

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 427 of 2015

1. Shailendra Thakur S/o Suryanarayan Singh Aged About 36 Years R/o Cross Stree-3, Block-6/b, Sector-6 Bhilai Nagar, District- Durg, Chhattisgarh, Chhattisgarh
2. Pitambar Sahu S/o Brindavan Sahu Aged About 21 Years R/o Vinod Kirana Stores, Priyadarshni Market, Khursipar, P.S.- Chhawani, District- Durg, Chhattisgarh, District : Durg, Chhattisgarh
3. Chhotu @ Krishna S/o Jang Bahadur Rajput Aged About 27 Years R/o Camp-1, Sangram Chowk, P.S.- Chhawani, District- Durg, Chhattisgarh, District : Durg, Chhattisgarh
4. Ranjeet Singh S/o Nirmal Singh Aged About 32 Years R/o Panch Rasta Supela, Near Pooja Traders, P.S.- Supela, District- Durg, Chhattisgarh, District : Durg, Chhattisgarh

---- Appellants

Versus

State Of Chhattisgarh Through Station House Officer, Police Station Supela, District- Durg, Chhattisgarh, Chhattisgarh

---- Respondent

CRA No. 487 of 2015

Mahesh @ Bijju S/o Shri Ambika Prasad Yadu Aged About 28 Years Private Contractor R/o Premnagar Sikolabhata, Police Station Mohannagar, District Durg Chhattisgarh. , Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through Police Station House Supela, District Durg Chhattisgarh. , Chhattisgarh

---- Respondent

CRA No. 495 of 2015

1. Tapan Sarkar @ Amitabh S/o Ravindra Nath Sarkar Aged About 33 Years R/o Prem Nagar, Sekolabhata, Ps Mohannagar, District Durg Chhattisgarh. , Chhattisgarh
2. Prabhash Singh S/o Shri Sadanan Singh Bhadoriya Aged About 32 Years R/o By The Side Of Lallu Hotel, Contractor Colony, Supela, District Durg Chhattisgarh. , District : Durg, Chhattisgarh

3. Satyen Madhvan S/o Shri D.H. Madhvan Aged About 36 Years R/o Sector-6, Block No. 2, Quarter 2/g, Bhilai Nagar, District Durg Chhattisgarh Civil And Rev. Distt. Durg. , District : Durg, Chhattisgarh

---- Appellants

Versus

State Of Chhattisgarh Through The Police Station Supela, District Durg Chhattisgarh. , Chhattisgarh

---- Respondent

CRA No. 502 of 2015

Anil Shukla @ Babalu S/o Rameshchandra Shukla Aged About 28 Years R/o Ravanbhata Jamul, Near Shukla Lakadi Mall Bhilai, District Durg Chhattisgarh. , Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through Station House Officer, Police Station Supela, District Durg Chhattisgarh. , Chhattisgarh

---- Respondent

CRA No. 639 of 2015

Bachcha @ Abdul Zayad @ Ashraf S/o Bakar Ali Aged About 27 Years R/o Near Nuri Masjid, Farid Nagar, Supela, Bhilai, Distt. Durg Chhattisgarh. , Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through Station House Officer, Police Station Supela, Bhilai, Distt. Durg Chhattisgarh. , Chhattisgarh

---- Respondent

CRA No. 741 of 2015

Bobby @ Vidyut Chaudhary S/o M.R. Chaudhary Aged About 34 Years R/o Housing Board Jamul, Police Station Jamul, Tah. And Distt. Durg Chhattisgarh. , Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through Police Station Supela, District Durg Chhattisgarh. , Chhattisgarh

---- Respondent

CRA No. 868 of 2015

1. Raju Khanjjar S/o Shri Jairam Dharikar Aged About 32 Years R/o Camp-1 Sangram Chowk, Police Station Chawni, District Durg Chhattisgarh. , Chhattisgarh
2. Mangal Singh S/o Dharam Singh Aged About 36 Years R/o Camp-1 Steel Nagar, Near Sulabh Complex, Police Station Chawni, District Durg Chhattisgarh. , District : Durg, Chhattisgarh

---- Appellants

Versus

State Of Chhattisgarh Through District Magistrate, Durg Chhattisgarh. , Chhattisgarh

---- Respondent

For Respective Appellants : Shri Surendra Singh, Senior Advocate with Shri Maneesh Sharma, Shri N.S.Dhurandhar, Shri Ashok Verma, Advocate with Shri Gajendra Sahu, Shri B.P. Singh, Shri S.C. Verma, Shri M.K. Bhaduri, Smt. Fouzia Mirza, Ms. Sharmila Singhai, Shri Amiyakant Tiwari, Shri Sudeep Agrawal and Shri Pragalbh Sharma, Advocates

For State : Shri Ramakant Mishra, Dy. A.G.

D.B. : Hon'ble Mr. Justice Manindra Mohan Shrivastava & Hon'ble Mr. Justice Goutam Bhaduri

C.A.V. JUDGMENT

17/05/2019

Per Manindra Mohan Shrivastava, J.

1. This order shall dispose off these seven appeals which arise out of judgment of conviction and order of sentence dated 13.3.2015 passed by learned Special Judge, Durg in Special Case No.25 of 2005 and 47 of 2005 whereby and whereunder the appellants, 13 in numbers, have been held guilty of commission of offence alleged against them and sentenced as described below :-

Conviction	Name of the Appellant/s	Sentence
u/S. 302 read with Section 149	Shailendra Thakur, Pitambar Sahu, Chhotu @ Krishna, Ranjeet Singh, Mahesh @ Bijju, Tapan Sarkar @ Amitabh, Prabhash Singh, Satyen Madhvan, Anil Shukla @ Babalu, Bachcha @ Abdul Zayad @ Ashraf, Bobby @ Vidyut Chaudhary, Raju Khanjjar, Mangal Singh	Life imprisonment and fine of Rs.30,000/-, in default of payment of fine, additional RI for 2 years.
u/S. 148 IPC	Shailendra Thakur, Pitambar Sahu, Chhotu @ Krishna Ranjeet Singh, Mahesh @ Bijju, Tapan Sarkar @ Amitabh, Prabhash Singh, Satyen Madhvan, Anil Shukla @ Babalu, Bachcha @ Abdul Zayad @ Ashraf, Bobby @ Vidyut Chaudhary, Raju Khanjjar, Mangal Singh	RI for 3 years and fine of Rs.10,000/-, in default of payment of fine, additional RI for 8 months
u/S. 25 (1B) (a) Arms Act	Shailendra Thakur, Tapan Sarkar @ Amitabh, Prabhash Singh, Satyen Madhvan, Mangal Singh	RI for 3 years and fine of Rs.10,000/-, in default of payment of fine, additional RI for 8 months
u/S. 27 (1) Arms Act	Shailendra Thakur, Tapan Sarkar @ Amitabh, Prabhash Singh, Satyen Madhvan, Mangal Singh	RI for 5 years and fine of Rs.10,000/- in default of payment of fine, additional RI for 8 months

- The prosecution case, as is unfolded from the impugned judgment of conviction and voluminous records of the case is that an incident of assault happened on 11.2.2005 in which Mahadev Mahar (deceased) was allegedly assaulted by the present appellants and other accused persons. Prashant Sharma (PW8) informed over telephone in Police Station Supela on 11.2.2005 that Mahadev Mahar was murdered by accused Tapan Sarkar and his associates. Upon receipt of such information, a police officer arrived at the stated place of occurrence and recorded a morgue intimation

at the instance of said Prashant. This was followed by spot FIR prepared at the spot on the basis of said information that Mahadev Mahar was assaulted by dangerous weapons like firearm, sharp edged weapon, clubs. The spot morgue and FIR were taken to police station where numbered morgue and FIR was duly recorded. Dead body of Mahadev Mahar was sent for postmortem. Postmortem was conducted by the doctor which revealed multiple injuries, 21 in numbers, which included bullet shot as well. The doctor opined that cause of death was shock and hemorrhage as a direct and immediate result of large number of antemortem injuries. The clothes, bullets and other articles which were collected from the spot were duly seized and sent for forensic examination. During investigation, the appellants and other accused were arrested from time to time and their respective memoranda were recorded and it is said that on the basis of these memoranda of appellants, mobile phones, SIM card, button knife, katta (local made revolver) empty cartridge, live cartridge, coconut cutting knife, motorcycle, car were recovered from different accused by the Investigating Officer and those articles which required forensic test like bullets, empty cartridge, pistol, revolver, scratches of skin, live cartridges were sent for forensic examination. As the allegation against all the appellants was of hatching conspiracy, in furtherance of which Mahadev was murdered, call details of mobile cell phones said to be seized from number of appellants were also collected from the telecom company. Serologist's report and FSL report were thereafter collected. Identification parade in respect of some of the accused were also conducted. On applications made by some of the prosecution witnesses, Judicial Magistrate First Class, Durg recorded 164 Cr.P.C. statements of Santosh @ Gudda @ Prashant, Chandan Sao, Girwar Sahu, Linga Raju and Santosh @ Dhanji. Upon completion of investigation, charge sheet was filed against the appellants and some other accused. Some of the accused remained absconding and one of the accused Govind Vishwakarma died in police encounter. Sahjad, P. Pritsh, Gaya Udiya @ Jaychand Pradhan remained absconding. On the basis of material contained in the charge sheet, trial Court framed charges against each of the appellant that the appellants along with other accused hatched conspiracy to commit murder of

Mahadev and in furtherance of this conspiracy and common object, they formed unlawful assembly and towards execution of the said common object, they all went to Subhash Chowk on 11.2.2005 at 6:35 AM. They all reached, armed with dangerous weapons and then opened assault on Mahadev by various weapons including firearm and committed his murder. The charges were also framed for attempt to commit murder of some other persons. The appellants having abjured guilt were put to trial.

In order to prove its case, the prosecution examined as many as 77 witnesses and relied upon 254 documents. The appellants were separately examined under Section 313 Cr.P.C. in respect of incriminating evidence and circumstances appearing against them. The appellants denied those circumstances and stated that they are falsely implicated. They also took some additional ground of defence. Mainly plea of alibi was taken by Bobby @ Vidyut Chaudhary, Anil Shukla @ Babalu, Ranjeet Singh, Tapan Sarkar @ Amitabh and Satyen Madhvan. In defence, number of witnesses were also examined.

3. Learned trial Court mainly relied upon the eyewitness account of Chandan Sao (PW7) and other evidence given by remaining witnesses, seizure of weapon on the memoranda of appellants, serological and FSL report and held present appellants guilty of commission of offence, though some of the accused namely Mujibuddin, Arvind Shrivastava @ Gullu, Jaideep and Vinod Bihari were acquitted of charges of commission of offence under Section 302 read with Section 149 and 148 IPC. The present appellants were convicted under Section 302 read with Section 149 and 148 IPC and Section 25 (1B) (a), 27(1) of the Arms Act respectively. All the appellants and other accused were acquitted of charges of commission of offence under Section 120-B, 307/149, 212, 216 IPC and Section 3 (ii) (v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. Ranjeet Singh and Bobby @ Vidyut Chaudhary were acquitted of charges under Section 25 (1B) (a) and 27 (a) of the Arms Act thereof. The appellants were sentenced life imprisonments for commission of offence under Section 302 IPC and lessor sentence for other offences, all of which are directed to run concurrently.

4. Learned counsel appearing for the appellants argued in extenso raising various grounds to assail legality and validity of their conviction and sentence. While taking ground individually in respect of different appellants, learned counsel appearing for each appellant made common submission also. Some of learned counsel for the appellants raised ground which, irrespective of individual cases and ground, would cut across and strike at the very root of the prosecution case with regard to the time and place of incident. It would be apposite to mention such common submissions first and then individual submission made on behalf of each of the appellant, some of which may be overlapping also.
5. The first and the foremost ground of attack to the judgment of conviction and order of sentence, argued by learned counsel appearing for each of the appellant, is that the learned trial Court committed gross illegality and perversity in relying upon testimony of so called eyewitness Chandan Sao (PW7). Each of the learned counsel, in his own way, raised this ground. The common thread of all the arguments was that though this witness in his examination-in-chief, supported the prosecution case and claimed to be an eyewitness of the incident that he had seen the present appellants arriving at the spot in a minodore, motorcycle, armed with dangerous weapon like pistol, katta, sharp edged weapon, clubs and opening assault on Mahadev in Subhash Chowk at 6:35 in the morning and also fired gunshot and killed Mahadev at the spot, later on, in his cross-examination, which was conducted on subsequent dates, this witness completely turned hostile and emphatically deposed before the Court that he had not seen any incident whatsoever and that he was pressurized by the police and Investigating Officer go give various statement including statement under Section 164 Cr.P.C. before the Magistrate and it was because of this pressure that the witness had spoken against the appellants even before the Court but as that pressure was later on removed, he is now telling the truth. According to this witness, what was stated prior to his cross-examination was all outcome of threat and pressure exerted on him by the police.

Learned counsel for the appellant would argue that in view of what has been stated by this witness in his cross-examination, it is clear that what

was stated by him earlier during examination-in-chief was only outcome of threat and pressure exerted on him. It is, therefore, argued that the learned trial Court committed illegality in basing its judgment mainly on what was deposed by this witness in examination-in-chief, completely ignoring that he had not supported and turned completely hostile in his cross-examination. It is then submitted that a witness who has not remained firm on his testimony and has turned completely hostile and denies whatever he has stated in examination-in-chief, at any rate, is not reliable and is therefore liable to be discarded completely. In support of this submission, reliance has been placed on **Rattiram & Ors. Vs. State of Madhya Pradesh** through Inspector of Police (2013) 12 SCC 316, **Akbar Sheikh & Ors. Vs. State of West Bengal** 2009 (7) SCC 415, **State of Delhi Vs. Shri Ram Lohia** (AIR 1960 SC 490), **Kanbi Nanji Virji and Ors. Vs. State of Gujarat** (AIR 1970 SC 219), **Ayodhya and Ors. Vs. State of U.P. and etc.** 1997 CRI.L.J. 2654, **Selvaraj alias Chinnapaiyan Vs. State represented by Inspector of Police** (2015) 2 SCC 662, **Amar Singh and Ors. Vs. State of Punjab** (AIR 1987 SC 826), **Vikramjit Singh alias Vicky State of Punjab** (2006) 12 SCC 306, **Vithal Pundalik Zendge Vs. State of Maharashtra** (AIR 2009 SC 1110).

6. Learned counsel appearing for appellant- Bachcha @ Abdul Zayad @ Ashraf has argued that the incident happened at Subhash Chowk at 6:35 AM in the morning is a concocted story because the evidence of Dr.J.P. Meshram (PW10) proved that rigor mortis had developed all over the dead body which was noticed and recorded also at the time of conducting postmortem. According to this doctor, the postmortem was conducted at 9:30 AM in the morning of 11.2.2005. He has admitted that rigor mortis appears 2-3 hrs. after the death and is fully developed in 12 hrs. and remains in that state between 12-24 hrs and thereafter it goes. From the evidence of this doctor and the expert opinion as also state of rigor mortis, the incident must have happened at least 6 hrs. before the time of postmortem. Therefore, it is contended, the prosecution case that incident happened at 6:35 AM in the morning is a concocted story whereas Mahadev had already died long before that, sometimes in the midnight. Thus, the entire case of the prosecution with regard to time and place of

incident is rendered doubtful and there is serious contradiction between the eyewitness account with regard to time and place as stated by Chandan Sao (PW7) and the evidence of Dr. J.P. Meshram (PW10). Learned counsel for the appellant also referred to the text of Modi's Jurisprudence (22nd Edition) and Parekh's Jurisprudence (6th Edition).

7. Brief resume of submission made by respective counsel in respect of each of the appellant is as below:

Appellant- Mahesh @ Bijju in Criminal Appeal No.487 of 2015

It is argued that his name never appeared at the initial stage of investigation and it is only, later, on that his name was involved which shows false implication on afterthought ground. According to learned counsel, Mahesh @ Bijju was not named in rojnamcha sanha recorded in Ex.P-128 on the telephonic information of Prashant Sharma (PW8), dehati nalishi (spot FIR) Ex.P-15 recorded by Anita Sagar (PW69), dehati morgue (spot morgue) in Ex.P-138 recorded at the spot, numbered morgue (Ex.P-139) and numbered FIR (EX.P-76) recorded in the police station. Further submission is that even in 161 Cr.P.C. diary statement of the prosecution witnesses namely Linga Raju, Chandan Sao, Prashant @ Gudda, Girwar Sahu, Tarkeshwar also do not mention Mahesh @ Bijju, not even in their supplementary 161 Cr.P.C. statement. Even in 164 Cr.P.C. statement made by so called eyewitness namely Santosh Singh @ Dhanji, Chandan, Girwar, Linga Raju, Prashant @ Gudda @ Santosh, appellant Mahesh was not named. Therefore, it is argued, the involvement of the appellant based only on the testimony of Chandan Sao (PW7), which itself is highly unreliable, is not sustainable in law, particularly when seizure of coconut cutting dagger allegedly made from memorandum of appellant is not proved from reliable evidence. One of the witness of memorandum of seizure Nagesh was not examined and evidence of Dhiraj Sharma (PW45) is liable to be disbelieved because of his criminal background and association with deceased Mahadev. It is also argued that time of recording of memorandum of seizure itself is contradictory. Witness was not shown the dagger during trial. The prosecution has not come out with clear evidence as to when remand was taken after surrender on 6.9.2005 and how this

appellant was brought to police station- Supela, Bhilai. The prosecution has not come out with any document with regard to police remand and the period during which he remained in police custody and when he was given in judicial custody. In any case, seizure of dagger does not carry any incriminating value, as no blood stain was found on it. In the last, learned counsel for the appellant argued that in the absence of any specific overt act alleged against the appellant by any of the prosecution witnesses, much less Tarkeshwar Singh (PW1) and Chandan Sao (PW7), claiming to be eyewitness, the appellant's conviction could be sustained only under Section 307 IPC. As the appellant has already undergone long period of jail sentence, the sentence for conviction under Section 307 IPC may be awarded for the period already undergone by him.

Appellant- Anil Shukla @ Babalu in Criminal Appeal No. 502 of 2015

8. It has been argued that none of the so called eyewitness except Chandan Sao (PW7) has involved the present appellant. He has not even been identified by other witnesses. Further, no recovery of any incriminating material like weapon etc. has been made from him.

