

**RESERVED****A.F.R.****GOVERNMENT APPEAL NO. 2617 OF 1979****State of U.P. .... Appellant.****Versus****Sohan Lal and Others ..... Respondents.****Connected with****CRIMINAL REVISION NO. 1238 OF 1979****Devendra Kumar ..... Revisionist****Versus****Sohan Lal and others ..... Respondents.****Hon'ble Vinod Prasad, J.****Hon'ble Surendra Kumar, J.****(Delivered by The Bench)**

Appellant State has come up in this appeal, U/S 378 Cr.P.C., challenging impugned judgement of acquittal of respondents accused Sohan Lal, Sita Ram, Shiv Kumar, Rameshwar and Braham Singh of charges U/Ss 147,148,307/149, 302/149 I.P.C. P.S. Muradnagar, District Ghaziabad, date 30.4.1979, recorded by Sessions Judge, Ghaziabad in Sessions Trial No. 49 of 1978, State Vs. Sohan Lal and four others. Aforesaid impugned judgement and order has also been questioned by the informant Devendra Kumar, son of Hari Ram Tyagi, by preferring tagged up Criminal Revision No. 1238 of 1979, Devendra Kumar versus Sohan Lal and others. Since in both the proceedings same impugned judgment and order is under examination, consequently both proceedings were clubbed and heard together and are being disposed of by this common judgment.

Before advertng to the merits of the matter, at the very outset, we record that albeit appeal and connected revision were filed and admitted against all the five above named accused/respondents but interregnum final outcome of aforesaid appeal and revision rest of the accused respondents except respondent accused no.1 Sohan Lal, have died and consequently we have to consider acquittal of sole surviving respondent accused no.1 Sohan Lal and thus this ordered is confined in his respect only.

In support of the appeal we have heard Sri Rama Shankar Yadav, learned AGA, for appellant State, Sri R.K. Shukla, learned counsel for surviving accused-respondent and Sri P.C. Srivastava, learned Amicus Curiae for the informant.

Prosecution case against the accused is gestated in the written FIR, Ext.Ka-1 and depositions of prosecution witnesses of facts viz; informant Devendra Kumar PW1, Ram Avtar PW2, Charan Singh PW4, and Smt. Mohini PW6, recorded at trial and from the perusal of these evidences it becomes evident that, both the factions, informant, injured and deceased on the one hand and appellant accused on the other, were descendants of a common ancestor. According to the divulged pedigree by Ram Avtar PW2, one Hukum Singh, resident of village Poothari, P.S.Modi Nagar, district Ghaziabad, had four sons namely, Harbans Singh, Munshi Ram, Onkar and Har Swaroop. Harbans Singh had three sons namely, Jang Bahadur, Subhash(deceased) and Ram Avtar(injured). Accused Sohan Lal and Raju is/was the sons of Munshi Ram whereas accused Rameshwar and Braham Singh were the sons of Onkar. Other two accused Shiv Kumar and Sita Ram were the sons Raju. Thus all them were/are related to each other as first cousin brothers, uncle and nephews.

Topographically, towards north a private *chak* road of Ram Avtar PW2 and deceased Subhash, running east-west, divided agricultural plots (*Chaks*) of deceased and accused Sohan Lal but in the south their plots (*Chaks*) were agglomerated. The aforesaid *Chak* Road was at a higher plinth than the agriculture plots (*chaks*) of Ram Avtar and Subhash and consequently to till the adjoining portion of agricultural field, all along the said road, was dangerous inasmuch as one bullock had to go on higher level making the hitch pole/ beam of the plough uneven and this posed an imminent danger of oxen pulling the hake of being injured by plough share. A day prior to the present incident of murder, on 5.1.1978, informant and deceased had tested their muscles flexing when they were engaged in a brawl with the respondent accused over levelling of the said *chak* road while removing extra soil, but nothing more happened that day. On the following day, 6.1.1978 at about 10 A.M. Ram Avtar (PW2) and deceased Subhash were levelling the *chak* road by digging extra soil, collecting it in a cart and were throwing it at the damaged mettled road and by the time incident had occurred they had already dumped eight or ten carts of soil. At that moment accused respondents Sohan Lal, Sita Ram and Shiv Kumar, all armed with spears (*Ballams*) and Rameshwar and Braham Singh armed with clubs (*Lathis*) appeared at the *chak* road digging spot and all of a sudden attacked Subhash and Ram Avtar PW2. While Sohan

Lal, Sita Ram and Shiv Kumar assaulted Subhash with spears(*Ballams*), Rameshwar and Braham Singh belaboured Ram Avtar with Lathis. Subhash, vainly attempted to save his life by running towards his sugar cane (*Ikh*) field but he was chased upto and into that field by the three spear wielding assailants, Sohan Lal, Sita Ram and Shiv Kumar, who all fatally assaulted him to death in that field. Murdering Subhash, these three assailants advanced towards Ram Avtar PW2 but he was rescued by meanwhile arrived witnesses. Subhash's cadaver, thereafter was lifted from his sugarcane field and was dumped in their field by the three assailants armed with *ballams* and thereafter, together, all of them retreated from the murder scene. Besides injured Ram Avtar PW2, this murder and assault incident was also witnessed by Devendra Kumar PW1, Charan Singh PW4, Smt. Mohani PW6 and Mahabir.

FIR respecting above murder incident, Ext.Ka-1, was penned down by the informant/ revisionist Devendra Kumar PW1, who then carried it to the Police Station Muradnagar, at a distance of 8 kilometers from the place of the occurrence and lodged it same day at 12.10 p.m. Dev Raj Singh, PW7, Head Moharrir on the basis of Ext, Ka-1 registered the crime by preparing chik F.I.R. Ext. Ka-3 of crime number 341 of 78, U/Ss 147/148/149/307/302 I.P.C. and corresponding crime registration GD entry Ext. Ka-4. During investigation PW7 had also prepared GD entry, Ext. Ka-5, regarding deposit of two containers of plain and blood stained soil by the investigating officer PW9 on 7.1.1978 at 7.25 A.M. Head Moharrir PW7 had also slated Ext.Ka-6, which is the GD entry of attires of the deceased deposited by two Consts. Suresh Chand and Veerpal, after autopsy examination of the deceased.

Investigation into the crime was entrusted to S.I. A.P. Singh PW-9, who picked it up forthwith and immediately recorded informant's statement u/ s 161 Cr.P.C. at the police station itself and then proceeded for the incident spot and after reaching in village he had promptly recorded the statement of the injured Ram Avtar PW2 and thereafter appointed inquest witnesses and performed inquest on the corpse of the deceased and prepared inquest memo Ext. Ka-8. Simultaneously, I.O. prepared other relevant documents of photo lash Ext. Ka-9, challan nash Ext. Ka-10, two letters to the CMO, Ext. ka- 11& 12 for getting post-mortem examination done and for seizing attires of the deceased and letter to RI Ext. ka-13. He sealed the dead body and entrusted it to constables Veer Pal Singh PW5 and Suresh Chand Sharma alongwith the papers to be carried to the mortuary for autopsy examination in a tractor. Investigating Officer PW9 collected samples of blood stained (Ext.1) and plain earth (Ext.2) from places 'B' and 'C' shown in site plan Ext. Ka-15 and sealed them in separate containers and slated it's recovery memo Ext. Ka-14. He also

prepared the site plan Ext. Ka-15. He recorded the statements of Charan Singh PW4 and Smt. Mohani PW6 on 11.1.1978. All the accused persons surrendered in the court. The Investigating Officer found a heap of earth on the road(*Rasta Aam*) but he had not depicted it in the site plan. After completing investigation, the I.O. PW9 charge-sheeted all the accused, for aforementioned crime, before CJM Ghaziabad, which charge sheet is Ext. Ka-16.

