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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 14/12/2016****Judgment Delivered on : 14/02/2017****Criminal Appeal No. 2165 of 1998**

Rajulal son of Bhagela Dhiwar, aged about 25 years, Resident of
village Korasi, PS Kharora, District Raipur, Madhya Pradesh
(Now Chhattisgarh)

---- Appellant**Versus**

State of Madhya Pradesh (Now Chhattisgarh), Through PS
Kharora, District Raipur, Madhya Pradesh.

---- Respondent**Criminal Appeal No. 2025 of 1998**

1. Rajeev Kumar S/o Nand Kumar aged about 19 years.
2. Kaushal Kumar S/o Jhandu Ram, aged about 61 years.

Both Resident of village Korasi, Police Station Kharora, District
Raipur.

---- Appellant**Versus**

The State of Madhya Pradesh (Now Chhattisgarh)

---- Respondent**Criminal Appeal No. 2022 of 1998**

1. Bisahu Patel son of Manbodh Patel, aged about 35 years.
2. Raju Son of Agnu Dheemar, aged 35 years.

Both R/o Gram Korasi, PS Kharora, District Raipur.

---- Appellant

Versus

State of Madhya Pradesh (Now Chhattisgarh), Through PS
Kharora, District Raipur.

---- Respondent

Acquittal Appeal No. 142 of 2016

The State of Madhya Pradesh (Now Chhattisgarh) Through
District Magistrate, Raipur, Madhya Pradesh.

---- Appellant

Versus

1. Ashwani Sharma, aged about 27 years, Son of Shri Kaushal Kumar Sharma.
2. Rajulal aged about 25 years son of Shri Baghela
3. Mohanlal aged about 34 years son of Shri Bisaru
4. Bhagwan aged about 32 years, son of Shri Pusau Dheemar
5. Khilawan aged about 25 years, son of Shri Manrakhan
6. Kishanlal son of Thakurram, aged about 22 years.
7. Bisahu Patel son of Shri Manbodh Patel, aged about 35 years.
8. Rajeev Kumar aged about 19 years, son of Shri Nandkumar
9. Kaushal Kumar aged about 61 years son of Shri Jharuram
10. Triloki aged about 20 years son of Shri Gajanand Sharma
11. Vinod Mahobia aged about 18 years son of Shri Kaushal Kumar
12. Ashwani Soni aged about 21 years son of Shri Trilochan Soni
13. Raju aged about 35 years son of Shri Aganu Dheemar
14. Kaushal Kumar Dheemar aged about 30 years son of Shri Aganu Dheemar

All are resident of village Korasi, Police Station Kharora, District
Raipur, Madhya Pradesh.

---- Respondents

For Appellant-Accused	: Shri Ranbir Singh Marhas, Smt. Anubhuti Marhas, and Shri C.R.Sahu, Advocates.
For Respondent/State	: Smt. Smita Ghai, Panel Lawyer.

Hon'ble Shri Deepak Gupta, Chief Justice
Hon'ble Shri Sanjay Agrawal, J.

C.A.V. Judgment

Per Deepak Gupta, Chief Justice

1. All the aforesaid cases are being disposed of by one judgment since they arise out of one criminal case and one judgment dated 07.08.1998 delivered by 7th Additional Sessions Judge, Raipur in Sessions Trial No. 418 of 1996. The learned Additional Sessions Judge has convicted and sentenced the Appellants (in Criminal Appeals No. 2165 of 1998, 2025 of 1998 and 2022 of 1998) as follows:

Conviction	Sentence
Under Section 147 IPC	One year rigorous imprisonment.
Under Section 148 IPC	Two years rigorous imprisonment.
Under Section 324/149 IPC	Two years rigorous imprisonment.
Under Section 302/149 IPC	Rigorous imprisonment for life with fine of Rs. 2000/-. In default of payment of fine, further six months rigorous imprisonment.

