

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 917 of 2001

State of Chhattisgarh

---- Appellant

Versus

Dr. C.P. Agre , aged about 36 years, S/o Chhedilal Agre,R/o Chakarbhata Camp, PS Chakarbhata, District-Bilaspur, Chhattisgarh

---- Respondent

CRA No. 918 of 2001

State Of Chhattisgarh

---- Appellant

Versus

Raj Kumar Upadhyay, aged about 42 years, S/o Kriparam Upadhyay, R/o Village Bodri, P.S. Chakarbhata, District- Bilaspur, Chhattisgarh

---- Respondent

CRA No. 919 of 2001

State of Chhattisgarh

---- Appellant

Versus

Bali Agre, aged about 30 years, S/o Chhedilal Agre, R/o Chakarbhata Camp, PS-Chakarbhata, District-Bilaspur, Chhattisgarh

---- Respondent

For State/Appellants	:	Shri Shailendra Dubey, Additional A.G.
For Respondents	:	Shri Praveen Das, Advocate
For Complainant	:	Smt. Indira Tripathi, Advocate

D.B. : Hon'ble Mr. Justice Manindra Mohan Shrivastava & Hon'ble Mrs. Justice Rajani Dubey

CAV Judgment

30/08/2019

Per Manindra Mohan Shrivastava, J.

1. The aforesaid three appeals have been filed by the State assailing legality and validity of common judgment dated 19.4.2001 passed by learned lower

appellate Court in three criminal appeal i.e. CRA No.195, CRA No.196 and CRA No.197 of 2000 filed by accused Dr.C.P. Agre, Rajkumar Upadhyay and Bali by which, the order of conviction passed by learned trial Court against the aforesaid accused has been set aside and all the accused acquitted of the charges by giving them benefit of doubt.

2. According to prosecution case, on 24.11.1992, at about 11:00 AM in the morning, respondent-accused C.P. Agre, Rajkumar, Bali and other accused assaulted Madhodos (PW2) and Dhannamal (PW2) with the help of axe, pick axe and other assaulting weapons, in which incident, these two victims sustained fracture injury on vital parts of their body. Upon report lodged by Parmanand (PW1), FIR was registered, investigation carried out and charge sheet was filed. Before the trial Court, prosecution examined two injured eyewitnesses namely Madhodos(PW2) and Dhannamal(PW3) who supported the case of the prosecution by deposing that they were assaulted by respondents-accused. Dr. S.S. Bhatia (PW5) proved fracture injury sustained by Madhodos (PW2) and Dhannamal (PW3). Parmanand (PW1), Chandrakumar (PW4), Bholanath (PW6), Gurumukhdas (PW10) were examined as eyewitness of the incident and all of them supported the prosecution case. Respondents-accused examined as many six defence witnesses. Accused- Dr. C.P. Agre took the defence that there was previous enmity because the complainant and their family members had encroached upon Govt. land in front of his house and a dispute had earlier arisen, number of complaints were made and a report was also lodged against misbehaviour of brother of the complainant with the wife of accused Dr. C.P. Agre and they were convicted also. He was on duty but falsely implicated. Accused- Rajkumar sought to defend himself by taking a defence that he is friend of Dr. C.P. Agre. He had taken action for removal of encroachment against the son of injured Dhannmal, in his capacity as President of the Nagar Panchayat, Bodari. Therefore, he has been falsely implicated. Respondent-accused Bali took the defence that at the time of alleged incident he was on duty in village- Parsada which is about 7 k.m. away from place of incident and he has been falsely implicated.
3. Learned trial Court not only relied upon evidence of injured witnesses- Madhodos (PW2) and Dhannamal (PW3) but also other eyewitnesses of the incident. Fracture injury sustained by Madhodos (PW2) and Dhannamal

(PW3) was found proved from the evidence of the Dr. C.S. Sharma (PW9). As the prosecution story was found proved from the evidence of injured eyewitnesses supported by other eyewitness and the medical evidence, the respondents accused were convicted under Sections 148, 452, 326/149 IPC and sentenced separately for each of the offences. Aggrieved by the said judgment, respondents-accused preferred appeal before the Sessions Judge. Learned Sessions Judge, however, not only disbelieved the evidence of eyewitnesses but also of the injured eyewitnesses Madhudas (PW2) and Dhannamal (PW3). According to learned lower appellate Court, the evidence of the eyewitness including that of the injured witnesses suffer from contradiction and omission, lodging of FIR by Parmanand (PW1) was doubtful, there was previous enmity between Dr. C.P. Agre and the accused, ocular testimony is not fully corroborated from medical evidence and that the evidence of eyewitnesses is doubtful because there was unexplained delay in recording their case diary statement. Even though finding of learned trial Court on the aspect of *alibi* was not reversed, learned lower appellate Court allowed the appeals and acquitted the respondents-accused by giving them benefit of doubt. It is against this judgment of acquittal that the State has filed aforesaid three appeals.

4. Learned Additional Advocate General made common submission in all the three cases. He would argue that learned lower appellate Court committed patent illegality and perversity in acquitting the respondents-accused by giving them benefit of doubt, even though, prosecution case was fully supported from the evidence of injured eyewitnesses Madhudas (PW2) and Dhannmal (PW3). He would argue that both these witnesses have very emphatically and clearly stated regarding respondents-accused arriving at the spot with weapon in their hands and opening assault on them due to which they sustained fracture injury on their head. Further submission of learned State counsel is that learned lower appellate Court adopted an illegal approach while assessing the evidence of injured witnesses. In his submissions, once the evidence of eyewitnesses is found trustworthy and supported by medical evidence as both of them had sustained grievous fracture injury on their skull, their, testimony could not be doubted because of certain contradictions and omissions in the evidence of other witnesses. Once the injured witnesses have stated regarding assault on

them, which is proved from medical evidence and the FIR promptly lodged, clearly disclosing the names of respondents -accused, delay in recording of their case diary statements particularly when they had sustained grievous fracture injury in their head and remained admitted in the hospital for certain length of time could not be made a basis to altogether disbelieve their testimony. It is further contended that the learned lower appellate Court has given undue weightage to minor contradictions and proceeded on erroneous assumption of law that conviction could not be sustained unless the evidence of injured witnesses is corroborated from the evidence of other eyewitness. He would further submit that otherwise also, evidence of eyewitness is trustworthy, but the learned lower appellate Court has picked up trivial and insignificant contradictions and omissions. Learned counsel for the complainant has supported submissions of State counsel.