On 7.1.1978, two constables, Veer Pal Singh PW5 and Suresh Chand Sharma handed over the dead body to Dr. O.P. Sharma PW-3, Medical Officer, P.L. Sharma Hospital, Meerut who conducted the post mortem examination on the cadaver of the deceased Subhash that very day at 3 P.M. and found following ante-mortem physical assault injuries sustained by the deceased:-

*"1. Stab wound 4 cm. x 1.5 cm. x chest cavity deep on the left side chest transversely 1 cm. over from nipple and 9 O' clock position from it.*

*2. Stab wound 4 cm. x 1.5 cm x chest cavity on the front of chest in lower 1/3 of sternum transversely.*

*3. Stab wound 2.5 cm x 1 cm. x abdomen cavity deep on the left side abdomen on the middle of costal margin transversely.*

*4. Incised wound 3 cm x 1.5 cm. x muscle deep on the outer part of left side abdomen, 11 cm. above the interior superior iliac spine, going backwards and communicating with incised wound 3 cm. x 1.5 cm. just above the middle of post iliac chest.*      *5. Incised wound 2 cm. x 0.5 cm. x muscle deep on the front of left forearm just above wrist joint.*

*6. Incised wound 2.5 cm. x 1 cm. x muscle deep on left hand in front of root of the thumb.*

*7. Incised wound 3 cm. x 1.5 cm x muscle deep on the right hand in front of root of the thumb.*

*8. Incised wound 4 cm. x 1 cm. x muscle deep on the right middle finger.*

*9. Stab wound 2.5 cm. x 1 cm. abdominal cavity deep, 6 cm. below and 6 O'clock position.*

Further facts recorded in the autopsy report indicate that deceased was a youth of 25 years of age and rigor mortis was present all over his dead body and he had demised 1 ½ day ago. His chest cavity contained 700 CC of blood and his chest had 3 piercing wounds out of which two were through and through. His diaphragm was ruptured at one place and small intestine was also cut at one place. His stomach was empty. Doctor further deposed that above

injuries could be sustained by the deceased at or about the time of the incident and were possible by piercing weapons like spear (*Ballam*) or knife. According to doctor's further opinion death of the deceased was the outcome of shock and haemorrhage as a result of above sustained injuries.

Dr. T. Singh PW8, in-charge Medical Officer, State Dispensary Govindpuri, Meerut, had examined the injuries of the injured Ram Avtar Tyagi PW2 on 6.1.1978 at 2.50 P.M. and had prepared his medical examination report Ext. ka- 7. This doctor had detected following physical assault injuries on the person of the injured:-

1. *A contused lacerated wound of 5.2 cm. x 0.30 cm. x scalp deep on the right side of head near midline, 13 cm. above the right ear. Advised X-ray.*

2. *A lacerated wound of 3.8 cm. x 0.4 cm. x scalp deep on the left side of head, 9 cm. above the left ear. Advised X-ray.*

3. *An abraded contusion of 3 cm. x 1.5 cm. on the top of left shoulder joint just near lateral end of left clavicle.*

4. *An abraded contusion of 5 cm x 2 cm on the Lt. side of back 6 cm below the injury no. 3.*

5. *An abrasion of 11 cm. x 0.7 cm on the right side of chest, 8 cm. above the right nipple.*

6. *A contusion of 10 cm. x 2.2 cm. on the left side of back, 22 cm. below the injury no. 4.*

7. *A contusion of 11 cm. x 1.7 cm. on the right side of back, 22 cm. below the right shoulder joint.*

8. *An abraded contusion of 10 cm. x 1 cm. on shoulder on the back & medial side of left forearm, 4 cm. below the left elbow joint. Advised X-ray.*

9. *An abraded contusion of 3 cm. x 1 cm. on the middle & inner part of the arm.*

10. *An abrasion of 1 cm. x 0.5 cm. on the based back of right index finger.*

11. *An abrasion of 11 cm. x 0.3 cm scalp on the base of nail of right little finger.*

12. *An abrasion of 8 cm. x 0.2 cm. on the leg.*

13. *An abrasion of 9 cm. x 0.2 cm on the middle & front of right leg.*

*Injuries no. 1, 2, 3, 4, 6, 7, 8, 9 & 11 caused by blunt object and injury nos. 5, 10, 12 and 13 caused by friction against hard object; all the injuries were simple except injuries no. 1, 2, 6 and 8 which were kept under*

*observation and advised X-ray. Duration fresh.*

On the basis of charge sheet, Ext. ka- 16, Criminal Case No. 515/9 of 1978, State versus Sohan Lal and others was registered in the committal court of CJM, Ghaziabad. Finding the disclosed offences triable exclusively by Sessions Court, CJM, Ghaziabad committed the case of the accused to the court of Sessions to stand their trial by passing committal order on 3.4.78 and resultantly, before the Sessions Judge S.T.No. 49 of 1978, State versus Sohan Lal was registered on 4.4.78.

Learned Sessions Judge/ trial Judge charged all the accused with offences punishable under Sections 302/149 and 307/149 I.P.C., besides also charging Sohan Lal, Sita Ram and Shiv Kumar under Section 148 I.P.C. and Rameshwar and Braham Singh under Section 147 I.P.C. on 5.7.78. The charges were read out and explained to the accused respondents, who all abjured them, pleaded not guilty and claimed to be tried and hence to establish their guilt their trial commenced by observing Sessions trial procedure.

During the trial, prosecution, to prove the charges levelled against the accused respondents, examined first informant Devendra Kumar PW1, injured Ram Avtar PW2, Charan Singh PW4 and Smt. Mohani PW6, wife of Harbans Singh (mother of the deceased Subhash), as eye witnesses. Autopsy doctor O.P. Sharma PW3, Constable Veer Pal Singh, PW5, Head Constable Dev Raj Singh, PW7, Dr.T.Singh PW8, and investigating Officer S.I. A.P. Singh PW9 were examined as formal witnesses to prove post mortem examination report, injury report, registration of FIR, carrying of dead body to the hospital, and various investigatory steps.

The accused respondents, in their examination u/s 313 Cr.P.C., denied the prosecution story and stated that *chak* road and agricultural plots of the deceased were on the same level and none was at higher level than the other. They alleged their false implication due to party-faction. They however admitted relationships of injured Ram Avtar and deceased Subhash being bachelor sibling brothers and also the fact that a *chak* road demarcated *chaks* of injured and deceased with those of *chak* of accused Sohan. Thus, they unerringly established existence of the *chak* road between the *chaks* of the prosecution and the accused. Accused further stated that injured and deceased aboded in an inn(*Dharamshala*) at the one end of the *chak* road and persons of shady characters visited them, which was objected to by the accused who had made complaints against Subhash and Ram Avtar to the police, twice or thrice, and because of aforesaid reason they have been falsely implicated in this incident. In their defence accused examined Head Moharrir Gaje Singh as

DW-1 to prove some G.D. of Police Lines, Meerut dated 7.1.1978, G.D. No. 20, Time 7.45 A.M. (Ext. Kha-2). This G.D. Ext. Kha-2 relates to the fact that constable Suresh Chand reached the village Poothari along with constable Veer Pal Singh for taking the papers relating to post mortem examination of the deceased Subhash and leaving the constable Veer Pal Singh in village Poothari, constable Suresh Chand came to the police station on 7.1.1978 at 7.45 A.M. One document Ext. Kha-1 is the copy of F.I.R. No. 14 under Section 506 I.P.C. That F.I.R. was lodged by one Jang Bahadur, who is *Behnoi* of the first informant Devendra Kumar, on 16.1.1978 against Onkar Singh, Raje Munshi and Om Dutt, stating therein that those accused persons along with others had murdered Subhash and they were giving life threats to the prosecution witnesses, in case they will depose against them in the court. One Onkar Singh had a licence of firearm.

As recorded in the opening paragraph of this judgment, since learned Sessions Judge/ trial judge disbelieved prosecution version and acquitted accused respondents of the framed charges that both, the prosecutor State and the informant, have come to this court in above two connected appeal and revision challenging the aforesaid impugned judgement of acquittal.

In the preceding background factual matrix, that we have heard Sri Rama Shankar Yadav, learned AGA for the State for the appellant State, Sri R.K. Shukla, learned counsel for the sole surviving accused respondent and Sri P.C. Srivastava, learned amicus curie for revisionist informant.

Since before us is an appeal against acquittal, therefore, before delving upon factual aspect involved in the appeal, we consider it proper and appropriate to have a glimpse upon some of the guiding precedent judicial pronouncements by the apex court relating to appeal against acquittal as that will be a pointer of approach to be adopted by us and path to be followed and hence we undertake that exercise.

