

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 830 of 2012

- Yogesh Singh Thakur S/o Kuldip Singh Thakur Aged About 20 Years R/o Shriram Nagar , Kanker , P.S. Kanker ,d Istt. North Bastar Kanker C.G.

---- Appellant

Versus

- State Of Chhattisgarh S/o Through - Sho., P.S. Kanker , Distt. North Bastar Kanker C.G.

---- Respondent

And

CRA No. 832 Of 2012

1. Arjun Yadav & Anr. S/o Late Raju Yadav Aged About 22 Years R/o Majhapara, Kanker , P.S. Kanker , Distt. North Bastar Kanker C.G.
2. Rajendra Yadav S/o Bholaram Yadav Aged About 24 Years R/o Subhash Ward , Kanker , P.S. Kanker , Distt. North Bastar Kanker C.G.

---- Appellants

Vs

- State Of Chhattisgarh S/o Through - Sho., P.S. Kanker , Distt. North Bastar Kanker C.G.

---- Respondent

And

CRA No. 833 Of 2012

- Sayyed Javed S/o Late Shri Khurshid Ali Aged About 22 Years R/o Lattipara, Kanker, Ps Kanker, Distt. North Bastar Kanker C.G.

---- Appellant

Vs

- State Of Chhattisgarh Through SHO, Ps Kanker, Distt. -North Bastar Kanker C.G.

---- Respondent

And

CRA No. 835 Of 2012

- Manoj Yadav S/o Shri Vinod Yadav Aged About 24 Years R/o Lattipara, Kanker, Ps Kanker, Distt. North Bastar Kanker C.G.

---- Appellant

Vs

- State Of Chhattisgarh Through Sho, PS Kanker, Distt. -North Bastar Kanker C.G.

---- Respondent

And

CRA No. 836 Of 2012

1. Mani Yadav S/o Shri Gokul Yadav Aged About 25 Years R/o Majhapara, Kanker, Ps Kanker, Distt. North Bastar Kanker C.G.
2. Parmesh Thakur S/o Late Shri Dharmraj Thakur Aged About 27 Years R/o Majhapara, Kanker, Ps Kanker, District North Bastar Kanker C.G.

---- Appellants

Vs

- State Of Chhattisgarh Through : SHO, PS Kanker, Distt.-North Bastar Kanker C.G.

---- Respondent

And

CRA No. 837 Of 2012

- Brijesh Sonkar S/o Late Shri Harilal Sonkar Aged About 24 Years R/o Lattipara, Kanker, Ps Kanker, Distt. North Bastar Kanker C.G.

---- Appellant

Vs

- State Of Chhattisgarh Through SHO, Ps - Kanker, Distt. - North Bastar Kanker C.G.

---- Respondent

And

CRA No. 843 Of 2012

1. Vikki Sarathi & Anr. S/o Late Prem Lal Aged About 29 Years R/o Shitlapara Mahadev Ward , Kanker , P.S. Kanker , Distt. North Bastar Kanker C.G.
2. Manoj Sevani S/o Gurumukhdas Aged About 25 Years R/o Subhash Ward Kanker , P.S Kanker , Distt . North Bastar Kanker C.G.

---- Appellants

Vs

- State Of Chhattisgarh S/o Through - Sho., P.S. Kanker , Distt. North Bastar Kanker C.G.

---- Respondent

And

CRA No. 844 Of 2012

- Dinesh Rawani S/o Rakhiyan Rawani Aged About 25 Years R/o Annapurnapara, Kanker , P.S. Kanker , Distt. North Bastar C.G.

---- Appellant

Vs

- State Of Chhattisgarh S/o Through - SHO, P.S. Kanker , Distt. North Bastar , Kanker C.G.

---- Respondent

And

CRA No. 914 Of 2012

- Manohar Balmiki S/o Sukhram Balmiki Aged About 26 Years R/o Tikrapara, Kanker C.G.

---- Appellant

Vs

- State Of C.G. Through Ps Kanker Distt. Kanker C.G.