2. The prosecution story, briefly stated is that on 23.06.1996 at about 3-3:15 pm, Rajendra Kumar Pandey (PW-3), his brother Parasmani (PW-4) alongwith their father Bodhram Pandey and his son Arvindra Kumar Pandey (PW-8) were returning from their fields. Rajendra (PW-3) and Parasmani (PW-4) were on one bicycle and the deceased Bodhram and Arvindra Kumar Pandey (PW-8) were on another bicycle. When they reached the starting point of the *basti* near Panchayat Bhawan, about 50-60 persons were standing. Former Sarpanch-Ashwani Sharma was standing there with a revolver in his left hand and

a rod in his right hand and on seeing Bodhram, Ashwani Sharma started abusing and stated that Bodhram Pandey has to be killed. He instigated others to kill Bodhram Pandey. The two brothers tried to run away. Their father was killed and the brothers were beaten up.

3. The prosecution story is that thereafter, these brothers managed to reach home where their house was surrounded. They were scared of coming out of their home. Arvindra some how managed to reach home unhurt. At about 6-6:30 pm, the police reached the spot. It was at that stage that Rajendra Pandey (PW-3) filed a complaint with the police. This complaint is Exhibit P-16. Since this is the first report with regard to the occurrence, we would like to refer to the same in detail. It reads as under:

"I live in Korasi. I work as conductor in State Transport. I have come to my house for treatment as I am ill. My father Bodhram Pandey provides ayurvedic treatment. Today, on Sunday i.e. 23.06.1996, I and my brother Parasmani Pandey and later my father and my 9 year old son Arvind Kumar had gone to plough the fields situated at Chamrachak. We came back at around 3-3:15 pm from there. While returning, Parasmani and I were on one bicycle and my father and my son were on another bicycle. Many people had gathered near the Panchayat Bhawan. Ashwani Sharma was also there. On seeing my father, he said, "today he is to be killed". I saw that Ashwani was holding a revolver in his left hand and an iron rod in his right hand. On seeing them, we came towards the basti from the canal side and saw near that Gaura Choura, Ashwani Mahraj and his nephew Rajeev, who was also holding revolver and something like battle axe and 20-25 people were present there. I was in the front when people surrounded me. My father and son Arvind were behind me. Then I saw that Rajeev, nephew of Ashwani Sharma who was in front was holding battle axe like weapon in hand. I saw that his maternal uncle, Ashwani Sharma and his father Kaushal Kumar, who were holding sword and club, were assaulting my father. I fled from the spot leaving my bicycle in the bushes and came home from the direction of kitchen garden. Those people surrounded our house from all sides. All of them were abusing and yelling to set the house on fire and kill the children alongwith

them. Thereafter, my son Arvindra came and told that they were assaulting his grandfather badly. After arrival of the police, I came out of my house and saw that my father Bodhram Pandey was lying dead at Gaura Chaura triangle. There were 2-3 big wounds on his head and 2-3 other wounds were also visible. His right wrist was fractured and his left thumb was also fractured. It was all blood smeared there. Radhia Bai Sahu, Dinesh Sahu and Garra Kurmi of the village have also seen. Report is recorded as heard and stated. "

4. The salient features of this report are that after the witness alongwith his father, brother and son were returning from the fields, they were accosted by Ashwani Sharma and his men. Ashwani Sharma exhorted and instigated the members of the assembly to kill Bodhram Pandey. This witness says that he saw Ashwani Sharma, Rajeev, nephew of Ashwani Sharma, and Kaushal Kumar, father of Ashwani Sharma who were armed with sword, *sabbal*, iron rods and others had encircled Bodhram. He saw Rajeev giving a blow of *Tabbal* on the head of his father. Then he saw Ashwani giving a blow of iron rod on the head of his father. He also saw Kaushal giving a blow of iron rod to his father. He then ran away from the spot leaving his bicycle behind. His father had fallen on the ground. According to the witness, Ashwani Sharma also instigated the unlawful assembly to catch hold of the two brothers and kill them. He somehow managed to reach home and thereafter, the accused persons pelted stones on them. Sometimes later, his son Arvindra came back and informed that his grand father (the deceased) had been badly beaten. Arvindra claimed that Raju Baghela had kicked him and thereafter threatened to kill him. But some how, he managed to run away. This witness also states that when he was running away some of the members of the unlawful assembly encircled him and hit him with rods. Some of them were also holding small sharp edged weapon- *Gupti*. Raju Dheemar, Bisahu Patel were having *Gupti* while

Raju son of Aghnu, Triloki Sharma, Ashwani Soni, Kaushal and Vinod Mahobia were having rods.

