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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 410 of 2000**

1. Bhuneshwar Prasad Verma S/o Bharatlal Verma, Aged about 22 years.
2. Kamta Prasad S/o Jagdish Yadav, aged about 23 years.
3. Biharilal Verma S/o Bharosa Verma, aged about 45 years.
4. Shankerlal Verma S/o Bharosa Verma, aged about 35 years.
5. Bharatlal Verma S/o Bharosa Verma, aged about 40 years.
6. Birendra Kumar alias Tetku Verma S/o Biharilal Verma, aged about 19 years.
7. Dauwalal alias Ganesh Devangan S/o Itwari, aged about 25 years.
8. Hariram Verma S/o Bharosa Verma, aged about 42 years.
9. Vinod Verma S/o Biharilal Verma, aged about 21 years.
10. Puneetram Verma S/o Kheduram Verma, aged about 18 years.

All Resident of Jarod, P.S. Bhatapara Gramin, District Raipur.

---- Appellants

Versus

State of Madhya Pradesh (Now State of Chhattisgarh) Through P.S. Bhatapara, Gramin District Raipur.

---- Respondent

AND**Criminal Appeal No. 698 of 2000**

1. Mohan Verma aged 25 years S/o Kirit Ram Verma.
2. Kaushal Verma, aged 25 years S/o Bhagbali Verma.
3. Gaya Ram Verma aged 23 years, S/o Heera Lal Verma.
4. Santosh Kumar, aged 20 years, S/o Meghnath Verma.
5. Bhuwan Lal, aged 20 years, S/o Kirit Ram Verma.
6. Manohar Verma, aged 26 years S/o Meghnath Verma.
7. Omkar Prasad, aged 28 years S/o Bhagbali Verma.

All Resident of village Jaroud, P.S. Bhatapara, Gramin, District Raipur, Madhya Pradesh (Now Chhattisgarh).

---- Appellants

Versus

State of Madhya Pradesh (Now State of Chhattisgarh) Through P.S.
Bhatapara, Gramin District Raipur, M.P.

---- Respondent

For Appellants	:	Shri Surendra Singh, Senior Advocate with Shri Neeraj Mehta, Advocate.
For Respondent/State	:	Shri Ravindra Agrawal, Panel Lawyer

Hon'ble The Chief Justice

Hon'ble Shri Justice P. Sam Koshy

C.A.V. Judgment

Per Navin Sinha, Chief Justice

15 /06/2015.

1. The Appellants stand convicted under Section 148 IPC to one year rigorous imprisonment, under Section 450 IPC to five years rigorous imprisonment with fine of Rs.1,000/- as also under Section 302/149 IPC to life imprisonment with fine of Rs.1,000/-. In the event of default in payment of fine, they were required to undergo six months further simple imprisonment for that offence as ordered by the Second Additional Sessions Judge, Balodabazar, on 29.01.2000 in Sessions Trial No. 359 of 1997.

2. An Application was filed in the appeal under Section 7(A) of the Juvenile Justice (Care and Protection of Children) Act (56 of 2000) on behalf of Appellant-Birendra Kumar alias Tetku Verma, , claiming that he was a juvenile on the date of occurrence. An enquiry by the Second Additional Sessions Judge, Balodabazar dated 12.3.2015 confirms that the said Appellant was below 18 years of age on the date of occurrence.

3. The deceased Parasram was assaulted inside his hut on 23.2.1997 at about 9:00 p.m. Dehatinalishi (Exhibit P-2) was lodged at 11:15 pm the same night by PW-2, Netram, cousin of the deceased, living fifteen steps across the hut of the deceased. FIR (Exhibit P-60) was

lodged by PW-2 on 24.2.1997 at 12:05 am stating that the deceased was the Deputy Sarpanch having a dispute with certain villagers. The witness was in his own hut when about 9:00 pm there was commotion outside the house of the deceased. The witness ran and saw about 25 - 30 persons including the Appellants with *lathi*, *danda*, *Khotla* etc. in their hands abusing the deceased, asking him to come out and that they would teach him a lesson for his political ambitions. Appellants Bhuneshwar, Manohar, Hariram, Mohan and Bhuwan then entered the hut of the deceased and started to assault him. The deceased was dragged outside his hut after which Appellants Santosh, Bihari, Omkar, Kamta, Bhuwan and others exhorted to kill the deceased. All of them started to assault the deceased indiscriminately. The witness sought to intervene when Appellants Omkar and Puneet assaulted him on the head causing injury. His wife then took him home. The witness from his own verandah saw the deceased being dragged from the "*Parchi*" to the courtyard. Appellant Bhuneshwar picked up a stone weighing approximately 15 to 20 kilos and assaulted the deceased on the head causing the brain material to spill out.

