
(2004) 10 MP CK 0009

In the Madhya Pradesh High Court

Case No : Criminal A. No. 188 of 1994 with Criminal A. No. 58 of 1995

State of M. P.

APPELLANT

Vs

Brij and Others

RESPONDENT

Date of Decision : 07-10-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 294, 302

Citation : (2004) 10 MP CK 0009

Hon'ble Judges : S.S. Jha, J;A.K. Gohil, J

Bench : Division Bench

Advocate : J.P. Gupta, with Mr. Himanshu Kaushal, in Criminal Appeal No. 188 of 1994, for the Appellant; Madhukar Kulshreshtha, for the Respondents in Criminal Appeal No.58 of 1995, Mr. Ami Prabal, Govt. Advocate, for the State, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Gohil, J.—Both the aforesaid appeals arise out of the common judgment dated 20.8.1994 passed in Sessions Trial No. 259/92. This judgment shall also govern the disposal of Criminal Appeal No. 188/94 and Criminal Appeal No. 58/95. In Sessions Trial No. 259/92, eight accused persons were tried. Vide judgment dated 20.8.1994, III Additional Sessions Judge, Morena convicted Govind s/o Soneram u/s 302 IPC and sentenced him to imprisonment for life against which Govind has filed Criminal Appeal No. 188/94 challenging his conviction and sentence and acquitted the rest of the accused persons namely Brij s/o Soneram, Soneram s/o Gangaram, Ramnivas s/o Lajuaram, Durga s/o Soneram, Kalicharan s/o Lajjaram, Kaladhar s/o Lajjaram and Maniram s/o Lajjaram and against the acquittal of the aforesaid accused persons, State has filed Criminal Appeal No. 58/95 after obtaining leave from this Court. Both these appeals have been heard together and they are being decided by this common judgment.

2. In short, the prosecution story is that on 19.8.1992 at about 9 AM in the

morning, when complainant Kamlesh s/o Vrindavan, his brother Girraj, Bablu, Satish, Ashok and cousin Ramnivas were digging foundation at "Raiju Wall" place, just then Govind, Kalicharan, Ramnivas, Kaladhar, Brij, Durga, Maniram and Soneram armed with Lathi and Farsa came there and asked them not to dig the foundation. Ramnivas retorted that he has purchased the land from Maharaj Singh Jadon for a consideration of Rs.7,500/- through registered sale deed therefore, he will dig foundation. Thereupon accused persons started bearing them as a consequence of which Kamlesh R W. 1 received injuries on his neck. In the meantime, Govind rushed and reached on his roof and from there fired from his mouser gun at Ramnivas hitting his head above the right ear. Ramnivas fell down. Thereafter Govind again fired two more shots from his gun. In the meantime, Kalicharan, Ramnivas S/o Lajjaram, Kaladhar, Brij, Durga, Maniram, and Soneram also beat Ramnivas by Lathi and Farsa and thereafter accused persons ran away from the spot and Ramnivas died.

3. Kamlesh P.W.I has lodged Dehati Nalishi on 19.8.1992 at 12.30 Noon at Village Ummedgarh Vansi under P. S. Bagchini, District Morena. On this report crime was registered under Sections 302, 147, 148, 149, 294/34 IPC and matter was investigated. Dead body was referred for post-mortem examination which was performed by Dr. S.K.Gupta P.W.4. The accused persons were arrested and one 312 bore mouser. gun was seized from the custody of Govind vide seizure memo Ex. P/12 and one brass case was recovered from the spot vide Ex. P/3 and iron parts of used cartridges, one big and two small pieces were also recovered from the spot vide seizure memo Ex. P/4 including blood stained and plain soil through seizure memo Ex. P/5 and the same was referred for examination to Forensic Science Laboratory Sagar. After investigation, charge-sheet was filed.

4. At the trial, prosecution examined as many as nine witnesses. After considering their evidence, trial Court convicted the accused Govind u/s 302 IPC and sentenced him to Life imprisonment and acquitted the rest of the accused persons from the charges on the ground that prosecution has failed to prove the allegations against the rest of the accused persons. The trial Court also found that as per the prosecution evidence, injuries caused by the other accused persons have not been supported by medical evidence and also found that no unlawful assembly was formed by the remaining accused persons and they have not participated in the commission of crime with common object and acquitted them against which State has filed appeal after obtaining leave against acquittal and Govind has also filed separate appeal challenging his conviction.

5. Shri J.P.Gupta, learned senior Advocate appeared for appellant Govind in Criminal Appeal No. 188/94 and vehemently argued that the trial Court has erred in convicting the appellant. The entire prosecution evidence has been disbelieved so far as seven acquitted accused persons are concerned and the trial Court has erred in relying upon the same evidence so far as appellant Govind is concerned and the investigation in the case has been tainted and discrepant. First Investigating Officer Kedarlal Sharma PW7 has recorded the statement of five

