

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 21-11-2016****Judgment delivered on 13-04-2017****CRR No. 237 of 2004**

- Hari Ram

---- Petitioner**Versus**

- Ganesh & Others

---- Respondent**And
CRA No. 114 Of 2004**

- Kunti Bai

---- Petitioner**Vs**

- State Of Chhattisgarh

---- Respondent**And
CRA No. 210 Of 2004**

- Gajanand & Others

---- Petitioner**Vs**

- State Of Chhattisgarh

---- Respondent**And****CRR No. 169 Of 2004**

- Gajanand & Others

---- Petitioner**Vs**

- State Of Chhattisgarh & Others

---- Respondent

For appellants in CRA 114 & 210 of 2004	Shri Rajeev Shrivastava & Shri Malay Shrivastava, Adv.
For applicant in CRR 169 of 2004	Shri Rajeev Shrivastava & Shri Malay Shrivastava, Adv.
For applicant in CRR 237 of 2004	Shri Atanu Ghosh, Adv.
For Respondent State	Shri Vinod Deshmukh, Dy. Govt. Adv.

**Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Shri Justice Anil Kumar Shukla**

C A V Judgment

The following judgment of the Court was delivered by **Prashant Kumar Mishra, J.--**

1. These two criminal appeals and two criminal revisions arise out of the same incident, therefore, they are being considered and disposed of by this common judgment.
2. CRA No.210 of 2004, CRA No.114 of 2004 and CRR No.237 of 2004 are arising out of judgment rendered by the trial Court in ST No.117/1999 whereas CRR No.169 of 2004 is arising out of judgment rendered by the trial Court in criminal case No.139/2000.
3. In the judgment rendered in ST No.117/1999, 13 accused persons were sent for trial. Out of whom 8 accused persons have been convicted and 5 accused persons have been acquitted as per the details given below :

List of convicted persons :

S.No.	Name of accused	Details of Conviction
1	Gajanand	148, 307 read with Section 149 (three times), 302 read with Section 149

		and 323 read with Section 149 of the Indian Penal Code (for short 'the IPC')
2	Sonu	-do-
3	Lala Ram	-do-
4	Bhulav	-do-
5	Meghu @ Meghnath	-do-
6	Paras	-do-
7	Pusau	-do-
8	Kunti Bai	325 of the IPC

List of acquitted persons :

S.No.	Name of accused
1	Ganesh
2	Ramesh
3	Sriram
4	Chetan
5	Radheshyam

4. While the first block of 7 accused have preferred CRA No.210 of 2004 and the accused Kunti has preferred CRA No.114 of 2004. Informant Hariram (PW-2) has preferred CRR No.237 of 2004 challenging acquittal of 5 accused persons.
5. Gajanand, who was the first accused in ST No.117/1999 and has been convicted for offence punishable under Sections 148, 307 read with Section 149, 302 read with Section 149 and 323 read with Section 149 of the IPC, had also lodged the First Information Report (for short 'the FIR'), as his fraction had allegedly sustained injuries in the same incident.

6. In Gajanand's FIR, accused Hariram (PW-2) (informant in ST No.117/1999), Bhagwat (PW-7), Sahasram (PW-5), Lalji and Sarju were tried for offences punishable under Sections 148, 323 (six times), 294, 506 Part II and 325 in the alternative under Section 325 read with Section 149 of the IPC, however, in criminal case No.139/2000, decided on the same date by the same Presiding Officer, all the 5 accused persons have been acquitted. Challenging their acquittal, Gajanand has preferred CRR No.169 of 2004.
7. In CRR No.237/2004, accused Sriram has been arrayed as respondent No.3, however, he has died, during pendency of the criminal revision in this Court, therefore, the revision as against him is abated.

