

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 28/04/2017

Judgment delivered on: 17/05/2017

CRA No. 406 of 2007

- Amit Rai @ Paltu S/o Anup Rai, aged about 23 years R/o New Forest colony Jagdalpur(Bastar)

---- Appellant

Versus

- State of Chhattisgarh Through D.M. Jagdalpur (Bastar)

---- Respondent

CRA No. 408 of 2007

- M. Raghuram Naidu S/o M. Rammana Ram Naidu, aged about 24 years, R/o Santoshi Ward, Kumhar Para, Jagdalpur, District-Bastar, Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through Station House Officer Police Station- Jagdalpur, District-Bastar, Chhattisgarh

---- Respondent

CRA No. 580 of 2007

- Ajay Kumar @ Aju, S/o Ram Garib Verma, aged 25 years, R/o Santoshi Ward (Kumharpara) Jagdalpur, Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through PS-Bodhghat Jagdalpur, Chhattisgarh

---- Respondent

CRA No. 460 of 2008

1. Shakti Pandey @ Babla S/o Sakleshwar Pandey, aged about 19 years, R/o New Forest Colony Kumharpara Jagdalpur, Distt.-Bastar, Chhattisgarh
2. Nagendra Upadhyay @ Mannu S/o. Purshottam Upadhyay aged about 25 years, R/o Village-Chapka, Thana-Bhanpuri, Distt.-Bastar, Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through the District Magistrate, Jagdalpur Distt. Bastar, Chhattisgarh

---- Respondent

ACQA No. 02 of 2008

- State of Chhattisgarh Through The District Magistrate, Jagdalpur, Distt. Bastar, Chhattisgarh

---- Appellant

Versus

1. Sakleshwar Pandey, S/o Late Shri-S.P. Pandey, aged about 45 years(ASI) R/o New Forest Colony, Jagdalpur, Chhattisgarh
2. Chintu Goyal @ Nishant Goyal, S/o Shri Somdatt Goyal, aged about 22 years, R/o Goyal Industries, Near Saket Colony, Jagdalpur, Chhattisgarh

---- Respondent

For the Appellants	: Shri Vimlesh Bajpai Shri Y.C. Sharma and Shri P.C. Pant, Advocates.
For the State/Respondent	: Shri Ravindra Agrawal, Panel Lawyer.
For the Respondents	: Shri P.K.C. Tiwari, Sr. Counsel assisted by Shri P.K. Tulsyan in Acquittal Appeal.

Hon'ble Shri Justice Pritinker Diwaker &

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Judgment

Per RCS Samant J,

17/05/2017

1. Since the above four criminal appeals and acquittal appeal arise out of the common judgment passed by Second Additional Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.343/04, the same are being disposed of by this common judgment.
2. Appellants in Criminal Appeal Nos.406/07, 408/07, 580/07 & 460/08 have challenged their conviction under Sections 302/149, 147 and 148 of Indian Penal Code (for short 'IPC') and Section 27 of the Arms Act being sentenced with life imprisonment along with fine of Rs.1000/-, R.I. for two years along with fine of Rs.500/-, R.I. for three years along with fine of Rs.500/- and R.I. for three years along with fine of Rs.500/- respectively with default stipulations. The acquittal appeal is filed to challenge the acquittal of respondents Sakleshwar Pandey and Chintu Goyal @ Nishant Goyal.
3. The case of prosecution is this, that deceased Nirmal Baghel had some previous animosity with the appellants and the acquitted

accused persons on account of some previous quarrel between them. On 24.08.04 at about 10:30 p.m. in the night deceased Nirmal Baghel along with his friend Anil Rao PW-6 was standing in the street and smoking a cigarette. Acquitted accused ASI Sakleshwar Pandey and appellant Sakti Pandey came there on a motorcycle. Acquitted accused ASI Sakleshwar Pandey was armed with a revolver and was in civil dress. At the same time, respondent /acquitted accused Chintu Goyal along with appellants Raghu and Amit came on the spot on another motorcycle and appellant Ajju @ Ajay and Narendra also came on another motorcycle on the same spot. Appellant Amit was hiding a sharp edged weapon, acquitted accused Chintu Goyal engaged in conversation with deceased on the matter of previous quarrel between them. Deceased was trying to appease them by saying that he does not want to have any quarrel with them. In the meanwhile, appellants and other accused persons started assaulting the deceased. At the same time, acquitted accused ASI Sakleshwar Pandey took out his revolver and shot on the chest of Nirmal Baghel, Chintu Goyal also shot deceased with a countrymade firearm. Appellant Amit used the sharp weapon to assault the deceased causing him injury and one of the appellant used a *gupti* to assault the deceased. Deceased fell down on the ground and died on the spot. Deceased Nirmal Baghel was taken to Maharani hospital, Jagdalpur where doctors declared him, dead.

4. Anil Rao PW-6 gave information of this incident to father of deceased Mangal Ram Baghel PW-1, who immediately lodged FIR in P.S.-

Bodhghat, District-Jagdalpur on 25.08.2004 at 00:10 a.m. Offences under Sections 147, 148, 149 & 302 of IPC and Section 25 and 27 of the Arms Act were registered. On the basis of information given by Mangal Ram Baghel PW-1, morgue intimation Ex.P/2 was also recorded on 25.08.2004, at 00:15 a.m. Inquest of the dead body of deceased was conducted vide Ex.P/3.