4. The postmortem (Exhibit P-1) done by PW-1 Dr. A.D.Purena on 24.2.1997 at 10:30 a.m. found extensive external injuries all over the body and head. The head was extensively crushed, lacerated with compound multiple fractures of the skull bone. The brain material (cerebellum) was absent. Both ears and nose were lacerated. Extensive laceration was present on the mouth. The maxilla and mandible were fractured and premolar teeth broken. The skull bones were fractured in various sizes, multiple in number about 10-20. A lacerated wound was found 4 x 3 cm on the left leg. Compound fracture of bone was seen on both tibia and fibula. Left femur shift fracture was seen on the right leg. Compound fracture of lower end of tibia and fibula with lacerated wound 2 x 1 cm.

Contusion 2 x 10 cm to 2 x 20 cm. Contusion was present on the chest, back of the body, hands and legs overlapping each other and multiple in number. There was a strong smell of alcohol present in the undigested food found in the stomach. Death was opined to have been caused by shock due to extensive injuries to the head (skull) and chest and homicidal in nature.

5. Learned Senior Counsel Shri Surendra Singh submitted that PW-2, Netram, cousin of the deceased, PW-3, Urmila, wife of the deceased and PW-4 Narendra son of the deceased, are stated to be eye witnesses to the assault. PW-12, Dharmendra, another son of the deceased was not an eye witness as claimed. The allegations for assault are omnibus in nature. It cannot be said with certainty from the nature evidence available as to which one of the Appellants caused the fatal injury leading to death. Unless the witnesses, who are all related, have positively and consistently identified the Appellants as the assailants confirming their presence, attributing overt-acts, it shall not be safe to convict them in absence of any independent evidence. It was a pitch dark night and none of the witnesses have stated of any source of light for identification. The assault having taken place inside the darkness of a room measuring 6 cubits by 6 cubits, identification of the assailants was impossible. Had the occurrence taken place outside in the open, matters may have been different. Reliance was placed on (1975) 4 SCC 497 (Ram Narain v. The State of Punjab) in support of the impossibility of identification in the dark.

6. The spot map (Exhibit P-31) prepared by the Patwari, PW-7 Dinesh Kumar Agrawal and the deposition of the witness demonstrates that the door of the hut of PW-2 and the deceased were not opposite each other but at an angle. The assault on the deceased after he was dragged out of his room, at the end of his "*Parchi*" could not have been visible from

the door of PW-2, especially when the witness states that he witnessed the assault along with PW-4, Narendra from a 4 inch gap in the door. It was not possible for two persons to watch together from such a small gap in the door. This part of the deposition was not made earlier in the police statement. There were vital omissions and contradictions in the evidence of PW-2, PW-3 Urmila and PW-4 Narendra as made under Section 161 Cr.P.C and their deposition in the Court. There is material variation in the evidence of the three witnesses with regard to the names of the Appellants. The motive attributed for the assault was too remote with regard to a dispute between the parties 4-5 months earlier. The deceased was drunk, had vomited at home and was put to sleep inside his hut by PW-3. Dharmendra, PW-12, minor son of the deceased aged about 8½ years did not eye witness anything as during cross examination he stated that he was sleeping and woke up to find himself in the house of PW-2. He was therefore a tutored witness.

7. Reliance was placed on (1997) 1 SCC 283 (Binay Kumar Singh v. State of Bihar) to submit that in case of an assault by a large number of persons as in the present case, the presence and overt act of an Appellant must find corroboration from at least two witnesses for upholding conviction.

