 72;** *Ganga Prasad v. State of U.P.* **1987 (2) SCC 232;** *Balaka Singh & Ors. v. The State of Punjab* **1975 (4) SCC 511: 1975 (0) Suppl. SCR 129;** *State of Uttar Pradesh v. Abdul Karim & Ors.* **2007 (13) SCC 569: 2007 (8) SCR 540;** *Animireddy Venkata Ramana & Ors. v. Public Prosecutor, High Court of Andhra Pradesh* **2008 (5) SCC 368: 2008 (3) SCR 1078;** *Sayed Darain Ahsan alias Darain v. State of West Bengal & Anr.* **2012 (4) SCC 352;** *Dana Yadav alias Dahu & Ors. v. State of Bihar* **2002 (7) SCC 295: 2002 (2) Suppl. SCR 363;** *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* **2010 (6) SCC 1: 2010 (4) SCR 103;** *Pramod Mandal v. State of Bihar* **2004 (13) SCC 150: 2004 (4) Suppl. SCR 479;** *Pravin v. State of Madhya Pradesh* **2008 (16) SCC 166: 2008 (5) SCR 367 and** *Ashok Kumar v. State (Delhi Administration)* **1995 Suppl.(3) SCC 626: 1995 (3) Suppl. SCR 777 – cited.**

2. There are overwhelming evidence to implicate the appellant A-2 to the death of the deceased by sharing the common intention along with the other accused who were convicted of the various offences. In the first instance, there was a clear cut evidence of PW-21 owner of the Maruti van whose evidence was not controverted in any manner relating to the fact that it was the appellant who took the Maruti van from him which was identified by PW-21 which was used for the crime. PW-25, the mechanic who was working in the garage of the deceased made a specific reference to the presence of the appellant in the van when the accused persons visited the garage of the deceased to enquire about his

whereabouts. PW 14, 33, 16, 23 and 27 made specific reference to the overt act played by the appellant in the assault on the deceased with a big knife (talwar). Talwar is a long knife with sharp edge on the one side and blunt edge on the other. PW-9, the post mortem doctor stated that the injury Nos. 2 to 20, 24 to 31, 35 and 36 were caused by hard and blunt weapon. Of the above injuries, injury Nos.2 to 12 were on the face itself. Injury Nos. 13 to 20 were on the arms and shoulder. Injury Nos. 24 to 31 were on the leg and in the buttocks. Injury Nos. 35 and 36 were on the back side of the body. To a specific query put to him, the doctor opined that except injury Nos. 21, 22, 23, 32, 33 and 34, other injuries of 2 to 36 found on the body of the deceased could have been caused by Exhibit 12 which is the sword and knife (Exhibit-13) while injury Nos. 21, 22, 23, 32, 33 and 34 on the deceased could have been caused by Exhibit 14, the danda. Therefore, the extensive part played by the appellant in the crime using the talwar Exhibit 12 was conclusively made out.[Para 17] [298-D-H; 299-A]

3. The appellant was identified by at least two of the witnesses PW-14 and 33 in the TIP held on 03.11.2003 at the behest of PW-30 the Special Judicial Magistrate. Though it was contended that the appellants raised an objection to the effect that they were already shown by the police officials to the said witnesses, in order to rule out any hazard on that score, the accused himself suggested that he be permitted to change his shirt which PW-30 allowed and, thereafter, he subjected himself to the TIP in which he was identified by PWs-14 and 33 without any hesitation. Nothing was elicited in the cross examination in order to hold that the whole of the TIP was not conducted in the manner it was to be held and that the identification of the appellant was not proved in the manner known to law. PW-14 also stated in her evidence that she had seen the appellant in the village earlier

though she did not know his name. Therefore, when such identification of the appellant was proved to the satisfaction of the Court, there was nothing more to be proved about the manner in which it was held or to find any flaw in the holding of the TIP. The witnesses were not questioned as to the manner in which they were asked to identify the appellant in the TIP or the alleged defect in the holding of the said parade when the witnesses were examined before the Court. Therefore, it is too late in the day for the appellant to contend that the identification parade was not carried out in the manner known to law. Coupled with the above, the evidence of other eye witnesses, namely, PWs-16, 23, 26, 27 and 34 in having identified him in the Court by making specific reference to the red colour shirt worn by him at the time of the occurrence fully corroborated the version of PWs-14 and 33. [Para 18] [299-B-G]

Mohanlal Gangaram Gehani v. State of Maharashtra **1982 (1) SCC 700: 1982 (3) SCR 277;** *Raju @ Rajendra v. State of Maharashtra* **1998 (1) SCC 169 and** *Kanan & Ors. v. State Of Kerala* **1979 (3) SCC 319 – held inapplicable.**

Simon & Ors. v. State of Karnataka **2004 (2) SCC 694: 2004 (1) SCR 1164;** *Dana Yadav alias Dahu & Ors. v. State of Bihar* **2002 (7) SCC 295: 2002 (2) Suppl. SCR 363 and** *Daya Singh v. State of Haryana* **AIR 2001 SC 1188: 2001 (1) SCR 1115 – relied on.**

