

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 996 of 2011**

1. Manrakhan S/o Shri Ganpati Prasad Sharma, aged about 58 years,
2. Dipesh alias Raja S/o Manrakhan Sharma, aged about 30 years,

Both R/o village Pachri, Police Station Akaltara, District Janjgir Champa, CG

---- Appellants

Versus

1. State of Chhattisgarh through Station House Officer, Police Station Scheduled Caste/Scheduled Tribe Welfare District, Janjgir Champa, CG

---- Respondent

AND

CRA No. 1001 of 2011

1. Itwari S/o Laxman Bharadwaj, aged about 50 years, R/o Pachari, Police Station - Akaltara, District Janjgir Champa, CG

---- Appellant

Versus

1. State of Chhattisgarh through Station House Officer, Police Station Scheduled Caste/Scheduled Tribe Welfare District, Janjgir Champa, CG

---- Respondent

For Appellants	:	Shri Pravin Das and Ms. Sunita Jain, Advocates
For Respdt/State	:	Shri Adil Minhaj, PL

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri R.P. Sharma

Judgment on Board by Pritinker Diwaker, J

07/09/2017

As the aforesaid two Criminal Appeals arise out of the same judgment dated 16.11.2011 passed by Special Sessions Judge

Janjgir Champa in Special Sessions Trial No. 102/2010 convicting the accused/appellants under Section 302/34 IPC on two counts (for committing the murder of Basant Kurre and Gajanand Nayak), and sentencing each of them to undergo imprisonment for life and pay fine of Rs. 3000/- twice plus default stipulations, they are disposed of by this common judgment.

2. In the present case there are two deceased namely Basant Kurre and Gajanand Nayak. According to the case of prosecution, on account of old Panchayat election dispute, on 25.04.2010 at 2.30 AM the accused/appellants went to the terrace of Basant Kurre where he was sleeping with Gajanand Nayak and caused injuries to them with a sharp edged weapon. Further case of the prosecution is that at the relevant point of time Megh Singh (PW-9) - the father of Basant Kurre came there to take some medicine from Basant Kurre and after hearing his cries went to the terrace and found both the injured persons lying in a pool of blood. On being asked, they informed him that it is accused/appellants Manrakhan and Dipesh alias Raja who caused injuries to them. Thereafter, at 3.35 AM un-numbered FIR Ex. P-10 was lodged by Megh Singh (PW-9) followed by numbered one being Ex. P-19 which was recorded at 12.15 hours against accused/appellants Manrakhan and Dipesh alias Raja for the offence punishable under Section 302/34 IPC. Both the injured persons were medically examined vide Ex. P-44 and P-45. Injured Basant Kurre however succumbed to the injuries on 25.04.2010 itself and based on the information sent from the concerned hospital *merg* Ex. P-42 was recorded. Inquest on the dead-body of Basant Kurre was done vide Ex. P-14. Thereafter, his dead-body was sent for postmortem examination which was conducted by Dr. C.B. Singh (PW-11) who gave his report Ex. P-38.

Another injured Gajanand Nayak also succumbed to the injuries suffered by him on 29.04.2010 while taking treatment in the hospital. On the basis of information received from the hospital *merg* in respect of him was recorded vide Ex. P-49. Inquest on the dead-body of Gajanand Nayak was done on 29.04.2010 vide Ex. P-1 and then postmortem examination thereon was conducted by Dr. Shivnarayan Manjhi (PW-21) who gave his report Ex. P-48. During investigation, memorandum of accused/appellant Manrakhan vide Ex. P-3 was recorded based on which a crowbar and a T-shirt were seized under Ex. P-6 and P-5 respectively. On the memorandum of accused/appellant Dipesh (Ex. P-4) an axe and a half shirt were seized under Ex. P-7 and P-8 and likewise on the memorandum of accused/appellant Itwari (Ex. P-21), seizure of axe, club and shirt was made under Ex. P-22 and P-23. As per FSL report Ex. P-54, blood was found on all the seized articles including axe and crowbar but excluding the shirt of accused/appellant Itwari. After investigation, charge-sheet was filed by the police against all the accused/appellants for the offences punishable under Sections 302, 201, 34 IPC and 3 (2) (v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act (hence forth called as "Special Act"). Trial Court however framed the charge u/s 302/34 on two counts against accused Itwari and u/s 302/34 on two counts as well as under Section 3 (2) (v) of the Special Act against accused Manrakhan and accused Dipesh alias Raja.

3. In order to prove its case the prosecution has examined 29 witnesses in support of its case. Statements of the accused/appellants were also recorded under Section 313 of the Code of Criminal Procedure in which they denied their guilt and pleaded innocence and false implication in the case. That apart,

two witnesses namely Raj Kumari (DW-1) and Chandra Kumar Barai (DW-2) have also been examined by the defence in support of its case.

4. After hearing the parties the Court below by the judgment impugned acquitted accused Manrakhan and Dipesh of the charge under Section 3 (2) (v) of the Special Act but has convicted all the accused/appellants under Sections 302/34 IPC twice.