brothers of the deceased who¹ were highly interested witnesses and has not recorded the statement of the neighbours or other independent witnesses. He further argued that the deceased was shot at while he was on the ground and the appellant was on the roof. Therefore, it was the duty of the prosecution to prove the medical evidence and that the injuries on the body of the deceased could have been received while assailant was on the roof i.e. at a higher place. He further argued that PW7 Kedarlal Sharma has admitted in his deposition that the parapet of the roof is about 3 ft. high and over that a lane of bricks was kept upto a further level of 2.5 ft. and if anybody was standing near the parapet wall, then his head would not be visible from the ground and this totally belies the version of PW2 Girraj and PW3 Harishankai and he submitted that they could not have seen that from where the injuries were caused by the appellant Govind to the deceased. He further argued that FIR has been suppressed which was lodged by Munna s/o Ramvilas and on his information PW7 Kedarlal Sharma and others had reached on spot. He argued that neither Munna has been examined nor the said Roznamcha has been produced on record. The,so called Dehati Nalishi is antedated and antetimed and in the result, the entire investigation is inadmissible and the accused Govind is entitled to be acquitted. Shri Gupta has taken us through the entire evidence on record and cited various decisions on every point. On the question of suppression of FIR, he argued and submitted that Roznamcha was not produced in the Court despite the orders of the Court and he placed reliance on the decisions in the case of Hallu and Others Vs. State of Madhya Pradesh, , Marudanal Augusti Vs. State of Kerala, , Emperor v. Nazir Ahmad, AIR 1945 PC 18, Sevi and Another Vs. State of Tamil Nadu and Another, , State of Andhra Pradesh Vs. Punati Ramulu and others, , and State of Rajasthan Vs. Sheo Singh and Others, , and submitted that Munna who was a material witness who gave information to the police has not been examined and FIR was not lodged and his information was also not recorded though the police officers proceeded on spot after receiving information from Munna. He further cited Sunil Kumar and others Vs. State of Madhya Pradesh, , according to which even telephonic information is FIR and submitted that decision in the case of Damodar v. State of Rajasthan, 2003 AIR SCW 505, in which it has been held that cryptic telephonic message is not FIR and submitted that earlier view prevails. He submitted that there are material contradictions and discrepancies in ocular and medical evidence and submitted that in this case, the deceased has not received any injury by Lathi and Farsa and therefore in the light of the medical evidence, evidence of eyewitness is not consistent which also falsifies the evidence of eye-witnesses. He cited various decisions in this regard Lakshmi Singh and Others Vs. State of Bihar, , Purushottam v. State of M.P., AIR 1980 SC 1873, and Jassa Singh and Others Vs. State of Haryana, , wherein presence of one injury falsifies the evidence of eye-witnesses and looking to the contradictions in ocular and medical evidence, accused persons were acquitted, Dinesh v. State of Haryana, AIR 2002 SC 2374, wherein two injuries were caused by three persons and acquittal was recorded by the Supreme Court, Ram Swaroop v. State of Rajasthan, 2004 AIR SCW 1729, wherein the evidence of

eye-witnesses was not found consistent with the medical evidence and there was difference in the injuries and therefore whole evidence was discredited. *Thaman Kumar v. State of Union Territory of Chandigarh*, 2003 AIR SCW 2837, wherein there was conflict between the oral and medical evidence and therefore the accused persons were acquitted. He also pointed out various faults in the investigation and infirmities in the prosecution evidence, and submitted that though on the defective investigation, the accused persons cannot be acquitted but the Court should be circumspect in evaluating the evidence. His main attack was that the evidence of PW1 and PW2 is not at all reliable. He also cited *Modi's* Jurisprudence to show that when the gun fire is made from an upper place, the gun shot injury would not be in a round shape but it will be in an oval shape. He also drew attention of this Court and stated that the evidence of eyewitnesses is also not reliable on the ground that the deceased has not received any injury in the chest as has been stated by the eyewitnesses in their statements. He also argued that there is no evidence that the recovered cartridges were duly sealed and packed. Prosecution has also not examined Malkhana Incharge. As per the evidence the gun was seized on 16.9.1992 and it was forwarded on 18.9.1992 for Chemical Examination but it was received on 14.10.1992 and the prosecution has not explained this delay in receiving the articles. The possibility of tampering with the articles cannot be ruled out. He has placed reliance on the decisions reported in *Mahmood Vs. State of U.P.*, *Mohd. Aman v. State of Rajasthan*, AIR 1997 SC 2960, *Modan Singh v. State of Rajasthan*, AIR 1978 SC 1511, *Santa Singh v. State of Punjab*, AIR 1956 SC 526, and *State of Gujarat v. Adam Fateh Mohmed Umatiya*, 1971 CAR 349. There are interpolations in the documents Ex. P/3, P/4 and P/5. The trial Court has wrongly relied on the evidence of PW1 Kamlesh. His whole evidence is not creditable. The statement of doctor is wholly inconsistent with the testimony of eyewitnesses. Therefore, he submitted that looking to the prosecution evidence which is wholly unreliable the" conviction of appellant Govind be set aside and benefit of doubt be given to him.