8. The MLC, Exhibit P-58 of PW-2, Netram, by PW-17, Dr. O.P.Sharma shows the injury is minor in nature and could have been occasioned otherwise and not necessarily due to any injury during the present occurrence. The witness in his statement in the Dehatinalishi (Exhibit P-2), and under Section 161 Cr.P.C stated that he was assaulted on the head by Appellants Omkar and Punit. But in his deposition in Court he stated that he was assaulted by Appellant Bihari and Kamta. If the witness could not say with certainty which of the Appellants assaulted

him, he was a completely unreliable witness. It only corroborates the contention of the Appellants that due to darkness identification was not possible. Similarly the witness in his earlier police statement said that Appellants Bhuneshwar, Manohar, Hariram, Mohan and Bhuwan entered the hut of the deceased and assaulted him and then the deceased was dragged out by them. But in his Court deposition he mentioned that the assault on the deceased inside the house was made by Appellants Bihari, Shanker, Vinod, Bharat and Kamta repeating the names of Hariram and Bhuneshwar only. In his earlier police statement, the witness stated that after the deceased was dragged out from his room and on to the "*Parchi*" he was assaulted by Appellants Santosh, Bihari, Omkar, Kamta, Bhuwan and others, but during his deposition in Court, he stated that Appellant Bihari alone dragged the deceased out of the hut and then all the Appellants assaulted the deceased in an omnibus manner. In his earlier police statement the witness named Appellant Bhuneshwar as the person who assaulted the deceased on his head with a stone, but during deposition in Court the witness stated that the deceased was assaulted on the head by Appellants Bhuneshwar, Bihari, Shankar, Birendra Kumar @ Tetku and Vinod. These are vital contradictions in his evidence making it untrustworthy. Likewise there were several omissions evident from paragraph 17 of his deposition. Being a related and interested witness it would not be safe to convict on basis of the same in absence of independent corroboration.

9. Learned Senior Counsel Shri Singh further submitted from the cross-examination of PW-2 that the thatched roof of the verandah in the house of the deceased was low and sloping. Only the neck of a person could be seen from the door of the Appellant. The witness has falsely deposed that the deceased did not drink alcohol. The postmortem report

confirms presence of alcohol in the undigested food found in the stomach. The witness acknowledged that he stepped out of his hut after the assailants had all left.

10. It was next submitted by Shri Singh that PW-3, Urmila, wife of the deceased in her earlier police statement said that Appellants Bhuneshwar, Manohar and 3-4 persons entered the hut and assaulted her husband. Appellant-Bhuneshwar dragged the deceased out of the hut on to the verandah when he was assaulted by Appellants Bihari, Vinod, Tetku and others about 10-12 in number. Appellant-Bhuneshwar picked up a stone and hit the deceased on the head. But during her Court deposition she did not name Appellant Manohar and instead mentioned the names of Appellants Bihari, Kaushal, Hariram, Bharat, Bhuneshwar, Tetku, Kamta and Mote alongwith others who came to her house and assaulted her husband. No individual Appellant was named who dragged the deceased on to the verandah. Thereafter Appellants Bihari, Hariram and Bharat assaulted the deceased on the head with the stone. She stated that she could not recognize all the Appellants by name but could identify them by face. If it was a dark night with no source of light available, and the witness was naming different persons at different times. She could not be relied upon being an interested and related witness. The witness acknowledges that she did not raise any alarm when the Appellants entered the house and were assaulting her husband. There were several omissions and contradictions in her earlier statements and during deposition in Court.

11. PW-4, Narendra, son of the deceased was approximately 11½ years old on the date of occurrence. He was a child witness whose evidence has to be considered with caution and must find corroboration. In his earlier police statement the witness mentioned the names of

Appellants Bhuneshwar, Manohar, Mohan and Bhuwan only as persons who entered the house after which Bhuneshwar dragged the deceased on to the verandah, and then Appellants Bihari, Hariram, Tetku, Vinod, Gayaram, Omkar, Kaushal and Kamta assaulted the deceased and Appellant-Bhuneshwar hit the deceased with a big stone. But in his Court deposition the witness deposed that Appellants-Bihari, Tetku, Vinod, Hariram, Bharat and Bhuneshwar entered the hut. They were carrying wooden blocks and *lathis* with which they assaulted. Appellant-Bhuneshwar dragged the deceased out after which Appellants-Manohar, Mote, Mohan, Bhuwan, Puneet, Dauwa, Kamta and Omkar who were waiting outside assaulted his father. While they were running to the house of PW-2, Netram, Appellant-Tetku assaulted his younger brother PW-12, Dharmendra. Apart from Appellant-Bhuneshwar, the witness stated that Appellant Vinod also assaulted his father on the head. It is not possible that both the witness and PW-2, Netram were watching through the small gap of about 4 inches of the door from the house of PW-2, Netram. The witness acknowledged that from the gap visibility was only straight. Therefore he could not have witnessed the assault at the end of the '*Parchi*' which was at an angle from the door of PW-2.

