

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 697 OF 2008**

Smt. Sarita Bai W/o. Mohan Suryavanshi aged about 26 years,
R/o. Jathiya Talab, Jarhabhata, P.S. Civil Line, Bilaspur, Distt.
Bilaspur

---- Appellant**Versus**

State of Chhattisgarh Through : P.S. Civil Line, Bilaspur, Distt.-Bilaspur
(C.G.)

---- Respondent**CRA No. 713 of 2008**

1. Sharad son of Deendayal Suryavanshi aged about 25 years, R/o. Jathiya Talab, Jarhabhata, P.S. Civil Line, Bilaspur, Distt. Bilaspur
2. Chota @ Ramdayal S/o Gajanand Suryavanshi, aged about 45 years R/o Jarhabhata, P.S. Civil Line, Bilaspur, Distt.-Bilaspur (C.G.)

---- Appellants**Versus**

State of Chhattisgarh Through : P.S. Civil Line, Bilaspur, Distt.-Bilaspur
(C.G.)

---- Respondent

For appellants : Mr. Suresh Kumar Verma, Adv. (Cr.A. No. 697/2008)
For appellant : Mr. A.K. Yadav, Adv. (Cr.A. No. 713/2008)
For Respondent/State : Mr. Vivek Sharma, Govt. Adv.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Chandra Bhushan Bajpai

C A V Judgment**Per Chandra Bhushan Bajpai, J.****18/1/2016**

1. By this common judgment, Cri. A. No. 679/2008 and Cri. A. No. 713/2008 are being disposed of as both the appeals arise out of the judgment of conviction and order of sentence dated 18-6-2008 passed by the 1st Additional Sessions Judge, Bilaspur in S.T. No. 151/2005 convicting and sentencing the appellants as under :-

Sarita Bai	S.147, IPC	SI for 1 year with fine of Rs. 200/-	In default of payment of fine to undergo 1 month SI
	S.148, IPC	SI for 1 year with fine of Rs. 200/-	In default of payment of fine to undergo 1 month SI
	S.323, IPC	SI for 1 year with fine of Rs. 200/-	In default of payment of fine to undergo 1 month SI
	S.452, IPC	SI for 1 year with fine of Rs. 200/-	In default of payment of fine to undergo 1 month SI
Sharad and Chhota @ Ramdayal	S.147, IPC	1 year with fine of Rs. 200/-	In default of payment of fine to undergo 1 month additional imprisonment
	S.148, IPC	2 years with fine of Rs. 200/-	In default of payment of fine to undergo 2 months additional imprisonment
	S.452, IPC	3 years with fine Rs. 200/-	In default of payment of fine to undergo 1 month additional imprisonment
	S.302/149, IPC	Life imprisonment with fine of Rs. 500/-	In default of payment of fine to undergo 2 months additional imprisonment

The substantive jail sentences are directed to run concurrently.

2. The court below also convicted co-accused Smt. Sita Bai and Smt. Devki Bai under Sections 147, 148, 452 of IPC and sentenced them to the period already undergone by them with fine of Rs. 200/- under Section 452, IPC. They have not preferred any appeal against their conviction and sentence.

3. Earlier to the impugned judgment, the trial Court also tried accused Mohan, Ramkushal, Darash Lal, Narad Suryavanshi, Ganesh and Guddu @ Shivdayal in the same S.T. No. 151/2005 for the offence under Sections 147, 148, 452/149, 302/149, 323/149, IPC. After their trial, the trial Court vide judgment dated 10-8-2006 acquitted all the above six accused persons of the charges as the prosecution failed to prove the charges beyond reasonable doubt. Against said acquittal in the first round of sessions trial No. 151/2005, revisionist Badri Prasad Gadhewal, father of deceased Ramu @ Ramkumar has preferred a Criminal Revision No. 618/2006, which is being disposed of by a separate order. At the time of trial of above six accused persons, other co-accused Sharad, Chhota @ Ramdayal, Smt Geeta Bai, Devki Bai and Sarita Bai were absconding. After the judgment dated 10-8-2006 all the above 5 accused persons surrendered and they

were tried in the same ST No. 151/2005 and the trial Court convicted and sentenced them as mentioned above.