5. According to the complainant, he could manage to come out of the house only when the police came and he saw that his father is already dead. There were 2-3 deep injuries on the head and some small ones. Skull was fractured. He in his first report stated that Ashwani Sharma and others had murdered his father and had also caused injuries to him. In this very statement, he named some of the witnesses including Radhika Bai, Dinesh, Garra Kurmi and others. Thereafter, FIR (Exhibit P-26) was lodged in the police station. On 24.6.1996 at 3:15 am, the investigation was started. The body of the deceased was sent for postmortem which was conducted by Dr. S.R.Banjare (PW-1). The statements of other witnesses were recorded and Parasmani (PW-4) also stated that he had also been beaten up by some of the accused. Thereafter, the police filed charge sheet against the accused in which the accused were alleged to have constituted an unlawful assembly with intention to kill the deceased Bodhram Pandey. The accused were also charged with for having constituting unlawful assembly at Gaurapara Tiraha at village Korasi with intention of killing Bodhram Pandey and causing grievous and serious injuries to Parasmani Pandey and Rajendra Pandey. It was also alleged that in furtherance of this, they had killed Bodhram Pandey and caused injuries to others. Accordingly, all the accused were charged with having committed an offence under Sections 147, 148, 302, 325, 324, 323 read with Section 149 IPC.
6. The accused were tried. There are as many as 14 accused persons who were tried for such offence. Out of these, six were convicted and eight were acquitted. The convicted accused are Raju Baghela, Bisahu,

Rajeev, Kaushal, Triloki, and Raju son of Aghanu and the acquitted accused are Ashwani Sharma, Mohan Lal, Bhagwan, Khilawan, Kishan Lal, Vinod Mahobia, Ashwani Soni, Kaushal Kumar Dhimar.

7. Out of these accused who were convicted, Triloki had filed Criminal Appeal No. 1941 of 1998. He has expired and the appeal filed by him was disposed of as having abated vide order dated 05.12.2016.
8. Criminal Appeal No. 2022 of 1998 has been filed by Bisahu Patel and Raju son of Agnu. Criminal Appeal No. 2025 of 1998 has been filed by Rajeev Kumar and Kaushal Kumar. Criminal Appeal No. 2165 of 1998 has been filed by accused Rajulal.
9. On 26.10.2016, Shri Y.C.Sharma, learned counsel for the Appellant has stated that Appellant No. 2 Kaushal Kumar in Criminal Appeal No. 2025 of 1998 had undergone substantial portion of sentence and thereafter he was granted permanent probation by the State Government, and therefore, he did not want to prosecute the appeal in respect of Appellant-Kaushal Kumar. Therefore, the appeal filed by Kaushal Kumar was disposed of as not pressed.
10. The State has filed Acquittal Appeal No. 142 of 2016 against acquittal of Accused No. 2, 7, 8, 9, 10 and 13 from charges under Sections 325, 323 IPC and Accused No. 1, 3, 4, 5, 6, 11, 12, and 14 from the charges under Sections 147, 148, 302, 325, 324, 323 and 149 of IPC.
11. Now, we take up the appeals of remaining four convicted accused and the seven acquitted accused.
12. This is a case wherein there are eyewitnesses. The only issue is whether the eyewitnesses are to be believed or not. There is no manner of doubt that the eyewitnesses may have embellished and exaggerated their statements while appearing in the Court. It is for this

Court to separate the grain from the chaff. It is the duty of this Court to analyse the entire evidence. Before doing so, we may make reference to the judgment of the Apex Court with regard to the scope of interference in appeal against the acquittal.