---- Respondent

For Appellants	:	Shri V.C. Ottalwar, Advocate
For Respondent	:	Shri Vivek Sharma, Government Advocate

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Sanjay Agrawal

Judgement

P. Diwaker, J

10/01/2018

1. The above appeals since arising out of a common judgment, are heard together and being disposed of by this common judgment.
2. Challenge in the present set of appeals is to the judgment of conviction and order of sentence dated 4.9.2012 passed by the learned Additional Sessions Judge, North Bastar, District Kanker in Sessions Trial No.32/10 whereby the learned Additional Sessions Judge has convicted the accused/appellants for the offences punishable under Sections 147, 148, 302/149, 307/149 & 324/149 of the Indian Penal Code (henceforth 'the IPC') and sentenced each of them to undergo RI for 6 months with fine of Rs.100/-; RI for 1 year with fine of Rs.100/-; RI for life with fine of Rs.100/-; RI for 7 years with fine of Rs.100/- & RI for 1 year with fine of Rs.100/-, plus default stipulations, respectively.
3. Brief facts of the case are that a day prior to the date of incident i.e. on 17.8.2009, there was some quarrel between brother of accused/appellant Brajesh with one Lokesh & Durgesh (deceased) and therefore on 18.8.2009 at 11 in the night when Durgesh (deceased) along with his friends was standing in a betel shop situated near Hotel Hina, accused/appellants namely Dinesh Rawani, Brijesh Sonkar, Mani Yadav & Parmesh Thakur along with their friends came there and after abusing Durgesh and his friends, caused injuries to them including gupti injuries to Durgesh & Natwar (PW-1). Durgesh succumbed to the injuries while he was being shifted to the hospital. At the instance of Shailendra Kumar (PW-2), FIR (Ex.P-2) was registered on 19.8.2009 at 00.25 hrs against

accused/appellants namely Dinesh Rawani, Brijesh Sonkar, Mani Yadav, Parmesh Thakur & Manoj Sewani for the offence punishable under Sections 302, 307/34 of IPC and Sections 25 & 27 of the Arms Act. Immediately thereafter merged intimation (Ex.P-3) was recorded. Inquest (Ex.P-6) was prepared on the body of deceased on 19.8.2009. Body of the deceased was sent for post-mortem examination which was conducted by Dr. A.K. Verma (PW-6) and he noticed following injuries;-

- Incised wound of 5cm x ½ cm, bone deep, over scalp.
- Penetrated wound of 3cm x ½ cm in size at lower left side of body of sternum.

The cause of death assigned by the doctor was syncope due to penetrated injury to chest caused by hard and sharp object and the death was homicidal in nature. In the course of investigation, memorandum of accused/appellant Dinesh Rawani was recorded vide Ex.P-7 and based on which recovery was effected vide seizure memos Ex.P-8 & P-11 in presence of witnesses PW-4 & PW-8.

Natwar Soni (PW-1) & Ramesh Kumar Semre (PW-3) have also suffered injuries in the incident. Natwar (PW-1) was medically examined by Dr. D.K. Kashyap (PW-15) vide Ex.P-37 and he noticed one stab wound in the right side of chest below coastal margin and one stab wound at the left side of chest in between 10th & 11th ribs. This doctor has also medically examined Ramesh (PW-3) vide Ex.P-33 and noticed one incised wound at right upper arm. Since the condition of Natwar (PW-1) was critical, his dying declaration has been recorded by the Executive Magistrate (PW-16). Subsequently, this dying declaration has been considered as statement of Natwar (PW-1) recorded under Section 161 CrPC since he was alive. Apart from the aforesaid witnesses, the incident was also witnessed by Shailendra Kumar Dhruv (PW-2) & Ravi

Chandwani (PW-7).

4. On completion of investigation, charge sheet was filed against as many as 12 accused persons under Sections 147, 148, 302/149, 307/149 (02 counts) of IPC and Section 25 & 27 of the Arms Act and accordingly the charges were framed against them by the trial Court. The prosecution in order to bring home the charges levelled against the accused/appellants examined 19 witnesses in all. Statements of accused persons were recorded under Section 313 of Cr.P.C. in which they abjured their guilt and pleaded innocence & false implication.
5. After hearing counsel for the parties, the trial Court by the impugned judgment convicted and sentenced the accused/appellants in the manner as described above.
6. We have heard learned counsel for the parties and perused the material available on record including the impugned judgment.
7. Learned counsel for the appellants submits that;-
 - PW-1, PW-2, PW-3 & PW-7 were not the eye-witnesses to the incident and they were subsequently planted as eyewitnesses.
 - according to alleged eyewitnesses, injuries were caused to the deceased by sword-cane (gupti) & wooden log, but no injury caused by wooden log has been noticed on the body of deceased by the autopsy surgeon.
 - at the time of incident there was complete darkness and without any source of light at the spot, it is not possible for the alleged eyewitnesses to identify the assailants.
 - to attract Section 149 of the IPC the prosecution must prove that the commission of the offence was by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such