5. Counsel for the accused/appellants submit as under:

(i) That the accused/appellants have been convicted on the basis of statement of the so-called solitary eyewitness Megh Singh (PW-9) - the father of Basant Kurre whose entire narration is untrustworthy for the following reasons:

(a) In the FIR (Ex. P-19) lodged by him he has not stated that he saw anyone fleeing the spot or committing the offence. He has also not disclosed therein the name of accused Itwari.

(b) In his statement recorded on 26.04.2010 under Section 161 of the Code of Criminal Procedure he has improved to the extent that he saw the accused persons fleeing the spot and that the oral dying declaration was also made by the two deceased.

(c) While deposing in the Court he resorted to further improvement stating that he saw from the bottom of staircase the accused persons assaulting both the deceased, but as per the statement of Patwari (PW-14) and the brother of deceased Basant Kurre (PW-26) anyone present in the terrace cannot be seen from the place Megh Singh (PW-9) claims to have witnessed the incident of assault.

(ii) That Megh Singh (PW-9) and his deceased son Basant Kurre

were the notorious criminals and number of cases were registered against them on the report of villagers, and therefore, in these circumstances the possibility of some third person committing the murder of the deceased on account of inimical terms cannot be ruled out.

(iii) That the criminal antecedents of PW-9 Megh Singh, PW-12 Anil Satnami and PW-26 Sanjay Kurre - father and brothers of deceased Basant Kurre have been duly proved by DW-1 Raj Kumari vide documents Ex. D-5 to D-10.

(iv) That in case where the entire case hinges on the testimony of the solitary eyewitness, the Court is required to deal with such testimony with great circumspection and due caution.

(v) That there are material contradictions and omissions in the statements of PW-12 and PW-26 and being so their credibility becomes doubtful.

(vi) That the contents of FIR have not been proved by the prosecution, rather the same have been denied by PW-9 to a great extent.

(viii) In respect of accused Itwari, it is submitted by the counsel for the appellants that had he been involved in the case, his name would have been disclosed by PW-9 while lodging the FIR itself. According to the counsel for the appellants, even in the memorandum of accused Manrakhani and Dipesh, name of accused Itwari does not find place.

(ix) That though as per the FSL report Ex. P-54 the blood has been found on the articles seized by the prosecution except the shirt of accused Itwari but unless and until the same is proved to be of the blood group of the deceased persons by the serologist, such

seizure cannot be connected with the crime in question.

6. On the other hand counsel for the respondent/State supports the judgment impugned and submits that the findings recorded by the Court below convicting and sentencing the accused/appellants as described above are strictly in accordance with law and there is no illegality or infirmity in the same. He submits that even if PW-9 has improved a bit while deposing in the Court, the fact remains that he immediately reached the spot and the oral dying declaration was made by both the injured persons naming the accused persons herein to be the perpetrators of the offence, his testimony cannot be discarded as a whole. He further submits that prior to the incident i.e. on 5.2.2010 a report was lodged by deceased Basant Kurre to the police against accused Dipesh for threatening him which shows that there was some ill-will between them and for that the accused persons might have committed the crime in question. According to the State counsel, statement of PW-9 has been corroborated by PW-26, may be partially, and further on the basis of memoranda of the accused persons seizure of various articles has been made which were stained with blood as has come in the FSL report Ex. 54.

7. Heard counsel for the parties and perused the evidence available on record.

8. Megh Singh Satnami (PW-9) – the lodger of the FIR and so-called solitary eyewitness to the incident has stated that on 24.04.2010 at about 8 PM his deceased son Basant Kurre had come to him and after taking tiffin he returned to his house. As this witness experienced pain in his stomach in the midnight, he went to the house of his son to take medicine which he had forgotten to

bring with him during his visit, and when he was in the ground floor he saw accused Manrakhan holding crowbar whereas accused Dipesh and Itwari were holding axe. According to him, accused Manrakhan and Dipesh were assaulting deceased Basant whereas deceased Gajanand was being assaulted by accused Itwari. This witness has stated that when the assault was being made, he saw the same from the ground floor but on account of being perplexed he did not call anyone. After the accused/appellants left the spot, he went upstairs and saw his son and Gajanand lying down. His son was breathing slowly whereas Gajanand was writhing. On the place of incident, this witness is stated to have become unconscious and regained consciousness after his sons Anil, Sanjay and Ajay came there in the meanwhile and sprinkled water on his face. Thereafter, according to this witness, number of villagers assembled there to whom he informed that it is the accused/appellants who had assaulted Basant and Gajanand. After lodging report in the police station, both the injured persons were taken to Government Hospital, Akaltara on a tractor where Basant breathed his last and looking to the condition of Gajanand he was shifted to Bilaspur and then to Raipur where he too succumbed to the injuries after four days. On being confronted with FIR, this witness has stated in the cross-examination that the contents written in "C to C portion thereof pertaining to hearing the cries and going to the spot" were not disclosed to the police by him and could not tell the reason as to why they came to be mentioned therein. On being further confronted with the FIR and the statement recorded under Section 161 of the Code of Criminal Procedure, this witness has stated that he informed the police that he had seen accused Manrakhan carrying crowbar and Dipesh carrying axe and assaulting his son