12. PW-12, Dharmendra was not an eye-witness to the assault. In cross-examination he acknowledged that he was sleeping and woke up to find himself in the house of PW-2. He was a tutored witness and unreliable. Reliance was placed upon (1977) 3 SCC 268 (Ram Lakhan Singh v. The State of Uttar Pradesh) to submit that since the statement of PW-12 was not recorded under Section 161 Cr.P.C the Appellants had been denied the opportunity to cross examine him with regard to any contradictions in his police statement and therefore his evidence could not be considered.

13. In the facts of the case, false implication by naming unidentified persons due to ill-motive cannot be ruled out, the benefit of which must be given to the Appellants especially when there were contradictions, relying on (1974) 3 SCC 664 (Ram Pukar Thakur v. State of Bihar). It was lastly submitted that if the allegations of assault are omnibus, conviction for murderous assault as member of unlawful assembly could not be fastened relying on 1999 (8) SCC 701 (Kamaksha Rai v. State of Uttar Pradesh), (1978) 4 SCC 385 (Muthu Naicker v. State of Tamil Nadu) and (2005) 10 SCC 369 (Nagarjit Ahir v. State of Bihar).

14. Learned Counsel for the State submitted that there is no conclusive evidence with regard to absence of any source of light. No prosecution witness has deposed that there was complete darkness either outside or inside the room. Some source of light was available for identification inside the room which was only 6 cubits by 6 cubits. The minor children PW-4, Narendra and PW-12, Dharmendra were also sleeping in the same room. The Appellants were clearly able to identify where the deceased was lying inside the room as they went and assaulted him directly. No mistaken assault was first made in the darkness on the two children. Referring to the spot map (Exhibit P-31), it was submitted that both the Patwari who prepared it and PW-3, Urmila have stated that the door of the deceased was visible from the door of PW-2, Netram. It cannot be said that it was impossible for PW-2 Netram and PW-12, Dharmendra to witness events from the door of the former if it was ajar. PW-2, Netram is an injured eye-witness during the same occurrence, who reached there when the assault was going on and therefore is fully reliable. His MLC (Exhibit P-58) has not been denied by the Appellants and it is not their case that the injuries were suffered due to assault by any other at a different time and place. The omissions and

contradictions in the evidence of PW-2, Netram and PW-3, Urmila and PW-4, Narendra were trivial in nature. There is no material contradiction in the evidence with regard to the presence and participation of the Appellants and others unknown of such nature so as to doubt the credibility of the witness and throw out their evidence completely. The Appellants came together to the house of the deceased at the unusual hour of 9:00 pm in the night armed with *lathi, danda, Khotla*. Some of them entered the room of the deceased which was small in size while the rest stood on the verandah. The deceased was first assaulted inside the room by some of them and then dragged out on to the verandah after which the others assaulted him. After the assault all the Appellants left together. These per se are evidence and sufficient to hold for existence of the common object to kill.

15. We have considered the submissions on behalf of the parties and evidence on record also.

16 There is no invariable rule of criminal jurisprudence that the evidence of a related witness cannot be considered and must be doubted as they are interested witnesses and the evidence of a related witness can only be considered if there is independent corroboration. The term 'interested witness' signifies some reason or ground to falsely implicate a person motivated by the desire to ensure conviction. Therefore, the term 'related witness' cannot necessarily and automatically be equated with an 'interested witness'. There may be circumstances where in the natural course of events no independent witness may be available and only the evidence may be that of friends, relations or family members. This would be especially true if the occurrence takes place inside the house or room at night, as is the case presently. To shut out their evidence on the ground that they are related or interested witnesses coupled with absence of