13. The Apex Court, in *Ranjit Singh v. State of Punjab & Others* {(2013) 16 SCC 752}, it was held as under:

"26. It is trite that even when exaggerations and embellishments are glare the courts can and indeed are expected to undertake a forensic exercise aimed at discovering the truth. The very fact that a large number of people were implicated in the incident in question who now stand acquitted by the High Court need not have deterred the High Court from appreciating the evidence on record and discarding what was not credible while accepting and relying upon what inspired confidence. That exercise was legitimate for otherwise the Court would be seen as abdicating and surrendering to distortions and/or embellishments whether made out of bitterness or any other reason including shoddy investigation by the agencies concerned. The ultimate quest for the court at all times remains "discovery of truth" and unless the court is so disappointed with the difficulty besetting that exercise in a given case, as to make it impossible for it to pursue that object, it must make an endeavor in that direction. Inasmuch as the High Court made an attempt in that direction in the case at hand, it did not, in our opinion, commit any mistake. The question whether the conclusions drawn by the High Court as to the guilt of the appellants before us are reasonably supported by the evidence on record, is a different matter to which we must turn immediately.

14. Shri Marhas, learned counsel for the acquitted accused submitted that if the view of the trial court is reasonable and plausible view, the High Court should not interfere. Section 378 of the CrPC confers upon the State a right to prefer appeal to the High Court against the order passed by the Trial Court acquitting the accused. Sub-section (3) of Section 378 CrPC mandates that the High Court should not entertain such appeals except if it deems fit to grant leave to appeal. Before an appeal is admitted, the Court has to consider the petition for grant of

leave to appeal. In this matter, though the leave to appeal (McrC) was filed in the year 1999 and was pending for many years, vide order dated 08.12.2016, we had allowed the same and thereafter, the acquittal appeal has been entertained. We are clearly of the view that this is a fit case to entertain the appeal against acquittal. The entire case of the prosecution is based on the allegation that Ashwani Sharma was the leader of the unlawful assembly which entered into a criminal activity but he has been acquitted on the basis of some defence evidence. We feel that it is a fit case where this Court must look into the evidence.

- 15.** The presumption of innocence attached to every accused person is fortified when he is acquitted. Therefore, in an appeal against acquittal, though the High Court is empowered to re-appreciate, review and reconsider the evidence, it should normally not interfere unless there are circumstances and compelling reasons to do so. In *Sanwat Singh v. State of Rajasthan* {1961 SCR (3) 120}, the Apex Court held as follows:

"The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

- 16.** In *Govindraju @ Govinda v State by Srirampuram Police Station* {(2012) 4 SCC 722} the Apex Court held as under:

“12. The legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 CrPC. This is an indication that appeal from acquittal is placed on a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 CrPC has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-section (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the courts.

13. Under the scheme of CrPC, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law....”

17. In the latest judgment cited before us in *Ramesh & Others v. State of Haryana* {(2016) SCC Online SC 1314}, the Apex Court held as follows:

"26. The appellate court, therefore, is within its power to reappreciate or review the evidence on which the acquittal is based. On reconsideration of the evidence on record, if the appellate court finds the verdict of acquittal to be perverse or against the settled position of law, it is duly empowered to set aside the same. On the other hand, if the trial court had appreciated the evidence in right perspective and recorded the findings which are plausible and the view of the trial court does not suffer from perversity, simply because the appellate court comes to a different conclusion on the appreciation of the evidence on record, it will not substitute its findings to that of findings recorded by the trial court."

18. Keeping in view the aforesaid law laid down by the Apex Court, we now proceed to deal with the evidence led by the parties.

19. It is not disputed that the occurrence took place. It is not disputed that Bodhram Pandey was killed at Gaura Choura. The learned Trial Court

acquitted the accused-Ashwani Sharma on the ground that he was not present at the spot. According to the prosecution, he is the main culprit and the person behind the entire crime. If we were to agree with the learned trial Court then we would acquit all the accused because the testimony of the witnesses, if found totally false with regard to Ashwani Sharma, cannot be accepted to be true with regard to the other accused. While appreciating the evidence of the witnesses, we are taking into consideration the fact that there was previous enmity between the family of Bodhram Pandey and one Late Bisru Sahu. It was argued on behalf of all the Appellants that the complainant party in this case was involved in murder of Bisru Sahu and Ashwani Sharma was the key witness in that case and therefore, he might have been wrongly impleaded in the case. It would be pertinent to mention that the said FIR was lodged by Rajendra Kumar Pandey (PW-3) and Parasmani Pandey (PW-4) and one other brother but not against Bodhram Pandey. This enmity would not give any cause to kill Bodhram Pandey.