4. Brief facts of the case are that on 26-11-2004 at about 8 pm near Jatia Talab, Jarhabhata, PS Civil Lines, Bilaspur, all the above 11 accused persons had formed an unlawful assembly armed with deadly weapon axe, hockey stick, steel plate and other arms on account of earlier dispute and entered into the house of Ramu @ Ramkumar, dragged him out, assaulted him by axe and other weapons. They also caused injuries to P.W. 5 Ku. Naina (P.W. 1 in second round of trial), P.W. 6 Dev Kumari (P.W. 2 in second phase), P.W. 7 Badri Prasad (P.W. 3 in second round of trial) and Vinay Kumar. Injured Ramu @ Ramkumar was taken to CIMS, Bilaspur and thereafter while shifting to a nursing home, Ramu @ Ramkumar succumbed to his injuries. P.W. 5/1 Ku. Naina, sister of injured Ramu alias Ramkumar lodged FIR (Ex. P-8) before Civil Lines police which in turn registered the Crime No. 1038/04 under Sections 307, 147, 148, 149 and 323 of IPC at about 8.00 pm against all the 11 accused persons. After death of Ramu @ Ramkumar at about 10.30 pm on 26-11-2004, P.W. 6/2 Devkumari intimated about death to the police. Police recorded merg vide Ex. P-9 on 27-11-2004 at 2.00 am. During investigation, P.W. 5/1 Ku. Naina, P.W. 6/2 Devkumari, P.W. 7/3 Badri Prasad and P.W. 7 (second round of trial) Vinay were sent for medical examination. P.W. 3 Dr. B.K. Vaishnav (his statement was recorded in first phase of trial) examined above injured persons and noticed following injuries :-

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|-------|---|---------|
| (I) | Injured Ku. Naina (P.W. 5/1) – | Ex. P-4 |
| | Lacerated wound over occipital region 1 x ½ x ½ cm, pain in body. | |
| (ii) | Badri Prasad (P.W. 7/3)- | Ex. P-5 |
| | Abrasion over left scapular region ½ cm x ½ cm. | |
| (iii) | Vinay (P.W. 7 second round of trial) | Ex. P-6 |
| | Abrasion over right foot (calcaneal region) ½ cm x ½ cm. | |
| | Abrasion over left leg. | |
| (iv) | Devkumari (P.W. 6/2) | Ex. P-7 |
| | Abrasion on right wrist joint | |
| | Contusion over right shoulder joint | |

5. During second phase of trial Ex. P-4, 5, 6 and 7 were admitted by the defence under Section 294 of the Cr.P.C. which finds place in the order sheet dated 3-5-2008 of the Court below. The body of the deceased was sent for autopsy. Dr. Pritam Sahani (P.W. 17 in first phase of trial) conducted autopsy on the body of the deceased and vide Ex. P-19 noticed following injuries :-

- i. LW 7 cm long- 2 cm to right of mid line in sagittal plane, 5 surgical stitches.
- ii. LW 5 cm long, behind right ear, running downwards and backwards overlying right mastoid process, 3 surgical stitches
- iii. LW 5 cm x 1 cm x bone deep on vertex of skull, no surgical repair
- iv. LW 5.4 cm long, 5 surgical stitches overlying occipital protuberance
- v. LW 5 cm perpendicular to injury No. 4 and terminating over occipital protuberance 4 surgical stitches
- vi. LW 4 cm long 3 stitches vertical along long axis of arm on lateral aspect of right arm just over insertion right deltoid.
- vii. Contusion 6 cm x 1 cm transversely oriented overlying left acromion process
- viii. Contusion 6 cm x 2 cm transversely overlying medial end of upper border of left scapular.
- ix. Multiple small contusions overlying right scapula
- x. L.W. 11 cm long vertical oriented, skin deep, right side of back 9.5 cm to right of mid line over mid scapular line.
- xi. Contusion 6.5 cm x 0.5 cm along long axis of right forearm just below right cubital fossa 3.5 cm to left of mid line.
- xii. Grazed abrasion 10 cm x 5 cm over lateral aspect upper $\frac{1}{2}$ of right forearm.
- xiii. Multiple contusions and laceration over left knee and lower $\frac{1}{2}$ of both legs and dorsum of both feet.