4. In regard to the contention of the appellant that the version of the eye witnesses is not reliable inasmuch as none of the witnesses had anything to say about the severe head injury suffered by A-4 on his forehead, the High Court has taken pains to analyze the crime threadbare and found that there was no evidence led as regards the alleged assault on him by sword, that not even a suggestion was put to any of the prosecution witnesses to state that there was assault by anyone and

the trial Court, therefore, noted that there was every possibility of A-4 having sustained the injures with Exhibit 12 which was very widely used by the appellant on the deceased in which occurrence A-4 also fully participated. Such an approach of the trial Court in the peculiar facts and circumstances of the case cannot be held to be wholly improbable. A-4 except making a statement in 313 questioning that he was assaulted by 4 to 5 person along with two other motor cyclists with a sword when he was waiting at the bus stop, there was no supporting material placed before the Court in the form of legally acceptable evidence and further in the absence of any cross examination on that aspect to any of the witnesses examined in support of the prosecution, there is no scope to consider the said submission to grant any relief to the appellant. Therefore, the submission that the prosecution failed to explain the grievous injury found on A-4 or other accused does not in any way support the case of the appellant and the said submission, therefore, stands rejected. [Paras 21, 22, 23] [302-D, H; 303-A-F]

Thaman Kumar v. State of Union Territory of Chandigarh **2003 (6) SCC 380: 2003 (3) SCR 1190 and** *Khambam Raja Reddy and Anr. v. Public Prosecutor, High Court Andhra Pradesh* **2006 (11) SCC 239: 2006 (6) Suppl. SCR 446 – distinguished.**

5. Under Section 362, IPC when by force or deceit if any person is compelled or induced to go from any place and such an abduction takes place in order to ultimately eliminate him, the offence would be made out under Section 364, IPC. As rightly pointed out by the High Court, examining the conduct of the appellant along with the other accused in wrongfully restraining the deceased by inflicting severe injuries on the body of the deceased i.e. by causing as many as 36 injuries in which process the person lost his conscious whereafter he was shifted

to a different place, where it ultimately came to light that the person was killed by hanging, every description of the offence under Sections 342 and 364 with the aid of Section 34, IPC was clearly made out. Therefore, no fault is found in the said conclusion of the High Court in having reversed the judgment of the trial Court for convicting the appellant for the offence under the said Sections. [Para 25] [304-H; 305-A-D]

6. The submission of the appellant about the impossibility of the eyewitnesses in having noted the participation of the appellant and the other accused in the crime was on the basis that according to PW-35 the distance between the place of occurrence and the point from which the eye witnesses stated to have seen the occurrence was more than 70 metres. The said submission is liable to be rejected. In the first place, when the occurrence had taken place at 4.30 in the evening there would be no difficulty for anyone to have a clear view of what was happening before them. Even in the vicinity of 70 metres when about 8 persons were assaulting the deceased with sword, knife and danda on the road, in full public gaze, it would have definitely caught the eye of everyone standing thereat. The presence of the eye witnesses at the place of occurrence was not in dispute. The witnesses made it clear that they were seeing the occurrence from the shop called Marina stores. It is not as if they were not looking at the occurrence. According to the witnesses, as well as, the prosecution, the eye witnesses were viewing the occurrence from the entrance of Marina stores. Therefore, the version of the eye witnesses that they were able to see the specific part played by different accused and, in particular, the appellant who was using a talwar in the absence of any malafide attributed to the witnesses, their version cannot be rejected. As regards the time factor, it cannot be held that since the incident happened within

4-5 minutes, it was not possible for the witnesses to have noted the participation of the accused in the crime. It is relevant to note that according to PW-9, as many as 36 injuries were found in the body of the deceased which were caused by the blunt side of the talwar, knife as well as danda. In inflicting so many injuries, the time taken would have been sufficient enough for the witnesses to have made an observation as to the role played by the accused in the crime. Therefore, on that score as well there is no scope for doubting the version of witnesses as regards the participation of the appellant in the crime. PW-23 in his evidence stated that he saw the appellant having suffered bleeding injury which was not proved. It was A-4 who suffered the bleeding injuries on his forehead which was caused with the aid of a knife. This Court concurs with the conclusion of the Courts below about the possibility of A-4 having suffered the injury with the aid of Exhibit -12 (talwar) which was widely used by the appellant and inasmuch as A-4 was also actively involved in the crime. Since the appellant used Exhibit 12 extensively, there was every possibility of A-4 having suffered the injury. In the light of the overwhelming evidence of the other eye witnesses, the medical evidence and the forensic reports, the wrong statement of PW-23 cannot be said to have caused any serious dent in the case of the prosecution. [Para 26] [305-D-H; 306-A-G]

Case Law Reference:

1982 (3) SCR 277	**held inapplicable**	**Para 8**
1982 (2) SCC 72	**cited**	**Para 8**
1998 (1) SCC 169	**held inapplicable**	**Para 8**
1979 (3) SCC 319	**held inapplicable**	**Para 8**
1987 (2) SCC 232	**cited**	**Para 8**
1975 (0) Suppl. SCR 129	**cited**	**Para 8**

2007 (8) SCR 540	**cited**	**Para 8**
2008 (3) SCR 1078	**cited**	**Para 8**
2012 (4) SCC 352	**cited**	**Para 9**
2002 (2) Suppl. SCR 363	**cited**	**Para 9**
2010 (4) SCR 103	**cited**	**Para 9**
2004 (4) Suppl. SCR 479	**cited**	**Para 9**
2008 (5) SCR 367	**cited**	**Para 9**
1995 (3) Suppl. SCR 777	**cited**	**Para 9**
2009 (14) SCR 464	**relied on**	**Para 9**
1964 SCR 71	**relied on**	**Para 14**
1955 SCR 1150	**relied on**	**Para 14**
2004 (1) SCR 1164	**relied on**	**Para 18**
2002 (2) Suppl. SCR 363	**relied on**	**Para 18**
2001 (1) SCR 1115	**relied on**	**Para 18**
2003 (3) SCR 1190	**distinguished**	**Para 23**
2006 (6) Suppl. SCR 446	**distinguished**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1089 of 2010 etc.

