

CRIMINAL APPEAL NO. 125 OF 2002

The State of Maharashtra	RESPONDENT
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CRIMINAL APPEAL NO. 126 OF 2002

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W I T H

CRIMINAL APPEAL NO. 127 OF 2002

Kailash S/o Vishwanath Godse,
Aged 25 Years, Occupation
Nil, Resident of Mudkhed,
District Nanded

APPELLANT**V E R S U S**

The State of Maharashtra

RESPONDENT

Mr. Nitin Pradhan, Advocate, holding for
Mr. A.H. Kapadia, Advocate for the Appellant
Mr. S.D. Ghayal, A.P.P. for the Respondent/State
Mr. A.S. Deshpande, Advocate, Assist to A.P.P.

CORAM : **T.V. NALWADE AND**
A.M. DHAVALA, JJ.

RESERVED ON : **20th NOVEMBER, 2017**
PRONOUNCED ON : **12th DECEMBER, 2017**

JUDGMENT [PER A.M. DHAVALA, J.] :-

Accused No.1 Kailash S/o Vishwanath Godse,
accused No.2 Bhimappa S/o Gopalappa Kottawar and
accused No.3 Nagorao S/o Madhvrao Pachling aggrieved
by their conviction in Sessions Case No. 175 of 1996
by II Adhoc Additional Sessions Judge, Nanded, by
Judgment dated 13th March, 2002, under Section 302 read
with Section 34 of the Indian Penal Code and sentence
of life imprisonment and fine of Rs.5,000/- each,

preferred Criminal Appeal Nos. 127 of 2002, 125 of 2002 and 126 of 2002, respectively. As common questions are involved, all the appeals are heard together.

2. Facts relevant for deciding the appeals may be stated as under :-

Deceased Uday, aged 24 years, was son of PW-1 Ram Choudhary and PW-14 Pushpa Chaudhary. PW-1 Ram Choudhary was a political leader of B.J.P. of Mudkhed, Taluka Mudkhed, District Nanded. He was also a Mayor of Municipal Council for around 10 years.

3. First Information Report [Exhibit 193] dated 14th July, 1996 recorded by PW-1 Ram Choudhary in Civil Hospital, Nanded, at 09.15 a.m. was registered at CR No.95/96 at Mudkhed Police Station, under Section 302 read with Section 34 of the Indian Penal code. On the same day, the incident took place in the night in between 13th July, 1996 to 14th July, 1996. As per First

Information Report [Exhibit 193], PW-1 Ram Choudhary, son Uday and other family members were watching movie on Television in the house. Other family members went to sleep. PW-1 Ram and deceased Uday had continued to see Television upto 00.30 midnight. Thereafter, Uday slept in the Television room. PW-1 Ram and PW-2 Mayura slept in drawing room and PW-14 Pushpa slept in adjoining room. At about 02.45 a.m., PW-2 Mayura got up and saw two strangers standing in the drawing room. They had made entry from the main door. She raised shout 'thieves-thieves'. Then all the family members got up. PW-1 Ram rushed to the adjacent room to bring a stick. He saw two persons namely accused No.1 Kailas and the other person who was not identified by him. As Uday tried to chase those persons, PW-1 also chased with a stick towards those persons. As they ran away, he returned back to the house and found that Uday was lying in front of their house with bleeding injury on his chest. He was not in a position to speak. He was brought inside the house. He was unconscious. He was immediately shifted to Civil Hospital, Nanded. There the Doctors declared that he was brought dead.

Accordingly, First Information Report was lodged against two persons including one Kailash Godse.

4. It shows reason that PW-1 Ram was running a Beer Bar at Chursi Naka Nanded road and accused No.1 Kailash was trying to secure a loan to start a Beer Bar. The bank did not provide him loan and he apprehended that PW-1 Ram, his brother and Uday were responsible for rejection of his application. Hence, Uday was murdered. One sentence was also inserted that there were political reasons behind the murder of Uday. On registration of crime, P.I. Mr. Kishansing started the investigation. He recorded the statements of material witnesses and additional statement of P.W.1 Ram on 14th July, 1996. On 9th August, 1996, he handed over further investigation to P.S.I. Mr. Chavan. The clothes of deceased Uday were seized, inquest panchnama and spot panchnama were drawn and post-mortem was conducted on dead-body. Accused No.1 Kailash was arrested on 14th July, 1996. The clothes on the person of accused No.1 Kailash were seized and were sent for chemical analysis. But, no blood was

found on the clothes of the accused. No weapon was recovered. After completion of investigation, charge-sheet was submitted in the Court.

5. In due course, the case was committed to the Court of Sessions. The Charge was framed against all the accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (Exhibit-55). The accused pleaded not guilty. The prosecution has examined 21 witnesses. The learned Adhoc Additional Sessions Judge, Nanded accepted the prosecution case and sentenced all the accused, as referred above. Hence, these appeals.

6. Mr. Nitin Pradhan, learned counsel for accused Kailash has taken us through evidence on record. He argued that there is no recovery of weapon and no blood was found on the clothes of accused No.1. Therefore, the prosecution solely relies on the evidence of eye witnesses i.e. P.W.1, P.W.2 and P.W.14. Their evidence is not cogent, consistent with each other and with their previous statements. It is

also improbable. There was no motive. The alleged motive of rejection of loan application of accused No.1 is falsified. The application was moved by accused No.1's brother. It was allowed before the incident. There was political rivalry. The names of accused Nos.2 and 3 were not mentioned in the First Information Report, but those accused have been subsequently implicated. PW-2 Mayura Choudhary had earlier shouted as 'thieves-thieves', and it is the case of prosecution that some thieves entered and one had stabbed deceased Uday. But, this story is given-up and new story is introduced against the accused out of enmity. There is no evidence that the door of the house was broken up and no impliment for house breaking was found with any of the intruders. There is inordinate delay in lodging the first information report. If the witnesses knew the names of the accused persons at 03.00 a.m., there was no first information report till 11.00 a.m., and in the first information report also only name of accused No.1 with one more unknown person was disclosed as the assailant. The Investigation Officer has selected all persons

connected with PW-1 Ram as panch witnesses. The Investigation Officer has used a case-diary and it can be used by the defence as well. It shows that PW-1 Ram, PW-2 Mayura and PW-14 Pushpa have disclosed the incident at the earliest point of time to three witnesses as a spontaneous reaction, but these three witnesses are not examined by the prosecution. The names of the accused persons were not disclosed to them and it was disclosed to them that there was entry of thieves. The conduct of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa is not normal. The learned trial Judge erred in relying on the prosecution evidence. He cited number of citations and we would consider the same in due course.

