

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on : 17/05/2018****Judgment delivered on: 10/08/2018****CRA No. 452 of 2012**

1. Jai @ Gudda Jaiswal S/o. Late Bajrang Prasad Jaiswal, aged about 30 years,
 2. Vijay @ Hallo Jaiswal S/o. Late Bajrang Prasad Jaiswal, aged about 42 years,
 3. Ajay @ Chhotu @ Jijji Jaiswal S/o. Late Bajrang Prasad Jaiswal, aged about 40 years,
- All Are R/o. In Front Of Govt. Multipurpose Higher Secondary School, Dayalband, P.S. City Kotwali, Bilaspur, Distt. Bilaspur (C.G.)

---- Appellants
In Jail

Versus

- State Of Chhattisgarh Through P.S. Torwa, Bilaspur, Distt. Bilaspur C.G.

---- Respondent

For Appellants	:	Shri Shakti Raj Sinha, Advocate.
For Respondent/State	:	Shri Vivek Sharma, Govt. Advocate.

CRA No. 492 of 2012

- Manoj Agrawal S/o Shankar Lal Agrawal, aged about 39 years, R/o Jagmal Chowk, P.S. City Kotwali, Bilaspur Distt. Bilaspur (CG)

---- Appellant
In Jail

Versus

- State Of Chhattisgarh Through - P.S. Torwa, Distt. Bilaspur C.G.

---- Respondent

For Appellant	:	Shri Ranbir Singh Marhas, Advocate.
For Respondent/State	:	Shri Vivek Sharma, Govt. Advocate.

CRA No. 522 of 2012

- Hani @ Koustubh Samdariya, S/o Dr. NK Samdariya, aged about 35 years, R/o Village-Akaltari, PS Ratanpur, at present resident of Beside Maruti Show Room, Car Deco, PS City Kotwali, Bilaspur (CG)

---- Appellant

In Jail**Versus**

- State Of Chhattisgarh through the Police Station Torva, Distt. Bilaspur (CG)

---- Respondent

For Appellant	:	Shri Awadh Tripathi, Advocate.
For Respondent/State	:	Shri Vivek Sharma, Govt. Advocate.

CRA No. 538 of 2012

1. Rishiraj @ Tutul Mukharjee S/o Ashok Mukharjee, aged about 33 years, R/o Link Road, Rajendra Nagar, P.S. Civil Line, Bilaspur, Distt. Bilaspur C.G.
2. Samrat @ Laltu Mukharjee S/o Ashok Mukharjee, aged about 29 years, R/o Link Road, Rajendra Nagar Chowk, P.S. Civil Line, Bilaspur, Distt. Bilaspur C.G.

---- Appellants**In Jail****Versus**

- State Of Chhattisgarh Through District Magistrate, Distt. Bilaspur C.G.

---- Respondent

For Appellants	:	Shri Awadh Tripathi, Advocate.
For Respondent/State	:	Shri Vivek Sharma, Govt. Advocate.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Sanjay Agrawal****Per Pritinker Diwaker, J:**

As all these four appeals arise out of a common judgment of conviction and order of sentence dated 30.4.2012 passed by the Sessions Judge, Bilaspur in ST No.169/2010, they are being disposed of by this common judgment. By the impugned judgment, the accused/appellants Jai @ Gudda and Manoj Agrawal have been convicted under Sections 147, 148, 302, 302/149 of IPC and Sections 25 & 27 of the Arms Act whereas accused/appellants Vijay @ Hallo, Ajay @ Chhotu, Hani, Samrat & Rishiraj have been convicted under

Sections 147, 148, 302/149, 302/149 of IPC and Vijay @ Hallo, Ajay @ Chhotu, Hani & Rishiraj have also been convicted under Section 25 of the Arms Act. The sentence awarded to them is as under:

Conviction	Sentence
U/s 148 of IPC.	3 years' RI.
U/s 302 of IPC.	Imprisonment for life, fine of Rs.1000/- with default stipulation.
U/s 302/149 of IPC.	Imprisonment for life, fine of Rs.1000/- with default stipulation.
U/s 25 of the Arms Act.	3 years' RI and fine of Rs.1000/- with default stipulations.
U/s 27 of the Arms Act.	7 years' RI and fine of Rs.1000/- with default stipulations.

02. In the present case, there are two deceased persons namely Gudda Sonkar @ Krishna Kumar and Nanka Sonkar @ Rajendra Ghore. As per prosecution case, on 9.6.2010 at around 12.15 am in the car parking of hotel Intercity, the accused persons were standing surrounding two deceased persons and altercation was going on between them. It is alleged that except accused Nos. 4 & 5 (Samrat & Manoj Agrawal), all the accused persons were carrying firearms. During altercation, accused No.5 Manoj Agrawal snatched pistol from the hand of accused No.1 Jai @ Gudda and after abusing one of the deceased namely Gudda Sonkar and saying that if Jai @ Gudda cannot shoot Gudda Sonkar, he himself would do the same, fired a gunshot near the cheek of Gudda Sonkar as a result of which Gudda Sonkar fell on the floor. When the second deceased Nanka Sonkar,

brother-in-law of first deceased Gudda Sonkar, intervened in the matter, accused No.1 Jai having snatched pistol from the hand of accused No.5, caused a gunshot injury to Nanka Sonkar as a result of which he also fell down on the floor. Thereafter, the accused persons fired randomly. Further case of the prosecution is that as the first deceased Gudda Sonkar was alive, the other accused persons shouted that he is still alive, on which accused No.1 Jai caused another gunshot injury on the chest of Gudda Sonkar and thereafter, all of them ran away from the spot. It is said that while the altercation was going on between the accused/appellants and two deceased persons, the first deceased Gudda Sonkar had made a telephonic call to PW-12 Jugal Kishore who was sitting in another hotel Surya and informed him about the quarrel. After receiving the said information PW-12 in his Scorpio vehicle rushed to hotel Intercity along with one Alok Singh (not examined) and saw accused No.1 Jai @ Gudda and accused No.5 Manoj Agrawal causing gunshot injuries to the deceased persons. Then PW-12 took Gudda Sonkar to CIMS in his Scorpio vehicle where he was declared brought dead. Likewise, other injured Nanka Sonkar was taken to Apollo hospital in a police jeep as in the meanwhile PW-12 had informed the police regarding the incident from Intercity hotel itself, where he too was declared dead.

03. On 9.6.2010 itself at 2.30 am FIR (Ex.P/33) was lodged by PW-12 Jugal Kishore against the appellants and three others under Sections 147, 148, 149, 302 of IPC and 25 & 27 of the Arms Act. Merg intimation (Ex.P/34) regarding death of Gudda Sonkar was recorded on 9.6.2010 at 2.35 am whereas merg intimation (Ex.P/35) in respect of

deceased Nanka Sonkar was recorded on the same day at 2.40 am at Police Station – Torva, Distt. Bilaspur. In the meanwhile, unnumbered merg Ex.D/7 was recorded at 1.30 am regarding death of Nanka Sonkar at Police Station – Sarkanda on the basis of information sent from Apollo Hospital. Inquest on the body of deceased Gudda Sonkar was conducted on 9.6.2010 vide Ex.P/3 and inquest in respect of deceased Nanka Sonkar is Ex.P/4 which was also conducted on the same day.

04. On 9.6.2010 PW-9 Dr. Chaturbhuj Minj conducted postmortem on the body of deceased Gudda Sonkar vide Ex.P/24 and noticed following injuries:

- (i) an entry wound with inverted margins 0.8 cm x 1 cm elliptical in shape 7 cm away from left nipples directed downwards medially towards sternum;
- (ii) two parallel abrasions marks over left side of chest about 4 cm long and 3 cm long respectively, about 9 cm above nipple,
- (iii) an entry wound over left cheek circular shape 0.8 cm x 0.8 cm tattooing present around it size approx. 8 cm x 6 cm, margins are inverted,
- (iv) contusion mark below right eye on right cheek 0.5 x 0.6 cm,
- (v) another contusion over nostrils right side 0.2 x 0.2 cm, bleeding from nose present,
- (vi) abrasion mark over back near 7-8 inter-vertebral space in inter scapular region over left side about 1.5 cm x 1 cm.

The doctor also noticed fracture of mandible bone and that a bullet was stuck in the 6th cervical spine. In his opinion, the cause of

death was due to multiple gunshot injuries resulting in damage to internal vital organs and hemorrhagic shock, however, the final opinion was reserved and will be ascertained after receipt of biochemical analysis report and ballistic expert opinion. The nature of death was opined to be homicidal.

05. On 9.6.2010 PW-9 Dr. Chaturbhuj Minj conducted postmortem on the body of deceased Nanka Sonkar vide Ex.P/25 and noticed two rounded tears in shirt just below pocket on left side chest and 2nd above 7 ½ cm below the 1st entry mark on shirt with blackening. He noticed the following injuries/symptoms:

- (i) an entry wound on left side of neck elliptical in shape 0.9 x 1 cm margins inverted and tattooing of skin,
- (ii) an exit wound on right side of neck with inverted margins size 1.3 cm x 1 cm,
- (iii) one entry wound over sternum at level of lower end of areola,
- (iv) second entry wound over xiphisternum level 7 ½ cm below 1st injury,
- (v) 3 ECG ports attached to chest, one on left side and two on right side,
- (vi) two exit wounds on back over right subscapular region one on 7th and one on 8th intervertebral level, each of 0.9 x 0.9 cm size,
- (vii) bullet was present just below (beneath) 2nd exit wound at level of 8th inter-vertebral space, bullet has become flat and dorsal pointed flattened.

In his opinion, the cause of death was due to multiple gunshot injuries resulting in damage to internal vital organs i.e. liver, right lung

and great vessels of neck, and hemorrhage (massive internal), however, the exact cause of death will be ascertained after receipt of histopathological, biochemical and ballistic expert reports. The nature of death was opined to be homicidal.

06. Memorandum of accused No.1 Jai @ Gudda (Ex.P/12) recorded on 9.6.2010 led to seizure of one pistol of 7.66 MM in which UNIQUE MOD/51 CQL-7.065 MM has been written, bearing body No.5323404, one magazine containing five live cartridges of 7.65 MM pistol and one white coloured Maruti Suzuki Car (Ritz) bearing registration No.CG 10-FA-4499 vide Ex.P/13. On the memorandum of accused No.7 Hani (Ex.P/25, which appears to have been wrongly marked), one 12 bore pistol bearing body No.MPABR/I-159/52-ZI having two round live cartridges in its barrel and two other live cartridges were seized vide Ex.P/26.

It is relevant to note here that this weapon was registered in the name of father of accused No.7, which is clear from Ex.P/5 and admittedly, no fire was made from this weapon in the crime in question.

From accused No.2, one 315 bore rifle bearing body No.MPRGH11/107/6/1967 with magazine having five live cartridges, one empty cartridge in the barrel and one white coloured Ford company Endeavour car bearing registration No. CG 10F-4499 were seized.

As per Ex.P/5, it is not in dispute that accused No.2 had the licence to hold the above weapon.

From the possession of accused No.3 Rishiraj, one 12 bore double barrel rifle of Royals Arms & Company, bearing No.9895A/2-Y2002, was seized vide Ex.P/15. As per Ex.P/5, this is also a licensed weapon in the name of accused No.3.

From accused No.6 Ajay @ Chhotu, one .22 rifle bearing body No.CAL22LONG/RIFLE/0147064JGANSCHITZGMBHWAFFENABRIK/UIM/D/GERMANY, having a magazine containing three live cartridges were seized vide Ex.P/14. As per Ex.P/5, the said weapon was licensed in the name of accused No.6.

From the spot vide Ex.P/23, bloodstained pieces of cement brick, five empty cartridges of 7.65 MM pistol, two cell phones, one Titan watch, one white coloured Maruti Suzuki Ritz Car, one Aviator moped bearing registration No. CG 10 EH 5326 were seized. The empty cartridges so recovered were duly sealed. However, the seized articles have not been identified to be of any of the accused.

07. According to the prosecution, only one weapon i.e. pistol recovered from accused No.1 Jai @ Gudda Jaiswal vide Ex.P/13 has been used in commission of murder of the deceased. The said weapon was sent to armourer vide Ex.P/30A on 1.8.2010 and as per report of the armourer (Ex.P/30), he opined that the weapon and the empty cartridges may be sent to CFSL. As per Ex.P/30A, the weapon which was sent to armourer bears body No.5323404 whereas the armourer gave his report Ex.P/30 in respect of pistol bearing body No.392344. Vide Ex.P/51 dated 9.8.2010 the seized articles including the bullets recovered from the dead bodies were sent to FSL, however, there is no

FSL report on record. Vide Ex.P/59 dated 9.8.2010, 7.65 MM pistol, five live cartridges, five empty cartridges and three bullets recovered from the body of deceased persons were sent to FSL, however, Ex.P/59 does not bear the body number of the pistol. As per endorsement made in Ex.P/59, the articles were received by CFSL on 19.8.2010. As per unexhibited report, which is available on record dated 29.10.2010, the pistol bearing No.392344 was examined and it does not talk about the weapon bearing No.5323404. In the opinion of CFSL, 7.65 MM pistol bearing No.392344 was in working order, this pistol was fired through before it was received in the laboratory, seized five 7.65 MM pistol cartridges marked as C/1 to C/5 were fired through 7.65 MM pistol bearing No.392344 only and likewise 7.65 MM cartridges B/1, B/2 and B/3 were also fired through this pistol only.

08. After investigation, charge sheet was filed by the prosecution against the appellants on 3.9.2010 and while framing charges, the trial Court framed charges under Sections 147, 148, 302, 302/149 of IPC and Sections 25 & 27 of the Arms Act against accused/appellants Jai @ Gudda and Manoj Agrawal whereas other accused/appellants were charged under Sections 147, 148, 302/149, 302/149 of IPC and Section 25 of the Arms Act.

09. So as to hold the accused persons guilty, the prosecution examined 13 witnesses in all. Statements of the accused were also recorded under Section 313 of Cr.P.C. in which they denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. In defence, they examined as

many as seven witnesses.

10. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the accused/appellants herein as mentioned above.

11. Learned counsel for the appellants submit as under:

- that the accused/appellants have been falsely implicated in the crime in question.
- that there is no evidence to substantiate presence of the appellants at the place of occurrence.
- that only interested and related witnesses have been examined by the prosecution despite availability of independent witnesses.
- that the FIR and the merg intimations are anti-timed which makes the whole prosecution case doubtful.
- that the merg intimation, inquest and the memo sent for postmortem do not contain the crime number whereas by the time these documents were prepared, FIR was already registered at 2.30 am on 9.6.2010.
- that while lodging FIR, name of accused Hani was shown as one of the accused persons, on 9.6.2010 he was served with a notice u/s 91 of CrPC vide Ex.P/48 and instead of arresting him, he was asked to produce documents in relation to the seized weapon and ultimately, he was arrested on 13.6.2010, the date on which licenced weapon was seized from him. According to the defence, it shows that till the time of issuance of notice to

accused Hani u/s 91 of CrPC, FIR was not registered.

- that copy of the FIR was not sent to the Magistrate promptly and it was sent at 5.25 pm on 9.6.2010 whereas as per requirement of law, it ought to have been sent forthwith.
- That statement of the Investigating Officer PW-13 DS Dehari makes it clear that mandatory provisions of Code of Criminal Procedure have not been followed and this anomaly has been duly admitted by the IO. The IO has admitted the fact that Exs.P/33, 34 & 35 i.e. FIR and merg intimations are forged documents.
- that false implication of the accused/appellants in the crime is evident from the following fact:
 - (i) that at the relevant point of time, all the eyewitnesses i.e. PW-1 Lallan Bole, PW-2 Ramnarayan, PW-4 Praveen Keshari and PW-12 Jugal Kishore were not present in the hotel Intercity and were having their meals at hotel Surya.
 - (ii) that statements of the eyewitnesses do not tally with the postmortem reports of the deceased persons.
 - (iii) that as per eyewitnesses only one weapon has been used by both accused Jai and Manoj, however, as per postmortem report one .9 MM injury was found on the neck of deceased Nanka and no eyewitness has explained the said injury.
 - (iv) that as per eyewitnesses four gunshots were made by the accused persons whereas as per Ex.P/23 five empty cartridges were recovered from the spot and only three cartridges were recovered from the body of the deceased persons.

(v) that as per FIR, even after causing gunshot injuries to deceased persons while fleeing the accused/appellants were firing indiscriminately but no such empty cartridge was seized by the prosecution.

(vi) that according to the eyewitnesses, deceased Nanka was subjected to two gunshots on his chest while he was standing and was trying to intervene in the matter whereas the injury sustained by him on his neck has not been explained by them. Most importantly, the injury sustained on his neck, could not have been caused while the deceased Nanka was in lying down position as is evident from the evidence of PW-9 Dr. Chaturbhuj Mishra (Paras 6 & 14).

(vii) that as per eyewitnesses, one weapon has been used in commission of the offence whereas injury found on the neck of deceased Nanka was of the size 0.9 x 1 cm and the same could not have been caused by the weapon of 7.65 MM bore seized.

(viii) that PW-13 (IO) has admitted the fact that he was instructed by the higher officer to send 0.9 MM pistol to the ballistic expert and this shows that the eyewitnesses are not narrating the correct facts in the Court.

(ix) that according to the learned counsel, the pistol of 0.9 MM has been suppressed by the prosecution

- that the pistol which was seized from accused/appellant Jai @ Gudda bears body No.5323404 whereas as per report of the armourer Ex.P/30, the pistol examined by him bears body No.392344 and the CFSL also examined weapon bearing No.392344 and has opined that the bullets recovered from the

body of the deceased persons were fired from the pistol bearing No.392344. According to the counsel for the appellants, it is thus clear that the weapon seized has not been sent for examination and some other weapon and cartridges have been sent for examination. According to them, weapon bearing No.392344 has been planted by the prosecution. The prosecution did not explain as to how they came in possession of the actual weapon of murder.

- that conduct of the eyewitnesses is very relevant as there is absolutely no justification as to how and why the eyewitnesses could remain present on the backside of the parking of the hotel. It appears a bit improbable that they remained present there for about 30-40 minutes and during that period, some verbal altercation took place.
- that the prosecution has prepared forged bills and has shown seizure of the same. The bills seized vide Exs. P/40 to P/43 are dated 8.6.2010 and as per time mentioned in the same, they were bills of afternoon of 8.6.2010. According to the counsel, even name of any person does not find place in the seized bills.
- It has been argued that no bill of alleged eyewitnesses has been seized to show their presence at the place of occurrence as they were chance witnesses.
- though as per prosecution case, altercation continued between the accused persons and the deceased for about 30-40 minutes but none of the witnesses has stated as to what was the reason for the said altercation.

- that no motive whatsoever has been attributed to the accused persons for commission of the crime.
- that referring to the statements of PW-4 (para-5) & PW-12 (paras 13 & 26), it has been submitted that both the deceased and the eyewitnesses have criminal background and antecedents.
- that there is unexplained delay in recording statements under Section 161 of CrPC of the witnesses. The diary statement of PW-1 Lallan was recorded on 18.8.2010 (Ex.D/1), diary statement of PW-2 Ramnarayan was recorded on 17.7.2010 (Ex.D/3) and diary statement of PW-4 Praveen Keshari was recorded on 17.7.2010 (Ex.D/4). While referring to the statement of IO, it has been argued that though the IO has admitted recording of diary statements with inordinate delay, however, no explanation has been offered therefor.
- that the prosecution has not produced call details of PW-12 and deceased Gudda Sonkar to substantiate the prosecution story that just before the incident PW-12 was called by Gudda Sonkar to come to Intercity Hotel.
- that the trial Court has completely ignored the statements of defence witnesses (DW-3 & DW-4) wherein they have specifically stated that all the four eyewitnesses (PWs-1, 2, 4 & 12) were sitting in Hotel Surya at the relevant time.
- that eyewitness PW-12 was forced and compelled to depose against the appellants which is evident from the FIR (Ex.D/16C) lodged by one Shobha Narsingh, mother of PW-12, wherein she has stated that on 3.7.2011 members of Sonkar community

came to her house, abused them and then forced PW-12 to depose against the appellants.

- that PW-12 never took the deceased Gudda Sonkar to CIMS, and in fact, it was Prashant Gulhare (though cited but not examined by the prosecution) who took Gudda Sonkar to CIMS and this fact is evident from the record vide Ex.D/14C i.e. intimation sent by CIMS, Bilaspur to the police. In fact, PW-12 had never gone to police station from CIMS and he reached the place of occurrence after it had taken place and thereafter, the so-called FIR was lodged.
- that in respect of accused Manoj Agrawal, it has been specifically argued that at the relevant point of time, he was in his house at Tikrapara and was having business discussion with DW-5, DW-6 and DW-7.
- that in respect of accused Vijay, Rishiraj, Samrat, Ajay and Hani, it has been argued that their conviction with the aid of Section 149 of IPC is not in accordance with law. They submit that as per alleged FIR, no overt act has been assigned to these accused persons and nowhere it has been mentioned that they exhorted other accused/appellants to kill the deceased Gudda Sonkar. They submit that the allegation of exhortation is nothing but an improvement and this fact is also evident from the statement of IO who has admitted that no such fact was recorded by him while making entry in the diary. Likewise, PW-1 Lallan in his Court statement has not deposed anything about the exhortation by the accused persons.

- that there is discrepancy in the statements of eyewitnesses with regard to carrying of weapons by the accused persons. In the Court none of the witnesses has deposed as to which weapon was being carried by which of the accused.
- even assuming that accused/appellant Manoj Agrawal was present at the place of occurrence carrying weapon in his hand, this itself is not sufficient to bring home the charge under Section 302 with the aid of Section 149 of IPC against him.
- there is absolutely no evidence that the object of the so-called unlawful assembly was to commit murder of the deceased persons.
- while referring to para-41 of the evidence of PW-12, it has been argued that while recording his diary statement, he had not disclosed to the police regarding exhortation made by some of the accused persons and he informed that the accused persons fled from the spot after firing four times. They submit that this part of the statement of PW-12 has been admitted by the IO in para-77 of his deposition.
- had there been any intention on the part of other accused persons to commit murder of the deceased persons, they would not have merely exhorted but would have used weapons which, according to the prosecution case, they were carrying. Even if the entire evidence is accepted as it is, the other accused/appellants cannot be convicted with the aid of Section 149 of IPC.
- that no question was put to the accused/appellants Jai @ Gudda

and Manoj Agrawal regarding possession of weapon bearing body No.392344, which was used in commission of the crime, and thus, this part of evidence cannot be used against these appellants.

- when the eyewitnesses were related and known to the deceased persons, they should have made some efforts to intervene in the matter to save the deceased, however, no such effort was made by them.
- though as per prosecution case, certain articles were seized vide Ex.P/23 from the spot and sealed there itself, however, as per statement of PW-12, the sealed articles were found in open condition in the police station and they were deposited by some boys with the police.
- that as per IO, two seizure witnesses namely Ravindra Nirmalkar and Baran Yadav were planted witnesses whereas according to him, actually the witnesses were Tarachand and Abdul Sattar (vide para 72 of the evidence of IO.)
- that the investigation has been done in a casual manner and no effort has been made even to collect fingerprints from the weapon of offence and get them examined.
- in respect of conviction of the appellants under the Arms Act, it has been argued that from the possession of accused/appellant Jai @ Gudda, one pistol of 7.66 MM was seized vide Ex.P/13 but the seizure witnesses have not supported the prosecution case. As regards weapon seized from accused/appellant Vijay @ Hallo i.e. one 315 bore rifle (Ex.P/22); from accused/appellant Rishiraj

12 bore double barrel gun (Ex.P/15); accused/appellant Ajay .22 bore rifle (Ex.P/14) and from accused/appellant Hani 12 bore double barrel gun (Ex.P/26), all the seizure witnesses have not supported the prosecution case and most importantly, the weapons so seized were licensed weapons, which is evident from Ex.P/5 & P/6 i.e. application for sanction and the sanction order for prosecution under the Arms Act.

Reliance has been placed on the decisions of the Hon'ble Supreme Court in the matters of ***Puran Singh Vs. State of Uttaranchal, (2008) 3 SCC 795; Lakhwinder Singh and others Vs. State of Punjab, (2002) 10 SCC 295; Ganesh Bhavan Patel and another Vs. State of Maharashtra, (1978) 4 SCC 371; State of Orissa Vs. Mr. Brahmananda Nanda, (1976) 4 SCC 288; Bir Singh and others Vs. State of UP, (1977) 4 SCC 420; Brijpal Singh Vs. State of MP, (2003) 11 SCC 219; Bijoy Singh and another Vs. State of Bihar, (2002) 9 SCC 147; State of UP Vs. Gajadhar Singh and others, (2009) 11 SCC 366; Kuldip Yadav and others Vs. State of Bihar, (2011) 5 SCC 324; State of UP Vs. Babu Ram, (2000) 4 SCC 515; Nachhattar Singh and others Vs. State of Punjab, (1976) 1 SCC 750; and State of Uttarakhand Vs. Jainail Singh, (2018) 1 SCC 128.***

12. On the other hand, State counsel supporting the impugned judgment has submitted as under:

- that a prompt FIR (Ex.P/33) was lodged by PW-12 Jugal Kishore at 2.30 am naming all the accused persons. In the said FIR, it has

come that PW-1 and PW-4, two important eyewitnesses, were present at the Intercity hotel.

- the fact that a telephonic call was made to PW-12 by deceased Gudda Sonkar during altercation between the two groups is also evident from the statement of PW-1 who has stated that Gudda Sonkar was talking on his cell phone during altercation and within 10 minutes PW-12 along with one Alok Singh reached the spot. Likewise, PW-2 has proved the presence of PW-4 at the place of occurrence.
- that PW-4 has also proved the presence of PW-2 as also of PW-12 at the place of occurrence. Similarly, PW-12 in his Court statement has proved the presence of all the eyewitnesses at the spot, which is also clear from the FIR lodged by him.
- that only on the basis of relationship of some of the eyewitnesses with the deceased persons their evidence cannot be discarded.
- that even assuming that there is some delay in recording diary statements of the eyewitnesses, it will not be of any help to the accused persons as no question was put to the investigating officer in this respect and by recording delayed diary statement, nothing new has been brought by the prosecution on record and the prosecution case has been consistent from the beginning to the end.
- that the trial Court has erred in law in disbelieving the statement of PW-1 only on the ground that his diary statement was recorded on 18.8.2010 whereas the incident occurred on 9.6.2010. Learned counsel submits that PW-1 has not been implanted and from the

beginning he was cited as an eyewitness and his name finds place in the FIR also.

- even accepting that there is some overwriting in the diary statements of PW-2 & PW-4, but it is of no help to the defence as no question was put to the investigating officer in this regard.
- that mentioning of merg number in the FIR is not fatal to the prosecution case as copy of the FIR which was sent to the Magistrate on 9.6.2010 itself contains the same facts as have been mentioned in FIR in question.
- that immediately after the incident on 9.6.2010, all the accused persons except accused/appellant Hani were arrested and were produced before the Court and their first remand was obtained. Thus, it is apparent that the FIR is not anti-timed or anti-dated as alleged by the defence.
- that there is no evidence that prior to lodging of FIR, PW-12 had any meeting with the family members of the deceased or eyewitnesses to the incident or there was any deliberation between them for false implication of the accused/appellants.
- that conduct of the eyewitnesses as pointed out by the defence is not as such which could render their testimony unreliable. After such shooting incident, if the eyewitnesses have reacted in a different manner and did not inform the family members of the deceased and went to their home, it hardly makes any difference.
- that PW-12, after the incident, took the deceased Gudda Sonkar to CIMS, Bilaspur where he was declared dead at 12.45 in the night and from there PW-12 went to police station and lodged report at

2.30 am.

- that FIR is not an encyclopedia and as such, is not required to contain every minute details of the incident. Even if in the FIR it has not been mentioned as to which of the accused was carrying which weapon and the exhortation part is missing, it would not affect the creditability of the FIR or its lodger.
- that the investigating officer has not acted in a fair and impartial manner in the present case and he appears to have done so to favour the defence for the reasons best known to him. However, it is settled law that for the lapses, fault or omission on the part of the investigating agency, the defence cannot get any advantage.
- that the trial court has erred in law in allowing the defence counsel to cross-examine the investigating officer on the basis of case diary and further allowing the investigating officer to go through the case diary without permission of the Court when he himself could not refresh his memory.
- In relation to discrepancy in the number of the weapon used in commission of the crime and the one sent to armourer and CFSL, it is argued that the investigating officer has deliberately mentioned incorrect weapon number in the case diary, seizure memo and the memo sent to the FSL to favour the defence. Further, description of the weapon, make of the weapon and most of the digits of its body number are same and therefore, the argument that the weapon has been implanted subsequently has no force because it is practically impossible for the investigating officer to procure any such weapon from outside having same make and bearing most of same digits of

body number, and implant it.

- that the ocular evidence has to be given more weightage than any other evidence adduced by the prosecution. Once a prompt named FIR was lodged, there was no occasion for the prosecution to design a false case against the accused persons.
- that notice u/s 91 of CrPC was not given to accused/appellant Hani on 9.6.2010 (Ex.P/48) and the said fact also does not find place in the case diary. In fact, on 9.6.2010 accused Hani was absconding and notice u/s 91 of CrPC was given to him on 13.6.2010, the date when seizure of weapon was effected from Hani and he was arrested. According to the State counsel, Ex.P/48 is either a created document by the investigating officer or an incorrect date has been mentioned therein.
- even if it is accepted that accused Hani was not arrested on 9.6.2010, it was discretion of the investigating officer to arrest him or not, and it will not affect the prosecution case because since beginning name of Hani finds place in all the documents i.e. FIR, merg and memo sent for postmortem.
- that there is no delay in sending copy of the FIR to the Magistrate. While referring to Ex.D/8, it has been argued that on 9.6.2010 at 5.25 pm, copy of the FIR was received by the concerned Magistrate. Further, contents of the FIR sent to the Magistrate and that of the FIR (Ex.P/33) filed along with the charge sheet are the same.
- that in relation to conviction of the accused persons with the aid of Section 149 of IPC, it has been argued that all the accused

persons were standing surrounding the deceased persons and while altercation was going on between the two groups, accused/appellant Jai pointed pistol at deceased Gudda Sonkar and during altercation, accused/appellant Manoj snatched pistol from Jai and caused gunshot injury to Gudda Sonkar and thereafter, with the same weapon, accused/appellant Jai caused gunshot injury to Nanka Sonkar who came to the rescue of Gudda Sonkar. Thereafter, the other accused persons exhorted that Gudda Sonkar is alive, shoot him and then all the accused persons fled from the spot. As soon as the pistol was taken out and used, provisions of Section 149 of IPC attract, particularly when there is no evidence that the other accused persons in any manner tried to pacify the dispute or prevent accused Jai and Manoj from firing, rather the evidence shows that they exhorted them to kill the deceased persons. In these facts and circumstances, their conviction under Section 149 of IPC is absolutely justified and requires no interference by this Hon'ble Court.

In support of his contention, State counsel placed reliance on the judgment of the Hon'ble Apex Court in the matters of ***Paras Yadav and others Vs. State of Bihar, (1999) 2 SCC 126; VK Mishra and another Vs. State of Uttarakhan and another, (2015) 9 SCC 588; Sikandar Singh Vs. State of Bihar, (2010) 7 SCC 477; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52; Munshi Prasad and others Vs. State of Bihar, (2002) 1 SCC 351; Pandurang***

Chandrakant Mhatre and others Vs. State of Maharashtra,(2009) 10 SCC 773; State of Karnataka Vs. K. Yarappa Reddy (1999) 8 SCC 715; Banti Vs. State of MP, (2004) 1 SCC 414; and Latesh Vs. State of Maharashtra, (2018) 3 SCC 66.

13. We have heard learned counsel for the parties at length and perused the material available on record.

14. PW-1 Lallan Bole is an eyewitness to the incident but has been disbelieved by the trial Court on the ground that his diary statement was recorded on 18.8.2010 i.e. after two months and ten days of the incident. He, however, has stated that on the date of incident at about 10.30 pm he along with his friends Mangal, Naim and Bashir (not examined) had gone to hotel Intercity and after having their meals when they came to the parking lot near their vehicle, all the accused persons were standing there. He also saw both the deceased standing there and that some altercation was going on between the accused persons and the deceased persons. He saw deceased Gudda Sonkar talking to someone on cell phone and after about 10 minutes, PW-12 and one Alok reached there and then the altercation between the parties intensified. He states that accused/appellant Jai @ Gudda took out his pistol and in the meantime, accused Manoj snatched the pistol from accused Jai and fired at Gudda Sonkar and thereafter, Jai snatched pistol from Manoj and fired at Nanka Sonkar. Both Gudda and Nanka Sonkar fell down on the ground and thereafter, accused Jai caused another gunshot injury to Gudda Sonkar on his chest and both the deceased sustained two gunshots. After causing injuries to the

deceased persons, the accused/appellants left the place of occurrence on their vehicle. He states that as he was standing a bit far, he could not see as to where injury was sustained by deceased Gudda and when he reached near the deceased persons, they had expired. After the incident was over, the police reached the spot and enquired from him and other persons, and also recorded his statement. He has further stated that after the incident at about 1 in the night he returned to his house. He has also given description of the parking place where the incident had taken place. He states that a marriage function was going on at a place adjacent to the parking lot and 10-20 persons were present at the parking lot. He is not aware as to what was the cause of dispute between both the groups; he heard the sound of four gunshots, however, he could not see as to on which part the deceased persons sustained injury and he has no reason to explain it. However, he has denied the suggestion that he was not present at the spot and did not see any incident.

In para-9 he states that after about 15 minutes when all the accused fled from the spot, the police party reached there and upon being asked by the police as to who saw the incident, he informed the police that he witnessed the incident and thereafter, his statement was recorded by the police and his signatures were obtained by the police. He has stated that except on the date of incident, he was never called by the police for enquiry or recording his statement. He categorically denied the fact that his statement in relation to the incident was recorded after two months of the incident. He has admitted the fact that at the time of occurrence of incident, number of persons were moving

to attend the wedding function. In para-18 he has stated that he had not seen Praveen Keshari (PW-4) and Ravish Narsingh at the place of occurrence.

15. PW-2 Ramnarayan, cousin of the deceased Nanka and another eyewitness to the incident, has stated that on the date of incident at about 10.30 pm he along with Praveen Keshari (PW-4), Prashant Gulhare, Ravish Narsingh (both not examined) had gone to Intercity hotel to have their dinner and when they came out from the hotel in the parking lot, they saw quarrel between the accused persons and the deceased persons. The accused persons were standing surrounding both the deceased; deceased Gudda Sonkar abused the accused persons and then accused Jai took out his pistol and pointed towards Gudda Sonkar and started abusing him. Accused Manoj came from behind, snatched pistol from Jai and caused gunshot injury to Gudda Sonkar. In the meanwhile, accused Jai again took pistol back from accused Manoj and caused gunshot injury to Nanka, who was trying to intervene in the matter. He states that all the other accused persons were shouting "*Gudda zinda hai*". He has stated that accused/appellant Jai after putting his leg on the chest of Gudda Sonkar caused gunshot injury to him. He has clarified that the first gunshot injury was caused to Gudda Sonkar on his cheek, accused Manoj was having a weapon like gun and Rishi was having revolver type weapon. In cross-examination, various questions have been put to this witness regarding place of occurrence and the parking lot in the hotel. He states that in his diary statement Ex.D/3 he had not informed the police as to which weapon was being carried by which of the accused and if any such description

finds place in his diary statement, he cannot tell the reason for the same. In para-11 he states that in his diary statement he did inform the police that the remaining accused persons were exhorting and if “remaining accused persons” words are missing, he cannot tell the reason. In para-14 he has stated that he cannot tell with certainty that the weapon carried by accused Rishi was revolver only. He states that he also informed the police about the presence of accused Samrat Mukharjee but could tell any reason as to why his statement in relation to accused Samrat has not been recorded. He has further clarified that he has not seen the firearms from close range and that he is not aware about the difference between revolver and gun. He states that after about 10 minutes of accused fleeing from the spot, the police party reached the place of occurrence, however, he never informed the police about the incident. When the police was lifting the deceased persons, he had not helped the police. He further states that from the date of incident till his statement was recorded he himself had never gone to police for recording his statement.

16. PW-3 Manish Kumar Ghore is a witness to inquest Ex.P/3 & P/4.

17. PW-4 Praveen Keshari is also an eyewitness to the incident. According to him, he along with Ramnarayan (PW-2), Prashant Gulhare and Ravish Narsingh (both not examined) had gone to have their dinner at Intercity Hotel, and when he and his friends came to the parking lot, he saw some altercation going on between the accused persons and the deceased. Both the parties were hurling abuses, the accused persons had surrounded both the deceased and during the said altercation, accused Jai took out pistol and pointed at Gudda

Sonkar. In the meanwhile, accused Manoj snatched the pistol from accused Jai and caused gunshot injury to Gudda Sonkar on his face and then accused Jai took pistol from accused Manoj and caused injury to Nanka Sonkar who came to intervene in the matter. He states that accused Jai had caused two injuries to Nanka, one on his chest and another on his stomach. After both the deceased persons fell on the ground, the accused persons shouted "*Gudda zinda hai, ise maar do*", on which accused Jai after putting his leg on the chest of Gudda Sonkar caused him a gunshot injury on his chest and thereafter, all the accused persons fled from there in 3-4 vehicles. According to him, the accused persons were carrying arms like gun. This witness was also subjected to various questions regarding exact place of occurrence in the parking lot and confronted with his diary statement in that respect. He has admitted the fact that he and Prashant Gulhare have remained in jail and that two cases are pending against him. When he was confronted with his diary statement Ex.D/4, he has stated that he did not inform the police about nature of the weapon carried by the accused persons and according to him, the accused persons were carrying weapon like gun. He states that it took around 30-40 minutes when the first firing was done and during that period he was standing there. In para-11 he has admitted his past criminal record. He has also admitted that he did not intervene in the matter. He has also acknowledged the presence of PW-12 at the spot. He further states that he is not aware as to why there was altercation between the two groups. He states that all the accused persons shouted, "*Gudda zinda hai*". He states that he informed the police that the accused persons

shouted, "*Gudda zinda hai, usse maro*" and also did inform the police about the names of those persons who exhorted and if the same is not recorded, he cannot tell the reason. He states that he did not inform PW-12 that he also saw the incident and as to how his name has been recorded as one of the eyewitness in the FIR, he cannot tell the reason. He states that though deceased persons were known to him but he did not make any effort to intervene in the matter. He, however, has denied the suggestion that he did not see the incident.

18. PW-12 Jugal Kishore @ Gappu, lodger of FIR (Ex.P/33) and merged intimations (Ex.P/34 & P/35), has stated that at about 12 in the night he was in Surya hotel along with Alok Singh Thakur (not examined) and there he received a phone call from deceased Gudda Sonkar that some quarrel is going on and therefore, he (PW-12) should reach there. When he along with Alok Singh reached Intercity hotel, he saw quarrel between deceased Gudda Sonkar and the accused persons outside the bar and that they were assaulting each other. During said quarrel, accused Jai took out his pistol which was snatched by accused Manoj and then Manoj caused injury to Gudda Sonkar with the said pistol as a result of which Gudda fell down. Thereafter, accused Jai snatched the said pistol from Manoj and caused two gunshot injuries to Nanka and also caused gunshot on the chest of Gudda after putting his leg on his chest. He states that he hid himself behind the vehicles and saw the accused persons leaving the said place. He states that he along with his friend Alok Singh took injured Gudda Sonkar to CIMS, Bilaspur in his Scorpio vehicle whereas injured Nanka was taken in police jeep to Apollo. At CIMS, Gudda was

declared dead and from CIMS, he went to Police Station – Torva where he came to know that Nanka has also been declared dead. At the place of occurrence, apart from accused Jai and Manoj, other accused persons were also present and they were shouting “*jaan se maro, jaan se maro*”. He states that at Torva, he lodged FIR (Ex.P/33) and likewise, he also lodged merg intimations (Ex.P/34 & P/35).

In cross-examination, he admits that he knew both the deceased persons and they were known to him very well and belong to the same community. He states that over the phone, it was informed by the deceased Gudda that he had some quarrel and he called him (PW-12) for his help, on which he along with Alok Singh went to Intercity hotel. He states that after about 20-25 minutes of departure of the accused persons from the spot, the police of Police Station – Torva reached there, to whom he had informed about the incident from Intercity hotel itself. He states that he only informed the police on phone that murder has taken place and called them and he also disclosed to the police authorities the names of the accused persons. When he was confronted with the FIR, in para-9 he states that he did inform the police that other accused persons exhorted by saying “*jaan se maro, jaan se maro*”, however, if the same is not recorded in the FIR, he cannot tell the reason. He admits that he is a member of Congress Party and that some cases are pending against him, but has denied the suggestion that on account of political rivalry he has implicated the accused persons. He has further admitted the fact that he belongs to Sonkar community and that Court proceedings are also being attended by the members of the same community. He has denied the suggestion

that on 30.6.2011 members of his community had entered his house and he was threatened for deposing the names of the accused persons in the Court. He has denied the fact of lodging of report Ex.D/16C by his mother Shobha. He, however, admits that the said report bears signature of his mother. He states that all the witnesses were residing near his house. He admits that he had not handed over any document related to his two cell phones to the police. He has expressed his ignorance about the political background of the deceased Nanka and the witnesses. Likewise, he has further expressed ignorance about the connection of accused Manoj with BJP or any political party. Various questions were put to this witness for doubting his presence at the place of occurrence but he has denied all such suggestions. According to him, he also made payment for his food at hotel Surya but did not obtain the bill. He states that at the place of occurrence he had not seen any watch, cell phone and empty cartridges. He states that all these articles were seized in the police station and he does not remember whether his signatures were obtained on the memo or not. He further states that all these three articles were seen by him in open condition in the police station and that these articles were handed over by some boys. He has denied the fact that he has been pressurized to make statement in the police station and that he is making false statement. He states that he did inform the police that three gunshot injuries were caused to deceased Gudda and if in his diary statement, only two is recorded he cannot tell the reason. Likewise, he informed the police that two gunshot injuries were sustained by deceased Nanka. In para-35 he states that he heard the sound of four gunshots,

the fourth gunshot was made on the chest and he did inform the police that fourth gunshot was made on the chest of the deceased after putting leg on his chest and if the same is not recorded, he cannot tell the reason. He admits that only once his statement was recorded after lodging the FIR and in Ex.D/5 he informed the police that two accused persons made 2-2 gunshots. He also admits that he informed the police that after such gunshots, the other accused persons fled from the spot. He states that while lodging merg (Ex.P/34 & P/35) he informed the police that other accused persons present at the spot were shouting "*jaan se maro, jaan se maro*", however, if the same is not recorded, he cannot tell the reason. He did not inform the police that he hid himself behind the vehicle. He has denied the fact that he had any dispute with the accused Hani as he had not made some payment due to him. In para-40 he states that his statement was recorded by the police after 2-3 days of lodging of FIR.

19. PW-13 DS Dehari, investigating officer, recorded FIR (Ex.P/33), merg intimations (Ex.P/34 & P/35), prepared inquest (Ex.P/3 & P/4) and effected certain seizures. In para-8 he states that from the house of accused Jai @ Gudda, one pistol of 7.65 MM in which UNIQUE MODCQL/51-7.065 MM has been written, bearing body No.5323404, five live cartridges, on the bottom of which KF7.65 has been written, one white coloured Maruti Suzuki Car (Ritz) bearing registration No.CG 10-FA-4499 were seized vide Ex.P/13.

It is relevant to note that this seized weapon, according to the prosecution, was used in commission of the offence and all the

gunshots were made from this weapon only.

On the same day from accused/appellant No.6 Ajay @ Chhotu, one .22 rifle bearing body Number CAL22LONG/RIFLE/0147064JGANSCHITZGMBHWAFFENABRIK/UIM/D/GERMANY, with three live cartridges of .22, on the bottom of which CBC was written, were seized vide Ex.P/14. Likewise, from accused Rishiraj, one double barrel 12 bore rifle of Royals Arms & Company, bearing No.9895A/2-Y2002 was seized vide Ex.P/15 from his house situated at Rajendra Nagar. Similarly, from the house of accused Hani @ Koustubh Samdaria one 12 bore double barrel gun bearing body No.MPABR/1-159/52-Z1, having two live cartridges, on the bottom of which "Shaktiman 12 Express" has been written, were seized vide Ex.P/26. The aforesaid seizure memos bear signatures of this witness.

On 9.6.2010 itself he gave notices (Ex.P/44, P/45, P/46, P/47 & P/48) to accused Jai Jaiswal, Rishi Mukharjee, Ajay Jaiswal, Vijay Jaiswal & Hani @ Koustubh Samdariya respectively for producing documents in relation to the weapons seized from them. On the same day he recorded statements of PW-12 Jugal Kishore @ Gappu Sonkar (Ex.D/5), Ajay Kumar Rai and Kamal Kishore Shah. On 17.6.2010 he recorded statements of PW-2 Ramnarayan Ghore (Ex.D/3), Ravish Narsingh, Prashant Gulhare and Alok Singh. On 18.6.2010 he recorded statement of Vinay Ghore. He has further stated that on 18.8.2010 he recorded statements of Mangal Singh, Lallan Bole (Ex.D/1), Naim Memon and Bashir Memon.

On 1.8.2010 he had sent the seized firearms as well as the

empty cartridges and live cartridges for examination to Police Station Bilaspur vide Ex.P/27A & P/31A. He also sent viscera of deceased Nanka and deceased Gudda Sonkar preserved by the doctor for chemical examination to FSL, Raipur along with letter of the Superintendent of Police, Bilaspur dated 9.8.2010 vide Ex.P/49 & 50. On the same day, the seized bloodstained and plain pieces of bricks and clothes etc. were sent for chemical examination to FSL, Raipur along with letter of the Superintendent of Police, Bilaspur vide Ex.P/51 to P/55. On 12.8.2010 he obtained permission from the Superintendent of Police, Bilaspur for sending the seized pistol and live cartridges for examination to CFSL, Chandigarh vide Ex. P/56 and on the same day directed in writing to one Rajkumar Saluja, seller of 7.65 MM cartridges, for producing his licence for arms selling vide Ex.P/57.

In para-26 he states that after recording FIR (Ex.P/33) and merging intimations (Ex.P/34 & P/35) he did not do anything after 2.40 am and in the next morning, inquests were prepared by him. In para-31 he has stated that after receiving information he proceeded for Intercity hotel along with two constables, however, both the constables have not been made witnesses in this case. According to him, deceased Nanka was taken to Apollo hospital in a police jeep. He admits that in the police station, within half an hour he received information about death of both the injured but he did not go to those hospitals and there is no reason for this. He states that at the place of occurrence, no report was lodged and he could not know the names of the assailants and the persons who were present there were not having any idea about the incident. He admits that in the notice to inquest and on the memo sent for

postmortem, crime number and merg number have not been mentioned. He states that he met PW-12 Jugal Kishore in police station at 2.30 in the night and before that he never met him either at Intercity hotel or at CIMS, Bilaspur. He states that FIR (Ex.P/33) is not in his handwriting, but it bears his signature. He states that it is in the handwriting of his Reader-Sandeep Yadav (Constable). He further admits that the FIR was required to be sent to the concerned Magistrate immediately, but he did not do the same. He also filed the Counter Nalishi with the charge sheet. He has denied the fact that in the documents Ex.P/1 to P/4, crime number has not been mentioned because till that time, offence was not registered. In para-48 he admits that during investigation, fired bullets were not seized from the place of occurrence. In para-56 also he has admitted the fact that he had not made any seizure of fired bullet from the place of occurrence. He has admitted the criminal record of deceased Gudda Sonkar. He admits that he did not make any effort to lift fingerprints from the pistol used in commission of the offence. In para-66 he states that Ex.P/33 to P/35 i.e. FIR and merg intimations are forged and fabricated documents. In para-71 he states that on 14.6.2010 he received instructions from the superior officers that copy of FIR be sent to the Magistrate and acknowledgment be obtained and further that .9 MM pistol which was seized, be also sent to CFSL, Chandigarh. When the question was put to him by the Court as to from whom and when .9 MM pistol was seized, he states that no such pistol was seized. In para-72 when this witness was confronted with the police case diary he states that on 9.6.2010 itself he had forwarded copy of FIR to the Magistrate,

however, there is no mention of the same in the diary. Likewise he had not mentioned the names of witnesses to the seizure from the spot effected on 9.6.2010. He further states that in the diary he recorded that on 9.6.2010 he could not get any physical evidence on inspection of the spot. He states that witnesses to the seizure Ex.P/23 from the spot are Ravindra Nirmalkar and Baran Yadav, however, their names have not been correctly mentioned in the diary and in the diary, even the number of pistol seized from accused Jai @ Gudda has been shown as 532344. In para 75 he has denied the fact that from the pistol which was sent to armourer on 1.8.2010, five round fire was made in the police station and then five empty cartridges and three bullets were sent to CFSL. In para-77 he has stated that only once he recorded statements of the witnesses and as per diary, Jugal Kishore (PW-12) had informed that each of accused Jai and Manoj had fired two-two gunshots. He admits that in the statement of PW-12 it has not come that the accused persons were exhorting, "*Gudda zinda hai, usko mar do*". He has clarified that in the diary short statements of witnesses are recorded. In para-80 he states that on 17.7.2010 he recorded statements of PW-2 Ramnarayan and PW-4 Praveen Keshari. In para-81 he states that in diary it has not come as to which of the accused persons was carrying which weapon. He admits that in his statement Ex.D/3, PW-2 Ramnarayan had not informed about the presence of accused Samrat and likewise, he did not inform that accused Rishi was having revolver like weapon and while lodging FIR (Ex.P/33), PW-12 Jugal Kishore had not informed him that deceased Gudda informed Jugal Kishore about any quarrel being taken place. Similarly, Jugal

Kishore had not informed that other accused persons were exhorting "*jaan se maro, jaan se maro*". In para-93 he admits that while lodging merger intimations (Ex.P/34 & P/35), Jugal Kishore (PW-12) had not informed that the other accused persons were exhorting "*jaan se maro, jaan se maro*". Likewise, it was also not informed that other accused persons were having weapons. He admits that notice of Ex.P/48 was given to accused Hani on 9.6.2010 in which there is no mention of barrel number of the weapon and four cartridges. He has admitted the fact that father of Hani made a complaint to superior officers of police for falsely implicating his son Hani, however, he is not aware as to whether any complaint was there against the police regarding forcible entry in the house of father of Hani on 9.6.2010 and recovery of licensed gun. He admits that the first remand of Hani was obtained on 13.6.2010.

20. PW-9 Dr. Chaturbhuj Minj conducted postmortem on the body of deceased Gudda Sonkar on 9.6.2010 alongwith Dr. SK Mohanti and Dr. Suparna Ganguli vide Ex.P/24 and noticed following injuries:

- (i) an entry wound with inverted margins 0.8 cm x 1 cm elliptical in shape 7 cm away from left nipples directed downwards medially towards sternum;
- (ii) two parallel abrasions marks over left side of chest about 4 cm long and 3 cm long respectively, about 9 cm above nipple,
- (iii) an entry wound over left cheek circular shape 0.8 cm x 0.8 cm tattooing present around it size approx. 8 cm x 6 cm, margins are inverted,

- (iv) contusion mark below right eye on right cheek 0.5 x 0.6 cm,
- (v) another contusion over nostrils right side 0.2 x 0.2 cm, bleeding from nose present,
- (vi) abrasion mark over back near 7-8 inter-vertebral space in inter scapular region over left side about 1.5 cm x 1 cm.

The doctor also noticed fracture of mandible bone and that a bullet was stuck in the 6th cervical spine. In his opinion, the cause of death was due to multiple gunshot injuries resulting in damage to internal vital organs and hemorrhagic shock, however, the final opinion was reserved and will be ascertained after receipt of biochemical analysis report and ballistic expert opinion. The nature of death was opined to be homicidal.

On 9.6.2010 PW-9 Dr. Chaturbhuj Minj conducted postmortem on the body of deceased Nanka Sonkar vide Ex.P/25 and noticed two rounded tears in shirt just below pocket on left side chest and 2nd above 7 ½ cm below the 1st entry mark on shirt with blackening. He noticed the following injuries/symptoms:

- (i) an entry wound on left side of neck elliptical in shape 0.9 x 1 cm margins inverted and tattooing of skin,
- (ii) an exit wound on right side of neck with inverted margins size 1.3 cm x 1 cm,
- (iii) one entry wound over sternum at level of lower end of areola,
- (iv) second entry wound over xifisternum level 7 ½ cm below 1st injury,
- (v) 3 ECG ports attached to chest, one on left side and two on right side,

- (vi) two exit wounds on back over right subscapular region one on 7th and one on 8th intervertebral level, each of 0.9 x 0.9 cm size,
- (vii) bullet was present just below (beneath) 2nd exit wound at level of 8th inter-vertebral space, bullet has become flat and dorsal pointed flattened.

In his opinion, the cause of death was due to multiple gunshot injuries resulting in damage to internal vital organs i.e. liver, right lung and great vessels of neck, and hemorrhage (massive internal), however, the exact cause of death will be ascertained after receipt of histopathological, biochemical and ballistic expert reports. The nature of death was opined to be homicidal.

In para-14 the doctor has admitted the fact that if the injured is in lying down position and assailant is in standing position, then injury sustained by Nanka on his neck could not have been caused.

21. PW-11 Jugal Kishore, Armourer, examined all the seized arms including the one which was allegedly used in commission of the offence. In para-8 he states that he received one pistol, five live cartridges and five empty cartridges for examination. In the upper part of slider of the pistol, Made in France, Made-51-CAL-7 MM (right side) and in left side slider, Manufacture-D-ARMSDES-PYRNEES-HENDAY and right side body No.392344 were written. The pistol was of 7.65 MM bore and it was functional. He found that the seized five round cartridges were live cartridges of 7.65 MM and the seized five empty cartridges were also of 7.65 MM. He had opined for obtaining ballistic expert report to ascertain as to whether the seized five live cartridges and empty cartridges were of the same seized pistol and can be fired

from the said pistol. In para-11 he states that he examined Article P i.e. pistol bearing body No.392344 which was received by him in sealed condition and after examination he advised the Station House Officer, Torva for referring the said pistol to CFSL, Chandigarh, however, the pistol which was examined by him does not bear the number 5323404, which is of the pistol mentioned in the memo. In para-12 he admits that he received a sealed bundle from Police Station – Torva on 1.8.2010, thereafter, states that all the firearms were sealed separately and then states that he received a sealed bundle, however, after unsealing it, the articles kept inside were not found sealed. He admits that the empty as well as live cartridges were also not sealed. He volunteers that the all the firearms received by him for examination were sealed separately.

22. PW-3 Manish Kumar Ghore is a witness to inquest. PW-5 Jagdish Shrivastava has proved sanction Ex.P/6 under the provisions of the Arms Act. PW-6 Anil Nair, Police Constable, assisted in the investigation. PW-7 Tarachand Rai, witness to memorandum, seizure and arrest memos, has turned hostile. PW-8 Ravindra Nirmalkar, Guard of Intercity hotel, seizure witness, has also turned hostile. PW-10 Pradeep Agnihotri, witness to memorandum and seizure, has turned hostile.

23. DW-1 Dr. Ranjan Kumar Mishra has stated that deceased Nanka was brought dead by Vinay Ghore. DW-2 Dr. Ramnesh Murthy has stated that deceased Gudda was brought dead by Prashant Gulhare. DW-3 Sunil Chhabdra, owner of Surya hotel, has stated that PWs-1, 2, 4 & 12 alongwith Alok and 3-4 other persons were present at the hotel

Surya from 11 pm to 1 am on 8.6.2010. In para-4 he, however, states that from his cabin, three bars and second floor of the restaurant are not visible. DW-4 LP Dwivedi, Police Inspector, has proved FIR (Ex.P/16) lodged by Shobha Narsingh, mother of PW-12. DW-5 Kishore Gwalani has stated that on the date of incident he was sitting with accused Manoj in his house along with one Sunil and Arjun (DW-6) for discussion regarding some business transaction. He states that at 10-11 pm he went to the house of accused Manoj and was there till 1 in the night. He has also given description of the business transaction. In para-6 he admits that he did not lodge any report with the police that on the fateful night he was sitting with accused Manoj nor did he get his statement recorded at the police station. He also did not make any complaint to the Collector.

24. DW-6 Arjun Agrawal has made almost similar statement as has been made by DW-5. DW-7 Smt. Savita Agrawal, sister of accused Manoj, states that at the relevant time, DW-6, Sunil Agrawal and Kishore Gwalani were sitting in the house of accused Manoj and as her mother was not well, she too was there in the house of accused Manoj.

25. True it is that in the present case there appears to be casual investigation by the investigating officer (PW-13 DS Dehari). Even the Government Advocate during the course of arguments has fairly conceded that the investigating officer has not done fair and impartial investigation and the same has been done to favour the defence for the reasons best known to him. Surprisingly, the investigating officer has gone to the extent of saying that the FIR and mere intimations

(Ex.P/33 to 35) are forged documents. That apart, from a bare reading of his statement there appears to be material irregularity committed by him during investigation.

26. It is a settled principle of law that for lapses, fault or omission on the part of the investigating agency, the entire prosecution case would not fail and cannot be treated as tainted one. If the investigation is faulty and the IO is supporting the defence, merely on this basis the defence cannot get any advantage. The Court is required to see the other material available on record, especially the statements of other witnesses including that of the eyewitnesses.

27. While dealing with the issue of faulty investigation, the Hon'ble Supreme Court in the matter of ***Paras Yadav and others Vs. State of Bihar, (1999) 2 SCC 126***, observed as under:

“8. It has been contended by the learned Counsel for the appellants that the Investigating Officer has not bothered to record the dying declaration of the deceased nor the dying declaration is recorded by the Doctor. The Doctor is also not examined to establish that the deceased was conscious and in a fit condition to make the statement. It is true that there is negligence on the part of Investigating Officer. On occasions, such negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. But in the present case, the evidence of prosecution witnesses clearly establishes beyond reasonable doubt that the deceased was conscious and he was removed to the hospital by bus. All the witnesses deposed that the deceased was in a fit state of health to make the statements on the date of incident. He expired only after more than 24 hours. No

justifiable reason is pointed out to disbelieve the evidence of number of witnesses who rushed to the scene of offence at Ghogha Chowk. Their evidence does not suffer from any infirmity which would render the dying declarations as doubtful or unworthy of the evidence. In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. For this purpose, it would be worthwhile to quote the following observations of this Court from the case of *Ram Bihari Yadav v. State of Bihar and others*, J.T. (1998) 3 SC 290.

"In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

28. In ***State of UP Vs. Jagdeo and others, (2003) 1 SCC 456*** the Hon'ble Supreme Court held as under:

"8. Coming to the aspect of the investigation being allegedly faulty, we would like to say that we do not agree with the view taken by the High Court. We would rather like to say that assuming the investigation was faulty, for that reason alone the accused persons cannot be let off or acquitted. For the fault of the prosecution, the perpetrators of such a ghastly crime cannot be allowed to go scot free. All the accused persons were armed with deadly weapons and they attacked the members of the victims' family who were totally unarmed and were sleeping at night in the open. The High Court has expressed a doubt about the FIR

being lodged at the time alleged by the prosecution and the manner in which it is so stated by the prosecution. The question however is: is it sufficient to acquit all the persons? The trial court had discussed all the elements leading to the brutal murder in this case and found them against the accused persons. Unfortunately, the High Court remained on the periphery and never attempted to grapple with the substance of the evidence on record. This peripheral approach of the High Court led to the impugned judgment of acquittal being passed. In the presence of such a strong evidence on record implicating the accused persons, things like alleged improper recording of time of lodging of FIR are not sufficient to dislodge the verdict of convictions passed by the Sessions Court. In our considered view the evidence of the eye-witnesses in the present case completely proves the prosecution case. The doubt thrown by the High Court on the presence of the eye-witnesses at the time of occurrence is totally unacceptable. The impugned judgment of the High Court whereby all the accused persons have been acquitted is hereby set aside. These appeals are allowed and the judgment of the Sessions Court is hereby restored. The accused persons shall be taken into custody to serve the remaining sentence as imposed on each of them by the Sessions Court.”

29. In the matter of ***Ram Bali Vs. State of UP, (2004) 10 SCC 598*** where the investigation was also stated to be defective since the gun was not sent for forensic test, the Hon'ble Supreme Court observed that in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. ([See Karnel Singh v. State of M.P. \(1995\)](#)

(5) SCC 518).

30. Likewise, in the matter of ***VK Mishra and another Vs. State of Uttarakhan and another, (2015) 9 SCC 588***, the Apex Court while observed that the investigating officer is not obliged to anticipate all possible defences and investigate in that angle. In any event, any omission on the part of the investigating officer cannot go against the prosecution. Interest of justice demands that such acts or omission of the investigating officer should not be taken in favour of the accused or otherwise it would amount to placing a premium upon such omissions.

31. In view of the above settled legal position, even assuming that the investigation is faulty, the accused persons cannot be acquitted on this ground alone. The most important aspect of the case is the prompt FIR (Ex.P/33) lodged at the instance of PW-12 Jugal Kishore at 2.30 am naming all the accused persons in the same. We have no reason to disbelieve the said FIR nor there is any evidence to show that the same has been recorded subsequently. In the FIR it has come that PW-1 Lallan Bole and PW-4 Praveen Keshari, two important eyewitnesses, were present at the Intercity Hotel. PW-1 while supporting the prosecution case has stated that on the date of occurrence at 10.30 pm he along with his friends Mangal, Naim and Bashir (not examined) had gone to hotel Intercity and after having their meals when they came to the parking lot near their vehicle, all the accused persons were standing there. He also saw both the deceased standing there and that some altercation was going on between the accused persons and the deceased persons. He saw deceased Gudda

Sonkar talking to someone on cell phone and after about 10 minutes, PW-12 and one Alok reached there and then the altercation between the parties intensified. He states that accused/appellant Jai @ Gudda took out his pistol and in the meantime, accused Manoj snatched the pistol from accused Jai and fired at Gudda Sonkar and thereafter, Jai snatched pistol from Manoj and fired at Nanka Sonkar. Both Gudda and Nanka Sonkar fell down on the ground and thereafter, accused Jai caused another gunshot injury to Gudda Sonkar on his chest and both the deceased sustained two gunshots. After causing injuries to the deceased persons, the accused/appellants left the place of occurrence on their vehicle. In his cross-examination he remained firm. He cannot be disbelieved merely on the ground that his diary statement was recorded belatedly. If the defence wanted to take advantage of delayed diary statement of this witness, it ought to have put relevant question to this witness in this respect, however, it has not been done and likewise, no cross-examination of the IO has been done in this respect also. We do not find any reason to disbelieve the statement of PW-1.

32. Yet another eyewitness to the incident PW-2 Ramnarayan, cousin of the deceased Nanka, has stated that on the date of incident at about 10.30 pm he along with Praveen Keshari (PW-4), Prashant Gulhare, Ravish Narsingh (both not examined) had gone to Intercity hotel to have their dinner and when they came out from the hotel in the parking lot, they saw quarrel between the accused persons and the deceased persons. The accused persons were standing surrounding both the deceased; deceased Gudda Sonkar abused the accused persons and then accused Jai took out his pistol and pointed towards

Gudda Sonkar and started abusing him. Accused Manoj came from behind, snatched pistol from Jai and caused gunshot injury to Gudda Sonkar. In the meanwhile, accused Jai again took pistol back from accused Manoj and caused gunshot injury to Nanka, who was trying to intervene in the matter. He states that all the other accused persons were shouting "*Gudda zinda hai*". He has stated that accused/appellant Jai after putting his leg on the chest of Gudda Sonkar caused gunshot injury to him. He has clarified that the first gunshot injury was caused to Gudda Sonkar on his cheek, accused Manoj was having a weapon like gun and Rishi was having revolver type weapon. In cross-examination, various questions have been put to this witness regarding place of occurrence and the parking lot in the hotel. However, even after lengthy cross-examination he stood firm and reiterated as to the manner in which the incident occurred. He has further clarified participation of all the accused persons in the crime in question.

33. PW-4 Praveen Keshari is also an eyewitness to the incident. According to him, he along with Ramnarayan (PW-2), Prashant Gulhare and Ravish Narsingh (both not examined) had gone to have their dinner at Intercity Hotel, and when he and his friends came to the parking lot, he saw some altercation going on between the accused persons and the deceased. Both the parties were hurling abuses, the accused persons had surrounded both the deceased and during the said altercation, accused Jai took out pistol and pointed at Gudda Sonkar. In the meanwhile, accused Manoj snatched the pistol from accused Jai and caused gunshot injury to Gudda Sonkar on his face and then accused Jai took pistol from accused Manoj and caused

injury to Nanka Sonkar who came to intervene in the matter. He states that accused Jai had caused two injuries to Nanka, one on his chest and another on his stomach. After both the deceased persons fell on the ground, the accused persons shouted "*Gudda zinda hai, ise maar do*", on which accused Jai after putting his leg on the chest of Gudda Sonkar caused him a gunshot injury on his chest and thereafter, all the accused persons fled from there in 3-4 vehicles. According to him, the accused persons were carrying arms like gun. This witness was also subjected to various questions regarding exact place of occurrence in the parking lot and confronted with his diary statement in that respect, however, in his lengthy cross-examination he also supports the prosecution case.

34. PW-12 Jugal Kishore @ Gappu who is lodger of FIR (Ex.P/33) and merged intimations (Ex.P/34 & P/35), has stated that at about 12 in the night he was in Surya hotel along with Alok Singh Thakur (not examined) and there he received a phone call from deceased Gudda Sonkar that some quarrel is going on and therefore, he (PW-12) should reach there. When he along with Alok Singh reached Intercity hotel, he saw quarrel between deceased Gudda Sonkar and the accused persons outside the bar and that they were assaulting each other. During said quarrel, accused Jai took out his pistol which was snatched by accused Manoj and then Manoj caused injury to Gudda Sonkar with the said pistol as a result of which Gudda fell down. Thereafter, accused Jai snatched the said pistol from Manoj and caused two gunshot injuries to Nanka and also caused gunshot on the chest of Gudda after putting his leg on his chest. He states that he hid himself

behind the vehicles and saw the accused persons leaving the said place. He states that he along with his friend Alok Singh took injured Gudda Sonkar to CIMS, Bilaspur in his Scorpio vehicle whereas injured Nanka was taken in police jeep to Apollo. At CIMS, Gudda was declared dead and from CIMS, he went to Police Station – Torva where he came to know that Nanka has also been declared dead. At the place of occurrence, apart from accused Jai and Manoj, other accused persons were also present and they were shouting “*jaan se maro, jaan se maro*”. He states that at Torva, he lodged FIR (Ex.P/33) and likewise, he also lodged merg intimations (Ex.P/34 & P/35). This witness was also subjected to lengthy cross-examination but he remained firm and reiterated the entire incident.

35. The statements of the aforesaid eyewitnesses further stand corroborated by the medical evidence of the autopsy surgeon PW-9 Dr. Chaturbhuji Minj who conducted postmortem on the body of deceased Gudda Sonkar on 9.6.2010 alongwith Dr. SK Mohanti and Dr. Suparna Ganguli vide Ex.P/24 and noticed following injuries:

- (i) an entry wound with inverted margins 0.8 cm x 1 cm elliptical in shape 7 cm away from left nipples directed downwards medially towards sternum;
- (ii) two parallel abrasions marks over left side of chest about 4 cm long and 3 cm long respectively, about 9 cm above nipple,
- (iii) an entry wound over left cheek circular shape 0.8 cm x 0.8 cm tattooing present around it size approx. 8 cm x 6 cm, margins are inverted,
- (iv) contusion mark below right eye on right cheek 0.5 x 0.6 cm,

- (v) another contusion over nostrils right side 0.2 x 0.2 cm, bleeding from nose present,
- (vi) abrasion mark over back near 7-8 inter-vertebral space in inter scapular region over left side about 1.5 cm x 1 cm.

The doctor also noticed fracture of mandible bone and that a bullet was stuck in the 6th cervical spine. In his opinion, the cause of death was due to multiple gunshot injuries resulting in damage to internal vital organs and hemorrhagic shock, however, the final opinion was reserved and would be ascertained after receipt of biochemical analysis report and ballistic expert opinion. The nature of death was opined to be homicidal.

On 9.6.2010 PW-9 Dr. Chaturbhuj Minj conducted postmortem on the body of deceased Nanka Sonkar vide Ex.P/25 and noticed two rounded tears in shirt just below pocket on left side chest and 2nd above 7 ½ cm below the 1st entry mark on shirt with blackening. He noticed the following injuries/symptoms:

- (i) an entry wound on left side of neck elliptical in shape 0.9 x 1 cm margins inverted and tattooing of skin,
- (ii) an exit wound on right side of neck with inverted margins size 1.3 cm x 1 cm,
- (iii) one entry wound over sternum at level of lower end of areola,
- (iv) second entry wound over xifisternum level 7 ½ cm below 1st injury,
- (v) 3 ECG ports attached to chest, one on left side and two on right side,
- (vi) two exit wounds on back over right subscapular region one on 7th and one on 8th intervertebral level, each of 0.9 x 0.9 cm size,

(vii) bullet was present just below (beneath) 2nd exit wound at level of 8th inter-vertebral space, bullet has become flat and dorsal pointed flattened.

