



Judgment

appeal50.15

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

CRIMINAL APPEAL NO. 50/2015
WITH
CRIMINAL APPEAL NO. 63/2016
WITH
CRIMINAL APPEAL NO. 410/2019
WITH
CRIMINAL APPEAL NO. 87/2015
WITH
CRIMINAL APPEAL NO. 116/2015
WITH
CRIMINAL APPEAL NO. 474/2016
WITH
CRIMINAL APPEAL NO. 72/2019

CRIMINAL APPEAL NO. 50/2015

Bannasingh @ Rupsingh s/o. Attarsingh @
Doulatsingh Bawari,
Aged about 42 years, Occ. Pvt. Labour,
R/o. Maltekdi, Nanded

... **APPELLANT**
(Ori.Accused No.1)
In Jail

VERSUS

State of Maharashtra,
through P.S.O., P.S. Hudkeshwar,
Nagpur.

... **RESPONDENT**

Mr. R. B. Gaikwad, Advocate for appellant.
Mr. V. A. Thakare, Additional Public Prosecutor for
respondent/State.

2

WITH

CRIMINAL APPEAL NO. 63/2016

Julfisingh Surajsingh @ Bambhai s/o.
Attarsingh Bawri,
Aged Major, Occ. Nil,
R/o. Karimnagar Nizamabad (A.P.)
At present detained in Central Jail,
Nagpur. (Convict No.C-8965).

... **APPELLANT**
(Ori.Accused No.5)
In Jail

VERSUS

The State of Maharashtra,
through A.C.P. Sakkardara Division,
Police Station, Hudkeshwar.

... **RESPONDENT**

Ms. Sonali Saware, Advocate (appointed) for appellant.
Mr. V. A. Thakare, Additional Public Prosecutor for
respondent/State.

WITH**CRIMINAL APPEAL NO. 410/2019**

Darasingh @ Dharasingh @ Satwantsingh
S/o. Vakilsingh Bawari @ Sikalkari,
Aged about 45 years,
R/o. Annabhau Sathe Nagar Zopadpatti,
Mehakar, Dist. Buldana.
(Presently Central Prison at Nagpur)

... **APPELLANT**

VERSUS

The State of Maharashtra,
through A.C.P. Sakkardara Division,
Police Station Hudkeshwar, Nagpur.

... **RESPONDENT**

Mr. C. R. Thakur, Advocate for appellant.
Mr. V.A. Thakare, Additional Public Prosecutor for respondent/State.

WITH
CRIMINAL APPEAL NO. 87/2015

Raman s/o. Pandurang Thaokar,
Age 48 years, Occ. Private,
R/o. Thaokar Bhavan, Ganjipeth Road,
Bhaldar Pura, Nagpur.

... **APPELLANT**
(Original Victim)

VERSUS

1. Bannasingh @ Rupsingh S/o. Attarsingh
@ Navnishalsingh @ Doulatsingh Bawri,
Aged about 42 years,
R/o. Maltekdi, Nanded.
2. Darasingh S/o. Mirsingh Bawri,
Aged about 45 years, R/o. Butibori,
Ward No.4, District Nagpur.
3. Lakhansingh s/o. Mirsingh Bawri,
Aged about 36 years, R/o. Khairigaon
Butibori, District Nagpur.
4. Pankajsingh S/o. Kalusingh Dudhani,
Aged about 28 years, R/o. Gandhinagar,
Ambarnath, District Thane.
5. Julfisingh @ Surajsingh @ Bambai
S/o. Attarsingh @ Navnihalsingh
@ Doulatsingh Bawri,
Aged about 38 years, R/o. Karimnagar,
Nizamabad (A.P.).
6. State of Maharashtra,
Through A.C.P. Sakkardara Division,
Police Station, Hudkeshwar, Nagpur.

... **RESPONDENTS**

Mr. R. R. Vyas, Advocate for appellant.
Mr. R.B. Gaikwad, Advocate for respondent No.1.
Mr. R.K. Tiwari, Advocate for respondent No.2 & 3.
Mr. H.P. Lingayat, Advocate for respondent No.4.
Ms. Sonali Saware, Advocate (appointed) for respondent No.5.
Mr. V. A. Thakare, Additional Public Prosecutor for respondent No.6/
State.

WITH
CRIMINAL APPEAL NO. 116/2015

Prasad S/o. Sharadrao Khadekar,
Aged about 32 yrs, Occ. Service,
R/o. Vishwakarma Nagar, Nagpur.

... **APPELLANT**
(Original Victim)

VERSUS

1. State of Maharashtra,
Through A.C.P. Sakkardar Division,
Police Station, Hudkeshwar, Nagpur.
2. Bannasingh @ Rupsingh s/o. Attarsingh @
Navnihalsingh @ Doulatsingh Bawri,
Aged about 45 years,
R/o. Maltekdi, Nanded,
Tq.. & Dist. Nanded.
3. Darasingh S/o. Mirsingh Bawri,
Aged about 48 years, R/o. Butibori,
Ward No.4, District Nagpur.
4. Lakhansingh s/o. Mirsingh Bawri,
Aged about 39 years, R/o. Khairigaon
Butibori, District Nagpur.
5. Pankajsingh S/o. Kalusingh Dudhani,
Aged about 31 years, R/o. Gandhinagar,
Ambarnath, District Thane.

5

6. Julfisingh @ Surajsingh @ Bambai
S/o. Attarsingh @ Navnihalsingh
@ Doulatsingh Bawri,
Aged about 41 years, R/o. Karimnagar,
Nizamabad (AP).

... **RESPONDENTS**

Mr. R.M. Patwardhan, Advocate for appellant.
Mr. V. A. Thakare, Additional Public Prosecutor for respondent No.1/
State.

Mr. R.B. Gaikwad, Advocate for respondent No.2.
Mr. R.K. Tiwari, Advocate for respondent No.3 & 4.
Mr. H.P. Lingayat, Advocate for respondent No.5
Ms. Sonali Saware, Advocate (appointed) for respondent No.6.

WITH
CRIMINAL APPEAL NO. 474/2016

State of Maharashtra,
Through A.C.P. Sakkardara Division,
Police Station, Hudkeshwar, Nagpur.

... **APPELLANT****VERSUS**

1. Bannasingh @ Rupsingh s/o. Attarsingh @
Navnihalsingh @ Doulatsingh Bawri,
Aged about 45 years,
R/o. Maltekdi, Nanded,
2. Pankajsingh S/o. Kalusingh Dudhani,
Aged about 28 years, R/o. Gandhinagar,
Ambarnath, District Thane.
3. Julfisingh @ Surajsingh @ Bambai
S/o. Attarsingh @ Navnihalsingh
@ Doulatsingh Bawri,
Aged about 38 years, R/o. Karimnagar,
Nizamabad (A.P.).