7. Learned counsel Mr.S.S. Jadhav for accused No.2 Bhimappa mainly adopted arguments of learned counsel Mr. Nitin Pradhan for accused No.1 Kailash. He argued that as per the prosecution case, there was no pre-meditation. It is highly improbable that two accused could have entered the house without weapons. There was allegation that only one accused inflicted

blow of sharp weapon. It was single injury. There is no material to show that all accused shared common intention to commit murder. Real brother of accused No.2 Bhimappa was the main rival of PW-1 Ram. Name of accused No.2 Bhimappa was not disclosed in the First Information Report. It was subsequently added due to sharp political rivalry. All eye witnesses i.e. PW-1 Ram, PW-2 Mayura and PW-14 Pushpa were knowing accused No.2 Bhimappa, but nobody has taken his name on the day of incident. The motive is flimsy as loan was granted to the brother of accused No.1 Kailash. Accused No.2 Bhimappa was a B.J.P. leader for many years. He defected and joined the Congress Party, therefore, he has been prosecuted belatedly.

8. Learned counsel Mr.H.A. Pathan for accused No.3-Nagorao argued that there was long standing political rivalry with him on account of no confidence motion moved against P.W.1 Ram. Though all witnesses knew him, his name was not taken by anybody. The evidence regarding role of prosecution witnesses and the accused is contradictory. No blood stains were

found on the spot of incident and spot panchnama is not proved. No broken bolt was seized. The facts alleged are improbable. He submitted that the prosecution evidence deserves to be discarded.

9. *Per contra*, learned A.P.P. Mr. S.D. Ghayal strongly supported the Judgment of the trial Court. He pointed out that the evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa is consistent. There was electric lights inside and outside of the house. Initial shouts as 'Chor-Chor' were by way of reflex action the names of the accused are taken by PW-1 Ram, PW-2 Mayura and PW-14 Pushpa immediately. Initially they were under shock and grief. Uday was reported to be dead when the F.I.R. was being dictated. Uday was immediately taken to Civil Hospital and immediately report was recorded by the police. It is reflected in the Inquest Panchnama drawn at 05.00 a.m. He stated that no exaggeration has been made by the witnesses. There is no reason to disbelieve the evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa. He argued that no interference is called for in the Judgment of

conviction.

10. The points for our determination with our findings are as follows :-

SR.NO.	POINTS	FINDINGS
1	Whether Uday met with homicidal death ?	Proved
2	Whether accused Nos.1 to 3 in furtherance of their common intention committed murder of Uday ?	Not Proved
3	Whether any interference is called for in the Judgment passed by the trial Court ? Order ?	All the appeals are allowed. The conviction of all the accused are set aside and they are acquitted

11. The evidence on record in short shows that accused Nos.1 to 3 in furtherance of their common intention made forcible entry in the house of PW-1 Ramrao on 13th July, 1996 at 02.45 a.m. PW-2 Mayura, daughter of PW-1 Ram saw the accused persons in the

drawing hall. She raised shouts. Deceased Uday came from television room and started pushing two accused out of the drawing hall. All the accused pushed him out. He was taken upto the compound wall. Two accused caught hold Uday and pushed up to the gate and the third accused stabbed on his chest. His father came with stick in the drawing room and he ran for chasing the accused, but they disappeared in the darkness and when he returned back, he saw Uday lying on ground with bleeding injury on his chest. Uday was taken in a Car to Civil Hospital, Nanded, where he was declared dead.

12. The evidence on record shows that PW-1 Ram initially was President of Mudkhed Municipal Council from 1985 to 1995. He was a B.J.P. leader. At the time of incident, the B.J.P. was in power and Gopinath Mundhe was the Deputy Chief Minister. The evidence shows that accused No.2-Bhimappa is brother of one Narayan Kotawar, who was earlier in B.J.P. party for several years. He was a Councilor, but in 1994, he defected alongwith some of the members to join the

Congress party. His action of defection was challenged by PW-1 Ram, but when no confidence was brought which was signed by Narayan, PW-1 Ram resigned as President. After his resignation, accused No.3-Nagorao became the President for one year. During that period, PW-1 Ram did not attend a single meeting. There are admissions to that effect in the evidence of PW-1 Ram and this background is not in dispute.

13. Accused No.1 Kailash was not in the politics at the relevant time. PW-1 Ram has led evidence that his brother Vidyanand was running a Beer Bar, which was managed by deceased Uday. Accused No.1 Kailash wanted to start his business of Beer Bar and had applied for loan from M.S.F.C., but the said loan was not sanctioned to him and accused No.1 Kailash was wrongly assuming that his loan application was rejected due to objections taken by PW-1 Ram.

14. The prosecution has examined 21 witnesses and proved several documents, which can be conveniently grouped as follows :-

[1] **EYE WITNESSES :-**

PW-1 Ram, father of deceased Uday, then aged 50 years. F.I.R. lodged at Exhibit 193.

PW-2 Mayura, sister of deceased Uday, then aged about 17 years.

PW-14 Pushpa, mother then aged around 44 years.

PW-20 – A.S.I. Vithal Bansode, who registered Crime at “0” number at 09.15 a.m. on 14th July, 1996 and forwarded the same through Police Constable to Mudkhed Police Station.

(First Information Report was recorded in Civil Hospital Nanded by PW-19 Maroti Waghmare between 08.30 a.m. to 09.00 a.m.)

[2] **MEDICAL EVIDENCE :-**

PW-9 Dr.Satyanarayan Panpale, who conducted postmortem of Uday from 09.00 a.m. to 10.00 a.m. on 14th July, 1996. Postmortem report [Exhibit-209].

PW-6 Jagdish Soni, panch to the Inquest Panchnama [Exhibit 203] drawn by PW-19 Head Constable Maroti of Wazirabad Police Station, Nanded.

Panch Witnesses – seizure of clothes of deceased Uday. PW-3 Ashotosh Choudhary.

Panchnama [Exhibit 198].

Spot Panchnama – PW-7 Uttam Chavan [Exhibit-205].

Map of the Spot [Exhibit 206].

