



Judgment

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPEAL NO. 277/2022

1. Raja @ Amar s/o Dilip Parteki,
Aged 30 years, Occ. Labour, ... (Original Accused No.1)
2. Roshan s/o. Dilip Parteki,
Aged 29 years, Occ. Labour, ... (Original Accused No.3)

Both resident of near Khobragade
Kirana Stores, Sudam Nagri,
Nagpur.

...

APPELLANTS
(In Jail)

VERSUS

The State of Maharashtra,
through Police Station Officer,
Police Station, Ambazari, Nagpur.

... **RESPONDENTS.**

Mr. S.P. Dharmadhikari, Sr. Advocate with Mr. U. P. Dable, Advocate
for appellants.

Mr. V.A. Thakare, Additional Public Prosecutor for respondent/State.
Mr. R. R. Vyas, Advocate for assisting to Prosecutor.

CORAM : **VINAY JOSHI AND**
VALMIKI SA MENEZES JJ.

JUDGMENT RESERVED ON : **13.07.2023**

JUDGMENT PRONOUNCED ON : **08.09.2023**

JUDGMENT : (PER VINAY JOSHI, J.)

Conviction of accused No. 1 Raja @ Amar Parteki and accused No.3 Roshan Parteki led them to file this appeal in challenging the judgment and order of conviction dated 09.03.2022 in Sessions Case No. 65/2017. The impugned judgment is assailed on various grounds to impress that on the touchstone of requisite standard of proof under criminal law, it is not sustainable.

2. A gruesome murder of one Sachin Somkuwar dated 29.09.2015 led in total five accused to face the trial in Sessions Case No.65/2017 for the offence punishable under Sections 302, 307 read with Sections 34, 143, 147, 148, 149 of the Indian Penal Code, Section 3 read with Section 25 of the Arms Act and Section 37(1)(3) read with Section 135 of the Maharashtra Police Act.

3. On full-fledged trial, Accused No.1 Raja @ Amar Parteki and accused No.3 Roshan Parteki were convicted for the offence punishable under Sections 302, 307 read with Section 34 of the Indian Penal Code, whilst rest were acquitted from all charges. Both convicted accused were sentenced to undergo imprisonment for life and to pay fine of Rs. 5,000/- each with default clause, for the

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offence punishable under Section 302 read with Section 34 of the Indian Penal Code, whilst they have been sentenced to suffer rigorous imprisonment for five years with fine of Rs. 3000/- for the offence punishable under Section 307 of the Indian Penal Code. Both substantive sentences were directed to run concurrently. The State has not challenged the acquittal of rest of the accused. Therefore, the limited question falls for consideration is about legality and sustainability of conviction of both of them for the offence punishable under Sections 302, 307 read with Section 34 of the Indian Penal Code.

4. Heard extensively Mr. S.P. Dharmadhikari, learned senior counsel for the appellants whilst Mr. V.A. Thakare, learned Additional Public Prosecutor ('APP') for respondent/State and also heard Mr. R.R. Vyas, learned counsel to assist the prosecution. We have gone through the entire material and especially adverted to the various decisions cited by the rival parties to substantiate the points canvassed by them.

5. It was an usual afternoon of 29.09.2015 in the busy market place of Gokulpeth, Nagpur. PW-2 Suraj Dongre and his friend

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Sachin (deceased) went to Pande Hardware around 01.20 p.m. situated at Gokulpeth. Within few minutes, both by riding on black coloured pulsar motorcycle started to proceed towards Mahal area. However, near Pande Hardware, particularly in front of shop namely Kanchan Traders, some persons fired at them. PW-2 Suraj has seen toward the assailants and identified them as Accused No. 1 Raja @ Amar Parteki , Accused No.5 Bittu Ashfaq and one Ankit Pali (not tried). The firing was made by a weapon namely pistol. PW-2 Suraj has also seen some unknown associates of the above assailants. Sachin sustained fire arm injuries and fell down. PW-2 Suraj carried injured Sachin by auto rickshaw to the Wockhardt Hospital. When he called auto-rickshaw, he also picked up a stone, seeing that the assailants fled. In said firing, PW-2 Suraj also sustained firearm injury at his head near left ear. At Wockhardt Hospital, on admission, Sachin was declared dead. The Police arrived at the hospital, and recorded statement of PW-2 injured Suraj. On the basis of said report, the crime was registered.

6. At the relevant time, PSI Amol Lakde (PW-20) was attached to the concerned Ambazari Police Station. He received

information from Control Room that a murder was committed at Gokulpeth area. Station Diary entry was taken and intimation was given to the senior Police Inspector API Suraj Suroshe (PW-21). PSI Amol Lakde rushed to the spot, but learnt that the injured were already shifted to the Wockhardt Hospital. He went to the hospital with Police Staff by arranging to guard the spot. He has requested the Medical Officer for recording the statement of Sachin, however the Medical Officer stated that Sachin was not in a position to give statement. Then he has recorded the statement of injured PW-2 Suraj. He learnt that injured Sachin succumbed to bullet injuries.

7. PSI Lakde (PW-20) returned to the place of occurrence, prepared Panchanama of the seen of offence in presence of panch witnesses. He has seized one cotton bed-sheet, ten empty cartridges and collected the blood sample from the spot. The place of incident was on the road in front of Kanchan Traders. Rough sketch of the place of occurrence was prepared. He returned to the Hospital and seized the clothes of deceased Sachin and injured Suraj. He prepared Inquest Panchanama on the dead body and sent it for postmortem examination. On the following day, investigation was

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entrusted to PW-21 API Suraj Suroshe. He received investigation papers including copy of First Information Report, statement of injured Suraj, Spot Panchanama, Inquest Panchanama, injury report of Suraj and Seizure Panchanama. During course of investigation, he has recorded statement of some other witnesses. On the same day, he has arrested accused Ankit Pali and Mohd. Ashfaq. He seized one Swift Desire Car from Ankit Pali. On 01.10.2016, he arrested Accused No.1. Raja @ Amar Parteki, Accused No.2 Ankesh Uikey and Accused No.3 Roshan Parteki. During personal search, one iron pistol was seized from Accused No.1 Raja @ Amar Parteki and Accused No.3 Roshan Parteki each. During course of investigation, seized articles were sent to Forensic Science Laboratory for chemical analysis.