... **RESPONDENTS**

Mr. V. A. Thakare, Additional Public Prosecutor for Appellant/State.
Mr. R.B. Gaikwad, Advocate for respondent No.1.
Mr. H.P. Lingayat, Advocate for respondent No.2.
Ms. Sonali Saware, Advocate (appointed) for respondent No.3.

WITH
CRIMINAL APPEAL NO. 72/2019

State of Maharashtra,
Through A.C.P. Sakkardara Division,
Police Station, Hudkeshwar, Nagpur.

...

APPELLANT**VERSUS**

1. Bannasingh @ Rupsingh s/o. Attarsingh @
Navnihalsingh @ Doulatsingh Bawri,
Aged about 42 years,
R/o. Maltekdi, Nanded,
2. Pankajsingh S/o. Kalusingh Dudhani,
Aged about 28 years, R/o. Gandhinagar,
Ambarnath, District Thane.
3. Julfisingh @ Surajsingh @ Bambai
S/o. Attarsingh @ Navnihalsingh
@ Doulatsingh Bawri,
Aged about 38 years, R/o. Karimnagar,
Nizamabad (A.P.).

...

RESPONDENTS

Mr. V. A. Thakare, Additional Public Prosecutor for appellant/State.
Mr. R.B. Gaikwad, Advocate for respondent No.1.
Mr. H.P. Lingayat, Advocate for respondent No.2.
Ms. Sonali Saware, Advocate (appointed) for respondent No.3.

**CORAM : VINAY JOSHI AND
BHARAT P. DESHPANDE, JJ.**

JUDGMENT RESERVED ON : 18.04.2023.
JUDGMENT PRONOUNCED ON : 22.08.2023.

JUDGMENT (PER VINAY JOSHI, J.) :

Heard learned counsels appearing for the convicted appellants/accused, additional public prosecutor for the State, and learned counsels appearing for the victim. Perused the entire record, written notes of argument, as well as both impugned judgments. Carefully considered rival submissions and position of law.

2. Unpredicted Incident of attempted robbery and murder dated 06.10.2012, gave rise to multiple appeals. Initially, in all five accused were tried in Special Cri. Case No. 4/2013 for the offence punishable under Sections 395, 397, 398, 307, 302, Section 120-B read with Section 34 of the Indian Penal Code, Sections 3 and 4 read with Section 25 of the Arms Act, and Sections 3(1)(i), 3(2) and 3(4) of the Maharashtra Control of Organized Crime Act, 1999 ('MCOCA Act'). One of the miscreant namely Darasingh @ Dharasingh @ Satwantsingh s/o Vakilsingh Bawari @ Sikalkari went absconding.

On his apprehension he was tried separately in Special MCO Case No. 1/2015 for the same charge. Precisely, both sides expressed their dissatisfaction to the separate judgments delivered by the Trial Court which gave rise to seven appeals.

3. Special Cri. Case No. 4/2013 was tried against five accused namely Accused No.1 Bannasingh @ Rupsingh s/o Attarsingh @ Navnihalsingh @ Doulatsingh Bawri, Accused No.2 Darasingh s/o Mirsingh Bawri, Accused No. 3 Lakhansingh s/o. Mirsingh Bawri, Accused No. 4 Pankajsingh s/o Kalusingh Dudhani and Accused No. 5 Julfisingh @ Surajsingh @ Bambai s/o. Attarsingh @ Navnihalsingh @ Daulatsingh Bawri. After appreciating the evidence, the Trial Court held Accused No. 1 Bannasingh @ Rupsingh s/o Attarsingh @ Navnihalsingh @ Doulatsingh Bawri guilty for the offence punishable under Sections 302, 324, 398 read with Section 34 of the Indian Penal Code, Section 4 read with Section 25 of the Arms Act, and Section 120-B of the Indian Penal Code. Accused No. 5 Julfisingh @ Surajsingh @ Bambai s/o. Attarsingh @ Navnihalsingh @ Daulatsingh was convicted for the offence punishable under Sections 302, 398 read with Section 34 of

the Indian Penal Code, Section 3 read with Section 25 of the Arms Act, and Section 120-B of the Indian Penal Code. Accused No. 4 Pankajsingh s/o Kalusingh Dudhani was convicted for the offence punishable under Sections 393, 120-B of the Indian Penal Code. However, Accused No. 2 Darasingh s/o Mirsingh Bawri and Accused No. 3 Lakhansingh s/o. Mirsingh Bawri were acquitted from all the charges.

4. The Trial Court has imposed separate punishment for each of the offences proved. The maximum sentence awarded to Accused Nos. 1 Bannasingh @ Rupsingh s/o Attarsingh @ Navnihalsingh @ Doulatsingh Bawri, and Accused No. 5 Julfisingh @ Surajsingh @ Bambai s/o. Attarsingh @ Navnihalsingh @ Daulatsingh was to undergo imprisonment for life along with fine, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, whilst maximum punishment for Accused No. 4 Pankajsingh s/o Kalusingh Dudhani was to undergo rigorous imprisonment for four years, for the offence punishable under Section 393 of the Indian Penal Code. Besides that, certain amount of fine was imposed on each count with stipulation of default. The

10

Trial Court directed that all the substantive sentences shall run concurrently.

5. Absconding Accused Darasingh @ Dharasingh @ Satwantsingh s/o Vakilsingh Bawari @ Sikalkari was tried separately in Special MCOC Case no. 1/2015 for the offence punishable under Sections 395, 397, 398, 307, 302, 120-B read with Section 34 of the Indian Penal Code, Section 3 and 4 read with Section 25 of the Arms Act, Sections 3(1)(i), 3(2), 3(4) of the MCOC Act. The Trial Court equally convicted him for the offence punishable under Sections 302, 398, read with Section 34 and Section 120-B of the Indian Penal Code. The maximum sentence was of imprisonment for life, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, along with fine. All sentences were directed to run concurrently.

6. Being aggrieved and dissatisfied by the judgment and order of conviction, Accused No. 1 Bannasingh @ Rupsingh s/o Attarsingh @ Navnihalsingh @ Doulat Singh Bawri preferred Criminal Appeal No. 50/2015 in terms of Section 374 of the Code of Criminal

11

Procedure ('Code') whilst Accused No. 5 Julfisingh @ Surajsingh @ Bambai s/o. Attarsingh @ Navnihalsingh @ Daulatsingh Bawri similarly raised the challenge to his conviction in Criminal Appeal No. 63/2016. Separately tried Darasingh @ Dharasingh @ Satwantsingh s/o Vakilsingh Bawari @ Sikalkari convicted in Special MCOC Case No. 1/2015, also called in question the judgment of conviction dated 03.05.2018 in Criminal Appeal No. 410/2019. Precisely, all convicted accused except Accused No.4 Pankajsingh, challenged the legality and sustainability of the judgment and order of conviction by separate appeals.