5. On the other hand, learned counsel for the respondents -accused would argue that though the prosecution had supported its case from the evidence of eyewitnesses including the injured eyewitness, learned lower appellate Court has meticulously examined the entire evidence on record and has assigned cogent reasons, applying correct principles of appreciation of evidence, as to why the evidence of all the eyewitnesses including injured eyewitnesses, creates doubt. He would argue that merely because the eyewitnesses happens to be injured witnesses, their evidence cannot be accepted as a gospel truth and in appropriate cases, where the Court finds that evidence is shaky, suffers from material contradiction and omission and there is possibility of false implication due to previous enmity, coupled with unexplained delay in recording case diary statement of injured witness, conviction cannot be sustained. Applying well settled principle of appreciation of evidence, learned lower appellate Court has re-appreciated the entire evidence on record and keeping in forefront the fundamental principles of criminal jurisprudence that prosecution is required to prove its case beyond reasonable doubt, found that prosecution case, suffering from several infirmities, is liable to be disbelieved and the accused are entitled to be acquitted by giving them benefit of doubt. He would argue that impugned judgment of acquittal was passed by learned lower appellate Court way back on 19.4.2001 and, therefore, at this stage, after about 19 years, the judgment of acquittal may

not be interfered with when the view taken by learned lower appellate Court is quite plausible. At the end, he would argue that the scope of interference against judgment of acquittal is limited and unless it is proved that the judgment passed by learned Court below suffers from patent illegality, perversity or has resulted in miscarriage of justice, interference against acquittal may not be warranted merely because more than one views are possible.

6. Before we advert to the evidence led by the prosecution and the reason assigned by learned lower appellate Court to disbelieve the prosecution evidence, we consider it apposite to refer to a couple of decisions of the Supreme Court with regard to scope of interference against judgment of acquittal.

In the case of **Badrilal & Ors. Vs. State of Madhya Pradesh** (2010) 14 SCC 412, the settled legal position was reiterated as below:-

“14. It is trite that the High Court in an appeal from the judgment of acquittal does not interfere with the same when it is found that the view taken by the lower Court is one of the possible views. It is further trite that the High Court in appeal from a judgment of acquittal can appraise evidence and come to its own conclusion. However, while coming to its own conclusion, it is expected to give due weight to the reasoning given by the trial court for acquittal. The High Court interferes with the same only when it is found that the view taken is not possible to be taken in the state of evidence.”

7. In another decision in the case of **Basappa Vs. Satate of Karnataka** (2014) 5 SCC 154, the approach which the appellate Court hearing appeals against acquittal is required to adopt and principles required to be applied were delineated as below:-

“9. The High Court in an appeal under Section 378 of Cr.PC is entitled to reappraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse, as held by

this Court in Gamini Bala Koteswara Rao and Others v. State of Andhra Pradesh through Secretary[1]. To quote: "14. We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so." (Emphasis supplied)

10. It is also not the case of the prosecution that the judgment of the trial court is based on no material or that it suffered from any legal infirmity in the sense that there was non-consideration or misappreciation of the evidence on record. Only in such circumstances, reversal of the acquittal by the High Court would be justified. In K. Prakashan v. P.K. Surenderan[2], it has also been affirmed by this Court that the appellate court should not reverse the acquittal merely because another view is possible on the evidence. In T. Subramanian v. State of Tamil Nadu[3], it has further been held by this Court that if two views are reasonably possible on the very same evidence, it cannot be said that the prosecution has proved the case beyond reasonable doubt.

11. In *Bhim Singh v. State of Haryana*[4], it has been clarified that interference by the appellate court against an order of acquittal would be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take.

12. In *Kallu alias Masih and others v. State of Madhya Pradesh*[5], it has been held by this Court that if the view taken by the trial court is a plausible view, the High Court will not be justified in reversing it merely because a different view is possible. To quote: “8. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further, if it decides to interfere, it should assign reasons for differing with the decision of the trial court.” (Emphasis supplied)

13. In *Ramesh Babulal Doshi v. State of Gujarat*[6], this Court has taken the view that while considering the appeal against acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly

erroneous or demonstrably unsustainable and if the court answers the above question in negative, the acquittal cannot be disturbed. To quote:

“7. ... the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then — and then only — reappraise the evidence to arrive at its own conclusions. ...” (Emphasis supplied)

14. In *Ganpat v. State of Haryana and others*[7], at paragraph-15, some of the above principles have been restated. To quote: (SCC p.62)

“15. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(ii) The appellate court can also review the trial court’s conclusion with respect to both facts and law.

(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. ..."

15. The exercise of power under Section 378 of Cr.PC by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted; but there is failure of justice if the guilty is let scot-free. As cautioned by this Court in *State of Punjab v. Karnail Singh*[8]:

"6. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of

the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. ..." (Emphasis supplied)

16. In this context, yet another caution struck by this Court in Chandrappa and others v. State of Karnataka[9] would also be relevant.

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong

circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.” (Emphasis supplied) “

8. Keeping in forefront the aforesaid settled principles, we shall proceed to examine the legality and validity of judgment of acquittal passed by learned lower appellate Court in respect of three respondents namely Dr. C.P. Agre, Rajkumar and Bali.
9. In order to hold the respondents-accused guilty of commission of offence of assault, learned trial Court heavily relied upon the evidence of the

injured witnesses namely Madhodos (PW2) and Dhannamal (PW3) . Learned trial Court also found proved, injury sustained by these two injured witnesses, as deposed by the Dr. J.S.S. Bhatia (PW5). Dr. J.S.S. Bhatia (PW5) deposed in his evidence that he found as many as four injuries on Dhannmal which included a cut injury to the right parietal region caused by hard and sharp object, a contusion over the left eye caused by hard and blunt object, a contusion on the right hand caused by hard and blunt object and one contusion on the chest simple in nature caused by hard and blunt object.

Dr. J.S.S. Bhatia (PW5) also deposed in his evidence that he examined Madhodos, son of Dhannamal also and he found one cut injury on the right parietal region, 5x1 inches bone deep caused by hard and sharp object, one contusion of simple nature on the left of shoulder and once more contusion below left shoulder caused by hard and blunt object.

Dr. C.S. Sharma (PW9) deposed that in the X-ray report of Dhannmal, depressed fracture on the right part of frontal and parietal bone was found. He also deposed that in the X-ray report of skull of Madhodos, one fracture injury on the parietal part of head and one fracture injury on the left shoulder was also found.