8. While Accused No.1 Raja @ Amar Parteki was in Police Custody, he expressed willingness to show the place where he has concealed the blood stained clothes. Memorandum Panchanama was prepared which was followed by seizure of clothes. PW-21 API Suroshe, has arranged for prior test identification parade through Tehsildar. Time to time supplementary statements have been

recorded. After completion of investigation, final report was initially filed against four accused. Latter on, supplementary charge-sheet was filed.

9. To meet the legal requirement of establishing guilt beyond reasonable doubt, the prosecution endeavoured into examining in all 24 witnesses. The prosecution evidence consists of eye-witnesses, Pancha, Medical Officer, Ballistic Expert and Police Persons. The prosecution also banks upon certain document. The defence is of deninal and false implication. The homicidal death of Sanchin was not seriously disputed before the Trial Court. Cause of death is hemorrhagic shock due to bullet injuries. The Trial Court has disbelieved the seizure of articles at the instance of accused. The Trial Court has disbelieved the role of other accused, but held that Accused No.1 Raja @ Amar Parteki and accused No.3 Roshan Parteki guilty for the murder of Sachin, and attempted to commit murder of Suraj.

10. Learned senior counsel appearing for appellants made variety of submissions to impeach the worth of the prosecution case, so also, he took us through the reasoning assigned by the Trial Court

to impress that the same does not withstand on the touchstone of settled law. We prefer to contextually deal with the submissions of both side in the latter part of the judgment.

11. Always in like cases, the first and foremost question needs to be addressed is whether victim (Sachin) met with homicidal death. The prosecution is coming with a case that the death of Sachin Sonkuwar was homicidal. In order to support its case, the prosecution heavily relied upon the evidence of Dr. Ajay Kurve (PW.16) and Dr. Jaideo Borkar (Exh.17). Besides that, the prosecution also relied upon the Post Mortem Report and inquest panchanama. As far as the defence is concerned, it seems that there is no much dispute as regards to the homicidal death. On perusal of the testimony of Dr. Ajay Kurve (PW.16), it reveals that when he examined the deceased, he noticed profuse bleeding from nose, oral cavity and multiple gun shots over scalp. He noticed 10 gunshot injuries. Those were, (1) right temporal area, (2) right parietal area, (3) right frontal area with brain matters prolapse, (4) left maxillary region, (5) large lacerated wound extending down on the face, communicating with oral cavity, (6) left intramurally region, (7) left

infra axillary region, (8) left para spinal lumber region at level around L1, (9) left submanbular region, and (10) right anterior triangle and neck upper 1/3rd. He further deposed that three bullets were recovered from the bed sheet over which the deceased was kept and those were handed over to the police.

12. The prosecution has examined Dr. Jaideo Borkar (PW.17), who conducted postmortem and noticed the injuries, which he mentioned in Col. No.17 of the Post Mortem Report, as under;

- 1) Firearm entry wound over left side of face.
- 2) Firearm entry wound over left side of neck at submandibular region below the angle of angle of mandible with evidence of blackening. Exit wound produce communicated perforated fracture of skull bone at saggital sutural level with lacerated wound corresponding with injury No.8 of Col.No.17.
- 3) Firearm entry wound over right side of forehead with evidence of blackening.
- 4) Firearm exit wound in the form of lacerated wound over right parietal region above the level of right ear, margins irregular.
- 5) Firearm entry wound over right angle of mouth, margins irregular with surrounding grease collar directed from lateral to medially and upward. Exit wound producing communicated perforated wound on right parietal bone of produce exit wound

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as lacerated wound on parietal region of scalp with margins everted corresponding with Injury No.4 of Col. No.17.

6) Forearm entry wound over left side of chest at the level of 6th intercostal space and 4 cm lateral to midclavicular line with circular shaped margins inverted with surrounding grease colour with evidence of collar with evidence of blackening directed lateral to medially.

7) Firearm entry wound over left side of chest at level 7th intercostal space midaxillary line, oval in shaped, margins inverted with surrounding grease collar with evidence of blackening directed lateral to medially.

8) Forearm exit wound in the form of lacerated wound over midparietal region above the level of supraorbital ridge, margins irregular.

9) Firearm entry wound over left side of back at the level of 8th throasic vertebra lateral to midline oval in shaped, margins inverted with surrounding grease collar with evidence of blackening directed posterior to anterior.

10) Firearm entry wound over left side of back at the level of 1st lumber vertebra and lateral to midline, oval in shaped, margins inverted with surrounding grease collar with evidence of blackening directed posterior to anterior.

11) Firearm entry wound over right side of neck below the level of angle of midline, circular in shaped, margins inverted with surrounding grease collar with evidence of blackening directed lateral to medially towards back.

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12) Firearm entry wound on left side of neck below angle of mandible circular in shaped, margins inverted with surrounding grease collar with evidence of blackening directed lateral to medially towards back.

13) Forearm entry wound on right temporal region above right ear, circular shaped, margins inverted with surrounding grease collar with evidence of blackening directed lateral to medially towards back.

This witness has also given detailed track of each injury. He also noticed corresponding internal injuries. He opined that the injuries were of ante mortem in nature, and the cause of death was shock and heamorrhage due to firearm injuries. The inquest panchanama (Exh.73) also demonstrates that there were several injuries on the person of the deceased. During cross-examination of Dr. Jaideo Borkar (PW.17), nothing emerges to dislodge the claim of the prosecution that the death of Sachin Somkuwar was homicidal. Even otherwise, the evidence of eye witnesses suggest that the bullets were fired towards the deceased and he sustained injuries. Thus, without hiccup it can be held that Sachin Somkuwar met with homicidal death.

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13. Mr. Dharmadhikari, learned senior counsel has criticized the impugned judgment from all possible angles. Precisely, he would submit that:-

(i) The Trial Court failed in appreciating the evidence in its proper perspective.

(ii) The Trial Court ought not to have relied on the evidence of PW-2 Suraj as he was prone to falsely implicate the assailants.

(iii) The Trial Court failed in holding the presence of PW-14 Prakash Somkuwar, and PW- 18 Aniket at the place of occurrence.

(iv) PW-2 Suraj was knowing Accused No.3 Roshan, however his name was not mentioned in FIR.