independent corroboration may lead to gross miscarriage of justice. The evidence at best may call for greater scrutiny. It is also a matter of common knowledge that even where there are independent witnesses, they prefer to stay away and not depose for various reasons including the dilatory criminal justice system and also fear of retribution by the accused. We therefore do not find substance in the submission of the Learned Senior Counsel for the Appellants that the evidence of PW-2, Netram, PW-3, Urmila, PW-4, Narendra must be rejected on the aforesaid ground. The Appellants were not strangers to the witnesses. They were co-villagers. The deceased was the Deputy Sarpanch. The Appellants are all named in the Dehatinalishi recorded immediately after the occurrence. The police statement of the witnesses was also recorded the very next day. In (2013) 4 SCC 607 (Subal Ghorai v. State of West Bengal) with regard to a related witness it was observed :-

“39. It is true that the prosecution has relied on the evidence of interested witnesses but, interested witness is not necessarily a bad witness. In fact, if the witness is related to the deceased, there is less chance of his leaving aside the real assailants. The evidence of interested witness has to be analysed with care. But, once the court comes to the conclusion that it is truthful and in accord with the relevant circumstances on record, the court should not hesitate to accept it and record conviction on the basis thereof.....”

17. The house of PW-2 was about fifteen steps opposite the deceased. The witness on hearing commotion, stepped out of his hut and came over to the house of the deceased. The Appellants and others, about 25-30 in number, armed with *lathis*, *danda* and wooden stumps were abusing the deceased who was the Deputy Sarpanch, for his political ambitions and asking him to step out as they desired to teach him a lesson. Thereafter, according to PW-2, Appellants-Bhuneshwar, Manohar, Hari, Mohan and Bhuwan entered the hut of the deceased. Evidently, all the Appellants who have been named in the Dehatinalishi

(Exhibit P-2) were first seen by the witness outside the hut of the deceased in the open.

18. The initial identification of all the Appellants from amongst 25-30 persons was therefore under the open sky. The Appellants were shouting also. It is not the case of the Appellants that they were strangers to the deceased and the witnesses, not known to each other since earlier. On the contrary they were co-villagers. Judicial precedents abound that ocular vision capacity of a villager is very different from a person living in town used to incandescent light. Rural folk can recognize a person by the gait and voice in the night also under open sky. In (1996) 10 SCC 508 (Krishnan v. State of Kerala) with regard to identification at night under the open sky it was observed as follows :-

“11.....So far as the contention of insufficient light is concerned, we may indicate that in an open field on a cloudless starry night, there was no difficulty in identifying a known person from a close distance. That apart, it should be kept in mind that there was no difficulty in identifying the victim by the assailants because of existence of some light with which identification was possible. PW 1 being a close relation of both the accused, there was no difficulty for PW 1 to identify them. The accused were also known to the other witness for which he could also identify them.....”

19. If the Appellants were co-villagers, the observation in 1998 SCC (Criminal) 907 (Kedar Singh v. State of Bihar) are also considered relevant for identification observing :-

“3.....It has also to be observed that even on a full dark night there is never total darkness. There can be other means to identify another through the shape of the body, clothes, gait, manner of walking etc.,etc. Identification is possible by voice too.....”

20. Similarly in (2001) 8 SCC 311 (Ram Gulam Chaudhary v. State of Bihar) with regard to the ocular vision of rural folk it was observed as follows :-

“34. We see no substance in this submission also. It must be remembered that the incident had taken place in a village. As has been held by this Court in the case of *Kalika Tiwari v. State of Bihar* the visibility capacity of urban people who are acclimatised to fluorescent lights or incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. It has been held that the visibility of villagers is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such light. Also the appellants were from the same village and were known to PW 3 and PW 4.”