From the Judgment & Order dated 17.12.2009/ 25.01.2010 of the High Court of Bombay at Goa in Criminal Appeal No. 13 of 2007.

WITH

Crl. Appeal No. 1224 of 2012.

Jaspal Singh, Nitin Sangra, Dheeraj Nangal, Gaurav Agrawal, S.S. Nehra, Rajendra Verma, for the Appellants.

Siddharth Bhatnagar, Pawan Kr. Bansal, T. Mahipal for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Leave granted in SLP (Crl) 3966 of 2010.

2. These appeals have been preferred by the second accused. Though, in all eight persons were accused of the alleged offences, records reveal that accused Nos. 7 and 8 were absconding even at the time of filing of the charge sheet and hence as many as six accused persons were charge-sheeted for the offences under Section 120B read with Section 302, IPC, Sections 342, 364, 504 read with Section 34, IPC for the alleged abduction, wrongful confinement and killing the deceased Shanu Komarpant on 10.10.2003. Accused No.5 and A-6 were acquitted by the trial Court giving benefit of doubt while A-1 to A-4 were acquitted of charges under Section 342, 504 and 364 read with Section 34 IPC. The accused Nos.1 to 4 were, however, convicted for offences under Sections 120B, 302 read with Section 34, IPC and were imposed with the sentence of life imprisonment apart from a fine of Rs.5,000/- each, in default to undergo further three months rigorous imprisonment. Accused Nos.1 to 4 preferred individual appeals being Criminal Appeal Nos.7/2007, 12/2007 and 13/2007. The appeal preferred by the second accused was Criminal Appeal No.13/2007. The State preferred Appeal No.6 of 2008 against the acquittal of charges under Sections 342, 504 and 364 read with Section 34 IPC and the total acquittal of A-5 and A-6. All appeals were tried together and by a common judgment impugned in these appeals, the High Court dismissed the appeal filed by the accused and the State appeal being Criminal Appeal No.6/2008 was partly allowed, where under, the accused Nos.1 to 4 were also convicted for offences under Sections 342 and 364 read with Section 34, IPC. The High Court held that the conviction of the said accused would, therefore, be for all the offences including offences under

Sections 342, 364 read with Section 34, IPC. At the outset, it has to be mentioned that as against the common judgment of the High Court, appeal was stated to have been preferred by A-3. However, it was dismissed at the stage of preliminary hearing. The review preferred by A-3 in Review Petition (Crl) No.115 of 2011 was also dismissed on 09.03.2011.

3. According to the case of the prosecution, on 10.10.2003, the accused 1 to 6 went to the garage of Shanu Komarpant (hereinafter called 'the deceased') in a white colour Maruti van and enquired about his whereabouts. The friend of the deceased by name Alex Viegas who was present at that time in the auto garage noticed the belligerent behaviour of the accused persons, and informed about the same to his cousin, the complainant-Avelino Viegas (PW-2) and proceeded to the house of the deceased, that there they met the deceased and informed him about the anxious enquiries made by the accused about his whereabouts. It is stated that the deceased himself wanted to straightaway go and meet the first accused with a view to arrive at some settlement relating to an issue relating to a love affair and in that view the deceased along with PW-2 and Alex Viegas went to the place of occurrence in two motor cycles one driven by PW-2 along with the deceased and the other hired by Alex Viegas and that after reaching the place of occurrence when the deceased asked A-1 as to for what purpose he was searching for him, the accused persons stated to have assaulted the deceased with knife, sword and bamboo stick (danda) and gave kick blows by hand in the middle of the road viewed by persons standing nearby. It is further stated that PW-2 was held by A-1 from extending any help to the deceased and save him from the assault by the other accused while Alex Viegas stated to have been directed by PW-2 to fetch other people for saving the deceased from the severe onslaught meted out to him. The said assault stated to have taken place at 4.30 p.m. on 10.10.2003 on the road at Galjibagh in the vicinity of Saint Anthony High School within the limits of Canacona police station of South Goa District.

4. After the severe assault on the deceased, it is stated that A-2 brought a white colour Maruti van to the spot in which the deceased was stated to have been placed in the dicky and the van proceeded towards Talpona side. Based on a telephonic information about the above incident recorded by PW-35 and at his instance, the crime was stated to have been registered which was subsequently registered based on the complaint of PW-2 for offences under Sections 302,342,504,364 and 120B, IPC read with 34 IPC in Crime No. 32/2003. Based on the information received, the registration number of the Maruti van in which the deceased was carried, the police stated to have alerted the check post and that the Maruti van was intercepted at Assolna around 5.45 pm to 6 pm on the same day when accused A-1 was found driving the vehicle with the other accused persons in the van in which the knife, sword, bamboo stick (danda) and a right foot chappal with blood stains were recovered. Shailesh Gadekar (A-4) had an injury on his forehead who was sent to Primary Health Centre, Bali along with A-5 and A-6 and that from there he was shifted to Hospicio Hospital of Margao. All of them were subsequently arrested by the police.

5. At the instance of A-1, the body of the deceased was discovered in the morning of 11.10.2003 which was found hanging to the branch of a cashew tree in an isolated place along side the road at village Onshi. The blood stained clothes of the deceased and his left foot chappal with blood stains were stated to have been recovered along with his belongings, as well as, the nylon rope with which the body was found hanging. After holding the inquest on the body of the victim the body was stated to have been sent for postmortem. PW-9 was the postmortem doctor who noted the injuries on the deceased numbering 36. PW-15 examined A-4 for the injuries sustained by him and issued the certificate about the nature of the injuries found on him.

6. The prosecution examined 35 witnesses. The FSL report relating to the blood stains found on the various articles

seized revealed the blood group of the deceased as 'A'.