Appellant- Ranjeet Singh in Criminal Appeal No.427 of 2015

9. It has been argued that he has not been named either in the FIR or dehati nalishi or case diary statement under Section 161 Cr.P.C., or 164 Cr.P.C. statement of any of the prosecution witnesses but his name surfaced for the first time while filing charge sheet. It was only when supplementary charge sheet was filed, he was involved in the alleged commission of offence on the basis of memorandum statement taken Ex.P-158 of co-accused Vidyut Chaudhary. Even Chandan Sao (PW7) has not involved him in his case diary statement under Section 161 Cr.P.C. or statement under Section 164 Cr.P.C. given before the Magistrate. Gopi (PW36) and Prem (PW39) witnesses of alleged seizure of motorcycle have also not supported seizure and even according to prosecution, the motorcycle in which the appellant is alleged to have arrived at the spot was un-numbered. Therefore, the recovery does not constitute any incriminating

circumstances. Even Chandan Sao (PW7) has stated that appellant Ranjeet ran towards Chandan Sao. Except this, there is no specific allegation regarding present appellant having assaulted the deceased. The conviction of the appellant therefore could not be sustained only with the aid of Section 149 IPC. Reliance has been placed on **State of Andhra Pradesh Vs. Pullagummi Kasi Reddy Krishna Reddy alias Rama Krishna Reddy and Ors.** (AIR 2018 SC 3277) and **Shanker Vs. State of Madhya Pradesh** (AIR 2018 SC 2687).

**Appellant- Shailendra Thakur, Pitambar Sahu and Chhotu @ Krishna
in Criminal Appeal No.427 of 2015**

10. It is argued that they have not been named in FIR, dehati nalishi, morgue, 161 Cr.P.C., 164 Cr.P.C. statements and they have been involved for the first time only in the Court statement. Their alleged involvement is based on their names mentioned in memorandum statement of one of the accused. None of the prosecution witnesses, during investigation, stated that there were accused, other than those named, who could be identified. Seizure of pistol is doubtful because seizure witnesses Arun Nirmalkar (PW54) is a stock witness and, therefore, not reliable. Witness of identification, Girwar Sahu (PW9) has turned hostile and not identified these appellants in the Court. The evidence with regard to identification parade is not reliable. It is not clear from the evidence of Chandan Sao (PW7) also that he identified these appellants. As Chandan Sao (PW7) has not named these appellants in his case diary statement recorded under Section 161 Cr.P.C. nor specifically named the appellants, a doubtful dock identification is liable to be disbelieved. Further submission is that seizure witnesses Shiv Sahu (PW4) has admitted that he never went to house of appellant- Shailendra.. Thus, on account of all these discrepancies in the evidence of the prosecution, these three appellants are entitled to be acquitted. Lastly it is submitted that on the same set of evidence, co-accused Vinod Bihari was acquitted giving benefit of doubt. Reliance has been placed on **State of Kerala Vs. Babu and Ors.** (AIR 1999 SC 2161), (2011) 1 SCC 353, **Baldev Singh Vs. State of Punjab** (AIR 1991 SC 31), **Babbu @ Babulal Vs. State of M.P., Babbu @ Babulal Vs. State of M.P.** 2000(1) MPHT 405, **Suraj Mal Vs.**

State (Delhi Administration), Mulla & Anr. Vs. State of Uttar Pradesh (2010) 3 SCC 508.

**Appellant- Bachcha @ Abdul Zayad @ Ashraf in Criminal Appeal
No.639 of 2015**

11. It has been argued that the very identification of the appellant is in doubt. In dehati nalishi (Ex.P-15) he has been named as Bachcha Ashraf and in all other documents and statement including 164 Cr.P.C. statement (Ex.P-18) of Santosh Sharma @ Gudda @ Prashant, he has been named as Bachcha @ Ashraf. However, after judgment was pronounced on 13.3.2015 by the trial Court, name of the appellant has been changed wrongly invoking provision of Section 362 Cr.P.C. The evidence of Tarkeshwar (PW1) is liable to be disbelieved because Chandan Sao (PW7) has not stated in his Court statement that at the time of incident, Tarkeshwar (PW1) was also present. Doman Singh who is stated to have prepared rojnamcha sanha regarding receipt of information of murder of Mahadev has not proved rojnamcha sanha. Though, dehati nalishi was recorded at 7:05 AM and numbered FIR on that basis was recorded in the police station at 10:10 AM copy of FIR was sent to the Magistrate belatedly only on 12.2.2005. Though Paramjit Singh (PW24) states that he had reached police station with dehati nalishi in five minutes, therefore, it is argued, delayed lodging of FIR and further delay in sending copy of FIR to the Magistrate supports the defence version that when dead body of Mahadev was found in the morning, who was already murdered many hours before, only because there were allegations of group enmity, large number of accused, including present appellant has been involved by concocted FIR. Learned counsel for the appellant argued that as far as this appellant is concerned, his case is identical to that of Gullu who has been acquitted on the same set of evidence, therefore, this appellant is also entitled to be acquitted. It is further argued that as far as alleged seizure of button knife and Samsung mobile vide Ex.P-118 is concerned, the independent witness of seizure, namely, Dheeraj Sharma (PW45) and Vimlesh Kumar (PW47) both have turned hostile and not supported the prosecution case. In any case, one button knife is said to be recovered from co-accused Vinod Bihari who has been acquitted. Lastly,

referring to Court statement of defence witness Jitendra Verma (DW1), it is argued that according to this witness, he had seen the dead body of Mahadev at about 5:30 early in the morning which was lying near the house of one Dhanji. This, taken together with the doctor evidence with regard to full development of rigor mortis, only lends supports and renders more probable and plausible the defence version that Mahadev was murdered sometimes in the midnight at some other place by unknown person and his dead body was thrown at Subhash Chowk which was seen an hour before the time of alleged incident recorded in the FIR and statement of Chandan Sao (PW7). One of the prosecution witnesses Tarkeshwar (PW1) who has been examined as eyewitness was present at the time of inquest but inquest report does not disclose the name of appellant. Therefore, this appellant is entitled to be acquitted by giving him benefit of doubt. Reliance has been placed on **Ram Laxman Vs. State of Rajasthan** (2016) 12 SCC 389, **Arjun Marik and Ors. Vs. State of Bihar** 1994 Supp (2) SCC 372, **Shivlal & Anr. Vs. State of Chhattisgarh** (2011) 9 SCC 561, **Ramesh Baburao Devaskar & Ors. Vs. State of Maharashtra** (2007) 13 SCC 501.

Appellant -Raju Khanjjar & Mangal Singh in Criminal Appeal No.868 of 2015

12.It has been argued that Tarkeshwar (PW1), the so called eyewitness of the prosecution has not involved these appellants. Even according to Tarkeshwar (PW1) and Chandan Sao (PW7), Mahadev was assaulted by other accused and not by present appellants. Referring to spot map (Ex.P-3) and the cross-examination of Tarkeshwar (PW1), it is argued that even the presence of Tarkeshwar, at the time when gunshot was fired and assault was allegedly given to Mahadev, is doubtful and he is planted as eyewitness. Seizure of dagger (used for cutting coconut) vide Ex.P-45 is not supported by independent witness Manoj Sahu (PW14) and other seizure witness has not been examined. Recovery of pistol and cartridge vide Ex.P-111 is also highly doubtful because Nagesh Verma, witness of seizure has not been examined and other seizure witness Dhiraj Sharma (PW45)

though supports, is liable to be disbelieved because he states that he had signed the memorandum in the police station. Further, the time recorded in memorandum and the time, as stated in the evidence, are contradictory which renders the entire proceedings of recording memorandum doubtful. Next submission is that the ballistic report Ex.P-135 does not establish any live link between commission of offence and the involvement of pistol and cartridge allegedly recovered from these appellants. Therefore, it would not constitute an incriminating evidence. Reliance is placed on **Harchand Singh & Anr. Vs. State of Haryana** (1974) 3 SCC 397, **Muluwa son of Binda & Ors. Vs. The State of Madhya Pradesh** (1976) 1 SCC 37.

Appellants -Tapan Sarkar and Satyen Madhvan in CRA No.495 of 2015

13.It is argued by learned senior counsel that the prosecution has failed to prove the case beyond reasonable doubt by leading concrete, clinching and reliable evidence. In addition to general submission that Chandan (PW7) having taken complete somersault in his cross-examination and, therefore, his evidence is liable to be discarded as a whole, it is submitted that in any case, the evidence of Tarkeshwar (PW1) and that of Chandan (PW7) are not corroborated from the medical evidence inasmuch as the postmortem report reveals as many as 21 injuries found on the dead body of Mahadev, but, according to these witnesses, only one gunshot and one head injury was caused to the deceased. Therefore, it is highly doubtful that these two witnesses were even present at the spot. The statement are of general nature without specifically attributing criminal overt act to different accused including present appellants. Drawing attention of this Court to the evidence of Rakesh Bhatt (PW77), that two gangs are known for their ongoing war in the area, the evidence of those witnesses who are said to be associated with deceased Mahadev, ordinarily ought not be believed, unless it finds sufficient corroboration from the other evidence. As there is material contradiction in the ocular testimony and medical evidence, the evidence of Tarkeshwar (PW1) and Chandan (PW7) could not alone be made a basis to involve the present appellants. In support of this submission, reliance has been placed on **Santa Singh Vs. State of Punjab** (AIR 1956 SC

526), **Bhajan Singh alias Harbhajan Singh & Ors. Vs. State of Haryana** (AIR 2011 SC 2552) and **Vijay Pal Vs. State** (GNCT) of Delhi (AIR 2015 SC 1495). Next submission is that the alleged recovery of katta from the present appellant is not proved beyond doubt. There is no specific evidence of sealing of shell said to be recovered from the spot, as to where it was kept until it reached FSL. The report of ballistic expert does not carry evidentiary value as the expert has not stated any basis for recording his opinion. According to him, the opinion of the ballistic expert, only in his capacity as such, is irrelevant. If the very basis of expert opinion is not stated, the report loses its relevancy. He further argued that the prosecution witnesses Tarkeshwar (PW1) and Rakesh Bhatt (PW77) have not clearly stated regarding sealing of the recovered articles. The endorsement of seal mentioned in Ex.P-4 by itself is not substantive evidence, unless aforesaid witness clearly deposes before the Court regarding sealing. The Investigating Officer has not stated where these articles were kept from 11.2.2005 till 29.7.2005, when it was sent to Forensic Science Laboratory, Raipur. Even seizure of katta vide Ex.P-55, in the light of what has been stated by R.K. Rai (PW76) does not prove that after such seizure, it was duly sealed and then kept in safe custody. The prosecution has neither led the evidence of sealing nor evidence of safe custody. Therefore, no amount of evidence to connect seizure of katta from the present appellants could be used against the present appellants. Reliance has been placed on (1995) suppl 3 SCC 217. Referring to Ex.P-134-A/C, it is further highlighted that one who had taken the articles and one who had received have also not been examined. Therefore, the prosecution has failed to prove by reliable evidence that what was received by CFSL vide Ex.P-134 on 27.10.2005 was the same article/firearm(katta) allegedly seized from the present appellants vide Ex.P-55. The articles kept on moving from one hand to other without proof of there being any safe custody and, therefore, the evidence linking with this katta /firearm loses its evidentiary value. Learned senior counsel also drew attention of this Court to suggestion given to witness regarding substitution of firearms given to police officer, though denied. Reliance has been placed on **The State of Rajasthan Vs. Daulat Ram** (AIR 1980 SC 1314), **Valsala Vs. State of Kerala** (AIR 1994 SC 117), **Santa Singh Vs.**

State of Punjab (AIR 1956 SC 526), Mohd. Aman and Anr. Vs. State of Rajasthan (AIR 1997 SC 2960). In the absence of microphotograph, referred to and clear opinion with regard to characteristic, the expert opinion namely Dr. P. Siddambari (PW63) loses its significance. Reliance is placed on **Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. and Ors. (AIR 2010 SC 806).** Referring to another decision in **Paramjeet Singh @ Pamma Vs. State of Uttarakhand (AIR 2011 SC 200),** it is argued that this alleged conduct of present appellant in having remained absconding for 5 ½ months until his arrest, does not by itself, without anything more, speaks guilty mind.

Appellant- Prabhash Singh in Criminal Appeal No. 495 of 2015

14. It has been argued that as far as Prabhash is concerned, no specific criminal overt act is alleged to have been committed by him. The alleged recovery of katta from his house vide Ex.P-54 and motorcycle in Ex.P-53 are false because even according to prosecution, after committing alleged crime, he did not go to his house. The two eyewitness of memorandum of seizure Ganesh Kumar Devdas (PW17) and Ishwarlal Gendre (PW41) have not supported the prosecution case. The ballistic report does not contain any specific report connecting injury found on the body of the deceased Mahadev with the katta allegedly seized from the appellant. In the evidence of ballistic expert Dr. P. Siddambari (PW63), there is nothing to show that the bullet which was found in the shirt of deceased Mahadev was fired from katta or that the empty cartridge was fired from katta allegedly seized from possession of Prabhash Singh.

Appellant Bobby @ Vidyut in Criminal Appeal No. 741 of 2015

15. Learned counsel for the appellant argued that though he has been acquitted of charges of commission of offence under Sections 25 & 27 of the Arms Act, no recovery of any incriminating article, weapon has been proved. Independent witnesses of memorandum of seizure have turned hostile. Tarkeshwar (PW1) does not allege any overt act committed by this appellant. The evidence of Chandan Sao (PW7) that this appellant fired gunshot on the deceased, is liable to be disbelieved because there is no

corroboration from the ballistic expert report and the evidence of ballistic expert Dr. P. Siddambhari (PW63). The appellant was not even present at the spot or even in the city where the incident happened. In support of plea of alibi, this appellant has examined Sanjeev Bansal (DW2) and Smt. Archana Choudhary (DW3) and has produced railway tickets in Ex.D-8 that on the date of alleged incident this appellant had already gone to other city and was not even present in Bhilai. His identity has also not been proved in accordance with law. Reliance has been placed on 2002 (8) SCC 165. Further submission is that mere presence would not involve the appellant in alleged commission of offence of murder with the aid of Section 149 IPC. Reliance is placed on **Jayantibhai Bhenkarbhai Vs. State of Gujarat** (2002) 8 SCC 165, **K.M. Ravi & Ors. Vs. State of Karnataka** (2009) 16 SCC 337.

16. Learned counsel for the State replied to the argument raised by learned counsel appearing for respective appellants. In his long submissions, it has been argued, the prosecution has proved the guilt of all the appellants in the alleged commission of offence on the basis of eyewitnesses account of the incident, given by Chandan Sao (PW7) and Tarkeshwar (PW1). It is argued that the star witness of the prosecution, Chandan Sao (PW7) has clearly stated regarding involvement of the appellant in the alleged commission of offence and he has fully described the manner in which the appellants arrived at the spot in more than one vehicle, armed with dangerous weapon and, thereafter, pouncing upon Mahadev who was standing at the square and then, opening fire and assault by dangerous sharp edged weapon, club etc. which is fully corroborated from the statement under Section 164 Cr.P.C. given by Chandan Sao (PW7) and 161 Cr.P.C. statement of Tarkeshwar (PW1). Learned State counsel further submitted that the ocular testimony of the eyewitness that assailants had come armed with firearm, sharp edged weapon, clubs and opening assault on deceased is corroborated from the medical evidence in which large number of injuries have been found on the body of the deceased because of firearm, sharp edged weapon as also hard and blunt object. The FIR was promptly lodged within couple of hours of the incident and merely because, there was short delay in sending copy of FIR to the Magistrate, the

entire prosecution case would not be thrown out. It is next submitted that from each of the appellants, firearm, sharp edged weapon and clubs have been seized by the Investigating Officer, during investigation. The seizure has taken place on the basis of memorandum of each of the appellants recorded by the Investigating Officer. Even though, independent witnesses of seizure may not have clearly supported, they all have admitted their signature on various documents and the Investigating Officer has clearly stated regarding recovery of firearms and weapon from the possession of the appellant. He next submitted that even if independent witnesses may not have supported, the evidence of the Investigating Officer clearly proves recovery of weapon. According to him, it is not the requirement of law that in every case, recovery of weapon or other articles are required to be supported by evidence of independent witnesses. It has been argued that the appellants are the persons of criminal antecedents and organized gangster. In such case, the prosecution case could not be held doubtful merely because some witness of seizure of memorandum have not fully supported the prosecution case. As the evidence of Investigating Officer is reliable, recovery of incriminating articles like weapon, fully supports the prosecution case and corroborates the evidence of eyewitness regarding involvement of the appellants in alleged commission of offence. He would next argue that the evidence of two Investigating Officers namely R.K. Rai (PW76) and Rakesh Bhatt (PW77) proves not only recovery of firearm and other weapon but also proper sealing and safe custody and those articles transmitted from the office of Superintendent of Police to the FSL. Learned counsel for the State elaborating his submissions, argued that Tarkeshwar (PW1) was examined on 27.4.2006 and thereafter cross-examined and released. On 1.8.2008, he was again examined and cross-examined and at this stage only, as he did not fully support prosecution case, he was declared hostile. Learned counsel for the State argued that even if witness is declared hostile, his evidence is not liable to be discarded in toto and that part of his evidence which is reliable and corroborated from other evidence on record, could always be relied upon. Learned counsel for the State also argued that Chandan (PW7) in his examination-in-chief, has fully supported the case of the prosecution. His cross-examination was delayed

and after a very long time of more than one year, he was cross-examined. During this period, he was in jail. There is nothing in the evidence of this witness, except bald allegation that he was pressurized by police officer to give evidence in support of prosecution case. His complaint (Ex.D-2) is in relation to some other case and not with regard to present case. A reading of his complaint would show that there was no pressure exerted on him by the prosecution to falsely involve the appellant. When he was examined in chief, he did not make any complaint before the Court that he is being pressurized. There is no specific evidence as to when, by whom and in what manner he was pressurized. The whole system cannot be said to be working against law. In the absence of any specific evidence, it has to be presumed that the evidence in examination-in-chief of Chandan was without any pressure. Rather, what he has stated in his cross-examination clearly shows that he was later on won-over because he has turned turtle and has mechanically stated that he did not see anything. In such a case, it is argued, even if the witness has turned hostile, that part of his evidence which otherwise appears to be reliable and is corroborated from other evidence of the prosecution, may be relied upon to prove guilt. It is also argued that Chandan Sao (PW7) had given 164 Cr.P. C. statement in which he clearly stated regarding involvement of the appellants in alleged commission of offence. Moreover, his ocular testimony is corroborated from the medical evidence, recovery of incriminating articles. The evidence of ballistic expert and the ballistic report also provide sufficient corroboration to the testimony of Chandan Sao (PW7), therefore, the learned trial Court has committed no illegality in relying upon his evidence to hold the appellants guilty of commission of offence.