CRA 114 of 2004 & CRA 210 of 2004 AND CRR 237 of 2004 :

8. In the trial under Section 302 of the IPC, amongst other offences, the FIR was lodged by Hariram (PW-2) vide Ex.P/2 at 15.00 hours on 16-1-1999 to the effect that at about 6.00 am, he was ploughing the field of Vijay Gautiya whereas Kumar (PW-9) was ploughing the adjoining field. At 9.00 am accused Gajanand, armed with an axe, came to the field and complained to the informant as to why he has brought the bullock cart through his gram field on which Hariram (PW-2) stated that he has brought the bullock cart through the area which is used as road to which Gajanand retaliated by saying that if he would have been present he would have thrown Hariram (PW-2) under the wheel of bullock cart. Being enraged, Hariram (PW-2) said that he will again take the bullock cart on the same route on which Gajanand said let us see how you would take bullock cart and started assaulting by means of axe. The informant left the plough and caught hold of Gajanand, however, he sustained injuries on his left hand. At this time Kumar (PW-9) came and intervened and, thereafter, the informant proceeded back to his

house. When informant reached the village, Gajanand was already there standing in front of his house with Sonu, Lala, Bhulau, Meghu, Ganesh, Ramesh, Pusau, Paras & Sriram. Radhe handed over one club to Sonu. On seeing the informant all the accused persons reached near well, encircled and started abusing him by saying that he should not be allowed to survive. Firstly; Sonu injured him by axe, on which he fell down. His father Kanchu (since deceased) came along with uncle Sahasram (PW-5), brother Bhagwat (PW-7) and wife Bimla Bai (PW-4) to intervene and save him, however, they were also beaten by the accused persons by club and axe. Kunti Bai wife of Gajanand hit him by a stone. The informant sustained injuries over head, both the hands, right thigh & calf. His father, uncle & brother have also sustained injuries over head and other parts of the body. Since at that time Kanchu was alive, the FIR was registered for offence under Sections 147, 148, 149, 307, 323, 506-B, 341 & 294 of the IPC.

9. In course of investigation, the following articles were seized from the accused persons :

List of articles seized :

S.No.	Name of accused	Details of articles seized	Exhibit
1	Sahasram (PW-5)	Bloodstained Towel	Ex.P/5
2	Bhagwatram (PW-7)	Bloodstained Lungi	Ex.P/6
3	Bhulau	Club with Nail at one end (<i>tutari</i>)	Ex.P/8
4	Gajanand	Axe	Ex.P/9
5	Meghu @ Meghnath	Club with <i>tutari</i>	Ex.P/10
6	Ramesh	Club	Ex.P/11

7	Pusau	Club with <i>tutari</i>	Ex.P/12
8	Sonu	Club	Ex.P/13
9	Kunti Bai	One piece of brick	Ex.P/14
10	Lala	Axe	Ex.P/15

10. Postmortem over the dead body of the deceased was performed by Dr. Ulhas Gonnade (PW-1), who submitted his report Ex.P/1 opining that death was due to coma as a result of ante mortem head injury and the death was homicidal in nature. The autopsy surgeon found the following injuries over the dead body of the deceased :

Details of injuries :

S.No.	Details of injuries found on the body of the deceased
1	A Lacerated wound with inflammed margin transversely oblique present just 2 cm in front of right frontal prominence on vault of skull size 5.5 cm x 0.5 cm x bone deep stiched.
2	A vertical lacerated wound present 3 cm anterior to left ear size 5.5 cm x 0.5 cm x bone deep underlined echymosed stiched margin inflammed.
3	Left black eye present.
4	A lacerated wound vertical present 5 cm above lower end of right radius size 1.5 cm x 0.5 cm subcutaneous deep.
5	An abrasion size 2 cm diameter present 8 cm below lateral epicondyle of right humerus.
6	Both 1 & 2 injury show linearfracture inter connected to each other transverse posteriorly towards left pantal prominence size 8 cm oblique present on vault of skull.