21. If the Appellants were identified in the open outside, before they entered the hut, in our opinion, in the facts and circumstances of the case, the question that identification inside the hut in the darkness was not possible is not relevant. Counsel for the State has rightly urged that there was some light available because of which in a room of 6 cubit x 6 cubit only the Appellants who entered the room assaulted the deceased straightaway who was lying down and not any one of the minor children PW-4, Narendra and PW-12, Dharmendra who were also present in the room. PW-4 has stated that he was eating his dinner inside the room when the assault took place. This suggests the availability of light inside the room to enable him to do so. Reference may profitably again be made to Ram Gulam Chaudhary (*supra*) observing as follows ;-

“32.....We see no substance in this submission also. It must be remembered that the evidence exclusively established that the deceased and his father were having meals in the verandah and that the mother and sister were serving the meals. It is clear that they had put a source of light at that place. This view of ours finds support from the observations made in the case of *B. Subba Rao v. Public Prosecutor, High Court of A.P.* In this case also an argument had been made that the hurricane lamp had not been seized and produced. This Court held that as it was proved that the deceased was issuing copies of voters' list and caste certificates and it was night-time, it could legitimately be inferred that there would be some source of light to enable him to perform his job.”

Similarly in (1994)4 SCC 397 (Kaki Ramesh v. State of Andhra Pradesh)

it was observed as follows :-

“4..... This is for the reason that the assault having taken place inside the sleeping room, it can well be presumed it had a lamp, may be half-burning....”

22. The presence of light inside the room is also corroborated from the fact that the Appellants who entered the room did not make any mistake in the assault due to darkness by hitting PW-4 and PW-12 who were also present in the room. The Appellants had no difficulty in identifying where the deceased was lying down in the room. In (1999) 9 SCC 143 (Siddiquie v. State of Uttar Pradesh) with regard to an assault made on the deceased in the dark even while others were sleeping there also, holding availability of light for identification it was held as follows :-

“7.....Further it may also be pointed out that in that night when the accused persons were able to single out the deceased from among various persons sleeping in the mango grove and dealt blows to him, followed him giving blows with the weapons carried by them, the version of the injured eyewitnesses that the accused were identified with the help of the torch held by them has to be given due credence. Further the appellants, the deceased and the injured witnesses were not strangers to each other as they belonged to the same village. They knew each other very well as they were competitors in the business of obtaining lease of mango grove and in the business of hides and skins of animals.”

23. Once the identification of all the Appellants at the time of occurrence stands established, the contradictions and omissions in the evidence of the prosecution witnesses become trivial and cannot be rejected on that ground. Exaggeration and embellishment can form part of evidence but that cannot be a ground to reject it. PW-2, PW-3 and PW-4 were cousin, wife and son of the deceased. In an assault by about 25-30 persons, to expect a photographic reproduction of sequence of events for sustaining a conviction is not required. It is the substance of the evidence

which has to be seen. No one would be more interested than the family members of the deceased in naming the real assailants. Likelihood of their stating falsehood by implicating wrong persons letting go the real assailants is remote and non-existent. Only if the omissions and contradictions are vital because of which the evidence appears to be shaky not inspiring confidence in the Court, it can be discarded and not otherwise. In (1983) 3 SCC 217 (Bharwada Bhoginbhai Hirjibhai v. State of Gujarat) it was observed as follows :-

“5.....The finding of guilt recorded by the Sessions Court as affirmed by the High Court has been challenged mainly on the basis of minor discrepancies in the evidence. We do not consider it appropriate or permissible to enter upon a reappraisal or reappraisal of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :

“(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person’s mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.”

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important “probabilities factor” echoes in favour of the version narrated by the witnesses.”

24. Common object is not something tangible to be seen or proved by substantive evidence. It is to be inferred from attendant surrounding circumstances of the occurrence. It has to be culled out from events such as whether the accused came together in a group, were armed, at what time they came, their behaviour before assault, the manner of assault and their conduct after the assault. The common object will then be deduced by a cumulative assessment of all these factors. The liability is vicarious. In every circumstance it is not necessary to prove overt act by each member of the assembly before vicarious liability can be invoked. That would militate against the very concept of vicarious liability. The caution to be exercised for not imposing vicarious liability on an individual is different from avoidance of vicarious liability for a fatal assault merely because omnibus allegations of assault have been made. The Appellants came together armed to the house of the deceased at 9:00 pm in the night. They stood outside his house shouting abuses asking him to come out agitated by his being the Deputy Sarpanch vowing to teach him a lesson.

Some of them entered his room assaulted and dragged the deceased after which the others assaulted. Merely because the head may have been smashed by one of them does not mean the others did not share the common object. Death was a cumulative result of the assault. Having killed the deceased they all left together. It is not the defence case that anyone of them were not armed, did not share the common object and did not indulge in assault. In Subal Ghorai (supra) it was observed :-

“52.....Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses “First”, “Second”, “Third”, “Fourth” and “Fifth” of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.....”