Dr. K.K. Nag PW-5 conducted the postmortem on the dead body of the deceased. He opined vide his report Ex.P/20 that all the injuries caused to the deceased were anti-mortem in nature and death resulted due to coma because of excessive haemorrhage. At the instance of appellant Raghu Ram vide his memorandum Ex.P/8, two numbers of live cartridge of 0.303 bore were seized from his possession vide Ex.P/9. At the instance of appellant Ajay vide his memorandum Ex.P/10 a *banda* of iron (cutting tool) was seized from his possession vide Ex.P/11. At the instance of appellant Amit Rai vide his memorandum Ex.P/12 a sword-made of iron was seized from his possession Ex.P/13. At the instance of appellant Nagrendra vide his memorandum Ex.P/14 a country-made firearm loaded with a one round live cartridge of 0.303 bore and another live cartridge of 0.315 bore was seized from his possession vide Ex.P/15. At the instance of Shakti Pandey vide his memorandum Ex.P/16 a country-made firearm loaded with one round cartridge and three numbers of live cartridge of 0.315 bore were seized from his possession vide Ex.P/17. A pistol in operating condition and 10 numbers of live cartridge of 9 m.m. pistol were seized from the possession of acquitted co-accused Sakleshwar Pandey vide Ex.P/18.

Dr. K.K. Nag PW-5 examined seized article *banda* vide Ex.P/21 and gave his opinion regarding the injuries caused to the deceased. Spot map was prepared vide Ex.P/22. Bloodstained soil and plain soil from the spot were seized vide Ex.P/23. A copper colored bullet, a strip of iron, one motorcycle and one bag of cloth were seized from the spot vide Ex.P/24. Skin around of the bullet injuries of the deceased was preserved by the doctor, who conducted post-mortem. Preserved bullet and the preserved skin of the deceased were seized vide Ex.P/26. The seized firearms and cartridge were examined by armourer, who gave his report vide Ex.P/34 about the working condition of the firearms and the cartridge. Seized articles were sent for FSL examination and report vide Ex.P/36 is produced. Report of the Central Forensic Science Laboratory vide Ex.P/38 and Ex.P/39 was also collected. Acquitted accused Chintu Goyal gave his memorandum statement vide Ex.P/41 for recovery of cartridges and at his instance, five numbers of cartridge of 410 bore and one live cartridge of 303 bore were seized from his possession vide Ex.P/42. Spot map Ex.P/6 was separately prepared by Patwari S.S. Manjhi PW-9, who assisted the police investigation. Statement of witnesses were recorded under Section 161 of Cr.P.C. On completion of investigation, appellants and the other acquitted accused persons were charge-sheeted.

5. All the appellants and acquitted accused persons were charged under Sections 147, 148, 302/149 of IPC and Sections 25 and 27 of the

Arms Act. Prosecution has examined as many as 13 witnesses. On examination under Section 313 of Cr.P.C., all the appellants and co-accused persons denied the evidence of prosecution against them and pleaded innocence and false implication. Two witnesses were examined in defence of co-accused Chintu @ Nishant Goyal. Impugned judgment was passed in which, co-accused ASI Sakleshwar Pandey and Chintu Goyal were acquitted of all the charges whereas the appellants were convicted and sentenced, as aforementioned.

6. The grounds in all the appeals are these that prosecution has failed to prove its case beyond all reasonable doubts, even then the trial Court has passed the judgment of conviction against the appellants, which is totally erroneous, not being based on legally admissible evidence. The evidence of prosecution witnesses were not properly appreciated by the trial Court.
7. The ground urged in the appeal against acquittal of accused Sakleshwar Pandey and Chintu Goyal that the trial Court has erroneously appreciated the evidence of eyewitness Anil Rao PW-6 and Chingdu @ Sunil Rajput PW-7, who made a clear statement regarding presence of acquitted accused persons as a member of unlawful assembly on the spot during the commission of crime. Excess weightage has been given to minor contradictions and discrepancies, hence, the acquittal of respondent/co-accused persons, is bad in law.

8. It is submitted by counsel for the appellant Amit Rai @ Paltu that there is no evidence against the appellant. As per evidence of prosecution he did not cause any fatal injury to the deceased. The only evidence present against the appellant is this, that he was armed with a *banda* (cutting tool) and no fatal injury was caused by use of this sharp weapon. Apart from that the statements of witnesses against these appellants are not reliable and he deserves to be acquitted of charges.
9. Learned counsel for appellant Raghu Ram and Ajay @ Ajju has submitted that there is no evidence to connect these accused persons with the incident, as they neither participated nor assaulted the deceased in any manner. It is the admission of Anil Rao PW-6 in his cross-examination Para-22, that accused ASI Sakleshwar Pandey came on the spot after leaving appellant Ajju and Raghu at their residence, when the altercation started and after hearing the commotion, appellants Ajju & Raghu came on the spot, this does not mean that they have participated in commission of crime. Instead, it is stated that they were present on the spot simply in capacity of bystander, hence, there was no evidence to prove that appellants Raghu and Ajju were the members of unlawful assembly.
10. Learned counsel for the appellants Shakti Pandey and Nagendra submits, that the memorandum and seizure regarding recovery of country-made firearm has not been proved by the prosecution against these appellants. Anil Rao PW-6 is not a trustworthy witness, his statement is full of contradictions and omissions. The seized firearms were not examined by any ballistic expert. Ex.P/34 is the report of one

armorer and that armorer has also not been examined before the trial Court. CFSL reports Ex.P/38 and Ex.P/39 have no evidentiary value. There is no evidence to confirm that the bullet found inside the body of the deceased was fired from one of the arms seized from the possession of accused persons. The lodger of FIR Mangal Ram Baghel PW-1 has denied the lodging FIR Ex.P/1 and stated that information regarding FIR was given by his wife Sukhdei PW-3 whereas FIR is signed by him, this makes the FIR unreliable. The seals of the seized articles pistol and country-made firearms etc. were tampered, hence, the report regarding the working condition of these articles cannot be regarded as legally admissible evidence. It is also submitted that Anil Rao PW-6 has stated that ASI Sakleshwar Pandey co-accused fired from his revolver on the chest of the deceased. Later on, acquitted co-accused Chintu fired from a country-made firearm on the abdomen of the deceased. This statement falsifies the prosecution case as no bullet injury was found on the abdomen of the deceased. Further, there is no evidence that any bullet was fired from the revolver seized from the possession of co-accused Sakleshwar Pandey. It is further stated that as per report Ex.P/34, the bullet was fired from the country-made firearm seized from the appellant Nagendra and no firearm was recovered and seized from the possession of appellant Chintu Goyal. Under these circumstances, the evidence of Anil Rao PW-6 is totally unreliable. FSL report Ex.P/39 does not connect the appellant accused persons with the offence in any manner. Hence, for these reasons, no case of conviction was made out against these appellants.