7. When the accused were questioned under Section 313 Cr.P.C. A-4 stated that 4 to 5 persons and two other motor cyclists assaulted him with a sword when he was waiting at a bus stop at Canacona at 4.30 p.m. on 10.10.2003, that pursuant to the said assault he fell unconscious on the spot and thereafter regained consciousness only at the hospital at Margao. A-3, A-5 and A-6 stated that they went to see A-4 in the hospital on the evening of 10.10.2003 where they were stated to have been taken into custody by the police. A-1 and A-2 made total denial of the offence in their questioning under Section 313, Cr.P.C. As stated earlier, the trial Court acquitted A-5 and 6 and convicted A-1 to A-4 for offences under Sections 302 and 120B read with Section 34, IPC and acquitted them for the offences under Sections 342, 504 and 364 read with Section 34 IPC.

8. Assailing the judgment of the High Court as well as of the trial Court, Mr. Jaspal Singh, learned senior counsel made elaborate submissions. The sum and substance of the submissions of the learned senior counsel were as under:-

a) Exhibit 96, complaint of PW-2 was not proved;

b) PW-2 having not offered himself for cross examination, his evidence in chief was of no value and the High Court rightly ignored the evidence of PW-2.

c) Though there was a specific overt act alleged against the appellant with the aid of talwar Exhibit 12, the medical evidence to the effect that there was no cut injury on the body of the deceased go to show that the appellant had nothing to do with the killing of the deceased.

d) The name of the appellant was not mentioned in Exhibit 96.

e) The appellant was a total stranger. The appellant's case should have, therefore, been equated to that of A-5 and

A-6 and he should have been acquitted on that basis.

f) The test identification parade was not held immediately after the occurrence apart from the fact that the procedure in holding the test identification parade was not duly followed. The identification of the appellant by PWs-14 and 33 should not have, therefore, been relied upon.

g) According to PW-35, the Investigating Officer, the place from where the eye witnesses stated to have seen the occurrence, namely, Marina store was admittedly 70 metres away from the place of occurrence and, therefore, the eye witnesses could not have seen the participation of the accused, in particular the appellant, in the crime.

h) There was total repugnancy in the ocular vis-a-vis the medical evidence as regards the use of the weapon, having regard to the nature of injuries found on the body of the deceased. Even according to the eye witnesses, the occurrence took place only for 4-5 minutes and from a distance of 70 metres, the eye witnesses could not have noted the persons with any certainty in order to identify them with regard to specific part played by them.

i) In the test identification parade, identical persons were not kept and that a wrong procedure was followed in the holding of test identification parade.

j) There were improvements in the statements of the eye witnesses as compared to the statement found in Section 161 Cr.P.C.

k) PW-23 referred to the bleeding injuries on A-2 in definite terms, whereas according to PW-9 as well as PW-15, no injury was found on A-2 and the only accused on whom knife injury was found was A-4. Therefore, the presence of the appellant and his involvement in the crime was not made out.

Learned counsel relied upon the reported decisions of this

Court in *Mohanlal Gangaram Gehani v. State of Maharashtra* - 1982 (1) SCC 700, *Manzoor v. State of Uttar Pradesh* - 1982 (2) SCC 72, *Raju @ Rajendra v. State of Maharashtra* - 1998 (1) SCC 169, *Kanan & Ors. v. State Of Kerala* - 1979 (3) SCC 319 in support of his submission as regards the infirmities in holding the Test Identification Parade (TIP). Learned counsel also relied upon the decisions reported in *Ganga Prasad v. State of U.P.*- 1987 (2) SCC 232, *Balaka Singh & Ors. v. The State of Punjab* - 1975 (4) SCC 511, *State of Uttar Pradesh v. Abdul Karim & Ors.* - 2007 (13) SCC 569 and *Animireddy Venkata Ramana & Ors. v. Public Prosecutor, High Court of Andhra Pradesh* - 2008 (5) SCC 368.

9. As against the above submissions, learned counsel appearing for the State submitted as under:-

a) that the test identification parade was held in accordance with law;

b) that PWs-14 and 33 who participated in the test identification parade stated that they had never seen A-2 or his photograph immediately before the holding of the TIP.

c) When the appellant raised objection at the time of holding of TIP and wanted to change his shirt, PW-30 who held the TIP allowed the appellant to change his shirt and thereby whatever objection he had was also duly set right.

d) The appellant and other accused never cross examined the witnesses about any shortcoming in the holding of the TIP and, therefore, they cannot now be heard to complain about the procedure followed in the holding of TIP.

e) PW-14 who was one of the witnesses, who identified the appellant in the TIP also made it clear that she had earlier seen him in her village though she did not know his name.

f) As far as the distance factor was concerned, learned

counsel submitted that PW-35 clarified that the witnesses viewed the occurrence from the entrance of Marina stores and, therefore, they had a clear view of what was taking place when the assailants were assaulting the deceased.

g) Apart from the identification of the appellant by PWs-14 and 33 in the test identification parade, the other witnesses, namely, PWs-16, 23, 26, 27 and 34 identified the appellant in the Court and thereby corroborated the version of Pws-14 and 33.

h) The evidence of PW-21, the owner of Maruti van who made a categorical statement that it was the appellant who took his Maruti van which was later on found to have been used in the crime for which he applied for the return of the vehicle.

i) The evidence of PW-25 who was a worker in the garage also proved the presence of the appellant in the Maruti van earlier in the day when the accused persons went to the garage of the deceased enquiring about the whereabouts of the deceased.

j) The subsequent interception of the said Maruti van by the police PWs-13 and 18 and the presence of the appellant along with other accused and their subsequent arrest support the case of the prosecution.