17. In reply to the argument regarding early development of full rigor mortis, learned counsel for the State argued that there is nothing in the evidence of the doctor that in the present case, the state of rigor mortis completely ruled out death of Mahadev at and around 6:35 in the morning or that death had taken place long before 6:35 AM. He argued that development of rigor mortis in a dead body depends on several factors and no hard and fast formula is there in this regard. Merely because, there was advanced stage of rigor mortis, prosecution story cannot be doubted. Learned

counsel for the State referred to the relevant text and expert's opinion contained in Parekh's jurisprudence (6th Edition) and Lyon's Medical Jurisprudence (11th Edition), Lawyers Guide by Bernardo (98th Edition) in support of the submission that it is possible that development of full rigor mortis in few cases cannot be said to be improbable. It is further argued that uncontroverted evidence of Keshav Prasad Choubey (PW2) is that Mahadev was fired at around 6-7 AM due to which he died. On information received in the police station, rojnamcha was taken that Mahadev was murdered which also records time of the incident on 6:00- 6:30 AM. Therefore, the prosecution case with regard to time of death of Mahadev Mahar cannot be doubted. According to learned counsel for the State, Dr. P. Siddambari, (PW63) ballistic expert, in his evidence clearly proves that firearm seized from the possession of the appellants Satyen, Prabhash, Tapan, Mangal, Shailendra are all found in working condition and capable of firing. The plea of alibi taken by Vidyut Chaudhary is concocted as his presence is proved from the evidence of eyewitnesses. In support of his submissions so made, learned counsel for the State relied upon 2017 (3) SCC 247, (2007) 13 SCC 25, **Baldev Singh Vs. State of Haryana** (2016) CRI.L.J. 154, **Vinod Kumar Vs. State of Punjab** (2015) 3 SCC 220, **Dhanabal & Anr. Vs. State of Tamil Nadu** (1980) 2 SCC 84, **Bhagwan Singh Vs. State of Haryana** (1976) (1) SCC 389, **Mishrilal & Ors. Vs. State of M.P. & Ors.** (2005 AIR SCW 2770), **Radha Mohan Singh alias Lal Saheb & Ors. Vs. State of U.P.** (2006) 2 SCC 450. **State of M.P. Vs. Mast Ram** (2004) 8 SCC 660. **Ajmer Singh Vs. State of Punjab** 1993 supp (3) SCC 738, **Mani Ram Vs. State of Rajasthan** 1993 Supp (3) SCC 18, **State of U.P. Vs. Farid Khan & Ors.** (2005) 9 SCC 103, **Nirpal Singh & Ors. Vs. State of Haryana** 1977 (2) SCC 131, **State of Punjab Vs. Hakam Singh** (2005) 7 SCC 408, **Kirender Sarkar & Ors. Vs. State of Assam** (2009) 12 SCC 342, **Susanta Das & Ors. Vs. State of Orissa** (2016) 4 SCC 371.

18. It was also argued that forensic report in Ex.P-218, Ex.P-220, Ex.P-221 and ballistic report in Ex.P-134 all support and corroborate the eyewitness account given by Chandan Sao (PW7) in his examination- in- chief regarding criminal overt act of the appellants as blood stains have been found in the weapon seized from the appellants Raju Khanjjar, Vidyut, Pitambar, Chhotu

and human blood was found in the khukari recovered from Raju, Vidyut, Pitambar, Chhotu. From ballistic report Ex.P-134 proved by ballistic expert Dr. P. Siddambari, (PW63), bullet found in the cloths of the deceased were found to have been fired from the country made pistol A/1, which was seized from the appellants. The Investigating Officer R.K. Rai (PW76) and Rakesh Bhatt (PW 77) have reliably stated regarding fair investigation carried out by them. Merely because there was group rivalry, eyewitnesses account which is otherwise reliable and corroborated in material aspect from other proved circumstances, is not liable to be rejected nor the evidence is liable to be rejected only because the witness also have criminal antecedents. He would also argue that non-naming of some of the accused in FIR is not fatal once there is reliable evidence of eyewitness which is corroborated from other evidence on record. Learned State counsel stressed upon the submission that according to prosecution evidence early in the morning, all the accused armed with weapon, had arrived together at the spot of incident in vehicles from which they got down and with arms in their hands, they all ran towards Mahadev, opened fire and also assaulted with sharp edged weapon and clubs. This evidence clearly proves that the appellant had formed unlawful assembly with the common object of killing Mahdev and it was in furtherance of this common object that they all arrived at the spot at one point of time in 2-3 vehicles and they all had come with arms in their hands whether it be firearm, sharp edged weapon or clubs. Once it is proved that an unlawful assembly was formed with a common object , criminal overt act done by one or more of them, in furtherance of common object, makes all of them vicarious liable and it is not necessary that each and every accused must have committed any specific overt act. Even according to eyewitnesses, all appellants ran towards Mahadev and he was injured. There were 21 injuries including firearm injury found on the body of the deceased. Therefore, conviction of the appellant with the aid of Section 149 IPC does not suffer from any illegality.

19. We have given our anxious consideration to the elaborate submissions made by learned counsel for the respective appellants as also learned counsel for the State. We have also gone through a very detailed judgment

delivered by learned trial Court and voluminous records which includes the statement of prosecution witnesses, documentary evidence led by the prosecution, Section 313 Cr.P.C. statements of the respective appellants, defence witnesses and defence documents.

20. At the outset, it is relevant to mention that one of the accused Govind Vishwakarma was killed in encounter with the police and three other accused Sahjad, P. Pritish, Gaya Udiyia @ Jaychand Pradhan remained absconding.

21. Learned trial Court in its judgment of conviction and order of sentence running in 211 pages has elaborately examined the oral evidence led by the prosecution, particularly that of the witnesses Tarkeshwar (PW1) and Chandan (PW7) the main witnesses. Though number of witnesses were cited as eyewitness, they did not support the case of the prosecution. The learned trial Court has also examined the evidence led by the prosecution relating to identification, seizure of weapon and another articles alleged to be used in commission of offence, serological report, FSL report as also ballistic report. The evidence, oral and documentary, led by the prosecution, in respect of the appellants, has been separately considered. Based on the evidence of homicidal death of Mahadev Mahar, evidence of prosecution witnesses particularly that of Chandan (PW7) and Tarkeshwar (PW1), evidence of recovery of weapon and other articles and various report and disbelieving the defence of the appellants including defence of alibi, learned trial Court held all the appellants guilty of commission of offence, which has been described hereinabove.

22. Subhash Singh Mandavi (PW60), Head Constable has deposed that on 11.2.2005 at about 6:35 AM, he received a phone call in Police Station-Supela from a person named Prashant @ Gudda that Tapan and his associates have murdered Mahadev at Subhash Chowk and police may reach immediately. Upon receipt of information, night officer Anita Sagar, ASI along with Holesingh, Constable proceeded to the place of occurrence. A copy of rojnamcha sanha in Ex.P-128 was also prepared. This document (EX.P-128) records that a person named Prashant @ Gudda has informed over telephone that Tapan Sarkar and his associates have murdered

Mahadev at Subhash Chowk upon which Anita Sagar and Holesingh were instructed to proceed to the place of occurrence. In cross-examination, it has been elicited that his duty was till 6:00 AM morning of 11.2.2005 and Constable Domar Singh had taken charge and relieved him. He has stated that he over stayed for some time in the police station and at that time, when there was a phone call, he picked up call and received information. It has further been elicited that entry made in rojnamcha sanha (Ex.P-128) has been made by Domar Singh, Head Constable because after his duty was over, he could not make entry in rojnamcha sanha. He has also admitted that upon information received on telephone call by him and informed to Domar, rojnamcha sanha entry were made. The evidence of this witness with regard to receipt and getting recorded information in rojnamcha sanha, instructing Anita Sagar and Holesingh to proceed to the spot of occurrence could not be impeached.

At this stage, it is relevant to state that Prashant Sharma @ Gudda (PW8) has not supported the prosecution case and he denied having given any telephone call in the police station, informing the incident. According to him, he reached the spot having come to know about death of Mahadev at 6:00 AM and reached Subhash Chowk where he found dead body of Mahadev lying there and some police personnel were also found present who asked him to sign number of documents. He has been declared hostile and in his cross-examination by the prosecution, a suggestion that he had given telephonic information in the police station, has been denied.

Therefore, on the basis of evidence of Subhash Singh Mandavi (PW60) what is proved is that at 6:35 AM on 11.2.2005, an information was received in Police Station -Supela from the person in the name Prashant Sharma @ Gudda that Tapan and his associates had murdered Mahadev at Subhash Chowk.

23. Anita Sagar (PW69) has stated in her Court statement that upon receipt of information in the police station, she proceeded to Subhash Chowk where, on the basis of information given by Prashant @ Gudda, a morgue intimation in Ex.P-138 was recorded by her. She has further deposed that

she was informed at 6:28 AM that the appellants along with other accused murdered Mahadev by multiple assaults, including firing with pistol. She has proved morgue intimation in Ex.P-138. She has further deposed that at 7:05 AM, at the spot, she recorded dehati nalishi (spot FIR) in Ex.P-15 against appellants and other accused for alleged commission of offence of attempt to murder by unlawful assembly, on the basis of what was informed to her by Prashant @ Gudda. She has proved her signature in the spot FIR as also that of Santosh @ Prashant @ Gudda. Prashant Sharma @ Gudda @ Santosh Sharma (PW8) states that his signatures were obtained on certain document at the spot by some police officer.

J.P. Chandrakar (PW66) has deposed that on the basis of dehati nalishi brought to the police station by constable Paramjeet Singh, a numbered FIR under Crime No.141 of 2005 (EX.P-76) was registered and a numbered morgue intimation was also taken in Ex.P-139 and he has proved his signature in FIR (Ex.P-76) as well as numbered morgue intimation in Ex.P-139.

24. Upon perusal of copy of rojnamcha sanha (EX.P-128C), spot morgue in Ex.P-138, spot FIR in Ex.P-15, numbered FIR in Ex.P-76 and morgue intimation in Ex.P-139, it is proved that on 11.2.2005, an information was received in the police station regarding murder of Mahadev by Tapan and his associates and in the spot FIR, morgue and numbered FIR morgue, it was recorded that at Subhash Chowk, Tapan Sarkar, Mangal Singh, Satyen Madhvan, Jaideep, Prabhash, Govind Vishwakarma, Bachcha,, Anil Shukla, Raju Khanjjar, Gullu, Bobby @ Vidyut and others and Vinod Bihari arrived in motorcycle, minidor, who were armed with weapon like pistol katta, sharp edged weapon, dagger, clubs and, fire was opened, Mahadev was shot at dead and at the same time assaulted also due to which Mahadev fell down and died.

25. Rajesh Bhatt (PW77) has deposed that after giving notice to witness in Ex.P-1, inquest over dead body of Mahadev was prepared by him in Ex.P-2 and dead body was sent for postmortem which was taken by Head Constable Holsingh (PW15) to district hospital where medical officer J.P. Meshram (PW10) conducted postmortem.

26. Dr. J.P. Meshram (PW10) has deposed that he conducted postmortem of the dead body of Mahadev and found as may as 21 injuries which are as below:-

- “1. फायर आर्म इंजुरी : जिसकी मार्जिन इवर्टेड ओवल सेप थी एवं चार्ज है, साईज 0.1 से.मी. / X 3/4 से.मी. X बोन डीप है, जो राइट टेम्पोरल रीजन पर ऊपर पार्ट आफ पिन्ना के 3 सी.मी. एंटीरियर में है, यह वूण्ड आफ एंट्री है ।
2. मल्टीपल पिन हेड साईज के चारिंग मार्क्स, चमड़ी पर हैं, जो 15 से 10 से. मी. चेहरे के बांयी तरफ, मेक्सिला में, फ्रन्टल रीजन में, जो लेफ्ट पिन्ना के सामने है, जो लेफ्ट साईड फेस को कवर कर रहे हैं ।
3. फायर आर्म इंजुरी — जो इवर्टेड मार्जिन की, लेफ्ट टेम्पोरल रीजन में 1.5 से. मी. X 1 से.मी X बोन डीप है जिसमें ब्रेन मेटर दिख रहा है , 4 से.मी. लेफ्ट पिन्ना के, मार्जिन चार्ज है, यह वूण्ड ऑफ एक्सिट है ।
4. लेसरेटेड वूण्ड 3 से.मी. X 1 से.मी. X थू एण्ड थू लेफ्ट ऊपर होंठ पर ।
5. लेसरेटेड वूण्ड 2 से.मी. X 1 से.मी. थू एण्ड थू लोवर लीप के मिडिल पार्ट पर ।
6. ऊपर इन्साईजर टूथ मिसिंग — साकेट में ब्लड क्लॉट है ।
7. उपर इन्साईजर टूथ ढीला हो गया है ।
8. इंसाइज्ड वूण्ड 15 से.मी. X 2 से.मी. X बोन डीप वर्टिकली इंड्रा-पेराइटल रीजन पर ।
9. इंसाइज्ड वूण्ड 10 से.मी. X 1 से.मी. X बोन डीप वर्टिकली इंड्रा-पेराइटल रीजन पर ।
10. इंसाइज्ड वूण्ड 10 से.मी. X 1.5 से.मी. X 1 से. मी. ट्रांसवर्सली आक्सीपीटल रीजन के लोवर पार्ट पर ।
11. इंसाइज्ड वूण्ड 6 से.मी. X 1 से. मी. मसल डीप ट्रांसवर्सली एकदम नीचे इंजुरी नं 10 के ।
12. इंसाइज्ड वूण्ड 3 से.मी. X 1 से.मी. X 1 से. मी. स्केपुलर रीजन के लेफ्ट उपर पार्ट पर ।
13. इंसाइज्ड वूण्ड 10 से.मी. X 4 से.मी. X मसल डीप, लेफ्ट लोवर स्केपुलर रीजन पर ।
14. इंसाइज्ड वूण्ड 4 से.मी. X 1 से.मी. X 1 से. मी. राइट स्केपुलर रीजन पर ऊपर पार्ट में मिडलाईन के समीप ।

15. इंसाइज्ड वूण्ड 12 से.मी. X 4 से.मी. X 2 से. मी. वर्टिकली फोरेसिक स्पाइन के राइट साईड में ।
16. इंसाइज्ड वूण्ड 8 से.मी. X 3 से.मी. X 2 से.मी. राइट स्केपुलर रीजन पर ।
17. इंसाइज्ड वूण्ड 4 से.मी. X 1 से.मी. फोरेसिकसे एल 1 स्पाइन पर वर्टिकली ।
18. इंसाइज्ड वूण्ड 4 से.मी. X 0.5 से.मी. X 0.5 से. मी. आब्लीकली राइट स्केपुलर रीजन के नीचे ।
19. इंसाइज्ड वूण्ड 4 से.मी. X 1 से.मी. X 1 से. मी. इंजुरी नं. 18 के तीन से. मी. राइट साईड में ।
20. इंसाइज्ड वूण्ड 10 से.मी. X 3 से.मी. X 2 से. मी. लंबर स्पाइन एल 3 से एल 5 के राइट साईड में ।
21. इंसाइज्ड वूण्ड 9 से.मी. X 2 से.मी. X 1 से. मी. राइट इलियक रीजन पर ।

The doctor further opined that there were number of irregular fracture on temporal parietal and occipital bone. Brain matter was lacerated. There were two oval shaped holes connecting injury 1 to 3. He further deposed that 10th and 11th ribs of left side were broken. His opinion was that injuries No.1,2 & 3 was bullet injury, whereas injuries No.4, 5, 6, & 7 could be caused by hard and blunt object and injuries No. 8 to 21 were caused by hard and sharp object and all the injuries were antemortem in nature. His opinion was that cause of death was shock and hemorrhage as a result of multiple antemortem injuries including gunshot injury. Though, this witness has been subjected to cross-examination with regard to stage of rigor mortis in the dead body, nothing could be elicited to impeach credibility of this witness with regard to the number, nature and extent of various injury found on the dead body as also with regard to nature of death being homicidal as a result of multiple injuries including gunshot injury.

27.It would be relevant to mention at this stage that while filing charge sheet, the prosecution came out with a case that the incident of assault was witnessed by Santosh @ Dhanji, Tarkeshwar, Chandan, Girwar, Linga Raju. Except Tarkeshwar, remaining four, according to prosecution case, had submitted applications before the Judicial Magistrate Shri Ramjeevan Dewangan (PW59) for giving their statement under Section

164 Cr.P.C with regard to the incident of murder of Mahadev, whereafter, their respective 164 Cr.P.C. statements were recorded by the Magistrate. It is also part of record that, later on, Santosh @ Dhanji, who was son of Tarkeshwar, was allegedly murdered. However, out of the aforesaid so called five witnesses, learned trial Court has relied upon the testimony of Tarkeshwar (PW1) and Chandan (PW7) to record finding of guilt against present appellants. As has been referred to herein above, while dealing with the submissions made by learned counsel for the respective appellants, a common submission was made by all the counsel that evidence of Chandan (PW7) is liable to be discarded as whole or in any case is not reliable because Chandan (PW7) has not remained firm and coherent in his cross-examination. Though in his examination- in- chief, he supports prosecution case claiming to be eyewitness of the incident of murder of Mahadev by appellants by specifically naming and identifying them, when he was, later on, cross-examined, he has completely turned hostile and has not supported the case on any of the material particulars of incident, as stated in his examination- in- chief. In support of this submission learned counsel for the appellants cited number of decisions. On the other hand, the argument of learned counsel for the State has been that even if later on, Chandan (PW7) turned hostile in his cross-examination, his entire evidence is not liable to be discarded but that part of his evidence, which appears to be reliable, trustworthy and otherwise corroborated from the other evidence on record, could be acted upon to rest conviction.