(v) Unexplained delay in recording statement of eye-witness PW-14 Prakash Somkuwar and PW-18 Aniket.

(vi) It is improbable that Accused No.1 Raja and Accused No.3 Roshan carried weapons for two days till they were arrested at the Police Station.

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(vii) Independent witnesses have not been examined, though the incident took place in busy market place.

(viii) Chain of custody of seized articles has not been established.

(ix) Test Identification Parade is faulty and against the settled norms.

(x) The Investigating Officer has not recorded the statement of auto-driver who carried injured to the Hospital.

(xi) During course of investigation, best available evidence of CCTV footage was not collected.

(xii) The prosecution failed to establish motive, rather false motive has been alleged.

(xiii) Deceased had various enemies.

14. To substantiate above contentions, Mr. Dharmadhikari, placed reliance on the following decisions:-

**Sr.
No.**

1. State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180.

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2. Mahendra Singh & ors. V. State of Madhya Pradesh, (2022) 7 SCC 157.
3. The State of Maharashtra Vs. Prabhu Barku Gade, 1994 SCC Online Bom 542.
4. Mohd. Iqbal alias Munna V. State of Maharashtra, 2016 SCC Online Bom 5365.
5. Prakash Nishad @ Kewat Zinak Nishand Vs. State of Maharashtra (Criminal Appeal Nos. 1636-1637 of 2023, decided on 19.05.2023)
6. Shivasharanappa and others Vs. State of Karnataka with connected matter, (2013) 5 SCC 705.
7. State of Maharashtra Vs. Raju Bhaskar Potphode, (2007) 11 SCC 261.
8. Amit s/o. Pramod Somkumar Vs. State of Maharashtra (Criminal Appeal No. 525 of 2018) with connected Matters, decided on 21.06.2023.
9. Sachin Kumar Singhraha Vs. State of Madhya Pradesh, (2019) 8 SCC 371.
10. Harbeer Singh Vs. Sheeshpal and others with connected matter, (2016) 16 SCC 418.
11. Maruti Rama Naik Vs. State of Maharashtra, (2003) 10 SCC 670.
12. Bijender alias Mandar Vs. State of Haryana, (2022) 1 SCC 92.
13. Badam Singh Vs. State of M.P., (2003) 12 SCC 792.
14. Tomaso Bruno and another Vs. State of Utter Pradesh, (2015) 7 SCC 178.

15. Per contra, Mr. V.A. Thakare, learned APP and Mr. Vyas, learned counsel for assisting prosecution supported the judgment of

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the Trial Court by stating that the prosecution has duly established the guilt of accused. The evidence eye-witnesses is cogent, consistent and reliable. The presence of chance witness is natural. Evidence of PW-2 Suraj would stand on high footing being injured in the occurrence. Suggestions given during cross-examination support the presence of PW-14 Prakash at the place of incident.

16. Mr. Vyas, learned counsel appearing for the informant, relied on the following decisions:-

15. State of A.P. Vs. K. Srinivasulu Reddy and another, (2003) 12 SCC 660.

16. Lalli alias Jagdeep Singh Vs. State of Rajasthan, (2003) 12 SCC 666.

17. The statement of accused under Section 313 of the Code was recorded to obtain their explanation on incriminating material. By and large, the defence of the accused is of total denial. Accused No.1 Raja stated that he was witness in murder case of one Uikey whilst deceased Sachin was accused in said case, hence he has been falsely implicated. Accused No.3 Roshan stated that he being real brother of Accused No.1 Raja, has been falsely implicated with an intention that Raja shall not get assistance in the case.

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18. On appreciation of oral and documentary evidence, the Trial Court has recorded finding of guilt against accused No.1 Raja and Accused No.3 Roshan for the offence punishable under Sections 302, 307 read with Section 34 of the Indian Penal Code. The Trial Court held that Sachin met with homicidal death. Evidence of these eye-witness is consistent and reliable. The prosecution has established guilt of Accused No.1 Raja and Accused No.3 Roshan, but failed as regards to the rest. The conviction is solely based on the testimony of ocular evidence. The Trial Court found evidence of PW-2 Suraj, PW-14 Prakash Somkuwar and PW- 18 Aniket cogent, consistent and reliable. Though other corroborative circumstances were relied by the prosecution, however the Trial Court disbelieved the same.

19. In view of above, the evidence of eye witnesses largely fell for scrutiny in the appeal. In this regard, the prosecution led evidence of informant PW-2 Suraj who is injured witness, PW-14 Prakash Somkuwar who is father of deceased, and PW- 18 Aniket who is a chance witness to the occurrence.

20. The main thrust of the prosecution is on the evidence of PW-2 Suraj who got injured in the occurrence. At the inception, Mr. Dharmadhikari, learned senior counsel reminded us the well cherished principles of criminal law, by placing reliance on the decision in case of **State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180**, wherein it is observed that if the circumstances gives rise to the possibility of two views, the view favourable to the accused should be adopted. Secondly, reliance is placed on the decision of the Supreme Court in case of **Mahendra Singh & ors. V. State of Madhya Pradesh, (2022) 7 SCC 157** to contend that, always the oral testimony of witnesses can be classified into three categories, namely wholly reliable, wholly unreliable, and neither wholly reliable nor wholly unreliable. Particularly, our attention is invited to para 12 of the judgment which reads as below:-

*“12. It will be apposite to refer to the following observations of this Court in its celebrated judgment in **Vadivelu Thevar, 1957 SC 614.***

“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.”

21. There is no manner of doubt that burden on prosecution in criminal cases being heavier the view pointing towards the possibility of innocence of accused would take precedence. Whether a particular witness is reliable or unreliable or partly reliable is a question of fact. The Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving

a fact. We may refer to the decision of the Supreme Court in case of *State of H.P. Vs. Lekh Raj and another, (2000) 1 SCC 247*, wherein observations regarding approach of the Court in dealing with oral evidence is succinctly explained in para 10 which reads as below:-

“10 The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstances keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic

hypertechnical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal Jurisprudence cannot be considered to be a utopian though but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind.”