11. Learned counsel for the State has argued in support of acquittal appeal, it is submitted that FIR was lodged within two hours after the incident. Under the facts and circumstances of this case, this delay of two hours is not fatal for the prosecution in any manner. Apart from that all the accused persons were named in the FIR. The statement of Mangal Ram Baghel PW-1, that he was not an informant of FIR Ex.P/1 is of no consequence as FIR is not substantive piece of evidence. On the contrary, Mangal Ram Baghel PW-1 has deposed before the Court in accordance with his previous statement under Section 161 of Cr.P.C. and stated that he was informed by Anil Rao PW-6 about the incident, in which, appellant and co-accused persons assaulted his son Nirmal Baghel(the deceased). The statement given by Mangal Ram Baghel PW-1 is explained by Sukhdevi PW-3, that she accompanied her husband Mangal Ram Baghel PW-1 when report was lodged. The statement of Dr. K.K. Nag PW-5 clearly demonstrate that two injuries were caused to the deceased by use of firearms, which is confirmed by the FSL report. Opposing the grounds in appeal it was submitted that minor discrepancies and contradictions in the statement of witnesses does not make them unreliable. Supporting the conviction of the appellants, it was submitted that the acquittal of respondent/co-accused persons Sakleshwar Pandey and Chintu Goyal by the trial Court is erroneous and contrary to the evidence on record. The eyewitness account regarding the presence of respondents on the spot and their active participation has been disbelieved by the trial Court on flimsy ground. The story of *alibi* of

respondent Chintu Goyal is cooked-up and afterthought which should have been outrightly rejected by the trial Court. The defence evidence produced in this respect was totally unreliable and was not enough to contradict the statement of eyewitnesses regarding the presence and activity of respondent Chintu Goyal on the spot. Hence, prayed that suitable orders be passed in the acquittal appeal and the conviction of appellants be upheld.

12. Replying to the arguments of counsel for State Government, the counsel for respondents in acquittal appeal has submitted that the credibility of FIR Ex.P/1 is doubtful on account of denial by Mangal Ram Baghel PW-1 that he was the informant. It is clearly demonstrated from the evidence on record that no shot was fired from the service revolver seized from the possession of respondent Sakleshwar Pandey and further, no firearm was seized from the possession of Chintu Goyal. The eyewitness account regarding the shot fired by respondent Sakleshwar Pandey and Chintu Goyal on the parts of the body named, is falsified by the postmortem report. Further, there is also a big *lacuna* in the prosecution case. The ground of *alibi* with respect to acquitted accused person Chintu Goyal has been fully established in defence on the basis of the defence witnesses examined and the document produced, which demonstrates that on the date of incident, respondent Chintu Goyal was not present in the city of Jagdalpur. On the contrary, he was present on his job in the Sawmill of Sitaram Agrawal on the date of incident i.e. 24.08.04, which is sufficient proof against the prosecution case. Further, it is also

submitted that on the basis of admission made by Anil Rao PW-6, appellant Ajju and Raghu were not a member of unlawful assembly in the commission of crime, who deserve to be acquitted of charge, under this circumstance the applicability of Section 149 of Cr.P.C. comes to an end. The incident took place all of a sudden, which started with altercation between deceased and the appellants. It is also submitted that as per the allegation of prosecution and evidence of Anil Rao PW-6 the only and interested witness, the acquitted accused person Sakleshwar Pandey and Chintu were the persons, who fired the shots causing bullet injuries to the deceased which were fatal for him is not believable Hence, these respondents cannot be held responsible for the death of deceased Nirmal Baghel.

13. Considering the material on record and the arguments submitted the question in these appeals are as under:-

1. whether the conviction against the appellants is supported by evidence of prosecution beyond all reasonable doubt ?
2. whether the respondents in acquittal appeal have been erroneously acquitted ?

14. The key witness in this case is Anil Rao PW-6. He has stated in his examination in chief, that he accompanied deceased Nirmal Baghel at the time of incident when deceased was standing near a shop and smoking cigarette. Another witness Chingdu PW-7 called both of them and they all stood talking, when appellants and acquitted accused persons arrived on the spot on different motorcycles. This witness saw that acquitted accused ASI Sakleshwer Pandey was in civil dress and

was armed with a revolver and appellant No.1 Amit Rai was armed with a sharp edged weapon. In his presence, argument started between deceased-Nirmal Baghel, appellant and acquitted accused persons with reference to the previous quarrel. Deceased made a statement that he does not want to have any quarrel or dispute with them, but the appellants and acquitted accused persons kept exhorting him. Anil Rao PW-6 requested acquitted accused Sakleshwar Pandey to interfere in the altercation, then acquitted accused Sakleshwar Pandey took out his revolver and shot on the chest of the deceased, thereafter acquitted accused Chintu took out a country-made firearm and fired another shot on the deceased. The first shot got its target on the chest of the deceased and the second shot got its target on the abdomen of the deceased, thereafter, Amit took out *banda* (a sharp edged weapon) and assaulted the deceased causing injury on his face. At the same time, one of the accused person took out a *gupti* and stabbed on the back of the deceased. Appellants and acquitted accused persons fled from the spot on their motorcycles. Anil Rao PW-6 informed and called the members of the family of deceased and the deceased died when he was taken to the hospital.