Learned trial Court has relied upon testimony of Chandan (PW7) upon close scrutiny of his evidence, as has been deposed in his examination- in- chief as also in his cross-examination by recording a finding that Chandan was firstly examined by the prosecution and he truthfully disclosed the incident of murder as has been contained in FIR and various statements recorded under Section 161 and 164 Cr.P.C. of this witness. Learned trial Court has also noticed that after his examination- in- chief, his cross-examination could not continue and it was after a long time that he was cross-examined by the defence in which, he gave a different statement which appeared to be as a result of he, later on, having been won-over by the accused.

Learned trial Court sought corroboration of the statement of Chandan (PW7) from the evidence of Tarkeshwar (PW1), corroboration from 164 Cr.P.C. statement and other evidence with regard to identification, recovery and that ocular testimony is also corroborated from the medical evidence. Since this finding of learned trial Court has been assailed by referring to several decisions that his evidence is liable to be discarded as a whole, we shall first examine the legal position in this regard as has been discussed and the principles propounded in plethora of decisions cited before us by learned counsel for both the parties as also referred to in the judgment of learned trial Court.

28. In the case of **Syed Ibrahim Vs. State of A.P.** 2006 (10) SCC 601, the Supreme Court, held that the principles of *Falsus in uno, falsus in omnibus* (false in one thing, false in everything) has no application in India and the witness or witnesses cannot be branded as liar (s). The maxim *falsus in uno, falsus in omnibus* has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases, testimony may be carefully and cautiously scrutinized and not that it must be altogether discarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of the Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient, or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end.

29. In an earlier decision in **Kanbi Nanji Virji and Ors. Vs. State of Gujarat** (AIR 1970 SC 219) having come to the conclusion that right from the beginning a prosecution witness was giving a distorted version of the incident, the appellate Court is not right in holding that any portion of evidence deposed by such prosecution witness can be relied upon merely because that some portion of his testimony in Court accords with the

version given by him to another prosecution witness. It was observed that often, the Courts have to separate the truth from falsehood, but where the two are so intermingled as to make it impossible to separate them, the evidence has to be rejected in its entirety.

30. In yet another decision in the case of **Bhagwan Singh Vs. The State of Haryana** (1976) 1 SCC 389, the fact that the Court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

In the aforesaid case, on facts, the basis of corroboration of evidence of witness who otherwise was declared hostile, was found satisfied and thus relied upon.

31. Relying upon one of its earlier decision in the case of *Vadivelu Thevar Vs. The State of Madra* (AIR 1957 SC 614), in **Vithal Pundalik Zende Vs. State of Maharashtra** (AIR 2009 SC 1110), the Supreme Court discussed different categories of witnesses namely wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. It was thus held thus :

“8. In *Vadivelu Thevar v. The State of Madras* (AIR 1957 SC 614) this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under:

“11. ... Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity

of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way -- it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses.' "

32. The principles governing appreciation of a witness who has supported the case of the prosecution in examination-in-chief but has turned hostile in his cross-examination was discussed by the Supreme Court in a more recent decision in **Selvaraj alias Chinnapaiyan Vs. State** represented by Inspector of Police (2015) 2 SCC 662, as below:

"33. It is settled principle of law that benefit of reasonable doubt is required to be given to the accused only if the reasonable doubt emerges out from the evidence on record. *Merely for the reason that the witnesses have turned hostile in their cross-*

examination, the testimony in examination-in- chief cannot be outright discarded provided the same (statement in examination-in-chief supporting prosecution) is corroborated from the other evidence on record. In other words, if the court finds from the two different statements made by the same accused, only one of the two is believable, and what has been stated in the cross-examination is false, even if the witnesses have turned hostile, the conviction can be recorded believing the testimony given by such witnesses in the examination-in- chief. However, such evidence is required to be examined with great caution."

33.The important proposition of law propounded by the Supreme Court in aforesaid decision is that even when a witness has turned hostile in his cross-examination, his testimony in examination-in-chief cannot be outright discarded provided what he has stated in the examination-in-chief otherwise corroborated from other evidence on record. Their Lordships however, emphasized that such evidence is required to be examined with great caution.

34.In the case of **Sarvesh Narain Shukla Vs. Daroga Singh & Ors.** (2007) 13 SCC 360, though witness was declared hostile, it was held that an outright rejection of his evidence is not called for and both the parties are entitled to rely on such part of his evidence which assists their case.

35.Chandan Sao (PW7) is the one eyewitness whose testimony in what has been deposed by him in examination-in-chief has been heavily relied upon by the learned trial Court to hold the appellants guilty of commission of offence of murder. In his deposition before the Court, Chandan (PW7) has identified Tapan Sarkar, Mangal Singh, Prabash Singh, Satyen Madhvan, Goldi, Raju Khanjjar, Ranjeet Singh, Chhotu @ Krishna, Pitambar, Anil Shukla, Bobby @ Vidyut Choudhary, Bachcha @ Abdul Jayad, Shailendra Thakur, Bijju who are the appellants before the Court. He has stated that on 11.2.2005 at about 6 to 6:30 early in the morning, he came out from his

house and went towards Subhash Chowk, Supela where Mahadev Pahalwan, Gudda and Girwar were already standing. Upon being asked, they disclosed that they were moving towards club. He further deposes that while they were talking to each other, from the site of Kallu's house, one Champion Minidor and two bikes arrived and stopped near them and from those vehicles, appellants came out. Govind Vishwakarma approached hurling abuses and assaulted Mahadev with the help of *khukari* (dagger) on his head due to which Mahadev fell down in front of the house of Tarkeshwar (PW1). This witness further deposes that thereafter, Tapan, Sarkar, Mangal Singh, Prabhash Singh, Babby @ Vidyut Choudhary, Bachcha @ Abdul Jayad, Satyen Madhwan and Raju Khanjjar, who were holding katta, pistol ran towards Mahadev who was already lying on the ground and opened fire on him. Other accused namely Goldi, Pitambar, Chhotu @ Krishna, Mangal Singh, Anil Shukla, Bijju, Ranjeet Singh, Satyen Madhwan ran towards them who were all holding axe, club, rod, pistol along with knife used for coconut cutting, in their hands. They also opened fire and hurled abuses due to which, this witness out of fear, ran away from the spot and took shelter in the house of one Murli . He further states that he stayed in the house of Murli for about 10 minutes and then, again came back to the spot where he saw Mahadev lying in blood bath near the house of Tarkeshwar and had already died. Thereafter, police reached the spot. He deposes that he was called in the police station and inquired about the incident also and he had narrated the incident.

36.Chandan Sao (PW7) gave his evidence on 2.8.2007. No cross-examination was done on behalf of accused- Ravi Thakur, Pratap Singh, Munjeeb Khan, Farhan, Torai Pandiyan, Susheel, Bobby Bhatia, Narendra, Chumman and Shailesh Singh.

37.As far as the appellants of the present case are concerned, we find that a peculiar prayer for adjournment was made on that day before the trial Court and further cross-examination on behalf of remaining accused was deferred and on untenable ground, adjournment was not only sought but granted, as reflected from the order sheet. Separate order sheet dated 2.8.2007 recorded by the trial Court reads that if cross-examination is done

on behalf of other appellants, their defence would be disclosed. The appellants, apparently, successfully avoided cross-examination of this witness on that date. It is relevant to note that this witness Chandan (PW7) had clearly deposed in para-4 of his evidence that he had given statement before the Judicial Magistrate First Class Mr. Dewangan. The evidence of this witness remained un-impeached on that date. Having admitted that he had given statement before the Magistrate also, it is clear that on this date of examination, the witness had fully supported the prosecution case with regard to involvement of the present appellants in the alleged commission of offence.

38. Chandan (PW7) was thereafter cross-examined after more than 2 months on 11.10.2007. Upon his cross-examination done on behalf of appellant Tapan Sarkar and Satyen Madhvan, taking a somersault, he stated that prior to his detention in jail at Rajnandgaon since 1 ½ months, he was detained in Central Jail Durg. Upon being shown an application dated 12.9.2007 (Ex.D-2) purportedly written by this witness, he admits his signature and states that letter was written by an employee of Warrant Office as stated by him and he signed after reading the same and got it forwarded to the Court. Thereafter, he proceeds to admit suggestion that there was extreme pressure exerted on him by the police which continued even on that date i.e. 11.10.2007 and now he is deposing before the Court independently and voluntarily that the evidence which was given by him in the Court on 2.8.2007 was an outcome of extreme pressure and influence. The other suggestion that police had threatened him to give such statement on 2.8.2007 while he was in the lock up of the Court, has also been admitted. Another suggestion that because of such threat administered to him on 2.8.2007 by the police, he had made incorrect statement before the Court and in fact he had not witnessed the incident of murder of Mahadev and he says that he does not know who murdered Mahadev. He then deposed that next date, when he reached Subhash Chowk at about 7 – 7:30 AM he was taken to police station. He met with Tarkeshwar at Subhash Chowk and then, Tarkeshwar had disclosed that in the night, someone murdered Mahadev. He further deposed that Linga Raju and Girwar had also come and they had also gone to the police station

and informed him that in the night, someone had murdered Mahadev. He further deposed that he had not given any statement in the police station Supela but he was asked to sign document which he does not know. He further admitted suggestion that he he is always harassed by police and even now a false case has been registered against him. He further admits suggestion that after murder of Mahadev, number of false cases have been registered so that he remains in the pressure of police. He deposes that 5-7 days after murder of Mahadev, he was kept in the police station. He also admits suggestion that police had given him in writing as to what is to be deposed in the Court and had also stated that he has to make the same statement even before the Magistrate and 5-7 days thereafter, he was produced before the Magistrate. Suggestion that he was threatened to give same statement before the Magistrate as tutored by the police, failing which he would be falsely implicated or encountered, has been admitted. He finally states that the statement made before the Magistrate (statement under Section 164 Cr.P.C.) was made under pressure exerted by the police. No cross-examination was done on behalf of other appellants.

39.It would thus be clear that on 2.8.2007, this witness had deposed, fully supporting the prosecution case. Adjournment was sought on that date on most untenable ground, which, to our dismay, was granted by learned trial Court and in this manner, cross-examination on behalf of the present appellants was avoided on that date. When the matter came up for hearing after 2 months, the whole scenario had undergone change. The manner in which this witness has stated in his cross-examination on 11.10.2007, shows that there was a complete turtle because all suggestions which were given to him on behalf of the appellants were admitted that whatever he has stated in his 164 Cr.P.C. statement before the Magistrate and evidence before the Court on 2.8.2007 was an outcome of pressure exerted on him by the police and on 11.10.2007, he has given a voluntary statement that he had not seen the incident as to who murdered Mahadev.

40.He has been cross-examined by the prosecution and, though, he admits that his statement under Section 164 Cr.P.C. (Ex.P-22) dated 14.2.2005 was the same as was stated by him before the Magistrate, but then, he adds

that such statement was given under influence of the police. He was declared hostile and prosecution was permitted to cross-examine him. He states that Ex.D-2, application was written by Prahari of jail. He states that he is not possessed any document of the case and he is unable to state crime number of case in which he was detained in Rajnandgaon jail. He deposes that he was detained in a case relating to offence under Section 34 of the Excise Act as also a criminal case for alleged commission of offence under Section 307 IPC is also pending against him. Suggestion that whatever he has stated on 2.8.2007 was voluntary, has been denied and in this manner, he has completely denied all suggestion supporting prosecution case.

41.Ex. D-2, upon perusal reveals that it is not in relation to present case nor the contents of the same are that he is being pressurized to give a statement in support of the prosecution in connection with the present case. According to letter Ex.D-2 he was being pressurized by the police to give favourable statement in connection with certain special cases of 2003 in which he was to appear before the Court for deposition on 14.9.2007 in respect of one Anil Shulka and Ors. There is no reference or mention of trial of the present case bearing Special Case No.47 of 2005. In the present case, incident of murder occurred on 11.2.2005. Clearly therefore, this application had nothing to do with present case. Curiously enough, the letter itself is dated 14.9.2007 i.e. on which the case was listed for recording his evidence in the Court, whereas, his statement in the present case was already recorded on 2.8.2007. There is absolutely no detail of the date on which the police officer, by whom and the manner in which he was threatened or pressurized. According to him, he was threatened by the police in the Court lock up itself on 2.8.2007, which again is highly improbable. It is relevant to note that his statement under Section 164 Cr.P.C. was recorded before the Magistrate as early as on 17.2.2005. The statement under Section 164 Cr.P.C. fully corroborates, in all material particulars, with regard to manner in which the incident of murder of Mahadev had taken place on 11.2.2005, as deposed by this witness Chandan Sao on 2.8.2007. A perusal of his statement under Section 164 Cr.P.C. (Ex.P-22) shows that the Magistrate had explained to him that there

is no obligation on him to give statement and he may give voluntary statement. On that date also he did not make any statement before the Magistrate that he was being pressurized by the police to give such statement. Ever since that date, till the date his evidence was recorded on 2.8.2007, Chandan neither made any application before the learned trial Court in the present case nor before any other authority that his statement under Section 164 Cr.P.C. was given before the Magistrate on account of pressure exerted by the police. Chandan was duly represented by counsel and on 2.8.2007, he had deposed before the trial Court in the presence of his own counsel which is clear from the order sheet. What prevented him to even disclose at that stage that he was pressurized by the police ? He could have even stated before the trial Court that earlier statement under Section 164 Cr.P.C. before the Magistrate, was given under the compulsion of police. Importantly this witness has not stated as to what change in the circumstance took place that the so called pressure on him, exerted by the police, was suddenly removed and he came in a position to make voluntary statement. Therefore, the only logical inference which could be drawn is that Chandan, later on, appears to have been won-over rather than it being a case of he deposing before the Court on 2.8.2007, under the pressure exerted by the police.

42.As we have noted in earlier parts of this judgment, relying upon some of the decisions of the Supreme Court ,even if a witness has turned hostile in his cross-examination his evidence is not liable to be discarded as a whole but still it is open for the Court to rely upon the evidence led by the witness in his examination-in-chief. Moreover, the decision referred to above, also lay down principles of appreciation that in such situation, the Court has to carefully and cautiously evaluate the evidence and find out which version appears to be reliable and also to look after corroboration, if necessary. Similar situation arose in number of cases where the Supreme Court, after minute scrutiny of the evidence of the prosecution witnesses, as stated by him in his examination- in- chief, relied upon to hold the accused guilty, notwithstanding that in the cross-examination, the witness had completely turned hostile. We find that the learned trial Court has very elaborately discussed this aspect referring to number of decision of the

Supreme Court. Some of which we also consider apposite to mention in our judgment.

43. In the case of **Vinod Kumar Vs. State of Punjab** (2015) 3 SCC 220, the Supreme Court, faced with similar situation where one of the prosecution witnesses, though having supported the prosecution in his examination-in-chief, totally resiled in his cross-examination, an argument was raised that his evidence is liable to be discarded in toto. It was held as below:-

“31. The next aspect which requires to be adverted to is whether testimony of a hostile evidence that has come on record should be relied upon or not. Mr. Jain, learned senior counsel for the appellant would contend that as PW-7 has totally resiled in his cross-examination, his evidence is to be discarded in toto. On a perusal of the testimony of the said witness, it is evincible that in examination-in-chief, he has supported the prosecution story in entirety and in the cross-examination he has taken the path of prevarication. In *Bhagwan Singh V. State of Haryana*²⁴, it has been laid down that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. In *Khuji @ Surendra Tiwari V. State of Madhya Pradesh*, the Court after referring to the authorities in *Bhagwan Singh (supra)*, *Rabindra Kumar Dey V. State of Orissa*²⁶ and *Syad Akbar V. State of Karnataka*²⁷, opined that the evidence of such a witness cannot be effaced or washed off the record altogether, but the same can be accepted to the extent it is found to be dependable on a careful scrutiny thereof.”

In the later paragraph of aforesaid judgment, while dealing with specifically with the evidence of eyewitness who had completely resiled from statement, in his cross-examination, appreciation had taken place in following manner :-

“53. Reading the evidence in entirety, his evidence cannot be brushed aside. The delay in cross-examination has resulted in his pre-varication from the examination-in-chief. But, a significant one, his examination-in-chief and the re-examination impels us to accept the testimony that he had gone into the octroi post and had witnessed about the demand and acceptance of money by the accused. In his cross-examination he has stated that he had not gone with Baj Singh to the vigilance department at any time and no recovery was made in his presence. The said part of the testimony, in our considered view, does not commend acceptance in the backdrop of entire evidence in examination-in-chief and the re-examination.”

On facts, in view of what was stated by the witness in his re-examination impelled the Court to rely upon his evidence notwithstanding that in his examination, he had completely resiled.

Further, the Court also looked for corroboration as below:-

“54. The evidence of PW6 and PW7 have got corroboration from PW8. He in all material particulars has stated about the recovery and proven the necessary documents pertaining to the test carried with phenolphthalein powder. The fact remains that the appellant's pocket contained phenolphthalein smeared currency notes when he was searched. It is apt to take note of the fact that the currency notes that have been recovered from the right side of the pant pocket were actually

prepared by PW8 by smearing them with phenolphthalein powder.”

44. Finally, the Supreme Court while recording conclusion relied upon the testimony of aforesaid witness also.

45. In the case of **Yakub Ismailbhai Patel Vs. State of Gujarat** (AIR 2004 SC 4209) dealing with similar case where the witness had resiled from the statement by filing an affidavit that whatever was stated earlier before the Court was not true and it was done at the instance of the police, the Supreme Court held as below:-

“37. The testimony of PW-2, in our view, is wholly believable and worthy of inspiring confidence but is also sufficient by itself to prove the case against the appellant and that the credibility of this witness has not been impaired in the cross-examination by the appellant. This witness has stuck to his police statement and the subsequent examination in chief in Court where he identified the appellant accused as well as the co-accused as the assailants of the deceased. This deposition, in our view, proved the intention of the accused to cause the death of the deceased inasmuch as he deposes that the assault was directed at the neck of the deceased. It is also not the case of the appellant that this witness was inimical to the appellant or that there was a reason for PW-2 to implicate the appellants falsely. The factum of his friendship with the deceased does not reduce PW-2 to the position of being an interested witness.