k) The evidence of post mortem doctor PW-9 about the nature of injuries, namely, injury Nos. 2 to 36 except injury Nos. 21, 22, 23, 32, 33, 34 which according to PW-9 could have been caused by Exhibit 12 from its blunt side and that the said injuries collectively could have caused the death of the deceased.

l) The evidence of PW-16 as well as other witnesses, namely, PWs-14, 33, 23 and 27 in having made specific reference to the red colour shirt worn by the appellant while indulging in the crime was never disputed.

m) The said witnesses specifically attributed the over act played by the appellant. The medical evidence, therefore, was in tune with the ocular evidence.

n) The evidence of PWs-14, 33, 16 and 23 in having specifically referred to the removal of the deceased in the Maruti van and the subsequent recovery of the body of the deceased at the instance of A-1 on the next day when the body was found hanging on a Cashew tree in village Onshi established the offence of abduction and the killing of the deceased as per Sections 342, 362, 364 read with 34, IPC.

o) The FSL report confirmed the presence of blood group 'A' belonging to the deceased in the red shirt worn by the appellant while the blood group of the appellant was 'O+'.

p) The version of PW-35 was truthful when he stated about the telephonic message was received by him about the ongoing assault on a person at Galjibagh in the vicinity of Saint Anthony High School and the subsequent complaint Exhibit 96 received by him on the basis of which he commenced the investigation which resulted in the filing of the final report against the accused.

Learned counsel appearing for the State relied upon the decision of this Court reported in *Sayed Darain Ahsan alias Darain v. State of West Bengal & Anr.* - 2012 (4) SCC 352, *Dana Yadav alias Dahu & Ors. v. State of Bihar*- 2002 (7) SCC 295, *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* - 2010 (6) SCC 1, *Pramod Mandal v. State of Bihar* - 2004 (13) SCC 150, *Pravin v. State of Madhya Pradesh* - 2008 (16) SCC 166, *Ashok Kumar v. State (Delhi Administration)* - 1995 Suppl.(3) SCC 626, *Satish Narayan Sawant v. State of Goa* - 2009 (17) SCC 724 in support of his submissions.

10. Having heard learned counsel for the appellant as well as learned counsel for the State and having perused the

judgment impugned as well as that of the trial Court and the other material papers, at the outset we wish to deal with the submission regarding the registration of the FIR and the alleged shortcomings. According to learned counsel, the author of the complaint-Exhibit 96 having abstained from offering himself for cross examination the said document ceased to have any effect. Learned senior counsel would, therefore, contend that once Exhibit 96 and the evidence of PW-2 goes out of picture and since he was not named in the FIR, there was no possibility of implicating the appellant to the offence alleged against him. According to him if Exhibit 96, the complaint cease to exist what remained was the prior telephonic information received by PW-35, based on which the appellant could not have been convicted.

11. When we examine the said submission, it is true that PW-2, the author of the complaint did not offer himself for cross examination. The High Court in paragraph 37 made extensive reference to the circumstances namely, the non-availability of PW-2 who was in abroad at the relevant point of time, when his cross examination was fixed and that no fault can be found with the prosecution since in spite of its best efforts, the witness could not be produced. The High Court also noted that the trial Court, therefore, had no option than to ignore his evidence. The High Court then rightly pointed out that the whole purpose of the complaint was to ignite the investigation, that PW-35, the investigating officer after receipt of the complaint Exhibit 96 set the law in motion, sent the record of the complaint to Canacona Magistrate on the morning of 11.10.2003 itself apart from the commencement of the investigation based on the telephonic message regarding the ongoing assault at Galjibagh without reference to either the victim or the accused involved in the assault. We fully agree with the approach of the trial Court as confirmed by the High Court in proceeding with the case of the prosecution, ignoring the evidence of PW-2 while at the same time the factum of the nature of offence alleged in the complaint Exhibit -96 as proceeded with by the prosecution deserved to be considered in accordance with law.

12. As rightly pointed out by the Courts below, apart from PW-2 who was the author of the complaint and also eye witness, there were nine other witnesses in the case who fully supported the case of the prosecution. Those witnesses were cross examined in detail on behalf of the accused. In the above stated background when the law was set in motion by PW-35, the Investigating Officer who initially received a telephonic message regarding the occurrence allegedly from the local MLA about a serious crime taking place at Galjibagh in which somebody was being assaulted, PW-35 stated to have sent his staff who brought PW-2 to the police station through whom Exhibit 96 came to be received and crime No.32/2003 was subsequently registered for offences under Section 302, 342, 504, 364, 120B read with Section 34, IPC. Closely followed by the said act it is in evidence that police in the District was alerted which resulted in PW-13 and 18 apprehending the accused along with the Maruti van bearing registration No.GA 02J-7230 along with the weapons used. Therefore, taking the totality of the above facts, it will be futile on the part of the appellant to contend that PW-2 did not offer himself for cross examination and, therefore, the whole genesis of the case should be thrown out of board. In the said background, the submission of the learned counsel about the non-reference of the name of the appellant in Exhibit 96 pales into insignificance especially, when the complicity of the appellant in the commission of the crime was otherwise fully established by the prosecution. Therefore, the claim that the case of the appellant should be equated to that of A-5 and A-6 does not merit any consideration. Consequently, the submission of the learned counsel based on the failure of PW-2 in offering himself for cross examination and non-mentioning of the name of the appellant in Exhibit 96 also stands rejected.