10. In the evidence of aforesaid two Dr.J.S.S. Bhatia (PW5) and Dr.C.S. Sharma (PW9), nothing could be elicited to doubt the nature and extent of injury caused by the two injured namely Madhodos (PW2) and Dhannamal (PW3), The evidence regarding fracture injury on the skull of Dhannamal and skull and shoulder of Madhodos remained uncontroverted. From the aforesaid clinching evidence of prosecution it is proved by reliable and emphatic evidence that and Madhodos (PW2) and Dhannamal (PW3) both sustained fracture injury and the injury found on their head was caused by hard and sharp object. According to doctor, these injuries were grievous in nature.

11. The learned lower appellate Court recorded a finding that the evidence of Parmanand (PW1) regarding lodging of FIR regarding incident in the police station -Chakarbhatta being contradictory to the evidence of other witnesses is doubtful. This finding has been recorded in para -51 to 56 of the impugned judgment. One of the main reason to disbelieve the testimony of Parmanand (PW1) is that the presence of Parmanand in the

office of sawmill rendered doubtful. However, only on that ground, lodging of FIR by this witness could not be doubted. There is no requirement of law that the lodger of FIR must necessarily be of an eyewitness. Parmanand (PW1) has deposed in his evidence that after the incident, he brought his father Dhannmal and brother-Madho Das to hospital and a report in Ex.P-1 was given and that he first went to hospital to take the injured and then went to office of Superintendent of Police. Learned lower appellate Court has also referred to the evidence of Madhodash (PW2) who has stated that information was given in police station Chakarbhatha but he does not know whether police from Police Station- Chakarbhatha had come with any enquiry because he became unconscious. Learned lower appellate Court has also taken into consideration the evidence of Chandra Kumar (PW4) who has deposed that after the incident, accused had run away and Parmanand had gone to police station. The evidence of Bholanath (PW6) has also been considered in which he has stated that after about one hour of the incident, the police had arrived at the spot and before that Dhannamal had already been removed from the spot of incident. Learned lower appellate Court has also taken into consideration the evidence of Gurumukh Das (PW10) that police had come from police station and his uncle and grandfather were taken to Bilaspur.

The evidence of Sanhar Singh (PW12), a police officer, has also been considered who has stated that the injured were taken to hospital and that on the basis of spot FIR (Ex.P-1) and zero numbered FIR in Ex.P-12 recorded in Police Station- Civil Lines, FIR in Ex.P-13 was recorded. Learned lower appellate Court has recorded a finding that on the date of incident, before receipt of information of assault on Dhannamal and others, an information regarding accused Rajkumar apprehended has also received in the police station and that on the basis of evidence of Madhodash, it is revealed that before the incident of assault on Dhannamal and Madhodash, probably, another incident happened in the morning due to which Rajkumar was taken to police station and after this witness brought Rajkumar to the police station, after some time, Parmanand came and informed regarding incident.

On the basis of aforesaid consideration, learned lower appellate Court has drawn an inference that the evidence with regard to lodging of FIR is not

reliable, which is completely perverse. The evidence of Parmanand (PW1) in so far as the lodging of FIR could not be doubted only on the ground that Parmanand is a doubtful eyewitness or on the ground that on the same day some other incident was reported in the police station -Chakarbhata. Parmanand is the son of Dhannamal and brother of Madhodash and he has clearly deposed that after the incident, he had taken his father and brother to the hospital for treatment and there in the hospital, spot FIR was taken in Ex.P-1. Learned lower appellate Court ignored that report of Parmanand was duly proved by him as also by Sanhar Singh (PW12), the police officer who had recorded FIR in Ex.P-13. He has clearly deposed that on the basis of *dehati nalishi* (spot FIR), Ex.P-1 and zero numbered FIR in Ex.P-12 of police Station Civil Lines, he had recorded FIR. He has deposed that he has worked with Assistant Sub Inspector Shri Koshale and also familiar with his signature and writing and further that *dehati nalishi* in Ex.P-1 has been written by Koshale and signed by him. He has also deposed that report (Ex.P-12) was also written by Koshle and has proved his signatures. In the *dehati nalishi* (Ex.P-1) which was lodged soon after the incident in the background that the injured were taken to hospital and Parmanand (PW1) relative of the injured had given information on the basis of which *dehati nalishi* in Ex.P1 was immediately prepared and based on the same "zero" numbered FIR was prepared in Ex.P-12 in Police Station Civil Lines and thereafter these documents were brought to the Chakarbhata Police Station where numbered FIR in Ex.P-13 was recorded by Sanhar Singh (PW12). In the very first document (Ex.P1), *dehati nalishi*, which was recorded within few hours of the incident based on the information given by Parmanand (PW1), each of the respondents have been clearly named as assailant who assaulted Dhannamal and Madhiodas. Learned lower appellate Court giving undue weightage to the fact coming in the evidence of witnesses that prior to the incident of assault on Dhannmal and Madhodash, some incident had already happened at about 8:00 am in the morning and further that before Dhannamal and Madhodash were taken to hospital, police had arrived at the spot, has jumped to the conclusion that the lodging of FIR is doubtful.

12. Present is a case where the learned trial Court had ordered conviction of respondents on the basis of evidence of not only eyewitnesses but also on

the evidence of those who were assaulted, namely, Madhudas (PW2) and Dhannmal (PW3). As discussed hereinabove and also held by both the Courts below, both Dhannmal and Madhudas sustained fracture injury in addition to other injuries. Thus, fracture injury was caused on their skull which is proved from the evidence of Dr. J.S.S. Bhatia (PW5) and Dr. C.S. Sharma (PW9). The evidence of the two doctors with regard to place and the nature of injury could not be impeached, though, they were subjected to cross-examination.

13. Madhudas and Dhannamal were injured eyewitnesses and they were subjected to grievous injury by assault on their head. If their evidence are reliable, law does not require that their evidence, before acceptance, would require corroboration from the evidence of other witnesses. It has, therefore, to be seen as to whether the evidence of these two injured witnesses is reliable or of such a nature that it would not be safe to convict the respondents accused without independent corroboration. Certainly if the evidence of these two injured witnesses is reliable and trustworthy, then, even if the evidence of other prosecution witnesses suffer from any contradiction and omission and for that reason doubtful, conviction could be ordered on the reliable testimony of injured witnesses.

14. In the case of **State of Uttar Pradesh Vs. Naresh & Ors.** (2011) 4 SCC 324, the principles with regard to appreciation of an injured witness was propounded as below:-

“27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or

want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: *Jarnail Singh v. State of Punjab*, (2009) 9 SCC 719; *Balraje @ Trimbak v. State of Maharashtra*, (2010) 6 SCC 673; and *Abdul Sayed v. State of Madhya Pradesh*, (2010) 10 SCC 259]."