11. The postmortem report and other injury reports/MLC proved by the prosecution are as follows :

- Postmortem report of the deceased – proved by Dr. Ulhas Gonnade (PW-1) vide Ex.P/1.
 - MLC reports of the deceased Kanchu, Hariram (PW-2), Sahasram (PW-5), Bhagwat (PW-7) & Bimla Bai (PW-4) – proved by Dr. R.P. Nonhare (PW-10) vide Ex.P/16, Ex.P.18, Ex.P/19, Ex.P/20 & Ex.P/21, respectively.
12. In response to the query made by the Investigating Officer, Dr. R.P. Nonhare (PW-10) and Dr. Ulhas Gonnade (PW-1) opined that the injuries sustained by the deceased and injured persons can be caused by axe, bamboo stick/club with or without *tutari* seized from the accused persons. The query reports in relation to the weapons are Ex.P/26 to Ex.P/32. Injured Sahasram (PW-5) was radiologically examined, however, in the report (Ex.P/33) he was not found to have sustained any bony injury. Similarly, other two injured persons were also not found to have sustained any bony injury in the radiological report Ex.P/34 & Ex.P/35. The deceased died at 2.45 am on 17-1-1999 at Medical College Hospital, Raipur, on which the merg intimation was sent to the concerned Police Station vide Ex.P/37. The seized articles were sent for FSL examination and the report whereof was submitted vide Ex.P/54 finding bloodstains on lungi seized from Bhagwat (PW-7) (Article 'H'); towel seized from Sahasram (PW-5) (Article 'I'); and lungi seized from Hariram (PW-2) (Article 'J').
13. On completion of investigation, the prosecution filed the charge sheet for offence under Sections 148, 307 in the alternative 307 read with Section 149 (four times), 302 in the alternative 302 read with Section 149 of the IPC and they were tried for the said offence wherein the prosecution examined 15 prosecution witnesses namely; Dr. Ulhas Gonnade (PW-1), Hariram (PW-2), Chandrashekhar Rajput (PW-3), Bimla Bai (PW-4), Sahasram (PW-

5), Ramanuj Chandrawanshi (PW-6), Bhagwat (PW-7), Dayawati (PW-8), Kumar (PW-9), Dr. R.P. Nonhare (PW-10), Jairam (PW-11), Vyas Singh (PW-12), Narmada Prasad (PW-13), J.P. Kathote (PW-14) & S.P. Bhagat (PW-15) and 3 defence witnesses namely; Kewalram Chandrawanshi (DW-1), Radheshyam (DW-2) & Lakhan (DW-3).

14. At the end of the trial, 7 accused persons have been convicted for offences punishable under Sections 148, 307 read with Section 149 (three times), 302 read with Section 149 and 323 read with Section 149 of the IPC; 1 accused has been convicted for offence punishable under Section 325 of the IPC; and the remaining 5 accused persons have been acquitted by the impugned judgment.
15. Shri Rajeev Shrivastava, learned counsel appearing with Shri Malay Shrivastava, learned counsel for the appellants in Criminal Appeal Nos.114 & 210 of 2004 would submit that the appellants did not form unlawful assembly, therefore, their conviction with the aid of Section 149 of the IPC deserves to be set aside. Learned counsel would also argue that there is material contradictions and omissions in the prosecution case, which makes the entire prosecution case unbelievable, therefore, their conviction under Sections 148, 307, 302 and 323 of the IPC, as also Kunti Bai's conviction under Section 325 of the IPC deserves to be set aside. Shri Shrivastava would take this Court through the entire deposition of all important witnesses to highlight the omissions and contradictions. Shri Shrivastava would next argue that it is a case of free fight between two groups in the village and the injuries sustained by the accused persons have not been explained by the prosecution and, as such, the conviction deserves to be set aside. It is also put forth that for the same set of evidence some accused have been acquitted but others have been convicted, which is not permissible in law.

16. Shri Vinod Deshmukh, learned Dy. Government Advocate appearing for the State, per contra, would submit that the contradictions and omissions are very minor hence it does not effect the prosecution case. He would submit that the appellants had formed unlawful assembly and mercilessly beaten all the injured persons including the deceased, therefore, the appellants' conviction does not suffer from any illegality or infirmity.
17. Shri Atanu Ghosh, learned counsel appearing for the informant Hariram in Criminal Revision No.237/2004, would also take this Court through the depositions to argue that the acquitted accused persons being part of unlawful assembly, they should also have been convicted by the trial Court.
18. Before proceeding to consider as to whether there was any unlawful assembly and what offence has been committed by each of the accused person, it would be necessary to refer to the deposition of the witnesses.