P.W.4 Maroti – Seizure of cloths of accused on 14th July, 1996 [Exhibit 200].

Report of Chemical Analyzer [Exhibit 221] shows no blood stains on clothes of the accused.

[3] **Evidence of res gestae :-**

PW-5 Gangadhar Wadde;

PW-7 Uttam Chavan;

PW-8 Dr. Ramesh Chidrawar, who accompanied
PW-1 Ram Choudhary from Mudkhed to Nanded;

PW-10 Kiran Deshpande – P.W.1's sister's son;

PW-11 Kishan Puri – driver;

PW-15 Bhagwan Panewar;

PW-16 Vidyanand Choudhary, PW-1's brother.

[4] **Evidence of enmity –**

Almost all witnesses on *res gestae* are the
witnesses also on the point of enmity.

[5] **Police witnesses –**

PW-13 A.S.I. Mr. Uttam Pawar, who received
F.I.R. at Mudkhed Police Station and registered Crime
No.95/96 at 11.00 a.m. He has also carried out spot

panchnama [Exhibit 205].

PW-18 P.I. Mr. Kishansingh Sandusingh, who carried out main investigation.

PW-17 P.I. Mr. Gangadhar Shikare, who has merely recorded statement of career and submitted charge-sheet.

PW-19 P.H.C. Mr. Maroti Waghmare, who registered F.I.R. [Exhibit 193] drew inquest and forwarded articles and documents with covering letter [Exhibit 220].

PW-20 P.S.I. Mr. Vithal Bansode who received documents from PW-9 Dr. Satyanarayan Punpale at Wazirabad Police Station and forwarded them to Mudkhed Police Station.

PW-21 Investigation Officer, S.D.P.O. Mr. Harish Chavan. He has produced documents of M.S.F.C. Loan [Exhibit 237] and Municipal record (Exhibits 233

to 235].

15. The chronological events and the evidence in this regard may be stated as follows :-

<u>SR. NO.</u>	<u>DATE AND TIME</u>	<u>INCIDENT</u>	<u>EVIDENCE</u>
1	13.07.1996 09.00 to 10.30 p.m.	Deceased Uday visited house of Ajay Choudhary	PW-10 Kiran PW-16 Vidyanand
2	13.07.1996 11.00 p.m. to 00.30 a.m.	Deceased Uday returned home for lunch and watched television	PW-14 Pushpa [mother] PW-1 Ram [father] PW 2 Mayura
3	14.07.1996 00.30 a.m.	Deceased Uday slept in T.V. Room [western side middle]. PW-1 Ram and PW-2 Mayura were sleeping in bed-room [western side front room] and PW-14 Pushpa slept in another room	PW-1 Ram PW-2 Mayura PW-14 Pushpa
4	02.45 a.m.	PW-2 Mayura woke up and saw two outsiders in the drawing room with main door open. The lights of drawing room and front room were on. She saw	PW-1 Ram PW-2 Mayura PW-14 Pushpa

		third person in the main door. She raised cries as thieves-thieves [PW-1 Ram stated that cry was 'Dada']	
5	02.45 a.m. to 03.00 a.m.	PW-1 Ram woke up, expressed word बापरे, got frightened and rushed to the adjourn room for a stick. Deceased Uday got up and came to the drawing room.	PW-1 Ram PW-2 Mayura PW-14 Pushpa
6	02.45 a.m. to 03.00 a.m.	The trespassers told PW-2 Mayra to keep quiet. She was afraid. She kept quiet. She identified accused Nos.1 to 3	PW-2 Mayura
7		Mother PW-14 Pushpa cried loudly. Deceased Uday woke up and rushed to the drawing room	PW-2 Mayura
8		Two persons in the drawing room pushed Uday down the steps	PW-1 Ram PW-14 Pushpa
9		Deceased Uday pushed two persons outside	PW-2 Mayura
10	02.45 a.m.	Deceased Uday shouted 'Dada' you come. I have identified the	PW-14 Pushpa

		assailants	
11	-do-	Trespassers held Uday near the gate and third assailant stabbed Uday on chest by Gupti	PW-2 Mayura PW-14 Pushpa
12	-do-	Three persons stabbed and ran away [later admitted that he did not see the stabbing]	PW-1 Ram
13	-do-	The trespassers ran away and PW-1 Ram chased them with a stick but as they disappeared in darkness, due to fear PW-1 Ram returned and saw Uday lying injured in the courtyard.	PW-1 Ram PW-2 Mayura PW-14 Pushpa
14	-do-	Deceased Uday was brought in the house and kept on a bedsheet.	PW-2 Mayura PW-14 Pushpa
15	03.00 a.m.	Neighbours and Dr. Mundada and brother of PW-1 Ram were called by PW-1, PW-2 and PW-14. Dr. Mundada advised to take Udhav to Civil Hospital, Nanded. PW-8 Dr. Ramesh Chidrawar came there	PW-1 Ram PW-2 Mayura PW-14 Pushpa

16	04.00 a.m.	PW-1 Ram, PW-8 Dr. Chidrawar and PW-11 driver Keshav carried Uday in Car to Civil Hospital Nanded. On the way PW-1 Ram disclosed to PW-8 Dr. Chidrawar and PW-11 driver Keshav that accused No.1 Kailas stabbed Uday. Uday was alive, but his condition was critical in the journey	PW-1 Ram PW-8 Dr.Satyanarayan Punpale PW-11 Kisan Puri
17	14.07.1996 05.00 a.m. [04.10 am]	Doctor at Civil Hospital declared Uday as dead	PW-1 Ram PW-19 Maroti Memo of Medical college [Exh.219]
18	14.07.1996 05.00 a.m. to 05.20 a.m.	PW-19 H.C. Maroti drew Inquest Panchnama	PW-6 Jagdish PW-19 Maroti Exhibit 203
19	14.07.1996 08.30 a.m. to 09.00 a.m.	PW-19 H.C. Maroti Waghmare recorded F.I.R. [Exhibit 193] and forwarded to Wazirabad Police Station. Received by PW-20 PSI Vithal Bansode	PW-1 Ram PW-19 HC Maroti
20	09.15 a.m.	Registered Crime at number '0'. Sent	PW-19 H.C. Maroti Waghmare