In yet another decision in **Brahm Swaroop & Anr. Vs. State of Uttar Pradesh** (2011) 6 SCC 288, the credibility required to be attached to the evidence of an injured witness was highlighted as below:-

"27. Injured witness Attar Singh (PW.1) has been examined, his testimony cannot be discarded, as his presence on the spot cannot be doubted, particularly, in view of the fact that immediately after lodging of FIR, the injured witness had been medically examined without any loss of time on the same day. The injured witness had been put through a grueling cross-examination but nothing can be elicited to discredit his testimony.

28. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide: *State of U.P. v. Kishan Chand & Ors.*, (2004) 7 SCC 629; *Krishan & Ors. v. State of Haryana*, (2006) 12 SCC 459; *Dinesh Kumar v. State of Rajasthan*, (2008) 8 SCC 270; *Jarnail Singh & Ors.*

v. State of Punjab, (2009) 9 SCC 719; *Vishnu & Ors. v. State of Rajasthan*, (2009) 10 SCC 477; *Anna Reddy Sambasiva Reddy & Ors. v. State of A.P.* (2009) 12 SCC 546 and *Balraje Vs. State of Maharashtra* (2010) 6 SCC 673."

In another decision in **Balwan & Ors. Vs. State of Haryana** (2014) 13 SCC 560, the Supreme Court again reiterated the evidentiary value required to be attached to the evidence of an injured witness, by observing thus:-

"16. It is trite law that the evidence of injured witness, being a stamped witness, is accorded a special status in law. This is as a consequence of the fact that injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness would not want to let actual assailant go unpunished. "

In another decision in **Pargan Singh Vs. State of Punjab & Anr.** (2014) 14 SCC 619, it was emphasized that testimony of injured witness carries higher degree of credibility and there has to be strong reason for discarding the same. Pertinent observation made in this regard is as below:-

"22. In the present case, the circumstances on which the PW-2 seen the accused persons even for 90 seconds, that was sufficient to absorb their faces. In contrast, things would be different if it is a case of some large get together where two unknown persons have a chance meeting for 90 seconds. Therefore, we reject the argument of learned counsel for the appellants that PW-2 could not recollect the face of the appellants after 7½ years and thus, he was not telling the truth. We have to keep in mind that PW-2 suffered serious injury because of the shot fired at him by the assailants and seriousness of the injury has resulted into conviction under Section 307 IPC as well. The testimony of an injured witness requires a

higher degree of credibility and there have to be strong reasons to describe the same. The appellants have not been able to demonstrate that the courts below unreasonably reached the conclusion as to the admissibility of the testimony of PW-2. Apart from a very feeble submission that this witness identified the appellants 7½ years after the incident, their arguments do not address the issue of whether testimony of PW-2 was false. We are, thus, not at all impressed by this argument of the learned counsel for the appellants. Except that PW-3 is not an injured eye-witness, he has also seen the occurrence and the reasons given in support of attaching credibility to the statement of PW-2 would apply in his case as well."

15. Madhudas (PW2) is an injured eyewitness and number of injuries have been found proved on his body, including fracture injury on the head. This witness has deposed that on 24.11.1992 at about 10:00 to 11:00 in the morning, when he was present in the 'Aata Chakki' (flour mill) and his father Dhannamal was present in 'Aara Machine' (saw-mill), respondent accused, holding pick axe, axe and club, arrived in the 'Ara Machine' and quarreled with his father but this witness did not go there because of fear and then the accused approached him and out of fear, he entered the furniture shop adjacent to flour mill and sat on a chair. The accused came towards flour mill from Saw-Mill and then entered furniture shop and Dr. Agre, having seen him, informed other accused, whereafter, all of them entered furniture shop. Dr. Agre assaulted with the help of pick axe on his head, whereas Rajkumar assaulted with club and axe on his head. One of the accused assaulted on his shoulder due to which he fell down and fainted and he regained consciousness in hospital where he came to know that his father was also assaulted. He further deposed that accused Dr. Agre was holding pick axe whereas Rajkumar was holding axe and other accused were holding club.

The evidence of this witness was relied upon by learned trial Court. The learned lower appellate Court considered the evidence of this injured

witness in para 23 to 26 of its judgment. In para-53 of the judgment, the evidence of this witness has again been considered by learned lower appellate Court that according to this witness after about an hour and fifteen minutes of the incident, the police had come to spot and Dhannamal was taken to hospital and has drawn inference that before lodging of *dehati nalishi* (spot FIR) in Ex.P-1 police had come to know about the incident. Again in para-60 of the judgment, the evidence of this witness has again been considered that he was assaulted and that according to this witness, accused Dr. Agre and Rajkumar both assaulted on his head by two sharp edged weapons resulting in injury. At this stage, learned lower appellate Court has noticed a contradiction that according to medical report, only one cut injury has been found on the head of Madhudas and two contusions on his shoulder and that Madhudas has not clarified as to which accused gave assault with the help of club and on this consideration, learned lower appellate Court has held that the evidence of this witness is not corroborated from medical evidence, because according to this witness, as many as 6 accused and 7-8 other associates assaulted on him and he sustained only three injuries. The reason assigned by learned lower appellate Court to doubt the evidence of this injured witness on the aforesaid consideration, is apparently erroneous in law. Injured witness has clearly stated that Dr. Agre gave assault on his head and the other accused Rajkumar who was also holding axe assaulted and someone assaulted on his shoulder. The only discrepancy is that out of three injuries one injury found on the head is caused by sharp edged weapon whereas there are two contusions on his shoulder. Only on this discrepancy, the evidence of the evidence of this witness could not be altogether disbelieved that he was making a statement not liable to be believed. He was injured witness. Number of persons charged upon him and he had stated regarding assault on his head and shoulder. The reason assigned to create doubt on the testimony of this injured eyewitness, on the aforesaid discrepancy, is contrary to settled legal position in this regard.

16. In the case of **Gosu Jayarami Reddy and Anr. Vs. State of Andhra Pradesh** (2011) 11 SCC 766, the principles applicable in the matter of appreciation of ocular evidence vis-a-vis medical evidence were discussed as below :-

“39. It is true that PW 1 has in his depositions attributed an injury to A 3 which according to the witness was inflicted on the neck of the deceased. It is also true that the post mortem examination did not reveal any injury on the neck. But this discrepancy cannot in the light of the evidence on record and the fact that it is not always easy for an eye witness to a ghastly murder to register the precise number of injuries that were inflicted by the assailants and the part of the body on which the same were inflicted. A murderous assault is often a heart-rending spectacle in which even a witness wholly unconnected to the assailant or the victim may also get a feeling of revulsion at the gory sight involving merciless killing of a human being in cold blood. To expect from a witness who has gone through such a nightmarish experience, meticulous narration of who hit whom at what precise part of the body causing what kind of injury and leading to what kind of fractures or flow of how much blood, is to expect too much.