6. Smt. Ami Prabal, Govt. Advocate appeared for the State in both the appeals and in Criminal Appeal No. 188/94 she supported the judgment of the trial Court for conviction u/s 302 IPC of appellant Govind and his sentence for life imprisonment, but in Criminal Appeal No. 58/95, her contention was that the trial court has wrongly acquitted the accused persons. Sufficient ocular as well as medical evidence is available on record against them. She submitted that all the respondents were members of the unlawful assembly. Sufficient evidence against the acquitted respondents is also available that they came on spot armed with lethal weapons and Ramniwas died due to head injury as a result of gun shot wound and sustained injuries. Her submission is that the prosecution has successfully proved the allegations against the convicted appellant as well as acquitted respondents. She further submitted that doctor has found gun shot injury - an entry wound 1-1/2 on right parietal region and also an exit wound on occipital area and two incised wounds 5 cm x 2 cm on right parieto occipital area and 8 cm x 2 cm on occipital area which clearly shows that deceased had

received not only the gun shot wound but two incised wounds also caused by sharp edged weapon like Farsa and they are clearly attributed to the accused persons those who were carrying Farsa in their hands. She submitted that though doctor has not found any injury on the chest but in Naksha Panchayatnama (Ex. P/8), the injuries over the chest have been mentioned. In the memo for post-mortem (Ex. P/1 3-B), it has been further mentioned that the deceased died due to injury caused by mouser gun as well as other injuries and in view of the medical evidence of PW4 Dr. S.K.Gupta, evidence of PW1 and PW2 cannot be disbelieved. P W1 is the injured eyewitness therefore his evidence cannot be discredited. She further argued that if the investigation is defective, then merely on this ground the respondents cannot be acquitted and Courts cannot play in the hands of investigation agencies, on the question of irregularity in investigation, she placed reliance on the decision reported in State of Madhya Pradesh Vs. Mansingh and Others, , Visveswaran v. State, (2003) 6 SCC 73, Amar Singh Vs. Balwinder Singh and Others, . She further argued that in Paragraph 13 of the evidence of P W4 Dr. S.K.Gupta, he has stated that the deceased received injury in round shape, but she clarified, that in Paragraph 6 doctor has stated that when the injury wound and the barrel of the gun are in the same level, in that case injury will be in round shape. He also clarified that the distance of fire can be more than 6 ft. but how much more it was he could not explain. He further clarified that because there was one cumulative bigger wound of all the injuries in the size of 10 cm x 12 cm and it was an open, wound therefore its exact size and shape also cannot be spelled out. Therefore, in view of this evidence, in sum and substance, the submission of the learned Govt. Advocate was that conviction of Govind be maintained and acquittal of rest of the respondents be" set aside and they be also convicted with the aid of Section 149. She submitted that in any case the accused persons-respondents those who have caused injury by sharp cutting object are also liable to be convicted alongwith accused Govind.

7. Shri Madhukar Kulshreshtha appeared in Criminal Appeal No. 58/95 for the acquitted respondents and supported the judgment and findings of the trial court and submitted that the trial court has rightly acquitted the respondents. There is no evidence on record to show that they have participated in the commission of crime or caused any injury to deceased. The injuries stated by the eyewitnesses have not been corroborated by medical evidence, therefore, their acquittal is justified and no case is made out.to interfere in the findings of acquittal recorded by the trial court.

8. After hearing the learned counsel for the parties, we have very carefully examined the prosecution evidence on record. Trial Court has placed reliance on the evidence of PW1 Kamlesh and PW2 Girraj and medical evidence of PW4 Dr. S.K.Gupta. PW1 Kamlesh in his examination-in-chief has categorically deposed that on the day of incident at about 9 in the morning, he, Ramnivas, Girraj, Bablu, Ashok and Satish were digging the foundation at "Raiju Wala" place which was purchased by him from Maharaj Singh Jadon by a registered sale deed for a

consideration of Rs.7,500/-. Govind who is neighbour alongwith other co-accused persons came on spot. Govind, Ramnivas s/o Lajjaram, Maniram and Soneram were armed with Lathi, Kalicharan, Kaladhar and Brij were armed with Farsa. They started abusing and asked them not to dig the foundation. When Kamlesh said that he has purchased this land from Maharaj Singh Jadon for a consideration of Rs.7500/-, all the accused persons abused and started beating them. His bTothers tried to intervene in the matter, but they assaulted on his neck. In the meantime, Govind rushed and reached on his roof with a mouser gun and fired from there at Ramnivas hitting his head above right ear. (sic) He also fired two more shots from his gun. In the meantime, other accused persons beat Ramnivas by Lathi and Farsa. He fell down and died on spot. Thereafter the accused persons ran away. He is also the witness of Dehati Nalishi (Ex.P/1), spot map (Ex.P/2) and seizure of one brass case Ex.P/3 and Ex.P/4 seizure memo of iron parts of used cartridge one big and two small pieces and also the witness of seizure of plain and blood-stained soil Ex. P/5. Copy of the sale deed was also seized vide Ex.P/6.

9. PW2 Girraj who was also present on spot has also deposed the same story. He is also the eyewitness of the incident. He is also the witness of Safina form of Lash (Ex.P/ 7), Panchayatnama Lash (Ex.P/8) and witness of arrest memo (Ex.P/9) and seizure of Lathi from Kaladhar (Ex.P/10) and Farsa from Kalicharan (Ex.P/11) and seizure of gun shot and live cartridge and licence from Govind (Ex.P/12).

10. It is true that both the witnesses have categorically deposed in their examination-in-chief as well as in cross-examination that the deceased Ramnivas received injury in his chest. They had seen the two injuries caused by Farsa on the chest of the deceased and these injuries were seen by both the witnesses and they have also been mentioned in Panchayatnama Lash Ex.P/8, but PW4 Dr. S.K.Gupta has not found any Farsa injury on the chest of the deceased. PW4 Dr. S.K.Gupta found following injuries on the body of the deceased vide post-mortem report Ex. P/14.