15. Reliability of the statement of Anil Rao PW-6 is challenged on the basis, that he was a friend of the deceased, as per his statement in examination-in-chief on his asking, acquitted accused ASI Sakleshwar Pandey told him that he had come to leave Ajju which is further confirmed by his statement in cross-examination in Para-22 that

acquitted accused Sakleshwar Pandey had come back after leaving appellant Ajju and Raghu at their residence when the dispute started. On hearing the altercation, appellant Ajju and Raghu came on the spot and they were present near their place of residence, hence, their presence on the spot was merely in the capacity of bystander, which rules out their involvement in the incident and there being a member of unlawful assembly. On this basis, it is argued that in case of non-inclusion of appellant Ajju and Raghu, the charge of forming of unlawful assembly fails.

16. On minutely scrutinizing the examination-in-chief and cross-examination of Anil Rao PW-6, it appears that he has stated that all appellants and co-accused persons were involved in altercation with the deceased and his statement that ASI Sakleshwar Pandey was armed with a revolver and appellant Amit was armed with a sharp edged weapon seems to have been in knowledge of all the accused persons present on the spot. The evidence of this witness about the statement made by acquitted accused ASI Sakleshwar Pandey and that the residence of appellant Ajju and Raghu was nearby is not sufficient to give them a ground in defence, as it is further admission in his cross-examination that the place of residence of Ajju and Raghu was at a distance about 500 mtr. which does not make a sense in saying that appellant Ajju and Raghu were standing in front of their residence. Otherwise, also his statement has remained unrebutted in his cross-examination. Some discrepancies in his previous statement Ex.D/2 have been pointed out in the cross-examination which are of

no consequence and insignificant. In whole of his cross-examination, there is no such statement which can be regarded as contradictory in rebuttal to his statement in examination-in-chief. Adverse suggestions given to him have been specifically denied. Statement of Anil Rao PW-6 is also challenged by the appellants on this ground, that according to him the first shot fired by ASI Sakleshwar Pandey found its mark on his chest, whereas, the so called second shot fired by acquitted accused Chintu found its mark on his abdomen, is belied by the medical evidence as medical evidence speaks of only one injury from firearm.

17. Dr. K.K. Nag PW-5 conducted the postmortem of deceased Nirmal Baghel and found injuries as follows:-

- An incised wound of 10 ½ x 1½ cm depth bone deep situated on the left facio maxillary region extending from tip of nose upto lateral part of left eye, running obliquely upwards.
- A penetrating lacerated wound with inverted margin sized 1x1 cm situated right side of the chest at the level of anterior axillary fold over to 6-7 intercostal space. 6 cm lateral to right nipple. The wound surrounded by numerous multiple puncture abrasions scattered all around the wound at right side of the chest wall sized 17x20 cm. Colour was deep brownish black.
- one incised wound 1x ½ x1 cm. situated at 4 cm below the injury No.2 margin was clearcut and sharp with scattered clotted blood over the margin.
- A lacerated wound with everted margin sized 2x1 cm x deeply

seated situated at 9th intercostal space in the anterior axillary line on the left side of the chest wall approx. 12 cm below the level of left nipple.

- one incised wound sized 2½ X 1 cm. X 1½ cm (muscle deep) situated on the back at lower end of thoracic region just to the midline on the right side 34 cm. below from Nape (C7) of neck with clearcut and sharp margin with blood clotted margin.
- A lacerated wound sized 1½ x 1 cm x muscle deep (deeply seated) with submuscular haematoma (clots) with inverted margin situated 3 cm below the interior angle of right scapula region(at right back).
- One abrasion sized 1x ¼ cm at right knee.
- One bullet underneath the left side of chest wall at the level of 9th to 10th intercostal space of mid clavicular line.

18. Dr. K.K. Nag PW-5 preserved and sealed the bullet head found inside the body of the deceased and he also preserved and sealed the skin from around the injury No.2 and injury No.6. In cross-examination, Dr. K.K. Nag PW-5 reiterated that he packed and sealed the articles for forensic examination. He could not specifically reply to the queries regarding the labeling etc. of the sealed articles which by itself does not make his statement unreliable. He could not explain about the direction of the entry of bullet from injury No.2 into the body of deceased which cannot be regarded as significant. His statement that bullet could have been fired from a distance of 10 ft. is not acceptable as he is not a ballistic expert. Apart from the questions asked and

answered by this witness, this fact cannot be denied, that deceased had bullet injury on his body. Number of questions were put to him, which he was not competent to answer, cannot be regarded as touching to the credibility of his statement in examination-in-chief. He admitted that there is difference between chest and abdomen and also stated that he did not find any injury of firearm in abdomen of the deceased.

19. The argument submitted by defence about the bullets fired and their finding mark on the body of deceased, is misconceived. An eyewitness on the spot can only see a person firing from a firearm on another person. Thus, Anil Rao PW-6 has stated that he saw acquitted accused ASI Sakleshwar Pandey firing a shot on the deceased which found mark on his body and then he saw acquitted accused Chintu firing a shot from country-made firearm and this shot also found mark on the body of the deceased. Anil Rao PW-6 has not stated that he examined the body of the deceased to ascertain the bullet injuries, it was the Medical officer, who has done this work and given a detailed report in this respect. There is a chance that a bullet fired may hit somebody or miss somebody which by itself does not cancel the eyewitness account about the number of bullets fired. Hence, the eyewitness cannot give a statement with precision as to the injury caused by the bullet fired from a firearm. An eyewitness can just make an assumption that bullet has hit its mark and the fact that deceased was injured and bleeding was by itself suggestive that the bullets fired had found their marks. For these reasons, the argument advanced by

the counsel for defence in this respect holds no ground and is rejected.