22. Keeping in mind the above principles, we have examined the evidence of eye-witness in the context of factual background and the submissions made by rival parties. Obviously, prosecution is largely banking on the evidence of PW-2 Suraj who is a star witness of the prosecution. It is his evidence that on the day of occurrence i.e. on 29.09.2016, around 01.20 p.m. he went with deceased Sachin to Pande Hardware shop at Gokulpeth market, by riding motorcycle. Both remained in the shop for 10 to 15 minutes, and started to proceed towards Mahal area. No sooner they proceeded some persons fired at them in front of a shop namely Kanchan Traders. PW-2 Suraj seen to front, and identified the shooters as Accused No.1 Raja (appellant No.1), Accused No.5 Bittu alias Ashfaq (acquitted)

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and one Ankit Pali (not tried). Suraj slowed down the vehicle and seen backward, that those three were assaulting Sachin with their associates by means of pistol. In the said incident, PW-2 Suraj also sustained head injury near left ear. PW-2 Suraj lifted stone, on which the assailants fled. Then PW-2 Suraj shifted injured Sachin by auto-rickshaw to the Wockhardt Hospital. On admission, Doctor declared Sachin dead, whilst admitted him for medical aid. The Police arrived at the hospital and then PW-2 Suraj has lodged report (Exh.47) about the occurrence. For the purpose of clarity, we note that though in the FIR PW-2 Suraj stated names of Accused No.1 Raja, Accused No.5 Bittu alies Ashfaq and one Ankit Pali, however the Trial Court has convicted Accused No.1 Raja, along with Accused No.3 Roshan who was not named in the FIR.

23. Mr. Dharmadhikari, senior counsel has strenuously criticized the evidence of informant PW-2 Suraj, by making variety of submissions. The entire endeavour was to demonstrate that PW-2 Suraj is totally unreliable, and he cannot be trusted to base the conviction. It is primly canvassed that though PW-2 Suraj was knowing Accused No.3 Roshan, however his name was not stated in

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the FIR, but falsely implicated in Court. According to him, Accused No.3 Roshan was known to the witness and thus, non-discloser of his name in the FIR, itself falsifies participation of Accused No.3 Roshan. It is canvassed that since Accused No.3 Roshan was known to the witness, identification of Roshan in Prior Test Identification Parade is a farce having no evidentiary value in law.

24. In order to impress said submission, the learned senior counsel took us through the cross-examination of PW-2 Suraj coupled with his statement recorded by the Magistrate in terms of Section 164 of the Code (Exh.49). It was suggested to PW-2 Suraj in cross-examination that he was knowing Accused No.3 Roshan since prior to the occurrence to which he denied. Particularly, he was asked that did he state before the Magistrate that he had earlier seen Accused No.3 Roshan at the Hill Top area. The witness has skillfully avoided the answer by stating that he does not remember whether he made such a statement. He reiterated that he do not remember whether he has stated to the Magistrate that prior to six months, Accused No.3 Roshan came to the Hill Top area and that is why he knew him. The witness was confronted with his prior statement recorded by the

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Magistrate that he knows Accused No.3 Roshan along with others, as prior 5 to 6 months they came to Hill Top area. On such confrontation, PW-2 Suraj admits the same. Thus, it is apparent that the witness was knowing Accused No.3 Roshan, since prior to the occurrence, but his name was not stated in the FIR as an assailant. Certainly this aspect shatters the very participation of Accused No.3 Roshan in the occurrence. Obviously, when PW-2 Suraj was knowing Accused No.3 Roshan then he has no reason to exclude him in first information. Moreover, it is not the case to the extent of Accused No.3 Roshan that he was unknown to the witness to rely on the Test Identification Parade or identification in Court. Thus, the defence submission is acceptable to the extent of exaggerated implication of Accused No.3 Roshan.

25. Apart, Mr. Dharmadhikari, senior counsel would submit that though PW-2 Suraj was not knowing Accused No.5 Bittu alias Ashfaq and Ankit Pali, their names have been stated in FIR which shows the falsity. However, careful examination of his evidence shows that though initially witness denied his acquaintance with them, however admits their acquaintance by identifying their

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vehicles. Moreover, in supplementary statement, witness stated that he has not properly seen them. Thus, it cannot be held that he has falsely stated about them but he was not sure about their participation. It is a different aspect to consider worth to that extent, but it cannot be said that total falsity lies in him.

26. It is argued that as per evidence of PW-2 Suraj, initially firing was from front side. According to defence, when PW-2 Suraj was driving the motorcycle, he must have received gun shot injuries to his front portion, but he did not, hence his presence is doubtful. No doubt, PW-2 Suraj stated that when firing started, he has seen the shooters from front side. True, PW-2 Suraj did not sustain several injuries at his front portion like chest, face, neck etc., however it is to be remembered that PW-2 Suraj did sustain gunshot injury at his head over left ear. Head injury of PW-2 Suraj was duly proved by the prosecution by leading medical evidence which vouch about his presence on the spot and strongly corroborates his version.

27. Normally, he might have sustained injury at front, if firing was exactly from front side. However, everything depends upon the facts and circumstances of the case. It depends upon the

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distance between both, speed of vehicle, angel of shot, sitting position on the vehicle, accuracy of shooter and so on. There cannot be a set rule to say that in the scenario PW-2 Suraj must sustain injuries at his front portion. Particularly, when the vehicle was in motion, the possibility of missing target is more and injury at the left side of head is quiet possible. Therefore, no definite inference can be drawn on said circumstance, nor his evidence can be discarded on mere assumption.

28. Then the prosecution has relied on the evidence of PW-14 Prakash Somkuwar who is a father of deceased. He claims to be the eye witness to the occurance. His evidence falls under the category of chance witness. The defence has strongly criticized his evidence to show his absence at the place of incident. We have carefully examined the evidence of this witness. He is a vegetable vendor doing business at Gokulpeth Bazar. On the day of occurrence, at about 02.00 to 02.30 p.m., he heard noise of firing of bullets. He saw that his son was lying on the road, thereafter he immediately shifted his son to the Wockhardt Hospital by auto-rickshaw of one Nilesh Dongre. Further, he added that there were 4

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to 5 persons in the mob near the place of incident. Those persons ran away, but he identified Accused No.1 Raja and Accused No.3 Roshan whilst others were unknown. PW-14 Prakash has identified both of them in the Court and stated that they were possessing guns and fired from the same. Apart from the sequences of events, the whole reading of his evidence indicates that he went to the place after firing incident. At the most, it can be gathered that he has seen Accused No.1 Raja and Accused No.3 Roshan in the mob at the place of occurrence. Further addition that both of them have fired with gun does not matches his earlier version.