7. Being aggrieved by the order of acquittal of Accused No.1 Bannasingh, Accused No.4 Pankajsingh and Accused No.5 Julfisingh from the offences punishable under Section 395, read with Sections 397, 307 read with Section 34 of the Indian Penal Code, under Section 3(1)(i), 3(4) and 3(2) of the MCOC Act, the State preferred appeal No. 72/2019 in terms of Section 12 of the MCOC Act read with Section 378 of the Code. The State also preferred Criminal Appeal No. 474/2016 under Section 377(1) of the Code for enhancement of sentence.

12

8. Another set of appeal is of victims of the crime. Criminal Appeal No. 87/2015 has been preferred by one Raman s/o. Pandurang Thaokar (brother of deceased), claiming conviction under all charges, enhancement of sentence and for convicting acquitted accused namely Accused No. 2 Darasingh s/o Mirsingh Bawri and Accused No. 3 Lakhansingh s/o. Mirsingh Bawri. In the same manner, injured of the crime namely Prasad s/o. Sharadrao Khadekar has also preferred an appeal No. 116/2015 claiming similar relief. Accused No. 4 Pankajsingh has not challenged his conviction under Sections 393 and 120-B of the Indian Penal Code, perhaps he has undergone the sentence during trial hence did not challenge the order of conviction.

9. Horrifying incident dated 06.10.2012 gave rise to the prosecution followed by two separate trials and judgment. In first trial Special Cri. Case No. 4/2013, five accused were tried, in which Accused No. 1 Bannasingh, Accused No. 4 Pankajsingh and Accused No. 5 Julfisingh were convicted. In second trial, Special MCOC Case No. 1/2015 pertaining to absconding Accused Darasingh (hereinafter referred to as 'Accused No.6' for the sake of convenience), he was

13

convicted as aforementioned. Since the incident is one and the same though gave rise to two separate trials, for the sake of convenience all appeals arising thereof are heard and taken for disposal together by this common judgment.

10. The facts of the case in nutshell are that, deceased Vijay Thavkar was running a jewelry shop in the building known as “Shriram Bhavan” in the market area, Nagpur. The said building consists of six shops. Two shops on upper floor, whilst remaining four on the ground floor. Jewelry shop namely Thavkar Jewelers run by deceased, was on the upper floor. Adjacent shop of mobile shopee was closed on the day of incident. Ground floor consists of four shops. They were Renuka Marketing, tea dust shop, edible oil shop and one empty. Iron staircase exists at the corner of the building to approach first floor. Footpath situates in front of the ground floor shops and then cement road. Jewelry shop was of the size of 10 x 12 ft. Entrance gate of jewelry shop was made of glass. There was ‘L’ shape counter on the right side of the entrance door. Deceased Vijay Thavkar was the proprietor of jewelry shop and was running the shop with his sole employee PW-1 Prasad

Khadekar.

11. It is prosecution case that on the day of incident around 01.00 p.m. three unknown assailants one, by one barged into the jewelry shop for the purpose of robbery. Two assailants were wearing *fetas* like Sardarji whilst third assailant did not. Accused No.1 Bannasingh armed with knife initially entered into the shop. He was followed by Accused No. 6 Darasingh and then Accused No.5 Julfisingh armed with pistol. They demanded deceased Vijay Thavkar for valuables, however there was a scuffle. Accused No.1 Bannasingh struck at the head of PW-1 Prasad (employee) by means of rear handle of knife, whilst others had scuffle with the owner Vijay Thavkar. During the scuffle, mobile handset of Accused No. 1 Bannasingh fell from his pocket in the shop. Since PW-1 Prasad raised alarm, the neighbouring shop owner PW-9 Bedi rushed to jewelry shop, likewise the people of vicinity also started to gather. Seeing the things going out of control, Accused No.1 Bannasingh took the pistol from Accused No. 5 Julfisingh and tried to fire on deceased Vijay Thavkar, however he could not operate the pistol. Accused No.5 Julfisingh took back his pistol and fired two rounds at

15

the chest of deceased Vijay Thavkar. Immediately, all three came down by staircase, boarded in nearby parked Maruti 800 car. Accused No. 4 Pankajsingh was already waiting them in the car and they decamped. Maruti 800 car speedily went towards Manewada Chowk. Nearby people were already gathered on the spot. They noted registration number of Maruti 800 car as MH-31-H 2081. They saw that owner of jewelry shop Vijay Thavkar was lying in the pool of blood, whilst PW-1 Prasad (employee of shop) sustained head injury. Some one gave call to the Police who arrived within short time. Employee PW-1 Prasad and others have seen the faces of all three assailants.

12. Both injured were shifted to the Medical College Hospital. Jewelry shop owner Vijay Thavkar was declared dead. Injured Prasad after medical treatment went to the Police Station and lodged report (Exh. 75). On receiving the information relating to cognizable offence, Police registered Crime no. 226/2012 for the offence punishable under Sections 398, 302, 307, 120-B read with Section 34 of the Indian Penal Code, Section 3, 4 read with Sections 25 of the Arms Act.

16

13. At the relevant time, PW-13 PI Wandhare was attached to Hudkeshwar Police Station. On receiving telephonic information about firing incident in the shop of Thavkar Jeweler, he rushed to the place with Police party. People were gathered near the place of incident. He found that one person was lying in the shop in the pool of blood whilst other was in the injured condition. PI Wandhare took preliminary information about the occurrence. He came to know about the incident of firing and use of Maruti 800 car with its registration number. Immediately, he sent wireless message about registration number of Maruti 800 car for search. Police Officer Suresh Shinde had prepared spot panchanama. Two empty cartridges, one live cartridge, small locket and one mobile of Nokia Company was seized from the place of occurrence. Blood samples were collected from the spot. PI Shinde made a phone call from the mobile found on the spot to his own mobile. It was revealed that the said Noika Mobile was of dual SIM. PI Shinde noted down the mobile numbers in the spot Panchanama.

14. Inquest Panchanama was drawn and dead body was sent for postmortem examination. Blood stained clothes of deceased

17

Vijay Thavkar were seized. Maruti 800 car involved in the incident was found in the abandoned condition near Munde Farm House on Wardha Road. On receiving information, Police seized said car by drawing panchanama. Statement of various witnesses have been recorded. On the basis of two SIM cards of the Nokia mobile of the first assailant, Police have traced the accused and apprehended them. Initially, two accused were apprehended. During investigation, names of other three revealed, on which they were also arrested. Knife used in the commission of crime was seized at the instance of Accused No. 1 Bannasingh. Prior test identification parades were conducted. Injured Prasad and other eye-witnesses have identified Accused No. 1 Bannasingh and Accused No. 5 Julfisingh during test identification parade. Particularly, PW-1 Prasad identified Accused No.1 Bannasingh as a first assailant entered into the shop and hit him with the handle of knife. He has also identified Accused No.5 Julfisingh as a third assailant who has fired at the chest of deceased Vijay Thavkar. Executive Magistrate has prepared test identification parade panchanama. On completion of investigation, charge-sheet has been filed against five accused.