that the members of the assembly knew that it was likely to be committed. In the present case, there was no satisfactory evidence to prove the formation of any unlawful assembly at any time with the common object of killing or assaulting either deceased Durgesh or Natwar (PW-1). The whole fight started suddenly on the spur of moment in a heat of passion and, therefore, the appellants could only be liable for the individual acts committed by them.

- no evidence is brought on record by the prosecution that other appellants had any knowledge about co-accused Dinesh Rawani being armed with a sword-cane (gupti). There is also no evidence that other appellants' instigation had provoked appellant Dinesh to cause gupti injuries to the deceased. Mere fact that other appellants reached the spot along with appellant Dinesh would not put them in the same category as that of appellant Dinesh in absence of any cogent evidence to rope them for the said offence of murder.
- though it is the case of prosecution that incident occurred on account of some previous dispute, but there is no evidence on record that there was some previous dispute between the appellants and the deceased.
- FIR (Ex.P-2) contained names of only four appellants. PW-2, lodger of FIR and an eyewitness of incident, had not named any other appellant. Thus, it is apparent that names of other appellants were subsequently added after due consultation and deliberations, in order to falsely implicate them. At least, from the record it is apparent that there is not a whisper against appellants namely Yogesh Singh Thakur, Arjun Yadav & Rajendra Yadav to involve them in the crime in question and therefore they are entitled to acquittal after giving benefit of doubt.

- Under Section 157 CrPC a copy of FIR has to be sent to the Magistrate, but in this case FIR (Ex.P-2) was not sent to the Magistrate.
- Since the incident occurred suddenly on the spur of moment in a heat of passion, appellant Dinesh, at worst, could be held liable under Section 326 of IPC or Section 304 Part I or II of IPC.

8. Supporting the impugned judgment, it has been argued by the State Counsel that;

- all the eyewitnesses, out of which two are injured witnesses, are natural witnesses and the question of planting them or fabricating the case of prosecution does not arise. These witnesses have categorically stated that all the accused persons came together on the spot and caused injuries to the deceased which resulted in his death. Therefore, conviction of accused/appellants with the aid of Section 149 of IPC is in accordance with law.
- Under Section 149 IPC, every member of unlawful assembly is liable to be punished for every offence committed by one or more of its members. In this case, the eyewitnesses have attributed a specific overt act of causing injury to the deceased with sword-cane (gupti) by accused/appellant Dinesh Rawani as one of the members of the unlawful assembly. Thus, the conviction of appellants with the aid of Section 149 IPC is justified.
- even after inflicting sword-cane blow to the deceased, other accused persons did not stop assaulting the deceased by hands, fists & legs. This shows that they have actively participated in the commission of crime in question.
- Non-recording of diary statement of Natwar (PW-2) is of no help to the defence because the dying declaration of this witness has been

subsequently treated as his diary statement since he was alive.

- Sword seized from the spot was infact of accused/appellant Manohar and this fact is evident from the memorandum (Ex.P-7) of accused/appellant Dinesh Rawani.
- FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. In the present case, the evidence of eyewitnesses inspires confidence and free from all blemishes.
- TIP proceedings are merely a corroborative in nature and the purpose behind TIP is to give direction to the investigation. Thus, non-conduction of TIP parade would not be fatal to the case of prosecution.
- from the material on record it is clear that a copy of FIR has been forwarded to the Magistrate concerned and the same has been duly acknowledged by the Clerk of the Court.
- defect in spot map alone is not sufficient to brush aside the entire prosecution case.