40. Significantly this witness, later on filed an affidavit, wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.

41. The averments in the affidavit are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there.

46. In another case of **Akil alias Javed Vs. State of NCT of Delhi** (2013 CRI.L.J. 571), the witness was examined and, thereafter, his cross-examination was done after about 2 months. When the witness turned hostile, even then, reliable part of the evidence of that witness as stated in examination-in-chief, was relied upon.

47. In the case of **Vimal Kumar and Anr. Vs. State of Chhattisgarh and Anr.** (2013 CRI.L.J. 381) also, the witness who had initially supported the prosecution case and then in cross-examination resiled, his entire evidence was not discarded but it was partly accepted as reliable piece of evidence.

48. As has already been referred to hereinabove, Chandan Sao (PW7) had appeared before the Magistrate during investigation and gave a statement (Ex.P-22) which was recorded under Section 164 Cr.P.C. before the Magistrate. The statement (Ex.P-22) was recorded on 17.2.2005. Separate order sheet recorded and signed by the Magistrate on 17.2.2005 (Ex.P-21) reveals that before recording statement, the Magistrate clearly apprised Chandan Sao that he was not bound to give any statement and that statement could be used against him but even then Chandan was prepared to give statement and statement was recorded by the Magistrate and only the Steno was present when the statement was recorded. A perusal of this statement reveals that it fully corroborates in all material particulars, what has been stated by Chandan Sao (PW7) in his examination-in-chief before the Court. It is well settled legal position that a Statement under Section

164 Cr.P.C. could be used to corroborate the witness as provided under Section 157 of the Evidence Act or to contradict him as provided in Section 155 of the Evidence Act (Please see *Ramprasad Vs. State of Maharashtra* 1999 CRILJ 2889 SC). However, 164 Cr.P.C. statement of Chandan Sao (PW7), provides corroboration in respect of appellants Mangal Singh, Tapan Sarkar, Raju Khanjjar, Satyen Madhvan, Prabhash Singh, Bachcha @ Abdul Zayad, Bobby @ Vidyut Chaudhary and Anil Shukla.

49. The other important witness of the prosecution is Tarkeshwar (PW1) who was examined by the trial Court on 27.4.2006 and on that date, the cross-examination was also completed. He deposes that on 11.2.2005, he had gone for morning walk. He states that he goes for morning walk every day and stays around Subhash Chowk . On that day, Mahadev, Girwar, Gudda, Chandan were standing at Subhash Chowk and Mahadev extended wish. At that time, he saw that Prabhash Singh, Mangal Singh, Tapan, Satyen, Gullu Shrivastava, Govind, Beni and Bachcha and about 8-10 persons arrived in small tempo like vehicle and motorcycle and started hurling abuses to Mahadev and thereafter, Govind struck on the head of Mahadev with the help of *kataar* (dagger). Mahadev fell down and then Tapan, Satyen, Mangal fired from their pistol. When he requested them not to assault, Tapan threatened him with pistol. Girwar, Linga Raju, Chandan all ran away from spot and then police arrived, before which, appellants had ran away. He deposes that, later on, Linga Raju, Girwar, Santosh and Chandan came back on the spot. He deposed that he had given statement before the police. He is one of the witness of inquest over dead body. He is also witness of recovery of empty cartridge of pistol recovered from the spot. He has been subjected to detailed cross-examination on behalf of the appellant Bachcha @ Asraf @ Jayad. He has stated that those who were standing with Mahadev ran away before the firing started. He has been given suggestion which has been admitted that he had seen a pistol in hands of Tapan, Mangal, Satyen and Prabhash who assaulted Mahadev and then Tapan had threatened him on gun point.

This witness was further cross-examined by the counsel on behalf of Vidut, Pitambar, Chhotu @ Krishna, Satyen, Prabhash, Tapan, J.J. Rao, Jaspal @ Goldi, Rajjan Miyan, Sanjay Singh, Mangal Singh, Bijju @ Mahesh, Raju

Khanjjar, Santosh Sahu, Shailesh Singh, S. Senthil and Pankaj Singh and some minor omissions from his diary statement (Ex.D-1) as elicited in para-24 of his evidence have come out which do not impeach credibility of this witness on material particulars with regard to what was stated by him regarding the persons who had arrived and their criminal overt act. No cross-examination was done on behalf of accused- Ranjeet, Bobby Bhatia, Sushil Rathi, Shailendra Thakur, Ravi Thakur, Pratap Singh, Vinod Kumar Singh, Farhan Khan, Munjeeb Khan, Torai Pandin, Narendra Dubey and Anil Shukla.

50. Two accused Jaydeep and Arvind Shukla @ Gullu who remained absconding were, later on, arrested after evidence of Tarkeshwar (PW1). After their arrest, Tarkeshwar was again examined on 1.8.2008 i.e. after about 2 years of his earlier statement. At this juncture, while stating that he does not know Jaydeep and Gullu Shrivastava also admitted on suggestion that he had not witnessed the incident of murder of Mahadev and that when he returned from morning walk at 7:00 AM, he saw the dead body of appellant- Mahadev lying in front of his house. He has been given number of suggestion which has been admitted that his evidence before the Court recorded on 27.4.2006 was under police pressure. He has stated that his son Santosh was murdered and at that time, he was pressurized by the police that if he does not support prosecution case, the murder case of his son would be spoiled and he would be arrested. At this stage, he also went to the extent of making allegation against one police officer Rajeev Sharma, In-Charge of Crime Branch that on his pressure, he had given evidence in support of prosecution on 27.4.2006 and on that date, when he was making statement, Rajeev Sharma was standing outside the Court. When he questioned whether he was brought by Rajeev, he fumbled saying that he was not with him but might have followed him before or after. He was then declared hostile by the prosecution and cross-examined by the Prosecutor. It has been elicited that he was making contradictory statement as to how he reached the Court. Importantly, it is also elicited that in connection with trial relating to murder of his son Dhanji, he had given statement which was not under police pressure and voluntarily.

51. We find that learned trial Court has meticulously scrutinized the evidence of this witness and what was stated by him on 27.4.2006 has been relied upon placing reliance upon Supreme Court's decision in **Mishrilal & Ors. Vs. State of M.P. & Ors.** (2005 AIR SCW 2770) that once Tarkeshwar (PW1) was examined and cross-examined on 27.4.2006, his subsequent cross-examination on 1.8.2008 could be used only for the purpose of assessing evidence in respect of Arvind Shrivastava @ Gullu and Jaideep Singh. Learned trial Court has also relied upon his testimony for many other reasons because the place of incident where Mahadev was assaulted and murdered is just in front of his house and he is a natural witness. Learned trial Court has also taken into consideration that the case diary statement (Ex.D-1) of Tarkeshwar was taken by the police on the very next day of the incident i.e. 12.2.2005 and no material contradiction and omission could be elicited from his diary statement.

52. The subsequent statement of Tarkeshwar (PW1) before the Court after about 2 years of his statement dated 27.4.2006, stating for the first time that earlier statement was given under the pressure exerted by police officer Rajeev Sharma, In-charge Crime Branch, has been disbelieved by learned trial Court for cogent reasons. It was held that this witness never made any complaint in any fora during the period from 27.4.2006 to 1.8.2008. Learned trial Court has also taken into consideration that even according to Tarkeshwar, his son Santosh was murdered on 2.3.2005 and the charge sheet must have been submitted before his evidence on 27.4.2006 and, therefore, it does not appeal to reason how Rajesh Sharma, In-charge Crime Branch would spoil his son's case. Learned trial Court has also taken into consideration that even though, Tarkeshwar (PW1) is possessed of twelve-bore gun, he had applied for grant of licence of a revolver also and in his evidence [Ex.P-144 (c)], given before the City Magistrate in connection with application for grant of revolver licence also, he has stated that as he is the main witness in Mahadev's murder case, therefore, he and his family is often threatened by Tapan and his group and therefore, he needs revolver licence for holding revolver for himself and his family. This is an additional circumstance why the learned trial Court disbelieved the statement of Tarkeshwar that because of the pressure

exerted on him by the police he had given evidence to support the case of the prosecution on 27.4.2006. Learned trial Court has also taken into consideration that in connection with investigation of the present case Rajeev Sharma (PW71) has only effected seizure of a Qualis Vehicle from Tapan Sarkar and nothing more. Learned trial Court also noticed that when Tarkeshwar (PW1) was being examined on 27.4.2006, no suggestion was given to him that he is making false statement on account of any threat administered by police that if he does not support the prosecution case, murder case of his son would be spoiled.

In view of above consideration, the finding of learned trial Court that the evidence of Tarkeshwar (PW1) recorded on 27.4.2006 is reliable does not warrant any interference. Thus, the evidence of this witness who involves Prabhash Singh, Mangal Singh, Tapan Sarkar, Satyen Madhvan, Bobby @ Vidyut Chaudhary and Bachcha @ Abdul Zayad in the alleged commission of offence also provides corroboration to what was stated by Chandan Sao (PW7), involving aforesaid appellants.

53. The learned trial Court convicted the appellants relying upon the eyewitness account of the incident as stated by Chandan Sao (PW7) as also Tarkeshwar (PW1). Though, the prosecution had cited many other witnesses as eyewitnesses but they did not support the case of the prosecution and turned hostile, the details of which have already been given hereinabove. The prosecution, in order to corroborate the testimony of eyewitnesses, came out with the evidence of identification of some of the accused persons, recording of memoranda and recovery of incriminating articles including weapons, vehicles said to be used in commission of offence. Further, in order to lay credence to the prosecution case regarding involvement of appellants Tapan Sarkar, Satyen Madhavan, Prabhash Singh and Mangal Singh that they all arrived at the spot and fired gunshot by using firearms, evidence of recovery of firearms from these persons and examination of these firearms by ballistic expert has also been led before the trial Court. We, therefore, proceed to examine the aforesaid corroborative evidence in relation to each of the appellant and the correctness and validity of finding of learned trial Court in that regard.

54. Shivkumar Tiwari (PW57) the then Tahsildar has stated regarding conducting of identification parade on 30.5.2005 at Sub-Jail Balodabazar and has proved the documents of identification (Ex.P-16 and Ex.P-28). According to this witness, in test identification parade, Prashant Sharma @ Gudda @ Santosh Sharma identified appellants- Pitambar and Chhotu @ Krishna. However, Prashant Sharma @ Gudda @ Santosh Sharma (PW8) have not supported the prosecution case with regard to identification of these two appellants, though, he states that he was taken to jail at Baloda-Bazar and Raipur for identification and has also admitted his signature in test identification proceedings (Ex.P-16).

55. Though Shiv Kumar Tiwari (PW57) has also deposed regarding identification proceedings of the aforesaid two appellants Pitambar and Chhotu @ Krishna being carried out and proceedings recorded vide Ex.P-28, according to him, in this identification, Girwar (PW9) had identified Pitambar and Chhotu @ Krishna. However, Girwar (PW9) in his evidence has not supported the case of the prosecution, though, he admits that he was taken to Baloda-Bazar jail for identification and has proved his signature in identification proceedings (Ex.P-28). It is relevant to note that these two witnesses Girwar Sahu (PW9) and Prashant Sharma @ Gudda @ Santosh Sharma both were cited by the prosecution as eyewitnesses of the incident but they have turned hostile and have not supported the case of the prosecution. They were also the witnesses of identification of appellants Pitambar and Chhotu @ Krishna, but they have turned hostile and have not supported identification of Pitambar and Chhotu @ Krishna and, therefore, the test identification proceedings cannot be used as corroborative evidence in so far as involvement of appellants -Pitambar and Chhotu @ Krishna is concerned. The evidence of the two identifying witnesses, Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar (PW9), therefore, cannot be relied upon when they themselves have not supported the case of the prosecution and turned hostile. It is not a case where the aforesaid two eyewitnesses have stated regarding they being eyewitness of the incident and there is some minor defect in the identification proceedings. Therefore, the evidence of test identification parade in respect

of Pitambar and Chhotu @ Krishna cannot be used as corroborative evidence to involve the two appellants Pitambar and Chhotu @ Krishna. We find that the learned trial Court has treated the identification evidence of Pitambar and Chhotu @ Krishna as corroborating Court statement of Chandan (PW7). If the corroborative evidence itself is doubtful because the identifying witnesses themselves have turned hostile and not claimed to have seen the incident or identified these two appellants, such defective evidence could not be used as corroborative evidence. The finding of learned trial Court in this regard therefore is not legal and proper.

56. Test identification proceedings in respect of appellant Mahesh @ Bijju is also not supported from the evidence of Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar (PW9). Though, the test identification parade of Mahesh @ Bijju was conducted by one S.R. Mandavi, Nayab Tahsildar who is stated to have prepared proceedings in Ex.P-123, the said witness could not be examined as he died. It is Shiv Kumar Tiwari (PW57), the other Executive Magistrate who had conducted test identification proceedings of Pitambar and Chhotu @ Krishna, has proved signature of late S.R. Mandavi in proceedings (Ex.P-123). Therefore, once the evidence of test identification parade of Mahesh @ Bijju is not found reliable because it could neither be proved by the Executive Magistrate who conducted it nor supported by the evidence of Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar (PW9) who are said to have identified Mahesh @ Bijju, the evidence of identification in respect of Mahesh @ Bijju cannot be used as corroborative evidence in support of eyewitness testimony given by Chandan Sao (PW7). The learned trial Court has also not recorded any categorical finding in this regard but it has been held that it is only corroborative piece of evidence.

57. As far as identification of appellant- Shailendra Thakur is concerned, Yamini Pandey (PW52), Tahsildar, deposes that she had carried out identification proceedings in respect of identification of Shailendra Thakur on 8.11.2015 and he was identified by Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar Sahu (PW9) and has proved identification proceedings conducted by her in Ex.P-17 and further that it was signed by both Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar Sahu (PW9).

However, in respect of this appellant also, both identifying witnesses namely Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar Sahu (PW9) have turned hostile. Though they say that they were taken to jail for the purpose of identification but they denied having identified Shailendra Thakur and identification proceedings. Therefore, only on the basis of evidence of Yamini Pandey (PW52), it cannot be held that the appellant- Shailendra Thakur was identified as one of the appellants by two eyewitnesses Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar Sahu (PW9). We have already observed herein-above that Prashant Sharma @ Gudda @ Santosh Sharma (PW8) and Girwar Sahu (PW9) have otherwise turned hostile and not supported the case of prosecution and therefore not proved to be eyewitness of the incident. The evidentiary value of the test identification parade not only of Shailendra Thakur but also of Mahesh @ Bijju, Pitambar and Chhotu @ Krishna loses its significance and the test identification evidence cannot be used as corroborative evidence in so far as appellant- Pitambar, Chhotu @ Krishna, Mahesh @ Bijju and Shailendra Thakur are concerned.

58. We shall now examine the evidence on record to find out whether the prosecution has proved recovery of incriminating articles and weapon from the appellants so as to corroborate the evidence of Chandan (PW7) and Tarkeshwar (PW1) with regard to involvement of the appellants in the alleged commission of offence.

59. From appellant Mahesh @ Bijju, one iron dagger has been seized by the Investigating Officer vide Ex.P-114 based on memorandum in Ex.P-113. Apart from the evidence of Investigating Officer Rakesh Bhatt (PW77), the seizure witness Dhiraj Sharma (PW45) has also supported recording of memorandum and seizure of dagger, but there is no FSL/serological report that it was stained with blood/human blood/blood of the group and origin of that of the deceased Mahadev.

60. On the basis of memorandum of Shailendra Thakur given in Ex.P-42, taken by the Investigating Officer R.K. Rai (PW76), an iron *katta* 303 bore, another iron katta 303 bore, two buttoned knives, 9 live cartridges of 303 bore are stated to have been recovered from his house in respect of which, seizure

memorandum in Ex.P-43 was prepared. Apart from the evidence of Investigating Officer R.K. Rai (Ex.P-76), Arun Kumar Nirmalkar (PW54), independent witnesses has supported the prosecution case of seizure of aforesaid articles from the house of Shailendra Thakur. However, it has been argued that this very witness, in another Criminal Case No.538 of 2008 also appeared as seizure witness in respect of seizure memorandum (Ex.D4 and Ex.D-5) of that case and has given statement in Ex.D-3 that he had not gone to the house of appellant Shailendra Thakur nor he knows the location or that he had seen any revolver.

On this aspect, the learned trial Court has concluded that as the evidence of this witness Arun Kumar Nirmalkar (PW54), in so far as recovery made in connection with present criminal case is concerned, has fully supported the prosecution case, only on the ground that in another criminal case, he did not support recovery of certain articles from the house of Shailendra Thakur, his evidence cannot be disbelieved.

On the above issue, firstly it has to be noted that the settled legal position as evolved in plethora of decisions of the Supreme Court and other Courts is that there is no requirement of law that in every case, seizure of any article must necessarily be supported by all independent witnesses of seizure and where it is not so supported, the evidence of Investigating Officer with regard to seizure should be discarded, irrespective of all other circumstances brought on record by the prosecution. It has been succinctly held that even though, the independent witnesses may not have supported the prosecution case of seizure of any article, even then the Court may rely upon reliable testimony of investigating officer to hold seizure proved. Learned trial Court, in this regard, has analyzed the evidence by applying correct legal position, noted by it in para-126 of its judgment wherein it has referred to the Supreme Court decision that merely because the eyewitness have turned hostile, is no ground to reject the evidence, if the same is based on testimony of Investigating Officer alone. Therefore, the evidence of Investigating Officer R.K. Rai (PW76) could be relied upon, if at all, there was some doubt on the evidence of Arun Kumar Nirmalkar (PW54), who otherwise has clearly stated regarding seizure of articles from the house of

Shailendra Thakur.

61. From appellant Tapan Sarkar, on the basis of his memorandum (Ex.P-51), a 315 bore katta, live cartridge is stated to have been recovered and seized vide seizure memorandum (Ex.P-55). From Tapan Sarkar, a shirt, jeans pant, a motorcycle is also said to have been recovered. The two seizure memoranda are Ex.P-55 & Ex.-56. The prosecution examined independent witnesses namely Ganesh Kumar Devdas (PW17). Though he admits his signature in the memorandum and seizure documents, but denies that the memorandum was given in his presence or any recovery was made in his presence. Learned trial Court has recorded that this witness had not made any complaint to the higher police officer that the police had threatened and obtained his signature on certain documents. Thus, seizure of firearm and live cartridge from the house of Tapan Sarkar is proved from the evidence of the Investigating Officer.