20. The argument advanced that deceased has only one bullet injury is also without substance. As per the statement of Dr. K.K. Nag PW-5, one bullet head was found and recovered from the left side of the chest of deceased, suspecting another injury from bullet Dr. K.K. Nag has preserved the skin, surrounding the skin of injury No.2 on right side of chest and No.6. He has described injury No.2 as penetrating wound whereas, the description of injury No.6 is a lacerated wound on the back. These preserved skins were sent for FSL examination. Report of Central Forensic Science Laboratory Ex.P/39 demonstrates that pieces of skins were examined and examination report given is this, that on chemical examination of the pieces of skins under reference, firing discharge residues were detected. This indicates the bullet injury making its entry from the injury No.2 of the body of deceased and exited from injury No.6 of the body of deceased. This explains why the second bullet head was not found inside the body of the deceased.

21. Next argument advanced is this that memorandum and seizure from the appellants and acquitted accused persons has not been proved by the prosecution. Inspector Rajendra Singh PW-13 has stated that appellant Raghu Ram gave statement under Section 27 of Evidence Act for recovery of live cartridge of 303 bore from his residence vide Ex.P/8 on the basis of which two live cartridges of the description

above were seized from his possession vide Ex.P/9. He stated that appellant Shakti Pandey made a statement for recovery of country-made firearm and cartridge from his residence vide memorandum Ex.P/6 and at his instance one country-made firearm of 315 bore and three live cartridges were seized vide Ex.P/17. He has further stated that appellant Aju made a statement for recovery of sharp edged weapon *banda* from his residence vide memorandum Ex.P/10 and at his instance *banda* was recovered Ex.P/11. He further stated that appellant Nagendra Upadhyay on interrogation gave statement for recovery of a country-made firearms from the house of acquitted accused Sakleshwar Pandey vide memorandum Ex.P/14 and at his instance country-made firearm of 315 bore, one empty cartridge and one live cartridge were seized vide Ex.P/15. Appellant Amit Rai gave memorandum statement for recovery of a sword from his residence vide Ex.P/12 and at his instance one sword was seized from his possession vide Ex.P/13. Further he has stated that one 9 mm. Pistol in operating condition was seized from acquitted accused ASI Sakleshwar Pandey with 10 round live cartridges seized vide Ex.P/18. In cross-examination his statement has remained unrebutted.

22. Witness of these procedures Radhe Kumar Baghel PW-2 has supported the prosecution. Other witnesses of these procedures have not been examined by the prosecution. In this manner, the investigative procedure conducted regarding the seizure of articles on the basis of memorandum statement of the appellants and acquitted accused Sakleshwar Pandey are proved. Inspector Rajendra Singh

PW13 has stated that the seized articles were sent for forensic examination to Central Forensic Science Laboratory Chandigarh. Report Ex.P/38 has been received in this respect. Ex.P/39 is a report given by junior scientist officer ballistic which can be regarded as admissible evidence under Section 293 of Cr.P.C.

In the judgment of State of Himachal Pradesh Vs. Mastram (2004) 8 SCC 660, it was held by the Hon'ble Supreme Court that report of CFSL is admissible evidence under Section 393 of Cr.P.C.

Argument for defence that it was the duty of prosecution to prove that the packets and seals on the articles seized were intact throughout from the time of seizure to the time of examination by experts is not acceptable. Format statement of Investigating Officer about finding the seals intact is enough. It was the burden of defence to establish and introduce the factum of tampering of seals and articles, in which they have not succeeded, as it is evident from the evidence of witnesses.

As per report Ex.P/3 the country-made firearms and the country-made pistol sent for examination were found to be in working condition. This evidence is though not conclusive but is sufficient to hold that appellant and acquitted accused from whom the firearms were recovered had in their possession firearms at the time of the recovery and seizure which suggests the availability of firearms for use at the time of incident.

23. Evidence of search and seizure made on the basis of memorandum by itself cannot be held as conclusive because this proves only the

fact that the concerned was in possession of the article in question at the time of recovery. Other investigations are made to connect the recovered article with the incident. These articles were sent for FSL examination and report Ex.P/36 has established that the blood was found on the sword seized from the possession of appellant Amit Rai. However, there is no serological examination report with respect to this article opining about the origin of blood. Hence, this evidence is also not conclusive.

24. Even though, the evidence on the basis of scientific examination of the seized articles does not help in arriving at any conclusion. Thus, the only evidence to appreciate on the basis of these investigative procedures is that, availability of such articles with the appellant/accused persons which may have been used in the incident. In case, the recovery and the scientific evidence is not sufficient to arrive at a conclusion of guilt, the prosecution case does not fail. The evidence of eyewitnesses in such cases, is more important which can find corroboration from other relevant facts and can help in arriving at a conclusion. Statement of an eyewitness that he saw the accused holding and using an article or weapon is more relevant to establish prosecution and use at the time of incident.

25. Another important witness on the spot of incident is Chingdu @ Sunil Rajput PW-7. According to his statement, he was inside his house when he heard some bursting sound, hearing which he came out of his house and saw that deceased was being beaten by 5 persons and

the persons were namely the acquitted accused Chintu Goyal, ASI Sakleshwar Pandey, appellant Shakti Pandey and Amit Rai and one another person, whose name he could not recollect. He saw deceased lying on the ground and bleeding. He also saw Shakti Pandey firing from a pistol on the deceased. Thereafter, the accused persons and others started to leave from the spot. Then, all of sudden the deceased got up and started walking and on seeing this appellant Amit Rai assaulted on his face with a weapon on which deceased again fell down on the ground and then, all the accused persons fled from the spot. In cross-examination, presence of accused persons and one another person he could not identify, is not rebutted in any manner. There is no other statement in his cross-examination which could be considered as a rebuttal and a contradictory statement to his statement in examination-in-chief. Although Chingdu PW-7 has not supported the version of Anil Rao PW-6 and in all particulars, he has witnessed the incident in the later part which is sufficient to corroborate the statement of Anil Rao PW-6.