9. Natwar Soni (PW-1) is an injured eyewitness. He has stated that he knew the accused persons present in the Court. On 18.8.2009 at about 10.45 p.m. he along with Pappu, Durgesh (deceased), Ravi Chandwani (PW-7) & Gudda was standing near a betel shop situated near the house of Durgesh. Accused Dinesh, Brajesh, Javed, Sheru, Manoj Sewani, Manoj Yadav, Paresh Thakur, Yogesh, Rajendra Yadav, Arjun Yadav & Vicky Sarthi came on the spot on four motorcycles. Accused Dinesh Rawani caught hold of the collar of deceased and assaulted him by hands & fists. Accused Dinesh, who was carrying sword-cane (gupti), also attacked on

the deceased. When he tried to intervene, accused Brajesh & Javed caught hold of him while accused Dinesh Rawani caused injuries to him by a sword-cane (gupti) twice on his stomach. Before causing injuries to him, accused Dinesh Rawani caused injuries on the chest of deceased by sword-cane (gupti) as a result of which he fell down. He has further stated that even after his falling on ground, the accused persons continued beating him by means of hands & fists. Accused Maniram Yadav assaulted him by wooden log. He has further stated that he was admitted in Komal Dev Hospital, Kanker for treatment from where he was referred to MMI Hospital, Raipur for better treatment where he remained admitted for about 12 days. He has further stated that in the course of treatment at MMI Hospital, Raipur, his dying declaration (Ex.P-1) was recorded by the Executive Magistrate on 24.8.2009 in which he has narrated the entire incident. This witness denied any previous animosity between him and accused persons, but admitted that there was some dispute between the deceased and the accused persons. This witness has been cross-examined at length by the defence but nothing has been brought out on record to create any doubt about the creditworthiness of the testimony of this witness.

10. Shailendra Kumar Dhruw (PW-2), is another eyewitness of the incident. He has stated that on 18.8.2009 at about 11 in the night, he along with Durgesh (deceased), Ravi Chandwani, Ramesh, Natwar Soni, Paramveer alias Gudda & Paras was standing at Sahu Betel Sahu located near Hotel Hina and talking with each other. At that time, the accused persons came there on four motorcycles and seeing Durgesh (deceased) they started hurling abuses at him and they said to Durgesh that today they will teach him a lesson for displaying extra hooliganism and saying so they started beating him. He has further stated that accused Dinesh Rawani took out

sword-cane, which he was carrying with him, and stabbed Durgesh with it. Accused Maniram Yadav, who was carrying wooden log, assaulted the deceased by it. Even after sword-cane blow caused by accused Dinesh Rawani, other accused persons continued beating the deceased by hands and fists. He has further stated that when Natwar Soni (PW-1) tried to intervene, accused Dinesh Rawani inflicted three gupti blows on his stomach as a result of which said Natwar Soni fell down. When he tried to intervene, accused Manoj Sewani gave 2-3 slaps to him and asked him not to intervene. He has further stated that accused Dinesh Rawani assaulted on the right forearm of PW-3 Ramesh Semre by sword-cane (gupti). In Para-10 he has stated that he had mentioned names of accused Mani Yadav, Dinesh Rawani, Parmesh Thakur and Brajesh Sonkar in the FIR. He has further stated that though he does not know names of other accused persons but he recognize them by face and therefore he did not mention their names in FIR. In para-35 he has reiterated the facts as stated in examination-in-chief.

11. Injured Ramesh Kumar Semre (PW-3) & Ravi Chandwani (PW-7) are two other eyewitness. While supporting the prosecution case, these witnesses have deposed about the occurrence more or less in almost similar terms as has been stated by PW-1 & PW-2.
12. Lokendra Singh Thakur (PW-4) & Gyanesh Thakur (PW-8) are the witnesses of memorandum (Ex.P-7) of accused/appellant Dinesh Rawani and seizure memo Ex.P-8 to Ex.P-17.
13. Animesh Shukla (PW-5) is the witness who reached the spot after the incident had taken place.
14. Dr. A.K. Verma (PW-9) is the person who conducted post-mortem examination over the body of deceased. According to him, the cause of death was syncope due to penetrating injuries to chest caused by hard &

sharp object and death was homicidal in nature.