13. In this respect the reliance placed upon by the learned counsel for the State on the decision of this Court reported in *Satish Narayan Sawant v. State of Goa* - 2009 (17) SCC 724 can be usefully referred to. In paragraph 22 to 27, this Court while dealing with such a situation has noted that the Court will

not become helpless. Inasmuch as any crime alleged is against the society, it is the bounden duty of the Court to find out the truthfulness or otherwise of the prosecution case allegedly based on initial information received and the steps taken in furtherance of its investigation for acceptance or otherwise of such information in order to determine the further course of action to be taken to unearth the details of the crime, the persons involved in the crime and ultimately ensure that the guilt are brought to book. In that respect in our view, there is every responsibility in the police as a law enforcing machinery and as savior of the society from the unlawful elements indulging in crimes, take necessary steps based on the information collected by it in the first instance and set the law in motion and proceed with its action as prescribed under the provisions of law. When the case of the prosecution is brought to Court by placing all the materials, it is for the Court to examine the action taken by the investigating machinery in the anvil of the law in force and on being satisfied with the correctness of the procedure followed can proceed to find the proof of guilt and pass its judgment. In other words, the Courts should examine and find out whether the story of the prosecution as projected before the Court trying the offence merits acceptance.

14. This Court has noted with approval the earliest case reported in *State of Uttar Pradesh v. Bhagwant Kishore Joshi* - AIR 1964 SC 221 wherein while explaining what is investigation which is not defined in the Code of criminal Procedure, the Court placed reliance upon an earlier decision of this Court reported in *H.N. Rishbud & Anr. v. State of Delhi* - AIR 1955 SC 196, in which it was held that the investigation consisted of five steps, namely, proceeding to the spot, ascertainment of facts and circumstances of the case, discovery and arrest of the suspected offender, collection of evidence relating to the commission of the offence which may consist of examination of various persons including the accused reducing them into writing, proceed with the search of places or seizure of things considered necessary for the investigation to be produced at the time of trial and formation of the opinion as to

whether on the material collected there is a case to place the accused before a Magistrate for trial and, thereafter, taking necessary steps for the said purpose by filing the charge sheet under Section 173.

15. In that case, according to PW-1 the investigation officer received information about the death of a person through PSI of another police station without any details as to how the incident happened and as to the cause of the incident and with that cryptic information regarding the death of a person who was residing within the jurisdiction of the investigating officer in an incident alleged to have taken place on the date and time informed to him without making any entry in the general diary or get any FIR lodged, the IO stated to have gone to the place of occurrence and noted certain blood marks with his torch light where even the complaining party was not present. Thereafter by bringing the persons present at the place of occurrence to the police station and after collecting necessary information, the FIR was recorded.

16. Keeping the principles laid down in *H.N. Rishbud & Anr. v. State of Delhi* - AIR 1955 SC 196 as noted by this Court in the later decision in *State of Uttar Pradesh v. Bhagwant Kishore Joshi* - AIR 1964 SC 221 and further referred to in the recent decision in *Satish Narayan Sawant v. State of Goa* - 2009 (17) SCC 724, we hold that the procedure followed by PW-35 in having commenced the investigation based on Exhibit 96 along with site inspection, the prior information received by him through phone about the alleged occurrence and every further steps taken by him in having recorded the statements of the other eye witnesses, the initiation taken by him for apprehending the vehicle in which the accused alleged to have travelled, recovery of weapons from the vehicle, arrest of the accused including the appellant, the recovery of the dead body at the instance of A-1 from the village Onshi, the step taken for getting the dead body examined through PW-9, the ascertainment of the injuries sustained by the accused themselves, gathering of the FSL reports on the materials

seized from the accused as well as the deceased, considered in a sequence, disclose that the case of the prosecution as projected based on Exhibit 96 even in the absence of the cross examination of PW-2 in the peculiar facts and circumstances of this case was perfectly in order and we do not find any good ground to reject the case of the prosecution based on the present submission of the learned counsel for the appellant.

17. With this, when we come to the alleged participation of A-2, in the offence, there are overwhelming evidence to implicate him to the death of the deceased by sharing the common intention along with the other accused who were convicted of the various offences as set out in the earlier part of this judgment. In the first instance, there was a clear cut evidence of PW-21 owner of the Maruti van whose evidence was not controverted in any manner relating to the fact that it was the appellant who took the Maruti van from him which was identified by PW-21 which was used for the crime. PW-25, the mechanic who was working in the garage of the deceased made a specific reference to the presence of the appellant in the van when the accused persons visited the garage of the deceased to enquire about his whereabouts. PW 14, 33, 16, 23 and 27 made specific reference to the overt act played by the appellant in the assault on the deceased with a big knife (talwar). Talwar is a long knife with sharp edge on the one side and blunt edge on the other. PW-9, the post mortem doctor stated that the injury Nos. 2 to 20, 24 to 31, 35 and 36 were caused by hard and blunt weapon. Of the above injuries, injury Nos.2 to 12 were on the face itself. Injury Nos. 13 to 20 were on the arms and shoulder. Injury Nos. 24 to 31 were on the leg and in the buttocks. Injury Nos. 35 and 36 were on the back side of the body. To a specific query put to him, the doctor opined that except injury Nos. 21, 22, 23, 32, 33 and 34, other injuries of 2 to 36 found on the body of the deceased could have been caused by Exhibit 12 which is the sword and knife (Exhibit-13) while injury Nos. 21, 22, 23, 32, 33 and 34 on the deceased could have been caused by Exhibit 14, the danda. Therefore, the extensive part played by the appellant in the

crime using the talwar Exhibit 12 was conclusively made out and the submission of the learned counsel on this aspect is grossly futile.