18

15. Accused No.6 Darasingh was later on arrested and separately tried. Once again, test identification parade was conducted, in which witnesses have identified him as second assailant entered into the shop at the time of incident. He was separately tried and convicted as aforesaid mentioned.

16. During investigation, it was transpired that the accused were members of organized crime syndicate. PW-13 PI Wandhare sent proposal to the Additional Commissioner of Police for invoking the provisions MCOC Act. It was followed by grant of approval for invoking Section 3 of the MCOC Act against the accused. Initially, Accused Nos. 1 to 5 were put on trial for various offences under Indian Penal Code, Arms Act and MCOC Act. They pleaded not guilty by claiming innocence. In first trial, the prosecution has examined in all 17 witnesses to establish the guilt of accused. The prosecution evidence mainly consists of injured, eye-witnesses, neighbouring witnesses, panch, medical officer and police personnel. Homicidal death of Vijay Thavkar was not seriously disputed before the Trial Court.

19

17. On appreciation of evidence, the Trial Court held that Accused No.1 Bannasingh was the first assailant entered into the shop, struck at the head of PW-1 Prasad by rear handle of knife, Accused No.5 Julfisingh was third assailant entered into the shop with pistol and had actually fired at the chest of deceased Vijay Thavkar. The Trial Court held that Accused No. 4 Pankajsingh was waiting for the rest in the Maruti 800 car to facilitate the crime. After incident, assailants seated in said Maruti 800 car and fled. However, the Trial Court negated the participation of Accused Nos. 2 and 3 in the occurrence. Accused No. 1 Bannasingh and Accused No. 5 Julfisingh were held guilty for the offence of committing murder of Vijay Thavkar in furtherance of their common intention. They were held guilty for attempting to commit robbery and while committing robbery, armed with deadly weapons. They were also held guilty under the Arms Act. Besides that, Accused No.1 Bannasingh was held guilty for causing hurt to PW-1 Prasad by means of dangerous weapon. The Trial Court held Accused No. 4 Pankajsingh guilty for the offence of attempting to commit robbery and criminal conspiracy.

20

18. After trial of these five accused, second assailant Darasingh was apprehended and tried separately in MCOC Case No. 1/2015. On denial of guilt, the prosecution has examined ten witnesses to prove the levelled charges. The Trial Court equally convicted him for causing death of Vijay Thavkar in furtherance of common intention, attempting to commit robbery with deadly weapons, hatching criminal conspiracy to commit an offence and imposed aforementioned sentence.

19. Though there were two separate trials, however the incident is one and the same. In first trial, the prosecution has examined 17 witnesses whilst in second trial for the same occurrence, 10 witnesses have been examined. In-fact, those 10 witnesses were already examined in the first trial, however this being a separate trial of Accused No. 6 Darasingh, they were once again called and led evidence in presence of Accused No.6 Darasingh.

20. Different challenges have been raised in these group of appeals. It can be stated in brief that convicted Accused No.1 Bannasingh, Accused No. 5 Julfisingh and Accused No.6 Darasingh

21

have challenged their conviction whilst the State has challenged their acquittal from the charges under which they were acquitted. The State also seeks for enhancement of the sentence for convicted offences. The State has challenged the acquittal under the provisions of MCOC Act. Likewise injured Prasad seeks for enhancement of sentence as well as conviction for the offence punishable under Section 307 of the Indian Penal Code instead of Section 324 of the Indian Penal Code. Moreover, he seeks conviction for the offence punishable under Section 396 of the Indian Penal Code. Brother of deceased also seeks conviction under the provisions of MCOC Act, and conviction of Accused No. 4 Pankajsingh for the offence for which Accused No.1 Bannasingh and Accused No. 5 Julfisingh were convicted.

21. Always in like cases first and foremost question falls for consideration is about the mode and manner of death. It is to be ascertained whether Vijay Thavkar met with homicidal death. With this connection, medical evidence would be largely relevant. PW-11 Dr. Nilesh Tumdam had conducted postmortem examination over the dead body of deceased on the day of incident itself i.e. on 6.10.2012

22

in between 5.00 p.m. to 6.00 p.m. (Witnesses are referred as per their number in first case i.e. Special Cri. Case No.4/2013.). On examination he found following surface wounds as mentioned in column no.17 of the postmortem report.

i] Fire arm entry wound present over front of chest 10 cms above right nipple and 3 cm from midline of size 1.2 cm x 1 cm x cavity deep directing obliquely downward and towards left side. Abrasion collar present surrounding entry wound size 1 cm on right lateral side and 0.2 cm in rest part. Track of wound going downwards towards left side perforating 3rd intercostal space, front of pericardium in middle upper 1/3rd and then perforating through and through front of heart in midline, middle 1/3rd of left ventricle exiting through inferior wall of left ventricle with through and through perforation in lower lobe of left lung from medial to lateral with one bullet found in left posterior throasic wall. The bullet is yellowish metallic full jacketed with hollow base of length 1 cm, maximum circumference of bullet is 2.2 cm, basal diameter 0.6 cm with dent on nose of bullet on one side. Another bullet perforating from same entrance and track and then performing the 8th intercostal space in left posteriolateral aspect of thorasic wall where it is embaded. This bullet was also yellowish fully jacketed with hollow base of length 1 cm, maximum circumference of bullet is 2.2 cm, basal diameter 0.6 cm with dent at the base of bullet on one side.

23

- ii] Reddish contusion over right side of forehead middle half roughly circular of size 3 cm x 2 cm.
- iii] Lacerated wound present over left side of forehead, upper half, 3 in number, 1 cm apart each other of size 2 cm x 0.2 cm x bone deep each, oblique. Reddish contusion present in surrounding area for 5 cm x 4 cm.
- iv] Reddish contusion over left side of forehead roughly circular, lower half 2 in number, 2 cm x 2 cm each 1 cm apart.
- v] Incised looking lacerated wound over front of nose middle 1/3 rd, 2 cm x 0.2 cm x cartilage deep, oblique.
- vi] Reddish contused abrasion over back of right elbow, two in number, 2 cm x 1 cm, 2 cms apart.
- vii] Reddish abrasion over right side of nose, middle 1/3rd, 1 cm x 1 cm.

22. According to the Medical Officer, injuries mentioned above were fresh. Injury no.1 is fire arm injury, while injury nos. 2 to 7 can be possible by hard and blunt object. All the above injuries were antemortem. He has mentioned the injuries fresh as they were caused within 6 to 12 hours before death.