29. Learned defence counsel has submitted that at the relevant time, PW-14 Prakash was at his house. After getting news, around 03.00 p.m. he directly went with his wife to the Wockhardt Hospital. It is submitted that his initial statement recorded by Police in the Wockhardt Hospital was suppressed. Moreover, though his clothes were allegedly smeared with blood, they were not seized despite showing to the Police. Besides that, statement of PW-14 Prakash was recorded after three days which is quiet suspicious. On the basis of theses discrepancies, it is strenuously argued that PW-14

Prakash was not present on the spot, but he has been foisted in the occurrence being father of the deceased.

30. Always in criminal cases, cross-examination is probably the only weapon in the armoury of defence to test the credibility of the witness. It has come in his evidence that he started towards Wockhardt Hospital with his wife at 03.00 p.m. from his house. The said admission runs counter to his entire evidence which is otherwise. He stated that since he lifted the injured, his clothes were smeared with blood and he has also shown his clothes to the Police at the Wockhardt Hospital. He admits that till date, his clothes smeared with blood were not seized by the Police. On the other hand, PW-20 PSI Amol Lakde, states that he did not see any blood stains on the clothes of PW-14 Prakahs in the hospital.

31. PW-14 Prakash has stated that the Police have recorded his statement at the Wockhardt Hospital, however there is no such a statement. Though the statement of this witness has been recorded by the Police on 01.10.2016, however he denied recording of his statement accordingly. We would not have adhered to the aspect of time of recording of statement, however the witness is very sure in

his evidence to say that his only statement was recorded at Wockhardt Hospital. In that case, it raises doubt about existence of his first statement. As per investigation papers, his statement was recorded on 01.10.2016, meaning thereby after two days from the occurrence. Had it been the fact that PW-14 Prakash has witnessed the occurrence particularly regarding deadly assault on his own son, he must have disclosed the same immediately to the Police. We do not see any explanation in this regard as to why the father despite seeing murderous attack on his son, remained silent for two days though confronted with the Police.

32. There are lot of improvement in his evidence. Even if first portion of his evidence is accepted, it goes to show that after firing incident, he reached to the spot. Apparently, the subsequent testimony dehors his earlier version appears to be improvement after two days from the occurrence. Moreover, PW-2 Suraj is totally silent about his presence, in the FIR as well as evidence too.

33. Undoubtedly, PW-14 Prakash appeared on the screen in the capacity of chance witness. Mr. Vyas appearing for informant would submit that, merely because he happened to be a chance

witness, his evidence cannot be discarded. In this regard, reliance is placed on the decision of the Supreme Court in case of **State of A.P. Vs. K. Srinivasulu Reddy and another, (2003) 12 SCC 660**. In the said case, the chance witness was considered to be independent one having no animosity against the accused. In the peculiar facts of said case, the chance witness was believed. Basically, one has to consider over all circumstances before deciding worth of the evidence of chance witness. Since the occurrence took place in the busy market in rush hours, naturally the passer-by would be the witnesses. Distinction lies that PW-14 Prakash cannot be considered as an independent witness since he was father of deceased. Moreover, it has come in his evidence that his deceased son was one of the accused in the murder case of one Ballya Uikey. It is the prosecution case itself that at the instance of murder of Ballya Uikey, the accused committed murder of Sachin. Moreover, silence of this witness for long two days despite allegedly witnessing the occurrence creates suspicion. Therefore, being different facts above decision would not assist the prosecution in any manner.

34. Mr. Vyas, learned counsel further relied on the decision of the Supreme Court in case of *Balu Sudam Khalde and another Vs. State of Maharashtra, 2023 SCC Online SC 355* to contend that suggestions given by the defence during cross-examination would bind the accused. In this regard our attention has been invited to the cross-examination of PW-2 Suraj. It was suggested to PW-2 Suraj that he along with PW-14 Prakash shifted injured Sachin to the hospital by auto-rickshaw. Relying on said suggestion, it is submitted that defence cannot deny the presence of PW-14 at the time of occurrence. In-fact, the said suggestion was not given to PW-14 Prakash, but to some one else. Moreover, for the sake of judgment, even if it has been considered as an admission, still it speaks only about presence of Prakash while shifting injured Sachin, and not to the extent of witnessing the actual occurrence. The over all scrutiny pursued us to hold that PW-14 Prakash did not witnessed the incident, but after the occurrence, he rushed to the place of incident. His half-hearted statement including the role of accused at the fag-end de hors the chain of events, raises reasonable doubt.

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35. In order to establish the presence of PW-14 Prakash the prosecution has examined PW-13 Sudhir who was running a shop at Gokulpeth area. It is his evidence that on the day of incident, he has seen PW-14 Prakash shifting the injured to the hospital by auto-rickshaw. We may clarify that evidence of auto-rickshaw driver is not available. The evidence of this witness itself shows that he was knowing PW-14 Prakash being nearby vegetable vendor. He never stated about the actual occurrence. Since he has not supported the prosecution case, he was declared hostile. No doubt, the evidence of hostile witness can be relied to the extent which was found credible, however, his evidence does not gain support from the injured witness PW-2 Suraj. Moreover, this witness has clarified in the cross-examination that he is not personally aware as to who has shifted injured Sachin to the Hospital. In the circumstances, evidence of PW-13 Pande is of no assistance to prove the presence of PW-14 Prakash on the spot.

36. To the next, prosecution relied on the evidence of PW-18 Aniket Bendre, who is one other eye-witness to the occurrence. It has come in his evidence that at relevant time, he was proceeding

towards Gokupeht Market. He heard the noise of explosion and saw people running helter skelter. He saw that Sachin and his friend PW-2 Suraj were lying in the injured condition. He saw 5 to 6 young persons were firing at Sachin. He has identified Accused No.1 Raja, and Accused No.3 Roshan, but could not identify the rest assailants. He stated that father of Sachin (PW-14 Prakash) called auto-rickshaw and shifted injured to the Hospital.