18. The appellant was identified by at least two of the witnesses PW-14 and 33 in the TIP held on 03.11.2003 at the behest of PW-30 the Special Judicial Magistrate. Though it was contended that the appellants raised an objection to the effect that they were already shown by the police officials to the said witnesses, in order to rule out any hazard on that score, the accused himself suggested that he be permitted to change his shirt which PW-30 allowed and, thereafter, he subjected himself to the TIP in which he was identified by PWs-14 and 33 without any hesitation. As pointed out by learned counsel for the State with regard to the holding of the TIP nothing was elicited in the cross examination in order to hold that the whole of the TIP was not conducted in the manner it was to be held and that the identification of the appellant was not proved in the manner known to law. PW-14 also stated in her evidence that she had seen the appellant in the village earlier though she did not know his name. Therefore, when such identification of the appellant was proved to the satisfaction of the Court, there was nothing more to be proved about the manner in which it was held or to find any flaw in the holding of the TIP. At the risk of repetition it will have to be stated that the witnesses were not questioned as to the manner in which they were asked to identify the appellant in the TIP or the alleged defect in the holding of the said parade when the witnesses were examined before the Court. Therefore, it is too late in the day for the appellant to contend that the identification parade was not carried out in the manner known to law. Coupled with the above, the evidence of other eye witnesses, namely, PWs-16, 23, 26, 27 and 34 in having identified him in the Court by making specific reference to the red colour shirt worn by him at the time of the occurrence fully corroborated the version of PWs-14 and 33. It will be appropriate to refer to the decisions of this Court reported in *Simon & Ors. v. State of Karnataka* -2004 (2) SCC 694, *Dana Yadav alias Dahu & Ors. v. State of Bihar* -2002 (7) SCC 295

and *Daya Singh v. State of Haryana* - AIR 2001 SC 1188. The following passages in the above referred to decisions can usefully be referred as under:

Simon & Ors. v. State of Karnataka (supra)

"14……mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration……."

Dana Yadav alias Dahu & Ors. v. State of Bihar (supra)

"38. (a) xxx

(b) xxx

(c) xxx

(d) xxx

(e) xxx

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) xxx"

Daya Singh v. State of Haryana (supra)

"12……For this purpose, it is to be borne in mind that purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the Court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material.

Further, where reasons for gaining an enduring impress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion - what in present day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution……."

19. With this, when we examine the reliance placed on the decision reported in *Mohanlal Gangaram Gehani v. State of Maharashtra* (supra) wherein it was held that without knowing the accused beforehand the identity made by a witness, the absence of any TIP would be valueless and unreliable, the said decision does not apply to the facts of this case. In the decision reported as *Mohanlal Gangaram Gehani v. State of Maharashtra* (supra), it was only held that where at the earliest opportunity the eye witness failed to mention any identifying feature of the accused persons, the identification of the accused by one of the witnesses nearly two months later in TIP cannot be accepted. In the case on hand while the occurrence took place on 10.10.2003 the TIP was held on 03.11.2003, therefore, it cannot be held that there was a long gap in between

in order to state that the witnesses could not have identified the accused appellant. On the other hand, PW-14 stated that she had already seen the appellant in the village though she did not know his name.

20. In the decision reported as *Raju alias Rajendra v. State of Maharashtra* (supra) it was held that a TIP parade after about 1 ½ years after the incident was not reliable. We do not find any support from the said decision to the facts of this case. Equally we do not find any scope to apply the decision reported as *Kanan & Ors. v. State of Kerala* (supra) where no TIP was held in respect of the witness who did not know the accused earlier. Therefore, the submission based on the alleged defect in the TIP does not merit any consideration.

21. According to the learned senior counsel, the version of the eye witnesses is not reliable inasmuch as none of the witnesses had anything to say about the severe injury suffered by A-4 on his forehead. PW-9 post mortem doctor has referred to the injuries sustained by A-4. Before that on 10.10.2003 itself at 7 p.m. he was examined by PW-15 doctor who noted the injuries and opined that it was caused by a sharp weapon less than six hours before examination. There was a visible fracture of skull and it was grievous in nature. A-4 was referred to the Hospicio Hospital Margao. Exhibit 12 was shown to PW-15 who opined that there was every possibility of the injury being caused by the said weapon. She stated that though A-4 complained that he was assaulted by fist blows all over his body she did not notice any injury or marks on his body. Learned counsel would contend that when such specific injuries on A-4 to A-6 were spoken to by PW15 and PW-9 none of the eye witnesses referred to that in their evidence and thereby they were suppressing the truth. Learned counsel therefore, contended that their whole version cannot be believed.

22. In this respect, it will be worthwhile to refer to the approach of the High Court where it has taken pains to analyze the crime threadbare and found that there was no evidence led

as regards the alleged assault on him by sword, that not even a suggestion was put to any of the prosecution witnesses to state that there was assault by anyone and the trial Court, therefore, noted that there was every possibility of A-4 having sustained the injures with Exhibit 12 which was very widely used by the appellant on the deceased in which occurrence A-4 also fully participated. Such an approach of the trial Court in the peculiar facts and circumstances of the case cannot be held to be wholly improbable.

23. Accused No.4 except making a statement in 313 questioning that he was assaulted by 4 to 5 person along with two other motor cyclists with a sword when he was waiting at Canacona bus stop at 4.30 p.m. on 10.10.2003, there was no supporting material placed before the Court in the form of legally acceptable evidence and further in the absence of any cross examination on that aspect to any of the witnesses examined in support of the prosecution, there is no scope to consider the said submission of the learned counsel to grant any relief to the appellant. Learned counsel relied upon *Thaman Kumar v. State of Union Territory of Chandigarh* - 2003 (6) SCC 380 para 16 and *Khambam Raja Reddy and Anr. v. Public Prosecutor, High Court Andhra Pradesh* – 2006 (11) SCC 239 para 17. We do not find any support from the said decisions to the case before us. Therefore, the submission of the learned counsel that the prosecution failed to explain the grievous injury found on A-4 or other accused does not in any way support the case of the appellant and the said submission, therefore, stands rejected.