23. On internal examination he found following injuries as mentioned in column no.19 of the postmortem notes.

24**Head-**

i] Underscalp haematoma over left frontal and left temporal region of size 4 x 3 cm and 3 x 2 cm respectively, red. Skull vault was intact. No evidence of fracture. Dura was pale. Brain pale 1200 grams. Column no.20. Thorax. Perforating injury mentioned in injury no.1 of column no.17 present. About 1 liter of dark red blood in left side of pleural cavity. Larynx, trachea and bronchi intact. Mucosa pale. Both lungs were pale, perforating injury in left lung as per injury no.1 of column no.17. Perforating injury in pericardium as mentioned in injury no.1 of column no.17. Heart and weight- Pale, perforating injury mentioned injury 1 of column no.17. Chambers empty, coronaries patent. Large vassals – intact. Column no.21 – Abdomen- All visceral organs were pale. Stomach contains 500 grams semisolid food containing Sabudana particles having no peculiar odour, mucosa present.

Visceral organs and articles were preserved, packed, and sealed.

24. On examination, PW.11 Dr. Tumdam opined that the injury no.1 of column no.17 with its internal corresponding injuries as mentioned in Column no.20 were sufficient in the ordinary course of nature to cause death. According to PW-11 Dr. Tumdam, the cause of death was shock and haemorrhage due to penetrating wound to heart and left lung due to fire arm and accordingly he and

25

his colleague Dr. S.K. Meshram have issued postmortem report Exh.133. He had forwarded the viscera and the aforesaid articles in requisite form Exh.134 for chemical examination.

25. PW-11 Dr. Tumdam had identified shirt of deceased Art. 15. He had sealed the bullets Art. 16 and 17 under his seal and signatures which were recovered from the dead body. C.A. report of the viscera Exh.73 did not reveal any poison. On examination of the C.A. report PW-11 Dr. Tumdam has stated that as there was single entry wound and two bullets were recovered from the body having characteristic of dent on nose of one bullet and base of other bullet, this feature is called a tandem bullet or piggy bag shot. The injury no.1 as mentioned in column no.17 was caused by fire arm like pistol. On postmortem findings and C.A. report, this witness has opined that bullets were shot from close range. Accused persons have not seriously challenged the homicidal death of deceased. The cross examination conducted by Accused nos. 1 and 5 did not shatter the opinion given by PW-11 Dr. Tumdam and therefore, it will have to be held that Vijay Thavkar died of bullet injury and his death was homicidal.

26

26. Though the prosecution has examined in all 17 witnesses, however, the prosecution heavily banks upon the evidence of PW-1 Prasad (injured) and PW-9 Bedi who were eye-witness to the occurrence. PW-1 Prasad being key prosecution witness, it is essential to go through his evidence. He was an employee of deceased, Vijay Thavkar working in the jewelry shop since the year 2012. The defence has not denied that he was serving in the shop of deceased, rather in view of the defence of total denial, their denial, if any, would assume no significance. PW-1 Prasad gave detailed account about the topography of the shop and the happenings on the day of occurrence since morning. On crucial aspect, it is his evidence that at the relevant time, he along with his employer Vijay Thavkar (deceased) were seated in the Jewelry shop after doing routine work. Around 01.00 p.m., one person hurriedly entered into the shop, took out knife and asked to him 'Nikalo'. When PW-1 Prasad tried to open the folding pannel of the counter, the said person hit on his head with the grip of the knife causing bleeding injury. Prasad got frightened and raised alarm. The said assailant had tied his head by black cloured cloth. He was of blackish complexion and trimmed

27

mustaches. PW-1 Prasad and his master came out of the counter. PW-1 Prasad had a scuffle with the first assailant. During said scuffle, mobile handset of first assailant (Accused No.1 Bannasingh) fell down. One another assailant entered into the shop and had a scuffle with owner Vijay Thavkar. At that time, third assailant Accused No.5 Julfisingh entered into the shop armed with a pistol. The second assailant Accused No.6 Darasingh caused owner Vijay Thavkar to lay down.

27. He further deposed that Accused No.1 Bannasingh took pistol from the hands of Accused No. 5 Julfisingh and tried to fire on Vijay Thavkar, however he could not operate the pistol. Immediately, Accused No.5 Julfisingh snatched the pistol. At that time, PW-9 Bedi came to the doorstep of the shop. Witness Bedi tried to kick open the door, however Accused No.5 Julfisingh pointing pistol, singled him to go away. It is his evidence that Accused No.1 Bannasingh and Accused No.6 Darasingh caught hold owner Vijay Thavkar whilst Accused No. 5 Julfisingh fired twice at the chest of Vijay Thavkar with pistol and asked his companions to leave. He stated that he was terrified by the incident. Owner Vijay

28

Thavkar was lying in the pool of blood. He came out of the shop and saw that all three assailants got down by the staircase, seated in the white colour Maruti 800 car and went towards Manewada square.

28. On the crucial aspect of identification of assailants, PW-1 Prasad identified Accused No.1 Bannasingh and Accused No.5 Julfisingh in the Court (first trial) whilst identified Accused No. 6 Darasingh in second trial. It has come in his evidence that he was called in Central Jail for the test identification parade, wherein he has identified Accused No.1 Bannasingh before the Executive Magistrate. After four months, he was again called to Central Jail for second identification parade. This time also he has identified Accused No.5 Julfisingh out of the dummies. It is his evidence in second trial that he was again called in Central Jail for identification and had identified Accused No. 6 Darasingh as second assailant.

29. This witness was thoroughly cross-examined in both the trials. Prominently, it has been canvassed that PW-1 Prasad has stated about two assailants in the FIR whilst during evidence stated about the third assailant too. Therefore, according to the defence,

the evidence of Prasad is not worthy of credit. Learned APP has pointed out that at relevant time, injured Prasad was in terribly frightened condition. In his presence, his master was killed by bullets which is a seldom incident in the life of common man. It is explained that due to frightened condition, Prasad had not stated about the presence of second assailant at the time of lodging FIR within few hours from the occurrence. However the Police recorded his statement in terms of Section 161 of the Code, wherein he has specifically stated about the presence of second assailant apart from first and third assailant.

30. The Trial Court has properly appreciated the said circumstance and therefore, we do not see any material irregularity in that regard. Beside that some minor omissions have been brought on record, however they do not shatter the core evidence about the occurrence and identification of assailants. Prasad has specifically stated that first and second assailant were wearing *Fetas* whilst third assailant was bare headed. Prasad has seen the assailants very closely in day light. He had been hit by one whilst other two were just a feet away. Prasad had ample opportunity and occasion to see

faces of assailants. FIR bears description of the assailants. His evidence discloses that the Executive Magistrate has taken all necessary precautions to see that witnesses could not see suspect before the parade, and selection of dummies. The cross-examination is not potential to raise a doubt about the credibility of the prior test identification parades.