37. The defence has equally doubted the presence of this witness by stating that he is interested witness. It is pointed that his evidence contradicts the evidence of PW-2 Suraj who stated that he himself has shifted injured to the hospital. The defence would argue that there is unexplained delay of three days in recording his statement. Relying on the decision of the Supreme Court in case of **Harbeer Singh Vs. Sheeshpal and others with connected matter, (2016) 16 SCC 418**, it is submitted that the delay in recording statement of witness affects the credibility, unless cogent and credible explanation to the satisfaction of the Court has furnished. The law in this regard, is settled that the Court may rely on such a

testimony, if found to be credible with satisfactory explanation for delay.

38. The learned counsel appearing for the defence would submit that this witness though posed himself to be independent one, but he was closely associated with the family of deceased. In this regard, we have been taken through his cross-examination. He admits that he was knowing the place of residence of deceased Sachin and his brother Bipin. He also admits that he is having cordial relations with the family of deceased Sachin and injured Suraj Dongre. Moreover, he admits that he was knowing PW-14 Prakash (father of deceased) since prior to two years of the occurrence. These admissions indicate that he was of well acquaintance with the family of deceased as well as injured Suraj. True, we are not jettisoning his evidence on said sole count, but it gives us ring of caution while appreciating his evidence.

39. This witness made material improvements in the evidence that he has also seen injured Suraj at the place of occurrence. His evidence on the point of shifting of injured to the Hospital contradicts the version of informant Suraj. So far as the

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delay in recording statement, admittedly, after two days, his statement was recorded by the Police on 01.10.2016. It has come in his evidence that on 29.09.2016 and 30.09.2016 neither he went to the Police Station, nor Police came to him. He stated that till 01.10.2016, he had not disclosed the occurrence. The conduct of this witness seems to be quiet unnatural that despite knowing the family of deceased, he had not disclosed the thing for next two days. The prosecution has not offered plausible explanation about the delay in recording his statement. Moreover, it is pointed by the defence that statement of PW-14 Prakash and PW-18 Aniket were recorded on the same day. It is the submission that after two days, the Police have chosen to make relative and friend as eye-witnesses and therefore, the delay. PW-2 Suraj though acquainted with this witness, has not stated about his presence on the occurrence. True PW-2 Suraj also sustained injury in the occurrence, meaning thereby he may not be attentive, but the fact remains that we do not get corroboration about the presence of this witness at the relevant time. Therefore, for the aforesaid reasons it is risky to rely on the belated version of this witness.

40. One another submission made by the defence is about commencement of investigation prior to the lodgment of FIR. It is brought to our notice that the Police registered crime vide Crime No. 246/2016 at 08.21 p.m. dated 29.09.2016 (Exh.118), whilst the Panchanama of the scene of offence was carried on 29.09.2016 in between 03.50 to 05.00 p.m. It is also pointed that the Panchanama though carried prior to the registration of FIR, it bears a crime number. We do note that Panchanama also bears reference of station diary Entry No. 28/2016 carried at 02.21 p.m. The core question is whether Police can commence investigation prior to the registration of FIR. Ordinarily the process of investigation starts after registration of crime, but registration of crime is not sine qua non for carrying investigation. Section 157 of the Code postulates that the Police Officer shall start investigation from the information received (under Section 154 of the Code) or otherwise, it means that even if the Police Officer besides FIR, receives information from other sources regarding commission of crime, he can well start the process of investigation. In this regard, we may refer to the decision of the Supreme Court in case of **State of Uttar Pradesh Vs. Bhagwant**

Kishore Joshi, AIR 1964 SC 221 (V 51 C 21), wherein the observation made in para 8 clarifies the position which reads as below:-

“(8) Though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation. Section 157 which prescribes the procedure in the matter of such an investigation can be initiated either on information or otherwise. It is clear from the said provisions that an officer in charge of a police station can start investigation either on information or otherwise. Under S. 4(1) of the Code of Criminal Procedure, "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.”

41. The said position was clarified by Privy Council way back in case of **Emperor Vs. Khwaja Nazir Ahmad, AIR (32) 1945 Privy Council 18**, wherein it is observed by Lord Porter as below:-

“In the case of cognizable offences, receipt and recording of a first information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of

information received and recorded in this way, but there is no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. S.157 when directing that a police officer, who has reason to suspect from information or otherwise that an offence which he is empowered to investigate under S.156 has been committed shall proceed to investigate the facts and circumstances supports this view.”

In view of above position, we do not see any irregularity in commencement of investigation preceeding to the lodgment of FIR.

42. One other point canvassed by defence is about failure of Police to collect CCTV Footage which was easily available. In this regard, our attention has been invited to the evidence of PW-20 PSI Amol Lakde who is candid enough to say that CCTV camera were installed at several shops in the vicinity. He further admits that he has not made efforts to collect CCTV Footage of the occurrence. It is submitted that despite availability of CCTV Footage, the Investigating Officer has not collected the same which was the best evidence. According to defence, possibility of suppression of CCTV Footage

cannot be ruled out as it goes against the prosecution case. In this regard, reliance is placed on the decision in case of **Tomaso Bruno and another Vs. State of Utter Pradesh, (2015) 7 SCC 178**, wherein the prosecution case was inter alia disbelieved on account of non-collection of CCTV Footage. The facts of said case are quiet distinct, wherein three persons stayed in the lodging house, where one of them found dead on the following day. The rest two took a defence that in the wee hours, they had gone out of the hotel. In the circumstances, it was found that though CCTV Footage was available in the hotel, the same was not collected. The evidence in that regard would have been thrown light whether it was a case of custodial death, or the two accused had gone out. Thus, in those peculiar facts, the CCTV Footage was held to be the best source and in said context, above observations have been made.

43. The case in hand materially defers. The prosecution case mainly rest on the ocular evidence, whilst above referred case was based on the circumstantial evidence. The prosecution has led evidence of three eye-witnesses. True, the Investigating Officer ought to have endeavoured to collect CCTV Footage, but he did not.

Since the evidence of eye-witness is available, the said lapse is minor having no impact on the over all credibility of the prosecution case.

