

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Appeal (DB) No. 64 of 1998 (R)

1. Najmul Hoda @ Nanhu (since dead)
2. Fakhrul Hoda @ Lalu
3. Minhajul Hoda
4. Khurshid Alam
5. Yusuf Hoda

All sons of late Qamrul Hoda

6. Halima Khatoon wife of Najmul Hoda
7. Ghulam Bari son of Rafique Mian
8. Rafique Mian son of late Amir Mian (since dead)

All residents of village Jaipur, P.S. Pratapur, Distt. Chatra

... ... Appellants

Versus

State of Bihar (now Jharkhand)

... ...Respondent

CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE RAJESH KUMAR

For the Appellants : Mr. Navin Kumar Jaiswal, Advocate
For the Respondent : Mrs. Lily Sahay, Spl. P.P.

10/10th July, 2025

Per Sujit Narayan Prasad, J.:

1. The instant appeal under Sections 374(2) and Section 389 of the Criminal Procedure Code, 1973 is directed against the judgment of conviction dated 26.02.1998 and order of sentence dated 04.03.1998 passed by the learned Ist Additional Sessions Judge at Chatra in Sessions Trial No. 19/1996 whereby and whereunder, the

appellants herein have been convicted for the offence under Sections 148, 149, 323 and 302 of the Indian Penal Code and have been sentenced to undergo Rigorous Imprisonment for life under Section 302/149 of the Indian Penal Code.

2. The learned Spl. P.P. appearing for the respondent-State has submitted that instruction has been received in terms of order dated 07.04.2025 and the affidavit has already been filed in this regard.
3. We have gone through the said affidavit dated 04.07.2025 wherefrom it is evident that initially the instant appeal was preferred by all the eight accused/appellants but during pendency of the instant appeal, the appellants namely Najmul Hoda and Rafique Mian have died, which is authenticated by the concern Mukhiya.
4. It is evident from record that no leave has been sought by any of the legal heirs/close relatives of the deceased appellants in terms of section 394 of the Cr. PC. as such, Cr. Appeal (DB) No. 64/1998 abates as against aforesaid appellants namely Najmul Hoda and Rafique Mian.

Factual Matrix

5. The brief facts of the case as per the memo appeal is being referred herein which reads as under:

Briefly stated, the case of the prosecution as made out in the FIR (Ext.5) is that the informant Md. Salauddin and his father namely Abdul Rahman had taken a land from one Wakil Mian at Batai adjacent to his house and he has been cultivating the same since 1994. On 01.11.1994, the informant's father, after ploughing the aforesaid parti land was levelling the same getting it ready for growing crops.

At about 5 P.M., the accused/ appellant Najmul Hoda having armed with tangi reached there and started abusing Abdul Rahman, and prohibited him to not to use the said land for cultivation purpose. The accused Najmul Hoda wanted to use that piece of land for keeping the tractors. On the other hand, Abdul Rahman was not agreeable and consequently a heated exchange of words followed between them.

In the meantime, other appellants reached there with khanti, lathi, farsa and danda in their hands. The informant also reached there and asked the accused Najmul Hoda to stop abusing his father upon which the informant was pushed by him on the ground and thereafter Najmul Hoda dealt 3-4 tangi blow on the head of Abdul Rahman followed by Fakhrul Hoda, who too attacked Abdul Rahman with khanti causing bleeding injury on his forehead.

Similarly, accused Yusuf Hoda and Rafique Mian gave farsa blow on Abdul Rahman. The blow dealt by Rafique Mian with farsa caused cut injury on the left hand of Abdul Rahman.

Other, appellant, namely Gulam Bari attacked Abdul Rahman with bhala and the lady appellant Halima Khatoon attacked with lathi. Lathi blows were also dealt on Abdul Rahman by Khurshid Alam.

Having sustained 3 and 4 tangi blows caused by accused Najmul Hoda, Abdur Rahman fell down upon the ground and the remaining accused persons assaulted the Abdur Rahman when he was lying injured on the ground.