25. PW-2, Netram first identified all the Appellants as present before entering the hut of the deceased. The room being small in size all the Appellants could not have entered together. It would have hindered them in making the assault itself. The Dehatinalishi (Exhibit P-2) mentions Appellants-Bhuneshwar, Manohar, Hari, Mohan and Bhuwan as having

first entered the hut. The statement under Section 161 Cr.P.C recorded on 24.2.1997, a day after occurrence was the same. The deposition in the Court by the witness was in July, 1998, 1 ½ years later. The witness in his deposition was consistent that the Appellants were standing outside shouting for the deceased to come out. Though, he named Bihari, Shanker, Vinod, Bharat and Kamta during his deposition, but he also repeated the names of Hari and Bhuneshwar mentioned in the Dehatinalishi and statement under Section 161 CrPC. These contradictions, if it can be so called is not considered very relevant in the background of the fact that the witness did see all the Appellants standing outside before some of them entered the hut. Likewise, the witness stated that the deceased was dragged outside the hut when Santosh, Bihari, Omkar, Kamta, Bhuwan and others exhorted to kill. Bihari is then alleged to have pulled the deceased out from the hut. If the witness identified the Appellants-Omkar, Puneet, Bihari and Kamta in the melee that followed, even if there was some contradiction in the evidence of PW-2, Netram in the Court and in his statement in the Dehatinalishi and under Section 161 Cr.P.C with regard to the fact who assaulted him on the head, especially when it was night, is not such a vital and serious contradiction to wipe out the evidence of the witness as an injured eye-witness. The MLC of the witness (Exhibit P-58) has not been denied or disputed by the Appellants and neither have they furnished any explanation or suggestion given that the witness may have sustained the injuries at another place in another incident. The credibility of an injured witness is always high and it will be for the accused to demonstrate to the contrary. It is significant to notice that the witness has not mentioned any new names during the assault inside the hut or in the "*Parchi*", different from those he first saw outside the hut of the deceased, after the deceased was dragged out. The Appellants are the same 17 persons identified by him outside before they

entered the hut. Bhuneshwar has been mentioned from the commencement till assault on the head of the deceased with stone.

26. PW-2, Netram identified all the Appellants before the assault and was also present when the assault started. His wife then dragged him home. His house was ten to fifteen steps from the house of the deceased. The fact that the witness then watched the rest from his own house through a gap in the door is not considered very relevant to discredit his entire evidence. It is not the case of the Appellants that after shouting from outside the hut of the deceased, they had gone away or any few of them had left. Likewise, the fact that thatched roof of the '*Parchi*' may be low is also not relevant if the identity of the assailants is not in dispute.

27. PW-3, Urmila, wife of the deceased, was present when the assault took place. In her statement under Section 161 Cr.P.C she stated that Bhuneshwar, Manohar and 3-4 other persons entered the hut and assaulted her husband. If during Court deposition she stated that 5-6 persons entered the hut, we find no material omission or contradiction considering the statement in the Dehatinalishi and Section 161 Cr.P.C of PW-2, Netram that five persons had originally entered the hut. PW-2, Netram had stated that five persons named by him entered the house dragged the deceased out. One of them was Bhuneshwar. PW-3, Urmila also in her statement under Section 161 CrPC stated that Bhuneshwar dragged the deceased out and alike PW-2 also stated that Bhuneshwar hit the deceased on the head with stone. During her deposition in the Court, the witness 1½ years later named the Appellants-Bihari, Kaushal, Hari, Bharat, Bhuneshwar and Tetku as the persons who assaulted her husband. According to PW-2, Bhuneshwar and Hari were amongst the persons who had entered the hut. PW-2 also stated that Bihari assaulted him on the head alike PW-3 who repeated the same. The witness then

stated that Appellants-Bihari and Bhuneshwar pushed the deceased on the ground and swore to assault him with stone lying there after which the deceased was assaulted on the head and died. The witness deposed that she had told the names of the persons to the police which it did not record properly in her statement under Section 161 Cr.P.C. We fail to find any reason why the witness, the wife of the deceased, would implicate the persons falsely unless they were actually present and were assaulting. She was a rustic village witness. In cross examination she candidly stated that she did not know all the persons who came by name and had mentioned the names only of those whom she knew. It is a perfectly natural and truthful statement which inspires confidence in the witness also.