26. Another argument advanced by the appellant/accused persons regarding the credibility of FIR is considered. Mangal Ram Baghel PW-1 is father of deceased, he was informed by Anil Rao PW-6 about the incident. When he went to the spot he found his son (deceased) in injured condition, who told him that it was Sakleshwar Pandey, who assaulted him with a *Katta* and then he died. He denied the lodging report Ex.P/1 though, he admitted his signature in FIR Ex.P-1. Further, he has stated that it was his wife, who gave information on the basis

of Ex.P/1 was written. Although, he admits giving information for recording of morgue Ex.P/2 when leading questions were asked by the prosecutor with the permission of the trial Court. In cross-examination, by defence, he reiterated that he was not the informant of which FIR Ex.P/1. He is only hearsay witness, stating on the basis of information received from Anil Rao PW-6.

27. Sukhdei PW-3 is mother of deceased and wife of Mangal Ram Baghel PW-1. She has stated about the information received from Anil Rao PW-6 regarding the incident and about going to PS-Bodhghat for lodging the report. She has stated that on her information report was lodged, but later the FIR was signed by her husband. In examination-in-chief, she has stated that before dying her son told that ASI Sakleshwar Pandey and Chintu had shot him and then he died. In cross-examination by defence, some questions were put about the contents of Ex.P-2 to which she replied that she did not inform in that manner and she is a hearsay witness. The only question for consideration is. Whether, she was the lodger of FIR Ex.P/1 ? Although, she has made a statement that she came to PS-Bodhghat for the purpose of lodging report and on her information, FIR was lodged. Only this much of statement has substance, rest of her evidence is hearsay and her statement regarding oral dying declaration made by the deceased, appears to be an improvement and therefore, this part of her statement cannot be relied upon.

28. It was held in the judgment of Supreme Court **State of U.P. Vs. Naresh and Others** reported in **(2011) 4 SCC 324** in Para-26 it is

settled legal proposition that FIR is not encyclopedia of the entire case. Further, it was held in **Baldev Singh Vs. State of Punjab** reported in **(1990) 4 SCC 692** by Hon'ble Supreme Court that FIR is not a substantive piece of evidence. There seems to be some misconception and irregularities with respect to the person giving information to the police in this case. It is a fact that FIR Ex.P-1 was lodged in PS-Bodhghat in the intervening night of 24/ 25.8.2004 at 00.10 am. Information regarding the offence committed was recorded with all the necessary details, just because of there being some confusion as to who is the actual informant whether it is Mangal Ram Baghel or Sukhdei PW-3, the entire evidence in this regard cannot be thrown out or disbelieved. The basics are there that information was given and it was recorded as Ex.P-1. Mangal Ram Baghel PW-1 though signed the FIR does not admit being the informant but Sukhdei PW-3 states that she was the informant, this seems to an irregularity. Scribe of Ex.P-1 Inspector Rajendra Singh PW-13 has clearly stated that he recorded FIR Ex.P-1, on the basis of information given. This statement is sufficient and the confusion that has arisen because of the statement of Mangal Ram Baghel and Sukhdei PW-3 cannot be given weightage for the purpose of discarding FIR Ex.P-1.

29. The question of reliability of eyewitnesses in this case is taken up again. Reliance has been placed on the judgment of Hon'ble Supreme Court in **Mahavir Singh Vs. State of M.P.** reported in **AIR 2016 SC 523 12** in which it was held in Para-24 that it is the duty of the Apex Court to separate chaff from the husk and to dredge the truth from the

pandemonium of Statements if such statements. It is but natural for human beings to state variant statements if such statements go to defeat the core of the prosecution then such contradictions are material and the Court has to be mindful of such statement (Tahsildhar Singh Vs. State of U.P. AIR 1959 SC 1012) was relied upon. The judgment of Hon'ble Supreme Court in **Nagesar Vs. State of Chhattisgarh** reported in **IV (2014) CCR 280 (SC)** and **Khairuddin & Ors. Vs. State of West Bengal** reported in **II (2013) CCR 699 (SC)** are also retired upon.

30. Learned counsel for the State has relied on the judgments of **State of West Bengal Vs. Mir Mohammad** reported in **AIR 2000 SC 2988** and **State of U.P. Vs. Jagdev and Others** reported in **AIR 2003 SC 660** and **Bikau Pandey Vs. State of Bihar (2003) 12 SCC 616**, on this point, that irregularities or illegalities in investigation conducted is of no consequence.

31. Further, State counsel has placed reliance upon the judgment of Supreme Court in **Paulmeli and another Vs. State of Tamil Nadu** reported in **2014 CRLJ 3240**, **Sheesh Ram Vs. State of Rajashthan** reported in **(2014) 3 SCC 689** and **Balaka Singh and Others Vs. State of Punjab** reported in **(1975) 4 SCC 511** in which it has been discussed that the principle of “falsus in uno falsus in omnibus” is not applicable in India and the principle that the Court must separate the grain from the chaff applies.

32. In **State of U.P. Vs. Naresh and Others** reported in **(2011) 4 SCC**

324, it was observed that the High Court has doubted the case of the prosecution for non-recovery of arms from the respondent-accused, which could not have been sufficient to discarded the prosecution case. The Apex Court observed in Paragraph 30, 31 & 32 as under:-

“30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”*

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trail or core of the prosecution's case, render the testimony of the witness liable to be discredited.[Vide State v. Saravanam⁵, Arumugam v. State⁶, Mahendra Pratap Singh v. State of U.P.⁷ and Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra⁸]

31. The High Court has also fallen into error in giving significance to a trivial issue, namely, that in respect of the morning incident all the accused had not been named in the complaint/NCR.

32. It is a settled legal proposition that an FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not

be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. (Vide *Rotash v. State of Rajasthan* and *Ranjit Singh v. State of M.P.*¹⁰)”

33. Hon'ble Supreme Court observed in **Lallu Manjhi Vs. State of Jharkhand** reported in **AIR 2003 SC 854**. The Apex Court observed in Paragraph No.10 as under:-

“10. The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of the single witness.