44. In order to impress the point of faulty investigation, reliance is placed on the decision in case of **Sachin Kumar Singhraha Vs. State of Madhya Pradesh, (2019) 8 SCC 371**. The relevant para 17 of the decision reads as under:-

“17. At this juncture, we would like to recall that it is well settled that criminal justice should not become a casualty because of the minor mistakes committed by the Investigating Officer. We may hasten to add here itself that if the Investigation Officer suppresses the real incident by creating certain records to make a new case altogether, the Court would definitely strongly come against such action of the Investigation Officer. There cannot be any dispute that the benefit of doubt arising out of major flaws in the investigation would create suspicion in the mind of the Court and consequently such inefficient investigation would accrue to the benefit of the accused.”

Certainly, if there are major flaws in the investigation then benefit belongs to the accused. However, on mere lapses of investigation, the criminal justice should not be thwarted. In the

present case, defence is unable to point any major flaw of investigation to compel us to doubt entire prosecution case.

45. It is settled position of law that defective investigation or lapses in the investigation itself cannot be a ground for acquittal. In this regard, we may advert to the decision of the Supreme Court in case of **C. Muniappan Vs. State of T.N., (2010) 9 SCC 567** of which para 55 reads as below:-

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth.

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Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”

46. In another case of **Karnel Singh Vs. The State of M.P. (1995) 5 SCC 518**, it was held that in case of defective investigation, the Court has to be circumspect in evaluating the evidence, but it would not be right in acquitting an accused solely on account of defect in the investigation. In case of **Ram Bihari Yadao Vs. State of Bihar and others, (1998) 4 SCC 517**, it is observed that in case of lapses in investigation, the case of prosecution has to be examined de hors such omission and contaminated contact of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied.

47. Mr. Dharmadhikari would submit that the prosecution has failed to establish motive rather PW-2 Suraj has stated the false motive. It is pointed out that PW-2 Suraj in his Police Report has stated that the assault was at the instance of taking revenge of the murder of one Ballya Uikey. Contextually, we have taken through cross-examination of this witness, wherein he admits that he has no

concern with the murder of Ballya Uikey and he had no inimical terms with Ballay Uikey. So far as the aspect of absence of motive is concerned, it is settled position of law that when the case is based on ocular evidence, in true sense, the motive losses its significance. Certainly, to strengthen the case, the prosecution seek motive for commission of crime.

48. In this regard, we may refer to the observation of the Supreme Court made in para 13 in case of **Bhimapa Chandappa Hosamani and others Vs. State of Karnataka, (2006) 11 SCC 323** which reads as below:-

“13. “.....It is well settled that in order to bring home the guilt of an accused, it is not necessary for the prosecution to prove the motive. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If the evidence of the witnesses appears to be truthful and convincing, failure to prove the motive is not fatal to the case of the prosecution. The law on this aspect is well settled.”

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Besides, it reveals that murder of one Ballya Uikey has some repercussion on the occurrence. Admittedly, deceased was one of the accused in the murder case of Ballya Uikey. Informant is friend of deceased Sachin. It gives clear indication that the incident was out-come of gang rivalry and it connects with the motive in committing murder.

49. It is the prosecution case that when both appellants were arrested, the Police have seized pistols from their possession. In order to establish seizure, the prosecution has examined panch witnesses however they have turned hostile. The prosecution led evidence of PW-21 API Suraj Suroshe on the point of seizure of pistol from both appellants along with co-accused Ankesh Uikey. It is his evidence that during personal search of Accused No.1 Raja and Accused No.3 Roshan, iron pistol were seized. The learned counsel appearing for the defence has strenuously criticized the said piece of evidence on account of improbability. The alleged occurrence took place on 29.09.2016, whilst both accused were arrested at concerned Police Station on 01.10.2016. It is the prosecution case that at the time of arrest, both were possessing arms which were seized under

panchanama. It is argued that it is highly improbable that even after committing murder, for next two days accused were roaming with pistol and when they were arrested at Police Station, they carried weapons. The said submission appears to be acceptable since no one can carry the pistol for two days that too till they were arrested at Police Station. The Trial Court has rightly disbelieved the seizure of weapons which we endorse.

50. Since the seizure of weapon has not been established, the ballistic expert report loses its significance. The learned senior counsel appearing for appellants also criticized the evidence of ballistic expert by stating that he has not produced the photographs with the report, but only conclusion has been forwarded. As noted above, since seizure falls, the connecting evidence equally falls.

51. It is the prosecution case that Accused No.1 Raja, while in Police custody, on 05.10.2016, expressed his willingness to produce blood stained clothes which he wore at the time of occurrence. It has come in the evidence of PW-21 API Suraj Suroshe that memorandum panchanama was prepared to that effect (Exh.131). Thereafter, Accused No.1 Raja took the Police to a secluded place,

took out a yellow colour polythene bag containing cloths which was seized under panchanama (Exh.132). It reveals from the chemical analyser report that human blood of 'A' group was found on his clothes. The learned counsel appearing for defence would submit that seizure of clothes is insignificant, as chain of custody has not been proved. In this regard, reliance is placed on the decisions in case of the **State of Maharashtra Vs. Prabhu Barku Gade, 1994 SCC Online Bom 542, Mohd. Iqbal alias Munna V. State of Maharashtra, 2016 SCC Online Bom 5365 and Prakash Nishad @ Kewat Zinak Nishad Vs. State of Maharashtra (Criminal Appeal Nos. 1636-1637 of 2023, decided on 19.05.2023) Prakash Nishad @ Kewat Zinak Nishad Vs. State of Maharashtra (Criminal Appeal Nos. 1636-1637 of 2023, decided on 19.05.2023).**

52. In above referred decisions, it has been observed that, in absence of evidence to show that seized articles were kept intact away from chances of tampering, then it can only be relied. The prosecution has not led evidence to show that the articles were properly sealed and kept in safe custody. We may recall that both panch witnesses turned hostile, whilst evidence of PW-21 API Suraj

Suroshe is silent on said aspect. Therefore, in absence of establishing the chain of safe custody of seized articles, we are not inclined to rely on said circumstance.

53. Contextually, we are tempted to deal with one another submission made by the defence. It is submitted that the Trial Court has disbelieved the seizure of weapon from convicted and acquitted accused. The similar was the evidence on the point of seizure of clothes from Accused No.1 Raja. It is submitted that on the same set of material, the Trial Court disbelieved all seizures and in absence of specific challenge by the State to the order of acquittal, the said finding cannot be questioned. We are not in agreement with said submission, since Section 386(b)(i) of the Code permits the Appellate Court to reverse the finding recorded by the Trial Court.