Basant but if the same do not find place therein he could not tell the reason for that. It is relevant to note here that in the FIR this witness does not say that he saw anybody assaulting the deceased or fleeing the spot but in the diary statement he has stated that he saw the accused/appellants fleeing the spot whereas in the Court he becomes an eyewitness and states that he saw all the three accused persons assaulting the two deceased. On confrontation with the diary statement he further states that he had informed the police that he saw the accused/appellants assaulting the two deceased and then fleeing the spot but why such things are not mentioned therein, he could not tell the reason. Sanjay Kurre (PW-26) - another son of Megh Singh (PW-9) has stated that on 24.04.2010 at 2-2.30 AM when he was sleeping in his house, one Makhan Nayak came there and informed that Basant Kurre and Gajanand were killed, and on coming to know this he accompanied the informant to the spot and found them lying with injuries on their body. According to this witness, after his father (PW-9) regained consciousness, he informed him that it is the accused/appellants who had assaulted the deceased persons. This witness is also stated to have been informed by PW-9 that accused Manrakhan was carrying crowbar whereas accused Itwari and Dipesh were carrying axe. He has admitted that some criminal cases against him and his father are pending in the courts. He has however denied that he ever took any loan on the guarantee of accused Manrakhan and did not return the same. In paragraph No. 18 this witness has stated that the terrace where the incident took place was at the height of 10-10.5 feet from the ground floor and if one stands at the ground floor, the person lying in the terrace cannot be seen by him. The deposition of this witness carries

several contradictions and omissions so far as it relates to narration of the story made by Megh Singh (PW-9). Anil Satnami (PW-12) – yet another son of Megh Singh (PW-9) has stated that on being informed by one Makhan about Basant Kurre and Gajanand being killed by someone when he along with his brother went there and saw his father (PW-9) lying unconscious. He has further stated that PW-9 did not inform him anything about the incident. According to him, at that time both the deceased persons were in a position to breath. He however has expressed his ignorance about there being any dispute between his family and that of accused Itwari. He has admitted that there was no dispute between accused Dipesh and deceased Basant Kurre. Dr. C.B. Singh (PW-11) is the witness who conducted postmortem examination on the body of deceased Basant and gave his report Ex. P-38 stating therein that he noticed the following injuries thereon:

(I) Incised wound over right frontal region – size 7 x .5 cm skull bone directed backwards laterally, (ii) incised wound over left frontal region directed backward laterally and brain matter seen through injury, (iii) incised wound over right side of chin – 4 x .3 cm, (iv) incised wound over left fronto-parietal region – 3 x .3cm (v) incised wound over left parietal region – 5 x .2 cm(5), (vi) lacerated wound over left tempo-parietal region – 7 x .5 cm, (vii) incised wound over left side angle of mandible – 8 x .7 cm, (viii) incised wound over left side chin to leftside neck – 15 x 2 x 4 cm, (ix) two incised wounds over left forearm and wrist – 5 x 1 & 4 x 1 cm,(x) incised wound over dorsal aspect of hand – 6 x 1 cm, (xi) incised wound over dorsal aspect of hand – 7 x 1 cm. Cause of death, according to this witness has been opined as shock due to injury in the brain and excessive hemorrhage and the mode as homicidal in nature.

9. Laxmiram Nayak (PW-1) – the father of deceased Gajanand

Nayak is the witness of inquest Ex. P-1. Ramkumar Satnami (PW-2) and Kamlesh Kumar Patle (PW-3) - the witnesses of memoranda Ex. P-3 and P-4 and the seizure of various articles made on the basis thereof under Ex. P-5, P-6 and P-7 have not supported the case of the prosecution. D.R. Gandharv (PW-6) is the witness who did part of the investigation. He has stated that the FIR contains the disclosure made by Megh Singh (PW-9) as a whole and nothing therein has been recorded of his own. He has further stated that PW-9 did not inform him that after seeing the gathering on the spot he had become unconscious, or that the deceased persons were assaulted by which particular weapons or even with respect to his seeing the incident of assault from the ground floor. Ram Kumar Rathore (PW-7) is the witness who recorded un-numbered FIR Ex. P-19 and forwarded the same to the magistrate vide Ex. P-20. Satish Kumar Dubey (PW-8) is the investigating officer who has duly supported the case of the prosecution. He has admitted that PW-26 while making diary statement Ex. D-4 did not disclose that after regaining consciousness his father PW-9 informed him to have seen the incident of assault with a particular weapon. Makhanlal Nayak (PW-10) - the neighbour of deceased Basant Kurre has stated that after hearing cries coming from the direction of Basant Kurre's house he went there and found him lying in an injured condition and immediately thereafter he informed the same to his brother (PW-26). This witness has further stated that soon thereafter number of villagers assembled there and the deceased persons were taken to hospital on a tractor. He is also the witness of inquest Ex. P-1 pertaining to deceased Gajanand Nayak. Ishwar Nayak alias Sadhu (PW-13) - brother of deceased Gajanand Nayak and witness to inquest of deceased Basant Kurre vide Ex. P-14. Vishwanath