40. Courts need to be realistic in their expectation from witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorised by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix up or confusion. It is the totality of the evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the accused.

In another decision in **Radhakrishna Nagesh Vs. State of Andhra Pradesh** (2013) 11 SCC 688, the principles were again reiterated as below:

“19. It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.

x x x
x x x

22. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation. Absence of injuries on the body of the prosecutrix, as already explained, would not be of any advantage to the accused.

23. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of Dayal Singh and Others v State of Uttaranchal [(2012) 7 SCALE 165] “29.

“35.This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally,

look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab* [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held,

“8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.”

'36. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

'34....The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. (See *Madan Gopal Kakad v. Naval Dubey & Anr.* [(1992) 2 SCR 921 : (1992) 3 SCC 204]}.”

17. In a more recent decision in the case of **Vijay Pal Vs. State (Government of NCT of Delhi)** (2015) 4 SCC 749, principles with regard to weighing of medical evidence vis-a-vis ocular testimony were summarized as below:-

“15. There is no dispute that the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner as alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it

completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. It is also true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-a-vis the injuries appearing on the body of the deceased person and likely use of the weapon and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses. It is also an accepted principle that sufficient weightage should be given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory. It is also a settled principle that the opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. That apart, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which are to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'. Where the eyewitnesses' account is found

credible and trustworthy, a medical opinion pointing to the alternative possibilities cannot be accepted as conclusive. (See: *Solanki Chimanbhai Ukabhai v. State of Gujrat*, *State of Haryana v. Ram Singh*, *Mohd. Zahid v. State of T.N.*, *State of Haryana v. Bhagirath* and *Abdul Sayeed v. State of M.P.*"

18. In the case of **Naresh** (supra), well settled principles regarding appreciation of evidence on the face of normal discrepancies and mere marginal variations of trivial nature were explained as below :-

"30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

"9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

Therefore, mere marginal variations in the

statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v. State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287]."

19. Learned lower appellate Court has also doubted veracity of the evidence of this injured witness that witness has given contradictory statement with regard to number of days he remained admitted in the hospital and his case diary statement in Ex.D2 was recorded belatedly after 9 days of the incident. The incident had happened on 24.11.1992. The witness has stated in his evidence that he was discharged after 5-6 days and his statement was recorded within 3 days. The evidence on record itself clearly explains delay, if any, caused in recording the case diary statement of this witness. This person had suffered grievous injury on his head and there was a fracture in the skull. He remained admitted in the hospital for number of days. In these circumstances, if his diary statement was taken after 9 days, we fail to understand how could this be taken as a ground to doubt the testimony of the witnesses on the ground of delay, which otherwise stood completely explained. Further, the learned lower appellate Court adopted completely erroneous approach ignoring that it was not a case where the names of the accused had surfaced for the first time in case diary statement of the injured witness recorded 9 days after the incident. In the report which was lodged within 2 hours of the incident not only the names of the respondents- accused were mentioned but their respective roles were also stated very clearly in the spot FIR which was recorded in the hospital itself when the injured Madhudas (PW2) and Dhannalal (PW3) remained admitted, on disclosure of the incident given by Paramanand (PW1), the

brother of Madhodash and son of Dhannmal who brought them to the hospital in injured condition and got them admitted.

20. Similarly, it is found that the evidence of other eyewitness Dhannamal (PW3) has also been disbelieved on most untenable ground by learned lower appellate Court. The evidence of Dhannmal (PW3) has been considered in para-27 & 28 of its judgment. This witness has also stated that on the date of incident at about 10:00 AM, when he was sitting in his saw-mill, accused Dr. Agre and 12-13 persons came hurling abuses and Dr. Agre assaulted on his head with the help of pick axe and Rajkumar assaulted with the axe on his forehead. He was looted also. He also deposed that other accused assaulted him with club and he fainted. Learned lower appellate Court has also noticed that this witness could not cry for help because he could not speak out. The evidence of this injured witness Dhannamal has again been considered in para-61 of the judgment by learned lower appellate Court that he had not seen the incident of assault on Madhodash and that Dr. Agre had assaulted with the help of pick axe on his head and Rajkumar assaulted with the axe on forehead and the injury started bleeding. He was assaulted with the club by other accused and then he fell down and fainted. In para-63 of the evidence, learned lower appellate Court referring to medical report in Ex.P-6 has observed that on the head of Dhannamal, only one cut injury was found whereas above the eyes, injury of hard and blunt object has been found and above the right part of the chest injury of hard and blunt object has been found. Only on this discrepancy, learned lower appellate Court has raised a doubt regarding presence of accused Rajkumar, without recording any reason as to why the evidence of the witness with regard to criminal overt act of accused-Dr. Agre was disbelieved. The other reason assigned to cast a shadow of doubt on the evidence of injured witness Dhannmal is that his case diary statement was recorded belatedly and the date has not been explained. Dhannamal's case diary statement under Section 161 Cr.P.C. was certainly recorded with some delay. From the evidence of this witness which has been considered by learned lower appellate Court itself, this witness was admitted in the hospital on the date of incident i.e. 24.11.1992 and he was again checked up on 29.11.1992. The learned lower appellate Court further observed that Dhannmal was vomiting because of the

trauma. Dr J.S.S. Bhatia (PW5) has clearly stated that injury was grievous in nature. Proved medical report and evidence is of a fracture in the skull of this witness. Even if it is found doubtful that this witness may have remained unconscious for 20-25 days, it is clear that this witness had sustained grievous injury and remained admitted in hospital for long. The aforesaid evidence of hospitalization, grievous injury itself explain delay in recording diary statement of the witnesses. Moreover, it is not a case where the name of the accused surfaced for the first time in the case diary statement of this injured witness. The spot FIR (Ex.P-1) which was recorded in the police station within two hours of the incident proved from the evidence of Parmanand (PW1) and Sanhar Singh (PW12), contained specific details of the incident, the manner in which assault was given and the role played by respondent-accused.

21. Thus, it is clear that both Madhudas (PW2) and Dhannamal (PW3), injured witnesses, who had received grievous fracture injury on their head and admitted in the hospital number of days had given their diary statement after few days which delay was explained by the evidence of them having sustained injury and having remained admitted in the hospital. Overwhelming evidence of recording of spot FIR in the hospital itself within two hours of the incident, naming the respondents-accused with specific overt act alleged to be committed by them, was ignored by learned lower appellate Court while doubting the coherent and reliable testimony of injured eyewitness. Those injuries including fracture injury were proved in their respective medical report.