The Hon'ble Supreme Court in ***Shivaji Sahabrao Bobade and another Vs. State of Maharashtra (1973) 2 Supreme Court Cases 793***, vide paras 5 and 7 thereof has observed that the Supreme Court has ever since its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review, at large, the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. In law there are no fetters on the plenary power of the appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinize the probative material *de novo*, informed, however, by the weighty thought that the

rebuttable innocence attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration. The Hon'ble Supreme Court in the reported case further held that where a judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the Court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. A fetish cannot be made of the trial Judge's psychic insight.

In paragraphs 6 and 8 of the same decision it has further observed that there is a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will break down and lose credibility with the community.

The Hon'ble Supreme Court in paragraph 11 also observed that while considering determination of time of death given after the examination of the stage of digestion of stomach contents one must also consider the time sense of the Indian people generally, especially with regard to a minor event such as taking a meal. Authorities on this aspect point out that stomach contents cannot determine with precision the time of death "in as much as the power of digestibility may remain in abeyance for a long time in states of profound shock and coma". "it must also be remembered that the process of digestion in normal healthy persons may continue for a time after death". There are imponderables which make the digestive testimony inconclusive and, therefore, insufficient to contradict positive evidence, if any, about the time of death. To impute exactitude to a medical statement oblivious to the variables noticed by experts and changes in dietary habits is to be unfair to the science.

Regarding approach to be adopted while analysing evidences the apex court went ahead and cautioned by observing, in paragraph 18, that photographic picturisation of blows and kicks and hits and strikes in an attack

cannot be expected from witnesses who are not fabricated and little turns on indifferent incompatibilities. Efforts to harmonise humdrum details betray police tutoring, not rugged truthfulness. Attour regarding motive it has been held by the apex court that proof of motive satisfies the judicial mind about the likelihood of the authorship but its absence only demands deeper forensic search and cannot undo the effect of evidence otherwise sufficient. Motives of men are often subjective, submerged and unamenable to easy proof that Courts have to go without clear evidence thereon if other clinching evidence exists.

Above lucid exposition and annunciation of law has been further approved in a plethora of subsequent decisions by apex court. In **Ghurey Lal v. State of U.P.:****AIR 2008 SCW 6598** it has been held by the apex court as under:-

"71.. In *Chandrappa and Others v. State of Karnataka (2007) 4 SCC 415*, this Court held :

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

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

*(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*

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

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

72. The following principles emerge from the cases above :

1. The appellate court may review the evidence in appeals against acquittal under sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.

73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal :

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when :

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts /appellate courts must rule in favour of

*the accused.*

The same view has been reaffirmed in **Md. Ankoos and Ors. v. The Public Prosecutor, High Court of A.P.:AIR 2010 SC 566.** For the sake of brevity we eschew referring to other apex court decisions further crystallizing above position. In view of above expounded law that we have to deal with the State appeal and informant's revision and examine the impugned judgment and hence we now under take appreciation of evidences by prosecution witnesses to fathom out sustainability or otherwise of the impugned judgment.

Coming to the evidence of fact witnesses we find that evidence of Devendra Kumar PW1 was recorded in the court on 19.12.1978 and on that date he was 18 years of age. Since incident had occurred one year ago , therefore on the date of the incident this witness should be about 17 years. He is the first informant and real brother-in-law (*Sala*) of Jang Bahadur real sibling brother of deceased Subhash and injured Ram Avtar. He has deposed that his sister was married to Jang Bahadur of village Poothari and he was residing with his sister in that village because he was studying in a school in village Niwari. The witness was a student of eleventh class at the time of the incident. There was strike in the school during days of the incident and college time was between 9.30 A.M. to 3.30 P.M. The strike continued from 2.12.1977 to 16.1.1978 and strike was observed by teachers. On the date of the incident ie: 6.1.1978, he was cutting green fodder (*Barseem*) in the field of his brother-in-law (*Behnoi*) Jang Bahadur, whereas his brother-in-law, injured and deceased were lifting earth from the *chak* road and throwing it on public way (*Rasta Aam*). As *chak* road was on a higher level than the adjacent agricultural field of the informant and the deceased, therefore it created difficulty in tilling the field because one ox had to go on the higher level whereas the other ox had to remain on a lower level, causing serious threats of injuring oxen by plough share because of tilting of hake and beam. This witness had heard cries and noise emanating from the place from where the soil was being lifted and therefore he and Smt. Mohani PW6, mother of injured PW2 and deceased Subhash, immediately rushed to that spot and witnessed that three accused Sohan Lal, Sita Ram and Shiv Kumar were assaulting deceased Subhash with their spears whereas other two Rameshwar and Braham Singh were belaboring Ram Avtar with their lathis. Subhash, after being injured, sprinted towards his sugar cane field to save his life but he was hotly chased by those three accused upto and into that field where again he was fatally assaulted by those accused with their respective spears resulting in his instantaneous death at that spot. Then spear wielding accused swooped upon injured Ram Avtar PW2 but he was saved by the timely presence of the witnesses and other persons.

Assailants armed with spears thereafter lifted the corpse of the deceased Subhash and placed it in their own field and after that left the incident scene hurriedly. Further testimony of informant PW1 is that on the previous evening of the incident, there were verbal tirade between the accused and injured and the deceased regarding lifting of earth from higher level of *chak* road. This *chak* road was a private *chak* road of the deceased Subhash and injured Ram Avtar. PW1 has also deposed that he had scribed the written report of the incident and had gone to the police station with it and got it registered. He has proved his written report dated 6.1.1978 as Ext. Ka-1, mentioning the time of incident as 10 A.M.

Informant Devendra Kumar PW1 was extensively cross examined by the accused and in his cross examination he disclosed that village *abadi* was about 1/2 mile from the place of the incident and the field of the deceased was towards north to the *chak* road. The field of the accused Sohan was towards south to the *chak* road. Removing soils from *chak* road was not going to harm the agricultural field or crop of the accused persons. Cross examination of Devendra Kumar PW1 further evidenced that the deceased Subhash, injured Ram Avtar and Jang Bahadur were residing and dinning jointly. The field of green grass (*Barseem*) was adjoining to the public road (*Pakki Sadak*) in north. When the school opened, the *Barseem* was brought by Ram Avtar from the field and during strike days of the school, PW1 used to bring *Barseem* from the field. The witness reached the field of *Barseem* around 9 A.M. on the day of the incident. The Investigating Officer had not taken into his possession the cut *Barseem* and *Daranti* and had not inked it's seizure memo. So also I.O. preferred not to take the green Sag (green leaves of gram) plucked by Smt. Mohani PW6. The spades by which the earth was being dug was shown to the Investigating Officer but he did not take it also into possession nor prepared any recovery memo. After the incident, PW1, all alone with his scribed report, first came to the house of his brother-in-law and from there he stepped to Niwari bridge and then by *Tonga* he came to Modi Nagar and finally by bus he arrived at PS Muradnagar, reaching there approximately by 12.45 P.M. Dead body of Subhash was dispatched by I.O. around 3-3.30 P.M. from the place of the incident. Informant PW1 further disclosed that his Mausi, Smt. Mohani PW6 had reached the field around 9.30 A.M. with lunch for him, deceased and injured, Subhash and Ram Avtar. PW1 and Ram Avtar, PW2 had taken lunch but Subhash had not eaten it and his lunch remained at the field. According to testimony of PW1, blood had tickled down on the place of assault where Subhash had fallen down, which was shown to the I.O. Shape and size of spears and the conventional piercing manner in which it were used by the

murderers was also disclosed by this witness. Informant PW1 was also tested about the contents of his FIR Ext. Ka-1, but no damaging statement could be elicited from him as he deposed that he had scribed the FIR on his own without seeking any body's help and he emphatically denied its preparation at the dictation of some policeman or the I.O.