1. Gun shot entry wound 1-1/2cms in diameter situated over right parietal area. Bone exposed through the wound in continuation of skull wound in bone 1-1/2cm in diameter round in shape. No charring, tattooing or blackening seen around the wound. Clotted blood present.

2. In continuation entry wound, exit wound present over occipital area about 5 cm in diameter. Skull bone pieces were meshed in brain matter which is coming out through wound. No metallic piece (e.g. pellet) or F.B. could be detected in wound.

3. Incised wound 5cm x 2cm subcutaneous muscle deep bone fractured, wound reaches upto margin of entry wound. Situated on right parieto occipital area. Clotted blood present.

4. Incised wound 8cm x 2cm subcutaneous muscle deep, bone fractured in

multiple fragments. Wound situated over occipital posterior to injury no. 3.

All injuries Nos. 1 to 4 have made one big wound of 10cm x 12cm over right parieto occipetal area extends upto right frontal, left parietal and left occipital area. All bones are fractured. Over the wound, skin meshed at various places and difficult to make out proper shape.

In the opinion of doctor all the injuries were ante-mortem in nature and caused within 12 hours of post-mortem examination and cause of death was coma and syncope due to head injury as a result of gun shot wound and sustained injuries. Duration of death was within 12 hours and death was homicidal in nature.

11. PW3 Hari Shankar was not present on spot. He was at his sister's house in village Jora Khurd. On 19.8.1992 Ashok, Kamlesh and Satish came to village Jora Khurd and narrated the incident to him. They had also stated that these three persons and Bablu and Girraj were present at the time of incident. Thereafter he came on spot and had seen the dead body of deceased Ram Niwas. He had also seen head injury as well as injury on the chest and in the stomach. He was also the witness of the seizure memo of the sale deed Ex. P/6. In the cross-examination he has denied that there was any dispute with the accused persons or any court case was pending between them. He was also cross-examined in detail.

12. PW5 Mohan, Head Constable No. 952 had brought the Dehati Nalishi. In the cross-examination he has admitted that one Munna s/o Village Chowkidar had informed about the murder in the village, but, he had not shown the names of the assailants.

13. PW6 O.P.Yadav had prepared Panchnama Ex.P/6 and had seized photocopy of the sale deed.

14. P W7 Kedarlal Sharma is also Head Constable No. 649 at Thana Baghchini. He has also deposed in the examination-in-chief that on the day of incident at about 12.05, Munna s/o Ramnilas Chowkidar had come on Thana and had informed about the quarrel between Ramnivas and Govind and Munna had also heard the noise of gun and on the basis of the information given by Munna he alongwith head constable Mohan Singh, Constable Ramavatar and Premnarayan had proceeded to village Umedgarhbansi. They had seen the dead body lying at Rairu Wali place. Thereafter he had written Dehati Nalishi (Ex.P/1) and had also issued Safina form (Ex.P/7) and had prepared Panchayatnama (Ex.P/8). Spot map (Ex.P/2) was also prepared by him. Thereafter SDO also visited the spot and had taken the photograph of incident and had also seized iron parts of used cartridges one big and two small pieces and seizure memo (Ex.P/4) was also prepared. He had also collected plain and blood stained soil vide Ex.P/5 and one brass case was also recovered from roof vide seizure memo Ex.P/3. He had also recorded statement of Kamlesh, Satish and had referred the dead body to the hospital for post-mortem. Memo for postmortem is Ex.P/13-A and further investigated the matter and on 28.8.1992 had prepared Panchnama (Ex.P/14)

and recorded the statements of other witnesses Girraj, Bablu, Ashok and Hari Shankar and thereafter had handed over the investigation to ASI O.P.Yadav. In the cross-examination he has stated that because I.O. Mahipal Singh Yadav and ASI O.P.Yadav were not present at Thana, therefore he had gone to conduct the investigation on the instructions of Incharge Thana Prabhari. In the cross-examination he has further admitted that the head of deceased was fully ruptured and half of the head was lying separately and there was a scar of injury on the chest of deceased and whatever he had seen he had written in Panchayatnama Lash Ex.P/8. He has denied that Panchayatnama of seizure memo of recovery of empty cartridge is a forged one. He has admitted that he had not recovered spade or pan from the spot. In the cross-examination he has also admitted that the height of the roof is around 10 ft. and thereafter there is a wall of 2.5 ft. on the roof and if somebody is standing just below the roof, then he cannot see the person standing on the roof but if he will go little backside he can see the face of the persons standing on the roof.

15. PW8 is Mahipal Singh Yadav. He was officer-in-charge of Thana Baghchini and he has investigated the matter from 21.8.1992. He had arrested the accused persons Soneram and Ramnivas and had prepared arrest memo Ex.P/15. Thereafter he had recovered Lathi from Ramnivas and Soneram through seizure memo (Ex.P/16 & P/17). He has also arrested Brij Maniram and Durga vide arrest memo Ex.P/18 and had also seized Lathi from Brij with Farsa through Ex. P/19 and had also seized Lathi from Maniram and Durga vide Ex.P/20 and Ex.P/21. Injured Kamlesh was also referred for medical examination.