Prasad Nunia (PW-14) is the Patwari who prepared spot map Ex. P-14 who has stated that the terrace where the deceased persons were asleep could not be seen by a person standing on the ground floor. Mahesh Kumar Shukla (PW-15) and Dilharan Satnami (PW-16) are the witnesses to inquest and seizure made under Ex. P-18. Dr. Shiv Narayan Manjhi (PW-21) is the witness who conducted postmortem examination on the body of deceased Gajanand Nayak and gave his report Ex. P-48 stating that he noticed following injuries thereon:

- (i) Contused lacerated wound on right frontal eminence - 4 cm long traverse having three stitches - 3 cm deep on opening.
- (ii) Contused lacerated wound over right parietal eminence 4 cm long having two stitches.
- (iii) Contused lacerated wound on right parietal region upto 4 cm bone deep at mid plane.
- (iv) Incised wound on chin below lip - 13 x 0.2 cm extending to ear.
- (v) Incised wound below injury No. iv - size 6 x 0.2 cm x 1.5 cm.
- (vi) Incised wound on lip - 7 x 1.5 cm traverse 2.5 cm with breakage of two teeth.
- (vii) Incised wound on right shoulder - 3 x 1 cm - traverse 2 cm deep.

Cause of death has been opined to be due to cardio respiratory failure as a result of head injury and complications and its mode was homicidal.

10. Sudarshan Kumar Satnami (PW-22) is the witness to seizure from accused Itwari under Ex. P-22. Bhagirathi Bharadwaj Satnami (PW-23) is the witness to spot map Ex. P-12 and seizure made under Ex. P-17. Kamlesh Kumar Kurre (PW-24) is the witness to

seizure made under Ex. P-22 and P-23. Raj Kumari (DW-1) is the head constable who proved the documents of Ex. D-5 to D-10 which are the lists of cases registered against PW-9, deceased Basant and PW-26. Chandra Kumar Barai (DW-2) has been examined to prove that a loan of Rs. 1,23,500/- was given to PW-26 under the guarantee of accused Manrakhan.

11. In the statement of accused Manrakhan recorded under Section 313 of the Code of Criminal Procedure a defence has been taken that PW-26 had borrowed some amount from him and when a demand was made to return the same, family members of PW-26 started nurturing ill-will and ultimately implicated him in a false case.

12. On the memorandum of accused Manrakhan Ex. P-3, one T-shirt was seized under Ex. P-5 and crowbar under Ex. P-6. Similarly, on the memorandum of accused Dipesh Ex. P-4, axe was seized under Ex. P-7 and a half shirt under Ex. P-8. On the memorandum of accused Itwari Ex. P-21, axe and bamboo piece were seized under Ex. P-22 and one white shirt under Ex. P-23. As per the FSL report Ex. P-54 all these articles except the shirt seized from accused Itwari marked as "F", contained blood. However, there is no serological report on record to show whether the blood so noticed was of the blood group of the deceased persons.

13. We have gone through the entire material available on record including the evidence of the witnesses very minutely. The star witness of the prosecution whose testimony is very crucial for deciding the appeals is Megh Singh (PW-9) - the lodger of the report and the so-called eyewitness to the incident. This witness in the FIR Ex. P-10 lodged by him has stated that on the date of

occurrence at about 2.30 AM after hearing the cries "*bachao-bachao*" he went to the terrace where the deceased persons were sleeping and found them in the pool of blood with number of injuries on their bodies and on being asked by him they disclosed the assailants as accused Manrakhan and Dipesh. However, in the statement recorded under Section 161 of the Code of Criminal Procedure Ex. D-1 he has stated that when he was to step up the stair, all the accused/appellants got down hurriedly and ran away. He is further stated to have identified all of them properly. Thereafter, he is stated to have somehow gone onto the terrace and saw both the deceased persons lying in the pool of blood and on seeing that he fainted and fell down. Diary statement of this witness further says that on the arrival of his son Sanjay (PW-26) he came to his senses and saw multiple injuries on the bodies of deceased persons and on being asked they informed him that it is all the accused/appellants who assaulted them. Now let us turn to the Court statement of this witness where he becomes an eyewitness and states that when he was to get onto the stair leading to the terrace, he saw from the ground floor that accused Manrakhan was carrying crowbar whereas accused Dipesh and Itwari were holding axe in their hands. He further states that accused Manrakhan and Dipesh were assaulting deceased Basant whereas accused Itwari was assaulting deceased Gajanand. He went on to state that all this he saw from the ground floor but on account of being in fear he did not call out anyone. Nowhere in the Court statement he has stated that any oral dying declaration was made by either of the deceased persons as has come in the FIR lodged by him and also the diary statement Ex. D-1. What is more surprising here is that when this witness was confronted with the