Ram Avtar PW2 is an injured witness of the same incident in which his sibling brother lost his life. He (Ram Avtar PW2) had divulged the pedigree referred to herein above, which has not been denied or challenged by the accused also. Ram Avtar further testified that there had never been any dispute between two sides except one, which took place one day prior to the murder incident. PW2 further deposed that he, deceased and their family members were residents of village Poothari, whereas the accused persons were residents of adjoining village Nagla Aakhu and agricultural plots/field of both sides were also adjacent. The incident took place on the private *chak* road of the injured which was situated in the jungle of village Nagla Aakhu. The level of the *chak* road was higher than the level of their agricultural plots/*chaks*, because of which there was difficulty in ploughing their agricultural fields as there always remained a danger of oxen being injured by share of the plough. It was because of this constant danger that he and the deceased wanted to level both the *Chak* road and their agricultural fields. PW2 also narrated the verbal onslaught incident occurred a day ago between both the sides when they were intervened by the accused persons who forbade them not to lift the earth from the *chak* road as they apprehended that if the level of the *chak* road was allowed to be reduced then the rain water might inundate their field. PW2 also deposed that when the incident occurred on 6.1.1978 around 10 A.M. then he and the deceased Subhash were lifting earth from the *chak* road and Devendra Kumar PW1, brother-in-law (*sala*) of Jang Bahadur, was cutting *Barseem* in the field and Smt. Mohani PW6 was plucking *Sag* (green leaves of gram). PW2 lend credence to the evidence of informant PW1 and described entire incident in the same manner as was deposed by PW1. He also testified that at the time of the incident accused Sohan Lal, Sita Ram and Shiv Kumar, all armed with spears and Rameshwar and Braham Singh, both armed with lathis appeared there and desisted them from lifting the soil from the *chak* road but they both(injured and the deceased) continued to lift the soil from the *chak* road, on which they were assaulted by the accused resulting in death of the deceased and sustaining injuries by him. PW2 further mentioned that he was attacked by Rameshwar and Braham Singh whereas rest of the three attacked Subhash who ran towards his sugarcane field to save his life but he was chased and murdered in that field. His body was lifted

and dumped in their own field near the side of the *chak* road by the assailants. The spear wielding accused had also turned towards him (PW2) for assaulting him but due to the presence of witnesses his life was spared.

The injured Ram Avtar PW2 was also subjected to lengthy cross examined during which he repeated the earlier day incident and also stated that by lifting of earth from the *chak* road no damage or harm was likely to be caused to the accused. Moreover accused were made aware of the difficulties being faced by the deceased and the injured in ploughing their fields but the accused did not pay any heed to their difficulties and they had hurled threats of life in case injured and the deceased continued to carry on their activities of removing the soil. PW2 further stated that they started digging the soil around 9.30 A.M. on the incident day and they were bare handed except using spade for lifting the soil. In the midst of their work that the incident had occurred. PW2 also stated that the *chak* road was a private road of him and the deceased and accused had no concern with it as the same was built on their private land 7-8 years prior to the incident and during this period of 7-8 years, the earth from the *chak* road was removed several times without any incident taking place nor any objection was raised by the accused and there was no enmity between the two sides. It is further evidenced that he (injured PW2) had become unconscious after receiving injuries and he was brought to the village in a Buggy by Devendra Kumar PW1 and he (PW2) regained consciousness in the village and he remained at his house till around 12 noon and thereafter was firstly taken to a private doctor but he had not given him any medical aid and thereafter he was taken to the Government hospital in a private tempo where he had reached at about 5.30 P.M. Regarding presence of PW1, the injured PW2 stated that Devendra Kumar was 10-15 yards away from the place of the incident and there was no sugarcane crop existing in between them. PW2 also testified that when the attack was mounted by the accused persons, he, the deceased and Smt. Mohani PW6 were already present at the place of the incident and attack was made at the place from where soil was being lifted. It was suggested to PW2 by the accused that he and the deceased were involved in illegal activities and against them accused had made a complaint to the police, and because of aforesaid reason they have falsely implicated them in this case, but the said suggestion was blatantly denied by this witness. Several types of other suggestions were also given by the accused to this witness but he rebuffed the same convincingly.

Now coming to the evidence of Charan Singh PW4 it is evident from his examination-in-chief as well as cross examination that he is an independent witness and a co-villager. He corroborated the informant and the injured in all

material aspects of the incident. He witnessed the incident while he was proceeding towards *Suhana Bhaneda* village to look out for a milking she buffalo accompanied with Mahavir Singh. He has corroborated date, time and place of incident, the weapons used in assaulting the injured and the deceased and which accused wielded which weapon. He also confirmed that the incident occurred because of removing of soil from the *chak* road. This witness further confirmed distance between place of incident and village to be ½ a mile. He stated that he had purchased she buffalo after one month from one Budh Singh r/o Raghunath Pur. He further disclosed that after the incident he had left the place of the incident and after 5-7 days that his statement was recorded by the I.O. at his house. He had denied defence suggestion that he came to know about the incident and since FIR was not in existence therefore he had not stated the incident to the I.O. for 5-7 days. He also testified that he had not disclosed the incident to village people as they had come to know of it on their own and he had not made any effort to comfort the deceased or the injured nor had suggested to lodge an FIR. He further confirmed that the spear was used in a piercing manner. He further deposed that he had caught hold of lathi wielding accused but they got themselves freed and recommenced their assault. He also deposed that nobody attempted to apprehend the assailants when they retreated. Very queerly this witness was not suggested any enmity with the accused and only a faint suggestion was given to him that he being friend of injured and deceased and had visiting terms with them and therefore he was deposing falsely, to which suggestion he denied point blank.

Smt. Mohini PW6 is the last fact witness. From her depositions it is evident that she is the mother of the injured PW2 and the deceased Subhash. She had also lend credence to the prosecution and FIR version and testified those very facts which her predecessor witnesses have evidenced regarding the incident. She has reiterated that she had gone onto the field with lunch of her sons and of PW1. Injured and deceased were lifting the soils from the *chak* road and PW1 was cutting *Barseem*. She further stated that she started plucking *Sag* when she heard the shrieks emanating from *chak* road. She and PW1 immediately rushed towards that direction and had witnessed the entire assault as has ready been recorded herein before with specific roles of each and every accused. She had also narrated graphically the incident of assault without vacillating even the slightest. She further deposed regarding time, date, place of incident, weapons used and specific role of all the assailants. PW6 also evidences that injured was transported to the village in a *Buggi*. She further deposed that she had sent PW1 on the field and she had followed him carrying lunch and on the incident date she was the only female member in

the house as sister of PW1 alongwith her children had gone to her parental home. This witness in no uncertain terms had testified that amongst the assailants there was no outsider and they were five in number. She further stated that deceased had not taken meal although she had not stated so to the I.O. She was unwittingly questioned regarding her previous marital relationships which evidence do not affect the merit of the case and hence we ignore it. This mother has also clarified that both of her sons had gone to the field only after taking tea and they could not eat anything hence she cooked food for them and took the same in the field and she had reached the field around 9.30 A.M. PW6 was also suggested that she had not seen the incident but she denied the same.

Amongst the formal witnesses autopsy doctor O.P. Sharma PW3 and Dr.T. Singh PW8 deposed regarding post mortem examination report of the deceased and injuries sustained by the injured. Theses witness stood fast test of their cross examinations and doctor PW3 in no uncertain terms stated that injuries caused to the deceased could be inflicted in a piercing manner. He had further stated that the deceased must have taken meal in the night. Dr. T.Singh, PW8 during his cross examination has stated that scalp is not a vital part of the body and no x-ray report was produced before him and therefore in absence thereof injuries of the injured will be simple in nature. He further mentioned that injuries of the injured were fresh in duration.

Constable Veer Pal Singh, PW5 had deposed that he had carried the sealed corpse of the deceased to the medical college, Meerut mortuary and had deposited it there. He has also identified the dead body to the doctor and had handed over papers to him. So long as deceased cadaver was in his possession he did not allow any body to touch or tamper with it. After autopsy examination he had carried the attires of the deceased and had deposited it at the police station. In his cross examination he had deposed that he had carried the dead body in a tractor from the village at 4 P.M. and on their way to Meerut they did not stop at any place and had arrived at Meerut at 6 <sup>3</sup>/<sub>4</sub> -7 P.M. same day. After getting entry done at police lines dead body was brought to the mortuary same night. He had denied the suggestion that the body was removed from the incident spot earlier and since FIR was not ready hence it was sent to Meerut following day in the morning and they have got entries made in police lines at 7.45 A.M.