31. It is argued that the Executive Magistrate has not been examined and therefore, the evidence of prior test identification parade is not reliable. Learned counsel appearing for informant has pointed that, in terms of Section 291-A of the Code, the identification report of Magistrate can be read in evidence. Notably, the defence has not called upon the Executive Magistrate for cross-examination. Therefore, non-examination of Executive Magistrate is not fatal to the prosecution. Evidence of eye-witnesses on the point of prior identification parade coupled with memorandum of parade vouch the credibility.

32. It has come in the evidence that PW-1 Prasad that he sustained head injury in the occurrence. Needless to say that

31

evidence of injured eye-witness carries more weight as his presence on the spot is affirmed by the injuries sustained by him. PW-1 Prasad is most natural witness as his presence in the shop of his master cannot be doubted, coupled with head injury sustained in the incident. The accused were totally unknown assailant, therefore he has no animosity against them to falsely implicate. The evidence of PW-1 Prasad passed the test of credibility and worthy of acceptance.

33. The prosecution further banks upon the evidence of PW-9 Bedi who owns a shop on the ground floor. It has come in his evidence that he was running a cosmetic shop namely 'Renuka Marketing' on the ground floor of the building known as "Shriram Bhavan". On material aspect, he deposed that around 01.00 p.m., he heard noise of shouts from Thavkar Jewelers shop. He came out of his shop, climbed staircase and went to the upper floor. Glass door of the shop was closed and one person was standing near the door inside the shop. He saw that owner Vijay Thavkar was lying on the ground and another person had caught hold his hands. One assailant holding knife was giving kicks to Vijay Thavkar. PW-1 Prasad was standing with bleeding head injury. He tried to open the

32

glass door by push which hit to the back side of one of the assailant. The said assailant turned around holding pistol in his hand and by moving pistol, signaled him to go away. He stated that after coming out, he heard noise of firing of bullets from the shop. He immediately saw three assailants getting down from the staircase and proceeded towards Maruti 800 car. One person was already seated on the driver's seat of the car and then all of them fled towards Manewad Square.

34. PW-9 Bedi described that two assailants were wearing *Feta*, whilst third was without *Feta*. He stated that the person sitting in the driver's seat of Marut 800 car was also wearing *Feta*. This witness has identified Accused No.1 Bannasingh and Accused No. 5 Julfisingh in the first trial, whilst Accused No.6 Darasingh in the second trial. He has identified all the accused in prior test identification parade. He was subjected to searching cross-examination, but besides minor omissions, the cross-examination does not yield. PW-9 Bedi being neighbouring shop keeper, his presence on the spot was quite natural. The incident occurred around 01.00 pm in the afternoon, therefore PW-9 Bedi was

33

supposed to at his business place in rush hours. It was quite natural for him to rush to see the matter on commotion. His evidence is corroborated by other witnesses.

35. The prosecution has examined other eye-witness. PW-10 Anil Kharwade, who owns a shop opposite to the place of occurrence. He equally runs a jewelry shop under the name and style as Kharwade Jewelers. The said shop situates to the opposite side of the road. It is his evidence that at the relevant time, after hearing hue and cry, he came out of the shop, saw towards the shop of Thavkar Jewelers. He saw that PW-9 Bedi was getting down from the staircase in frightened condition. He heard the noise of firing of bullets in the shop of Thavkar Jewelers. On hearing noise, he stood at the road divider and saw three persons coming out of the shop of Thavkar Jewelers, and went towards white Maruti 800 car. Out of those three persons two were wearing *feta* like Sardar. He saw one of them was holding pistol whilst other knife. He saw that one person like Sardar was already seated on the drivers seat of the car. No sooner three assailants boarded into the car, they speedily proceeded towards Manewada square. This witness was unable to

34

identify the assailants, however his evidence corroborates the evidence of PW-9 Bedi. There are several omissions in his evidence, but essentially he stated about the incident.

36. The prosecution has examined PW-6 Sushant Pali who happened to be a chance witness to the occurrence. It is his evidence that, at the relevant time he had been to Manewad road for his personal work. While he was in the shop namely Anand Furnitures, he heard shouts from the shop of Thavkar Jewelers, which was opposite to the Anand Furnitures across the road. On hearing shouts, he as well as other people started to look towards Thavkar Jewelers shop. When he came to the road divider, he heard sound of firing bullets. He saw three persons hurriedly coming out of the shop of Thavkar Jewelers. Two of them were wearing turbans (*Feta*) whilst the third without turban. Person who was without turban, was holding pistol and one other was holding knife. All of them seated into a Maruti 800 car, in which already driver was seated and they fled. This witness was called thrice in Central Jail for test identification parade, wherein he has identified all three assailants. This witness has identified Accused No.1 Bannasingh and Accused

35

No.5 Julfisingh in the Court (first trial), whilst Accused No.6 Darasingh in second trial. Though he is a chance witness, the cross-examination fell short to raise doubt about his natural testimony. Moreover, he has no animus against the assailants. His evidence fully corroborates to the evidence of PW-1 Prasad and PW-9 Bedi.

37. True, there are some discrepancies in the evidence of PW-1 Prasad, however on the point of actual occurrence, he has firmly faced cross-examination leaving no doubt. This witness sufficiently explained in his Police statement about presence of three assailants. Always the credibility of witness is to be tested on the anvil of factual background. PW-1 Prasad is merely a servant working in the Jewelry shop. Obviously, he was shocked and terrified due to horrifying incident. His master was gunned down in his presence, rather he was also in death shadow. In such temperament, he has lodged report within few hours, therefore his evidence is to be appreciated on the background of said fact. Besides that, in Police Statement, he has specifically stated about the presence of all three assailants. His evidence is quite natural, reliable and trustworthy, deserves to be accepted. Presence of PW-9 Bedi on the spot is also

36

quite natural. His presence is corroborated by other eye-witnesses. Besides that, the prosecution has examined panch witness to establish seizure, two empty cartridges, one live cartridge and mobile of Accused No.1 Bannasingh from the place of occurrence. Knife was recovered at the hands of Accused No.1 Bannasingh.

38. The presence of Accused No.4 Pankajsingh in the Maruti 800 car at the place of occurrence was established in the first Trial which is not challenged. Moreover, the prosecution has examined witnesses who have seen Accused No. 4 Pankajsingh seated in the car at the relevant time. It has come in the evidence that all three assailants armed with pistol and knife hurriedly got down from staircase, boarded the car and fled. The said circumstance itself indicates prior meeting of mind on their part. Moreover, the very act of Accused No.1 Bannasingh asking the victim 'Nikalo' indicates their intention to loot the shop. Otherwise, they have no reason to go to the Jewelry Shop with weapons, and demand the valuables. It is evident from the circumstances that they have hatched criminal conspiracy to commit robbery at Thavkar Jewelry Shop, and in order to execute the plan, three of them actually went to the shop whilst

37

one was waiting in the car to facilitate the safe passage. It is also duly established that they were armed with deadly weapon while attempting to commit robbery.