FIR lodged by him he has stated that the contents written in "C to C portion thereof pertaining to hearing the cries and going to the spot" were not disclosed to the police by him and was not aware as to how all this came to be mentioned therein. Further, in the FIR he has named accused Manrakhan and Dipesh alias Raja only whereas in the diary statement and the court statement he has taken the names of all three. On being further confronted with the FIR and the diary statement, this witness has stated that he informed the police to have seen accused Manrakhan carrying crowbar and Dipesh carrying axe and assaulting deceased Basant but if they do not find place therein he could not tell the reason for that. It is relevant to note here that in the FIR this witness does not say that he saw anybody assaulting the deceased or fleeing the spot but in the diary statement he improved himself and stated that he saw the accused/appellants fleeing the spot whereas in the Court he becomes an eyewitness and states that he saw all the three accused persons assaulting the two deceased. On confrontation with the diary statement he further states that he had informed the police that he saw the accused/appellants assaulting the two deceased and then running away from the spot but why such things are not mentioned therein, he could not tell the reason.

14. Deviation thus resorted to by PW-9 - the so-called solitary eyewitness to the incident presenting different versions at different stages renders the credibility of his testimony extremely doubtful and being so it would be quite unsafe for this Court to base the conviction of the accused/appellants on such piece of fragile evidence. It is not that the conviction of an accused cannot follow on the testimony of a single eye witness, but for doing so the Court must be satisfied that the testimony of such witness is of sterling

quality, wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in holding so. Dealing with a case hinging on the testimony of a single eyewitness it has been held by the Apex Court in the matter of **Bhimapa Chandappa Hosamani and others v. State of Karnataka (2006) 11 SCC 323** as under:

“24. We have undertaken a very close and critical scrutiny of the evidence of PW-1 and the other evidence on record only with a view to assess whether the evidence of PW-1 is of such quality that a conviction for the offence of murder can be safely rested on her sole testimony. This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the Court must be satisfied that the testimony of the solitary eye witness is of such sterling quality that the Court finds it safe to base a conviction solely on the testimony of that witness. In doing so the Court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the Court as wholly truthful, must appear to be natural and so convincing that the Court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness.

25. So tested, we do not find the evidence of PW-1 to be of that quality. In the first instance, she began with inventing a false story about existence of a motive. The narration of events as they took place before the actual murder of her son are also shown to be untrue. There is considerable doubt as to whether the first information was recorded on her saying at about 8.00 or 8.30 in the morning. Her evidence also leaves a lurking suspicion about her being an eye witness. Having discarded the evidence of PW-2, and the other two alleged eye witnesses having turned hostile, we find no reliable corroboration of her testimony. We do not find this case to be one in which the judgment of acquittal deserved to be set aside.

26. We, therefore, feel compelled to give to the appellants the benefit of doubt while allowing their appeal. Accordingly, this appeal is allowed, the appellants are acquitted of the charge levelled against them, and they are directed to be released unless required in connection with any other case.”

15. Further, in the matter of **Joseph v. State of Kerala (2003) 1 SCC 465** the Apex Court has dealt with an identical issue and

held as under:

“12.In a case of this nature when there is a sole witness to the incident his evidence has to be accepted with an amount of caution and after testing it on the touchstone of the evidence tendered by other witnesses or evidence as recorded. What is urged before the Court is that FIR - Exhibit P 1 contained signature of a doubtful character which PW.1 himself admitted as having been different from the one given by him on the acknowledgement of having received the summons. How far reliance can be placed upon his evidence when PW.1 stated that he had rushed to the junction to inform PWs 2 to 4 and thereafter rushed back to the place of the incident, while the deceased also run on the western side of the place of incident though he was profusely bleeding and he got hold of his wound by his hand and ran. If that is so, there would have been blood all over the place and not at one particular point. The abrasion on the neck of PW.1 could have been caused by a nail scratch and not by a weapon and was not a bleeding injury will clearly believe the statement made by him that he was profusely bleeding. If really the witness (PW.1) was wearing blood stained clothes the same would have been certainly seized by the police for appropriate investigation of the same. Particularly, when the trial court had given cogent reasons to acquit the accused, the High Court ought not to have interfered with the same merely because another opinion is possible and not that the finding concluded by the trial court was impossible.

13.To our mind, it appears that the High Court did not follow the aforesaid standard but went on to analyse evidence as if the material before them was given for the first time and not in appeal. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eye witness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when prosecution case rests mainly on the sole testimony of an eye-witness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable.”