The autopsy surgeon opined that cause of death is extensive craniocerebral injury hemorrhage and coma, injuries are homicidal in nature caused by a combination of sharp heavy cutting weapon and hard and blunt weapon.

6. The doctor also answered to the query vide Ex. P-20 regarding two axes sent for examination and opined that the injuries may be caused by those axes. Ex. P-19, P-20 are also admitted by the defence during second phase of trial which finds place in the order sheet dated 3-5-2008. As the defence admitted those documents, both the doctors conducting MLC, post mortem and query, were not examined by the prosecution in second phase of trial.

7. Police during investigation recovered weapons used, blood stained clothes etc. from the accused persons. After completion of investigation, charge sheet was filed before the Additional Chief Judicial Magistrate, Bilaspur who in turn committed Criminal Case No. 413/2005 (State -v- Mohan and 10 others) to the court of Sessions. Learned Additional Sessions Judge, Bilaspur received the case on transfer for trial.

8. As aforementioned, the court below at the first phase of trial framed charges against six co-accused persons and after taking evidence passed the judgment dated 10-8-2006 acquitting all of them of the charges affording benefit of reasonable doubt. In the first phase of trial, 18 witnesses were examined by the prosecution. Thereafter the present accused appellants and other two convicted co-accused persons surrendered before the court below. Charges were framed against them under Sections 147, 148, 452 and 302/149, 323/149 (for 4 counts) of the IPC. In the second phase of trial, prosecution examined 12 witnesses. Accused in their defence examined one defence witness Pardesh Sarathi as per whom, Devprasad armed with lathi, Bhurva armed with axe were standing behind Jatia Talab, Ramu was also there and they were quarreling. Far from there, Bedu and some women were standing. They were also quarreling. He went to attend the natural call and on return he saw that family members of Ramu were taking him to hospital.

9. After examination of the witnesses, statements of the appellants and two co-accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication in the crime in question.

10. The trial Court after hearing respective parties and considering the material available on record by the impugned judgment in the second phase of trial convicted and sentenced the accused/appellants and two other

accused persons as aforementioned.

11. Learned counsel appearing for appellant Smt. Sarita Bai contended that he is not challenging the finding recorded by the trial Court on merit, instead he is confining his arguments only on quantum of sentence. It is submitted that appellant Sarita Bai has remained in jail for about 24 days during trial. Offence under Section 452, IPC is not proved. As per allegation she caught hold of P.W. 5/1 Ku. Naina. As per MLC report, P.W. 5/1 Ku. Naina received only a lacerated wound of simple nature in her head. Hence at the most she can be held guilty under Section 323, IPC. The incident is about 11 years old. Appellant Sarita Bai is a woman with no criminal past. Looking to the injury and as no overt act is assigned to appellant Sarita Bai, she may be sentenced to the period already undergone by her.

12. Learned counsel for appellants Sharad and Chhota @ Ramdayal contended that the conviction awarded to both these appellants is not proper. Prosecution has failed to prove its case beyond reasonable doubt. Copy of the FIR has not been sent to concerned Magistrate as required under Section 157 of the Cr.P.C. P.W. 1/4 Shyamkumar Suryavanshi, brother of P.W. 5/1 Naina has stated that he had lodged the report whereas P.W. 5/1 Ku. Naina has stated that she had lodged the report. P.W. 7/3 Badri Prasad has stated different fact regarding lodging of FIR whereas only one FIR Ex. P-8 has been adduced by the prosecution. FIR Ex. P-8 is suspicious. There is no number mentioned in the FIR which goes to show that the report is antedated and is an afterthought. Injured Vinay (P.W. 7) was not examined. Statements of other eye-witnesses were recorded under Section 161 of the Cr.P.C. belatedly after 13th day ceremony of the deceased. Seizure witnesses of club, stick and axe have turned hostile. As there is no serological report, the seizure has now no relevance. The police officer who had recorded the FIR was not examined. All the witnesses turned hostile in the first phase of trial were not examined by the prosecution in the second phase of trial. The place of incident is initially stated as inside the house and thereafter as out side the house. There are material omission and contradiction in the statements of the witnesses. Both the appellants may be given benefit of doubt. P.W. 7/3 Badri Prasad, father of the deceased, has not supported the fact that he went to hospital and his MLC was conducted.