39. The incident unveiled a failed attempt of robbery, which took life of Jeweler Vijay Thavkar. It is manifest that Accused No.1 Bannasingh, Accused No.5 Julfisingh and Accused No.6 Darasingh had planned to loot the shop and if resisted to eliminate the objector. Their intention is evident from the nature of weapons they carried. It was their common intention to eliminate the Jeweler if resisted. With prior determination, they entered into the shop armed with deadly weapons. Accused No.1 Bannasingh tried to fire but failed, which shows his active participation coupled with intent. Accused No.6 Darasingh caught hold deceased to facilitate Accused No.5 Julfisingh to fire which shows their common intention to commit murder. The Trial Court has rightly appreciated the evidence while convicting Accused No.1 Bannasingh and Accused No.6 Darasingh for the offence of murder with the aid of Section 34 of the Indian Penal Code. However, the said principle cannot be extended to Accused No.4 Pankajsingh as he never entered into the shop

though facilitated to run away. His mere presence at some distance from the scene of murder without participating is not enough to book him for murder. It cannot be presumed that he has also planned to murder the objector, as essentially they went to commit robbery. However, conspiracy on his part to commit robbery can be easily inferred. There is no infirmity in the order of Trial Court in acquitting Accused No.4 Pankajsingh from the charge of murder.

40. Learned counsel appearing for injured Prasad in Criminal Appeal No. 116/2015 in terms of Section 372 of the Code would urge for conviction of Accused No.1 Bannasingh for the offence punishable under Section 307, instead of Section 324 of the Indian Penal Code. It is submitted that in said occurrence, Accused No.1 Bannasingh dealt a knife blow at the head of Prasad, therefore his act squarely falls within the ambit of Section 307 of the Indian Penal Code. He would submit that, to constitute the offence under Section 307 of the Indian Penal Code, it is not essential that bodily injury shall be capable of causing death, but the intention of accused is material. In support of said contention, reliance is placed on the decision of the Supreme Court in case of **State of M.P. Vs. Saleem**

alias Chamaru and another, AIR 2005 SC 3996. Particularly emphasis is led on para 12 and 13 of the decision which reads as below:-

“12. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

13. *It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt. .”*

41. Undoubtedly, bodily injury capable of causing death is not a *sine qua non* for the said offence. All that which is essential is to see the intention of the accused, which can be deduced from the surrounding circumstances. If the prosecution succeeds from the circumstances to prove the presence of intention to kill, coupled with some overt act in execution thereof, it would attract commission of offence punishable under Section 307 of the Indian Penal Code.

42. Though it is strenuously argued to convict Accused No.1 Bannasingh for the offence punishable under Section 307 of the Indian Penal Code, however the said exercise is unwarranted to see

41

whether the act of Accused No.1 Bannasingh falls under Section 324 or Section 307 of the Indian Penal Code. The entire occurrence is to be considered as a whole. It is not an ordinary case where one has caused simple hurt to other by means of handle of knife. The prosecution has duly established that all three entered into the Jewelry Shop to commit robbery. While attempting to commit robbery, hurt was caused with dangerous weapon. The Indian Penal Code provides a distinct offence under Section 394 of the Indian Penal Code to deal the situation. For ready reference, Section 394 of the Indian Penal Code is reproduced as below:-

“394. Voluntarily causing hurt in committing robbery.—If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with [imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

This Section imposes sever punishment when hurt is caused in committing or attempting to commit robbery. Section 394 postulates causing of harm during commission of robbery, or in attempting to

42

commit robbery. This Section classifies two distinct class of persons. Firstly, those who actually cause hurt and secondly, those who do not actually cause hurt but are “jointly concerned” in the commission of the offence of robbery or attempted robbery. Apparently, the second class of persons may not be concerned in the causing of hurt, but they become liable independently of the knowledge of its likelihood or a reasonable belief in its probability.

43. Section 394 of the Indian Penal Code does not make a distinction in the nature of hurt namely simple hurt, or grievous hurt. Both are treated equally by imposing a sever punishment since hurt was caused during the course of robbery or attempted robbery. Thus, the act of causing hurt cannot be construed independently to asses whether it was a case of causing simple hurt by dangerous weapon, or it was an attempt to commit murder. The act of causing hurt cannot be considered in isolation but to be appreciated in the context that while attempting to commit robbery, hurt was caused. Therefore, the act of Accused No.1 Bannasingh would fall under Section 394, instead of Section 324 of the Indian Penal Code. Likewise Accused No.5 Julfisingh and Accused No. 6 Darasingh are

43

also responsible for the act of causing hurt as they are 'jointly concerned' in attempted robbery. Therefore, both of them are also liable to be convicted for the offence punishable under Section 394 of the Indian Penal Code.

44. Though Section 397 of the Indian Penal Code provides a sever punishment for attempting to cause death or grievous hurt while committing robbery or dacoity, but it does not speak about attempted robbery or dacoity. Section does not make attempted act punishable like Section 394 of the Indian Penal Code. Herein offence of robbery was not complete, but was an attempt only. Therefore, Section 397 of the Indian Penal Code would not apply to the facts of the present case.

45. True, the accused were not charged for the offence punishable under Section 394 of the Indian Penal Code, however they were very much charged for Sections 395 read with Sections 397 and 398 of the Indian Penal Code. Certainly, offence punishable under Section 394 of the Indian Penal Code can be construed as minor offence of those sections therefore, they can be convicted for

44

Section 394 of the Indian Penal Code with the aid of enabling Section 222 of the Code. Therefore, appeal of State as well as victim needs to be allowed to the extent of converting conviction of Accused No.1 Bannasingh from Section 324 to 394 of the Indian Penal Code, and additionally convicting Accused No.5 Julfisingh and Accused No.6 Darasingh for the offence punishable under Section 394 of the Indian Penal Code.

46. Already all of them have been held guilty for the offence punishable under Section 302 of the Indian Penal Code, and sentenced to suffer imprisonment for life, therefore imposition of sentence under Section 394 of the Indian Penal Code would be an academic exercise since all sentences are directed to run concurrently. In view of that the appeals of State and victim are to be allowed to that extent only by imposing sentence of rigorous imprisonment for four years along with fine of Rs. 1,000/- in-default to undergo further rigorous imprisonment for four months for the offence punishable under Section 394 of the Indian Penal Code. The said exercise is permissible in terms of Section 386(e) read with Section 378 of the Code.