Thereafter he has arrested Kalicharan, Govind and Kaladhar and Panchnama of arrest Ex.P/9 was prepared. Lathi was seized from Kaladhar vide Ex.P/10 and one Farsa was seized from Kalicharan vide Ex.P/11 and gun and live cartridge including licence were seized from Govind vide Panchnama Ex.P/12. He has also exhibited report of F.S.L. Sagar as Ex.P/24. Gun-Article "A" and live cartridge Article "B" were identified in the court. He was also cross-examined at length.

16. PW9 Babu Singh, Head Constable No. 444 was also examined to prove that intimation of the incident was given by Munna s/o Chowkidar, Dehati Nalishi (Ex.P/1) was received by him and thereafter crime was registered vide Ex.P/23.

17. After considering the aforesaid evidence, trial court has found that the prosecution has failed to prove that all the accused persons formed an unlawful assembly with a view to participate in commission of crime with common object within the meaning of Section 149 IPC. Court has found that since the accused persons are residing in the same village near the place of incident therefore they might have remained present on spot but it has not been found true that they participated in the commission of crime. Court has found that from the medical evidence of PW4 Dr. S.K.Gupta no Farsa or Lathi injuries were found on the body of deceased Ram nivas and therefore it cannot be said that except Govind other accused persons participated in the commission of crime with common object and have caused any injury to deceased Ramnivas. Therefore, in the opinion of

the trial Court the evidence of the eyewitnesses has not been found supported by medical evidence. So far as the case of acquitted respondents is concerned, PW1 Kamlesh has also received one abrasion and other witnesses have not received any injury. The act of Govind was found to be an isolated act for causing the injury by fire arm to the deceased.

18. Thus, trial Court has convicted appellant Govind on the basis of ocular as well as medical evidence on record, but acquitted the rest of the accused persons on the ground that ocular evidence is not supported by medical evidence. Doctor has not found any Farsa injury on the chest as stated by eye-witnesses consistently and also not found any lathi injury on the body of deceased. On the basis of aforesaid evidence Shri Gupta, learned Senior Counsel submitted that the entire prosecution evidence has to be discredited. On the basis of the same evidence on a person cannot be convicted while rest of the accused persons are being acquitted. The main contention of the learned counsel for the appellant Govind was on the principle of *falsus in uno, falsus in omnibus* and he cited the decisions on the same line, but, recently in the case of *Sucha Singh and Another Vs. State of Punjab*, the apex court has considered this principle of *falsus in uno, falsus in omnibus* and has reiterated that :-

"The maxim *falsus in uno falsus in omnibus* has no application in India and the witnesses cannot be branded as liars. The maxim "*falsus in uno falsus in omnibus*" has not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". See (*Nisar Ali Vs. The State of Uttar Pradesh*, . Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted (See *Gurcharan Singh and Another Vs. State of Punjab*, . The doctrine is a dangerous one, especially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers it to be insufficient for placing reliance on the testimony of a witness, it does not necessary follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See *Sohrab and Another Vs. The*

State of Madhya Pradesh, and Ugar Ahir and Others Vs. The State of Bihar, . An attempt has to be made to as noted above, in terms of the felicitous metaphor, separate the grain from the chaff, truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing the essential details presented by the prosecution completely from the contest and the background against which they are made, the only available course to be made is to be discard the evidence in toto. (See *Zwingle Ariel v. State of M.P.*, AIR 1954 SC 277 and *Balaka Singh and Others Vs. The State of Punjab*, .

19. Therefore, as held by the Apex Court it is clear that the aforesaid principle is not applicable in India and the duty of the Court is not to discredit the entire evidence but is to separate the grain from chaff because in every case one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. Evidence can only be rejected if the separation of grain from chaff cannot be done. Where chaff can be separated from grain it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Therefore the evidence in this case has to be decided on the aforesaid principle laid down by Supreme Court.

20. As we have already examined here-in-above the principle of *falsus in uno, falsus in omnibus* is not applicable in this country and therefore we have to analyse the evidence of witnesses in the light of the aforesaid principle because when it is/not possible to separate the chaff from the grain then only the evidence of witnesses has to be discredited and benefit has to be given to the accused but in this case we find that so far as the involvement of the appellant Govind in the commission of crime is concerned sufficient material is available on record. PW1 Kamlesh and PW2 Girraj who were present on spot at the time of commission of crime have stated that the Govind came on spot alongwith Lathi and thereafter rushed and reached on his roof and from there fired from his mouser at Ramnivas hitting his head above the right ear. This evidence of aforesaid two eyewitnesses is fully corroborated by medical evidence of PW4 Dr. S.K.Gupta. Therefore, merely on the ground that these eyewitnesses have assigned role to other co-accused persons for causing injury by Farsa and Lathi have not been found proved, the whole evidence of PW1 and PVV2 cannot be discredited and appellant Govind cannot be acquitted.