62. From appellant Satyen Madhwan, on the basis of his memorandum (Ex.P-71) recorded by second Investigating Officer Rakesh Bhat (PW77), a deshi katta 315 bore, a fired cartridge fixed (empty), stuck in the barrel is stated to have been recovered from a place near pole situated in under-bridge vide seizure memorandum Ex.P-72. Seizure of motorcycle and a mobile phone (Samsung) seized vide Ex.P-73 from Satyen has also been proved by the Investigating Officer Rakesh Bhatt (PW77). During the course of trial, the katta and mobile which was produced in Article- "A" and empty cartridge in Article "C-3" has also been identified by this witness. Learned trial Court has taken into consideration that a dispute with regard to identity was raised on the basis that according to this Investigating Officer, bullet and empty cartridge were seized in one packet but in the Court, two different packets were received which has been explained by the witness that he had prepared one packet but after examination by experts it has been returned in two packets. An objection of the defence that no specific identification marks were made on the articles so as to form basis for identification and therefore, the identification by the Investigating Officer itself is doubtful. Learned trial Court has recorded a finding that the officer who has identified is an experienced and senior police officer and

therefore, his identification could not be doubted. Challenge to the reliability of this recovery on the ground that there was a gap of more than 18 days in taking memorandum and making recovery for which, no explanation has been offered, has been repelled by learned trial Court on the ground that no question was put to this witness as to why delay had occurred and therefore, it cannot be said that though, witness was asked to explain but failed to explain delay of 18 days and therefore, on that ground the testimony of Investigating Officer is not liable to be rejected. Further the argument that it was found in an open place also has been rejected, firstly on the ground that it has been recovered from a place stated in the memorandum of Satyen Madhvan from a particular location near under-bridge and secondly, that such recovery could not be doubted only on the ground that it has been made from open place relying upon Supreme Court decision in 2010 LAWS (SC) 1094.

63. From appellant Prabhash Singh, on the basis of his memorandum Ex.P-50 , a 315 bore katta and empty cartridge is said to have been recovered vide Ex.P-54. A motorcycle has also been seized vide Ex.P-53. The independent witness of memorandum (Ex.P-50) and seizure memorandum (Ex.P-5 and Ex P-54) namely Ganesh (PW17) and Ishwarlal Gendre (PW41) have not supported the recovery, though, have admitted their signature on all the documents. Relying upon settled legal position, as laid down in [2010 LAWS SC \(1094\)](#), learned trial Court, relying upon reliable testimony of Investigating Officer R.K. Rai (PW76), has found seizure of the aforesaid articles from Prabhash, as proved.

64. From appellant Mangal Singh, on the basis of his memorandum in Ex.P-111, a 9 MM pistol, 9 MM cartridge were stated to have been recovered from his house and seized vide Ex.P-112. Memorandum was prepared by the Investigating Officer R. K. Rai (PW76) who has proved recording of memorandum. Seizure was effected by Rakesh Bhatt (PW77) who, in his evidence, has proved that on the basis of memorandum, from the house of Mangal Singh, aforesaid articles were recovered in presence of witnesses. One of the seizure witnesses, Dhiraj Sharma (PW45) has supported the prosecution case regarding recovery of aforesaid firearms and cartridge

from the house of Prabhash Singh.

65. From appellant Raju Khanjjar, on the basis of his memorandum (Ex.P-44), an iron dagger is stated to have been recovered and seized vide Ex.P-45 from his house.

From appellant- Chhotu @ Krishina on the basis of his memorandum Ex.P-100 , an iron dagger is stated to have been seized vide Ex.P-103.

From appellant- Pitambar on the basis of his memorandum Ex.P-101, an iron dagger in Ex.P-104 is stated to have been recovered from his house.

From appellant Vidyut Chaudhary, on the basis of his memorandum Ex.P-58, an iron khukri (dagger) is said to have been recovered and seized in Ex.P-40 from his house.

From appellant Bachcha @ Abdul Zayad @ Ashraf, on the basis of his memorandum Ex.P-116 ,a buttoned knife stated to have been recovered and seized from his house vide Ex.P-117.

66. While in all cases, where memorandum has been recorded and on the basis of said memorandum, recovery of various articles from different appellants have been made, barring in few cases, in most of the cases, the independent witness having admitted their signatures in the document of memorandum of recovery/seizure, have not supported prosecution case. But then, it is found that in all those cases, learned trial Court, relying upon settled legal position, upon due scrutiny of evidence of investigating officer has held the seizure of various articles proved from the appellants. Except seizure in case of Satyen Madhvan , in all other cases, seizure has been made from the house of respective appellants, as deposed by the Investigating Officer of the case.

67. In the present case, prosecution evidence proves seizure of firearms from as many as five appellants namely Tapan Sarkar, Mangal Singh, Satyen Madhvan, Shailendra Thakur and Prabhash Singh. From all other accused, weapons not being firearms, are stated to have been seized.

68. On behalf of appellant- Tapan Sarkar and other accused named above,

from whom, firearm is said to have been recovered, seized and in respect of which ballistic report has been obtained, a serious doubt has been raised on reliability of the evidence of ballistic expert in respect of those firearms which were examined by the ballistic expert, on the submission that prosecution has failed to prove proper sealing, safe custody and authorized carriage of these weapons/firearms to the FSL and ballistic expert. In this regard, learned senior counsel relied upon number of decisions wherein it has been clearly propounded by the Supreme Court that in case where the prosecution has failed to come out with reliable evidence with regard to proper sealing, safe custody and authorized carriage from the stage of seizure up to the stage of examination by FSL/Ballistic Expert, the evidence of ballistic expert could not be made a basis to establish that it is the weapon seized from the accused which was examined by the ballistic expert, because serious doubt is created whether it was the same weapon which was seized from the accused that was examined by the ballistic expert.

There can be no quarrel with the settled legal position as adumbrated in various decisions cited by learned senior counsel that when the prosecution is lacking in reliable evidence with regard to proper sealing, safe custody, authorized carriage and specimen sealing from the spot of seizure up to the stage of examination by the ballistic expert, a doubt would be created. In its finding recorded in para 111 to para 132, dealing with the seizure of firearms from Tapan Sarkar, Satyen Madhvan, Prabhash Singh, Mangal Singh, Shailendra Thakur, learned trial Court has relied upon the evidence of Investigating Officer to hold seizure of firearms proved from those accused/appellants. In para-136 of its judgment, the learned trial Court has held that the prosecution has failed to lay specific evidence as to where the seized articles were kept until they were sent for examination, after scrutiny of the evidence of both R.K. Rai (PW76) and Rakesh Bhatt (PW77). But the learned trial Court has held that seizure memorandum in all the cases there is mention of this fact that seized articles were sealed. Learned trial Court has also taken into consideration that in Ex.P-212 and ExP-218 of the FSL, there is mention of receipt of 11 packets containing 15 articles on 17.8.2005 which were bearing seal of the

hospital and police station. Learned trial Court has also recorded a finding that Investigating Officer R.K. Rai (PW76) has stated in his evidence regarding sending of Articles A to G to Central FSL Chandigarh vide Ex.P-213 with a letter of authority Ex.P-214 and further, that the Scientist, CFSL Chandigarh Dr. P. Siddambari (PW63) has deposed regarding receipt of articles in sealed condition along with sample seal with covering letter in Ex.P-134 A. Learned trial Court has also taken into consideration the evidence of Scientist Dr. P. Siddambari that Articles are received for examination only along with sample seal and has proved the receipt of letter Ex.P-134 A-B and Ex.P-134- A-B-C and this witness has proved those sample seal in Ex.P-134, Ex.P-134 A-B, Ex.P-134 C, Ex.P-135 B and Ex.P-135 B/C.

69. After going through the relevant evidence of Investigating Officer, various seizure memo which have been referred to above, receipt memo of State FSL, Central FSL and the evidence of Scientist, CFSL Dr. P. Siddambari (PW63) it is found that when various seizure were made during investigation by the Investigating Officer in the present case, there is mention in the seizure memorandum that Articles, which included firearms were also sealed. The forwarding memorandum of sending these Articles to different laboratories also contained the fact of sealing. The records of the concerned laboratory whether it be State FSL or Central FSL, it also find mention of receipt of various Articles for examination in sealed condition along with sample seal. There is no evidence to show that the seals were found tampered with.

70. The ballistic report has been prepared by Dr. P. Siddambari (PW63) Scientist in CFSL Chandigarh, as deposed by him. In his evidence, he has stated regarding his qualification, expertise, experience in examination of firearms cartridge etc. Ballistic report prepared by this witness in Ex.P-134 and P-135 has been proved by this witness in the Court. Relevant part of the report in Ex.P-134 is as below :

“i- The country-made pistols marked “A/1”, “A/2” and “A/3” were test fired and found in working order and capable of firing . 315”/8MM and .303” rifle cartridges.

ii- On thorough examination and comparison of individual characteristic marks present on the crime and test fired cartridge cases under the Comparison Microscope, I came to the conclusion that the .315"/8 MM rifle cartridge case marked "C/1" had been fired through the country made pistol marked "A/3" and it could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

iii- On thorough examination and comparison of individual characteristic marks present on the crime and test fired cartridge cases and bullets under the comparison Microscope, I came to the conclusion that the .315"/8MM rifle cartridge case marked "C/3" and the marked .315"/8MM rifle bullet marked "B/1" had been fired through the country made pistol marked "A/1" and they could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

iv. On thorough examination and comparison of individual characteristic marks present on the crime and test fired cartridge cases and bullets under the comparison Microscope, I came to the conclusion that the .315"/8MM rifle cartridge case marked "C/4" and the marked .315"/8MM rifle bullet marked "B/2" had been fired through the country-made pistol marked "A/2" and they could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

v. It could not be possible to form a definite opinion regarding the linkage of the crime .315"/8MM rifle bullet "B/3" with respect to the country made pistols

marked "A/1", "A/2" and "A/3" due to lack of sufficient individual characteristic marks.

vi. The holes present on skin pieces under reference could have been caused by firing within the close range.

vii. The 9 MM pistol cartridge marked "L/1" and the .315"/8MM rifle cartridge marked "L/2" wire test fired and found to be live."

71. Similarly, the content of the report in Ex.P-135 prepared by Dr. P. Siddambari (PW63) upon examination of the various Articles is as below :-

"i- The pistol marked "A/4" was test fired and found in working order and capable of firing 9 MM pistol cartridges.

ii. The country made pistols marked "A/5" and "A-6" were test fired and found in working order and capable of firing .303" rifle cartridges.

iii. It could not be possible to form a definite opinion regarding the linkage of the 9 mm pistol cartridge case marked "C/2" with respect to the pistol marked "A/4" due to lack of sufficient individual characteristic marks.

iv. On thorough examination and comparison of individual characteristic marks present of the crime and test fired cartridge cases under the Comparison Microscope, I came to the conclusion that the 9 mm pistol cartridge case marked "C/5" had been fired through the pistol marked "A/4" and it could have not been fired through any other firearm because every firearm has its own individual characteristic marks.

v. On thorough examination and comparison of individual characteristic marks present on the crime

and test fired cartridge cases under the Comparison Microscope, I came to the conclusion that the firing pin impression of .303" rifle cartridge case marked "C/6" does not tally with the firing pin impression of the test fired cartridge cases fired through the country-made pistols marked "A/1", "A/2", "A/3", "A/5" and "A/6".

vi. The three .303" rifle cartridges marked "L/3" to "L/5" were found misfired. The six .303 " rifle cartridges marked "L/6" to "L/11" were test fired and found to be live"

72. Upon comparison of the firearms seized from different appellants which were examined by the ballistic expert and report prepared, following facts are found proved:

(A) Fired empty cartridge "C/1" was fired from katta "A/3" seized from appellant Tapan Sarkar. Fired empty cartridge "C/1" was seized from the place of incident as per the evidence of Investigating Officer.

(B) Fired bullet "B/1" was fired from katta "A/1" seized from appellant Satyen Madhvan which also matches with stuck empty cartridge "C/3".

(C) Fired bullet "B/2" seized from spot of incident was fired from katta "A/2" seized from Prabhash Singh and fired empty cartridge "C/4" also matches with the said katta "A/2" and fired bullet "B/2". Specific report has been given by the Ballistic Expert that the bullet was fired from the same cartridge and weapon and not from any other weapon.

73. The revolver seized from Mangal Singh and two revolvers cartridges seized from Shailendra Thakur were capable of being fired.

74. It is thus found that while the prosecution has not clearly come out with regard to safe custody of firearms and clear evidence of proper sealing along with sample sealing, various memorandum sent by the Investigating Officer to FSL contained endorsement of articles kept in sealed condition,

records of the State FSL and Central FSL contained endorsement of articles received in sealed condition along with sample seal without there being any observation of seal broken.

75. Learned senior counsel appearing for appellant Tapan Sarkar has placed reliance upon five decisions namely **Amarjit Singh alias Babbu Vs. State of Punjab** 1995 Supp (3) SCC 217, **The State of Rajasthan Vs. Daulat Ram** (AIR 1980 SC 1314), **Valsala Vs. State of Kerala** (AIR 1994 SC 117), **Santa Singh Vs. State of Punjab** (AIR 1956 SC 526), **Mohd. Aman and Anr. Vs. State of Rajasthan** (AIR 1997 SC 2960) to buttress his submission that in the absence of clear evidence, proper sealing, safe custody authorized transit handover and receipt, prosecution has failed to prove beyond reasonable doubt, that it was the same revolver, pistol cartridge, empty cartridge, bullet, live cartridge seized from the clothes of the deceased, spot and appellant Tapan Sarkar and other accused which was handed over in sealed condition in FSL and therefore, the FSL report/ballistic report could not be attributed to the aforesaid articles said to have been seized from the possession of appellant – Tapan . Though ,he appeared for one of the appellant- Tapan Sarkar, he has argued that on this legal aspect, the other appellants namely Satyen Madhvan, Prabhash and Shailendra from whom also firearms, empty cartridge, live cartridge is said to have been seized, could not be convicted on this basis only. He also draws attention of this Court to the suggestion given to Investigating Officer, which has been denied, that various firearms and other articles seized for ballistic examination were changed.

76. The aforesaid legal submission requires serious consideration because firearms, empty cartridge, bullet, live cartridges, allegedly stated to have been seized by the two Investigating Officer R.K. Rai (PW76) and Rakesh Bhatt (PW77) were sent and ballistic expert report was obtained to connect the appellants with the alleged commission of offence.

77. In the case of **Santa Singh** (supra), bonafides of the investigation was doubted upon appreciation of cumulative circumstances that there was inordinate delay in sending the sealed parcel of the empty cartridge case recovered from the scene of occurrence and the rifle from the house of

accused for the opinion of ballistic expert and further that memorandum relating to recovery of empty cartridge case was not attested by any independent witness.

In the case of **Amarjit Singh** (supra), the entire prosecution case was found clouded with number of infirmities and disbelieved, as weapon was tested by expert after about 2 months and the police officer who seized the weapon did not seal it on the spot but handed over to another person. Report of the expert that the revolver was in working order was held to be insignificant since it could not be said with certainty as to what was the condition of weapon at the time of recovery, holding that non sealing of revolver on the spot was a serious infirmity and the possibility of tampering could not be ruled out. The Court had taken into consideration another circumstances that the expert evidence was that he did not test fire the revolver.

In the case of **Daulat Ram** (supra), on facts, it was found that though there were number of persons involved in the custody of samples but those persons were not examined to lay credence to the prosecution case that since the date of seizure and drawl of sample, until it reached the Analyst, it remained in safe custody. In that background, a doubt was raised on the case of prosecution.

In the case of **Valsala** (supra), again, the doubt was raised with regard to safe custody of seized articles being narcotics. It was found that there was delay of more than three months in sending seized articles to the Court and there was no evidence to say that articles was sealed and kept in proper custody in police station. In this background sending of the very articles seized, to chemical examiner was found to be highly doubtful.

In the case of **Mohd. Aman** (supra), it was found that specimen finger prints were not taken to the Magistrate, seized articles not produced and exhibited. In the absence of satisfactory evidence of safe custody, the prosecution case of finger prints evidence so as to connect the same with the accused was held doubtful.

78. It has been one of the vehement submission of learned senior counsel that

no evidentiary value could be attached to the report of ballistic expert because while giving the opinion that the bullet found in the shirt of the dead body and the empty cartridge found at the spot were those fired from the revolver/katta said to be recovered from revolver of Tapan because, no firm basis has been divulged either in the ballistic report or in the evidence and only on the basis that ballistic expert is highly qualified and experienced, no evidentiary value whatsoever could be attached to the expert opinion. According to him, the opinion of the expert is not binding on the Court and its weight essentially depends upon the clearly stated scientific basis to support the opinion. Mere declaration, it is contended, without stating the basis, would not qualify the expert for formation of opinion . It was also highlighted that though, expert has stated in its report and also deposed in the Court that it had examined the Articles from microscope, micro-photograph have not been produced by the prosecution, to lay credence to the evidence of the witness. To bolster his submission, learned counsel for the appellant relied upon **Ramesh Chandra Agrawal** (supra).

In the aforesaid decision, the Supreme Court while delineating scope and ambit of Section 45 of the Evidence Act with regard to admissibility, reliability and credibility of expert opinion held as below:

"11) EXPERT OPINION:

The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the

admissibility of expert evidence are:

- i) that the expert must be within a recognized field of expertise
- ii) that the evidence must be based on reliable principles, and
- iii) that the expert must be qualified in that discipline.

[See Errors, Medicine and the Law, Alan Merry and Alexander McCall Smith, 2001 ed., Cambridge University Press, p.178]

12) Section 45 of the Indian Evidence Act speaks of expert evidence. It reads as under:

"45. Opinions of experts - When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of hand writing or finger-impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts. Such person called experts. Illustrations

(a) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is whether A, at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinion of experts on the question whether the two documents were written by the same person or by different persons are relevant."

13) The importance of the provision has been explained in the case of *State of H.P. v. Jai Lal and Ors.*, [(1999) 7 SCC 280]. It is held, that, Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

14) It is not the province of the expert to act as Judge or Jury. It is stated in *Titli v. Jones* (AIR 1934 All 237) that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

15) An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of

the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. (See Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and Others) [Criminal Appeal Nos. 1191-1194 of 2005 alongwith Civil Appeal No. 1727 of 2007, decided on 7.8.2009].