Head Constable Dev Raj Singh, PW7 stated that he had prepared Chik FIR Ext Ka-3, on the strength of Ext. Ka-1 and had prepared GD entry Ext. ka-4. He had also proved that SI Amrit Pal Singh, I.O. had deposited two sealed containers containing plain and blood stained earth regarding which he had

inked GD Ext. ka- 5. On 7.1.78 he had prepared GD Ext. ka-6 regarding depositing of deceased cloths by constable Suresh Chand and Veerpal. He had denied defence suggestion that on telephone information of murder was received and I.O. had gone to the place of the incident and thereafter either in the late night or next day morning that the FIR was fabricated. He had also proved a FIR dated 16.1.78 lodged by Jang Bahadur, brother of deceased and brother-in-law of PW1, u/s 506 I.P.C. as Ext. Kha-1 in which Jang Bahadur had signed in English.

Investigating Officer S.I. A.P. Singh PW9 detailed various investigatory steps taken by him which have already been mentioned above and hence we avoid repetition. During his cross examination I.O. had deposed that no *Buggi*, spades, *Daranti*, food cut *Barseem* and plucked *Sag* were found by him at the spot and he had not shown them in site plan. He had seen new tilled soil on the road but he had not shown it in the site plan. He categorically stated that although FIR by Jang Bahadur, u/s 506 I.P.C. related with present murder and threatening of witnesses but he had not read the same nor had taken any action on it. He further stated that during investigation he had not found involvement of any other unknown person in the incident. He also mentioned that he had gone to the spot in a tempo. He denied defence suggestion that he had deliberately not penned down witnesses investigatory statements u/s 161 of the Code because FIR was not ready and he further denied that he had received information earlier on phone, on which he had gone to spot and after his return from there that the FIR was cooked up in his connivance and appellants were implicated.

In the back drop of above evidences learned trial court concluded that *"prosecution have failed to prove their case beyond on reasonable doubt. A strong doubt prevails about the time of occurrence and the veracity of the prosecution assertions. The benefit of this doubt must go to the accused persons. They must be acquitted"*. The above conclusion was arrived at by the Sessions Judge for the following reasons which favoured with him:-

- (a) That the accused persons could not have any motive to assault the victims and prosecution evidence on the point of motive was not convincing and hence it had failed to prove the same or at any rate an element of doubt in that respect prevails. The learned trial judge further observed that in the criminal law presence or absence of the motive is relevant but is never conclusive because a person having strongest of motive may not be a real culprit. On the other hand, a person having no motive at all might have committed the crime.
- (b) That the presence of Devendra Kumar PW1 at the spot during the incident was doubtful because he claimed to have been cutting *Barseem* by a *Daranti*

but the Investigating Officer PW9 had not found any cut *Barseem* or *Daranti* at the time of his inspection of the spot.

(c) That informant Devendra Kumar PW1, in his written report, Ext. Ka-1 had wrongly mentioned that "SUBHASH KO UN LOGON NE JAN SE MAR DIYA TATHA RAM AVTAR KO BALLAM TATHA LATHIS KI CHOT AYI HAIN". Transliteration of it means that Subhash was murdered by them and Ram Avtar had sustained *Ballam* and *lathi* injuries. According to the learned trial Judge this wrong mentioning of fact was sufficient to discard informant's presence at the spot during the incident and only to make his evidence commensurate with medical evidence that, during trial, he had expatiated his evidence by testifying that Ram Avtar was attacked only with *lathi*. Only for this maiden reason that the trial court disbelieved presence of the first informant at the spot during the incident and concluded it to be doubtful as according to him had PW1 been present at the spot he would have mentioned separate assault being made on the deceased and the injured by separate accused and by weapons and the view favourable to the accused be adopted.

(d) That the presence of Smt. Mohani PW6 at the spot, at the time of the occurrence, was doubted as she claimed to have taken food for three persons in a tiffin and she had plucked Sag also but the leftover food of the deceased, the tiffin and plucked Sag were not shown to the Investigating Officer nor the I.O. found any of it at the spot and hence had not shown them in the site plan. Further trial Judge also considered it to be a significantly damaging omission that she had not stated clearly u/s 161 statement that deceased had not taken meal and hence she expatiated her statement before the court only to fall in line with medical evidence. Another factor which weighed with the learned trial Judge was that had she been present at the spot she would have not implored the I.O. to show her the face of her deceased son. For above reasons it was opined that PW6 was also not present at the spot.

(e) Presence of Charan Singh PW4, was disbelieved by the learned trial Judge for the reason that during investigation he had narrated to the I.O. that along with Mahabir Singh he was going to village Nagla Aakhu looking for a milking she buffalo but before the court he had deposed that he was going from village Poothari towards village Suhana Bhanede in search of a she-buffalo and hence there was a material contradiction in his statement because of change of name of village. Testimony of this witness was further castigated for the reason that he had not expressed sorrow or remorse to his friend Jang Bahadur for the demise of his brother and this conduct is very bizarre. Another reason is the query made by PW4 to the informant regarding wielding of weapon by the accused. From such a query learned trial Judge concluded that the same would

not have been made had PW4 witnessed the incident himself. Further that, according to evidence of Charan Singh PW4, he had left the spot after 15 minutes of the occurrence but he remained at his house all along. He was available to the Investigating Officer who could have interrogated him the same day but he interrogated him 5-7 days after the occurrence and hence PW4 was a got up witness. For the aforesaid reasons that the deposition of PW4 was discarded by the learned trial Judge.

(f) Learned trial judge rejected credibility of injured witness Ram Avtar PW2 for four reasons firstly, that the road led to the inn which was exclusively used by the deceased and the injured and it was suggested to PW1 & 2 that both, injured and the deceased, used to "*entice girls to the Daramshala*", secondly that there was a fight between the deceased and the injured with milkmen and it was suggested to the witnesses that certain milkmen used to pass through that way in the wee hours of the morning and he (injured) PW2 and the deceased Subhash used to forcibly take milk from them and in a fight with them that the deceased had died and injured had sustained injuries. Thirdly that it is improbable that the deceased will not take meal after a gap of twelve hours and will not feel hungry and hence his empty stomach is a strong evidence against the prosecution version and the explanation offered is not convincing, and lastly that the milkmen, with whom fight had ensued between deceased and injured were unknown to PW2 and therefore the opportunity was utilised to falsely implicate the accused persons. Learned trial Judge further observed that although suggestions alone do not take the place of proof but the defence is not expected to establish their suggestions by any cogent evidence. Probabilities of the suggestions could only be emphasised by attending circumstances and if they seem probable enough they can be taken into consideration.

(g) Trial Judge further held that the prosecution is trying to pass certain witnesses as eye witnesses of the occurrence shows that the prosecution was keen to pad up and provide corroboration to Ram Avtar PW2. This has not brought any result in favour of the prosecution. Rather it stands to show that prosecution was trying to put forward a wrong theory of the incident to have taken place at about 10 A.M. The medical evidence on record is in no way inconsistent with the defence theory that Subhash met his death same time by 3 A.M. The suggestion is that he met his death and Ram Avtar PW2 received injuries in a dispute with milkmen when none could see the occurrence.

(h) That the learned trial judge while discussing the site plan Ext. Ka-15, observed that according to the prosecution case, the deceased Subhash was done to death with *Ballams* at point 'B' but his dead body was lifted and placed

at point 'C' in the site plan. These two points were across the chak road. If the dead body of the deceased was lifted from point 'B' and brought to point 'C' immediately after the incident then his blood would have trickled between the two points. No trail of blood was shown in the site plan. The Investigating Officer PW9 explained that he had seen the blood trickling marks along 'B C' but had not shown in the site plan. The theory of shifting the dead body from point 'B' to 'C' was thought of to be absurd by the trial judge observing that it was not understandable why the accused persons could have behaved in that way.

Above were the reasons which heavily weighed with the learned trial Judge to record acquittal, which judgment and order has now been assailed in this appeal.

In the backdrop of above evidences and findings when we reassess, vet and summate vis-a vis trial court's reasoning, we find ourselves in total disagreement with learned trial court view as in our opinion prosecution has successfully established it's charge beyond any shadow of doubt and entire approach by the learned trial Judge is faulty and no prudent man would have arrived at those conclusions which has been arrived at by the learned trial court. At places he has even misquoted facts. Before indulging into a critical and comparative examination we recapitulate that we are very much conscious of the fact that we are dealing with an appeal and revision against acquittal in which we have to reassess the findings recorded by the learned trial judge only to scan as to whether they are reasonably possible or not as the trite law is that unless the findings of the trial court is perverse and against the weight of evidence on record, which no man of ordinary prudence would have arrived at, a judgment of acquittal should not be altered and for altering the findings there must exist very strong and compelling reasons.