22. In the case of **Ranbir and Ors. Vs. State of Punjab** (1973) 2 SCC 444, it was observed thus:

"7..... The appellants' counsel also faintly contended that Tota Ram P.W.7 was examined by the police after considerable delay, the suggestion being that his evidence must be looked at with suspicion. We are not impressed by this submission. The fact of delayed examination of Tota Ram should, in our opinion, have been put to- the Investigating Officer so as to enable him to explain the undue delay, if any,

in examining Tota Ram. The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to falsely support the prosecution case.”.....

23. In a case where the evidence of injured witness is otherwise reliable, not suffering from any material discrepancy and further corroborated from the evidence of other witnesses and proved circumstances of the case, mere delay in recording case diary statement during investigation would not render the statement of such witness liable to be rejected only on that count. In the case of **Dr. Krishna Pal and Ors. Vs. State of UP** (1996) 7 SCC 194, it was held :-

“9.....In the instant case, no explanation has been given by the prosecution as to why eye witnesses had not been examined shortly after the incident and from the materials on record it appears that there had been inordinate delay in examining the eye witnesses. But simply on that account, the convincing and reliable evidences adduced in this case should not be discarded. The Investigating Officer in his deposition has also admitted that through mistake he omitted to mention the crime No. in the inquest report. It appears to us that the Investigating Officer had not been diligent enough but for that reason we do not feel that reliable and clinching evidences adduced in this case by the eye witnesses particularly by Dr. Rajveer Singh should be discarded. In this connection, we may refer to a recent decision of this Court in **Karnel Singh Vs. State of M.P.** (Judgment Today 1995 (6) SC 437). In the said decision, it has been indicated by this Court that in a case of defective investigation, it would not be proper to acquit the accused if the

case is otherwise established conclusively because in that event it would tantamount to be falling in the hands of an erring Investigating Officer."....

24. In the present case, the injured witnesses namely Madhodas (PW2) and Dhannamal (PW3) both of them have stated regarding they having suffered injury, having remained admitted in the hospital and then recording of their statements. Even if the Investigating Officer in the present case has not been examined and his explanation has not come forth, the explanation raised by the witnesses, if reliable, could certainly be accepted as proper application of delay, if any, in recording case diary statement.

25. Learned lower appellate Court, observed that there is evidence of previous enmity between the parties and that cases, counter cases, have already reported by the parties against each other and on that basis, it has been observed in para-44 of the judgment that the evidence of the witnesses including injured witness is required to be minutely and carefully examined. It has also recorded that the evidence of injured witness is more reliable and important as compared to the evidence of other witness.

26. A background of previous enmity may not only be a basis to discard the evidence as there could be a motive of false implication, at the same time, it could lend support the prosecution case as the very motive for commission of offence. In other words background of previous enmity is a doubled edged sword.

27. In the case of **State of Punjab Vs. Sucha Singh and Ors.** (AIR 2003 SC 1471), it was observed as below:

"11.At the same time, animosity is a double-edged sword. It could be a ground for false implication, it could also be a ground for assault.".....

28. Therefore, it cannot be said that the evidence of the injured witnesses have to be doubted merely because there is a background of previous dispute and enmity between the parties because this could well be the motive of giving assault by accused on injured witnesses Madhodas(PW2) and Dhannamal (PW3). The evidence of an injured witness has to be

appreciated keeping in view that ordinarily a person who has been assaulted by someone would not allow him to go scot free and falsely implicate persons other than those who actually assaulted him. The evidence of injured witness stand on different pedestal as compared to any other witness cited by the prosecution as eyewitness who claims to have seen the incident. Where an injured witness clearly names the persons and the assault made on him by those persons which is broadly corroborated with what has been found in the medical report, even though, there may not be any mathematical precision with regard to the manner of assault, the evidence of an injured eyewitness cannot be lightly thrown aside only on certain minor contradiction and omission. It could be a case of some exaggeration or it could even be some discrepancy in recollecting the whole incident with exactitude and certainty, but on such minor discrepancy, disbelieving altogether the testimony of injured eyewitness, would be against settled principles of appreciation of the evidence.

29. Present is not a case where the prosecution case of Madhudas (PW2) and Dhannamal (PW3) assaulted by respondents- accused was based only on the evidence of the injured eyewitness. The learned trial Court, while holding the respondent- accused guilty of commission of offence relied upon evidence of three important eyewitness namely Chandra Kumar (PW4), Bholanath (PW6) and Gurumukh Das (PW10). While Chandra Kumar (PW4) and Gurumukh Das (PW10) have clearly stated during trial that they witnessed the incident of assault, Bholanath (PW6) has supported the prosecution case only to the extent that on the date of incident, he saw the accused persons coming inside Saw-Mill and later on he found that Dhannmal and Madhudas were found having sustained injuries and the accused fled away. The learned lower appellate Court examined the evidence of Chandra Kumar (PW4) and Gurumukh Das (PW10).

30. In paragraph 29, 30, 31 & 62 of its judgment, learned lower appellate Court closely scrutinized the evidence of Chandra Kumar (PW4) an eyewitness and did not record any reason nor a conclusion that this witness is liable to be disbelieved as eyewitness. Rather, this witness was relied upon to hold that Parmanand was not an eyewitness. Even with regard to manner of assault and the injury caused to injured witnesses, the evidence of this eyewitness has been relied upon.