13. It is also contended that the brother and the uncle of the deceased i.e.

Bhurva and Ram Prasad assaulted the deceased. As per statement of P.W. 7/3 Badri Prasad, his daughter-in-law P.W. 6/2 Dev Kumari made hue and cry that Daras, Ramkushal are quarreling with her husband, thereafter P.W. 7/3 Badri Prasad reached to the spot. It shows that prosecution has failed to prove the common intention of the appellants. All the accused persons are close relatives. The interested witnesses have falsely implicated the accused. Those who were residing outside have stated altogether different story as to who assaulted whom and by which weapon. There are overwriting in the time of the incident mentioned in Ex. P-8. It is further submitted that Bedu Suryavanshi's name is mentioned in the FIR but he was not examined by the prosecution. It makes the prosecution case suspicious. P.W. 1/4 Shyamkumar Suryavanshi has not seen the actual incident. P.W. 5/1 Ku. Naina has improved her statement. P.W. 6/2 Devkumari has also improved her statement. The prosecution has not proved the map. In absence of any map, the place of incident is suspicious. There are many other persons residing near the spot but those independent witnesses were not examined. Bhurwa assaulted the deceased as per defence witness but he was not made accused. The deceased was taken from hospital and on way to hospital he died. Had he remained hospitalized in the same hospital, there would have been better chances for his survival. The material difference of time in the MLC goes to show that the injured had not received any injury in the incident. It is argued that as the prosecution has failed to prove its case beyond all probable doubt, both the appellants be acquitted of the charges.

14. Learned counsel for the appellants placed reliance on **Shiv Lal and anr. -v- State of CG** reported in **2011 LAW SUIT SC 1020 (SC)** wherein requirement of sending copy of FIR to concerned Magistrate was not complied with, chemical examiner's report regarding stains of human blood was not produced, there were material contradiction, improvement in the prosecution version apparent- material contradiction and improvement in the statement of witnesses, Hon'ble Apex Court held that omission to send FIR under Section 157(1) of the Cr.P.C. would cast a shadow on prosecution case. Some witnesses lack credibility and credence. Prosecution failed to prove its case beyond reasonable doubt. Hon'ble the Apex Court after awarding the benefit of doubt acquitted the appellants. Further reliance is

placed on **Vijoy Singh -v- State of Bihar** reported in 2002 LAW SUIT (SC) 456 wherein there was delay in lodging FIR and sending its copy to Magistrate, involvement of other accused not clearly established, other accused given benefit of doubt and on account of enmity with object of taking revenge innocent persons were falsely implicated as accused persons, the Apex Court allowed the appeal partly.

15. Reliance is also placed on **Thandu @ Arun -v-** reported in **2015 LAW SUIT CG 272** wherein the Division Bench of this Court held that if the origin of blood is not detected, it does not mean that blood stuck on seized article would not have been human blood at all. It depend on facts and circumstances of each case and effect of above circumstances have to be judged in the light of facts situation of each case. The Division Bench also held that discoveries and seizure are doubtful. Once the discovery fails there would be literally nothing which would support the prosecution. It is argued that in the present case also seizure is not proved by adducing witnesses though they admitted their signature and in the absence of serological report origin of blood is not detected. Reliance is also placed in **Chandrappa -v- State of Karnataka** reported in **2007 LAW SUIT SC 155** wherein Hon'ble Supreme Court held that if two views are possible on the basis of evidence on record, the one favourable to the accused has to be taken. It is submitted that the accused appellants Sharad and Chhota may be given benefit of doubt and acquitted of the charges.

16. Per contra, learned counsel for the respondent/State opposed the arguments advanced on behalf of the appellants and submitted that there is no manipulation in the FIR. As regards the argument that the FIR is written after the date mentioned in it, as per statement of the IO P.W. 18/12 D.P. Thakur he assigned the duty to the Head Constable to submit the copy of FIR to the concerned Magistrate and also there is entry in the FIR, therefore there is no force in the argument that the FIR is antedated and suspicious. Further, no specific questions were asked in the cross-examination in this regard. Learned counsel further submitted that as the witnesses are rustic persons, there may be minor discrepancies in their statements before police, in FIR, merg intimation or any other inquiry. P.W. 18/12 IO D.P. Thakur and P.W. 5/1 Ku. Naina have stated that it was P.W. 5/1 Ku. Naina who had lodged the FIR. There is no substance in the argument that there are three

FIRs. Much is said regarding number of pages in the FIR. Immediately after the FIR, MLC Ex. P-4, P-5, P-6 and P-7 were conducted. Injured were sent along with letter for their medical examination and investigation started. In absence of any printed number in the FIR same cannot be held as suspicious and whatever printed form was given to the police, the same is used. No question to this effect was asked to the IO during the first phase of trial hence also looking to the other facts, FIR cannot be held as suspicious and antedated document. The injured eye-witnesses and other eye-witnesses i.e. P.W. 5/1 Naina, P.W. 6/2 Devkumari and P.W. 7/3 Badri Prasad have supported the prosecution case. The FIR was duly proved in the first phase of the trial, no suspicion can be attached on it simply on account of non-examination of lodger of the FIR. The witnesses who had turned hostile during first phase of trial were not examined at the second phase of trial but as the injured eye-witnesses were examined and their statements may be appreciated independently for their quality hence non-examination of the hostile witnesses at second phase of trial may not be held as fatal to the prosecution. So far as non-examination of both the doctors P.W. 3 Dr. V.K. Vaishnav and P.W. 7 Dr. Pritam Sahani is concerned, vide order dated 3-5-2008, defence admitted the MLC report Ex. P- 4, 5, 6 and 7 and also the post mortem report Ex. P-19 and the query report Ex. P-20. After admission of those reports, further examinations of the doctors in second phase of trial is not necessary. It is argued by the appellants' counsel that place of incident is changed but as per the facts, initially the incident started by trespass of the accused in the house of the injured and thereafter he was dragged out of the house hence both the places of incident are in continuity and it cannot be said that the place of incident is suspicious or it is changed. Though there are minor omission and contradictions in the statements of the witnesses but in totality their statements may not be doubted. As regards appellants' contention that P.W. 7/3 Badri Prasad has denied that he was examined by the doctor, it is submitted by State counsel that the appellants are not convicted for assaulting P.W. 7/3 Badri Prasad. There is medical examination and further corroboration by P.W. 3 Dr. B.K. Vaishnav at the first phase, therefore the statement of P.W. 7/3 Badri Prasad that he was not examined cannot be held fatal to the prosecution story. P.W. 5/1 Naina is the star witness of the prosecution. She remained unchanged and the same was duly corroborated by other witnesses. MLC also supports her. The multiple

injuries found on the body of the deceased supports her statement and there is common intention to kill. There was motive that few days ago there was dispute for use of cracker which goes to show that both the present accused trespassed the house of the deceased, dragged him out and assaulted. Defence witness DW 1 Pardeshi Sarthi has admitted that he had not seen Bhurva and Dev Prasad beating the deceased and the witness had for the first time stated any fact before the court. It is not correct that accused were falsely implicated. The witnesses are natural witnesses. They have received the injuries. There is nothing to discredit their statements. The formation of unlawful assembly for commission of offence is proved. As per statements, those who intervened and attempted to save the deceased were also assaulted. Merely due to absence of any spot map, prosecution story does not become suspicious. Non-examination of any of witnesses of nearby place cannot be held as fatal because during investigation those who were present and saw the incident were made witnesses. The presence of the appellants is not suspicious. The FIR contains name of the appellants and their specific role in the incident. So far as recording of statements after 13th day ceremony of the deceased is concerned, as the witnesses are close relatives, after death of the deceased they observed their local customs and followed them for 13 days and immediately thereafter their statements were recorded. Hence belated recording of statements may not be held as fatal. There is no ambiguity in mentioning the time of MLC. The doctor has mentioned the exact time hence the time mentioned by police constable for other facts is not relevant. The injured witnesses proved the fact that they were present at the time of incident. Their presence cannot be doubted. It is argued that there are differences in the statements of the eye-witnesses as to the manner the incident took place. The same is not important because a group of persons were assaulting and it is very difficult to narrate the overt act of every accused person. There may be some discrepancies in the overt act assigned to the accused persons. There was light and both the parties are known to each other therefore, there is no question of wrong identification and also as the incident took place suddenly hence there may be some description about weapon used by the accused persons. It is not fatal to the prosecution case.

17. Learned counsel for the State submitted that there are sufficient

material to hold that appellants Sharad and Chhota @ Ramdayal assaulted the deceased by axe and club and the deceased received multiple injuries including multiple fracture over vital part of his body and ultimately died while shifting to another hospital. The prosecution has duly proved its case against them and also against accused Sarita hence both the appeals may be dismissed.

18. We have heard learned counsel for the parties and perused the material available on record.

19. P.W. 5/1 Ku. Naina is the eye-witness to the incident. She has stated that accused Sharad and Sarita along with other co-accused persons entered into her house. The accused persons dragged Ramu @ Ramkumar outside the house. Accused Sharad, Ramdayal, Mohan assaulted her brother by axe. Shivdayal assaulted him by a rod, Ramkushal and Ganesh by pipe, Narad and Darash by iron strip. Devki, Sarita and Seeta pulled her and Sarita assaulted her by an iron strip and Devki assaulted her by a club. Her brother fell down on the spot and became unconscious. He received injuries on his body. He was taken to CIMS where he died during treatment. She had lodged the FIR Ex. P-8. P.W. 6/2 Devkumari, wife of the deceased is also an eye-witness. She has stated that Sharad, Ramdayal, Sarita and other accused persons suddenly entered into their house and started assaulting her husband. They dragged him outside the house. When she raised a call for help, her father-in-law P.W. 7/3 Badriprasad, mother-in-law Devkibai and P.W. 5/1 Naina and Amrawati both sisters-in-law etc. reached to the spot and attempted to save Ramu @ Ramkumar. Ramdayal and Sharad assaulted her husband by axe and other assaulted by rod, pipe and iron strips. Her husband received many injuries over his head and other parts of the body. Thereafter her husband was taken to hospital for treatment and during treatment, he died. As per this witness, accused Sarita also assaulted.

20. P.W.7/3 Badriprasad is also an eye-witness. He has stated that when he heard the call of his daughter-in-law, he along with other family members immediately reached to the spot and saw Sharad, Ramdayal and other accused persons present inside the house of Ramu. They were abusing him, thereafter they dragged his son outside the house. When they attempted to save Ramu, the accused forcibly pushed them. Accused Sarita was holding

an iron strip. Accused Ramdayal alias Chhota and accused Sharad assaulted by axe. Other accused persons were holding rod, pipe and they also assaulted his son Ramu and other witnesses. Accused Sarita assaulted his daughter P.W. 5/1 Naina . His son died during treatment.

21. P.W. 1/4 Shyamkumar Suryavanshi, younger brother of the deceased, is a hearsay witness. He reached to the spot after the incident. He saw his brother Ramu lying unconscious near road. When he asked, he was informed by the family members that it was the accused persons who assaulted Ramkumar and others. He saw Sharad, Ramdayal and Sarita and other accused persons at some distance. Thereafter all the accused person fled away from the spot. His brother Ramu died during treatment. He is also witness of seizure of blood stained soil, plain soil vide seizure memo Ex. P-1 and also witness of Ex. P-2 the seizure of blood stained pant of the deceased. P.W. 5 Dinesh Kumar, younger brother of the deceased, reached to the spot when his sisters-in-law P.W. 6/2 Devkumari called for help that accused Sharad, Ramdayal and other co-accused persons were beating her husband Ramu. When he along with other family members reached to the spot, they saw accused dragging his brother outside the house. Accused Sharad and Ramdayal assaulted his brother by axe and others assaulted him by pipe, club and crowbar. Accused Sarita assaulted his sister P.W. 5/1 Naina. Thereafter his brother was taken to the police station and then to CIMS and during treatment in a nursing home, his brother succumbed to the injuries.

22. P.W. 6 Shiv Kumar is also a hearsay witness. He saw his sister P.W. 5/1 Naina injured with injury over her head and it was she who informed him regarding the incident. He reached to the hospital, his brother died in the hospital. P.W. 7 Binnu @ Vinay is also a hearsay witness. He reached to the spot after the incident. He saw Ramu @ Ramkumar lying on the road unconscious. His sisters-in-law informed him regarding the incident. His brother died during treatment. P.W. 2/8 Sanjay Suryavanshi is the witness of seizure of iron rod and blood stained shirt vide Ex. P-3. He has not supported the facts as to what was seized by the police. P.W. 9/9 Ravindra Gupta is the witness of seizure memo Ex. P-12 whereby a blood stained shirt was seized. P.W. 12/10 Gokul, electrician is also witness of seizure memo of full shirt and rod vide Ex. 14 and seizure of iron pipe and a full shirt Ex. P-

15. P.W. 11/11 Raghunandan Prasad Sahu gave his report Ex. P-16 regarding immovable property of the accused persons. P.W. 18/12, inspector of police has conducted investigation and duly supported the prosecution case. As per order sheet dated 3-5-2008, MLC Ex. P-4, 5, 6 and 7, PM report Ex. P-19 and query report Ex. P-20 have been admitted by the defence under Section 294 of the Cr.P.C. The appellants have examined one defence witness D.W. 1 Pardeshi Sarathi. As per him, he saw that Bhurva and Ramu were quarreling with each other and thereafter family members of Ramu were taking him to hospital. Next day he came to know that Ramu had expired. This witness in the cross-examination has admitted that he had not seen Bhurva and Devprasad assaulting the deceased.

23. The case of appellant Sarita Bai and appellants Sharad and Chhota alias ramdayal is different. It would be proper to appreciate the evidence with regard to Sarita separately.

24. Appellant Sarita has been convicted under Section 147, 148, 323 and 452 of the IPC As per prosecution's case, she assaulted P.W. 5/1 Naina by iron strip. P.W. 5/1 Naina received one lacerated wound over occipital region simple in nature as per Ex. P-4. Though it is argued that Section 452 of the IPC has not been made out against appellant Sarita but as per the FIR Ex. P-8 she had also entered into the house and at the time of incident she was carrying an iron strip. These facts were supported by P.W. 5/1 Naina, P.W. 6/2 Devkumari who saw accused Sarita inside their house. P.W. 7/3 Badri Prasad also supported this fact and further has stated that Sarita has assaulted his daughter P.W. 5/1 Naina. Medical evidence also corroborates it as a single injury was noticed over occipital region of injured P.W. 5/1 Naina thereby the offence under Sections 148 and 452 of the IPC is duly proved. Section 147 of the IPC is included in Section 148, IPC. The trial Court has rightly convicted appellant Sarita under Sections 148, 452 and 323 of IPC. So far as sentence awarded to her is concerned, considering the facts that she is a woman, the incident is about 11 years old, she is not having any criminal past and the entire facts and circumstances of the case and also as the appellant remained in jail for 24 days, further as there is no minimum sentence prescribed for all these three offences, she has sufficiently suffered the post-effect of the incident as she has faced trial and thereafter is contesting her appeal for long 11 years, in the considered

opinion of this Court, it would be proper that she be sentenced to the period already undergone by her for above offences.

25. So far as case of appellants Sharad and Chhota alias Ramdayal is concerned close scrutiny of the entire evidence makes it clear that P.W. 5/1 Naina, P.W. 6/2 Devkumar, P.W. 7/3 Badriprasad described the role of both the appellants and they have specifically stated that both the appellants along with other co-accused assaulted and inflicted injuries by sharp edged weapon to Ramu @ Ramkumar. There is no material contradiction in their statements. Hence their statements are admissible and trustworthy. As per evidence, FIR was lodged by P.W. 5/1 Ku. Naina. P.W. 1/4 Shyamkumar went along with P.W. 5/1 Naina and as per statement, P.W. 6/2 Devkumari, wife of the deceased had lodged Merg Ex. P-9. Hence it cannot be said that there were 3 reports. Eye-witnesses have stated their presence at the time of incident. The minor contradiction may not make the case suspicious. It is proved by the witnesses that there was nothing suspicious in the spot of the incident. Initially the incident started while trespassing in the house and after said trespass, both the appellants and other accused dragged deceased Ramu outside the house and assaulted. Hence it cannot be said that place of incident has been changed. D.W. 1 Pardeshi Sarathi himself in para 6 of his cross-examination has stated that he had not seen Bhurva and Dev Prasad assaulting deceased and also this witness has stated for the first time in the court. Hence D.W. 1 Pardesi Sarthi is not of any help to the defence. The statement of the eye-witnesses are duly supported by the MLC Ex. P-4, 5, 6 and 7, PM report Ex. P-19 and query report Ex. P-20. Presence of the appellants and other accused is undisputedly proved. Their identity is not under cloud. Earlier there was dispute regarding use of cracker. The witnesses remained very firm in the cross-examination. FIR also cannot be held antedated. No suspicion can be attached if the statements of eye-witnesses were recorded after 13th day ceremony observed after the death of Ramu @ Ramkumar as per rituals. In the light of promptly lodged FIR and MLC the recording of statements of eye-witnesses after 13th day ceremony would not make their statements suspicious. The witnesses are injured. There is no reason to discredit their statements. There is endorsement in the FIR for sending the copy to the Magistrate. Also as per P.W. 18/12 D.P. Thakur, IO he directed the Head Constable to send the copy to the

concerned Magistrate. Also the defence has not examined concerned reader of the Magistrate to establish the fact that the FIR was not received. Therefore, the argument that the FIR had not been sent to the Magistrate has no substance. On the basis of the evidence available, it is proved that the copy of the FIR was sent to the concerned Magistrate. Witnesses in their examination remained very firm and stated the role of the appellants and other accused. The post mortem report Ex. P-19 is duly corroborated by the statements of the eye-witnesses. Hence the witnesses are trustworthy.

26. P.W. 16 Dr. Neeraj Shande in his statement in the court has stated that the condition of the injured was very grievous. He informed this fact to the relatives of the injured and if they attempted to take the deceased to a nearby hospital, it cannot be said that if they would not have shifted the patient to nearby hospital, life of the injured could have been saved. As the prosecution proved that the FIR is not antedated, there is no change in the spot, the treating doctor has very specifically stated the time of the examination of the injured witnesses, hence even if the constable received the copy and if he by ignorance had not mentioned the correct date, said MLC may not be doubted. As per statement of the doctor, there is no reason to disbelieve the witnesses and doubt their testimony. Witnesses are not required to give details of the incident like a computer. They are hardly literate labour and the contradictions are very minor and overall not fatal to the prosecution. Both the appellants are not sentenced to assault P.W. 7/3 Badriprasad. Hence if P.W. 7/3 Badri Prasad has not supported his medical examination, even then the same is not fatal to the prosecution case. No manipulation in the FIR is proved. If at all, in the time of incident, there is an overwriting in the minute part and if no initials is put, even then this cannot make the FIR doubtful. The arguments that the witnesses who turned hostile in the first phase of trial were not examined in the second phase of trial is not of any help to the prosecution as statements of the witnesses examined in the second phase of trial have to be appreciated on their own strength and the injured eye-witness and other eye-witnesses have shown and proved their trustworthiness and credibility. P.W. 5/1 Naina remained very firm in her entire statement. Other eye-witness are also duly corroborated and supported the MLC, PM report, query report and multiple fractures noticed by

the autopsy surgeon. As per statement of the witnesses, common object and motive of the appellants along with other co-accused to kill the deceased is proved in the light of earlier dispute and on the date of incident, the appellants trespassed in the house of the deceased quarreled, dragged him outside and assaulted by sharp edged weapon. In the considered opinion of this Court, there is no illegality, impropriety in the impugned judgment and accused Chhota and Sharad have rightly been convicted and sentenced by the trial court.

27. In the result, the Cr. A. No. 697/2008 appeal filed by appellant Sarita is allowed in part. Her conviction under Section Sections 148, 452 and 323 of IPC is hereby affirmed and she is sentenced to the period already undergone by her with the fine sentence as awarded by the trial Court. She is on bail. Her bail bond shall continue for a further period of six months as per requirement of Section 437-A of the Cr.P.C.

28. Cr.A. No. 713/2008 filed by Sharad and Chhota is dismissed being devoid of any substance. Their conviction and sentence are affirmed. They are reported to be in jail therefore no further order regarding their surrender etc. is required.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Chandra Bhushan Bajpai)
Judge