20. We may now refer to the relevant evidence and also the statement of the witnesses in this regard. There is no dispute that the witness when they appeared in the Court did exaggerate their version and also embellished their statements. It is, however, the duty of the Court to separate the grain from the chaff and to ensure that the truth comes out. In the first merg intimation (Exhibit P/16) recorded at 6 pm at the instance of Rajendra Kumar Pandey (PW-3), three persons have been named viz. Ashwani Sharma, his nephew Rajeev Sharma and Kaushal Kumar Sharma, father of Ashwani Sharma. The next important document is the FIR (Exhibit P/11) which was lodged immediately thereafter at 6:15 pm. The merg intimation is the first intimation of death

and the FIR is the document which is of more important nature. In this FIR, the persons who have been identified and named by Rajendra Kumar Pandey (PW-3) are Ashwani Sharma, Kaushal Kumar Sharma, Rajeev, Raju Dheemar, Bisahu Patel, Triloki Sharma, Raju S/o Aghanu Dheemar, Ashwani Soni, Kaushal Dheemar, Vinod Mahobia and Ram Vishal Soni. It would be pertinent to mention that out of the aforesaid persons, Ram Vishal Soni was never made accused and Ashwani Soni, Kaushal Dheemar and Vinod Mahobia have been acquitted.

21. When appearing in the Court, the witnesses have named many other persons and they have, in our opinion, rightly not been arrayed as accused or they have been acquitted. However, it would be pertinent to mention that all the witnesses have stated that Ashwani Sharma, Rajeev Sharma and Kaushal Sharma made a murderous assault on the deceased-Bodhram Pandey.

22. We shall deal first with the case of murder of Bodhram Pandey. The version of the prosecution is that it was Ashwani Sharma who gave a call that Bodhram Pandey should be killed that day and thereafter, Ashwani Sharma, Rajeev Sharma and Kaushal Kumar Sharma alongwith 20-25 persons attacked Bodhram Pandey who admittedly was killed on the spot. Though, Rajeev Sharma and Kaushal Kumar Sharma have been convicted, Ashwani Sharma has been acquitted on the ground that at about 4 pm, he had gone to the police station and lodged a complaint that two groups were fighting in the village. The learned Trial Court acquitted Ashwani Sharma only on the ground that presence of Ashwani Sharma at the spot had not been proved. We are not at all in agreement with this finding of the learned Trial Court since there are a number of eye-witnesses in this case, who have proved his presence at the spot.

23. The first eyewitness is Rajendra Kumar Pandey (PW-3), son of the deceased. He is the person who lodged the merger intimation (Exhibit P/16) as well as the FIR (Exhibit P/11). According to him, when they were returning from their field and reached Gaura Chaura, at that time, Ashwani Sharma, Rajeev Sharma, Kaushal Kumar Sharma, Bisahu Patel, Triloki, Raju son of Baghela, Raju son of Aghnu Dheemar, Ashwani Soni, Vinod Mahobia, Kaushal Kumar Dheemar, Bhagwan Dheemar, Mohanlal Sahu, Khilawan Sahu @ Bucchu, Krishna Kumar Patel and 20-25 other persons who were armed with *danda*, sword, *lathi* etc. surrounded them. As soon as his father reached Gaura Chaura, he was given one blow by Rajeev Sharma with a *danda* which had an iron end. Ashwani Sharma gave blow with an iron rod and Kaushal Kumar Sharma also gave a *danda* blow on the head of his father. His father fell down but he was still attacked by these accused. When this witness went to save his father, then Raju son of Aghnu Dheemar, Bisahu Patel and Raju son of Baghela and Triloki also attacked him with a *Gupti* (knife). Thereafter, according to this witness, he was attacked by Ashwani, Kaushal and Rajeev on his legs but somehow he managed to escape.