24. It was then contended that none of the ingredients of Section 364, IPC were made out for the High Court to find the appellant guilty of the said offence along with A-1, A-3 and A-4. In this context, it is sufficient to refer to what has been stated by the High Court. In paragraph 87, the High Court has observed on this aspect which reads as under:

> "87. The learned trial Court, however, erred in acquitting the accused No.1- Valeriano Barretto, the accused No.2-

> Subhash Krishnan, the accused No.3-sanjay Gadekar, the accused No.4-Shailesh Gadekar under Sections 342, 364 read with Section 34 of IPC, 1860. The view taken by the learned trial Court for acquitting the said accused persons proceeded from the fact that the victim Shanu fell unconscious and thereafter, he was put in a dicky of the Maruti van. This fact, the learned trial Court reasoned, did not further materialize into his prevention from proceeding in any direction and or his abduction in order to murder him or to put him in danger of being murdered. Essentially both the offences i.e. wrongful confinement and abduction are the offences which are committed as a result of curtailment of personal liberty. The offence of wrongful confinement as defined under Section 340 of the Code occurs when individual is wrongfully restrained in such a manner as to prevent him/her from proceeding beyond certain circumscribing limits. The offence of abduction under Section 362 of the Code involves use of force or deceit to compel or induce any person to go from any place. Evidence clearly shows that the victim Shanu by use of criminal force i.e. the assault was made to loose his consciousness. Even if the victim would have wished to proceed in any one direction, he would not have been in position to do so for the reason of his unconsciousness. Certainly, Shanu never wished to go with his assailants in the Maruti Van, but was compelled by the said accused persons to go from the place of incident to the place where he ultimately met his death. Deceit involves tricking away of individual from reality. Unconsciousness paralyzed the mental faculties of the victim and freezed his perception as regards the place. Virtually, the victim was, thereafter, tricked away from the reality while in unconscious state and made to go from one place to another. Thus, the learned trial Court grossly misinterpreted the facts and recorded manifestly illegal finding."

25. As rightly pointed out by the High Court under Section

362, IPC when by force or deceit if any person is compelled or induced to go from any place and such an abduction takes place in order to ultimately eliminate him, the offence would be made out under Section 364, IPC. As rightly pointed out by the High Court, examining the conduct of the appellant along with the other accused in wrongfully restraining the deceased by inflicting severe injuries on the body of the deceased i.e. by causing as many as 36 injuries in which process the person lost his conscious where after he was shifted to a different place, where it ultimately came to light that the person was killed by hanging, every description of the offence under Sections 342 and 364 with the aid of Section 34, IPC was clearly made out. Therefore, we do not find any fault in the said conclusion of the High Court in having reversed the judgment of the trial Court for convicting the appellant for the offence under the said Sections.

26. The submission of learned counsel for the appellant about the impossibility of the eyewitnesses in having noted the participation of the appellant and the other accused in the crime was on the basis that according to PW-35 the distance between the place of occurrence and the point from which the eye witnesses stated to have seen the occurrence was more than 70 metres. In the first place, when the occurrence had taken place at 4.30 in the evening there would be no difficulty for anyone to have a clear view of what was happening before them. Even in the vicinity of 70 metres when about 8 persons were assaulting the deceased with sword, knife and danda on the road, in full public gaze, it would have definitely caught the eye of everyone standing thereat. The presence of the eye witnesses at the place of occurrence was not in dispute. The witnesses made it clear that they were seeing the occurrence from the shop called Marina stores. It is not as if they were not looking at the occurrence. According to the witnesses, as well as, the prosecution, the eye witnesses were viewing the occurrence from the entrance of Marina stores. Therefore, the version of the eye witnesses that they were able to see the

specific part played by different accused and, in particular, the appellant who was using a talwar in the absence of any malafide attributed to the witnesses, their version cannot be rejected. We, therefore, do not find any substance in the said submission of the learned counsel. As regards the time factor, it cannot be held that since the incident happened within 4-5 minutes, it was not possible for the witnesses to have noted the participation of the accused in the crime. It is relevant to note that according to PW-9, as many as 36 injuries were found in the body of the deceased which were caused by the blunt side of the talwar, knife as well as danda. In inflicting so many injuries, the time taken would have been sufficient enough for the witnesses to have made an observation as to the role played by the accused in the crime. Therefore, on that score as well there is no scope for doubting the version of witnesses as regards the participation of the appellant in the crime. It is true that PW-23 in his evidence stated that he saw the appellant having suffered bleeding injury which was not proved. It was also true that it was A-4 who suffered the bleeding injuries on his forehead which was caused with the aid of a knife. We have already concurred with the conclusion of the Courts below about the possibility of A-4 having suffered the injury with the aid of Exhibit -12 (talwar) which was widely used by the appellant and inasmuch as A-4 was also actively involved in the crime. Since the appellant used Exhibit 12 extensively, there was every possibility of A-4 having suffered the injury. In the light of the overwhelming evidence of the other eye witnesses, the medical evidence and the forensic reports, the wrong statement of PW-23 cannot be said to have caused any serious dent in the case of the prosecution. Therefore, on that score, we do not find any scope to interfere with the judgment impugned.

27. Having regard to our above conclusions, we do not find any merit in these appeals. The judgment impugned in these appeals does not call for any interference. The appeals fail and the same are dismissed accordingly.

B.B.B. Appeals dismissed.