21. It was repeatedly argued that the eyewitnesses are not reliable as the nature of gun shot injury is in round shape whereas if the shot shall be fired from a distance place it would form oval shape, thus the shot as not fired from a distance place. To consider this vital question we have again perused the evidence of eyewitnesses as well as evidence of PW4 Dr. S.K.Gupta. PW1 Kamlesh and PW2 Girraj have categorically stated that Govind initially was having lathi in his hand and thereafter he went on his roof alongwith the mouser gun and fired at Ram niwas from that place. The evidence of PW1 and PW2 is

fully consistent on this point which is fully supported by medical evidence. PW4 Dr. S.K.Gupta who has found gun shot injury on the head with entry wound and exit wound which has exposed bone through the wound in continuation of skull wound and bone and he also found exit wound present over occipital area about 5 cm in diameter, skull bone pieces were meshed and brain matter was coming out through the wound and all the injuries Nos. 1 to 4 had made one bigger wound of size 10x12 cms over right parieto occipital area extending upto right frontal, left parietal and left occipital area. All bones were fractured over the wound and skin was meshed at various places and it was difficult to make out a proper shape. This clearly shows that the nature of injury was gun shot injury and that was caused by Govind. Doctor has not found any charring, tattooing or blackening around the wound which clearly shows that shot was made from a distance of more than six ft. as stated by PW4 Dr. S.K. Gupta. In a case where the deceased received a gun shot injury in the head from a distance of more than six ft. which had ruptured whole head and half of the head was separated, it was not possible for the doctor to say that the nature of injury was of round shape and it should have been of oval shape as suggested by learned counsel for the appellant Govind and on this ground appellant Govind is not entitled for any benefit of doubt. As per Modi's Medical Jurisprudence and Toxicology, Twenty Second Edition, page No. 355 ".....On the other hand, at a distance of six ft., the central aperture is surrounded by separate opening in an area of about two inches in diameter made by a few pellets of the shot, which spread out before reaching the mark. The skin surrounding the aperture may not be blackened or scorched, but is tattooed to some extent. At a distance of 12 ft. the charge of the shot spreads widely and enters the body as individual pellets producing separate openings in an area of five to eight inches in diameter depending on the choke, but without causing blackening, scorching or tattooing of the surrounding skin. Interestingly in this case, the defence lawyer himself in the cross-examination from PW4 Dr. S.K.Gupta in Para 13 has himself got it clarified that looking to the nature of injury the exact shape of wound cannot be determined or specified. Thereafter there was no cross-examination that since the fire was made from a distance, the shape of injury should be oval. Therefore, we conclude that in view of the aforesaid clarification got recorded from doctor, appellant Govind would not be entitled to get any benefit on this basis.

22. Shri Gupta next contended that the witnesses PW1 and PW2 both are interested witnesses therefore their evidence cannot be relied upon. PW1 Kamlesh and PW2 Girraj both are cousins (uncle's son) of deceased Ram nivas. In the case of Sucha Singh (supra) and in various other decisions, the Supreme Court has also considered this aspect of the matter and has consistently held that the relationship is not a factor to doubt the credibility of a witnesses. It is more often that an unrelated witness also conceals the actual culprit and makes allegations against an innocent person. Therefore, foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. In

case of Sucha Singh (supra), Supreme Court has placed reliance on the decision in the case of Dalip Singh and Others Vs. State of Punjab, , Guli Chand and Others Vs. State of Rajasthan, and Vadivelu Thevar Vs. The State of Madras, , in which the court has quoted the passage from Dalip Singh's (supra) as under:-

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

In the case of Rameshwar Vs. The State of Rajasthan, , Vivian Bose, J. (as he then was) held that relationship of the witnesses with the deceased cannot be a ground for discrediting the witnesses. This is a fallacy common to many criminal cases. Again in the case of Masalti Vs. State of U.P., , the Supreme Court held as under :-

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence : but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

The evidence of these two witnesses simply cannot be discredited on the ground that they are the relatives of the deceased or they are interested or partisan witnesses or on the ground that the prosecution has not examined other persons those who were present on spot. Further in the case of State of Rajasthan Vs. Teja Ram and Others, , the Supreme Court has observed that the over insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house or nearby, the most natural witnesses would be the inmates of that house. It would be unpragmatic to ignore such natural witnesses and insist on outsiders who would not have been seen anything. This judgment has been relied upon in the case of Sucha Singh v. State of Punjab (supra) and the Supreme Court has held that if the court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the

incident in question, then there is justification for making adverse comments against non-examination of such person as a prosecution witness. Otherwise, merely on surmises the court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. The prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also.

23. On the question of exaggerated devotion to the rule of benefit of doubt in the case of Sucha Singh (supra), the apex Court has held that:-

It must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law (See Gurbachan Singh Vs. Satpal Singh and others, . The prosecution is not required to meet any and every hypothesis put forward by the accused. (See State of U.P. Vs. Ashok Kumar Srivastava, . A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial: if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. (See Inder Singh and Another Vs. The State (Delhi Administration), . Hon''ble Pasayat, J. of Supreme Court has quoted that vague hunches cannot take the place of judicial evaluation.

"A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in *Stirland v. Director of Public Prosecution* (1944 AC 315) quoted in *State of U.P. Vs. Anil Singh*, .

24. Learned counsel for the appellant Govind argued that when the gun is fired from roof it was not possible for the witnesses to see who fired from the roof and submitted that PW7 Kedarlal Sharma has stated that distance from the roof was more than 10 ft. and therefore the prosecution story is totally unreliable and it cannot also be said that the fire was made from the roof. In this connection we have carefully examined the evidence of PW1 and PW2. Both of them have stated that Govind rushed and reached on the roof and fired on the deceased from the roof and the distance was more than ten ft. and it was visible from the ground.