54. Reverting to the core issue, though the evidence of eye-witness PW-14 Prakash and PW-18 Aniket is unreliable, however we find that the evidence of PW-2 Suraj is cogent, reliable and trustworthy to the extent of participation of Accused No.1 Raja. We have amply discussed above that PW-2 Suraj was very well acquainted with Accused No.3 Roshan, but FIR is totally silent about

the participation of Accused No.3 Roshan. There was no reason for PW-2 Suraj to exclude the name of Roshan, if he partook in the occurrence. Though the prosecution endeavoured to establish the presence of Accused No.3 Roshan through prior Test Identification Parade and Court Identification, however the said exercise was unwarranted. Basically, when the assailant was known to the witness, holding of prior Test Identification Parade turned to be exercise in futility. One can rely the Court identification being substantive piece of evidence, however this is not a case of unknown assailant as regards to Accused No.3 Roshan. Rather the conduct of PW-2 Suraj of adding Roshan at belated stage creates reasonable doubt regarding participation of Roshan by all means. We do not see any explanation for Suraj to exclude Roshan, if he was seen to be one of the assailant. Therefore, we are hesitant to rely on the version of PW-2 Suraj to the extent of Accused No.3 Roshan only.

55. Presence of Accused No.3 Roshan in the occurrence remains to be lying in the realm of suspicion. Particularly non-discloser of his name in the immediate reaction of FIR creates a reasonable doubt. It is well cherished principle of criminal

jurisprudence that when two view emerges from the situation, the view favouring to the accused would take precedence. Therefore, dehors the finding of the Trial Court in convicting Accused No.3 Roshan for the charges levelled, we accord him benefit of doubt.

56. However, the evidence of PW-2 Suraj is fully reliable regarding the participation of Accused No.1 Raja throughout from the stage of FIR lodged within few hours from the occurrence. It is duly established through medical evidence that PW-2 Suraj sustained injuries in the occurrence. Mr. Vyas, learned counsel has rightly pointed from the decision of the Supreme Court in above referred case of ***Balu Sudam Khalde*** (supra) that the evidence of injured eye-witness stands on high pedestal.

57. Certainly, if case of exaggerations in the evidence of injured eye-witness, the Court can separate the grain from the chaf, however merely on the basis of exaggeration, his evidence which is otherwise found credible, cannot be discarded in-toto. It is not uncommon for witnesses to make exaggeration during the course of evidence, but merely because there are certain exaggerations, and embellishment, the entire prosecution story shall not be doubted. In

this regard, we may refer to the observation made by the Supreme Court in para 14 in case of ***Sunita Tiwari Vs. Union of India and others, (2019) 18 SCC 719*** which reads as under:-

“14. It is a well-settled position of law that the testimony of a witness cannot be discarded in toto merely due to the presence of embellishments or exaggerations. The doctrine of falsus in uno, falsus in omnibus, which means “false in one thing, false in everything” has been held to be inapplicable in the Indian scenario, where the tendency to exaggerate is common. This Court has endorsed the inapplicability of the doctrine in several decisions, such as”

58. We may refer the decision of the Supreme Court in case of ***Kameshwar Singh Vs. State of Bihar and others with connected matter, (2018) 6 SCC 433*** of which para 22 reads as below:-

“22. The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) is not being used in India. Virtually, it is not applicable to the Indian scenario. Hence, the said maxim is treated as neither a sound rule of law nor a rule of practice in India. Hardly, one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is the duty of the court to scrutinize the evidence

carefully and, in terms of felicitous, metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. Efforts should be made to find the truth. This is the very object for which courts are created. To search it out, the court has to disperse the suspicious cloud and dust out the smear of dust, as all these things clog the very truth. So long as chaff, cloud and dust remain, the criminals are clothed with this protective layer to receive the benefit of doubt. So, it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicious are created. It is the onerous duty of the court, within permissible limits to find out the truth. It means, on one hand that no innocent man should be punished, but on the other hand to see no person committing an offence should go scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused. The evidence is to be considered from the point of view of trustworthiness and once the same stands satisfied, it ought to inspire confidence in the mind of the court to accept the evidence.”

59. In view of above, we have no difficulty in relying the evidence of PW-2 Suraj to the extent which fully inspires our

confidence. So far as the role of Accused No.1 Raja is concerned, the evidence of Suraj is consistent, cogent and fully reliable. It may be noted that Suraj was injured in the same incident and had lodged FIR within few hours with specific name of Accused No.1 Raja. Certainly, the immediate disclosure of the participation of Accused No.1 Raja wipes out the chances of concoction. Besides that, the evidence of PW-2 passed the test of credibility as regards to participation of Accused No.1 Raja in the occurrence. PW-2 has specifically deposed that he saw Accused No.1 Raja while firing from pistol at deceased Sachin. The said evidence is credible and trustworthy. The prosecution has duly established that Accused No.1 Raja fired bullets and caused death of Sachin. We have no hesitation in affirming the Trial Court's finding to that extent only. Rather, it is the duty of the Courts to carefully examine the material to separate the falsity and act upon the truthful version to punish the real culprit. Accordingly, we fully concur with the Trial Court's finding about guilt against Accused No.1 – Raja for the offence under section 302 and 307 of the IPC. However, we defer with the Trial Court's

finding against Accused No.3 – Roshan and accord him benefit of doubt.

60. In view of above, appeal stands partly allowed. We hereby quash and set aside the conviction of Accused No. 3 Roshan from the charged offences, whilst we affirm the conviction of Accused No.1 Raja Parteki for the offence punishable under Sections 302, 307 read with Section 34 of the Indian Penal Code. Accused No. 3 Roshan Parteki, if not required in other offence, he be set at liberty. Fine amount, if any, deposited by the Accused No.3 Roshan, be returned to him.

61. The impugned judgment and order passed by the learned District Judge-1 and Additional Sessions Judge, Nagpur in Sessions Trial No. 65/2017 on 09.03.2022 is hereby modified to above extent only.

62. Criminal appeal stands disposed of in above terms.

(VALMIKI SA MENEZES J.)

(VINAY JOSHI, J.)