Adverting now to the merits of the appeal we find that on some of the facts having significant bearing on the outcome of the appeal both the factions are at one with each other and they are not in dispute. Learned trial court has also noted those facts but completely failed to attach importance which it deserved and in one sided way analysed the entire prosecution version only to castigate it. Firstly, the relationships between both the factions was not questioned by the accused and hence it is established on record that both the sides were related with each other and hence their identities were without any doubt. Accused were resident of adjoining village having adjoining agricultural fields and hence also there could not have been any doubt about their identities. Secondly, but for a dispute regarding levelling of the *Chak* road there was no animus between both the factions and but for the triadic verbal

onslaught, which occurred a day earlier both the sides had cordial relations. Repeatedly it has come in evidence that but for the aforementioned incident prosecution and the accused had no hostile feeling against each other. This was a very significant fact as it completely ruled out possibility or motive for false implication in a day light incident in which own uterine sibling brother was annihilated. This most vital aspect has been completely eschewed by the learned trial court. Thirdly that existence of *chak* road which belonged exclusively to the informant and the deceased as the same entirely existed on the their plot, having nothing to do with the respondent accused is also an admitted fact. This fact was also diluted by the learned trial court while inking impugned judgment. This indicate that respondent accused could not have any earthly comprehensible reason to object to removing of soil from the *chak* road and they did it only for a motive. Fifthly that place of murder has not been challenged by the accused although they have suggested that murder had taken place at dawn without any body witnessing it. Sixthly, it also remains unchallenged that both deceased and injured sustained injuries in the same incident and hence presence of injured during the assault is an established fact. This aspect is well cemented by the suggestions given to the fact witnesses and hence accused also admitted presence of Ram Avtar PW2. In absence of any motive to falsely implicate respondent accused it is difficult to cogitate that an injured witness will implicate innocent persons without any rhyme or reason in an assault launched on himself and his brother sparing real assailants.

With above admitted facts when entire prosecution evidence is scanned critically, without accepting it pedantically, it is revealed that all the fact witnesses including the injured have corroborated the entire prosecution story in no uncertain terms without exaggeration or embellishment or vacillating even slightly. They all narrated the same sequence of events detailing part played by each accused in the incident. Motive for launching assault has been clearly and conspicuously divulged by them and they have deposed unambiguously that there was no hostility between them and the accused prior to the incident of tirade and hence there was no deep seated enmity furnishing any motive to the prosecution witnesses to cook up a story against the respondent accused. Date, time, place of incident, weapons wielded by each accused were narrated by them with crystal clear clarity while graphically describing the assault witnessed by them. Since we have, in detail, noted all these aspects herein above, therefore for the sake of brevity we avoid repetition. All these witnesses were subjected to lengthy and searching cross examinations by the defence who miserably failed to dislodge their testimonies

on all material aspects of the incident, although they did fathomed out some insignificant omissions and contradictions between their 161 Cr.P.C. statements and depositions in court. In our opinion those omissions are so minor and insignificant that they do not create any doubt or in road in the prosecution version and contrary to it rules out the criticism of witnesses being tutored. This adds to their credibility rather than diminishing value of their depositions. We are of the opinion that unless the omissions are of such a degree that it affects the main substratum of prosecution version it cannot be attached with undue significance to reject eye witness account of even that witness whose presence at the scene is not in doubt. Some normal discrepancies are bound to occur due to errors of observations or memory and due to lapse of time. Recently in **State of U.P. versus Naresh : (2011)4 SCC 324** apex court has held as under:-

*23. The High Court has disbelieved Balak Ram (PW.5), who had suffered the gun shot injuries. His evidence could not have been brushed aside by the High Court without assigning cogent reasons. Mere contradictions on trivial matters could not render his deposition untrustworthy. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: Jarnail Singh v. State of Punjab, (2009) 9 SCC 719; Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; and Abdul Sayed v. State of Madhya Pradesh, (2010) 10 SCC 259].*

*The same view has been expressed in **Nand Kishore versus State of M.P. :AIR 2011 SC 2775** , wherein it has been held as under:-*

*13. Another aspect which the Court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any pre- determined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all*

alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh and Nand Kishore got together outside their house and as is evident from the statement of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial Court and the High Court would not call for any interference.

The learned counsel appearing for the appellant had relied upon the judgment of this Court in the case of *Shivalingappa Kallayanappa & Ors. v. State of Karnataka* [1994 Supp. (3) SCC 235] to contend that they could not be charged or convicted for an offence under Section 302 with the aid of Section 34 IPC. The said judgment has rightly been distinguished by the High Court in the judgment under appeal. In that case, the Supreme Court had considered the role of each individual and recorded a finding that there was no common object on the part of the accused to commit murder. In that case, the court was primarily concerned with the common object falling within the ambit of Section 149, IPC. In fact, Section 34 IPC has not even been referred to in the afore-referred judgment of this Court. In ***Ashok Kumar v. State of Haryana***: AIR 2010 SC 2839 it has been held by the apex court :-

"28. This Court has to keep in mind the fact that the incident had occurred on 16.05.1988 while the witnesses were examined after some time. Thus, it may not be possible for the witnesses to make statements which would be absolute reproduction of their earlier statement or line to line or minute to minute correct reproduction of the occurrence/events. The Court has to adopt a reasonable and practicable approach and it is only the material or serious contradictions/variations which can be of some consequence to create a dent in the case of the prosecution. Another aspect is that the statements of the witnesses have to be read in their entirety to examine their truthfulness and the veracity or otherwise. It will neither be just nor fair to pick up just a line from the entire statement and appreciate that evidence out

*of context and without reference to the preceding lines and lines appearing after that particular sentence. It is always better and in the interest of both the parties that the statements of the witnesses are appreciated and dealt with by the Court upon their cumulative reading."*

In the present case no such contradiction has surfaced to discard entire prosecution case and testimonies of the prosecution witnesses of fact. Medical evidence of the doctor further authenticates ocular version and is compatible with time and day of the incident alleged by it. FIR about the incident was lodged without any delay and investigation was commenced soon thereafter. It is true that in this case the investigation seems to be perfunctory as the I.O. has left much to be desired but his lapses are not major enough to discard confidence inspiring eye witness account of un-inimical witnesses. It does not emerge from entire evidence that participation of respondent accused has not been established successfully.

Since we are of the view that impugned judgment of acquittal cannot be sustained therefore to meet the reasoning of the learned trial court we now advert to comparative analysis to point out our reasons for difference of opinion and to indicate faulty approach adopted by learned trial Judge. Firstly, trial court held that accused could have no motive to assault the victim and evidences led by the prosecution about motive was certainly not convincing. This conclusion is contrary to the evidences on record. First informant as well as his successor fact witnesses in un-ambiguous terms had narrated regarding earlier day incident of verbal dual in the presence of deceased Subhash and his brother injured Ram Avtar PW2 on the one hand and accused on the other when respondent accused had remonstrated the deceased and the injured to refrain from digging the soil from *Chak* road. This incident must have been a sufficient faux pas for the respondent accused to assault the deceased and the injured and hence it is not a case of absence of motive and resultantly finding on motive sketched by the learned trial judge is based upon erroneous reading of evidences and palpably false. Otherwise also in case of an eye witness account motive pales into insignificance. More over learned trial Judge completely failed to appreciate that there was total absence of any reason for the injured and the deceased mother, having no animus, to feign a story against the accused. This eschewing of most significant aspect erodes entire vetting of evidences by the learned trial Judge. Thus we find the opinion of the learned trial court unsustainable and hold that there was sufficient motive for the accused to indulge into the crime and motive has been successfully proved by the prosecution. Let us remind that absence of motive and existence of weak motive are two different aspects and

present is certainly not a case of absence of motive.