28. PW-4, Narendra, son of the deceased was undoubtedly a child witness. But the evidence of such witness cannot be rejected on that ground alone. It may only call for more caution. He was present in the room having his meal when the assault started. The witness also repeated the names of Appellants-Bhuneshwar, Manohar, Mohan and Bhuwan in his statement under Section 161 Cr.P.C and who were also named by PW-2, Netram in the Dehatinalishi. PW-3, Urmila in her statement under Section 161 CrPC stated that Appellant-Bhuneshwar dragged the deceased out of the hut and PW-4, Narendra said to the same effect. PW-2 and PW-3 both in their statement under Section 161 Cr.P.C and during deposition in Court talked of assault by the Appellants and with stone by Bhuneshwar, reiterated by PW-4. The nature of the injuries found on the deceased with multiple fractures of skull bone, absence of brain material, laceration in ears, nose and mouth, fracture of mandible and teeth, tibia and fibula, contusion on the body, hands and

legs, all go to suggest that the deceased was definitely assaulted by more than one person.

29. The fact that PW-2, Netram and PW-4, Narendra may have been watching from behind a gap in a closed door and that the end of '*Parchi*' may not have been visible is not such a fatal issue to hold that the witnesses were not speaking truth especially when the Appellants were all identified even before the assault began. We therefore find no reason to differ with the conclusion of the Trial Court on the issue for identification of the Appellants at paragraph 38.

30. The Appellants in their statements under Section 313 Cr.P.C did not offer any defence why they were being falsely implicated but on the contrary admitted that they had a very serious animosity against the deceased due to Panchayat elections. The deceased was the Deputy Sarpanch. The evidence of PW-12, Dharmendra is not considered relevant in view of his statement in cross-examination that he was sleeping and when he woke up, he found himself in the house of his uncle PW-2, Netram.

31. In Ram Pukar Thakar (*supra*) the observation with regard to absence of light and consequent identification considered at paragraph 4 of the judgment was made in context of the facts that there was a solitary eye witness who did not disclose the names immediately after the occurrence and the other family members present also did not name the accused.

32. In Ram Narain Singh (*supra*) relied upon on behalf of the Appellants the observations regarding doubt of identification because of darkness at 8:00 pm was made on its own facts at paragraph 11. The prosecution evidence was at variance with medical evidence. The timing of the occurrence had been shifted from 8:00 pm to 6:30 pm and the

weapons also did not appear to have been recently used as noticed at paragraph 13.

33. It is not considered necessary to discuss Ram Lakhan Singh (supra) since we have not taken into consideration the evidence of PW-12, Dharmendra.

34. Muthu Naicker (supra) is distinguishable on its own facts. There was factionalism in the village. Paragraph 6 notices that there was a melee, with large number of assailants and 34 prosecution witnesses. In the facts of that case it was held that the possibility of innocent by-standers being made accused cannot be ruled out seeking corroboration.

35. In Binay Kumar Singh (supra) 13 people had been killed and 17 mauled. Dwelling houses were gutted. In paragraph 31 it was observed that the testimony of a sole witness if reliable could also be sufficient. It was only a caution pointed out that if there were a large number of accused and assailants, the two witnesses corroboration theory would be advisable. It has no application in the facts of the present case.

36. Kamaksha Rai (supra) is distinguishable on its own facts relating to 500 persons. Nagarjit Ahir (supra) related to an occurrence at 6:00 am in the morning at the river bathing ghat. In those facts it was held that caution had to be exercised so that innocent by-standers were not made vicariously liable under Section 149 IPC.

37. The aforesaid discussion leads us to the conclusion that the conviction of the Appellants by the Trial Court calls for no interference. Appellant Birendra Kuamr alias Tetku Verma was a juvenile on the date of occurrence. He has already undergone the maximum period of sentence that could have been imposed on him before grant of bail on 18.7.2001.

He is not required to undergo further custody and is discharged of his bail bonds.

The appeal is dismissed.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE

Subbu