15. Dr. Shirish Yadu (PW-14) is the doctor who medically examined Natwar Soni (PW-1) and proved his injuries vide Ex.P-34. According to him, the injuries caused to Natwar (PW-1) by hard and sharp object were grievous in nature and dangerous to life.
16. Dr. D.K. Kashyap (PW-15) is the doctor who medically treated Ramesh (PW-2) and proved his injuries vide Ex.P-36.
17. A.S. Paikra (PW-16) is the Tahsildar who recorded the dying declaration of injured Natwar Soni (PW-1). He has stated that he has recorded the dying declaration of injured as per the say of injured. He has proved the dying declaration (Ex.P-1) and his signature over it.
18. Sunil David (PW-17) is the investigating officer who has duly supported the prosecution case.
19. R.P. Sinha (PW-18) & Vinod Katlam (PW-19) are the police personnel who assisted in the investigation.
20. In the present case, conviction is substantially based on the ground of formation of unlawful assembly having its common object of commission of culpable homicide amounting to murder of Durgesh and injuries to other persons.
21. As regards the complicity of accused/appellants No.1 to 9 in the crime in question, the conviction is substantially based on the evidence of injured eyewitnesses Natwar Soni (PW-1) & Ramesh Semre (PW-3), who have deposed in their evidence that on the date of incident when they along with deceased & other friends were standing near a betel shop, accused persons came there and started assaulting Durgesh Mahant (deceased) by hands & fists. According to them, accused Dinesh Rawani, who was carrying sword-cane (gupti), stabbed thrice on the abdomen & chest of Durgesh Mahant (deceased) with gupti as a result of which he fell down.

When they came for rescue of the deceased, accused Dinesh Rawani had stabbed Natwar Soni (PW-1) on his abdomen & chest, whereas accused Maniram had beaten him with a wooden log on his back and other accused persons had assaulted him by hands & fists. Accused Dinesh Rawani also inflicted injury with gupti and caused serious injuries on the right forearm of Ramesh Semre (PW-3). The testimonies of the injured eyewitnesses get support from the statement of other eyewitnesses namely Shailendra Kumar Dhruw (PW-2) & Ravi Chandwani (PW-7) and also the medical evidence. These two witnesses have also deposed about the incident in question almost in para-materia with the deposition of PW-1 & PW-3. Their deposition clarifies the manner in which the accused/appellants including accused/appellant Dinesh Rawani assaulted the deceased, PW-1 and PW-3. Shailendra Kumar Dhruw (PW-2) has also deposed about lodging of report by him vide Ex.P-2. The defence has utterly failed to discredit the evidence of PW-2 & PW-7 in the cross-examination. On the other hand, they withstood in the cross-examination by deposing about the incident in question.

Evidence of injured eyewitnesses is further supported by the medical evidence. Ex.P-34 & P-36 are the medico-legal reports of injured PW-1 & PW-3 which are issued by Dr. Shirish Yadu (PW-14) & Dr. D.K. Kashyap (PW-15) after the treatment. They have explained about the injuries sustained by both the injured eyewitnesses in detail. It has come in the evidence of Dr. Shirish Yadu (PW-14), who medically examined Natwar Soni (PW-1), that nature of injury on the person of PW-1 was grievous in nature and dangerous to life.

Since the testimonies of the injured witnesses are corroborated by the testimonies of other eyewitnesses PW-2 & PW-7 and also by medical evidence, there is no reason to discard it. Evidence of eyewitnesses

including injured eyewitnesses is consistent, cogent and reliable. There is no reason as to why they should tell falsehood. Generally, the injured witnesses would not try to foist a false case against innocent persons ignoring real culprits. Presence of injured on the spot cannot be disputed inasmuch as both the injured have sustained injuries. The fact that the witnesses are injured at the time and in the same occurrence, lends support to the testimony that they were present during occurrence and they saw the happening with their own eyes. Thus, the prosecution has been established beyond doubt complicity of accused/ appellants No.1 to 9 in the crime in question.

22. So far as the conviction of accused/appellants No.1 to 9 with the aid of Section 149 of IPC is concerned, in the instant case a day prior to the date of incident a quarrel took place between the deceased, Lokesh and the accused persons and next day the accused persons came to the scene of occurrence and seeing deceased Durgesh, all the accused persons started abusing him filthily and saying that they will teach him a lesson today for displaying extra hooliganism, attacked and assaulted him. Accused Dinesh Rawani stabbed Durgesh with sword-cane (gupti), accused Maniram Yadav assaulted Durgesh by wooden log whereas remaining accused/appellants assaulted him by hands, fists and kicks. Evidence further shows that even after inflicting gupti blows on the chest of the deceased, the accused were assaulting the deceased by means of fists & kick blows. When PW-1 & PW-3 tried to intervene in order to save Durgesh (deceased), accused Dinesh Rawani caused injuries to them also by sword-cane (gupti) and other accused persons assaulted them by hands & fists. Thus, it is apparent that all the aforesaid accused-appellants came to the spot together, one of them was carrying deadly weapon like sword-cane (gupti), immediately on reaching the spot they