Discussion of eye witnesses

19. Hariram (PW-2), Bimla Bai (PW-4), Sahasram (PW-5), Ramanuj Chandrawanshi (PW-6), Bhagwat (PW-7), Dayavati (PW-8), Kumar (PW-9) and Jairam (PW-11) are the eye witnesses.
20. Hariram (PW-2), is the first informant, with whom the fight initially broke out. Gajanand assaulted him by axe over his left hand. Kumar (PW-9) came to the field at this juncture and separated them whereupon Hariram (PW-2) proceeded and reached his house and informed about the incident to his father Kanchu (deceased), Bimla Bai, his mother and Sahasram. His father advised him to lodge FIR on which he along with the deceased Kanchu, Sahasram and Bhagwat were going to the police station for lodging the report, but on the way, near temple, accused persons restrained and started

abusing & assaulting them by means of club and axe. He would state that Sonu, Lala and Gajanand injured them by axe, whereas Bhulav, Meghu and others used club. Villagers Baisakhu, Jairam, Ramanuj, Narad and many more were trying to pacify the accused persons, but the accused did not yield to their persuasion. At the end of para 1 of examination-in-chief, he would specifically say that since all four namely; he himself, Kanchu, Sahasram and Bhagwat were simultaneously beaten by the accused persons, he could not see as to who assaulted whom. This witness also stated about *party-bandi* (groupism) in the village and further that they belong to one group whereas the accused persons belong to other group of the village. He also stated that Kunti Bai injured him by throwing brick. There are contradictions in his case diary statement and Court statement, inasmuch as in the FIR and the statement recorded under Section 161 of the Cr.P.C., he has stated that the accused persons assaulted him before he had reached his house, however, in the Court he would say that when he had gone to the house and informed about the incident occurred in the field to his father Kanchu, Bimla Bai, his mother, Bhagwat and Sahasram, he along with these persons started for lodging the FIR, but when they reached near the temple the accused persons restrained and started beating them. In the FIR, he has attributed specific act by Sonu regarding causing injuries to him by axe, whereas in the Court statement he has attributed specific act to Gajanand in the first incident and for the second incident he has not attributed any role to Sonu, but has stated that all accused persons assaulted together. Similarly, in para 47 of the cross-examination, he would depose that his father Kanchu fell on the ground during the *maarpeet*, therefore, he could not say as to who was the first person to cause injury to Kanchu. He would further say that when he saw Kanchu, the axe had stuck on his head which was brought out by Lala.

21. Bimla Bai (PW-4) is witness to the second incident and attributes head injury caused to her husband Hariram (PW-2) by Sonu and injuries caused by axe over the head of the deceased to accused Lala. In cross-examination she has denied to have given any case diary statement to the police. Sahasram (PW-5) had seen the accused persons hurling abuses while standing in front of their house. He also says that when they were going to lodge report, the incident happened near the temple. According to this witness, accused Sonu, Lala and Gajanand have caused injuries to the deceased Kanchu by axe and when he tried orally to restrain them, Gajanand caused head injury to him by axe. This witness also admits of groupism in the village. He too speaks about presence of villagers namely Ramanuj, Jairam, Narad and many more.
22. Ramanuj (PW-6) appears to be an independent witnesses. In para 1 of his statement, he speaks about the quarrel between both the parties each having armed with club. He would say that he did not see as to who initiated the blow. Subsequently, he has been declared hostile. Bhagwat (PW-7) is the son of Sahasram (PW-5). He speaks about Kunti causing injury to Hariram by a brick and Lala causing head injury to Kanchu, however, in his case diary statement, he has not attributed any specific act to Lala. He further speaks about Gajanand causing axe blow to his father Sahasram (PW-5) over his head. Dayawati (PW-8) is relative of the injured persons. She attributes injury sustained by Kanchu to have been caused by Lala. She also says that Sonu also gave axe blow over the hand of Kanchu and Sonu causing head injury to Sahasram, however, in para 4 of cross-examination, she would state that head injury to Sahasram was caused by Gajanand. She admits that there were 60-70 persons who had assembled at the time of incident. In cross-examination she also says that Kanchu sustained head injury caused by Lala.