16. In yet another case involving the credibility of the sole eyewitness it has been held by the Apex Court in the matter of **Lallu Manjhi and another v. State of Jharkhand (2003) 2 SCC**

401 as under:

“12. There is another very material aspect of the incident and we cannot resist observing that the investigation in the case has been very defective. The Investigating Officer did not prepare any site plan of the place of occurrence. Samples of blood stained earth were not sent for chemical examination. No effort seems to have been made to recover and seize any weapon of offence. No witness of the locality, who could have been present near the place of occurrence at the time of the incident, has been interrogated. It was the cultivation time and agriculturists or labourers busy ploughing the fields must have been present in neighbourhood. The witnesses referable to neighbouring piece of land could have deposed to as to the question and nature of possession over the land in dispute; as to whether it was cultivated previously and if so by whom whether the complainant party or the accused persons. The village Patwari and Chowkidhar would have been most material witnesses. Their interrogation and collection of entries in revenue papers would have revealed who was in actual possession of the land prior to the incident. The Court is just left in doubt guessing whether it was the complainant party in possession of the land illegally obstructed by the accused persons or whether the accused persons were in possession of the land which was sought to be trespassed upon by the deceased and his brother Mannu (PW-9) and the attempted trespass was sought to be prevented and preempted by the accused persons.

13. It is, therefore, clear that the genesis or the root cause of the incident is not known. The most crucial question as to the factum of possession over the land in dispute immediately preceding the date of the incident cannot be determined and any specific finding in that regard arrived at. The version of the incident given by the sole eyewitness who is also an interested witness on account of his relationship with the deceased and being inimically disposed against the accused persons is highly exaggerated and not fully corroborated by medical evidence. The version of the incident as given in the Court is substantially in departure from the earlier version as contained and available in the First Information Report. We cannot, therefore, place reliance on the sole testimony of Mannu (PW-9) for the purpose of recording the conviction of all the accused persons.

14. Incidentally, it may also be stated that the manner in which the Trial Court has recorded the statements of the accused persons u/s 313 Cr.P.C. is far from satisfactory. The entire prosecution case running into very many details has been summed up into just 5 questions asked to each of the accused persons. It is obligatory on the part of the Trial Court to examine the accused for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him. If such

opportunity is not afforded, the incriminating pieces of evidence available in the prosecution evidence cannot be relied on for the purpose of recording conviction of the accused persons.

15. All these aspects of the case, specially the infirmities in the prosecution evidence and the investigation, have not received the attention of the Trial Court as also the High Court. We are very clear in our mind that on the state of evidence available the accused persons could not have been held guilty of the offences charged.

16. The appeal is allowed. The judgment of the Trial Court as also of the High Court are set aside. The accused appellants are acquitted of the charges framed against them. The appellants shall be released forthwith if not required to be detained in connection with any other offence."

17. Further, though according to PW-26 he was informed by PW-9 that it is the accused/appellants who caused injuries to the deceased persons but just to the contrary has been stated by PW-12 that PW-9 did not inform him anything like that. This dissimilarity in the statements of PW-26 and PW-12 again creates a doubt in the mind of this Court about the involvement of the accused/appellants in the commission of murder of two deceased.

18. Another important point so as to arrive at the proper conclusion is the seizure of various articles including crowbar and axe made on the basis of memoranda of the accused persons. Though as per the FSL report Ex. P-54 all the articles except the shirt of accused Itwari marked as "F" contained blood yet the prosecution has not obtained the serological report to determine whether the blood present on the seized articles was that of human origin and of the blood group of the deceased persons. Dealing with the opinion of the chemical examiner regarding blood stained articles seized, it has been held by the Apex Court in the matter of **Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra** reported in **(2008) 3 SCC 210** it has been held as under:

“The next thing which is to be seen is whether the evidence relating to the recovery of clothes of the appellant and the half blade, allegedly used for commission of crime, is credible and could be relied on for proving the charge of culpable homicide against the appellant. In this context, it is important to note that the prosecution did not produce any document containing the recording of statement allegedly made by the appellant expressing his desire to facilitate recovery of the clothes and half blade. The prosecution case that the accused volunteered to give information and took the police for recovery of the clothes, half blade and purchase of handkerchief is highly suspect. It has not been explained as to why the appellant gave information in piecemeal on three dates i.e. 3.10.1994, 5.10.1994 and 6.10.1994. Room No.45 of Ganesh Bhuvan from which the clothes are said to have been recovered was found to be unlocked premises which could be accessed by any one. The prosecution could not explain as to how the room allegedly belonging to the appellant could be without any lock. The absence of any habitation in the room also cast serious doubt on the genuineness and bonafides of recovery of clothes. The recovery of half blade from the road side beneath the wooden board in front of Ganesh Bhuvan is also not convincing. Undisputedly, the place from which half blade is said to have been recovered is an open place and everybody had access to the site from where the blade is said to have been recovered. It is, therefore, difficult to believe the prosecution theory regarding recovery of the half blade. The credibility of the evidence relating to recovery is substantially dented by the fact that even though as per the Chemical Examiners Report the blood stains found on the shirt, pant and half blade were those of human blood, the same could not be linked with the blood of the deceased. Unfortunately, the learned Additional Sessions Judge and High Court overlooked this serious lacuna in the prosecution story and concluded that the presence of human blood stains on the cloths of the accused and half blade were sufficient to link him with the murder. The over jealous efforts made by the prosecution to link the handkerchief allegedly found near the body of the deceased of the appellant lends support to the argument of the learned counsel for the appellant that the police had fabricated the case to implicate the appellant. In his statement, PW7 Mohd. Farid Abdul Gani, who is said to have sold the handkerchief to the appellant, admitted that he was not selling branded handkerchiefs and that there were no particular marks on the goods sold by him. He, however, recognized the handkerchief by saying that the accused made a lot of bargaining and he was amused by the latters statement that he will soon become an actor.”