Next finding by the learned trial court that presence of informant, PW1 during the incident, at the incident spot, is doubtful is also contrary to the material on record and is based on misguided approach adopted by the learned trial Judge and an improper appreciation of evidences. Learned trial Judge himself has concluded that residing of PW1 along with his sister is an established fact as the fact that he studied in a school at Niwari had not been challenged by the defence. Thus presence of PW1 in the village of the incident cannot be disputed. Merely for the reason that I.O. had failed to seize cut *Barseem*, and *Daranti*, which was shown to him is wholly insufficient to dub informant as a got up witness and discard his testimonies. Since PW2, whose presence is admitted in the incident, also confirmed presence PW1 at the spot therefore it was wholly absurd for the learned trial Judge to hold otherwise. More over by introducing PW1 in the case prosecution would not have gained any mileage and hence we are of the opinion that the presence of PW1 is well proved at the time of the incident and the conclusion arrived at by the learned trial court regarding his presence at the incident scene is wrong. If, the trial Judge would have dispassionately examined entire evidence he would not have arrived at the conclusions, which he had arrived in the impugned judgement of acquittal.

Further, trial court held that since in the FIR, Ext. ka-1, informant PW1 had inked that "SUBHASH KO UN LOGON NE JAN SE MAR DIYA TATHA RAM AVTAR KO BALLAM TATHA LATHIS KI CHOT AYI HAIN"(Subhash was murdered by them and Ram Avtar has sustained Ballam and Lathi injuries), therefore presence of PW1 at the spot is doubtful because had he been present at the spot he would have separately mentioned that deceased was assaulted with *Ballam* and injured was assaulted with lathi, is also a faulty conclusion. We have not been able to fathom out any reason for such a conclusion on the aforesaid basis in as much as a boy of eleventh class was scribing a FIR and not an epic. His FIR has to be analysed from his wisdom and perceptions and not from the wisdom of a legal luminary. If he wrote a comprehensive complicated sentence that Subhash was done to death by those persons and Ram Avtar was injured by spears and lathis, that it could not be called any kind of discrepancy or contradiction because he used that compounding sentence regarding both deceased Subhash and injured Ram Avtar. During his examination-in-chief, he clearly deposed that three accused persons Sohan Lal, Sita Ram and Shiv Kumar each were armed with spears and remaining two accused persons Rameshwar and Braham Singh each were holding lathis in their hands and the accused holding spears were attacking Subhash and those holding lathis were assaulting injured Ram Avtar. Thus, there was no

material contradiction or omission between evidence at the trial and contents of the F.I.R. and there was no deviation in between two. A close and careful scrutiny of the testimony of Devendra Kumar PW1 clearly establishes his presence on the date, time and place of the occurrence. Otherwise also since the assault had started simultaneously therefore court's deposition is neither an improvement nor an embellishment. Presence of PW1 at the spot cannot be doubted only because defence had suggested that he had departed from his F.I.R. version simply to make it in line with medical evidence. Thus, the finding of the learned trial judge that the presence of Devendra Kumar PW1 at the relevant time was doubtful, is not substantiated from the evidence on record which indicate otherwise.

Another finding by the learned trial judge that presence of Smt. Mohani PW6, who is the mother of the deceased and the injured, was also doubtful as she claimed to have taken food to the field for three persons and since Subhash did not feel hungry, he had not eaten it and it was left there which was not shown to the I.O. nor the Sag plucked by her was seen by the I.O. nor he has mentioned it in his site plan Ext. Ka-15 is also a surreal reasoning. Such a finding is not borne out from the evidence of Smt. Mohani PW6. The incident of murder took place on 6.1.1978 at 10 A.M. According to evidence of the Investigating Officer PW9, he reached the place of the incident around 1.30-2 P.M. Thus, the Investigating Officer reached the spot after about four hours of the incident and if the plucked Sag or remaining part of the food was not found by the Investigating Officer on the spot that by itself could not make the presence of Smt. Mohani PW6 doubtful. She is the mother of both the victims and it will be puerile to expect that she will spare real assailants and implicate innocent persons in the crime in which one of her son was murdered and other sustained serious injuries. It is not uncommon in villages that woman folk usually takes meal of male members at the field who normally goes there in early hours in the morning. If the mother had gone to the field taking food for her sons namely, injured Ram Avtar and deceased Subhash and Devendra Kumar PW1 around 9.30 A.M., there was nothing unnatural in her conduct. Her residential abode in village Poothari was hardly at a distance of half mile from the place of the incident and village of the accused persons namely, Nagla Aakhu was at a distance of only 1/4 mile from the place of the incident and hence the distance was also not much so as to make her presence doubtful. No doubt she has stated that she had to do other household works but that does not belie her witnessing the incident and she being present at the spot and hence we are of the opinion that learned trial judge mis-conceptionally disbelieved her presence at the spot which is fully

established.

Learned trial Judge also disbelieved presence of Charan Singh PW4 at the relevant time at the place of the incident but again he committed error of misunderstanding. His presence was disbelieved because said witness has changed the name of the villages where he was proceeding in search of a milking she buffalo. The learned trial judge further observed that as per evidence of Charan Singh PW4, he left the spot after 15 minutes of the occurrence and he remained at his house all along the day but the Investigating Officer did not interrogate him on the day of the incident itself but had interrogated him 5-7 days later. In our view because of aforesaid two reasons Charan Singh PW4 could not have been branded as a got up witness. Conversely, there was evidence of the Investigating Officer PW9 that witness Charan Singh PW4 and Chander did not meet him at the place of the incident and he recorded the statements of Smt. Mohani PW6 and Charana alias Charan Singh PW4 on 11.1.1978 that is after 5 days of the occurrence. The Investigating Officer PW9 clearly denied the defence suggestion that he interrogated Charan Singh PW4 with slight delay because the F.I.R. of the case was not ready till then. We may mention here that S.I. Sri A.P. Singh PW9, Investigating Officer was not cross examined by the learned counsel for the accused persons in the trial about reasons for not recording interrogatory statement of Charan Singh PW4 with some delay on 11.1.1978. Since the reason for delay was not asked on behalf of the accused persons from the Investigating Officer PW9, the learned trial judge had no occasion to find the presence of Charan Singh at the relevant time doubtful. Whatever was witnessed by Charan Singh PW4 was deposed by him at the trial in examination-in-chief honestly and during cross examination he has stated that he and Mahabir Singh were going in search of she-buffalo towards village Suhane Bhanede and village Nagla Aakhu. If Charan Singh PW4 narrated in examination-in-chief that he was going towards village Suhane Bhanede whereas he stated to the Investigating Officer that he and Mahabir Singh were going to village Nagla Aakhu, that did not constitute any material contradiction or discrepancy because villages Nagla Aakhu, Suhane Bhanede and Poothari were adjoining. These villages are situated within a radius of one mile. It is amply clear from the close scrutiny of testimony of Charan Singh PW4 that he passed through the place of incident at the relevant time and witnessed the incident and his presence at the place of the occurrence at the relevant time is fully established beyond any shadow of doubt. The finding of the learned trial judge terming him as got up witness is based erroneous approach bereft of common man's prudence.

Here we note with concern that learned trial judge has not dealt with depositions of injured witness Ram Avtar PW2 and has completely eschewed mentioning reasons for disbelieving his testimonies. We are constrained to observe with deep anguish and are sorry to say that the learned trial judge conveniently ignored judging credibility and truthfulness of testimony of this injured witness whose presence at the spot is proved beyond any shadow of doubt. He decided the fate of his (PW2) testimony only on the basis of suggestions thrown to him by defence counsel which learned trial Judge has cited in the impugned judgment. Although these suggestions were abjured by the witness but the learned trial Judge prolixed one single suggestion regarding fight with milkmen to throw over board the evidence of injured witness without any basis. Not only this, the learned trial judge at one page of the judgment observed that it is true that the suggestions alone do not take place of proof but at the same time observed that defence is not expected to establish their suggestions by any cogent evidence. Thus, the learned trial judge decided the trial on self-interdictions completely ignoring too well settled proposition of law that testimony of injured witness cannot be ignored or rejected merely on fanciful suggestions. To disbelieve injured witness PW2 learned trial court has culled out a very weird reasoning that it is difficult to believe that deceased will remain hungry when there was every reason for him to take meal brought by his mother and it is also difficult to accept that a person will not eat anything for more than twelve hours. Since the stomach of the deceased Subhash was found empty, learned trial court opined that incident must have occurred in early hours of the morning. To say the least all the above conclusions to reject the evidence of injured witness are totally hollow without any substance and material. Except emptiness of the stomach there was no evidence worth in name to drive the trial court to observe that incident seems to have occurred at dawn with milk men. Thus the aforesaid reasoning is purely conjectural and hypothetical. Autopsy report also lend credence to prosecution version as time since death mentioned in it conforms to the time of the incident. The post mortem of the deceased was done on 7.1.1978 at 3.00 A.M. wherein time since death is mentioned as 1-1½ days ago. Occurrence is alleged to have occurred previous day 6.1.1978 at 10 A.M. while post mortem was conducted on 7.1.1978 at 3.00 P.M and hence both fits in very well to confirm the other. Dr. O.P. Sharma PW3 also opined that death of the deceased might have taken place on 6.1.1978 around 10A.M. as a result of sustaining injury by sharp edged weapon like spear. Therefore the finding in the impugned judgment that medical evidence is consistent with the defence theory is a perverse finding. Nowhere it has come in the doctor's evidence that death could not have occurred as alleged by the prosecution.