47. Then the learned counsel for the victim and State would submit that, since death was caused in the occurrence, the Trial Court ought to have convicted Accused for the offence punishable under Section 396 of the Indian Penal Code. He would submit that, acquittal of the some of the accused would not affect in convicting the rest, for the offence punishable under Section 396 of the Indian Penal Code. In other words, he would submit that even a conviction of single accused under Section 396 of the Indian Penal Code is permissible, if murder was committed while commission of dacoity. In this regard, he drew our attention to the decision of the Supreme Court in case of **Manoj Giri Vs. State of Chhattisgarh, (2013) 5 SCC 798**. It was a case of dacoity with murder. Some of the accused were acquitted whilst a single accused was convicted for the offence punishable under Section 396 of the Indian Penal Code. In said context, it has been observed that conviction of single accused for charge of dacoity with murder has no effect though rest were acquitted. In said case, murder was committed during cojoint commission of dacoity by five persons, however some of them were acquitted due to insufficiency of evidence. However, the factum of

involvement of five persons in the occurrence was not disputed. In that context, it is held that acquittal of some of the accused has no effect in convicting a single person for the offence of dacoity with murder.

48. The case at hand materially defers, as in present case, the prosecution has not established the involvement of five or more persons in the occurrence. In order to record conviction for offence of dacoity, there must be involvement of five or more persons. In absence of such a finding, any one cannot be convicted for an offence of dacoity as well as dacoity with murder, since offence of dacoity is an act of five or more persons. The said essential ingredient is totally missing and therefore, being different facts, the above decision would not assist the victim in any manner.

49. Placing reliance on the decision of the Supreme Court in case of **Kalika Tiwari and others Vs. State of Bihar, AIR 1997 SC 2186**, it has been submitted on behalf of victim that in order to establish the offence of Section 396 of the Indian Penal Code (dacoity with murder), proof of common intention or common object

47

is not necessary. Everyone is liable to be punished under this Section though they have not participated in murder. The relevant penal provision reads as below:-

“396. If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Under this Section extreme penalty of death can be inflicted on a person convicted for taking part in dacoity in the course of which a murder is committed. This Section fastens the liability on other persons as co-extensive with one who has actually committed murder. Therefore, it is not necessary that everyone shall have common object or intention to commit murder, but their participation in the conjoint activity of dacoity resulting into murder is sufficient. However, in case at hand, the very essence of the Section is missing. The prosecution failed to establish participation of five or more persons, meaning thereby, an offence of dacoity. The offence under this Section requires two things. Firstly, dacoity must

be the joint act of the persons concerned and secondly, murder has been committed in the course of the commission of the dacoity. Since participation of five or more persons has not been established, despite murder, this Section cannot be invoked, therefore being distinct facts, above decision would not apply to the facts of this case.

50. The accused were also charged for the offence punishable under Sections 3(1)(i), 3(4) and 3(2) of the MCOC Act alleging that organized crime syndicate headed by Accused No.1 Bannasingh was run of which the rest were members. Some prior charge-sheets against different accused have been tendered, however the Trial Court has dealt the same in detail holding that there were no two prior charge-sheets against the organized crime syndicate. The prosecution has failed to established that the accused were indulged into continuing unlawful activity amounting to organized crime within the meaning of Section 2(1)(e) of the MCOC Act. Therefore, we are unable to accept the submission made on behalf of the victim and State that accused are also liable to be convicted under the provisions of MCOC Act.

51. As regards to the enhancement of sentence, Accused No.1 Bannasingh, Accused No.5 Julfisingh and accused No.6 Darasingh were sentenced to undergo imprisonment for life for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. It is nobodies case that the act of the accused falls in the category of rarest of the rare case. So far as conviction for the offence punishable under Sections 398 and 120-B of the Indian Penal Code is concerned, they are sentenced to suffer rigorous imprisonment for seven year with fine. We find no justification in the urge of enhancement because already they are sentenced for life and all sentences are directed to run concurrently.

52. Accused No.4 Pankajsingh is convicted for attempted robbery with the aid of Sections 34 of the Indian Penal Code and for conspiracy to commit robbery. Section 393 of the Indian Penal Code provides punishment of rigorous imprisonment which may extend to seven years, with fine. Trial Court has imposed rigorous imprisonment for four years with fine. Having regard to his role of facilitator, the said sentence is proper.

50

53. As a summary of above discussion, we are of the considered view that the prosecution has duly established that Accused No.1 Bannasingh, Accused No.5 Julfisingh and Accused No.6 Darasingh have hatched criminal conspiracy. All of them in furtherance of their common intention, committed murder of Vijay Thavkar. At the time of attempting to commit robbery, they were armed with deadly weapons. The prosecution also proved that while attempting to commit robbery, Accused No.1 Bannasingh, Accused No.5 Julfisingh and Accused No.6 Darasingh were jointly concerned in the attempt and during the course of attempt, one of them has voluntarily caused hurt attracting offence punishable under Section 394 of the Indian Penal Code against them. Besides that, the offence under Arms Act, has been duly proved against Accused No.1 Bannasingh, Accused No.5 Julfisingh. The prosecution also succeeded in establishing the offence of criminal conspiracy to commit robbery and attempt of robbery against Accused No.4 Pankajsingh.

54. In view of above, both impugned judgments and orders of conviction against Accused No.1 Bannasingh, Accused No.4

51

Pankajsingh, Accused No.5 Julfisingh and Accused No.6 Darasingh are well sustainable in the eyes of law, therefore, appeals filed by convicted accused needs no interference. However, appeals filed by State and victims would succeed only to the extent of altering conviction of Accused No.1 Bannasingh from the offence punishable under Section 324 to 394 of the Indian Penal Code, and additionally convicting Accused No. 5 Julfisingh and Accused No.6 Darasingh for the same offence. Therefore, we dismiss Criminal Appeal Nos. 50/2015, 63/2016, 410/2019 filed by the convicted accused. We hereby partly allow the Criminal Appeal Nos. 474/2016, 72/2019 filed by State and Criminal Appeal Nos. 87/2015, 116/2015 filed by victims to the extent of punishing Accused No.1 Bannasingh for the offence punishable under Section 394 instead of Section 324 of the Indian Penal Code and convicting Accused No.5 Julfisingh and Accused No.6 Darasingh for the offence punishable under Section 394 of the Indian Penal Code, and they are sentenced to undergo rigorous imprisonment for four years along with fine of Rs. 1000/- each in-default, to suffer rigorous imprisonment for four months for the said offence. The rest of the impugned orders would remain as it

52

stands with the direction to run all sentences concurrently.

55. All appeal stands disposed of in above terms.
56. Fees of the appointed counsel be paid as per Rules.

(BHARAT P. DESHPANDE, J.)

(VINAY JOSHI, J.)