19. Further, while deciding the credibility of the eyewitnesses and the seizure of blood stained articles in the matter of **State of M.P.**

v. Kriparam (2003) 12 SCC 675 it has been held by the Apex

Court as under:

“8. Having heard the arguments of the learned counsel and perused the record, we notice that the prosecution relies on evidence of PWs. 1&3 as eye witnesses and also on the recoveries allegedly made at the instance of the first accused/respondent herein. Since the judgment of the High Court is a reversing judgment we thought it proper to scrutinise the evidence led by the prosecution very carefully and in that process we notice that there is sufficient force in the contention of the defence that the presence of PWs. 1&3 at the time of incident was doubtful and the incident in question which led to the death of the deceased could not have been noticed by said witnesses. This is for the following reasons:

The original case of the eye witnesses was that they were all sleeping together when the attack in question took place and the intention of the attackers was clear from what was stated during the attack which was to kill all. Thereafter during the course of evidence these witnesses conveniently changed the said part of their evidence by stating that PWs. 1&3 slept on the roof of the pump house while the deceased slept on a cot under a tree. The reason for this change, as observed by the High Court, is obvious because if they were sleeping together and the intention of the accused as proclaimed was to kill all these three then there would have been no occasions for these witnesses to escape the attack. Therefore, obviously they had to find an explanation and for this purpose they made the later statement that the deceased and the two eye witnesses were sleeping separately. Apart from this, these witnesses have stated that immediately on seeing the attack on the deceased they ran away and hid themselves until next day morning being afraid of the assailants. But then there is so much contradiction in regard to the direction and the place the witnesses ran away that it creates a suspicion as to their presence. PW1 says that he ran in the direction of river while PW2 says he ran in the direction of the hill which according to the defence are in opposite directions. This apart, assuming they did hid themselves, there is absolutely no explanation why these witnesses till about 8 O' clock in the morning did not try to seek any help from sources available to them. It has come in evidence that near about thrashing yard of PW-4 where the incident took place, there were other thrashing yards where people were sleeping, therefore, they could have easily sought help from them which was not done. Then again we notice that the incident in question has taken place in the month of April, and being summer month, we can take judicial notice of the fact which has been done by the courts below that the sun rise would have been around 6 O' clock in the morning. If that be so we find no explanation whatsoever why these witnesses did not go to their house or contact anybody upto 8 O' clock in the

morning to inform them of the incident in question. This act of PWs. 1&3 in informing the relatives and the villagers of the attack only at 8 O'clock in the morning was obviously to explain the delay in filing the FIR, which was lodged in the police station which was about 3 K.ms. away from the place of incident only at 8.15 O'clock in the morning. Here again in regard to the lodging the complaint there is direct contradiction in evidence of PWs 1 & 3. While one of the witnesses states they went straight from the place of incident to the police station, the other states they went to the village first to inform the relatives and then went to the police station. If the evidence of these eye witnesses were otherwise believable for good reasons some of the contradictions referred to hereinabove by us might not have damaged the veracity of their evidence. But in the back ground of the defence as to the falsity of PWs. presence, the existence of these contradictions makes a lot of difference, more so when the prosecution has failed to explain the delay in filing the complaint. This is because of the fact that according to the defence the incident in question must have taken place without their being eye witnesses, and when noticed in the morning a complaint was lodged after due deliberation involving these accused persons.

9. As noticed above the prosecution has also relied on certain recoveries made at the instance of A-1. Firstly it is stated that the blood stained clothes worn by the accused at the time of arrest were seized by the police. In regard to the place from where these were seized, there is contradiction as to whether it was taken off from the person of A-1 or was taken from a place where the clothes were kept in his house. Be that it may the prosecution case is that these clothes were blood stained though washed, still the stains were visible hence was sent to chemical examination which has established the stains were of blood. Therefore the same was sent to Serologist who opined that he could not give an opinion as to the origin of the blood meaning thereby the blood stain that was noticed by him on the clothes cannot be said to be that of human origin. In such situation this circumstance of recovery of blood stained clothes will be of no assistance to the prosecution.

10. Similar is the case in regard to recovery of an axe. In regard to this, witnesses for the recovery say they found small stain of blood on it. The serologist in regard to this blood also states that it is not possible to find out the origin of the same. Therefore, even this recovery would not in any manner help the prosecution in this case. Even otherwise if the prosecution case in regard to Pws. 1& 3 are not acceptable then these recoveries by themselves would not take the prosecution case any further."