		F.I.R. to Mudkhed	PW-20 ASI Bansode
21	10.00 a.m. to 10.30 a.m.	Clothes of deceased Udhav seized before PW-3 Ashutosh Choudhary	PW-3 Ashutosh Seizure Memo [Exhibit 198]
22	09.00 a.m. to 10.00 a.m.	Postmortem by PW-9 Dr. Satyanarayan Punpale	PW-9 Dr.Punpale Postmortem note [Exhibit 198]
23	11.30 p.m. to 12.15 p.m.	Spot panchnama showing no blood on the spot	PW-7 Uttam Spot Panchnama [Exhibit 205]
24	14.07.1996 12.30 p.m. to 12.45 p.m.	Arrest of the accused and seizure of clothes C.A. report [Exhibit 221] shows no blood stains	PW-4 Maroti PW-18 PI Bahure [Exhibit 200]
25	15.07.1996	Statements of PW-2 Mayura and PW-14 Pushpa and other witnesses	PW-2 Mayura PW-14 Pushpa
26	14.07.1996 to 09.08.1996	Investigation by PW-18 PI Mr. Bahure. Statements of other witnesses	PW-18 P.I. Mr. Bahure
27	09.08.1996 to 30.09.1996	Further investigation by S.D.P.O. Mr. Chavan. Collected M.S.F.C. Documents [Exhibit	PW-21 S.D.P.O. Mr.Harish Chavan

		232 to 235]	
28	01/10/96	Investigation by PW-17 P.I. Mr. Shikare. Recorded statements of career. Received C.A. report. Filed charge-sheet on 9 th October, 1996	PW-17 P.I. Mr. Gangadhar Shikare

16. **Homicidal Death :-**

The evidence of PW-1 Ram Choudhary, PW-2 Mayura Choudhary, PW-14 Pushpa Choudhary, inquest panch PW-6 Jagdish Soni and PW-20 H.C. Mr. Vithal Bansode and PW-9 Dr. Punpale's postmortem notes [Exhibit 209] show that deceased Uday had sustained a stab wound on his chest. It was penetrating stab injury over left side of chest in third intercostal space 4 c.ms. from midline and 4 c.ms. from left nipple. It was spindle shaped, clearcut margins 2 c.ms. x 1 c.ms. On dissection of thorax injury continued in 3rd intercostal space, intercostal muscles clean cut divided and it was passing into thoracic cavity. On opening thoracic cavity, pulmonary vein and left upper lobe of lung seen perforated. Pericardial

cavity contained 400 ml blood. It is opined that Udhav died due to this stab wound. There is no dispute about the same. This injury cannot be self inflicted or accidental. Hence, we hold that it is homicidal death.

Murder by Accused Nos.1 to 3 : -

17. Learned counsel Mr. H.I. Pathan for appellant Nagorao in Criminal Appeal No. 126 of 2002 relied upon following rulings;

[1] **Deepak Manikrao Andhare V. State of Maharashtra [2002 [9] LJSoft 60]**. In this case of murder of Ashok was out of political enmity at 11.35 p.m. It was alleged that accused No.2 Bhimappa had disclosed to PW-4 Maroti Panchal names of the assailants, but PW-4 Maroti had not disclosed their names before the Police Station officer. The F.I.R. disclosed that some persons had assaulted deceased with 'Gupti'. The benefit of this circumstance was given to the appellants to allow the appeals.

[2] **Babasaheb Apparao Patil & Ors. V. State of Maharashtra [2005 [7] LJSOFT 152]**. In this case, absence of blood stains on the cloths of accused Nos.3 and 4 were held relevant circumstance to give benefit of doubt.

[3] **Mahaya Chaitya Ozare V. State of Maharashtra [2005 [3] LJSOFT 69]**. In this case, no weapon of offence was recovered and no blood stains were found on the site. In absence of bleeding injury sustained by the injured, the trial Court ignored this fact and declined to give benefit to the accused.

18. Learned counsel Mr. Nitin Pradhan for the appellant Kailash [accused No.1] relied on following rulings :-

[1] **Ganesh Bhavan Patel and another v. State of Maharashtra [AIR 1979 S.C. 135]**. It is held that;

When Investigator was deliberately marking

time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. Delay of few hours in recording the statements is a serious infirmity.

[2] **R v. Andrews [1987] 1 All ER 513**]. With regard to *res gestae*, it was held that the statements are unusual or startling or dramatic as to dominate the thoughts of the victim, so as to have utterance to that event, thus giving no real opportunity for reasoned reflection. It would be admissible as *res gestae*. The Judge can conclude that the involvement of the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity and spontaneously in case associated with event.

[3] **Ratten V. Regnam [1971 [3] A.I.R. 801]**. It is held that the mere fact that evidence of a witness includes evidence as to words spoken by another person

who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. Such evidence may not be inadmissible, when it is not led, not to prove the truth of the statement but the fact that it was made.

[4] ***Gentela vijayavardhan Rao v. State of A.P***
[1996 [6] S.C.C. 241]. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or

statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication when the statement is not part of *res gestae*.

[5] ***Sm. Bibhabati Devi v. Ramendra Narayan Roy and others [A.I.R. [34] 1947 Privy Council 19]***. In this case, PW over heard telephonic talk made by the person by their side who was informed about death of a person and to make arrangement of cremation of body. The said statement was held as admissible as *res gestae*.

[6] ***Chhotka v. The State [A.I.R. 1958 Calcutta 482]***. In this case, Chhotka's complicity in the crime was sought to be proved by among other things, by statements of by-standers that had collected at the place of occurrence and statements of two co-accused.

It was held that statements in the First Information Report are not substantive evidence and the said evidence is inadmissible.

[7] **Krishan Kumar Malik v. State of Haryana [2011] 7 S.C.C. 130**]. It is held that there is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the appellant and others upon her. In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best persons to lend support to the prosecution story invoking Section 6 of the Act. In other words, the statements said to be admitted as forming part of *res gestae* must have been

made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which the prosecution had conducted the investigation, then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond any shadow of doubt, that it was the appellant who had committed the said offences.

This ruling is squarely applicable to the present case as the prosecution solely relied on the oral evidence of PW-1 Ram Choudhary, PW-2 Mayura Chaudhary and PW-14 Pushpa Chaudhary. The evidence of these witnesses shows that they have disclosed the name of the accused who had arrived on the spot to the neighbours immediately after the incident. The prosecution was duty bound to examine one of them.

Though their statements were recorded, the prosecution did not examine any of them. The prosecution thus failed to provide missing lacunae which could have supported the oral evidence.