34. Hon'ble Supreme Court observed in **State of U.P. Vs. M.K. Anthony** reported in **1985 (1) SCC 505**. The Apex Court observed in para-10 as under:-

“While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether

the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer. Having examined the evidence of this witness, a friend and well-wisher of the family carefully giving due weight to the comments made by the learned counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial court, we have no hesitation in holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible.

35. Reliance has been placed by the counsel for appellant and the respondents in revision case upon the judgments of **Patel Chela Viram Vs. State of Gujrat** reported in **AIR (1994) 81 1250**, **Mani Ram and others Vs. State of U.P.** reported in **1994 CRLJ 3848**, **Vadivelu Thevar Vs. State of Madras** reported in **AIR 1957 SC 614**, **Dilawar Singh and Other Vs. State of Haryana** reported in **2014 AIR SCW 5537** and **Ram Laxman Vs. State of Rajashthan** reported in **2016(12) SCC 389** on the principle of appreciation and evidence of witnesses, which are settled principles followed in deciding criminal cases.

36. In CRA No.2308/1997 **State of M.P. Vs. Dhaneshwar Soni** by High Court of Chhattisgarh, it has been held that every case has to be decided on the basis of its own facts. Before arriving at conclusion on the basis of the evidence of witnesses appreciated in this appeal, the defence of *alibi* of respondent Chintu Goyal needs examination. The defence taken was this that on the date of incident that respondent Chintu Goyal was living in Ambikpur since 6 months prior to the date of incident, hence, he was not present on the spot on the date of incident. Suggestions were given to the prosecution witnesses in this respect which have been categorically denied. H.L. Shukla DW-1 has stated that respondent Chintu Goyal was working as servant in the Saw-Mill of Sitaram Agrawal and he also worked as his assistant from May, 2004 to 14 March, 2005, when he was arrested by the police. In cross examination, he has stated that he is confirmed in this knowledge that respondent Chintu Goyal never left for his place of residence at Jagdalpur between the period above mentioned. He has denied the adverse suggestions given by prosecutor.

Sitaram Agrawal DW-2 has stated that he is the owner of the Saw-Mill in which respondent Chintu Goyal had worked from May, 2004 till 14 March, 2005. He has produced the Attendance Register (Ex.D/6) showing attendance of respondent Chintu Goyal on each day of work in which, the date of incident is one of the dates. In cross examination, he has stated that register is prepared by him and his son, but it is not signed by them. He has admitted that he never tried to produce the register before the Police-Officer.

37. Thus, the stand of defence is this, that respondent Chintu Goyal was not present in Jagdalpur from May, 2004 to 14 March, 2005 and he never visited Jagdalpur in between. In reply to one question put to Mangal Ram Baghel PW-1 in cross-examination, he has stated that he got acquainted with respondent Chintu Goyal from about 1½ months prior to the date of incident and Chintu Goyal used to visit him in between. He has stated that he saw respondent Chintu Goyal about 10-12 days before the date of incident. Anil Rao PW-6 has stated about the presence and participation of respondent Chintu Goyal in the incident, his statement remained unrebutted. In his cross examination. On questions being put to him in cross-examination, he has replied that he saw respondent Chintu Goyal on one or two occasions before the incident and also saw him on two occasions in the month of incident. There is no other statement in his cross-examination to falsify his statement about the presence of respondent Chintu Goyal in Jagdalpur before the date of incident. Chingdu PW-7 has stated about the presence and participation of Chintu Goyal in the incident and his statement in cross-examination has remained unrebutted. On question put to him on cross-examination he has answered that he saw Chintu Goyal 4-5 days prior before the incident. There is no other statement in his cross-examination to falsify his statement about presence of respondent Chintu Goyal in Jagdalpur soon before the date of incident.

38. Inspector Rajendra Singh PW-13 is the scribe of FIR Ex.P/1 and morgue intimation report Ex.P/2, in which the name of respondent

Chintu Goyal has been mentioned as one of the assailants. Ex.P/1 and Ex.P/2 both were recorded in P.S. Bodhghat within two hours from the time of incident, which leaves no room for any concoction or consultation. The stand taken by the defence is itself falsified by the questions put to the witnesses of prosecution about the presence of respondent Chintu Goyal soon before the date of incident, which have been answered positively.

39. Coming to the statement of defence witnesses and the document produced, no authenticity can be attached. It has been argued by defence, that the register of the concerned Saw-Mill is one of the book which was kept in business routine, hence, entries in this book are relevant and have presumptive value. Such register of recording presence of attendance of employees on job, is not described in Section 32(2) or 34 of the Evidence Act. Hence, no presumptive value can be attached to Ex.D/6.

The principle regarding proof of *alibi* is settled by 3 Judge Bench of Hon'ble Supreme Court in **Mahinder Singh Vs. State of Punjab** reported in **AIR 1953 SC 415**. It was held that the standard of proof required with respect to plea of *alibi* must be the same as the standard which is applied to the prosecution evidence. This view has been followed and reiterated in **Jumni; Premnath and another Vs. State of Haryana** reported in **(2014) 11 SCC 355**, hence the evidence of defence in this case is not in accordance with the principle to meet the requirement of proof. Strict proof is required to prove the plea of *alibi* and the entire burden lies on the accused to prove impossibility of his

presence at the place of incidence and it has to be proved with absolute certainty so as to completely exclude the possibility of his presence at the place of incidence.

As per the appreciation of evidence, the stand of defence with respect to respondent Chintu Goyal is falsified, hence, findings of the trial Court in this respect that the defence was successful in proving of alibi of respondent Chintu Goyal is found to be erroneous which is liable to be set aside.

After considering all the evidence in support of prosecution in this case, it is found that the statement of Anil Rao PW-6 and supporting witness Chingdu PW-7 although, suffer from some minor discrepancies, omissions and contradictions but the same cannot be given weightage, so as to discard the whole statement of these witnesses. The principle laid down regarding the appreciation of eyewitnesses is very clear in State of U.P. Vs. M.K. Anthony (supra).