20. As regards motive that prior to the incident a report was

lodged by deceased Basant Kurre against accused Dipesh for threatening him and further that as accused Manrakhan had demanded back the money given to PW-26 ill-will crept in between driving the accused persons committing the crime in question, this Court is of the opinion that when the basic foundation of the prosecution case itself has crumbled down, the motive becomes inconsequential and such a plea is of no help to the prosecution case. In a matter having similar issue, it has been held by the Apex Court in the matter of **State of Punjab v. Sucha Singh and others (2003) 3 SCC 153 as under:**

“7. A perusal of the statements of PWs 4 and 5, coupled with the testimony of other witnesses and facts and circumstances of the case, shows that the presence of PWs 4 and 5 at the place of occurrence is inherently improbable for the following reasons:-

PW-5 has admitted in his cross-examination that he owned no land in village Lawan. If that is so, he has no reason to be there at the place of occurrence, that too, at 6.45 in the morning. PW-4 has stated that the distance between his land and the land of PW-5 is about two killas. Assuming this statement is accepted, in normal circumstances, no one would travel from a distance of two killas, that too, at 6.45 a.m. to meet a friend without a purpose. The prosecution has not been able to establish the circumstances leading PW-4 going to the field of PW-5 at that time. From the evidence on record it appears that the deceased travelled on a scooter to Chogawan village for purchase of medicines for his mother all of a sudden. Even PW-4, father of the deceased did not know about the illness of his wife, which led him to inquire from his son as to where he was going. If the father of the deceased himself did not know the programme of the deceased going to Chogawan village in advance it is inherently improbable that the accused would know his programme, way-lay and attack him armed with kirpan, gandasi, datar etc. It is in the evidence of both PWs 4 and 5 that the accused emerged from the Basmati crop fields and attacked the deceased. The evidence on record shows that in the murder case of Kuldip Singh nephew of Sucha Singh where PW4 was also one of the accused, were acquitted by the High Court. If that could be the motive to nurse a grudge against the complainant party, the accused would not have spared PW-4. It is also humanly improbable that the deceased sustained as many as 24 injuries on his body and the father of the deceased would be a mere spectator without trying to rescue him or intervene. The evidence on record would also show that the house of the accused is 6/7 killas towards the west of

the village Abadi and the place of occurrence was at a distance of half a kilometer on the eastern side of the village Abadi. In ordinary circumstances, it is difficult to accept that the accused would be loitering around the place of occurrence covering a distance of 6/7 killas armed with kirpan, gandasi, datar etc. PW-5 did not accompany the injured to the hospital. No explanation by the prosecution as to why he could not accompany the injured to the hospital. The conduct of PW-5 is quite unnatural. This would make the presence of PW5 at the place of occurrence all the more doubtful. In our view, these circumstances would make the alleged presence of PW4 and PW5 at the place of occurrence inherently improbable.

11. Mr. Walia, learned counsel, lastly contended that there is a strong motive connecting the accused with the crime for the reasons being that Kuldip Singh, nephew of accused Sucha Singh was murdered by the complainant party and the accused had nursed a grudge against the complainant party for revenge. This plea is of no help to the prosecution case. When the basic foundation of the prosecution case crumbled down, the motive becomes inconsequential. At the same time, animosity is a double-edged sword. It could be a ground for false implication, it could also be a ground for assault. In the instant case, in view of the facts and circumstances as discussed above, the motive, however, strong merely creates a suspicion. Suspicion cannot take the place of proof of guilt."

21. Having thus considered entire material collected by the prosecution and the evidence of the witnesses, in particular the lodger of FIR (PW-9) in the light of the decisions of the Supreme Court adumbrated above, this Court has no hesitation to say that the prosecution has not proved its case beyond all reasonable doubts. The sole important witness (PW-9) who could have played a decisive role in the case of the prosecution has lost his credibility on account of resorting to different stands at different stages. He has not even named accused Itwari in the report lodged by him. His version that from the bottom of the staircase he saw the assault opened by the accused persons also gets falsified because the Patwari who prepared the spot map has categorically stated that a person standing on the ground floor cannot see the things going on over the terrace. Even the seizure of blood stained articles has not

been duly proved with the help of serological report whether the blood was of human origin or of the blood group of the deceased persons. PWs - 26 and 12 - the sons of PW-9 are also contradictory to each other. In this view of the matter, the findings recorded by the Court below convicting the accused/appellants under Section 302/34 IPC twice are not based on proper appreciation of the evidence and therefore, they are liable to be set aside.

22. In the result, the appeals are hereby allowed, judgment impugned is set aside and the accused/appellants are hereby acquitted of the charge levelled against them. Accused/appellants Manrakhan and Dipesh alias Raja are in jail and therefore they are directed to be set free forthwith if not required in any other case. Accused/appellant Itwari is however reported to be on bail and therefore his bail bonds stand discharged.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(RP Sharma)

Judge