[8] The arguments of learned counsel Mr. Pradhan for appellant in Criminal Appeal No. 127 of 2002 that as the Investigating Officer has referred the Case Diary, under Section 172 of Cr.P.C., the statement given by the neighbours before him which were unfortunately brought on record before the trial Court are admissible. The doctrine of *res gestae* is not applicable to that extent. There is clear bar under Section 162 of Cr.P.C. for bringing on record any statement of a witness when non examined through the evidence of Investigating Officer.

[9] ***Dhal Singh Dewangan V. State of Chhattsgrh*** [2016 [16] S.C.C. 701]. It is held in paragraph no. 21 of the Judgment that the general rule of evidence is that hearsay evidence is not admissible. However,

Section 6 of the Evidence Act embodies a principle, usually known as the rule of *res gestae* in English Law, as an exception to hearsay rule. The rationale behind this Section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter. The key expressions in the Section are ...so connected... as to form part of the same transaction. The statements must be almost contemporaneous as ruled in the case of Krishan Kumar Malik [supra] and there must be no interval between the criminal act and the recording or making of the statement in question as found in Gentela Vijayvardhan Rao's case [Supra]. In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states...whatever

was said or done....at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

[10] **Non-examination of material witnesses :**

Habeeb Mohammad V. State of Maharashtra [A.I.R. 1954 S.C. 51]. It is held that one Biabani was material witness in a case against police officers, but he was not examined. He should have been examined as a Court witness who could have given accurate and true version as what took place.

(11) **Chander Pal V. State of Haryana [2002] 2 SCC 755].** In this case, it is held that the material witness Mohanlal was not examined, whose evidence could have thrown light on the facts, which creates doubt about prosecution story.

[12] **Chander Pal V. State of Haryana [2002] 2 S.C.C. 755].** In this case, the necessity to examine the material witness like Doctor who performed the postmortem

has been highlighted and adverse inference has been drawn on non-examination.

[13] ***Thulia Kali V. State of Tamil Nadu [AIR 1973 S.C. 501]*** on the point of delay in filing First Information Report.

[14] ***Bir Singh V. State of Uttar Pradesh [A.I.R. 1978 S.C. 59]*** on the point of examination of only interested witnesses.

[15] ***Mahadeo Kundalik Vaidya & Ors. V. State of Maharashtra [2002 [Supp.1] Bom CR [Cri] 894]***, on the point of enmity between the accused and informant.

[16] ***Kalyan and others V. State of U.P. [2001 Cri.L.J. 4677]*** on the point of contradictions and improvements.

[17] Deo Narain V. State of Uttar Pradesh [2010] 12 Supreme Court Cases 298}{citataion}; Criminal Appeal No. 51 of 2003 [The State of Maharashtra V. Bhimrao and Ors.] and Criminal Appeal No. 114 of 2003 [The State of Maharashtra V. Dattu Balaram Katekar] on the point of examination of

interested witnesses with strong political modification.

19. Learned A.P.P. Mr.S.D. Ghayal for the respondent-State relied on following rulings :-

[1] ***Mritunjoy Biswas V. Pranab @ Kuti Biswas & Anr. [2013] 12 SCC 796***. In this case, relying on observations made in the case of Pandurang & Ors. v. State of Hyderabad [AIR 1955 SC 216], it was held that non-mention of the names of accused in the First Information Report is not fatal to the prosecution case when those names were disclosed in the inquest panchnama and their absence did not make the prosecution version a concocted one. In paragraph no.28 of the said Judgment, it was held that no undue weightage should be given to the minor discrepancies. The evidence is to be considered on the point of view of trustworthiness. In this case, non-recovery of pistol or cartridge does not detract the Apex Court when the direct evidence was acceptable.

[2] ***State of Rajasthan V. Dhool Singh [2004***

Cri.L.J. 931j. In this case, it is held that number of injuries are irrelevant ascertaining the intention. It is the nature of injury, the part of body where it is caused, the weapon used in causing such injury, which are indicators of the fact whether the respondent caused the death with an intention or causing death or not. The knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim is relevant. With reference to determine the nature of the offence disclosed from the facts, it is observed that the discretion in this regard is not absolute or whimsical. In this case, there was incised wound on transversely placed on left side of neck Thyroid Cartilage is cut. Transversely on left side sternocleidomastoid muscle External Jugular Vein Internal Jugular Vein and common carotid Artery cut completely. Margin of wound is clear cut deep staining Gaping and swelling of surrounding tissue. Wound is Ante Mortem in nature.

[3] ***Saddik @ Lalo Gulam Hussein Shaikh & Ors. V. State of Gujarat [2017 Cr.L.J. 149]***. It is also held in this case that the evidence of motive is not a material factor in cases which are based on direct evidence.

[4] ***Fahim Khan V. State of Bihar Now Jharkhand [2012 [1] SCC (Cri) 794]***. In this case, no blood stains were found on the spot and there was some delay in lodging F.I.R., which were found not fatal to the prosecution case. It was also held that absence of blood stains on the cloths of the witnesses who had lifted the injured, is also not fatal to the case of prosecution.

[5] ***Paresh Kalyandas Bhavsar V. Sadiq Yakubbbhai Jamadar and others [1993 AIR [SC] 1544]***. It is held that if there is lapse on the part of Investigation Officer in recording the statements of witnesses at the earliest, it cannot affect the credibility of the witnesses.

[6] ***Kamta Yadav & Ors. v. State of Bihar [2016 AIR [SC] 4866]***. In this case, it is held that merely because the witnesses are relatives of the deceased, their evidence cannot be discarded if it is trustworthy and if their depositions are worth of credence.

[7] ***Dhanaj Singh alias Dhera and others V. State of Punjab [2004 AIR [SC] 1920]***. It is explained in paragraph No.6 that if the lapse or omission is committed by the investigating agency or because of negligence, the prosecution evidence is required to be examined dehors such omissions to find out whether said evidence is reliable or not. The contaminated conduct of officials should not stand on the way of evaluating the evidence by the Courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party. It is also held that if primacy is given to such designed or negligent investigation to the omission or lapses by perfunctory investigation or omissions, the faith and

confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice. It cannot be affected the credibility of the prosecution version. When the eye witness account is corroborated by the medical evidence to fully establish the prosecution case. It is also held that non-examination of weapons of assault or the pellets etc. in the background of defective investigation. In the said case, no crack in the evidence of the vital witnesses can be noticed.

The prosecution solely relies on evidence of three eye witnesses i.e. PW-1 Ram Choudhary, PW-2 Mayura Choudhary and PW-14 Pusha Choudhary and some of the corroborative evidence in the form of *res gestae*.

20. Admittedly, accused No.1 Kailash was immediately arrested on 14th July, 1996 at 12.30 a.m. As per arrest panchnama proved by PW-4 Maroti Panchal, no blood stains were found on his clothes. The clothes of accused Nos. 2 and 3 are not seized. There is no seizure of weapon of offence from anybody.

21. As discussed earlier, PW-1 Ram had strong enmity with one Narayan, who was brother of accused No.2 Bhimappa. Besides this, it is claimed that accused No.1 Kailash had given evidence against PW-1 Ram's brother Vidyanand. The suggestion was denied and no document is filed by the defence in support thereof. There is admitted enmity between PW-1 Ram and accused No.3 Nagorao. The evidence of prosecution witnesses will have to be appreciated in the light of the admitted enmity. This is a small incident not lasting for more than 10 minutes, but it is full of contradictions.

22. PW-2 Mayura stated that she woke up at 02.45 a.m. and saw two persons standing in the door of the room and the lights were on. She raised shouts as 'चोर चोर'. PW-1 Ram got up and shouted as 'Aare Bapare'. PW-2 Mayura has stated that she shouted as 'चोर चोर'. PW-1 Ram conveniently does not disclose this fact. All witnesses stated that PW-1 Ram rushed to the adjacent room to bring a stick and deceased Uday came there.

According to PW-2 Mayura, that time her mother also cried, but PW-14 Pushpa does not say so. In fact she denied that she had ever cried. According to PW-2 Mayura, Uday got up on hearing shouts of mother. PW-2 Mayura stated that two intruders asked her to keep quiet. Nobody else says so.

23. According to PW-1 Ram, two persons had entered the bedroom where he was sleeping and Uday came there. According to PW-2 Mayura, she saw them in drawing room and incident with Uday took place in drawing room. According to PW-2 Mayura, when her father went to room to bring 'lathi', Uday was pushing two persons outside the house, but PW-14 Pushpa stated that two persons dashed Uday in courtyard.

24. According to PW-2 Mayura, after Uday and the assailants went to courtyard, two assailants held him and pushed him upto the gate and the third assailant stabbed him on chest. PW-14 Pushpa remained in her bed-room and she from her window saw what was going on. She stated that two persons had caught Uday and

Uday was calling her father that 'Dada you come, I have identified the assailants'. Neither PW-2 Mayura nor PW-1 Ram stated so.

25. PW-14 Pushpa stated that third assailant entered into the courtyard from the gate, Uday was dashed near the gate and third person stabbed with *Gupti* on his chest. PW-2 Mayura had also stated that there were three persons [accused Nos.1, 2 and 3]. Two out of them dashed Uday to gate and third person stabbed him on chest. She did not specifically state what was the weapon and who was the person stabbing Uday.

26. PW-1 Ram initially stated all three persons stabbed Uday and ran away. But, subsequently stated that he had not seen the incident of stabbing. He had chased the accused and after returning, he saw Uday lying in injured condition. According to PW-2 Mayura, her father had seen Uday lying, and thereafter, he ran towards the assailants.

27. As per First Information Report [Exhibit 193] and earlier statements of PW-2 Mayura and PW-14 Pushpa dated 15th July, 1996, there were only two trespassers. The F.I.R. shows name of accused No.1 Kailash and one more person who could not be identified. F.I.R. further shows that deceased Uday was chasing the intruders and thereafter PW-1 Ram chased them with stick. When he was coming back, he had seen Uday lying in injured condition. The F.I.R. nowhere shows that three persons had entered in the house. Besides this, it does not disclose the names of accused No.2 Bhimappa and accused No.3 Nagorao. Similar is the case with the statements of PW-2 Mayura and PW-14 Pushpa, recorded on 15th July, 1996. These contradictions of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa are duly proved by confrontations with their previous statements. This is a serious discrepancy regarding number of persons involved and their names. Accused No.2 Bhimappa and accused No.3 Nagorao are subsequently roped in by disclosing their names in the supplementary statements. Their names were not disclosed on 14th July, 1996 and 15th July, 1996.

28. The prosecution story shows that there was house breaking as the assailants had made entry in the house forcibly. But, no charge of house breaking was framed. The spot-panchnama [Exhibit 205] proved by PW-7 Uttam Chavan shows that the inner latch bolt of the house was broken. Surprisingly, broken bolt has not been seized. If the trespass was committed from outside, there should have been some signs of damage to the door from the outside. No such signs are noted. Besides this, it is not the case of anybody that the trespassers were equipped with any implement of house breaking.

29. As per the evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa, only one person was carrying a weapon. It is surprising that if accused Nos.1 to 3 came there by house breaking to commit murder, it was expected that all of them should have been armed with weapons. The absence of weapons in the hands of some of the assailants, is unnatural and suspicious.

30. The conduct of PW-1 Ramrao and his role at

the time of incident is suspicious. On hearing shouts, he went to store room. At the same time, Uday came from television room to the drawing room and started pushing two persons outside the house. There is contradiction whether those persons were pushing Uday or Uday was pushing them. But, thereafter Uday was taken up to the compound gate, which is about 10 feet way from the steps and 'Ota' outside the house. As per spot-panchnama [Exhibit 205] and map [Exhibit 206], the house of PW-1 Ram consists of six rooms with a 'Ota' and steps outside the house which is facing towards north. Three rooms are on the eastern side, marked as "A", "B" and "C". "A" is drawing room and "B" and "C" are store rooms. There is 'ota' on the eastern side followed by three rooms "D", "E" and "F". "D" is the drawing room, "E" is T.V. Room and "F" is kitchen. PW-1 Ram, PW-2 Mayura and her five year old cousin were sleeping in room "D" which is on the front eastern side. In the room behind it towards south room "E" is T.V. room where Uday was sleeping. The entry to the drawing room "A" to the western side where the incident must have taken place is from

bedroom "D". If PW-1 Ram had gone to room "B" for taking a stick, he should have reached drawing room "A" within short time and he should have seen the incident of stabbing. But, he had not seen the stabbing. As per First Information Report, the trespassers were running away and deceased Uday was chasing them and they were followed by PW-1 Ram. This contradiction is brought on record by confrontation. If deceased Uday was chasing the accused and PW-1 Ram was also chasing them, PW-1 Ram should have seen the incident of stabbing. But, he had neither seen the stabbing nor seen that Uday was chasing nor Uday lying in injured condition. He saw him in injured condition lying in courtyard only after returning from chase.

31. Surprisingly, PW-2 Mayura and PW-14 Pushpa did not move from their places nor raised shouts for saving Uday when they were watching the assailants taking away Uday towards compound gate and stabbing him. It must be mentioned here that out of two or three assailants, only one was armed with weapon and

other two were not armed with any weapon. PW-2 Mayura and PW-14 Pushpa left their place only after Uday was found lying in injured condition and the assailants had fled away. This is not a natural conduct on the part of a sister and mother. It is also surprising that PW-1 Ram could not see the incident of stabbing.

The evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa does not disclose which of the three accused had given blow of "*gupti*" or knife on the chest of deceased Uday. The First Information Report discloses that it was accused No.1 Kailash who gave blow of weapon, but we find that the prosecution witnesses while deposing remained silent on this aspect.

32. The incident was over at about 03.00 a.m. The doctor, brothers and neighbours were called or came there. PW-5 Gangadhar Wadde, PW-7 Uttam Chavan, PW-10 Kiran Deshpande, son of PW-1 Ram's sister, PW-16 Vidyanand Choudhary have deposed that PW-1 Ram and PW-14 Pushpa disclosed them that accused No.1 Kailash had killed Uday. They have not stated that PW-1 Ram, PW-2

Mayura and PW-14 Pushpa disclosed them that accused Nos.1, 2 and 3 had killed Uday. Besides, this disclosure was not immediate and spontaneous statement made by PW-1 Ram, PW-2 Mayura and PW-14 Pushpa to them. They have submitted about such disclosure only after PW-1 Ram returned from Civil Hospital, Nanded, much after the incident i.e. more than seven to eight hours after the incident.

33. It is no doubt true that spontaneous statement made by the injured witnesses or eye witnesses about the events taken place or seen by them are admissible as *res gestae* under Section 8 of the Evidence Act. Learned counsel Mr. Nitin Pradhan for the appellant Kailash has rightly relied in this regard on number of rulings.

34. It was argued that there is delay in lodging the First Information Report. This is in addition to non-disclosure of accused Nos.2 and 3 in the First Information Report and in the statements of PW-2 Mayura and PW-14 Pushpa recorded on 15th July, 1996.

The First Information Report [Exhibit 193] does not show the time when it was recorded by PW-19 Head Constable Maroti Waghmare. But, he stated that it was recorded at 08.30 a.m. to 09.00 a.m. As per the report [Exhibit 219], Uday was declared as 'dead' at 04.10 a.m. and its report was submitted to Wazirabad Police Station by Medical Officer attending him. Therefore, delay from 04.10 a.m. to 08.30 a.m. is also quite significant in the light of facts discussed above, but learned A.P.P. has relied on Inquest Panchnama proved by PW-6 Jagdish Soni. It shows that it was drawn from 05.00 a.m. to 05.30 a.m. and that time PW-1 Ram had stated that accused No.1 Kailash and his accomplice had entered the house and when they had shouted as 'चोर चोर', he ran away and Uday followed him, and at that time, Uday was killed by stabbing in the chest. If as per Inquest panchnama [Exhibit 203] PW-1 Ram had disclosed the material facts relating to the cognizable offence of murder of Uday before 05.00 a.m., there is no explanation by PW 19 Head Constable Waghmare as to why he did not immediately record it as

F.I.R. and forward it to Wazirabad Police Station. The police of Wazirabad Police Station have received the First Information Report at 09.15 a.m.

35. Learned A.P.P. relied on the evidence of PW-8 Dr. Ramesh Chidrawar and PW-11 driver Kishan Puri, who have stated that PW-1 Ram had disclosed to them in the journey from Mudkhed to Nanded that accused No.1 Kailash had killed Uday. The presence of PW-8 Dr. Ramesh Chidrawar is suspicious. PW-1 Ram had not stated that he had called PW-8 Dr. Ramesh Chidrawar, who was Medical Officer. One Dr. Pravin Mundada had been there and seen Uday and recommended that he should be shifted to Civil Hospital. PW-1 Ram did not state that Dr. Ramesh Chidrawar had also been to his house and he had accompanied him to Civil Hospital Nanded and, in the journey, he had disclosed to him that accused No.1 Kailash had stabbed Uday. Therefore, the evidence of Dr. Ramesh Chidrawar is very suspicious and his presence is doubtful. He stated that they left Mudkhed at 04.00 a.m., but the report of Medical Officer [Exhibit 219] to the police shows

that Uday was brought at Civil Hospital and was declared dead at 04.10 a.m. The report was also submitted at 04.10 a.m. PW-1 Ram has stated that Uday was not taken to Medical Officer Dr. Mundada of Primary Health Centre Mudkhed.

36. The evidence of PW-11 driver Kishan Puri shows a cloud of doubt on evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa. He stated that PW-1 Ram came to him at 02.00 to 02.30 a.m. and told him that his son was stabbed. This evidence is contrary to the evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa that entire incident took place at 02.45 a.m. to 03.00 a.m. He has stated that accused No.1 Kailash had threatened before 20 to 25 days of the incident that he would damage the Car. In cross-examination, he could not tell why it was not recorded in his statement that PW-1 Ram told in the Car that his son was stabbed by accused No.1 Kailash.

37. The conduct of PW-2 Mayura and PW-14 Pushpa is further suspicious. They had not accompanied Uday

from Mudkhed to Nanded though Uday was in serious condition. Apart from it, they did not contact the local police from Mudkhed to give them intimation about the incident. The evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa shows that right from 03.00 a.m. to 11.00 a.m. no intimation was given to the police of Mudkhed about the incident. PW-1 Ram has stated that after the incident, around 5000 to 6000 people came to meet him and his family members for offering condolences. PW-1 Ram was a prominent figure in small place Mudkhed as he was President of Municipal Council for 10 years. It is, therefore, highly improbable that the incident of stabbing Uday was not reported to the police right from 03.00 a.m. till 11.00 a.m. The police from Mudkhed came to know about the incident only when First Information Report [Exhibit 193] was forwarded by A.S.I. from Wazirabad Police Station to Mudkhed Police Station. This is highly suspicious. If PW-2 Mayura and PW-14 Pushpa have any reason not to go to Nanded they should have at-least contacted the local police and requested them to search out the accused persons. One of them could

have filed First Information Report to the police and police could have initiated immediate investigation, but that has not been done.

38. It is also surprising that no blood stains were found on the spot. When Uday was stabbed in a standing position and has become unconscious immediately, there would have been some blood stains on the spot.

39. There is evidence of Investigation Officer that on that night there were some robberies and dacoities in that locality.

40. PW-1 Ram has stated that his brother PW-16 Vidyanand was running a Beer Bar which was managed by deceased Uday. Accused No.1 Kailash wanted to start a Beer Bar, but his application for loan was not granted by M.S.F.C. and he was under impression that the said application was not allowed as PW-1 Ram, PW-16 Vidyanand and Uday had objected to it. The evidence of PW-12 Girjappa Narhire, Assistant Manager M.S.F.C.

shows that Balaji Godse, brother of Kailash [accused No.1] who had applied for loan of Rs.5,18,000/- on 26th March, 1996 and the said loan was sanctioned to him on 17th April, 1996. Then there is no substance in the contention that there was motive for accused No.1 Kailash to commit murder. But, further evidence of PW-12 Girjappa Narhire shows that one Dhupadabai sent a Lawyer's notice dated 26th June, 1996 to M.S.F.C. objecting the loan on the ground that she had a share in the property which was mortgaged by Balaji Godse. Copy of the said notice is at Exhibit-213. This objection was communicated on 27th June, 1996 by M.S.F.C. to its original office, Aurangabad vide letter [Exhibit-214]. The sanction order is at Exhibit-215. The Loan application is at Exhibit-216. It is nowhere stated whether the loan was withheld or not. There is also no communication between PW-1 Ram and Dhupadabai. PW-1 Ram has admitted that he had not issued any instructions to M.S.F.C. Therefore, if there was any reason to get annoyed, it was for Balaji Godse as against Dhupadabai. Thus, the motive for accused No.1 Kailash to commit murder of Uday on this

ground is far-fetched.

41. The act of PW-1 Ram in implicating accused No.2 Bhimappa and accused No.3 Nagorao throws a cloud of doubt about his credibility. The First Information Report was in respect of two persons entering into a house, one of them accused No.1 Kailash and other was unidentified. PW-1 Ram had strong enmity with Narayan who is real brother of accused No.2 Bhimappa. PW-1 Ram himself has narrated one incident, in which accused No.2 Bhimappa and accused No.3 Nagorao allegedly stabbed Uday in the year 1994 for which they were facing prosecution under Section 307 of the Indian Penal Code. No documents in this regard are produced to support the oral evidence. PW-1 Ram had political enmity with accused No.3 Nagorao as well. Accused No.2 Bhimappa and accused No.3 Nagorao were known to PW-1 Ram, PW-2 Mayura and PW-14 Pushpa, but their names were not disclosed in the First Information Report and in their earlier statements dated 15th July, 1996. Considering all these facts, the evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa is

not found cogent, consistent, credible and trustworthy. There is no corroborative evidence in the form of recovery of weapon or recovery of blood stained clothes.

42. The absence of blood stains on the spot or in the house create a possibility that Uday might have been stabbed some where outside and before the time disclosed by PW-1 Ram, PW-2 Mayura and PW-14 Pushpa. Such probability is strengthened by PW-11 Kishan Puri, who stated that on the night of 13th July, 1996, at about 02.00 a.m. to 02.30 a.m., PW-1 Ram Choudhary came to him and disclosed the incident of stabbing of Uday. There are serious doubts as to whether PW-1 Ram, PW-2 Mayura and PW-14 Pushpa have seen any incident or not; or whether such incident as described by them has taken place or not. As per their evidence, neighbours Dharma, Jewba and Bachewar had arrived on the spot immediately after the incident, but the prosecution has not examined them. The statements made by PW-1 Ram, PW-2 Mayura and PW-14 Pushpa before them could have been admissible as *res gestae*, but they are not

examined. The evidence of other witnesses on the point of *res gestae* is not immediate and spontaneous reaction of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa and thus is not admissible. Though motive does not play material part in case of direct evidence, it is relevant as nobody commits murder of a stranger without any reason. We find that the evidence on the point of motive is not reliable and trustworthy. In the result, we hold that evidence of PW-1 Ram, PW-2 Mayura and PW-14 Pushpa cannot be believed.

43. Since we are accepting the arguments of learned counsel Mr. Pradhan for Appellant in Criminal Appeal No. 127 of 2002. It is not necessary to discuss in detail all these rulings. But, it must be stated as held in ***Megh Singh v. State of Punjab***, reported in ***2003 Cri.L.J. 4329 [S.C.]*** there can be no precedent on the question of fact. The criminal cases are based on facts and the facts in no two cases are identical. However, the guiding principles laid down are certainly helpful for appreciating the evidence on

record.

44. Learned Adhoc Additional Sessions Judge has failed to appreciate the evidence in the light of above referred discrepancies, and therefore, arrived at a wrong conclusion. Therefore, his findings resulting into conviction of accused No.1 Kailash, accused No.2 Bhimappa and accused No.3 Nagorao are not sustainable. Hence, all the appeals deserve to be allowed. Hence, the following order :-

O R D E R

- [1] All the Appeals bearing Criminal Appeal Nos. 125 of 2002, 126 of 2002 and 127 of 2002 are allowed.
- [2] The conviction of accused Kailash S/o Vishwanath Godse, Bhimappa S/o Gopalappa Kittawar and Nagorao S/o Madhavrao Pachling vide Judgment passed in Sessions Case No. 175 of 1996 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code is set aside.

- [3] All the accused Kailash S/o Vishwanath Godse, Bhimappa S/o Gopalappa Kittawar and Nagorao S/o Madhavrao Pachling are acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.
- [4] Bail-bonds of all the accused shall stand cancelled.
- [5] All accused are directed to furnish P.R. bond of Rs.15,000/- each with solvent surety under Section 437-A of the Code of Criminal Procedure before lower Court.
- [6] The muddemal property shall be preserved till the Appeal period is over.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