24. Parasmani (PW-4) is the other injured eyewitness. According to him, his version is similar to that of Rajendra Kumar Pandey (PW-3). He states that near Gaura Chaura, the accused Ashwani Sharma gave a call that Bodhram Pandey should be killed and then the accused Rajeev Sharma gave blows with *danda* having an iron end to his father on the head. Thereafter, Ashwani Sharma gave blow with the iron rod on the head of his father. Then Kaushal Kumar gave a blow of *danda* on the head of his father. His father fell down unconscious. When his brother, Rajendra Kumar Pandey (PW-3) went to save his father, then his

brother was beaten by Bisahu, Raju son of Aghnu, another Raju son of Baghela, Triloki son of Gajanand, Kaushal son of Aghu, Vinod and Ashwani Soni and many other persons. As far as this witness himself is concerned, he states that he was beaten up by Mohan, Khilawan, Kishan and Bhagwan Dheemar. He was given fists blows and *danda* blows.

25. Next important witness is Arvindra Kumar Pandey (PW-8) . This witness is the grandson of the deceased and was walking with his grand father. His statement has been recorded after ascertaining that he was fit to make a statement. He was aged about 10 years when the occurrence took place. His version is also that the accused Ashwani, Rajeev and Kaushal Kumar gave blows to his grand father with iron rod and *danda* with iron end and a *danda*, respectively. According to him, Ashwani Sharma threatened him also and then he ran away.

26. Another eyewitness is Dinesh Sahu (PW-5). This witness states that near Gaura Chaura, Ashwani Sharma was armed with an iron rod and revolver. Rajeev Sharma had also a revolver and also carrying a *danda* with an iron end. Kaushal Kumar Sharma was also armed with a *lathi* and a sword. When Bodhram Pandey came towards Gaura Chaura, the three accused attacked him and gave him three blows on the head and thereafter, the deceased fell down. Other family members of the deceased were also beaten up.

27. Birju Ram (PW-6) also claims to have been beaten up during this occurrence but appears not to be an eyewitness. He does not say anything about the murder of the deceased Bodhram Pandey. His evidence is only relevant to show that Ashwani Sharma was also present on the spot.

28. Radhika Bai (PW-9) states that her house is about 300-400 feet from the place of occurrence. She saw Ashwani Sharma and Rajeev and Kaushal Kumar Sharma and other accused persons from the house of Shyama Barai. She saw these three persons giving blows to Bodhram Pandey and when the sons of Bodhram Pandey tried to save him, they were also beaten up preventing from saving their father by other accused persons. These are the main witnesses.

29. As far as the medical evidence is concerned, it fully corroborates the version of the witnesses. The postmortem report with regard to the deceased is Exhibit P/1 and has been proved by Dr. S.R.Banjare (PW-1). The injuries on the person of the deceased are as follows:

- "1. Contusion and laceration injuries with compound fracture of both radius and ulna of writ. Size of contusion $2\frac{1}{2}$ " x $1\frac{1}{2}$ " and $2\frac{1}{2}$ " x $1\frac{1}{2}$ " left and right side whole fracture are $1\frac{1}{2}$ " x 1" x $\frac{1}{2}$ " and 2"x1"x1" (RWx1) respectively on left and right side forehead are antemortem and grievous.
2. Right thumb having contusion and fracture of phallanges with laceration 1" length x $\frac{1}{2}$ " deep x $\frac{1}{2}$ " width. Antemortom and grievous in nature.
3. Abrasion $3\frac{1}{2}$ " length x 4" width bruise with contusion injury present obliquely. Lateral and left side chest antemortem.
4. Injuries over head (a) abrasion $4\frac{1}{2}$ " length x $3\frac{1}{2}$ " width x 2" depth. Lacerated injury over left lateral portion parietal region of head with fracture. Left lateral torn and lacerated of nerves and brain matter comes out are dangerous antemortem injuries. (b) Multiple lacerated wound over head are 2" length x 1" width x 1" depth, 1 $\frac{1}{2}$ " length x 1" width x 1" depth, $2\frac{1}{2}$ " length x 1" width x 1" depth. $\frac{1}{2}$ " l x 1" width x 1" depth. Lacerated wound over right frontal, right parietal, right lacrimal and occipital of head. all are antemortem caused by hard and blunt object".