23. Kumar (PW-9) is witness to both the incidents, however, after admitting his presence in the first incident which happened at the agricultural field, he turned hostile insofar as the second incident is concerned. Even for the first incident, he has not made any statement of causing injuries by Gajanand over the hand of Hariram. Jairam (PW-11) is an eye witness, however, he has turned hostile. He has made inconsistent or contradictory statements about the groupism in the village as also about the incident and seizure. Thus, his statement is insignificant.
24. The expert medical opinion as well as their report in respect of the injuries sustained by the deceased and other injured persons have been proved by Dr. Ulhas Gonnade (PW-1) and Dr. R. P. Nonhare (PW-10).
25. On a reading of the postmortem report (Ex-P-1) and the injury reports (Ex-P-16 & Ex-P-18 to Ex-P-21) along with the statements of eye witnesses, it is fully proved that the deceased has suffered serious ante mortem head injury and nature of death was homicidal.
26. On comparative analysis of the statements of witnesses including their case diary statements under Section 161 of the Cr.P.C., the following would be the summary of statement in relation to each of the convicted accused :-

Appellant – Gajanand

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	Gajanand at field assaulted Hariram (PW-2) with tangiya (Ex.D/1, page No.314)	Gajanand at field assaulted Hariram (PW-2) with tangiya Gajanand, Sonu, Lala assaulted with tangiya to all the persons.

2	Vimla Bai (PW-4)	Statement under Section 161 of Cr.P.C. was not exhibited	Gajanand with other accused persons are doing marpeet.
3	Sahasram (PW-5)	Gajanand assaulted with tangiya (Ex.D/3, page No.318)	Gajanand, Sonu and Lala assaulted deceased Kanchu with tangiya Gajanand assaulted PW-5 Sahasram with tangiya
4	Bhagwat (PW-7)	Gajanand assaulted PW-5 with tangiya Gajanand assaulted with tangiya (Ex.D/4, page No.319)	Gajanand assaulted PW-5 Sahasram with tangiya Gajanand assaulted with tangiya to PW-7 Bhagwat
5	Dayawati (PW-8)	Gajanand assaulted with tangiya to Kanchu (Ex.D/5 page No.321)	Gajanand assaulted PW-5 Sahasram with tangiya

Appellant – Sonu

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	Sonu assaulted with Tangiya.	Gajanand, Sonu, Lala assaulted with Tangiya to all the persons.
2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	Sonu assaulted with Tangiya to PW-2 Hariram.
3	Sahasram (PW-5)	No specific attribution against the appellant Sonu	Gajanand, Sonu and Lala assaulted deceased Kanchu with Tangiya.
4	Bhagwat (PW-7)	No specific attribution against the appellant Sonu.	No specific attribution against the appellant Sonu.
5	Dayawati (PW-8)	Sonu assaulted with Tangiya to Hariram (PW-2).	Sonu assaulted PW-2 Hariram with Tangiya.

			Sonu assaulted kanchu's hand with tangiya.
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Appellant – Lalaram

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	No specific attribution against the appellant Lalaram	Gajanand, Sonu, Lala assaulted with Tangiya to all the persons.
2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	Lala assaulted with Tangiya to deceased Kanchu.
3	Sahasram (PW-5)	No specific attribution against the appellant Sonu	Gajanand, Sonu and Lala assaulted deceased Kanchu with Tangiya.
4	Bhagwat (PW-7)	No specific attribution against the appellant Sonu.	Lala assaulted deceased Kanchu with Tangiya.
5	Dayawati (PW-8)	Lala assaulted with Tangiya to Hariram (PW-2)	Lala assaulted Kanchu with tangiya.

Appellant – Bhulau

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	No specific attribution against the appellant Bhulau.	Bhulau assaulted with Lathi to all the persons.
2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	No specific attribution against the appellant Bhulau.

3	Sahasram (PW-5)	No specific attribution against the appellant Bhulau	No specific attribution against the appellant Bhulau.
4	Bhagwat (PW-7)	No specific attribution against the appellant Bhulau.	No specific attribution against the appellant Bhulau.
5	Dayawati (PW-8)	No specific attribution against the appellant Bhulau.	Assaulted with Lathi to PW-2 Hariram.

Appellant – Meghu @ Meghnath

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	No specific attribution against the appellant Meghu @ Meghnath.	No specific attribution against the appellant Meghu @ Meghnath.
2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	No specific attribution against the appellant Meghu @ Meghnath.
3	Sahasram (PW-5)	No specific attribution against the appellant Meghu @ Meghnath.	No specific attribution against the appellant Meghu @ Meghnath.
4	Bhagwat (PW-7)	No specific attribution against the appellant Meghu @ Meghnath.	No specific attribution against the appellant Meghu @ Meghnath.
5	Dayawati (PW-8)	Assaulted with Tangiya to PW-7 Bhagwat.	Assaulted with Lathi to Hariram (PW-2).