16) In the case of State of Maharashtra v. Damu s/o Gopinath Shinde and others., [AIR 2000 SC 1691 at page 1700], it has been laid down that without examining the expert as a witness in Court, no reliance can be placed on an opinion alone. In this regard, it has been observed in The State (Delhi Administration) v. Pali Ram, [AIR 1979 SC 14] that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him."

17) In the Article "Relevancy of Expert's Opinion" it has been opined that the value of expert opinion rest on the facts on which it is based and his competency for forming a reliable opinion. The evidentiary value of the opinion of expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of

an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on basis of which opinion is formed. The same is clear from following inference: "Mere assertion without mentioning the data or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value."

79. The two ballistic reports Ex.P-134, Ex.P-135 contained recital that pistol was test fired and found in working order, and further that upon thorough examination and comparison of individual characteristic marks present on the crime and test fired cartridge cases under the comparison microscope, conclusion was drawn that .315"/8MM rifle cartridge case marked "C/1" had been fired through country made pistol marked "A-3" and it could not have been fired through any other firearm because every firearm has its own individual characteristic marks.

Similar recital has been made in respect of another Article that on thorough examination and comparison microscope, the expert came to the conclusion that 0.315"/8MM rifle cartridge case marked "C/3" and marked .315"/8MM rifle bullet marked "B-1" had been fired through the country-made pistol marked "A/1" and they could not have been fired through any other firearm because every firearm has its own individual characteristic marks. In this manner, the expert has given its opinion in respect of different firearms, bullet, empty cartridge etc contained in two reports. The ballistic expert Dr. P. Siddambari (PW63) has been examined and cross-examined in detail before the trial Court.

80. The expert has stated regarding his high qualification and long experience of examining arms and ammunition in large number of cases and having

appeared in various Court in the country and given evidence. In addition, it has been stated that this witness is an expert Lecturer also, delivers expert lecture in the workshop of police officers. Thus, the ballistic expert is an officer of longstanding experience since 1994. After proving its own opinion, the witness was subjected to grilling cross-examination. Basis for giving expert opinion has been contained in para-10,11, 12,13,14,15,16,20,21 of the examination which deals with minute scientific aspect. Reading of the expert opinion, as stated in his evidence in the cross-examination, it cannot be said that there was absolutely no basis for giving opinion as expert. Rather, the expert has not only exhibited his deep knowledge of the scientific training of ballistic examination but also stated how he carried out the test. Looking to his high qualification and vast, varied experience and knowledge also, merely because micro-photograph have not been produced, it cannot be said that the opinion of the ballistic report does not carry any evidentiary value and the evidence of the ballistic expert, no doubt, is based on his own examination of scientific aspect and conclusion drawn from those examination. The opinion of the ballistic expert, therefore, in our opinion, carries high evidentiary value and could be relied upon to reach to the conclusion as has been drawn by the learned trial Court.

81. Another important submission made by learned senior counsel is that there is material contradiction and omission in the ocular testimony of so called eyewitness Tarkeshwar (PW1) and Chandan (PW7). From the medical evidence and the injury found on the body of the deceased Mahadev, as proved from the evidence of Dr. J.P. Meshram (PW10), it was contended that though, Dr. J.P. Meshram (PW10) found large number of injuries on the body of the deceased, the testimony of two eyewitness shows that the deceased sustained only one or two injury. Relying upon the decision in the case of **Bhajan Singh** (supra) and **Vijay Pal** (supra), it is argued that in such cases, the ocular testimony is liable to be disbelieved. In **Bhajan Singh** (supra), the legal position in case of contradiction between medical and ocular evidence was crystallised by declaring that though, the ocular testimony of a witness carries greater evidentiary value viz-a-viz medical evidence where medical evince makes the ocular testimony improbable,

that becomes a relevant factor in the process of the evaluation of evidence. It was further held that where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

The settled legal position has been reiterated in the subsequent decision also.

82. The question, however, is whether it can be said that there is serious contradiction in the ocular testimony and the medical evidence.

83. In our judgment, we have already noted herein above, part of the evidence of Dr. J.P. Meshram (PW10), in which he found as many as 21 injuries. There were three firearm injuries, four lacerated wound and rest all being incised wound. Clearly, therefore, the deceased was not only shot at but had sustained number of incised wounds, most of them on his head. If we look into the evidence of Tarkeshwar (PW1) he has deposed regarding arrival of number of accused. According to him, assault was given on the head of Mahadev which was followed by gunshot fired at the deceased by Tapan Sarkar, Satyen Madhvan and Mangal. He has deposed that when he requested not to assault he was also put at gunpoint so he kept mum. He then called up to his son and advised to run away. Thus, according to this witness, gunshot was fired and sharp edged weapon was used to assault.

84. Chandan (PW7) has also stated regarding arrival of all the accused. Some some of them were armed with firearm and some of them were armed with sharp edged weapon, clubs and has stated that the gunshot was fired at the deceased and then injury on his head and when he fell down, then other also came there and other accused also chased this witness who were all holding club, rod, sword, coconut cutting knife, pistol, katta etc. due to which he ran away from the spot as they all were armed with weapon. They all charged. Gunshot was fired at Mahadev and he was also assaulted. When some of them chased Chandan, Chandan ran away from the spot. Thus, Chandan could not see the whole incident but only beginning of the assault. Further, the evidence of Tarkeshwar (PW1) shows that he was also silenced on the gunpoint and then he was attempting to

save his son by giving him call that he should run away. He had not made any attempt to intervene accused. He was silenced on the gunpoint. That means that he had detracted himself from the scene and engaged more in saving his son. Obviously, he could not see each and every assault given to the deceased. But the manner in which the accused arrived at the spot and charged and opened fire as also gave assault from various sharp edged weapon, large number of incised wound found on the body of the deceased has been explained from the evidence of the witness. Merely because each and every injury has not been explained, the evidence of the eyewitness could not be disbelieved on the ground that it is contradictory to the medical evidence. It is not a case that the allegation are only of giving assault by firearm or that assault is said to have been given only with the help of sharp edged weapon and not firearms. Both were used. Count of injury therefore would not be made a basis to disbelieve the testimony of eyewitness, rather the evidence of the witness is corroborated from medical evidence is that the accused had arrived at the spot, charged upon Mahadev, opened firing and giving assault by sharp edged weapon. Most of the injuries are incised wound and there are firearms wound also. The submission of learned counsel for the appellant in this regard, therefore, is liable to be rejected.

85. As far as appellant Anil Shukla is concerned, no seizure has been made from his possession.

86. The report of serologist proved that blood of deceased Mahadev was of "O" group. From FSL report (Ex.P218), dagger seized from Raju Khanjjar, Vidyut Chaudhary, Pitambar and Chhotu @ Krishna was found stained with blood but the group and origin could not be traced as it was disintegrated. This could only be treated to be a corroborative evidence in the absence of any explanation as to how the weapon contained blood. But it cannot be completely ignored in view of the Supreme Court decision in the case of **Dr. Sunil Clifford Daniel Vs. State of Punjab** (CRI L.J. 2012 4657), referred to by learned trial Court in its judgment wherein, it has been held that a failure by the serologist to detect the origin of the blood due to disintegration of the serum, does not mean that the blood stuck on the axe

would not have been human blood at all. Sometimes, it is possible, either because the stain is too insufficient, or due to haematological changes and plasmatic coagulation that a serologist may fail to detect the origin of blood but then it cannot be said that in the absence of report regarding the origin of blood, the accused cannot be convicted and that the report of disintegration of blood cannot be termed as missing link.

87. Delay in lodging FIR as also delay in sending the copy of FIR to the Magistrate has been raised as ground to doubt credibility of entire prosecution case, relying upon **Ramesh Baburao Devaskar** (supra) and **Shivlal & Anr** (supra). In the present case, as has been discussed hereinabove, as soon as the information was received in the police station regarding the incident at about 6:35 AM, it was recorded in rojnamcha sanha and in Ex.P-128 and immediately thereafter Anita, the police officer and another constable Holesingh proceeded to place of occurrence and spot FIR was recorded by Anita (PW69) in Ex.P-15 on the basis of which numbered FIR was recorded in the police station. Anita (PW69) has been examined and cross-examined and her evidence has been considered by us. It is not a case that long after the incident, FIR was lodged in the police station and in the name of morgue inquiry, case was cooked up. On the other hand, the response of the police, immediately upon receipt of information regarding murder of Mahadev is extremely prompt. It is not a case where a completely different FIR than what was recorded at the spot, has been prepared in the police station after few hours. Therefore, on facts we are not convinced that there was any delay in lodging FIR.

88. As far as the aspect of so called delay in sending copy of FIR to the Magistrate is concerned, learned trial Court has taken into consideration the evidence of Rakesh Bhatt (PW77) that after the incident of murder on 11.2.2005, law and order situation had worsened in the city and when dead body was returned after postmortem, again the law and order situation was seriously disturbed till 8:30 in the night. There were agitation made and print as well as electronic media had also arrived. As per the evidence of Neman Sahu (PW62) he had submitted carbon copy of FIR and arrest memo before the Magistrate on 12.2.2005 in respect of which an

acknowledgment in Ex.P133 was also given by the Reader of the Court of Magistrate. In the background that after the incident of murder, the law and order situation was disturbed and agitation were going on till the evening up to 8:30 pm, submission of copy of FIR on the next day before the Magistrate cannot be said to be inordinate delay so as to doubt the entire prosecution story itself, particularly when spot FIR and numbered FIR are not inconsistent with regard to the names of the accused and the manner in which the incident happened. Learned trial Court has elaborately dealt with this aspect in para -171, 172, 173 of its judgment . The two decisions cited by learned counsel for the appellant in this regard are distinguishable on facts.

89. Learned counsel appearing for one of the appellant Baccha @ Abdul Zayad @ Ashraf, apart from raising other submission relating to credibility of eyewitness, delay in sending copy of FIR to the Magistrate, delay in lodging FIR, has sought to impeach the credibility of the prosecution case with regard to time of death and place of incident by submitting that in the background of the evidence that the appellants on one side and deceased Mahadev on the other side were operating gangs involved in various criminal activities and existence of group enmity, attempt has been made to falsely implicate the appellants including Bachcha @ Zayad in the incident of death of Mahadev Mahar. It was further submitted that from the evidence of Dr. J.P. Meshram (PW10), full rigor mortis found developed at the time of autopsy indicates that Mahadev was assaulted not at 5 to 6 AM early in the morning, as putforth by the prosecution and its witness but many hours before, may be sometime in the midnight. It renders more probable that Mahadev was assaulted long back, sometimes in the midnight and his dead body was thrown at Subhash Chowk and then, entire case of the prosecution was built up implicating appellants on the suspicion that the other warring gang must have assaulted Mahadev. The entire argument has been developed on the premise that development of full rigor mortis at the time of postmortem in the morning i.e. 9:30 AM completely rules out death 3-4 hrs before and it could be only during the period from 6 to 12 hrs. before the time of autopsy. To support this submission, relevant text of Modi's Jurisprudence and Toxicology (22nd

Edition, on pages 228 to 232) has been referred to and relied upon. On this aspect, learned State counsel has replied stating that there is nothing in the evidence of doctor conducting autopsy that the time since death was more than 6-8 to 12 hrs. He would submit that onset of rigor mortis would depend on variety of factors like background in which death occurred, whether it was homicidal, suicidal or natural, climatic condition, age of the deceased and many other things and no hard and fast rule has been authoritatively declared in any authentic text or judicial pronouncement.

To test submission of learned counsel for the parties we should first scrutinize the evidence of Dr. J.P. Meshram (PW10) who conducted autopsy.

Dr. J.P. Meshra (PW10) has deposed that he conducted postmortem of the dead body of Mahadev brought before him on 11.2.2005. He opined that cause of death was shock and hemorrhage as a result of antemortem injury and has deposed that the time of death was within 24 hrs of autopsy .He has proved postmortem in Ex.P-34. The time of conducting postmortem as recorded in Ex.P-34 is 9:30 AM. Moreover, the doctor in his evidence has stated that rigor mortis had developed. The postmortem report also states that rigor mortis was present. But in the report there is no specific mention with regard to the stage of rigor mortis. It needs to be noticed that postmortem was conducted by the two doctors including Dr. J.P. Meshram (PW10). Doctor was examined and cross-examined on 26.12.2008 i.e. after three years and ten months of the date of preparation of postmortem report.

Ordinarily, in the absence of there being any specific observation contained in postmortem itself as regards stage of rigor mortis, it would not be possible for a Govt. doctor to specifically remember whether the dead body, of which, he had conducted autopsy almost 4 years before had developed full rigor mortis or not. Dr. J.P. Meshram (PW10) being a Govt. doctor, it can safely be presumed that during this long period, he must have conducted autopsy of large number of dead bodies.

We, however, find that a suggestion has been given to this doctor which has been admitted that at the time of autopsy, full rigor mortis had developed.

At the first place, mere admission of such suggestion, in the absence of there being specific mention of the fact relating to stage of rigor mortis, in the postmortem report itself, does not lend much credibility. Even otherwise, in his further statement in cross-examination, he deposed that rigor mortis starts within 2-3 hrs and within 12 hrs it is fully developed and then lividity starts after 24 hrs. Moreover, in response to a question with regard to whether the deceased died three hrs prior to time of postmortem, doctor states that he has recorded his observation regarding presence of gases in small and large intestine of the deceased and such formation starts after death. On a further question asked, doctor deposed that he cannot definitely states that the death was caused within 6 hrs prior to time of postmortem. In his further cross-examination in para-26, he makes similar statement that he had stated regarding stage of rigor mortis after examining dead body and that, at the time of postmortem, the body had become stiff, hands and legs could not be folded and the head was also not touching the chest. A suggestion has been given which has been admitted that in such an advance condition of stiffness, death may have been caused 6-12 hrs since the time of postmortem.

90. It would thus be seen that an attempt has been made to elicit in the cross-examination of the doctor that at the time of postmortem, full rigor mortis had developed which renders more probable that death must have been caused at least 6-12 hrs since the time of postmortem.

Firstly, in the absence of there being any specific observation made and written in the postmortem report in Ex.P-34 by the doctor, admission of such suggestion of development of full rigor mortis, when the doctor was examined after almost 4 years of he conducting postmortem, may not be of much reliance, which we have discussed herein above. Otherwise also in the case of **Main Pal and Anr. Vs. State of Haryana & Ors.** (2004) 10 SCC 692, it has been held that doctor's evidence cannot always be the last word on what he deposed or meant for implicit acceptance. Evidence of the doctor has to be sifted, analyzed and tested in the same manner as that of any other witness, keeping in view only the fact that he has some experience and training in the nature of function discharged by him.

91. In another decision in **Solanki Chimanbhai Ukabhai Vs. State of Gujarat** (AIR 1983 SC 484 : 1983 CRI.L.J 822, the Supreme Court observed that ordinarily, the value of medical evidence is only corroborative. It proves that the injury could have been caused in the manner alleged and nothing more. Medical evidence may be used to prove that injury could not possibly have been caused in manner alleged and thereby discredit the witness. Unless, however, the medical evidence, in its term, goes so far that it completely rules out all possibility whatsoever of injury taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. The principle propounded by the Supreme Court in the aforesaid decision was that the evidence of medical person is merely an opinion which lends corroboration to the direct evidence in the case.

92. In three authoritative text of medical jurisprudence the opinion of the expert on the aspect of onset of rigor mortis, as noticed by us is as below :

"1. Modi's Text Book of Medical Jurisprudence and Toxicology
(24th Edition)

"Time of onset- This varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after death in temperate climates, and it may take two to three hours to develop. In India, it usually commences in one to two hours after death.

2. HWV Cox Medical Jurisprudence and Toxicology (7th Edition)

Rigor Mortis:

This is a very well known phenomenon after death, recognisable by lay persons as well as medical men. It is of slight use in estimating the time since death, though here its lack of accuracy is so great as to make it only a check on other calculations of the time of death, notably from the temperature."

The speed of onset of rigor mortis is very variable and depends upon a number of factors. In the average condition in

temperate climates (but not in India as will be discussed shortly), the stiffening of the muscles is usually detectable about two to five hours after death. It rapidly spreads to the rest of the body and may be fully established in eight to twelve hours. However, it may be apparent within half-an-hour after death or it may be delayed indefinitely in very cold condition.

Apart from the temperature of the environment, the speed of onset of rigor mortis is affected by the mode of death. Where violent activity has taken place immediately before death, rigor mortis comes on rapidly. This has been explained by the fact that acid metabolites have already accumulated in the muscle, but a more likely explanation is that the glycogen stores have been depleted. Whatever the true reason, it is a well established fact that death after strenuous exertion, battle casualties and deaths after convulsions etc tend to have a rapid onset of rigor which lasts a relatively short time.”.

3. Lyon's Medical Jurisprudence and Toxicology (11th Edition)

Physical activity prior to death- In cases where severe physical exertion precedes death, the onset of rigor mortis might be hastened. One school of thought regards cadaveric spasm as an extreme form of rigor mortis. Krompecher and Bergirioux observed that in cases of electrocution, rigor mortis appeared and passed off early.

Any violent physical activity prior to death, such as a convulsion, intense physical struggle, struggle prior to drowning and high body temperature leads to a higher consumption and hence depletion of ATP in muscles. Therefore, in these conditions rigor mortis sets in faster.”

93. Thus, upon close scrutiny of evidence on record, legal position, expert view, the argument of learned counsel for the appellant that in the present case, the prosecution story of incident having taken place between 5-6 AM in the morning is rendered highly improbable, is liable to be rejected. On

the contrary, the evidence on record and the expert view renders more probable, quick onset of rigor mortis in the present case as death was result of a violent attack, gunshot injury and multiple incised wound resulting in excessive bleeding and instant death.

94. Learned trial Court has very pertinently noticed the evidence of Keshav Prasad Chouby (PW2) who has deposed that while he was sleeping in the house, which is situated about 50-60 meters away from Subhash Chowk, at about 6-6:30 AM in the morning of 11.2.2005, he heard of cracking fire and thought that it was during procession of Huj pilgrims. However, after some time, his neighbor Mochanlal Sahu came out and informed that someone has been murdered in the square. Thereafter, he went and found that near the house of Dhanji [son of Tarkeshar (PW1)] dead body of Mahadev was lying and dead body was profusely bleeding and soon thereafter, police arrived . He deposed that he had reached at about 6:30 – quarter to 7:00 AM at the spot. From this reliable evidence also, the defence version that Mahadev was killed long before the time stated by the prosecution and the dead body was thrown at Subhash Chowk is demolished .He is the natural and independent witness. He is a Corporator and his house is situated only at a distance of 50-60 meter from Subhash Chock. When he reached the spot he found that blood was coming out from body of Mahadev which means that incident had taken place within a short period and not hours together. This also fully lends support to prosecution story regarding time and place of incident.

95. One of the appellant Vidyut Chaudhary has taken a defence of alibi that he was not present at the spot and not even in the city on the date and time of incident. In support of this plea of alibi ,he has examined two defence witnesses Sanjeev (DW2) and Archana (DW3) and also produced railway tickets in Ex.D-8 to support his submission that he was present in another city on the date and time of incident. Learned trial Court has elaborately considered the defence of alibi of this appellant in para-194 and 195 of its judgment. The plea of alibi has been disbelieved by learned trial Court taking into consideration that the two defence witnesses are the wife of the appellant- Vidyut and friend of his wife. Their evidence is that on 9.2.2005

all three including the appellant had gone to Delhi by Samta Express and reached Delhi on 10.2.2005 and stayed in the house of one Manjula and then on 11.2.2005 at 6-6:30 AM they proceeded to Bareilly by bus and then attended marriage on 12.2.2005 and then again proceeded to Vaishno Devi pilgrimage towards Jammu. In support thereof Archana (DW3) has produced photograph of aadhar card (EX.D-6), marriage invitation card (EX.D-7) tickets of travelling from Mahasamund to Delhi, Delhi to Jammu and Vaishnav Devi. The learned trial Court has rejected the plea of alibi mainly on the ground that railway tickets do not prove that Vidyut Chaudhary had actually traveled and that the negative of photograph have not been produced.

We find that the evidence of alibi is sought to be established from the railway ticket and the evidence of certain interested witnesses, photograph of marriage and marriage card, but there is no evidence of the person in whose house the marriage was solemnized nor there is evidence of the person in whose house the appellant Vidyut claims to have stayed at Delhi nor he produced any document of his presence in Vaishnav Devi temple for pilgrimage. The evidence and document are mostly self serving.

This has also been disbelieved because Vidyut has not only been named by both the eyewitnesses namely Tarkeshwar (PW1) and Chandan (PW7), even in 164 Cr.P.C. statement of Chandan, Vidyut has been involved in the alleged incident, relying upon Supreme Court decision, wherein, the plea of alibi was rejected by taking into consideration that the presence of the accused was identified and his specific involvement in the incident was stated by eyewitnesses of the prosecution. The reason assigned by learned trial Court to reject the plea of alibi are quite cogent and we find no ground to interfere with the said finding of learned trial Court that plea of alibi is liable to be disbelieved.

96. One of the grounds raised by appellant Bachcha @ Abdul Zayad is that there is discrepancy in the prescription of his name as stated in dehati nalishi (Ex.P-15) and other documents including statement under Section 164 Cr.P.C. of prosecution witness. It is further argued that when judgment

was pronounced on 13.3.2015 by the trial Court, the name was changed wrongly invoking provision contained in Section 362 Cr.P.C. This argument of learned counsel for the appellant must pale into significance firstly because Bachcha has been identified on the dock by eyewitness Chandan (PW7) Sao as well as by Tarkeshwar (PW1) both. Moreover, this argument lies ill in the mouth of the appellant because correction of his name has been carried out only on his own request which is reflected from order sheet dated 31.3.2015 of the trial Court.

97. An argument has also been raised that from evidence of Tarkeshwar (PW1) and Chandan (PW7) all that emerges is that only some of the appellants were involved in the alleged criminal overt act of opening fire and giving assault and these two eyewitnesses have not alleged criminal overt act committed by all the appellants. In the absence of clear evidence of common object and even formation of unlawful assembly, conviction of all the appellants irrespective of any criminal overt act committed by them with the aid of Section 149 IPC is not maintainable in law.

The scope and ambit of Section 149 IPC which creates vicarious criminal liability in certain circumstances has been considered by the Apex Court from time to time. The broad principles which are applicable, irrespective of individual facts of circumstances of a given case as adumbrated by the Supreme Court following two decisions provide beckon light being the settled legal position:

98. In the case of **Sunil Kumar & Anr. Vs. State of Rajasthan** AIR 2005 SC 1096 it was held as below :

“7. The pivotal question is applicability of Section 149 IPC. Said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where

common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of such an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member

of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

8. 'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other

words it can develop during the course of incident at the spot eo instante. "

99. In yet another decision in the case of **Krishnpa and Anr. Vs. State of Karnatka by Babaleshwara Police Station** 2012 CRLJ 4347 (SC) the principles of vicarious criminal liability were re stated as below :

"20. It is now well settled law that the provisions of Section 149 IPC will be attracted whenever any offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or when the members of that assembly knew that offence is likely to be committed in prosecution of that object, so that every person, who, at the time of committing of that offence is a member, will be also vicariously held liable and guilty of that offence. Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. This principle ropes in every member of the assembly to be guilty of an offence where that offence is committed by any member of that assembly in prosecution of common object of that assembly, or such members or assembly knew that offence is likely to be committed in prosecution of that object. [Lalji v. State of U.P., (1989) 1 SCC 437; Allauddin Mian v. State of Bihar, (1989) 3 SCC 5; Ranbir Yadav v. State of

Bihar, (1995) 4 SCC 392]. The factum of causing injury or not causing injury would not be relevant, where accused is sought to be roped in with the aid of Section 149 IPC. The relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not. [State v. Krishan Chand, (2004) 7 SCC 629; Deo Narain v. State of Uttar Pradesh, (2010) 12 SCC 298]."

100. On behalf of learned counsel appearing for various appellants and State, large number of judgments were cited before us, dealing with those cases where the accused were either convicted or acquitted in given fact and circumstance and evidence obtaining on record, where accusation of commission of offence was made with the aid of Section 149 IPC. The principles on the basis of which those cases were decided is one and the same which has been discussed hereinabove with reference to two decisions of the Supreme Court. However, facts and circumstances of every case and the evidence has given rise to different conclusion , either of conviction or acquittal. But one common thread running through all these judgments cited at the bar before us is that once formation of unlawful assembly is proved, in order to fasten criminal liability, it is not necessary to prove that each member of unlawful assembly committed any overt act. This cardinal principle has been invariably applied in all the cases though with reference to peculiar facts and circumstances and evidence obtaining in each of those cases.
101. In the present case, the evidence of Tarkeshwar (PW1) and Chandan (PW7) proves beyond reasonable doubt that arrival of large number of persons together in three vehicles, one being minidor and two being

motorcycles. The time of arrival is also very important i.e. early in the morning around 6 O'clock. The next important aspect of the matter which is proved from evidence of the aforesaid two eyewitnesses is that all those who had come were armed with weapon. Thus, arrival of number of persons in more than one vehicle at a particular destination and that too armed with weapon proves that they all were moving together and arrived at a particular place with a common object.

Further, from the evidence of two eyewitnesses it is clear that no sooner the accused arrived at the spot, they all ran towards Mahadev and others. There is nothing to show that the incident of assault happened all of a sudden and presence of the accused was only incidental and not planned. Moreover, the evidence is that no sooner all of them de-boarded the vehicle, they all ran towards Mahadev and other, holding number of weapon in their hands. There was absolutely no altercation and the accused persons pounced upon Mahadev holding various weapon in their hands.

102. Apart from gunshot injury, Mahadev sustained multiple incised wound caused by sharp edged weapon, most of the injury were caused on his head. The aforesaid set of evidence and the aforesaid act on the part of appellants proves beyond reasonable doubt that unlawful assembly was formed with the common object of killing Mahadev and in furtherance of that common object, Mahadev was shot dead and also inflicted multiple injuries by assaulting him with dangerous weapon, sharp edged weapon which led to his instantaneous death at the spot. Therefore, irrespective of individual overt act committed by the accused persons, all of them were vicarious liable for criminal overt act of assault given by some of them and they cannot escape from the liability by stating that the prosecution has not proved that each of them, though possessed of weapon, had actually not assaulted the deceased.
103. In the ultimate conclusion based on aforesaid consideration of evidence on record, it has to be held as below :-

1. As far as appellant Shailendra Thakur is concerned, he was not named in dehati nalishi, rojnamcha sanha, spot FIR, numbered FIR, Spot and numbered morgue intimation, 161 Cr.P.C. statement of Tarkeshwar and 164 Cr.P.C. statement of Chandan Sao. His name has appeared for the first time in the evidence of Chandan (PW7). Though a firearm was seized from his possession, the ballistic report does not prove that either the bullet which was found in the pocket of the deceased and the empty cartridge found at the spot were fired from his weapon. There is no clinching evidence of identification. Tarkeshwar (PW1) also not named him. Therefore, involvement of Shailendra Thakur in the alleged commission of offence cannot be said to be proved beyond reasonable doubt.

2. As far as appellant Mangal Singh is concerned, his name has throughout been mentioned in spot FIR, numbered FIR , case diary statement of Tarkeshwar (PW1) and 164 Cr.P.C. statement of Chandan Sao (PW7). He has been named as one of the assailants by both the eyewitnesses Tarkeshwar (PW1) and Chandan (PW7). From his possession, pistol along with cartridge has been seized and the pistol was found capable of firing . The evidence of Chandan involving Mangal Singh is thus sufficiently corroborated not only from his own 164 Cr.P.C statement given before the Magistrate but also from the evidence of another eyewitness Tarkeshwar (PW1) and recovery of firearm in which it has been found that 9 mm cartridge "C-5" was fired from pistol "A-4" recovered from Mangal Singh. His involvement in the incident is therefore, proved beyond reasonable doubt.

3. Tapan has been named in rojnamcha sanha, morgue intimation, spot FIR, numbered FIR, numbered morgue , 161 Cr.P.C. statement of Tarkeshwar and also 164 Cr.P.C. statement of Chandan made before the Magistrate. From his possession, a katta with live cartridge has been seized. Both Tarkeshwar (PW1) and Chandan (PW7) have stated regarding Tapan being

the leader of the unlawful assembly and the ballistic report also establishes live link between the katta seized by him with the alleged commission of offence. Therefore, his involvement in the incident is also proved beyond reasonable doubt.

4. As far as appellant Chhotu @ Krishna is concerned, he was not named in the morgue intimation spot FIR, registered FIR , 161 Cr.P.C. diary statement of Tarkeshwar nor in 164 Cr.P.C. statement of Chandan. He has been named for the first time in the Court in the evidence of Chandan Sao (PW7). A dagger allegedly said to be seized from him, though, was found containing human blood, in the absence of clinching evidence that the blood was of the group and origin of that of the deceased, involvement of the Chhotu @ Krishna in the alleged incident becomes doubtful. The evidence of his identification during identification parade is also doubtful because identification witness has turned hostile.

5. As far as appellant Raju Khanjjar is concerned he has been throughout named in the morgue intimation, spot FIR , numbered FIR, statement under Section 161 Cr.P.C. and statement under Section 164 Cr.P.C. of Chandan Sao. Though Tarkeshwar (PW1) has not named him, the statement the Court of Chandan involving Raju is corroborated from 164 Cr.P.C. statement of Chandan Sao (PW7). Moreover, an iron dagger seized from his possession has been found to be stained with human blood. He having been named in the incident right from beginning and also named by one of the eyewitness Chandan (PW7), in the circumstances , he was required to explain how the dagger seized from him was stained with human blood. No explanation has come forth therefore involvement of Raju Khanjjar is also proved beyond reasonable doubt.

6. As far as appellant Ranjeet Singh is concerned it is found

that he was not initially involved and named in the incident as his name has not come either in morgue intimation, spot FIR, numbered FIR or 164 Cr.P.C. statement of Chandan and he has been involved in the incident only on the basis of Court statement of Chandan (PW7) in which, for the first time, he named Ranjeet Singh. No incriminating evidence of recovery has been proved against him. The other eyewitness Tarkeshwar (PW1) has also not involved Ranjeet Singh. Therefore, involvement of Ranjeet Singh in the alleged commission of offence is doubtful.

7. As far as appellant Satyen Madhvan is concerned, his case is identical to that of Tapan Sarkar inasmuch as he has been named right from the beginning in the morgue intimation, spot FIR , numbered FIR , diary statement of Tarkeshwar and 164 Cr.P.C. statement of Chandan. Both the eyewitnesses of the case namely Tarkeshwar (PW1) & Chandan (PW7) have clearly stated regarding involvement in the alleged commission of offence. From his possession, one katta along with cartridge, stuck in the chamber of pistol seized and the ballistic report established live link between the commission of offence of pistol and empty cartridge seized from his possession. Therefore, his involvement in the alleged commission of offence is proved beyond reasonable doubt.

8. As far as appellant Prabhash is concerned, his case is also similar to that of Tapan Sarkar and Satyen Madhvan inasmuch as he has been named in the morgue intimation, spot FIR, numbered FIR, 161 Cr.P.C. diary statement of Tarkeshwar and 164 Cr.P.C. statement of Chandan. Both the eyewitnesses of the case namely Tarkeshwar (PW1) & Chandan (PW7) have clearly named him as one of the assailants. From his possession, a katta with empty cartridge was seized and the ballistic report established live link between the weapon seized and commission of offence. Therefore, his case is also

proved beyond reasonable doubt.

9. As far as appellant Bachcha @ Abdul Zayad @ Ashraf is concerned, his name has also been involved in the alleged commission of offence right from the beginning as his name is mentioned in morgue intimation, spot FIR, numbered FIR, diary statement of Tarkeshwar and 164 Cr.P.C. statement of Chandan. He has been named by both the eyewitnesses namely Tarkeshwar (PW1) and Chandan (PW7). A knife is said to have been seized from his possession . Therefore, his involvement is also proved beyond reasonable doubt.

10. As far as appellant Bobby @ Vidyut Chaudhary is concerned he has also been involved in the incident as in the morgue intimation, spot FIR, numbered FIR, diary statement of Tarkeshwar and 164 Cr.P.C. statement of Chandan he has been throughout named as involved. He has also been named in the Court statement of Chandan as well as Tarkeshwar and therefore, his involvement is also proved beyond reasonable doubt.

11. As far as appellant Mahesh @ Bijju is concerned, it has been found that he has not been named in morgue intimation , spot FIR, numbered FIR, case diary statement of Tarkeshwar and not even in 164 Cr.P.C. statement of Chandan Sao. He has been named for the first time in the Court evidence of Chandan (PW7) which does not find corroboration from any other evidence on record because even Tarkeshwar (PW1) has not involved Mahesh in the alleged commission of offence. In the background of seizure of a dagger from him unless establishes live link, would not constitute incriminating evidence. Though, dagger seized from him was found stained in serological report, there is nothing to show that from dagger seized from his possession, blood of the group and origin of that of the deceased was found. Therefore,

involvement of Mahesh is also doubtful, more so when identification witnesses of identification parade have turned hostile.

12. As far as appellant Pitambar is concerned, it is found that he was not initially involved in the alleged commission of offence as he has not been named in the morgue intimation, spot FIR, numbered FIR , 161 Cr.P.C. statement of Tarkeshwar or 164 Cr.P.C. statement of Chandan. His name is appeared in the evidence of Chandan (PW7). Tarkeshwar (PW1) has also not named him. A dagger was seized from his possession which was found stained with human blood. However, in the absence of group and origin of the blood it cannot be treated as corroborative piece of evidence so as to corroborate the testimony of Chandan. Thus, in the absence of any clinching corroborative evidence, involvement of Pitambar has also become doubtful, more so when identification witnesses of identification parade have turned hostile.

13. As far as appellant Anil Shukla is concerned, we find that his name has been mentioned in morgue intimation, spot FIR, numbered FIR and 164 Cr.P.C. statement of Chandan Sao. Though no recovery of any incriminating material has been proved from his possession, Court statement of Chandan regarding involvement of Anil finds corroboration from his 164 Cr.P.C. statement. Thus, corroboration being available to the Court statement of Chandan his involvement in the alleged commission of offence is also proved beyond doubt.

104. We must hasten to mention that in so far as Tapan Sarkar, Mangal Singh, Satyen Madhvan and Prabhash Singh are concerned, a doubt has been created in so far as connection of ballistic report with the firearms seized from each of them is concerned, which we have considered in elaborate details hereinabove. But then we find that

prosecution has proved a case against them beyond reasonable doubt despite that doubt because there are other corroborative evidence available on record against them and both the eyewitnesses of the incident namely Tarkeshwar (PW1) and Chandan (PW7) have involved them in the alleged commission of offence as the assailants and from each of them, firearm were seized and right from morgue intimation till recording of statement under Section 164 Cr.P.C. they have been stated to be involved in the alleged commission of offence. In this regard, we consider it appropriate to refer to what has been stated by the Supreme Court in the case of **State of Punjab Vs. Hakam Singh** (AIR 2005 SC 3759), as below:-

“13. It was also pointed out by learned counsel for the respondent that no fire arms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the fire arms and recovering the empties and sending them for examination by the Ballistic expert would have only corroborated the prosecution case but by not sending them to the Ballistic expert in the present case is not fatal in view of the categorical testimony of P.W. 3 about the whole incident.”

105. In the result, the appeals of appellants- Shailendra Thakur, Chhotu @ Krishna, Ranjeet Singh, Mahesh @ Bijju, Pitambar are allowed and their conviction under Section 302 read with Section 149 and Section 148 IPC are set aside. However, conviction of appellants- Shailendra Thakur under Section 25 (1B) (a) and 27 (1) of the Arms Act is upheld. Shailendra Thakur has already undergone the period of sentence awarded under the Arms Act, therefore, appeal of Shailendra Thakur, Chhotu @ Krishna, Ranjeet Singh, Mahesh @ Bijju and Pitambar are

allowed. They be set at liberty forthwith.

106. Conviction of appellants- Mangal Singh, Tapan Sarkar, Raju Khanjjar, Satyen Madhvan, Prabhash Singh, Bachcha @ Abdul Zayad @ Ashraf, Bobby @ Vidyut Chaudhary and Anil Shukla @ Babalu is affirmed and their appeals are dismissed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Goutam Bhaduri)
Judge