started hurling filthy abuses at deceased followed by causing stab wounds to deceased by sword-cane which resulted into his death. In the same incident, the accused/appellants had also caused several injuries to injured eyewitnesses, who were present at the spot and tried to save the deceased. The aforesaid facts clearly established that the accused/appellants No.1 to 9 had formed an unlawful assembly with a common object to cause grievous hurt to the members of rival group specially to Durgesh with whom some dispute had taken place just a day before the incident. An inference of the knowledge of common object and formation of common object can also be drawn from the behaviour of the members of the assembly of accused persons, who came together at the spot and immediately started attacks on the deceased. As many as three persons have received injuries, which clearly establishes the common object of the unlawful assembly to do away with Durgeh and cause injuries to any person who tried to intervene. Thus, the conviction of accused/appellants No.1 to 9 with the aid of Section 149 of IPC is proper and does not call for any interference.

23. Submission of the learned counsel for the appellants that as the incised wounds to the deceased and injured persons were caused only by accused Dinesh Rawani, who was said to be armed with sword-cane, it cannot be said that other accused have also shared common object to kill the deceased and inflict injuries to the injured. The submission does not commend to us for acceptance inasmuch as the accused have been convicted by taking aid of Section 149 of the Penal Code. It is settled that once an unlawful assembly has come into existence, each member of the assembly becomes vicariously liable for the criminal act of any other member of the assembly committed in prosecution of the common object of the assembly.

24. As regards the non-recording of statement of injured Natwar Soni (PW-1) under Section 161 CrPC, in the present case statement of injured Natwar (PW-1) was recorded as a dying declaration, however, he recovered from the injuries, therefore, his dying declaration (Ex.P-1) has to be treated as a superior quality/high degree than that of a statement recorded under Section 161 CrPC. In **Sunil Kumar & ors v. State of MP** reported in **AIR 1997 SC 940**, the Hon'ble Supreme Court dealt with the issue and held that

".. that immediately after PW.1, injured witness was taken to the hospital and his statement was recorded as a dying declaration which, consequent upon his survival, is to be treated only as a statement recorded under Section 164 Cr.P.C. and can be used for corroboration or contradiction

In **Maqsoodan & ors v. State of UP** reported in **AIR 1983 SC 126**, the Supreme Court dealt with a similar issue wherein a person who had made a statement in expectation of death did not die. The Supreme Court held that it cannot be treated as a dying declaration as his statement was not admissible under Section 32 of the Indian Evidence Act, 1872, but it was to be dealt with under Section 157 of the Act 1872, which provides that the former statement of a witness may be proved to corroborate later testimony as to the same fact.

A similar view has been re-iterated by the Supreme Court in **Ramprasad v. State of Maharashtra** reported in **AIR 1999 SC 1969**, as the Supreme Court held:

"Be that as it may, the question is whether the Court could treat it as an item of evidence for any purpose. Section 157 of the Evidence Act permits proof of any former statement made by a witness relating to the same fact before "any

authority legally competent to investigate the fact" but its use is limited to corroboration of the testimony of such a witness. Though a police officer is legally competent to investigate, any statement made to him during such an investigation cannot be used to corroborate the testimony of a witness because of the clear interdict contained in Section 162 of the Code. But a statement made to a Magistrate is not affected by the prohibition contained in the said section. A Magistrate can record the statement of a person as provided in Section 164 of the Code and such a statement would either be elevated to the status of Section 32 if the maker of the statement subsequently dies or it would remain within the realm of what it was originally. A statement recorded by a Magistrate under Section 164 becomes usable to corroborate the witness as provided in Section 157 of the Evidence Act or to contradict him as provided in Section 155 thereof."