Appellant – Paras

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	No specific attribution against the appellant Paras.	No specific attribution against the appellant Paras.

2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	No specific attribution against the appellant Paras.
3	Sahasram (PW-5)	No specific attribution against the appellant Paras.	No specific attribution against the appellant Paras.
4	Bhagwat (PW-7)	No specific attribution against the appellant Paras.	No specific attribution against the appellant Paras.
5	Dayawati (PW-8)	No specific attribution against the appellant Paras.	No specific attribution against the appellant Paras.

Appellant – Pusau

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	No specific attribution against the appellant Pusau.	No specific attribution against the appellant Pusau.
2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	No specific attribution against the appellant Pusau.
3	Sahasram (PW-5)	No specific attribution against the appellant Pusau	No specific attribution against the appellant Pusau.
4	Bhagwat (PW-7)	No specific attribution against the appellant Pusau.	No specific attribution against the appellant Pusau.
5	Dayawati (PW-8)	No specific attribution against the appellant Pusau.	No specific attribution against the appellant Pusau.

Appellant – Kunti Bai

S.No.	Witness	161 Cr.P.C. Statement	Court Statement
1	Hariram (PW-2)	Assaulted with Stone to Hariram (PW-2)	Assaulted with Bolder to Hariram (PW-2).
2	Vimla Bai (PW-4)	Statement Under Section 161 of Cr.P.C. was not exhibited.	Assaulted with Bolder.
3	Sahasram (PW-5)	No specific attribution against the appellant Kunti Bai	No specific attribution against the appellant Kunti Bai
4	Bhagwat (PW-7)	No specific attribution against the appellant Kunti Bai.	No specific attribution against the appellant Kunti Bai.
5	Dayawati (PW-8)	Assaulted with Stone to Hariram (PW-2)	Assaulted with Stone to Hariram (PW-2).

27. In order to establish the guilt of the accused persons in the light of admission by Hariram (PW-2) that since there was a free fight between the members of both the parties and about 60-70 persons had assembled at the time of fight it would be necessary to notice the law laid down by the Supreme Court as to the criminal liability of the accused persons with or without aid of Section 34 and 149 of the IPC.
28. In **Gajanand and Others v. State of Uttar Pradesh**¹, the Supreme Court quoted the observation made by Harrison, J. in – Ahmad Sher v. Emperor, AIR 1931 Lah 513 (A) that when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders".

¹ AIR 1954 SC 695

29. In **Dwarka Prasad v. State of U.P.**², the Supreme Court reiterated the law referring to **Gajanand** (supra), **Kanbi Nanji Virji and Others v. The State of Gujarat**³, **Puran v. State of Rajasthan**⁴ and **Vishvas Aba Kurane v. State of Maharashtra**⁵.
30. The same principle has been reiterated in by the Supreme Court in **State of Haryana v. Chandvir and Others**⁶, to hold that 'a reading of the evidence clearly goes to show that after the first incident of quarrel between the ladies had taken place, when the deceased-Rajpal was passing through the road and had come near the house of the accused, there appears to have arisen a quarrel between the accused party and the prosecution party. Both the incidents had taken place during the course of the same transaction. The question then is: whether it is possible to believe the evidence of the injured witnesses implicitly to base the conviction of the respondents ? It would appear from the evidence adduced that there is no common object or intention to kill the deceased. It would appear that it is a case of free fight between the accused party and the prosecution party on account of the quarrels between the two families. There is evidence that some of the accused suffered injuries in the same transaction and the prosecution has not explained injuries on them. In those circumstances, the liability of each of the accused has to be considered independently. In that attempt, we have scanned the evidence of injured witness carefully vis-a-vis the reasoning given by the High Court. It would appear that all the witnesses have improved upon their version stated in the statement recorded under Section 161 Cr.P.C. In fact, the Sessions Court itself has noted that some of the witnesses have spoken falsely in their evidence with regard to some of the accused. Under those circumstances, would it be possible to place implicit