31. The evidence of Bholanath (PW6) has also been scrutinized by the learned lower appellate Court in paragraphs 32, 33, 34, 51 and 68 of its judgment. The evidence of this witness has been believed to hold that Parmanand reached the spot after the incident of assault on Dhannamal and Madhoda Das. Learned lower appellate Court clearly recorded a finding that, though, this witness has not actually seen the assault, his evidence has been believed in so far as arrival of the accused and their leaving the spot and Dhannamal found injured, is concerned.
32. The evidence of another eyewitness Gurumukhdas (PW10) has also been closely examined by learned lower appellate Court in paras 37, 38 & 39 and the evidence of this witness has been discussed but not disbelieved. In para-47 of its judgment, a very irrational and illogical reason has been assigned by learned lower appellate Court to create a doubt on the evidence by saying that the room in which the accused are stated to have entered was very small and it may not be probable that it would accommodate number of assailants looking to the size of the office of Dhannamal which is stated to be 10 x 12 sq.ft. on the basis of evidence of Gurumukh Das (PW10) and the evidence of Parmanand (PW1) has also been relied upon who has stated that size of the room is 15 x 15 sq.ft. Rushing of 14-15 persons inside the room and giving assault by some of them particularly Dr. Agre, Rajkumar and Bali cannot at all be said to be improbable. That is the only reason assigned by learned lower appellate Court to disbelieve the testimony of Gurumukh Das (PW10).
33. Curiously enough, learned lower appellate Court having not found any cogent basis to disbelieve the testimony of Madhoda (PW2) Chandra Kumar (PW4) and Gurumukh Das (PW10), the witnesses of the incident, noticed in para-54 of its judgment that there is contradiction in the evidence of Parmanand (PW1) on one side and that of Madhoda (PW2) Chandra Kumar (PW4) and Gurumukh Das (PW10) on the other regarding who had taken the victims to the hospital. On appreciation, a finding was recorded that evidence of Parmanand (PW1) that he had taken the victim to hospital was disbelieved by relying upon evidence of Madhoda (PW2) Chandra Kumar (PW4) and Gurumukh Das (PW10) that the victim were taken to hospital by the police. By no stretch of imagination such finding could lead to conclusion that the evidence of Madhoda (PW2) Chandra

Kumar (PW4) and Gurumukh Das (PW10) regarding assault given by respondents-accused was liable to be disbelieved.

We find that the learned lower appellate Court had disbelieved the testimony of Parmanand (PW1) that he himself was eyewitness and that he had not taken the victim to hospital but the police people who had arrived. Even if those finding are sustained, it is beyond our comprehension as to how this could be made a basis to disbelieve the testimony of two injured witnesses Madhudas (PW2) and Dhannamal (PW3) and three other witnesses Chandra Kumar (PW4), Bholanath (PW6) and Gurumukh Das (PW10). It would thus be seen that on irrelevant consideration, learned lower appellate Court doubted the prosecution case.

34. It is noteworthy that while learned trial Court disbelieved the plea of *alibi* set up by respondents-accused, learned lower appellate Court did not traverse those finding nor came to the conclusion upon re-appreciation of evidence on record that plea of *alibi*, set up by respondent accused was plausible and possible one, rendering the story of the prosecution doubtful. Judgments.
35. The above referred settled principles of appreciation were not correctly applied by learned lower appellate Court while re-appreciating the evidence of injured eyewitness and other eyewitness with the result that, even though, serious injury was caused to injured eyewitness and other eyewitness also corroborated that serious injury was caused to injured eyewitness, the respondent accused were acquitted by giving benefit of doubt.
36. It would thus be seen that learned lower appellate Court virtually adopted a biased approach right from the beginning to find out small contradiction and omission to disbelieve the prosecution story, completely ignoring clinching evidence of the injured witnesses Madhudas (PW2) and Dhannamal (PW3). Learned lower appellate Court, having found that these witnesses having concurred with the finding regarding several injuries sustained by these witnesses including fracture in their skull, having not disbelieved the evidence of Chandrakumar (PW4), Dr. J.S.S. Bhatia (PW5) and Bholanath (PW6) and Gurumukh Das (PW10), swayed by minor contradiction and omission and adopting illegal approach in appreciation of evidence of eyewitness and injured witnesses, reached to the conclusion

that the prosecution case is not free from doubt. The apparent legal flaw in the judgment of learned lower appellate Court is that the learned lower appellate Court while entertaining the doubt on certain minor discrepancies, omissions and contradictions of injured witnesses Madhudas (PW2) and Dhannamal (PW3), failed to appreciate the same in correct prospective of law that the evidence of injured witnesses corroborated on all material particulars by other eyewitness of the case, which have been discussed in detail in paragraphs hereinabove. The approach of the learned lower appellate Court was not only illegal but against settled principles regarding appreciation of evidence of injured witnesses and eyewitnesses, suffering from perversity, conclusion contrary to reliable evidence, ultimately resulting in serious miscarriage of justice.

37. In the present case, though we have analyzed and reached upon conclusion that the judgment of the learned lower appellate Court is perverse, suffering from patent illegality, failure to correctly apply the settled principles with regard to appreciation of evidence, particularly that of an injured witness, contrary to reliable evidence palpably wrong and manifestly erroneous, at the same time, it cannot be overlooked that present is a case of incident of assault which took place way back in the year 1992. Moreover, present is not a case of commission of heinous offence like murder, rape, dacoity. The respondents- accused were convicted under Sections 148, 452, 326 and 149 IPC. Out of these offences, the maximum punishment awarded to respondents- accused is three year RI with fine under Section 326 read with Section 149 IPC. For commission of offence under Section 452 IPC, respondents- accused have been awarded RI for 2 years with fine and under Section 148 IPC awarded RI for one year with fine. All the sentences have been directed to run concurrently. In the case of **Roy Fernandes Vs. State of Goa and Ors.** (2012) 3 SCC 221, having found that the conviction under Sections 143, 148, 323 and 325 read with Section 149 was justified, prayer for reducing the sentence for the period already undergone having regard to the fact that incident in question had taken place 15 years back, the Supreme Court taking into consideration the aforesaid aspect and that the Court should invoke its power under Section 357 Cr.P.C. to award compensation to the victim, though affirmed the conviction for offence punishable under

Sections 323, 325 IPC, sentence was reduced to the period of imprisonment already undergone with a direction to deposit compensation as below:-

“46. In the result, we allow this appeal in part, set aside the conviction and sentence awarded to the appellant under Section 302 read with Section 149 of the IPC and acquit the appellant of that charge. The conviction of the appellant for offences punishable under Sections 323 and 325 of the IPC is affirmed and the appellant is sentenced to the period of imprisonment already undergone by him. We further direct that the appellant shall deposit a sum of Rs.3,00,000/- towards compensation to be paid to the widow of the deceased Shri Felix Felicio Monteiro, failing her to his surviving legal heirs. A sum of Rs.1,00,000/- shall be similarly deposited towards compensation payable to Shri Salish Monteiro, besides a sum of Rs.50,000/- to be paid to Ms. Conceicao Monteiro failing to their legal representatives. The deposit shall be made within two months from today failing which the sentence of one year awarded to the appellant shall stand revived and the appellant taken in custody to serve the remainder of the period. The appeal is disposed of with the above modification and directions. ”

The aforesaid was a case where the death had taken place but the Court acquitted the accused of allegation of commission of offence under Section 302 IPC and convicted under Sections 143, 148, 323 & 325 read with Section 149 IPC.