In his opinion, the cause of death was due to multiple gunshot injuries resulting in damage to internal vital organs i.e. liver, right lung and great vessels of neck, and hemorrhage (massive internal), however, the exact cause of death would be ascertained after receipt of histopathological, biochemical and ballistic expert reports. The nature of death was opined to be homicidal.

Thus, from the above clear and cogent ocular evidence duly supported by medical evidence, complicity of accused/appellants Jai @ Gudda Jaiswal and Manoj Agrawal in the crime in question stands proved beyond all reasonable doubt.

36. The next point which needs to be considered by this Court is whether conviction of other accused namely Vijay, Rishiraj, Samrat, Ajay & Hani with the aid of Section 149 of IPC in accordance with law.

37. Before entering into the merits of the case, we deem it appropriate to first refer to the law with regard to applicability of Section 149 of IPC. This section is a very important provision with regard to group liability. It is also known as laying down a principle of joint or vicarious or constructive criminal responsibility. It says that whenever any member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, or any such offence is committed by any member of that assembly about which the members of the assembly had knowledge that such offence was likely to be committed in prosecution of the common object of that assembly, every person who was a member of such assembly at the time of

commission of the offence is guilty of that offence.

In other words, there are two kinds of cases covered under this section. The first part holds every member of an unlawful assembly guilty of any offence which has been committed by any member of such assembly in prosecution of the common object of the assembly. The second part holds every member of such assembly guilty of any offence which the members of such assembly knew to be likely to be committed in prosecution of the common object of the assembly. The basis of the constructive guilty under this section is the membership of an unlawful assembly. Common object is determined keeping in view nature of the assembly, arms carried by members and behaviour of members at or near the scene of incident. It is not necessary in all cases that the same must be translated into action or be successful.

38. In ***Lalji and others Vs. State of UP, (1989) 1 SCC 437***, the Hon'ble Apex Court observed as under:

“8. [Section 149](#) I.P.C. provides 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 members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in [Section 141](#) I.P.C., an assembly of five or more persons is designated an 'Unlawful Assembly', if the common object of the persons composing that assembly is to do any act or acts stated in clauses 'First', 'Second', 'Third', 'Fourth', and 'Fifth' of that section. An assembly, as

the explanation to the section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, whenever so many as five or more persons meet together to support each other, even against opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm person of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in [Section 141](#) I.P.C. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. [Section 149](#) makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and

distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under [section 149](#). It must be noted that the basis of the constructive guilt under [section 149](#) is mere membership of the unlawful assembly, with the requisite common object or knowledge.

10. Thus, once the Court hold that certain accused persons formed in unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

39. In the case of ***Sikandar Singh Vs. State of Bihar, (2010) 7 SCC 477***, the Hon'ble Apex Court referring to its earlier decisions on the applicability of Section 149 of IPC observed as under:

"13. We shall now proceed to assess each of the contentions seriatim. The first question is, whether all the appellants can be convicted under [Section 302](#) with the aid of [Section 149](#) IPC?

14. [Section 149](#) IPC 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."

15. The provision has essentially two ingredients viz. (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the

assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.

16. In *Mizaji & Anr. Vs. State of U.P.* (AIR 1959 SC 572), explaining the scope of [Section 149](#) IPC, this Court had observed thus: (AIR p. 576, para 6)

"6. This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts. The first part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. It is not necessary that there should be a AIR 1959 SC 572 preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under [S. 149](#) if it can be held that the offence was such as the members knew was likely to be committed. The expression 'know' does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a

woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of [S. 149](#). Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all. There is a great deal to be said for the opinion of Couch, C.J., in Sabed Ali's case, 20 Suth WR Cr 5 that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part, but not within the first. The distinction between the two parts of [S. 149, Indian Penal Code](#) cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of [S. 149](#) as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part."

17. A 'common object' does not require a prior concert and a common meeting of minds before the attack. It is enough if each member of the unlawful assembly has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular

stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.

18. In *Masalti Vs. State of U.P.* (AIR 1965 SC 202), a Constitution Bench of this Court had observed that: (AIR p. 211, para 17)

“17. [Section 149](#) makes it clear 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 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; and that emphatically brings out the principle that the punishment prescribed by [Section 149](#) is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.”

40. From perusal of the law expounded through various judicial pronouncements as quoted above in relation to constructive liability of the accused persons under Section 149 of IPC, it emerges that it covers two sorts of cases where the first part holds every member of an unlawful assembly guilty of any offence committed by any member of such assembly in prosecution of the common object of the assembly and the second part holds every member of such assembly guilty of any offence which the members of such assembly knew to be likely to be committed in prosecution of the common object of the assembly. Common object is determined regard being had to the nature of the assembly, arms carried by members and behaviour or conduct of

members at or near the scene of incident. Once it stands proved that the accused persons were members of such unlawful assembly and had the common object, even if some of the accused did nothing with their own hands, they cannot be absolved of the constructive criminal liability because it is not necessary that all the persons forming an unlawful assembly must do some overt act. Furthermore, it is also well settled that even a lawful assembly may turn out into an unlawful assembly on the spot and it is not at all necessary for forming common object, the accused persons must have a prior concert and a common meeting of minds before the attack, and it is to be ascertained from the acts and language of the members composing it as also from a consideration of all the surrounding circumstances. For determination of the common object, the conduct of each of the members of the unlawful assembly, before and at the time of attack needs to be scrutinized. It is an inference to be deduced from the facts and circumstances of each case.

41. In the case in hand, from the unrebutted evidence of the eyewitnesses (PWs-1, 2, 4 & 12) it is apparent that all the accused persons were standing surrounding the deceased persons and during the course of altercation between the two groups, accused/appellant Jai pointed pistol at deceased Gudda Sonkar, which was subsequently snatched by accused/appellant Manoj who caused gunshot injury to Gudda Sonkar and thereafter, with the same weapon, accused/appellant Jai caused gunshot injury to Nanka Sonkar who came to the rescue of Gudda Sonkar. All these witnesses have further stated that thereafter, the other accused persons exhorted that Gudda

Sonkar is alive, shoot him. Thus, from their conduct during the course of incident it is evident that they were well aware of the act likely to be committed by the said assembly. Furthermore, there is no evidence that the other accused persons in any manner tried to pacify the dispute or prevent accused Jai and Manoj from firing. Thus, in light of the aforesaid principles of law as to the scope of Section 149 of IPC, from the evidence of the eyewitnesses coupled with the conduct of these accused persons, it is clear that all the accused persons had a common object of committing murder of the deceased persons.

42. As regards the argument of the appellants that the evidence of the eyewitnesses being interested/related witnesses cannot be relied upon, it is well settled principle of law the evidence of an interested witness should not be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. It has to be realized that related and interested witness would be the last persons to screen the real culprits and falsely substitute innocent ones in their places. Indeed there may be circumstances where only interested evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house when the only witnesses who could see the occurrence may be the family members. In such cases it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness. But once such witness was scrutinized with a little care and the Court was satisfied that the evidence of the interested witness have a ring of truth such evidence could be relied upon even without corroboration.

Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (***See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52.***)

43. In the case in hand, defence has not brought on record any such material to substantiate this argument regarding interestedness of the witnesses. Nothing is there to suggest that these witnesses had any motive to falsely implicate the accused persons in this crime. Moreover, the witnesses examined by the prosecution appears to be natural witnesses and from the evidence, their presence on the spot at the relevant time is also established. As such, only on account of they being related to the deceased, their testimony cannot be doubted.

44. Further, we find no substance in the argument of the defence that merg intimations and the FIR are anti-timed or anti-dated. In relation to this argument also, there is absolutely no evidence led by the defence. Mere non-reflection of crime number in the merg intimations, inquests or the memo sent for postmortem, is not sufficient to doubt the authenticity of the prosecution case. It is relevant to note here that immediately after the incident on 9.6.2010 itself except

accused Hani, other accused persons were arrested and produced before the Court and their first remand was obtained. Thus it is evident that the FIR is not anti-timed or anti-dated as alleged by the defence. However, in the facts and circumstances of the case, there was no time for the prosecution to create false evidence and to frame any of the accused in this crime. In quick succession all the formalities were completed by the prosecution and as such, there was no room for it to create or fabricate the evidence. There is also no evidence to suggest that prior to lodging of FIR, PW-12 had any meeting with the family members of deceased or eyewitnesses to the incident or there was any deliberation between them for false implication of the accused persons. Furthermore, there is no evidence as to why these accused persons have been falsely implicated by the prosecution.

45. We also do not find any substance in the argument advanced in respect of appellant Hani that he was not present at the time of occurrence. Notice u/s 91 of CrPC was not given to accused/appellant Hani on 9.6.2010 (Ex.P/48) and the said fact also does not find place in the case diary. In fact, on 9.6.2010 accused Hani was absconding and notice u/s 91 of CrPC was given to him on 13.6.2010, the date when seizure of weapon was effected from Hani and he was arrested. According to the State counsel, Ex.P/48 is either a created document by the investigating officer or an incorrect date has been mentioned therein. Even if it is accepted that accused Hani was not arrested on 9.6.2010, it was discretion of the investigating officer to arrest him or not, and it will not affect the prosecution case because since beginning name of Hani finds place in all the documents i.e. FIR, merg and memo

sent for postmortem. Furthermore, this plea of alibi has nowhere been taken by the appellant Hani in his statement u/s 313 of CrPC.

46. As regards the argument of the defence that there was delay in sending copy of the FIR to the Magistrate, the same is to be noted and rejected for the reasons that on 9.6.2010 itself copy of the FIR was sent to the Magistrate. This also negates the argument of the defence that merge number has been shown in the FIR which, according to the defence, makes the FIR doubtful.

47. In the matter of ***Munshi Prasad and others Vs. State of Bihar, (2002) 1 SCC 351***, while considering the effect of delay in sending FIR to the Magistrate on the prosecution case, the Hon'ble Supreme Court observed as under:

“13. In support of the appeal, a further submission has been made pertaining to the First Information Report (FIR). On this score the appellants contended that delayed receipt of the FIR in the Court of the Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that [Section 157](#) of the Code makes it obligatory on the Officer Incharge of the Police Station to send a report of the information received to a Magistrate forthwith, but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice - if the Court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, mere delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case. The decision of this Court in [Shiv Ram and another v. State of U.P.](#), [1998] 1 SCC 149 lends support to the

observation as above.

14. This Court further in [State of Karnataka v. Moin Patel and others](#), AIR (1996) SC 3041 slated vis-a-vis the issue of delay in despatch of FIR as below:

"16. The matter can be viewed from another angle also. It has already been found by us that the prosecution case is that the FIR was promptly lodged at or about 1.30 AM and that the investigation started on the basis thereof is wholly reliable and acceptable. Judged in the context of the above facts the mere delay in despatch of the FIR -and for that matter in receipt thereof by the Magistrate - would not make the prosecution case suspect for as has been pointed out by a three Judge Bench of this Court in [Pala Singh v. State of Punjab](#), AIR (1972) SC 2679, the relevant provision contained in [Section 157](#) Cr.P.C. regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under [section 159](#) Cr.P.C. and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however, improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable".

48. In ***Pandurang Chandrakant Mhatre and others Vs. State of Maharashtra,(2009) 10 SCC 773***, the Hon'ble Apex Court held that FIR is not expected to be encyclopedia of the events but must contain some essential and relevant details of the incident. It is not a substantive piece of evidence and can be used only to discredit the

testimony of maker thereof and cannot be utilised for contradicting or discrediting the testimony of other witnesses. If the evidence of the eyewitnesses is found cogent, convincing and credible, delay in receipt of copy of FIR by the Court concerned is insignificant.