25. It is true that the witnesses have made some exaggerations in their statements but in the cross-examination nothing has been brought on record about the exaggerated statement. However the Supreme Court in the case of *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, , has already

pointed out the dangers of exaggerated devotion to the rule of benefit of doubt and Hon"ble Pasayat, J. speaking in the case of Sucha Singh v. State of Punjab (supra) has quoted as follows :-

"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 special 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 evil of acquitting a guilty person light-heartedly as a learned author (Glanville Williams in Proof of Guilt) has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted persons and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless.....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent...."

26. In this case there was lengthy cross-examination from PW1 and P W2 which is running in thirty pages and sixty paragraphs out of which so many paras are without much relevance to the case. Here we would like to mention that in many cases we, have seen that Shri V.R.Gupta, Advocate of Morena is in habit of making lengthy cross-examinations from the witnesses and many a times without their relevance. Shri J.G.Gupta, learned senior Advocate while arguing the case has agreed that lengthy and irrelevant cross-examination is never helpful to the accused persons. Many a times the defence lawyers are themselves getting clarified most of the discrepancies arising during the cross-examination in one paragraph and they are getting them contradicted in the other paragraph. We have seen that in most of the cases such a lengthy cross-examination is not helpful to the accused persons rather damaging the case of defence and leads to conviction of the accused persons. It is true that the purpose of cross-examination is to bring the truth on record and to help the Court in knowing the truth of the case, but if the purpose of the cross-examination is to harass the witness and to ask irrelevant questions, the purpose of cross-examination is defeated and frustrated. Such a lengthy cross-examination does neither helps the Court either in finding the truth or in evaluating the evidence, nor it helps the accused but damages the defence case and compels the Court to record conviction of the accused persons. In this case too while arguing the case learned senior counsel Shri J.P.Gupta was unable to justify the lengthy cross-examination and to get any support from it in favour of the appellant Govind.

27. The main object of cross-examination is to find out the truth and detection of

falsehood in human testimony. It is designed either to destroy or weaken the force of evidence a witness has already given in person or elicit something in favour of the party which he has not stated or to discredit him by showing from his past history and present demeanour that he is unworthy of credit. It should be remembered that cross-examination is a duty, a lawyer owes to his clients and is not a matter of great personal glory and fame. It should always be remembered that justice must not be defeated by improper cross-examination. A lawyer owes a duty to himself that it is the most difficult art. However, he may fail in the result but fairness is one of the great elements of advocacy. Talents and genius are not aimed at self-glorification but it should be to establish truth to detect falsehood, to uphold right and just and to expose wrong doings of a dishonest witness. It is the most efficacious test to discover the truth. Cross-examination exposes bias, detects falsehood and shows mental and moral condition of the witnesses and whether a witness is actuated by proper motive or whether he is actuated by enmity towards his adversaries. Cross-examination is commonly esteemed the severest test of an advocate's skill and perhaps it demands beyond any other of his duties exercise of his ingenuity. There is a great difficulty in conducting cross-examination with creditable skill. It is undoubtedly a great intellectual effort. Sometimes cross-examination assumes unnecessary length, the court has power to control the cross-examination in such cases (See Wrottescey on cross-examination of witness). The Court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime (See *State of Punjab v. Gurmit Singh*, (1996) SCC (Cri.) 316).

28. As regards interpolation in Ex. P/3, P/4 and P/5 from the perusal of the documents it appears that Ex.P/3 is seizure memo of one case of brass. Ex.P/4 is seizure memo of iron parts of used cartridge one big and two small pieces. Ex. P/3 was prepared at 14.00 hours. Ex. P/5 is seizure memo of blood-stained and plain soil seized from the spot at 14.15 hours. It is true that some overwriting has been made in the timings of preparation of these seizure memos and it appears that time has been extended. Ex.P/3 was originally prepared at 14.00 hours but its time was changed from 14.00 to 14.30 hours. Ex. P/4 was prepared at 16.00 hours but by over-writing its time has been changed to 14.00 hours and Ex. P/5 was prepared at 15.45 hours, but by overwriting its time has been changed to 14.15 hours. What is the effect of these changes on the truthfulness of the prosecution case has not been pointed out. It was further argued that no evidence has been produced that those seized materials were properly sealed and packed though in the memos it has been mentioned that they were sealed at the place of incident. The prosecution has also not proved that they were received in the Malkhana. Malkhana Incharge has not been examined. They were seized on 19.8.1992 and mouser rifle with live cartridge with head of brass and licence was seized on 16.9.1992 vide Ex.P/12. All these articles were forwarded for chemical examination on 18.9.1992 but they were received at FSL Sagar on 14.10.1992. Therefore the submission of the learned counsel for the appellant

Govind was that there was delay in receiving the aforesaid articles in the laboratory and the delay has not been explained by the prosecution and there was possibility for tampering the articles as they were not properly sealed and were not kept in the police station properly. We have dealt this question in next paras alongwith other objections.