The last finding recorded by the learned trial judge while acquitting the accused persons is that according to the prosecution case, the deceased Subhash was done to death with Ballams at point 'B' shown in site plan Ext. Ka-15, but his cadaver was lifted and placed at point 'C' of the site plan but no trail of blood between point 'B' and 'C' was shown in the site plan. The distance between these two places, according to the statement of PW1 is about 10-12 paces and blood had trickled down between these marks which was shown to the I.O. PW9. Investigating Officer PW9 also confirmed it that he had seen the blood trickling marks along point 'B' and 'C'. during his spot inspection and hence defence argument is contradicted by both the witnesses. Furthermore blood was collected by the I.O. from place 'B' and dead body was discovered at place 'C' and hence, no capital can be made out of it. It is recollected here that that defence has not challenged collection of blood from place 'B' by the I.O. The learned trial judge expressed his astonishment for the accused conduct of lifting the cadaver of the deceased and dump it in their field but the reason being obvious to make a defence of murdering of the deceased in their field and because of dispute of lifting of soil from *chak* road, probably to show that their *chaks* crops were also being denuded.

Thus we find that entire approach adopted by the learned trial court was perverse, sans common sense and it emerges that entire exercise was coated with exaggerated rule of acquittal. Some of the findings are based on pure conjecture and surmises. A new method for appreciating the evidence of the injured eye witnesses was adopted by the learned trial judge and that is to ignore its discussion and refer it in a cursory and slipshod manner. No prudent man could have ever reached the conclusions that have been arrived at by the learned trial judge in the impugned judgment. Since all the findings of the trial judge in favour of the acquittal are perverse and are not based on proper and correct appreciation of evidences on record, the same are liable to be interfered with. Learned Additional Government Advocate taking us through the evidence on record meekly submitted that the learned trial judge misdirected himself and recorded wrong conclusions, without careful and cautious analysis of the evidence of the eye witnesses including the injured witness Ram Avtar PW2 and hence conclusions are infallible.

To us insignificant discrepancies and natural minor contradictions in the ocular versions do not demolish entire prosecution story divulged by injured witness. FIR of the incident was lodged without any undue delay and it contained all necessary facts essential to disclose the committed offence and perpetrators thereof and the weapons wielded by the culprits. It is neither encyclopaedic nor laconic and contains true and confidence inspiring narration

about the incident. From a boy of class eleventh we do not expect more than what he had slated in his FIR which he was inking for the first time.

The Hon'ble Apex Court in the case of ***Mano Dutt and another Vs. State of U.P., 2012 (77) ACC, 209 (S.C.)*** in paragraph 23 has recently observed as follows:-

" In our view, non-examination of Nankoo, to which the accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more *res integra*, as has been consistently stated by this Court in uniform language. We may merely refer to the case of *Abdul Sayeed v. State of Madhya Pradesh [(2010) 10 SCC 259: 2010 (71) ACC 555 (S.C.)]*, where this Court held as under:

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [*Vide Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P. (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P. and Balraje v. State of Maharashtra.*]

29. While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab*, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside

lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In *Shivalingappa Kallayanappa v. State of Karnataka* this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In *State of U.P. v. Kishan Chand* a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (*vide Krishan v. State of Haryana*). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

As deliberated by us herein above, there was no viable reason for the learned trial Judge to brush aside the confidence inspiring evidence of non-inimical injured witness and the grounds on which the same has been rejected are wholly untenable, more so when the defence admits his presence at the scene of the incident. His injuries are an inbuilt guarantee of his presence at the scene of the crime and because he did not want to let his actual assailants go unpunished merely to falsely implicate a third party without any deep seated enmity. The well proved and creditworthy testimony of the injured witness cannot be lightly brushed aside or rejected just on the probabilities of the defence suggestions put to the injured witness. The bald defence suggestions have no role to play in criminal jurisprudence and there must be

some substance in the veracity or probabilities of such suggestions, which in the present appeal is woefully missing.

Our preceding discussions lead us to conclude that prosecution has succeeded in bringing home the charge against the respondent accused with no possibility, even remotely, of false implication of the accused and hence it has established its allegations by cogent and confidence inspiring evidences and resultantly impugned judgment is infallible and cannot be sustained.

Since we have opined that guilt of the accused has been established, therefore it is our job now to determine as to what offence/ charges has been proved by the prosecution. Coming to the said aspect we find that sole surviving appellant was a member of an unlawful assembly who had an intention to commit murder and in furtherance of that common object, appellant Sohan Lal had also participated as one of the main assailant alongwith two others (since dead accused) and had caused fatal injuries with *Ballam* to the deceased therefore offences u/s 148, 302/149, and 323/149 of being a member of an unlawful assembly who had caused death of deceased and simple injuries to the injured Ram Avtar PW2 has been fully established. Appellant cannot be held guilty u/s 307/149 for the reason that although injury report Ext. Ka-7, of Ram Avtar PW2 mentions in all thirteen injuries including lacerated wounds, contusions and abrasions etc. but according to the evidence of Dr. T. Singh PW-8, no X-ray of any injury was got done and hence none of the those injuries were found to be grievous in nature and we found them simple.

Resultantly, Sohan Lal sole surviving respondent accused is held guilty for offences u/s 148, 302/149 and 323/149 IPC.

Coming to the quantum of sentence it was argued by learned counsel for the said respondent accused that some leniency be shown to him because of lapse of decades and he now being a septuagenarian and this being his first crime without any criminal background and both the sides must have been settled in life interregnum. Since we don't find this to be a case which falls under category of rarest of rare cases that in our opinion imprisonment of 2 years RI u/s 148 I.P.C., life imprisonment with a fine of Rs. 10000/= and in default in payment of fine to undergo 1 year further RI, u/s 302/149 I.P.C. and only a fine of Rs. 500 and in default in payment thereof to serve 1 month RI u/s 323/149 IPC will meet the ends of justice and hence we implant those sentences.

The residue is that Government Appeal No. 2617 of 1979, State of U.P. versus Sohan Lal is allowed and impugned judgment of acquittal dated

30.4.79 recorded by sessions Judge Ghaziabad in S.T.No. 49 of 1978, State versus Sohan Lal and others relating to P.S. Murad Nagar, district Ghaziabad is hereby set aside and sole surviving accused respondent Sohan Lal is convicted u/s 148, 302/149 and 323/149 I.P.C. and for those offences is sentenced to 2 years RI u/s 148 I.P.C., life imprisonment with a fine of Rs. 10000/= and in default in payment of fine to undergo 1 year further RI u/s 302/149 I.P.C. and only a fine of Rs. 500 and in default in payment thereof to serve 1 month RI u/s 323/149 IPC is imposed. All the sentences are directed to run concurrently and said accused is conferred benefit of set off. In the event fine is deposited the entire amount of it shall be handed over to the injured Ram Avtar PW2 as compensation for the injury caused to him and loss which he has suffered.

Respondent accused Sohan Lal is on bail. His personal and surety bonds are cancelled and he is directed to be taken into custody forthwith and lodge in jail to serve out remaining part of his sentence.

In view of the fact that aforementioned Government appeal No. 2617 of 1979, State of U.P. versus Sohan Lal, against acquittal, has been allowed and the sole surviving respondent accused Sohan Lal has been convicted and sentenced by this order, there remains nothing to be decided in connected Criminal Revision No. 1238 of 1979, Devendra Kumar versus Sohan Lal, which is dismissed as infructuous.

Let a copy of this order be certified to the learned trial court forthwith for immediate compliance and report.

**Dt/16.4.2013**

**Rk/-**