49. So far as submission on behalf of the defence that statement of the Investigating Officer (PW-13) demolishes the entire prosecution case is concerned, it is not acceptable to us. True it is that the investigation appears to have been done in a casual manner but if the investigation has not been done properly and there are some lapses on the part of the IO, this itself would not make the accused persons entitled for acquittal. Rather this strengthens the argument of the State counsel that the IO appears to have favoured the accused persons as already discussed above and they cannot derive any benefit out of it in the face of other clinching and reliable evidence, in particular of the eyewitnesses, on record showing their involvement in the crime in question.

50. So far as discrepancy between the number of gunshot injuries described by the witnesses and the injuries found on the persons of the deceased is concerned, true it is that such discrepancy is there, however, considering the manner in which the incident occurred, the accused persons fired indiscriminately in a public place, it would not be logical to expect from a person witnessing such incident to tell the exact number of gunshots fired or name or features of the person who fired or the part of body of the deceased where the bullet hit. Naturally, the witnesses must have got frightened and the people present at the

spot must be running helter-skelter. In this view of the matter, the argument in this regard is of no help to the appellants.

51. In ***State of Karnataka Vs. K. Yarappa Reddy (1999) 8 SCC 715*** the Hon'ble Supreme Court observed as under:

“Criminal Courts should not expect a set reaction from any eyewitness on seeing an incident like murder. If five persons witness one incident there could be five different types of reactions from each of them. It is neither a tutored impact nor a structured reaction which the eye witness can make. It is fallacious to suggest that PW-11 would have done this or that on seeing the incident. Unless the reaction demonstrated by an eye witness is so improbable or so inconceivable from any human being pitted in such a situation it is unfair to dub his reactions as unnatural. {*Rana Pratap v. State of Haryana, AIR (1983) SC 680, Appabhai v. State of Gujarat, AIR (1988) SC 696.*}

Further, in the case of ***Kathi Bharat Vajsur and another Vs. State of Gujarat, (2012) 5 SCC 724***, it has been observed as follows:

“35. We are in agreement with the above observations. When an eyewitness behaves in a manner that perhaps would be unusual, it is not for the prosecution or the Court to go into the question as to why he reacted in such a manner. As has been rightly observed by his lordship O. Chinnappa Reddy, J., in Rana Pratap's case (supra.) there is no fixed pattern of reaction of an eyewitness to a crime. When faced with what is termed as 'an unusual reaction' of an eyewitness, the Court must only examine whether the prosecution story is in anyway affected by such reaction. If the answer is in the negative, then such reaction is irrelevant. We are afraid that the unusual behaviour of the

injured eyewitness, PW6, will not, in anyway, aid the appellants to punch a hole on to the prosecution story.”

52. So far as argument in relation to discrepancy in the weapon used in commission of the offence is concerned, this minor discrepancy will not extend any benefit to the defence in view of the postmortem report, report of the ballistic expert and more particularly, the evidence of the eyewitnesses. As already noted above, the IO in this case appears to have been biased and have acted in favour of the accused persons. In such an eventuality, it is quite possible that the IO had deliberately mentioned incorrect weapon number in the case diary and other relevant documents including the memo sent to FSL. However, looking to the weapon, make of the weapon and its body numbers, most of which are the same as mentioned in the seizure memo, it would not have been practically possible for the IO to procure any such weapon from outside and implant the same, and such discrepancy appears to be deliberate one to weaken the prosecution case.

53. Similar is the position with seizure of bills of the hotels. Mere non-mentioning of dates in the bills is not good enough to doubt the prosecution case. Likewise, criminal record of the deceased persons and the eyewitness is also of no help to the defence, rather it supports the prosecution case because in such eventuality, hostility can always be there between such criminals which serves as a motive for them to settle their old scores. Though no motive could be attributed to the appellants in this case, but it is well settled principle of law that normally in circumstantial evidence based cases, the prosecution has to prove motive. The absence of motive becomes material in such

cases; correspondingly motive is not important in the case of direct or ocular evidence, and present being the case of ocular evidence, non-proving of motive does not at all affect the credibility of the prosecution case. Man's behaviour and reaction differ from person to person and by no scale is measurable. In today's time when patience run low and anger is aroused over a very trifling matter, it cannot be said with utmost certainty that the act such as hurling abuses could not have been sufficient enough to form a motive for commission of an offence.

54. As regards delay in recording statements u/s 161 of CrPC of the witnesses, in the case of ***Banti Vs. State of MP, (2004) 1 SCC 414*** the Hon'ble Supreme Court held that unless the Investigation Officer is categorically asked as to why there was delay in examination of the witnesses, the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion. [[See Ranbir and Ors. v. State of Punjab](#), AIR (1973) SC 1409 and [Bodhraj @Bodha and Ors. v. State of Jammu and Kashmir](#), [2002] 8 SCC 45]. The same view has been further reiterated in the case of ***Sunil Kumar Vs. State of Rajasthan (2005) 9 SCC 283*** and ***V.K. Mishra Vs. State of Uttarakhand (2015) 9 SCC 588***.

In the present case, no question whatsoever was put to the investigating officer in respect of recording of delayed diary statements

and furthermore, from perusal of the record we find that nothing new has been brought on record by the prosecution through recording of delayed diary statements. The prosecution case has been consistent from the very beginning to the end. Defence has utterly failed to point out as to what prejudice has been caused to it by recording of such delayed statements. Moreover, mere delay in recording statement u/s 161 of CrPC would not *ipso facto* render the whole prosecution case doubtful if it has been explained properly or the Court from the other material available records and the attending circumstances finds such delay to be insignificant. As such, effect of delay in recording diary statements on the prosecution case varies from case to case depending upon the facts and circumstances of each case.

55. As regards non-production of call details of PW-12 Jugal Kishore and the deceased Gudda Sonkar, it also does not damage the prosecution case in view of the oral testimony of PW-12 coupled with the evidence of PW-1 Lallan Bole who remained firm on this point.

56. So far as discrepancy pointed out by the defence regarding taking the deceased persons to hospital is concerned, we find no force in this argument because there is clear evidence that PW-12 Jugal Kishore took Gudda Sonkar to CIMS and Nanka Sonkar was taken to Apollo Hospital in a police jeep and in the hospital they were declared dead. If according to the defence, it was one Prashant Gulhare who had taken Gudda Sonkar to hospital, then it ought to have examined him as a defence witness to substantiate their stand but it has not been done and therefore, mere assertion of the defence in this regard would

not prevail over the clinching oral evidence of the witnesses. Even otherwise, it is not in dispute that in the said incident which took place in the parking lot of Intercity Hotel two persons namely Gudda Sonkar and Nanka Sonkar died as a result of gunshot injuries and therefore, even if it is assumed that there is some ambiguity as to who took the deceased persons to hospital from the spot, in our considered view, it is not of such a nature which could prevail over the other clinching evidence on record inculcating the appellants.

57. As for the defence witnesses (DW-3 & DW-4) who have stated about presence of the eyewitnesses (PWs-1, 2, 4 & 12) at Surya Hotel at the relevant time, it appears to be a bald statement and does not inspire confidence of the Court because from the overall evidence including that of the eyewitnesses, their presence at the place of occurrence stands established beyond all reasonable doubt. Similarly, the defence taken by the accused/appellant Manoj that at the relevant time he was in his house at Tikrapara and was having business discussions with DWs-5, 6 & 7, appears to be an afterthought and created defence.

58. So far as minor discrepancy in the statements of the eyewitnesses is concerned, as already discussed above, in such cases of shooting different persons react differently and therefore, such variation or discrepancy are quite natural in their statements. However, if their statements are read as a whole, it is evident that they are eyewitnesses to the incident and on material particulars have remained firm. It is not that statement of one eyewitness is the reproduction or

replica of statements of other eyewitnesses.

59. So far as argument regarding medical evidence being at variance with the ocular evidence is concerned, in the case of *Ram Bali* (supra) the Hon'ble Apex Court held that the plea that the medical evidence is contrary to the ocular evidence has also no substance. It is merely based on the purported opinion expressed by an author. Hypothetical answers given to hypothetical questions, and mere hypothetical and abstract opinions by textbook writers, on assumed facts, cannot dilute evidentiary value of ocular evidence if it is credible and cogent. Only when the ocular evidence is wholly inconsistent with the medical evidence the Court has to consider the effect thereof. In the case of ***Latesh Vs. State of Maharashtra, (2018) 3 SCC 66***, the Hon'ble Supreme Court further held that oral evidence takes precedence over the medical evidence unless the latter completely refutes any possibility of such occurrence. In the present case, as already observed, the presence of the eyewitnesses on the spot is found to be natural and their evidence cogent, convincing and trustworthy. Therefore, the inconsistency pointed out by the defence between the ocular and medical evidence is not of such a nature which could render the whole prosecution case concocted one making it liable to be discarded as a whole.

60. As regards non-mentioning of certain details in the FIR, the law is fairly well settled that FIR is not supposed to be an encyclopedia of the entire events and cannot contain the minutest details of the events. When essentially material facts are disclosed in the FIR that is

sufficient. FIR is not substantive evidence and cannot be used for contradicting testimony of the eye witnesses except that may be used for the purpose of contradicting maker of the report. The question is whether a person was impleaded by way of afterthought or not must be judged having regard to the entire factual scenario in each case. Therefore, non-naming of one or few of the accused persons in the FIR or non-mentioning of certain details of the incident is no reason to disbelieve the testimony of crucial witnesses. In the present case, it has not been mentioned as to which of the accused was carrying which weapon and exhortation part is also missing, however, in view of the evidence of the eyewitnesses which is clear and cogent and duly corroborated by the other circumstantial evidence, non-mentioning of such details would not affect the credibility of the FIR which was lodged promptly.

61. In the matter of *Latesh Vs. State of Maharashtra* (supra), the Hon'ble Supreme Court observed that the value to be attached to the FIR depends upon facts and circumstances of each case. When a person gives a statement to the police officer, basing on which the FIR is registered, the capacity of reproducing the things differs from person to person. Some people may have the ability to reproduce the things as it is, some may lack the ability to do so. Some times in the state of shock, they may miss the important details, because people tend to react differently when they come across a violent act. Merely because the names of the accused are not stated and their names are not specified in the FIR that may not be a ground to doubt the contents of the FIR and the case of the prosecution cannot be thrown out on this

count.

62. As regards the judgments relied upon by counsel for the appellants, having gone through the same we are of the opinion that they are of no help to the appellants as the facts of the present case are quite different from that of those cases in which the cited judgments were delivered. Here in this case the appellants cannot claim benefit of doubt on account of certain faults in the prosecution case as we have already held that such defects in the prosecution case appear to be deliberate ones by the investigating officer to favour the accused/appellants and as per the long settled law, no benefit can be derived out of such lacunae in the prosecution case by the accused when there are other clinching and reliable evidence fortifying their involvement in the crime in question. In the preceding paragraphs we have discussed in detail all the defence raised by the appellants in light of the law governing the field and found them untenable in the eye of law.

63. Considering the overall evidence, oral and documentary including medical, available on record coupled with the conduct of the investigating officer in carrying out the investigation, conviction of the appellants Jai @ Gudda, Manoj Agrawal, Vijay @ Hallo, Ajay @ Chhotu, Hani & Rishiraj under the Arms Act is also justified and need no interference by this Court.

64. On the basis of aforesaid discussions, we are of the opinion that judgment impugned has been passed considering all the relevant material adduced by the prosecution and the defence in its correct

perspective and as such, the findings of guilt recorded by the trial Court deserve affirmation.

65. In the result, all the appeals being bereft of any substance are liable to be dismissed and are, accordingly, dismissed.

Appellants Jai @ Gudda Jaiswal and Manoj Agrawal are reported to be in jail, therefore, no further order regarding their arrest/surrender etc. is required to be passed. However, since the other appellants are reported to be on bail, their bail stands cancelled and they are directed to be taken into custody forthwith to serve out the remaining part of their sentence.

Sd/

(Pritinker Diwaker)
Judge

Sd/

(Sanjay Agrawal)
Judge