2 1993 Supp (3) SCC 141

3 (1970) 3 SCC 103

4 (1976) 1 SCC 28

5 (1978) 1 SCC 474

6 (1996) 8 SCC 678

reliance on the evidence of these injured witnesses, though their presence stands confirmed ? We have given our anxious consideration to the facts in this case. We find that it is absolutely difficult to place implicit reliance on their evidence. It is true that *falsus in uno, falsus in omnibus* has no application in criminal trial. Court has to endeavour to separate the grain from the chaff and accept that part of the evidence which is found to be truthful and consistent. Having made that attempt, we find that on the facts of this case, it is very difficult to separate the grain from the chaff. It is seen that the participation of five of the accused is totally disbelieved by the Sessions Court as well as the High Court. As regard the participation of the eight accused in the commission of the crime, it is seen that witnesses fabricated and improved their version from stage to stage. Therefore, it would be very difficult to place implicit reliance on each of their evidence or cumulatively to convict accused 1 and 2. The two accused are alleged to have attacked the deceased. Each of the injuries is not independently sufficient to cause death. Moreover, in a case of free fight, Section 149 cannot be applied. It is difficult to accept the prosecution case to hold that A1 and A2 alone had attacked the deceased in the melee. It might be that some other had attacked the deceased. PW.9, father of the deceased is found to have given false evidence. On the facts and circumstances, neither Section 34 nor Section 149 can be applied to any of the accused.'

31. We shall now apply the law to the evidence adduced by the prosecution, as noted in the preceding paragraphs of this judgment. The evidence available in the case would clearly depict that there was a gathering of about 60-70 persons and after initial altercation a free fight broke out, in which both the parties had sustained injuries though unfortunately one member of Hariram's fraction, the informant in ST No.117/99, has died in the incident.

32. The evidence would definitely suggest that while Hariram would admit in cross-examination that because of melee of a big crowd he could not see as to who attacked whom, the fatal blow received by Kanchu has been attributed to Gajanand, Sonu, Lala by Sahasram (PW-5), whereas Dayavati (PW-8), in her case diary statement, would attribute this fatal injury to be caused by Gajanand alone, however, in Court this witness says that Gajanand assaulted Sahasram with tangi. Thus, the witness namely Sahasram (PW-5), who makes allegation against Gajanand, Sonu & Lala to have caused injuries to the deceased Kanchu, has not made such allegation in his statement given to the police under Section 161 of the Cr.P.C. Dayawati (PW-8), who ascribed fatal blow to the deceased Kanchu having been made by Gajanand in her case diary statement, would not make such statement in the Court. Thus, both the eyewitnesses failed to inspire confidence to sustain conviction of Gajanand, Sonu & Lala for causing fatal blow to the deceased Kanchu.
33. Since the law is settled by the Supreme Court that in a case of free fight there is no application of the provision under Section 34 and 149 of the IPC and each accused would be liable for his individual act, none of the accused can be held liable to have committed the murder of the deceased Kancha
34. Moreover, as mentioned in the chart, extracted *supra*, on the basis of statement of witnesses in respect of each of the accused, there is material contradictions in the statement of witnesses as to who assaulted the deceased Kanchu. If statement made by some of the witnesses that at least 3 persons attacked Kanchu by axe is believed, the deceased should have suffered many injuries, however, Dr. Ulhas Gonnade (PW-1), who has conducted the postmortem on the dead body of the deceased, has found one injury over anterior cranial fossa and other injury near left ear and third injury in form of blood clotting above left eye.