The evidence of Anil Rao PW-6 when read as a whole appears to have a ring of truth, minor discrepancies on trivial matters not touching the core of case, cannot be made a ground to discard such evidence. Taking a hyper-technical approach for appreciating the evidence of eyewitnesses has been deprecated by the Hon'ble supreme Court. Hence, on the basis of these findings, the evidence of Anil Rao PW-6 is found to be reliable evidence which is sufficiently corroborated by the evidence of Chingdu PW-7 and the evidence of medical reports. Further, prompt lodging of FIR is also a fact which is in support of the statement of Anil Rao PW-6.

40. Some discrepancies and some lacunae are there in the investigation of this case as there is no specific report of CFSL or any ballistic expert to this effect, that the bullet found inside the body of the deceased was one of the bullet which was fired from one of the arms seized from the possession of appellants/respondent. It is reiterated that possession of any article at the time of recovery proves the possession with the concerned accused at the time of recovery only, which gives a suggestion of availability of such articles with the accused persons. The fact that an article of a weapon was used at the time of incident ultimately rests on the evidence of the eyewitnesses which are in turn supported by the medical evidence.

This is a case where Anil Rao PW-6 has clearly stated that the respondent Sakleshwar Pandey and Chintu Goyal were the persons, who made use of firearms to shoot at the deceased which is supported by the medical evidence in postmortem report in which one bullet was found inside the body of the deceased. On the basis of finding of postmortem report and CFSL report Ex.P/39, this finding has been arrived at that one of the bullets fired had entered the body of deceased from injury No.2 and exited from injury No.6. This is sufficient proof against acquitted accused/respondents, hence, their acquittal is found to be erroneous and liable to be set aside.

41. The argument advanced that no firearm was seized from the possession of respondent Chintu is of no consequence because as per the eyewitness account respondent Chintu Goyal held a firearm and shot at the deceased which is enough evidence. It is already

observed that recovery of firearm at the later point of time is only an evidence of possibility and availability. Otherwise, also one pistol and two country-made firearms have been recovered and seized in this case from the possession of the accused persons. It is not necessary that shot can be fired by such person only who carries the firearm, anybody being a member of such assembly can take hold of a firearm and used it for commission of offence.

42. The argument advanced that application of Section 149 of IPC has not been proved by the prosecution, is without any substance. On the basis of findings arrived at, as aforementioned, it is apparently clear that all the appellants including the acquitted accused persons actively participated in this incident. Reliance has been placed upon the judgments of Supreme Court by the State counsel :-

(1) 2014 (5) S.C.C. Page 753

Om Prakash Vs. State of Haryana (Para 15)

(2) A.I.R. 2011 S.C. 1379

Amreka Rai Vs. State of Bihar (Para 7)

(3) 2010 Cri. L.J. 3854 (S.C.)

Sikandar Singh Vs. State of Bihar (Para 16,17)

(4) A.I.R. 2004 S.C. 4570

Dani Singh & Ors. State of Bihar (Para 14, 21)

(5) A.I.R. 1965 S.C. 202 Masalti Vs. State of U.P.

Common object of an unlawful Assembly can be gathered from nature of assembly, weapons used and behaviour of assembly before and after incident for becoming a member of such assembly, the proof

of some overt act is not necessary.

43. The common object of the appellants and acquitted accused persons assembled on the spot is demonstrated from the evidence of prosecution as all of them came armed with an intention to engage with the deceased in a quarrel. The presence of all the appellants and acquitted accused persons on the spot until assaulting on the deceased took place and fatal injury was caused to him was ascertained, further confirms that all of them were the members of unlawful assembly with a common object of assaulting and causing fatal injury to the deceased. Hence, this argument has no force.

44. After minutely scrutinizing the evidence adduced by the prosecution and the defence and for the reasons aforementioned, we are of the considered opinion that the appeals preferred by the accused/appellants are devoid of any substance and are liable to be dismissed. On the contrary, on minutely scrutinizing the evidence of prosecution and defence, the acquittal appeal filed by the State deserves to be allowed as per the conclusion arrived at. Accordingly, it is held that the trial Court has erroneously acquitted the respondents/acquitted accused persons of the charges under Sections 302/149, 147 and 148 of IPC. It is also proved by the evidence that respondent Sakleshwar Pandey and Chintu Goyal were the persons who held firearm and used the firearm in commission of the offence making them liable to be convicted under Section 27 of the Arms Act.

45. In the result, all the appeals are dismissed and the acquittal appeal by the State is allowed, invoking the powers of Appellate Court under Section 386 of Cr.P.C., respondent ASI Sakleshwar Pandey and Chintu Goyal @ Nishant Goyal are convicted under Sections 302/149, 147 & 148 of IPC and Section 27 of Arms Act and sentenced to undergo RI for life imprisonment and fine of Rs.1,000/-, in default to undergo additional RI for 3 months; RI for 2 years and fine of Rs.500/-, in default to undergo additional RI for 2 months; RI for 3 years and fine of Rs.500/-, in default to undergo additional RI for 2 months and RI for 3 years and fine of Rs.500/-, in default to undergo additional RI for 2 months, respectively.
46. The accused/appellants are reported to be on bail. Their bail bonds stand cancelled. They shall immediately surrender before the Court below concerned to serve out the jail sentence imposed upon them.
47. Respondents – Chintu Goyal @ Nishant Goyal and Sakleshwar Pandey be taken into custody and sent to jail to serve the jail sentence imposed on them.
48. All the sentences imposed upon the respondents-accused shall run concurrently and the period of custody undergone during trial, if any, shall be adjusted with the substantive sentence ordered in this judgment.

Sd/-

(Pritinker Diwaker)
Judge

Sd/-

(R.C.S. Samant)
Judge