30. These injuries fully tally with the version of the witnesses. As far as the injured witnesses are concerned, Dr. S.R.Banjare (PW-1) has also proved the injuries on the person of Birjhu Ram (PW-6), Parasmani

(PW-4) and Rajendra Kumar Pandey (PW-3) and his statement corroborates the version of the injuries suffered by the witnesses.

31. We shall now first take up the defence of the accused-Ashwani Sharma that he was not present at the spot. In this behalf, reliance has been placed on the statement of Ram Bahadur Singh (DW-1) who on 23.06.1996 was a *Moharrir* (Head Constable) in police station Kharora. He states that he made an entry in the register (Exhibit D-10) on the asking of the accused Ashwani Sharma at about 4:40 pm and thereafter, he alongwith Ashwnai Sharma and police officials, went to the village. In this evidence, he states that Kharora is at a distance of about 16 KM from village Korasi where the occurrence took place but admits that in the police record, the distance is shown to be 14 Kms. He also states that the accused came on a motor-cycle to lodge the report. According to him, it takes about 20-25 minutes to reach the place of occurrence. He further states that as per the police record, the police officials left for village Korasi at 5.05 pm. Dayanand (DW-2) is not at all relevant.

32. Assuming that the distance from the village to the Police Station is 16 KMs, if a person goes on a high speed on a motor-cycle, he can cover this distance in 15-20 minutes. Therefore, the learned Trial Court gravely erred in holding that Ashwani Sharma could not have been present in the village because all the police officials have stated that he reached police station at about 4 pm. The occurrence took place between 3:15 and 3:30 pm. It would have been over in five minutes. Thereafter, nothing prevented Ashwani Sharma from going to the police station to lodge a false report. It cannot be believed that Ashwani Sharma on seeing the fight immediately took his motorcycle and went to the police station. He would have easily informed the police on

telephone. He owned a motorcycle. He is not a poor villager. We have no doubt in our mind that he tried to create an alibi. We are also not fully relying upon the statement of the defence witness that Ashwani Sharma reached the police station at 4 pm. If he had reached the police station at 4 pm, why would the entry in the register be made at 4:40 pm. This entry would have been made within 5-10 minutes of reaching the police station. Therefore, in all probability, Ashwani Sharma had gone to the police station much after 4 pm. Even assuming that he reached the police station at 4 pm, then also on a motorcycle being driven at a high speed, he could have easily reached the police station by 4 pm. In this view of the matter, we feel that the learned Trial Court totally erred in relying upon the alibi of Ashwani Sharma especially when this alibi is totally against the ocular statement of the witnesses including the injured eyewitnesses all of whom saw that Ashwani Sharma was the architect of the entire crime.

33. There are three injured eyewitnesses. Rajendra Kumar Pandey (PW-3), Parasmani (PW-4) and Birju (PW-7). There are two other eyewitnesses namely Arvindra (PW-8) and Radhika Bai (PW-9). They have stated that Ashwani Sharma was present on the spot. There is no reason why their evidence should be disbelieved. In this case, immediately after the occurrence, the house of the victim was surrounded by the goons of the village. The report has been lodged at 6:15 pm. There was no time to cook up a false story. There are no contradictions as far as the presence of Ashwani Sharma on the spot is concerned. Therefore, we have no hesitation in coming to the conclusion that the prosecution has proved beyond reasonable doubt that Ashwani Sharma was also present on the spot and assaulted the deceased.

34. The other main argument raised on behalf of the accused is that even if Ashwani Sharma, Rajeev Sharma and Kaushal Kumar Sharma are to be convicted for the murder, all the other accused cannot be convicted. The argument is that there was no unlawful assembly and the learned Trial Court erred in relying upon Section 149 IPC in convicting the accused.

35. Common object prescribed under Section 149 IPC is of less wide connotation than the common intention under Section 34 IPC. In this case, there is no doubt that the common object was to kill Bodhram Pandey.