35. According to the witnesses, the deceased was attacked with axe, whereas Dr. Ulhas Gonnade (PW-1) has found that injury Nos.1 to 3 being responsible for death were lacerated wounds. On the other hand, the witnesses would say that the axe causing head injury got stuck in the skull of the deceased, meaning thereby that the sharp edge of the axe was used. If sharp edge was used, the deceased should ordinarily suffer cut injury and not lacerated wound. Thus, the fatal injury suffered by the deceased does not confirm to the narration of manner of causing injury by so many persons, as stated by the witnesses.
36. It would thus appear, as has been admitted by Hariram (PW-2), the informant himself, that there was a free fight, therefore, he could not see as to who attacked whom and, as such, it is a case where neither Section 149 of the IPC would attract nor would it be safe to convict any one or more persons for their individual act, because while one witness would attribute fatal blow to only one accused, the other would attribute the fatal blow on more than one accused and the names are not common and moreover, there is departure or contradiction from their case diary statement. Accordingly, all the accused persons are entitled to benefit of doubt.
37. In the result;
- CRA No.210 of 2004 is allowed. Conviction and sentence imposed upon the appellants under Sections 148, 307 read with Section 149 (three times), 302 read with Section 149 and 323 read with Section 149 of the IPC are hereby set aside. They are on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellants shall appear before the higher Court as and when directed.

- CRA No.114 of 2004 is allowed. Conviction and sentence imposed upon the appellant under Section 325 of the IPC are hereby set aside. She is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of Section 437-A of the Cr.P.C. The appellant shall appear before the higher Court as and when directed.
- CRR No.237 of 2004 is dismissed.

CRR No.169 of 2004 :

38. This revision has been preferred by Gajanand and six others who have been convicted in ST No.117/1999, however, their criminal appeal, being No.210 of 2004, has been allowed by this Court by this judgment on the ground that in case of free fight, where pitched battle was fought by both the parties against each other, nobody could see as to who attacked whom, therefore, it would not be safe to convict any one or more persons with the aid of Section 34 or 149 of the IPC.
39. Gajanand lodged an FIR against Hariram, Bhagwat, Sahas Ram, Lalji & Sarju for causing grievous injuries to the members of applicants' fraction. The accused persons herein were charged for commission of offence under Sections 148, 323 (six times), 294, 506 Part II & 325 of the IPC alleging that on 16-1-1999 at about 10.00 am when the applicant No.1 was returning back to his house after watching the gram field of Bullau Keat, on the way the respondent No.2 Hariram stopped the applicant No.1; asked him why you were abusing me; the applicant No.1 replied that he has not abused him; on which the respondent No.2 assaulted to Gajanand. Kumar Chouhan saw this incident; he stopped the quarrel of Gajanand & Hariram. Thereafter, the respondent No.2

came back to his field and the applicant No.1 went to his house. On the way the applicant No.2 narrated about the incident to Shatrudhan, Khelan & Ramanuj. The applicant No.1 came back to his house and narrated about the incident to Sonu, Lal & Chetan. Due to this dispute on 16-1-1999 both the parties i.e. the respondents No.2 to 6 and Kanchu formed unlawful assembly and assaulted the applicants.

40. It has been argued that there is sufficient evidence against the accused persons/respondents No.2 to 6, therefore, the trial Judge should have convicted them.
41. On the other hand, learned counsel appearing for the respondent No.2 to 6 would take this Court through the entire evidence and the contents of the judgment to argue that it was a case of free fight and the prosecution witnesses have themselves admitted that they could not see as to which accused was carrying what kind of weapon and who has committed the *marpeet* by hand and fist.
42. Having heard learned counsel appearing for the parties at length and on perusal of the evidence together with the impugned judgment, it appears the trial Judge has taken one of the plausible view in the matter, which is borne out from the record. Even if the trial Court was persuaded by the fact that the member of the opposite party has been murdered, therefore, the applicants/complainants were aggressor and the non-applicants No.2 to 6 having sustained lesser injuries they are not to be convicted, the evidence available would show that it was a case of free fight, therefore, when the other set of accused persons in the counter case have been acquitted on the ground that it is a case of free fight, the respondents No.2 to 6 also deserved to be acquitted on the same reasoning.

43. It is the well settled proposition of law that while considering an appeal or revision application against the acquittal, if the trial Court has considered all the material evidence and the view taken by the trial Judge is borne out from the record, the High Court should not interfere merely because another view was possible.
44. It is also the well settled law that when two views are possible in the case and the trial Court has taken one of the views, the judgment of acquittal should not be converted into a judgment of conviction. (See : **State of M.P. v. Bachhudas alias Balram and others⁷**).
45. In the result, the CRR No.169 of 2004 is liable to be and is hereby dismissed.

Sd/-

Sd/-

Judge

Judge

Prashant Kumar Mishra

Anil Kumar Shukla

Gowri