29. Next objection and contention of Shri Gupta was that the Investigating Officer has also not performed proper duty. He pointed out that in this case the investigation is faulty and defective and copy of the Roznamacha was not produced despite the order of the Court, therefore adverse inference should have been drawn in the case. In this connection we have perused the record of the trial Court. Vide order dated 18.4.1994, the Court directed to call for the Roznamacha document and on the next date of hearing i.e. on 2.6.1994 Roznamacha from 19.8.1992 to 22.8.1992 of Thana Baghchini was produced in the Court and witness had also come alongwith the Roznamacha but on that day he was not cross-examined and time was obtained by the counsel for the defence. We have perused that the copy of Roznamacha is available in the unexhibited documents of the trial court record. Therefore when the witness could not be examined due to fault of the defence lawyer there is no case for recording any adverse inference. We have also perused the Roznamacha. Though name of Munna has not been mentioned in the Roznamacha that he had informed, but it has been mentioned that on receiving information police proceeded on spot. Non-examination of Munna will not adversely affect the case of prosecution as PW7 himself has deposed in his statement that on 19.8.1992 at about 12.05 Munna s/o Ramvilas Chowkidar had informed about the quarrel at village Umedgarh Bansi and on this information police proceeded to spot, from this statement it is clear that Munna has given vague and cryptic information to police regarding the commission of cognizable offence, which was required to be verified by the police. Therefore the same information cannot be treated as FIR nor was material to record F.I.R. nor can be a case of suppression of the same. Dehati Nalishi (Ex.P/1) was recorded on spot. The aforesaid objections are to be considered from another legal angle as submitted in reply by, learned counsel for respondent-State that simply on the ground that the investigation is faulty or defective or there was interpolation or delay in sending the articles for chemical examination, appellant Govind cannot be acquitted when direct evidence is available on record against him and in support of this contention she has placed reliance on a decision of the Supreme Court in the case of Amar Singh Vs. Balwinder Singh and Others, , in which it has been held that in the matter of defective investigation court should circumspect in evaluating the evidence but prosecution case cannot be solely rejected on that ground. Fault on the part of investigating officer to send fire arms and empties recovered from the spot to Forensic Science Laboratory and failure to take into possession wire gauze of the window of the "baithak" from where the gun shot was fired cannot be said to be fatal to the prosecution when the case is fully established from the testimony of eyewitnesses. The Court has further held that not mentioning all the names of

the witnesses, weapons of offence and place of occurrence in the daily diary register is also not fatal to the prosecution. Again in the case of *Visveswaran Vs. State Rep. by S.D.M.*, it has been held that effect of any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved. The only requirement in such cases is of extra caution by the courts while evaluating evidence. Acquittal of accused solely on the ground of defective investigation would not be just and proper. Further in the case of *State of Madhya Pradesh Vs. Mansingh and Others*, the apex court has held that even if it is accepted that there was deficiency in investigation as pointed out by the High Court, that cannot be a ground to discard the prosecution version which is authentic, credible and cogent. Non-examination of Hiralal is also not a factor to cast doubt on the prosecution version.

From the aforesaid law laid down by the apex Court it is clear that admittedly courts cannot play into the hands of investigating agencies and in the presence of sufficient ocular and medical evidence, acquittal is not proper where investigation is defective or faulty. In the case of *Paras Yadav and others Vs. The State of Bihar*, while commenting upon the investigating agency it has been held that it may be that such lapse is committed designedly or because of negligence hence prosecution evidence is likely to be examined *dehors* such omissions to find out whether the said evidence is reliable or not. Similar view was taken in *Ram Bihari Yadav Vs. State of Bihar and Others*, where the Supreme Court has held that in such cases story of prosecution will have to be examined *dehors* such omissions and contaminated conduct of the officials, otherwise, mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law-enforcing agency but also in the administration of justice.

30. After considering the aforesaid case laws it is very much clear that delay in sending empty cartridges for chemical examination and non-examination of Malkhana Incharge in the trial to prove the keeping of the sealed articles and non-mentioning of the name of Munna in Roznamacha before proceeding to spot and also not examining Munna in the trial would not be fatal to the prosecution. In such a case it also cannot be said that the FIR is fabricated or suppressed or Roznamacha was not produced despite the orders of the court or the FIR is antedated. The investigation may be faulty to some extent and the investigating officer might have deliberately committed the mistake or was negligent in conducting the investigation. But in our considered opinion sufficient evidence of eyewitnesses is available on record for the commission of crime by appellant Govind. Evidence of eyewitnesses is fully corroborated by medical evidence of PW4 Dr. S.K.Gupta. PW4 Dr. S.K.Gupta has clearly removed another discrepancy argued by the learned counsel for the appellant that the fire was also made from a distance and if the fire is made from a distance it will make an oval shape wound and not a round shape wound.

31. Upon sorting out the grain from chaff and then analysing the evidence on record, in our considered opinion sufficient direct ocular as well as medical evidence is available against appellant Govind on record. The trial Court has rightly convicted appellant Govind u/s 302 IPC for commission of murder of deceased Ramniwas. As such we do not find any ground for interference in the conviction and sentence in criminal Appeal No. 188/94 of appellant Govind. Appellant Govind is in jail. He shall undergo remaining part of his sentence. We also find that the trial court has taken a reasonable view in the matter and has acquitted the respondents in Criminal Appeal No. 58/95 on the ground that their presence on spot has not been found proved and the injuries stated by eyewitnesses have not been found corroborated by the medical evidence. In state appeal we are also bound by the settled position of law that when two views from the same set of evidence are possible, the view taken by the trial court in favour of accused cannot be reversed by the appellate court merely because other view is possible. No interference is warranted in the findings and judgment recorded by the trial court. Bail bonds of respondents are discharged except respondent No. 2 Soneram who died on 25.10.1999. Consequently, both the appeals fail and are hereby dismissed.