In the aforesaid decisions Their Lordships in the Supreme Court emphasized upon the importance of provision relating to award of compensation contained in Section 357 Cr.P.C. and also noticed that though there exists such a provision, the Court have seldom invoked it, perhaps due to ignorance of the object of it. A detail consideration on this respect of

law of compensation to victims was made as below:

"38. Even in Hari Singh's case (supra), the court granted a similar benefit to a convict under Section 325 who had been sentenced to undergo two years rigorous imprisonment. The Court in addition invoked its power under Section 357 of the Cr.P.C. to award compensation to the victim, and determined the amount payable having regard to the nature of the injury - inflicted and the paying capacity of the appellant. This Court said:

"10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-section (1). We are concerned only with sub-section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

11. The payment by way of compensation

must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default."

39. Section 357 of the Code of Criminal Procedure embodies the concept of compensating the victim of a crime and empowers the courts to award a suitable amount. This power, it goes without saying, shall be exercised by the Courts having regard to the nature of the injury or loss suffered by the victim as also the paying capacity of the accused. That the provision is wide enough to cover a case like the present where the appellant has been found guilty of offences punishable under Sections 323 & 325 of the IPC has not been disputed before us. Indeed Mr. Luthra relied upon the provision and beseeched this Court to invoke the power to do complete justice short of sending the appellant back to the prison. Mrs. Subhashini also in principle did not have any quarrel with the proposition that the power was available and can be exercised, though according to her, the present being a gross case of unprovoked violence against law abiding citizens the exercise of the power to compensate the victims ought not to save accused from suffering a deterrent punishment warranted

under law.

40. Prof. Andrew Ashworth of Oxford University Centre for Criminological Research has in the handbook of Criminology authored by him referred to what are called "Restorative and Reparative Theories" of punishment. The following passage from the book is, in this regard, apposite:

"Restorative and Reparative Theories

These are not theories of punishment, rather, their argument is that sentences should move away from punishment of the offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are therefore victim-centred, although in some versions they encompass the notion of reparation to the community for the effective crime. They envisage less resort to custody, with onerous community based sanctions requiring offenders to work in order to compensation victims and also contemplating support and counselling for offenders to regenerate them into the community. Such theories therefore tend to act on a behavioural premises similar to rehabilitation, but their political premises is that compensation for victims should be recognised as more important than notions of just punishment on behalf of the State"

41. The provision for payment of compensation has been in existence for a considerable period of time on the statute book in this country. Even so, criminal courts have not, it appears, taken significant note of the said provision or exercised the power vested in them thereunder. The Law Commission in its 42nd Report at para 3.17 refers to this regrettable omission in the following words:

"3.17. *Payments of compensation out of fine*-We have a fairly comprehensive provision for payment of compensation to the injured party under Section 545 of the Criminal Procedure Code. It is regrettable that our courts do not exercise their statutory powers under this Section as freely and liberally as could be desired. The Section has, no doubt, its limitations. Its application depends, in the first instance, on whether the Court considers a substantial fine proper punishment for the offence. In the most serious cases, the Court may think that a heavy fine in addition to imprisonment for a long terms is not justifiable, especially when the public prosecutor ignores the plight of the victim of the offence and does not press for compensation on his behalf."

42. In *Manish Jalan Vs. State of Karnataka* (2008) 8 SCC 225, even this Court felt that the provision regarding award of compensation to the victims of crimes had not been made use by the Courts as often as it ought to be. This Court observed:

"12. Though a comprehensive provision enabling the Court to direct payment of compensation has been in existence all through but the experience has shown that the provision has really attracted the attention of the Courts. Time and again the Courts have been reminded that the provision is aimed at serving the social purpose and should be exercised liberally yet the results are not heartening."

43. In the above case the appellant had been convicted under Sections 279 and 304A of the IPC. The substantive sentence of imprisonment was in that case reduced by this Court to the period already undergone with payment of fine and a compensation of an amount of rupees one lakh to

the mother of the victim. Reference may also be made to the decision of this Court in *Rachpal Singh and Anr. Vs. State of Punjab* AIR 2002 SC 2710, where this Court emphasised the need to assess and award compensation by the accused to the gravity of the offence, needs of the victim's family as also the paying capacity of the accused."

38. The aforesaid decision of the Supreme Court is a reminder to all the criminal Courts dealing with the aspect of compensation under Section 357 Cr.P.C. while deciding criminal cases that despite existence of provision of compensation to victims, the Courts, while convicting offenders, are not awarding proper compensation to victim by invoking jurisdiction, authority and power available to them under Section 357 Cr.P.C.

39. In another decision in the case of **Labh Singh & Ors. Vs. State of Haryana & Anr.** (2012) 11 SCC 690, it being a case of conviction under Sections 323, 324, 326 read with Section 34 IPC, looking to the age of the appellant and that being a case of old incident and that appellant had already undergone part of sentence and keeping in view that sending them to jail after laps of 20 years would not be justified, jail sentence was reduced to the period already undergone though direction was issued for payment of compensation as below :

" 2. According to the impugned judgment passed by the High Court, appellant 1 is more than 82 years of age and Appellants 2 and 3 are 72 and 62 years of age respectively. This is an incident of 1985. The appellants have already undergone part of the sentence. Sending them to jail after a lapse of about 27 years, in the facts circumstances of this case, would not be justified.

3. On a consideration of the totality of the facts and circumstances of this case, we are of the opinion that ends of justice would meet if we direct each of the appellants to pay Rs.1 lakh to the complainant/injured persons. We direct accordingly. Let the amount be deposited before

the trial court within two weeks from today and after the amount is deposited, the trial court shall disburse amount equally among the injured persons.

4. Consequently, the sentence of the appellants is reduced to the period already undergone by them, the impugned judgment is modified to the aforementioned extent and the appeal is partly allowed."

40. Present being not a case where the victim had succumbed to death but the injury being fracture injuries caused to the injured witnesses and incident being 26 years old and respondents-accused having suffered jail sentence for some period, while we set aside the judgment of learned lower appellate Court acquitting the respondents-accused Dr. C.P. Agre, Raj Kumar Upadhyay and Bali Agre and restore their conviction as ordered by the learned trial Court, sentence part is reduced to the period already undergone by them. Each of the respondents-accused shall be liable to pay compensation of Rs.50,000/- to the victim Madhoda and Dhannamal. In other words each of the victim shall receive compensation of Rs.1,50,000/- (one lakh fifty thousand). Each of the respondent-accused shall pay Rs.50,000/- as compensation within a period of two months from today.

41. If the deposits are not made as directed by each of the respondent-accused, sentence awarded to them by the learned trial Court shall stand revived and they shall be taken into custody to serve remainder of the sentence.

42. The appeals are accordingly partly allowed with the aforesaid modification and direction.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge