

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No.1228 of 2015**

1. Phillip Chand Goyal S/o Goyal Chand Aged About 23 Years R/o Village - Sirnabhata, Dhamdha Police Station - Dhamdha District - Durg Chhattisgarh , Chhattisgarh
2. Nishant Alias Nishu Goyal S/o Goyal Chand Aged About 20 Years R/o Village - Sirnabhata, Dhamdha Police Station - Dhamdha District - Durg Chhattisgarh , District : Durg, Chhattisgarh

---- Appellants**Versus**

- State Of Chhattisgarh Through - Station House Incharge Police Station - Dhamdha Revenue Tahsil - Dhamdha District - Durg Chhattisgarh , Chhattisgarh

---- Respondents**Present:-**

Dr. N. K. Shukla, Sr. Advocate with Ms. Radhika Soni, Advocate for the appellants.

Shri Rajendra Tripathi, Panel Lawyer for State.

Division Bench: Hon'ble Shri Justice Manindra Mohan Shrivastava & Hon'ble Smt. Justice Vimla Singh Kapoor

Order on board**Per Manindra Mohan Shrivastava, J.****01/07/2021**

Heard.

1. This appeal is directed against the impugned judgment of conviction and order of sentence dated 16-09-2015 passed by the Additional Sessions Judge, Durg, by which, the appellant-Philip chand Goyal has been held guilty for commission of offence under Section 302 of the IPC and 25(1-B)(B) and Section 27(1) of the Arms Act and the appellant-Nishant @ Nishu Goyal has been held guilty for commission of offence

under Section 302/34 of the IPC and both the appellants were sentenced as below:-

Appellant-Philip Chand Goyal

Section-302 of the IPC	Life Imprisonment and fine of Rs.1000/-
Section 25(1-B) B of the Arms Act	R.I. for one year and fine of Rs.1,000/-
Section 27(1) of Arms Act	R.I. for three year and fine of Rs.1,000/-

Appellant-Nishant @ Nishu Goyal

Section-302/34 of the IPC	Life Imprisonment and fine of Rs.1000/-
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Further, in default of payment of fine, both the appellants to undergo additional R.I. for one month under each section, sentences ordered to appellant-Philip Chand Goyal under each section to run concurrently.

2. The prosecution story, as unfolded from the impugned judgment of conviction and order of sentence and the records of the case, is that on 29-09-2012, while a procession for submergence of a statue was proceeding on the way towards Sirnabhata College Road, initially a quarrel took place between the appellant-Nishant and the deceased-Vivek. This was pacified. The procession continued and then it is said that at later stage of procession, appellant-Nishant and his brother appellant-Philip caught hold of the deceased-Vivek. It is alleged that while appellant-Nishant caught hold of the deceased by his neck, the appellant-Philip opened up assault with the help of buttoned knife, giving repeated blows in the abdomen and other parts of the body of the victim-Vivek and then,

Vivek was taken to the hospital, where he was declared dead.

3. Yogesh Singh Rajput, PW-6, brother of the deceased, lodged FIR in the Police Station Dhamdha in Ex.P-14, wherein he narrated the aforesaid incident of assault on his brother-Vivek by the appellants. In the FIR, he has stated that the appellant-Nishant had also assaulted, whereas Nishant's brother-Philip had assaulted the deceased with the help of a knife. The Investigating Officer of the case reached at the place of occurrence and prepared inquest report Ex.P-16, deadbody of Vivek was sent for postmortem and Dr. B. N. Dewangan, PW-18 conducted postmortem. In the postmortem report, Dr. Dewangan, PW-18 found multiple stab injuries and protruding of intestine and in his opinion, cause of death was shock and hemorrhage due to ante-mortem stab injury No.1 in the Abdomen with cutting of liver with Haemo-peritoneum with clotted blood caused by hard and sharp pointed object. The appellants were named as the main culprits of the case and they were arrested, seizure of the weapon and clothes are said to have been made and then sent for Forensic report also. Upon completion of usual investigation, after recording case diary statements of prosecution witnesses, appeared to be acquainted with the alleged incident of murder, charge sheet was filed before the jurisdictional Magistrate, who in turn, committed the case to the Court of Sessions. On the basis of the material contained in the charge sheet, the learned trial Court framed charges against both the appellants stating that the appellants, sharing common intention, stabbed the deceased with an intention to cause death and thereby committed the offence of murder punishable under Section 302 of the IPC. The appellants abjured guilt and they were put to trial. The prosecution, in

order to prove its case, examined as many as 20 prosecution witnesses. Thereafter, the appellants-accused were examined under Section 313 of Cr.P.C. in respect of incriminating evidence and circumstances appearing against them in the evidence led by the prosecution. The appellants denied having committed the offence and pleaded innocence. Two defence witnesses were also examined in support of the case of the accused-appellants.

4. Learned trial Court, however, disbelieving the defence version and relying on the eye-witness account given by Yogesh Singh Rajput, PW-6, Pranjal Yadav, PW-7 and other prosecution witnesses regarding presence of the accused, deceased during the procession and the evidence of first round of quarrel between the deceased and appellant-Nishant soon before the incident of murderous assault, held the appellants guilty for commission of offence and convicted and sentenced them, as described above.

5. Assailing legality and validity of the impugned judgment of conviction and order of sentence, learned Senior Counsel for the appellants argued that the prosecution case suffers from several illegalities and flaws both in the matter of veracity and the version given by the prosecution witnesses as also the very presence of the appellants in the alleged commission of offence. He would argue that in the present case, FIR has been lodged by brother of the deceased, Yogesh Singh Rajput, PW-6. He would submit that in the FIR, this witness exaggerated the prosecution story by stating that not only Philip, but Nishant also assaulted the deceased, whereas none of the prosecution witnesses including this witness has stated that at the second stage of quarrel, appellant-Nishant had inflicted injuries,

except that he is alleged to have caught hold of the deceased by neck. As this witness is the relative, it is argued that it would not be safe to convict the appellant on the testimony of this witness. It is next argued that as far as Pranjal Yadav, PW-7 is concerned, the evidence on record shows that right from the beginning, when the incident had taken place, followed by taking care of the deceased, while he was suffering from assault, taking him to hospital, this particular witness Pranjal Yadav was closely associated. That means, he was very close friend and thus, an interested witness. According to learned Senior Counsel for the appellant, in the FIR also, Pranjal Yadav has not been named as the person present at the time witnessing the incident of alleged assault. That means, he is a concocted witness. Moreover, it is argued that there is contradiction in the version of these two witnesses Yogesh Singh Rajput, PW-6 & Pranjal Yadav, PW-

Next submission of learned counsel for the appellants is that though, large number of prosecution witnesses were cited as eye-witnesses, but none of them have supported the prosecution story. As far as the alleged incident of murderous assault is concerned, all of them have stated regarding simple quarrel having taken place between the appellant-Nishant and Vivek. All these persons were stated to be present at the time of procession and they were independent witnesses. Therefore, it raises serious doubt with regard to alleged criminal overt act on the part of the appellants and it is quite probable that because of first incident of quarrel, the appellants have been involved in the second incident of quarrel, though no one has seen thus, attempting to create false evidence by the brother of the deceased, Yogesh Singh Rajput, PW-6 and close friend, Pranjal Yadav, PW-7. Learned Senior Counsel for the appellant would

further argue that as far as recording of memorandum and recovery is concerned, that is also highly doubtful, because, there were number of independent witnesses available, the prosecution has chosen to make interested persons as Panch Witness, whereas the evidence on record including the evidence of this witness clearly shows that they were close associate of the deceased and his family and they were present throughout up to the hospital. In order to inspire confidence, the other Panch Witness, ought to be examined. Learned Senior Counsel for the appellant would further argue that the presence of blood in the knife alleged to have been recovered on the disclosure statement of appellant-Philip is per se not acceptable, because, it is clear from the prosecution case that by that time, knife was taken out of the pond and it had remained submerged in the water for 20 to 23 hours, so, it is wholly improbable that even after the long period, blood stains would have remained on the knife so much so that it could be chemically examined. Therefore, the Forensic report is highly doubtful and cannot be relied upon. Learned Senior Counsel for the appellant would further argue that in such cases, finger print ought to be taken to clear all shadow of doubt, but the Investigating Officer, in his examination, has admitted that he had not taken fingerprint on the knife. According to learned Senior Counsel for the appellant, the Apex Court has held that in such cases, the investigation ought to be fair and all evidence, which could be collected, should be collected, which included the finger print also. Thus, learned Senior Counsel for the appellant argued that the appellants are victim of unfair investigation. Learned Senior Counsel for the appellant would further argue that all the other witnesses, namely Rakesh Parganiha, PW-1,

Yashwant Das Manikpuri, PW-2, Rakesh Chakradhari, PW-3 and Gourav Duvey, PW-5, though stated regarding simple quarrel between Nishant and Vivek, but they have not supported the version of Yogesh Singh Rajput, PW-6 & Pranjal Yadav, PW-7 regarding assault with the help of knife by the appellant-Philip. This renders the prosecution case highly doubtful, because all of them were present at the spot, even their names have been mentioned in the FIR. Learned Senior Counsel for the appellant would further argue that many of these witnesses have admitted in their cross-examination that at the time, when procession was going on the road, there was no light, meaning thereby it was all dark and therefore, it is highly doubtful that Yogesh Singh Rajput, PW-6 & Pranjal Yadav, PW-7 could have seen as to who assaulted the deceased-Vivek. Learned Senior Counsel for the appellant would also argue that the learned trial Court has found corroboration in the eye-witness account given by Yogesh Singh Rajput, PW-6 & Pranjal Yadav, PW-7 by wrongly applying the principle of *res gestae* as the evidence of Krishna Kumar Singh Rajput, PW-8, father of the deceased, when he reached at the spot, then he enquired, the information was given by his son-Yogesh Singh Rajput, PW-6 regarding involvement of the appellants. This was not spontaneous disclosure to Krishna Kumar Singh Rajput, PW-8 by Yogesh Singh Rajput, PW-6 and therefore, the principles of *res gestae* have been wrongly applied. Learned Senior Counsel for the appellant would further argue that Gourav Dubey, PW-5 and other witnesses have been declared hostile, because they have not supported the prosecution story. As far as murderous assault with the help of knife is concerned, when Investigating Officer was examined, he was not confronted with this situation and

therefore, the substantive evidence on record weakens the prosecution case. In support of the aforesaid contention, learned Senior Counsel for the appellant has relied upon the judgments in ***Dadulla vs. State*¹, *Pratap Singh and another vs. State of M.P.*², *Malkhan Singh vs. State of M.P.*³, *State (Delhi Admn.) vs. Chander Pal*⁴, *Satish Kumar vs. The State*⁵, *Deva vs. State of Rajasthan*⁶, *State of U.P. vs. Arun Kumar Gupta*⁷, *Prakash vs. State of Karnataka*⁸ and *Digamer Vaishnav and another vs. State of Chhattisgarh*⁹.**

6. Learned Senior Counsel for the appellant next argued that as far as appellant-Nishant is concerned, he could not be convicted with the aid of Section 34 of the IPC, because, the circumstances, in which, the incident is stated to have happened, as deposed by the prosecution witnesses, the criminal overt act on the part of the appellant-Nishant and Philip did not satisfy the legal requirement of appellants sharing common intention to cause death of the deceased. Learned Senior Counsel for the appellant would argue that even according to Yogesh Singh Rajput, PW-6 & Pranjal Yadav, PW-7, during the period, procession was going on, initially, quarrel took place between Nishant and Vivek, which was followed by another incident of quarrel, in which, Nishant is said to have caught hold of neck of the deceased-Vivek and other appellant-Philip assaulting the deceased with the help of knife. It is not a case where the prosecution has come out with any evidence that after the first incident, the appellants had left the place and then came back, loaded with arms. The second incident took

1 1962 (2) Cr.L.J. 690

2 1971 Cr.L.J 172

3 1990 Cr.L.J. 2763

4 1995 Cr.L.J. 2951

5 1996 Cr.L.J. 265

6 1998 AIR SCW 3578

7 2003 AIR SCW 231

8 2014 Cr.L.J 2503 SC

9 AIR 2019 SC 1367

place soon after the first incident in the crowd of procession and it has come in the evidence that while, at the later stage of procession, Nishant and Philip were also dancing, again a quarrel arose, in which, Nishant caught hold of the neck of the deceased-Vivek and Philip assaulted Vivek with the help of knife. The appellant-Nishant was not holding any weapon in his hand and he did not utter anything to draw inference that he was abetting commission of offence of murder. It was a spot incident and therefore, in the absence of any material evidence, the accused persons, would at the most, be liable for their individual criminal overt act. Therefore, in any case, it is argued, the appellant-Nishant could not be held liable for commission of offence of murder with the aid of Section 34 IPC. In support of his contention, learned Senior Counsel for the appellant has placed reliance upon ***Bhagwan Bux Singh and another vs. State of U.P.***¹⁰, ***Rambilas Singh and others vs. State of Bihar***¹¹, ***Vencil Pushpraj vs. State of Rajasthan***¹², ***Kashmira Singh vs. State of Punjab***¹³, ***Sripathi and others vs. State of Karnataka***¹⁴ and ***Balwant Bhai B. Patel vs. State of Gujarat and another***¹⁵.

7. On the other hand, learned State counsel, while supporting the impugned judgment of conviction and order of sentence, would argue that in the present case, the conviction of the appellants is based on cogent and reliable evidence of Yogesh Singh Rajput, PW-6, brother of the deceased and Pranjal Yadav, PW-7, who is an independent witness. It is argued that the incident was promptly reported by Yogesh Singh Rajput, PW-6 in the police station and in that very report, at the earliest occasion,

10 AIR 1978 SC 34

11 AIR 1989 SC 1593

12 AIR 1991 SC 536

13 1994 AIR SC 1651

14 AIR 2010 SC 249

15 AIR 2010SC 1158

it was clearly alleged that while the appellant-Nishant caught hold of the deceased-Vivek by neck and assaulted and appellant-Philip also assaulted the deceased-Vivek with the help of knife giving repeated blows, resulting in death of Vivek. He would argue that as far as evidence of Gourav Dubey, PW-5 is concerned, he is a natural witness and his evidence could not be discarded nor any doubt could be raised on his testimony only because he happens to be the brother of the deceased. He would next submit that the evidence of Yogesh Singh Rajput, PW-6 could not be doubted merely because he being interested witness. He was also a natural witness, because he stated to be present at the spot. Merely because, he helped the deceased-brother to some extent, that by itself, without any other material evidence, could not be made a basis to discard his evidence as an interested witness. Learned State counsel would further argue that though, name of Gourav Dubey, PW-5 has not been mentioned in the FIR, nevertheless, this witness has stated regarding the incident and fully corroborated the version of Yogesh Singh Rajput, PW-6 on all material aspects with regard to murderous assault given on the deceased by the appellants. As far as Panch witness is concerned, evidence of Gourav Dubey, PW-5 is reliable to show that he was present all the time and also accompanied the deceased up to the hospital, would not render the evidence liable to be disbelieved as interested witness. It is merely a co-incident that though, they were present at the time of enquiry by the police were made panch witnesses and they deposed before the Court as a natural witness. Learned State counsel would further argue that the recovery of weapon has been made from under the water at the specified place, which was disclosed by the appellants in their disclosure

statement given before the police. That particular knife, though remain submerged in the water for some time, this article was found to be stained with blood and the appellants have not explained as to how blood was found on it. The Forensic Science Laboratory report regarding presence of blood could not be discarded only on the ground that the knife remained submerged in the water for 22 to 23 hours, in the absence of any question put to any prosecution witnesses including the Investigating Officer. No evidence has been led by the appellants to doubt the evidence of forensic nature. It is also argued that the evidence regarding knife stained with blood, are all corroborating evidence. Learned State counsel would further argue that though Rakesh Parganahiya, PW-1, Yashwant Das Manikpuri, PW-2, Rakesh Chakradhari, PW-3, Gourav Dubey, PW-5 & Lekhrum Chakradhari, PW-9 have not deposed having witnessed the incident of murderous assault on the deceased and inflicting of injury on him, all of them have invariably stated in their evidence that in the evening, during procession, there was a quarrel between Vivek and Nishant and soon thereafter, at a later stage of procession, they saw that Vivek fell down on the road and sustained injury. This evidence fully lays credence to the evidence of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7, because soon before the murderous assault, there is evidence of quarrel between Nishant and Vivek and this incidentally confirms the presence of Nishant also at the place of incident. Further argument of learned State counsel is that in the present case, the prosecution case does not merely rest on circumstantial evidence, but, it is a case where more than one eye-witnesses have supported the prosecution case. Therefore, merely because, the finger prints on the knife were not taken, that would not be

sufficient by itself to render the entire investigation doubtful and to disbelieve, otherwise reliable testimony of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7. Learned State counsel would further submit that the evidence with regard to lack of light on the road is not of such a nature that during procession, what was going on the road, could not be seen by those, who were in the procession itself. He would submit that the evidence of eye-witnesses is not to the effect that they were outside the procession and from any distance, they all witnessed the incident. They all were the part of the procession itself. Moreover, number of witnesses, having seen the first incident of quarrel, also supported the prosecution story which does not cast any cloud over the evidence of Yogesh Singh Rajput, PW-6 & Pranjal Yadav, PW-7 on the basis of lack of proper light on the road, where the procession was going on. Learned State counsel would further argue that as far as assault on the deceased is concerned, eye-witnesses have clearly stated that Philip had assaulted the deceased with the help of knife and repeated blows were given, one after the other. At that time, the appellant-Nishant was holding the deceased by his neck. Though, the eye-witnesses have not stated regarding the appellant-Nishant having actually assaulted the deceased, his very act of catching hold of the deceased by his neck, shows that either he had intention to cause death by strangulating the deceased or disabling the victim in furtherance of common intention to cause death. According to him, the act of appellant-Nishant in catching hold of the deceased by his neck, did not absolve him from allegation of assault by knife, which was actually given by the other accused-Philip. Therefore, it is argued that the overt act, the nature and the manner, in which, the incident happened, particularly the

second incident, it was an outcome of the first incident of quarrel between Nishant and Vivek. There is overwhelming evidence to prove that though, appellant-Nishant did not inflict the stab injury on the deceased, which resulted in death, act of the appellant, though, he was not holding any weapon in his hand, he shared common intention with the appellant-Philip to cause death of Vivek. In support of his submission, learned State counsel relied upon the judgment of the Apex Court in the case of ***Shio Shankar Dubey and others vs. State of Bihar***¹⁶ & ***Subed Ali and others vs. State of Assam***¹⁷.

8. Learned Senior Counsel also brought to the notice of this Court of one judgment of the Supreme Court in the case of ***Asif Khan vs. State of Maharashtra and another***¹⁸ to submit that the line of distinction, where Section 34 will apply and where it will not apply, has been considered in this judgment, which only support the case of the appellant that the second incident was in continuance of first incident and the appellants left the place after the first incident of quarrel and later on, after sometime, returned with loaded arms so as to draw common intention to commit murder.

9. The incident of assault on Vivek, the deceased, has been reported in FIR, Ex.P-14 lodged by Yogesh Singh Rajput, PW-6. Lodging of FIR by Yogesh Singh Rajput, PW-6 in the police station and recording the same by the Investigating Officer, Shivanand Tiwari, PW-20, as has been proved from their oral evidence on record, which has not been substantially disputed and it is clear from their evidence. In the FIR, the time of incident stated to be about 19.50 hours on 29-09-2012, the time of

16 (2019) 6 SCC 501

17 (2020) 10 SCC 517

18 2019 Cr.L.J 3604

lodging FIR is 20.30 hours on the same date. That means, the FIR was promptly lodged soon after the incident. It is not the case that long after the incident, the FIR was lodged so as to doubt the same with regard to involvement of the appellants on the basis of any design and false implication. In the FIR, which was lodged by Yogesh Singh Rajput, PW-6, brother of the deceased, it has been stated that during procession in the evening, in front of Sahu Complex, Philip and Nishant came in, Philip was holding a knife like weapon and he assaulted Vivek on the chest and abdomen. Against appellant-Nishant, it was stated that he was holding the victim, with an intention to cause death, he caught hold of the victim by his neck and also assaulting. According to this report, he himself, Gourav Dubey, Bramha Sahu, Rakesh Parganiha tried to pacify the dispute and Vivek fainted and thereafter, he was taken to the hospital and Gourav Dubey, Bramha Sahu and Rakesh Parganiha went along with him. From this FIR, place of incident, time of incident, role alleged to be played by the appellants in the incident is described. The appellants are said to be the assailants. Appellant-Philip is said to have assaulted the victim with the help of knife and the appellant-Nishant holding the deceased by his neck and also assaulting him.

10. Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7, have deposed that they are eye-witnesses of the incident. Out of these two witnesses, Yogesh Singh Rajput, PW-6 is the brother of the deceased and he is also the FIR informant.

11. One of the arguments advanced by learned Senior Counsel for the appellant that Yogesh, PW-6 is the relative and Pranjal Yadav, PW-7, being the close associate and friend of the deceased, the evidence of

Yogesh Singh Rajput, PW-6 are liable to be viewed with the eye of suspicion.

12. To say that the evidence of the relative, who are the interested witnesses, should always be viewed with suspicion and their evidence should not be relied upon without independent corroboration, is not correct in law. It has been settled in catena of decisions that merely because, the witnesses of the incident are relatives or friend of the deceased, their evidence cannot be discarded and their evidence is competent and reliable as any other witnesses provided unless evidence, for some reason, becomes doubtful and in the opinion of this Court, it would not be safe to hold the accused guilty on their evidence without sufficient corroboration. It is only when the evidence of such witnesses are otherwise doubtful, the Court may look for corroboration from the evidence of other eye-witnesses or circumstantial evidence. In this regard, certain observations were made by the Hon'ble Supreme Court in the case of ***Shio Shankar Dubey*** (supra), as below:

10. ---- xxx ----

“The mere fact that witness is related does not lead to inference that such witness is an interested witness. This Court has occasion to consider such submission in number of cases. In *Kartik Malhar v. State of Bihar*, : (1996) 1 SCC 614, this Court held that a close relative who is a very natural witness cannot be regarded as an interested witness. In paragraph Nos. 15 and 16, following was laid down:

15. As to the contention raised on behalf of the Appellant that the witness was the widow of the deceased and was, therefore, highly interested and her statement be discarded, we may observe that a close relative who is a natural witness cannot be regarded as an interested witness. The term 'interested' postulates that the witness must have some direct interest in having the Accused somehow or the other convicted for some animus or for some other reason. In *Dalbir Kaur(Mst)v.State of Punjab*, (1976) 4 SCC 158, it has been observed as under: (SCC pp. 167-68, para 11)

11.....'Moreover, a close relative who is a very natural witness cannot be regarded as an interested witness. The term 'interested' postulates that the person concerned must have some direct interest in seeing that the Accused person is somehow or the other convicted either because he had some animus with the Accused or for some other reason. Such is not the case here.'

16. In Dalip Singh v. State of Punjab : AIR 1953 SC 364 it has laid down as under:

26. 'A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the Accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general Rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.'

13. The FIR, as has been observed hereinabove, was lodged promptly by the Yogesh Singh Rajput, PW-6, brother of the deceased. In his evidence, he deposed that on the date of incident, while procession for ritual submergence of Ganesh Idol was proceeding, he saw quarrel of deceased-brother (vivek) with appellant-Nishant and then, he went there to get it pacified and procession proceeded further. He further depose that when they reached near the shop of Arun Sahu, at that time, the appellant-Philip took out a knife and started assaulting his brother-Vivek and appellant-Nishant had caught hold of the deceased by his neck. In his cross-examination, a suggestion that he was drunk on the date of incident, has been denied. In the cross-examination, it has also been elicited that incident happened at about quarter to 8 to 8 PM in the evening. He has

also deposed that he was enquired by the police and then, statement was recorded. He has denied that he was not present at the spot, and therefore, could not see the incident. His evidence is in two parts. The first part relates to incident of quarrel between the deceased-Vivek with appellant-Nishant and the second part deals with the assault made on Vivek by appellant-Philip, at a later stage of procession, after some time.

14. Nothing could be elicited from the cross-examination of this witness, which renders his evidence doubtful. In the FIR, which was also lodged promptly by this witness, the details of the incident are substantially the same, except that, in his court statement, he has not stated regarding Nishant assaulting the deceased at the second stage of quarrel. While in the FIR, he has stated that Nishant was also assaulting, in his Court evidence, he has deposed that at an early stage of procession, there was some quarrel between his brother-Vivek with appellant-Nishant and when procession advances, after sometime, appellant-Philip and Nishant came and Philip took out knife and assaulted Vivek. As far as appellant-Nishant is concerned, he states that Nishant, at that time, was catching hold of the deceased by his neck, but there is no evidence of assault given by Nishant on the deceased. Except this, the incident as stated in the FIR, is substantially the same as has been stated before the Court by this witness. There is no reason why this witness would falsely implicate the assailant. Nothing has been elicited in the cross-examination to doubt that this witness was the eye-witness of the incident. It has come in the evidence that he is the Chairman of Ganesh Samiti and the incident happened during procession for taking Ganesh Idol to destination/water body for submergence. The evidence of this witness, therefore, is

creditworthy as eye-witness of the incident.

15. Pranjali Yadav, PW-7 has also deposed regarding two incidents while the procession was going on by stating that initially, there was some quarrel between Nishant and Vivek, which was pacified and at the advance stage of procession, when they reached near the shop of Arun Sahu at around quarter to 8 and 8 PM. Nishant and Philip came, Nishant caught hold the deceased-Vivek by neck and his brother-Philip assaulted the deceased. At this stage, he and Yogesh, PW-6 rushed to the place. Thereafter, Nishant and Philip ran away and Vivek fell down. In his cross-examination, this witness has denied suggestion that the appellants were not present at the spot, they being Christian and occasion being that of idol procession. From his statement also, particularly what he has stated in the cross-examination, nothing could be elicited to doubt his evidence. The argument that this witness was closely involved in taking the deceased to hospital in the car of one Ashish, so was interested one being a close associate, cannot be accepted. Except that, this witness played role in taking the deceased to the hospital, without anything more, it cannot be said that this witness was interested in falsely implicating the assailant. Nothing has been elicited in his cross-examination as to why this witness would falsely implicate the appellant in the alleged incident.

16. Thus, the evidence of Yogesh Singh Rajput, PW-6 and Pranjali Yadav, PW-7, by itself, are reliable and do not require any further corroboration, though what has been stated by Yogesh Singh Rajput, PW-6 has been fully corroborated by what has been stated by Pranjali Yadav, PW-7. In the FIR, the time of incident is stated to be 19.50 hours. Both the witnesses have stated that the incident of assault by knife happened at

around quarter to 8 to 8 PM. Moreover, these two witnesses also stated that the place where the assault by knife was given to Vivek was near the shop of Arun Sahu. Therefore, the argument of learned Senior Counsel for the appellant that there is material contradiction in the evidence of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7, cannot be accepted and liable to be rejected.

17. The prosecution has examined number of witnesses and many of them have clearly stated regarding they having seen the first incident of quarrel between Nishant and Vivek while the procession was going on.

18. Rakesh Parganiha, PW-1 has deposed that during procession, he saw that at around 7.30 PM, quarrel was going on between the appellant-Nishant and the deceased-Vivek and thereafter, when procession advanced further, near the shop of Arun Sahu, he found that Vivek was lying on the ground. In his cross-examination, though he has admitted that there was no arrangement of light during procession and therefore, there was darkness, there is nothing to show that he could not see the first incident of quarrel between Nishant and Vivek.

19. The other prosecution witness Yashwant Das Manikpuri, PW-2 has also deposed regarding the first incident of quarrel between Nishant and Vivek. He has also involved the appellant-Philip and stated that they were advised suitably and he then stated that in the meantime, Vivek was murdered. As he has not fully supported the prosecution story, as far as second part of the incident is concerned, he has been declared hostile and in the cross-examination, he denied suggestion that Nishant was also holding knife in his hand.

20. Another prosecution witness, Rakesh Chakradhari, PW-3 has also

stated regarding he having seen the appellant-Nishant and the deceased-Vivek quarreling near Rajput Kirana Store and he, along with others, pacified the dispute and thereafter, procession advanced. He has deposed that later on, he saw Vivek falling down on the ground, from a distance. In the cross-examination, he admits that it had become dark in the evening and there was no proper arrangement of light during procession, but there is nothing to show that he could not see the incident of quarrel which happened earlier between Nishant and Vivek.

21. Similar is the statement of Gaurav Dubey, PW-5, who has also deposed that near Rajput Kirana Store, there was scuffle between Nishant, Vivek and Philip and dispute was pacified and procession advanced. He stated that when the procession reached near Arun Sahu Kirana Store, Nishant and Philip again joined and started dancing at the spot and then, another round of scuffle started between Vivek and Philip, which was pacified. After some time, he saw Vivek falling down. In the cross-examination, nothing could be elicited to doubt the version of this witness having seen the incident of quarrel between Nishant, Philip and the deceased at different stages of procession.

22. Another witness, Lekhram Chakradhari, PW-9 also deposed that around 6 to 7 PM, while procession was going on, there was quarrel between Vivek and Nishant, which was got pacified and later on, Vivek fell down. As he has not fully supported the prosecution case, after he having been declared hostile, he has been examined by the prosecution and admitted that during procession, Philip and Nishant were also present. He denies that he had seen Philip assaulting Vivek with the help of knife. He has also denied having seen Vivek assaulted by the appellants. In the

cross-examination, it has been elicited that it had become dark and there were about 50 to 60 persons, therefore, he could not clearly see.

23. From the evidence of the aforesaid witnesses, it is proved beyond doubt that in the procession, both the appellants were present at one stage, where quarrel had taken place between Nishant and Vivek. It has also come in the evidence of one witness that after the first round of quarrel between Nishant and Vivek was pacified, at a later stage of procession, the appellants again started dancing and thereafter, Vivek was found falling on the road. While these witnesses have not stated regarding actual assault by knife on the deceased-Vivek by the appellant-Philip and appellant-Nishant catching hold of the deceased by neck, their evidence proves part of the evidence of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7 to corroborate that at the initial stage of procession, quarrel had taken place between Vivek and Nishant. All of them have stated that at a later stage of procession, Vivek was seen falling down. These witnesses have not stated regarding assault by Philip, nevertheless, the evidence of these witnesses, lays credence to the evidence of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7 regarding presence of the appellant and quarrel between Vivek and Nishant.

24. The argument of learned Senior Counsel for the appellant that the evidence of these witnesses renders doubtful the evidence of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7 regarding the incident of assault by knife at a later stage of procession, cannot be accepted. There is no contradiction in the evidence of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7 on one hand and the evidence of the aforesaid

witnesses on the other, but the only difference is that while Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7 witnessed both the incidents of quarrel and subsequent incident of assault by knife on the Vivek, other witnesses have only supported the first incident of quarrel between Vivek and Nishant, but not the later stage of procession.

25. One of the argument raised by learned Senior Counsel for the appellant is that there were number of independent witnesses present and Gaurav Dubey, PW-5, a close associate of the deceased, alone was made a witness of recording of memorandum of the appellant-Philip and recovery of knife at his instance, therefore, the proceedings of recording of memorandum statement and consequent recovery should be disbelieved. There is nothing in the evidence of Gaurav Dubey, PW-5 that he was relative of the deceased. In his cross-examination, nothing has been elicited that he had any motive to falsely implicate the appellant in the incident of quarrel which took place between Nishant and Vivek. Merely because, Gourav Dubey helped to carry the injured to the hospital for treatment, he cannot be branded as interested witness, so as to say that investigation was not fair and no attempt was made to search for independent witnesses of recording of memorandum and seizure. For that reason only, the evidence of this witness does not become doubtful.

26. Another argument raised by learned Senior Counsel for the appellant is that the evidence of Gaurav Dubey, PW-5 as witness of recording of memorandum of the accused and the recovery of knife from the accused-Philip and consequent recovery of knife from *Nala*, does not fulfill the legal requirement. To appreciate this submission, we have closely scrutinized the evidence of Gaurav Dubey, who has clearly

deposed that in his presence, the appellant-Philip stated before the police upon being enquired that he assaulted Vivek and knife is hidden near Danganiya Nala and thereafter, he along with police and Philip, reached Danganiya Nala and there, Philip stepped into Nala and took out knife and gave to the police, which was seized. He proves signature on the memorandum, Ex.P-3 and Seizure Memo, Ex.P-4. In the cross-examination, though, an attempt was made to impeach his credibility, to extract discrepancies, this witness has reiterated that proceedings for recovery of knife near Nala took place before him, though he signed the document on the next date. A suggestion that he was not present at the site of Nala has been denied. Other discrepancies are only minor in nature, but not on material particulars with regard to disclosure statement given by Philip and recovery of knife from Nala. Number of decisions with regard to legal requirement of Section 27 and the evidentiary value of recovery upon disclosure, have been cited at the bar by learned Senior Counsel for the appellant, but evidence of disclosure statement and recovery, on application of principles stated therein, are not impeached.

27. The Investigating Officer, PW-20 had proved from his evidence regarding disclosure statement taken by him from appellant-Philip Chand on 30-09-2012 that in the presence of Gaurav Dubey, PW-5 and one Bramha Sahu, Philip Chand disclosed that bloodstained knife was thrown in the pond near culvert situated at Danganiya Road, which was recorded by him in Ex.P-3 and he has proved his signature also. He has further deposed that thereafter, he went to the disclosed spot along with witnesses and Philip Chand and Philip Chand took out knife from the disclosed spot, which was seized by him in Ex.P-4. In the cross-

examination, he has denied suggestion that knife was not so hidden as disclosed, but reiterates that it was hidden near the pond under the culvert. Except this, nothing could be elicited in his cross-examination to impeach credibility of this witness with regard to recording of disclosure statement and consequent recovery of knife from the spot disclosed by the appellant-Philip. Though, it is not invariable rule of law or thumb rule that in all cases, the evidence of Investigating Officer with regard to recording of disclosure statement and consequent recovery should be necessarily be supported by any other witness, the evidence of Gaurav Dubey, PW-5 fully corroborates the evidence of Investigating Officer, who has also clearly stated that in his presence, when Philip Chand was enquired into, he disclosed that the knife was hidden by him in Danganiya Nala, whereafter he and Philip Chand had gone to the spot along with police and then Philip went inside Nala and took out the knife and it was seized. This witness has proved his signature in memorandum statement Ex.P-3 and seizure memo, Ex.P-4. In the cross-examination, though he states that the documents were prepared in the police station, but, seizure was made near the nala and on that very day, the seizure memo was prepared and he signed on the next day. A suggestion that he was not present at the time when seizure was made, has been denied.

28. Learned Senior counsel for the appellant argued that as this witness was a close associate and friend of the deceased and his brother-Yogesh Singh Rajput, PW-6, in order to lay credence to the evidence of the Investigating Officer, the other independent witness mainly Bramha Sahu, ought to be examined and non-examination of that independent witness renders recording of memorandum and consequent seizure doubtful.

29. We are unable to accept this submission, because, firstly the evidence of Investigating Officer is reliable and secondly, the evidence of Gourav Dubey, PW-5 fully supports. The basis, on which, the evidence of Gourav Dubey, PW-5 is sought to be doubted is that he appears to be friend/close associate of the deceased and his brother-Yogesh, also does not merit acceptance, because, all that is reflected from the evidence is that Gourav Dubey, PW-5 played an active role in taking the deceased to hospital for treatment. This by itself, without anything more, would not mean that this witness had any motive to falsely implicate the appellant-Philip. Gourav Dubey is not the relative, near or distant of the deceased or his brother-Yogesh Singh Rajput, PW-6.

30. Another argument of learned Senior Counsel for the appellant is that the Forensic Science Laboratory Report regarding presence of blood on the knife loses evidentiary value, because according to the evidence led by the prosecution itself, recovery of knife was made after 20 hours and during that period, it remained submerged in the water under the culvert. Even if, we accept this argument on the factual aspect, no evidence has been brought on record that the condition, in which, knife was recovered, there was no possibility of bloodstains remaining intact for the purpose of forensic test. Once recovery of knife is proved and there has been nothing to doubt the knife taken to the Forensic Science Laboratory and subjected to forensic examination, Forensic Science Laboratory report could not be doubted.

31. Common thread of argument of learned Senior Counsel for the appellant, referring to various stages of investigation has been that the investigation was not fair, mainly based on evidence of only interested

witnesses, cited as eye-witnesses, witnesses of memorandum and recovery. To add force to his submission, learned Senior Counsel for the appellant has argued that all possible evidence, particularly finger print ought to be collected and failure to do so, would raises doubt on the fairness of investigation and credibility of the witnesses.

32. On principles, we are of the opinion that an investigation to be ideal one, all possible evidence should be collected, even then, if direct and circumstantial evidence, as collected by the investigation agency is found reliable, their evidentiary value cannot be set at naught, only because some more evidence, which could possibly be collected, has not been collected. Things would be entirely different, if the evidence collected by the investigation agency created doubt. In such a situation, perhaps, failure on the part of the investigation agency to collect other evidence of circumstantial nature like fingerprint, may have the effect of prosecution failing to prove its case beyond reasonable doubt. However, that is not the situation here, as has been discussed above. If eye-witnesses are reliable, corroborated by other circumstantial evidence of recovery of weapon like knife and failure on the part of the accused to explain as to how weapon seized on his memorandum statement, was stained with blood, will have the effect of corroborating the eye-witnesses account and in that situation, merely because, the fingerprint was not taken, the entire case of the prosecution cannot be thrown to wind.

33. Another argument of learned Senior Counsel for the appellant is that the possibility of the incident being witnessed by the so-called eye-witnesses is doubtful and also smacks of false implication, is on the basis that there is evidence on record that there was no proper light and it was

dark when the incident is alleged to have happened and therefore, the prosecution story, as also the credibility of the prosecution witnesses becomes doubtful and not reliable. This aspect has been quite elaborately examined by the learned trial Court in paras 31 to 35 of the judgment. The learned trial Court has not only taken into consideration the evidence of prosecution witnesses, but also taken into consideration the defence witnesses. It has taken into consideration the evidence of Rakesh Parganiha, PW-1, Rakesh Chakradhari, PW-3 and Lekhram Chakradhari, PW-9 regarding what has been stated by them in their cross-examination that during the course of procession, there was no arrangement of light, and it had become dark. It has also taken into consideration the evidence of Mulchand Chopda, PW-14, Patwari, that in the street polls, there were no bulbs. Thereafter, it has taken into consideration the evidence of Investigating Officer, PW-20, who has stated that the photographs did not relate to the place of incident, whereas the place of incident is near the shop of Arun Sahu on the road. It has taken into consideration the place of incident is on the road and there is house of one Manish and complex of Arun Sahu situated around and also the version of defence witness, Chankaya Verma, DW-1 regarding presence of light in the house. It has taken into consideration the evidence of eye-witness-Pranjal Yadav, PW-7 that there was light at the spot and mercury bulb was spreading light. It has also taken into consideration the evidence of Krishna Kumar Singh Rajput, PW-8 that when he reached near Arun Sahu Complex, there was light as also the evidence of it being a procession, the assailants and the witnesses knowing each other and the decision of the Supreme Court in the case of ***State of Uttar Pradesh vs. Nahar Singh (dead) and others***¹⁹

19 AIR 1998 SC 1328

and Bisna @ Biswadev Mahto and others vs. State of West Bengal²⁰,

to hold that identification of the assailants was not altogether possible in such a situation. It has also taken into consideration another decision in the case of **Rangnath Sharma vs. Satendra Sharma²¹**, that those, who are well known to each other, possibility of identification from some distance is highly probable. In addition, we have also noticed that the incident is said to have happened between the members of the procession and at more than one place between the period from 6 to 8 PM. It is not a case where the appellants not being a part of the procession, not known to any body and suddenly appearing in a flash of moment and then running away after assault. There is clear evidence that out of these two assailants, initially, there was a quarrel between one of the accused-Nishant and Vivek, the deceased, at the beginning of the procession and later on, the appellants were found dancing and another round of quarrel took place at the spot after some distance, in front of Arun Sahu Complex. There are number of witnesses cited by the prosecution witnesses, who have seen the incident between Nishant and Vivek. The witnesses have named the appellants, deceased and other persons, who are part of the procession, which would mean that all of them were very near to each other and virtually rubbing their shoulders while proceeding as part of the procession and passing through the main road and surrounded on either sides by residential houses, shops and shopping complex. It is not a case where the incident is said to have happened in the dark midnight in the outskirts, where the witnesses, happened to be passer by and claimed to have seen the incident at some distance, without there being source of

20 2005 SAR (Cri) 916

21 AIR 2009 SC (Supp.) 822

light illuminating the spot. Therefore, it is difficult to accept this submission that spot of incident was so dark that it was impossible for the witnesses to see the incident of some of them assaulting other during that procession. The finding of the learned trial Court in this regard is unassailable.

34. In the case of **Deva** (supra), the prosecution case was held doubtful and eye-witnesses were disbelieved in peculiar circumstances, when witnesses said that the accused was beating the deceased only with stick to disbelieve the oral dying declaration given to the witnesses. It was also noticed that the witnesses had not stated regarding any injury. In the present case, there is clear evidence that Philip Chand took out a knife and then, assaulted the deceased.

35. In the case of **State (Delhi Admn.) vs. Chander Pal** (supra), the Court was considering the reliability of prosecution case which was based only on circumstantial evidence and there being no eye-witnesses and the motive being found not probable. As the Court found that the circumstantial evidence have failed to form complete chain, the conviction could not be sustained, that being a case, based only on circumstantial evidence, which is not the case herein.

36. In the case of **State of U.P. vs. Arun Kumar Gupta** (supra) also, the reliability of the evidence led by the prosecution based only on circumstantial evidence, was examined. The prosecution has failed to prove any material to show that presence of family members and the Court doubting the prosecution story of the accused committing ghastly act of murder in presence of family members and that it was highly unlikely that neighbours and passerby would not have been attracted if the deceased was given as many as 30 injuries and murdered. In that

connection, recovery evidence was doubted mainly on the ground that the witnesses, who resided in the immediate proximity of house of the accused and belonged to the community of the complainant. There were many other discrepancies, which created doubt. Moreover, the bloodstained weapon said to be recovered from the place of occurrence was not sent for chemical examination and therefore, on that count, recovery was found to be doubtful. Thus, on factual premise, the aforesaid decision is distinguishable.

37. In the case of **Dadulla** (supra), it being a case based only on circumstantial evidence, it was held that only that part of the report, which is covered by Section 27 of the Evidence Act, would be led as evidence and not inculpatory part of the confession. It was also held that before relying upon the evidence of recovery upon memorandum, it has to be established that the statement containing information covered by Section 27 of the Evidence Act was actually given by the accused. On facts, it was found that the concerned witness of memorandum did not state anything about what accused actually stated. In this background, the evidence of recovery was held doubtful, whereas in the present case, there is a concrete and reliable evidence of the Investigating Officer corroborated from the evidence of Gourav Dubey, PW-5 regarding what actually Philip Chand stated before the police as recorded in the memorandum statement which led to recovery of weapon.

38. In the case of **Digamber Vaishnav** (supra), the Court was considering the validity of the judgment of death sentence, the argument advanced before the Court was that in the background of unexplained delay in reporting the matter to the police, reliance was placed on the

testimony of child eye-witness, which is not the witness to the actual incident and there is no corroboration and there, the Court was considering the evidence of child witness and that though, there is no rule of practice that in every case, the evidence of child witness has to be corroborated by other evidence, but as a rule of prudence, the Court finds desirable to seek corroboration of such evidence from other reliable evidence placed on record. On facts, it was found that the evidence of child witness was fraught with inconsistency and no other witness had identified the accused. It was also found that there was unexplained delay. As far as recovery evidence is concerned, it was found that recovery of motorcycle did not connect the accused as it was not found belonging to him. Moreover, there was doubt on the colour of the motorcycle, as stated by the seizure witness and what was actually found. The recovery of silver ornaments followed by identification was also doubtful, because none of the witnesses identified the silver ornaments as belonging to any of the deceased. In this set of circumstances, dealing with the case of death sentence, the Court further examined the direct contradiction in the evidence with regard to the place of seizure. Further, the T-shirt was not found to be shirt of the accused, to the exclusion of every one else. The findings of hair analysis were also held inconclusive. The motive of murderer being robbery were also not held reliable, because other valuable ornaments were left behind. The evidence of last seen was also not found reliable. Taking into consideration the aforesaid peculiar facts of the case and the finding recorded thereon as also the findings recorded upon the examination of the prosecution witnesses, absence of fingerprint on almirah was also considered to be an important failure on the part of

the prosecution to lead clinching evidence, which could otherwise be collected. The principles laid down in the aforesaid decision cannot be stretched to the extent that even if other evidence involving the accused are found reliable including eye-witness, the prosecution case should be held doubtful, because the investigation agency did not collect the fingerprints. In other words, each case has to be examined on the basis of its peculiar facts and set of evidence, direct or circumstantial, led by the prosecution to arrive at the conclusion of guilt and cannot be held as rule of thumb that if fingerprints are not taken, prosecution case must necessarily fail.

39. In the case of ***Prakash*** (supra), it was again a case based on circumstantial evidence and it was found that the fingerprint evidence did not link the appellant with the murder and in that background, serological blood test of the accused and the seizure and bloodstains were found to be necessary to bring home the guilt and absence thereof rendering it to be a case of doubt.

40. Learned Senior counsel for the appellants also assailed the finding recorded by the learned trial Court in para 29 and 30, in which, the learned trial Court has considered the evidence of Krishna Kumar Singh Rajput, PW-8, father of the deceased-Vivek Singh Rajput and Yogesh Singh Rajput, PW-6. This witness has deposed that at about 8 PM in the evening, his son Yogesh gave a call to reach near Arun Complex as Vivek is injured, whereafter, this witness immediately reached at the spot and saw crowd of about 20 to 25 persons. When he went inside, his son was found lying injured and when he asked his other son Yogesh, as to how this happened, Yogesh, PW-6 disclosed that Philip Chand and Nishant

quarreled with Vivek and assaulted with knife. This evidence has been admitted in evidence being relevant under Section 6 of the Evidence Act, relying upon the Supreme Court judgment in the case of ***Bhishma @ Biswa Mahto*** (supra). Applying the principle of ‘res gestae’, the learned trial Court held that the evidence of Krishna Kumar Singh Rajput, PW-8 corroborates the statement of eye-witness that the deceased was assaulted and killed by the appellants.

41. According to learned Senior counsel for the appellant, the principle of ‘res gestae’ has been wrongly applied as the disclosure of event was not spontaneous, but it was disclosed by Yogesh, PW-6 only, upon being enquired by Krishna Kumar Singh Rajput, PW-8, his father.

42. In order to appreciate the submission of learned counsel for the appellant, it is relevant to state here that Section 6 of the Evidence Act carves out an exception to the general rule, wherein hearsay evidence becomes admissible. In the case of ***Krishan Kumar Malik vs. State of Haryana***²², it was explained thus:

37. “[Section 6](#) of the Act has an exception to the general rule where under, hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of [Section 6](#), what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter.”

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In the aforesaid judgment, the Supreme Court referred to Black’s

²² (2011) 7 SCC 130

Law Dictionary which defines res gestae, as below:-

35. “Black's Law Dictionary defines Res Gestae as follows:

(Latin: "things done") The events at issue, or other events contemporaneous with them In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception (such as present sense impression or excited utterance).”

43. Learned Senior Counsel for the appellant has referred to two decisions i.e. **Pratap Singh and another** (supra) and **Malkhan Singh** (supra).

44. In the earlier judgments, it was held that the requirement of Section 6 is that the statement must have been made contemporaneously with the act or immediately thereafter and not after such interval of time so as to make it narrative of past events or to allow time for fabrication. In that case, the witnesses testified that in the night at about 10 to 10.15 PM, he heard row from at a distance of about 400 yards from the house of the accused and then, he went towards the house of the accused, where much crowd had collected. When he went inside the house, he found dead body lying with fresh wounds from sword. Wife of the accused was there and when he heard about the murder, she stated that her husband and brother had run away after committing murder. As statement was made in answer to a query made after lapse of some time, after the murder, it was not treated as spontaneous as part of the transaction of the murder. The statement was not held admissible in evidence under Section 6 and excluded from consideration.

45. In the later judgment, relying upon the earlier judgment in almost similar factual scenario, when the witnesses reached at the spot and

statement was made only in answer to query after some time of occurrence, it was not treated as spontaneous or contemporaneous and was accordingly held inadmissible in evidence. There also, the principle of 'res gestae' was not made applicable. The aforesaid two decisions explained the underlying principle of Section 6 of the Evidence Act that in order to become relevant, an otherwise hearsay evidence, as 'res gestae', the statement is required to be made spontaneously and contemporaneously and should not be made in answer to a query. In the present case also, the statement of Krishna Kumar Singh Rajput, PW-8 is that the statement regarding the incident was made by Yogesh, PW-6 upon being asked as to what happened. The reply to query takes the statement outside the ambit of Section 6 of the Evidence Act and is therefore, not admissible as 'res gestae'. The learned trial Court has, therefore, on this aspect, not correctly applied the principle applicable under Section 6 of the Evidence Act. Reliance on the decision in the case of ***Biswa @ Mahto and others vs. State of West Bengal*** (supra) is misconceived in law, because in that case, it is not clearly stated that it was not stated by the witness that the statement was made after some time. On facts, it was found that it was spontaneous and contemporaneous, whereas in the present case, statement was made after some time and not spontaneous, therefore, the finding of the learned trial Court to that extent, is not correct as the statement is not admissible as part of the same transaction by application of Section 6 of the Evidence Act.

46. However, even if the statement of Krishna Kumar Singh Rajput, PW-8 is not accepted as it is not found admissible evidence under Section 6 of

the Evidence Act, it does not affect or in any manner renders doubtful otherwise reliable on the testimony of Yogesh Singh Rajput, PW-6 and Pranjal Yadav, PW-7 for the reason as stated hereinabove with regard to assault by Philip Chand on the deceased-Vivek.

47. However, there is considerable force and much weight in the submission of learned Senior Counsel for the appellant that the learned trial Court has wrongly applied the provision of Section 34 of the IPC to hold that the appellant-Nishant also shared common intention.

48. The evidence on record, as has been discussed thread-base hereinabove, proved that when the procession was started, there was a quarrel initially between the appellant-Nishant and the deceased-Vivek, but that was pacified. This has been stated by large number of witnesses including Vivek Singh Rajput, PW-6 and Pranjal Yadav, PW-7. The evidence, as has been discussed hereinabove, also shows that when the procession advanced further, at some distance, the appellants came and started dancing along with others. These facts have been stated by Gourav Dubey, PW-5. He has deposed that when procession reached near Arun Sahu Kirana Store, Nishant and Philip again came forward and started dancing and fight took place between Vivek and Philip. He then stated that after some time, he saw Vivek falling down, while dancing.

49. The statement of Yogesh Singh Rajput, PW-6 describing the criminal incident is that when the procession reached near Arun Sahu Kirana Store, he saw that Nishant had caught hold of the neck of the deceased-Vivek and Philip giving assault. This witness does not state that any assault was given on the deceased-Vivek by appellant-Nishant, but assault was made only by Philip. Nishant was not even holding any

weapon, much less giving any assault.

50. Pranjali Yadav, PW-7 also deposed that at later stage of procession, Philip Chand and Nishant came and Nishant caught hold of the neck and Philip Chand gave assault on the deceased-Vivek.

51. Thus, overall consideration of the evidence of all the prosecution witnesses with regard to what happened at two different stages that initially, there was some kind of quarrel between vivek and Nishant, which was pacified and the procession advanced and then later on, the appellant-Philip and Nishant again came forward and they started dancing and again dispute arose. Then, Nishant caught hold of the neck of the deceased-Vivek and at that stage, a knife was taken out by Philip Chand and assault was given to the deceased. None of the witnesses have stated that Nishant was holding any weapon in his hand. It is not a case that both Nishant and Philip left the procession and later on, came back with weapon and both opened assault. As the evidence shows the appellants were also part of the procession and while they were also dancing, a dispute arose. There is nothing in the evidence of any of the prosecution witnesses, particularly the evidence of Yogesh Singh Rajput, PW-6 & Pranjali Yadav, PW-7 that Nishant gave any call to the accused-Philip Chand to assault Vivek, much less abetting Philip Chand to kill Vivek. The circumstances show that the dispute arose spontaneously. There is not even evidence that the appellant-Nishant disabled Vivek by holding his hands, so that, he could not resist assault by Philip Chand. In such a situation, it is difficult to hold that the appellant-Nishant shared common intention with appellant-Philip Chand to kill the deceased.

52. In one of its earlier decisions, the Supreme Court in the case of

Bhagwan Bux Singh and another (supra) found that the evidence of the witnesses would show that one of the accused merely caught hold of the victim, stating that he would be set right, but there was no allegation whatsoever that when the other accused opened assault on the deceased, there was any other accused who aided or abetted the main assailant. In that case, it was held that in the absence of any evidence that one had caught hold of the deceased for the purpose of aiding the main assailant, there was no reliable evidence to show that the participation with the assault on the deceased was as a result of common intention shared by the accused other than the main assailant.

53. Learned counsel for the State has relied upon the decision of the Supreme Court in the case of **Shio Shankar Dubey and others** (supra), to support the judgment of conviction and order of sentence passed by the learned trial Court holding that the appellant-Nishant was sharing common intention. In that case, facts were little different. There was found to be a case of rivalry and enmity and in this backdrop, the accused persons came to him and one of them fired gun shot and also gave assault by stopping the rickshaw and pulling out the deceased from his rickshaw and started assaulting. The other decision is of **Subed Ali and others** (supra), where the facts were that when the deceased persons were returning from the market in bicycle, one of the appellant-accused stopped the two deceased and thereafter, the other accused assaulted. One of the victim tried to flee away after the injury, but he was chased by another accused. In this background, common intention was found proved.

54. In the present case, as the evidence of large number of prosecution witnesses show that while the appellants were dancing, dispute again

arose with the deceased and in this spontaneous act, Philip Chand took out knife and assaulted whereas the appellant-Nishant only caught hold the deceased by his neck without doing any further act to indicate that he was adding or abetting the commission of offence by disabling the deceased. The dispute arose at the spot spontaneously during procession.

55. In order to convict under Section 34 of the IPC, the prosecution evidence has to be clear and unimpeachable and beyond doubt to prove the wordings of Section 34 that a criminal act was done by several persons in furtherance of common intention. Nishant was not holding any weapon in his hand and fight took place all of a sudden. Nishant did not speak any word conveying he shared common intention to kill the deceased.

56. In view of the above consideration, the two appellants were liable for their individual act only. As the assault was given only by the appellant-Philip Chand and not by appellant-Nishant, the appellant-Nishant could not be convicted with the aid of Section 34 as having shared common intention with the main appellant-Philip Chand to kill the deceased.

57. In the result, this appeal is partly allowed. While conviction of the appellant-Philip Chand Goyal is affirmed, conviction of the appellant-Nishant is set aside. Appellant-Nishant be set at liberty.

SD/-
(**Manindra Mohan Shrivastava**)
J U D G E

SD/-
(**Vimla Singh Kapoor**)
J U D G E