25. In view of the above, it can safely be held that in such an eventuality the statement so recorded has to be treated as of a superior quality/ high degree than that of a statement recorded under Section 161 Cr.P.C. and can be used as provided under Section 157 of the Evidence Act. Thus, non-recording of the statement of Natwar Soni (PW-1), under Section 161 of Cr.P.C. cannot be termed as fatal to the prosecution case because no prejudice has been caused to the defence for the reason that previous statement of this witness was available for the defence to confront him so as to shatter his veracity.
26. So far as the conviction of accused/appellants No.1 to 9 under Section 147 & 148 of IPC is concerned, in order to convict the accused persons, formation of unlawful assembly is pre-supposed because until and unless

there is an unlawful assembly as envisaged under Section 141 IPC, there cannot be any rioting. Since the accused/appellants have already been held guilty for forming an unlawful assembly common object of which was to teach lesson to the deceased for displaying extra hooliganism and in prosecution of that object, accused Dinesh Rawani caused fatal incised wounds to the deceased and remaining accused persons assaulted him by means of hands & fists, their conviction under Sections 147 & 148 of IPC is also justified.

27. We further find no substance in the plea of counsel for the appellants that at the place of incident there was no sufficient light. According to PW-7 Ravi Chandwani, an injured eyewitness, there was sufficient light on the spot as the street lights were on. Even otherwise, since the accused persons were not strangers to the eyewitnesses, there could be no difficulty for the eyewitnesses to identify the appellants in the darkness.
28. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 00.25 hrs on 18-8-09 and was forwarded to the Magistrate concerned on the very next day i.e. on 19.8.09. Even the suggestions put to the investigating officer (PW-17) with regard to non-sending of FIR copy to the concerned Magistrate has been emphatically denied by him. Even if it is presumed that copy of FIR has not been sent to the Magistrate concerned, then also a perusal of the impugned judgment discloses that no case of any prejudice was shown nor even raised on behalf of the appellants based on alleged violation of Section 157 CrPC.

29. We also do not find any substance in the submission of counsel for the appellants that accused/appellants No.1 to 9 are liable to be convicted under Section 326 or 304 Part I or II of IPC for causing injuries to the eye-witnesses PW-1 & PW-7 or even to the deceased as the incident occurred all of a sudden in a heat of passion upon sudden quarrel. It is clear that a day prior to the incident some quarrel took place between the deceased and accused persons. Next morning the accused persons came together at the place of occurrence with intent to teach lesson to the deceased for displaying extra hooliganism and out of them, one was carrying dangerous weapon i.e. sword-cane. According to medical evidence, the injuries were on the vital parts of the deceased and injured Natwar Soni i.e. abdomen & chest. Thus, the evidence available on record prima facie suggests that the accused/appellants had not only intended to commit murder of the deceased but also had every knowledge that the injuries caused by them were likely to cause death of deceased.
30. As regards the complicity of accused/appellants No.10 to 12 in the crime in question, these appellants were neither named in the FIR (Ex.P-2) nor their names figured in the statements of prosecution witnesses recorded under Section 161 CrPC. The prosecution has neither led any evidence nor succeeded in bringing out anything in the examination of the prosecution witnesses which may cast even a slightest doubt regarding their participation and taking an active role in the crime in question. In absence of any clear & clinching evidence showing involvement of accused/appellants No.10 to 12 in the crime in question, they cannot be convicted for the alleged offences, especially in the absence of any reference about any role-played or specific overt acts as such on their part and being so, they are entitled to acquittal by extending them benefit of doubt.

31. In the result;

- Criminal Appeal No.830/12 & 832/12 are allowed. Conviction of appellants in these appeals under Sections 147, 148, 302/149, 307/149 & 324/149 of IPC and sentences imposed under those sections are hereby set aside. They are acquitted of all the charges. They are reported to be on bail. Their bail bonds stand discharged.
- Criminal Appeal Nos.833/12, 835/12, 836/12, 837/12, 843/12, 844/12 & 914/12 being meritless are liable to be dismissed and are hereby dismissed. Since accused/appellants in Criminal Appeal No.836/12, 837/12 & 844/12 are already in custody, no extra direction regarding their surrender etc. is needed. However, accused/appellants in Cr.A. No.833/12, 835/12, 843/12 & 914/12 are reported to be on bail, therefore, their bail bonds stand cancelled and they are directed to be taken into custody immediately to serve out the remaining jail sentences as imposed by the trial court.

Sd/-
(P. Diwaker)
Judge

Sd/-
(Sanjay Agrawal)
Judge

roshan/-