36. The main issue which arises before us is that whether Sections 148 and 149 IPC are at all applicable. Section 141 IPC defines an assembly of five or more persons as an "unlawful assembly" if the common object of the persons composing that assembly is unlawful. We are mainly concerned with the third object, which is to commit any mischief or criminal trespass or other offence. We may also add an explanation to Section 141 IPC which clearly shows that an assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly. Section 148 IPC reads as follows:-

"148. Rioting, armed with deadly weapon.- Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment or either description for a term which may extend to three years, or with fine, or with both."

37. Section 148 IPC is applicable in the case of rioting where the members of the assembly are armed with a deadly weapon or the offence is likely to cause death. The most important provision in this case is Section 149 IPC, which reads as follows:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

38. A close analysis of Section 149 IPC shows that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the member of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Therefore, if a person of a member of the unlawful assembly even if have a common object of killing some person and even if that person does not take any action or overt act, he can be guilty of murder by applying Section 149 IPC.

39. The underlying principle of Section 141 IPC is that the law discourages illegal assemblage of men to preserve the public peace. The basic test is that all the persons of this assembly i.e. which must comprise of five or more persons should have a common object of committing a particular offence. The law is clear that the number of persons who are simple onlookers or who do not share the common object cannot be treated as the part of the unlawful assembly.

40. We are not at all in agreement with this view. This is a clear cut case where the unlawful assembly had been formed with a sole intention of killing Bodhram Pandey. It may not have been the intention of the assembly to kill other persons but the evidence led clearly shows that all of them who had gathered there, had assembled with the purpose of killing Bodhram Pandey. Some of them may not have taken active part

in murdering Bodhram Pandey but by preventing the sons of Bodhram Pandey from coming to rescue of their father, they are equally guilty.

41. In this case, as far as the facts are concerned, it stands proved that Ashwani Sharma gave a clarion call that Bodhram Pandey should be killed. He should not be left alive. All the accused persons were armed with deadly weapons, some with *lathi*, some with revolver and some with *danda*. The common object was to kill Bodhram Pandey. Several persons who was a member of that assembly, knew that the common object was to kill Bodhram Pandey. When the attack took place on Bodhram Pandey they were aware that this attack was with a view to kill Bodhram Pandey. Therefore, even if they did not do any overt act, they are guilty of commission of the offence.

42. In view of the above discussion, we are clearly of the view that the statement of the prosecution witnesses have to be believed even in respect of Aswhani Sharma Ashwani Soni, Kaushal Kumar Dheemar and Vinod Mahobia who were named in the FIR. As held by us above, there may have been embellishment and improvements in the statement of the witnesses while appearing in the Court, but we are clearly of the view that the initial version stated in the FIR was correct and there is no reason to doubt that version.

43. In view of the above discussion, the appeals filed by the accused Rajulal son of Baghela Dhiwar, Bisahu Patel son of Manbodh Patel, Rajeev Kumar son of Nand Kumar, and Raju son of Aghnu Dheemar, are dismissed. The judgment of the learned trial Court in respect of these accused is upheld.

44. The appeal filed by the State challenging the acquittal of Ashwani Sharma, Ashwani Soni, Kaushal Kumar Dheemar and Vinod Mahobia is allowed. They are convicted under Sections 302/149 IPC and are

sentenced to undergo rigorous imprisonment for life. They are directed to surrender or be taken into custody forthwith for serving out the remaining part of the sentence.

45. As far as the appeal by the State against acquittal of the accused-Mohanlal, Bhagwan, Khilawan and Kishanlal, is concerned, the same is dismissed.

46. We have been informed that Accused-Kaushal Kumar in Criminal Appeal No. 2025 of 1998 was granted permanent probation by the State. We are unaware of any provision of law which permits the State to grant permanent probation to a person who has been convicted for an offence of murder. However, Kaushal Kumar has not pressed his appeal.

47. The Registry is directed to register a separate petition (*In Reference High Court of Chhattisgarh on its own motion (matter relating to grant of permanent probation) Versus State of Chhattisgarh & Kaushal Kumar*) under Section 482 CrPC read with Article 226/227 of the Constitution of India. Keeping in view the nature of the dispute, this matter shall be listed before a Division Bench presided over by the Chief Justice. The State shall inform the Court under which provision of law was Kamlesh Kumar was granted permanent probation.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE

Sd/-

(Sanjay Agrawal)
JUDGE