The fardbeyan further disclosed that the informant's wife namely Saira Khatoon tried to save his father-in-law Abdul Rahman and in course of which, she too had received two tangi blows dealt by Najmul Hoda. It has alleged that the appellant No. 2 Fakhrul Hoda had fractured the hand of Abdul Rahman by giving blow with his khanti. In course of the aforesaid assault, the accused, appellant no. 5 herein Yusuf Hoda had also given blow with the lathi portion of farsa.

It is also alleged that the lady, appellant No. 6 herein, Halima Khatoon broke the teeth of injured Abdul Rahman by giving blow on his teeth with a danda while the aforesaid Abdul Rahman was lying unconscious on the ground.

The informant's wife Saira Khatoon had also received blow dealt by accused appellant No. 2. The informant's mother was assaulted by appellant No. 2. The appellants had also assaulted ten years old daughter of the informant namely Naushaba. Further, it was alleged that the appellant No. 4 gave Naushaba lathi blows. The land owner,

who lived adjacent to the place of occurrence, had come there on hearing hulla. The appellants had also assaulted him.

It is further alleged that the appellants after launching said murderous attack and injuring the informant's party severely had left the place of occurrence. Injured Abdul Rahman was lifted to his house in injured condition by the informant and his brother. On the following day, i.e., 02.01.1994, the injured Abdul Rahman was being taken to Pratappur Police Station, but it is said that he died on the way. The informant, in his company of his brothers and others had reached at Pratapur Police Station with the dead body of his father and there he narrated the entire occurrence and his fardbeyan was recorded.

6. After instituting of the case under various offences including Section 302 of the IPC against the appellants, the police investigated into the same and after concluding the investigation, submitted the charge-sheet against the appellants.
7. In course of the trial, the charges were framed under Section 302 and 323 of the IPC read with Section 148, 149 of the IPC. The prosecution had examined all together 10 prosecution witnesses and on the other hand, 4 witnesses were also examined from the side of defence.
8. The learned Trial Court has convicted the present appellants for the offence punishable under Sections 148 and Section 323 read with 149 IPC and Section 302 read with 149 of the Indian Penal Code

and have been sentenced to undergo Rigorous Imprisonment for life under Section 302/149 of the Indian Penal Code, against which the instant appeal has been preferred.

9. However, All the appellants have been acquitted from the charge under Sections 307 read with 149 IPC.

Arguments advanced by the learned counsel appearing for the appellants:

10. The learned counsel appearing for the appellants has taken the following grounds in assailing the impugned judgment:

- (i) The prosecution miserably failed to establish the charge, as per the accusation made against the appellants.
- (ii) There is delay in instituting the FIR of 24 hours.
- (iii) The Investigating Officer has not been examined, due to which the appellants have seriously been prejudiced, reason for prejudice is that the place of occurrence has not been ascertained.
- (iv) As per the admitted case of the prosecution, the death occurred in another place, while the inquest report was prepared in the concerned Police Station, and the doctor who had carried the post-mortem has also not been examined.
- (v) The conviction is based upon Section 149 of the Indian Penal Code, even though there is no attributability, said to be

committed,by one or the other appellants in commission of crime showing the common object.

(vi) The allegation against the assault is mainly upon Najmul Hoda, who is no more, the other appellants have been convicted with the aid of Section 149 of the IPC, but very surprisingly all the appellants have been acquitted under Section 307 read with 149 IPC.

(vii) The learned trial Court has not taken into consideration the important factual aspects that previously accused person had lodged a case against the informant and as such false accusation cannot be ruled out.

(viii) Further in the entire evidence no documentary evidence has been brought by the prosecution regarding the said land has been rented (batai) to the deceased or his family. Further the alleged owner of the said land has not been examined in this regard.

(ix) No independent witness has been examined herein and all the witnesses who have been examined are the interested witness.

11. Learned counsel, based upon the aforesaid ground, has submitted that the impugned judgment therefore is not sustainable in the eye of law.

**Arguments advanced by the learned Spl. Public Prosecutor
appearing for the State:**

12. *Per contra*, Mrs. Lily Sahay, learned Spl. Public Prosecutor, appearing for the State, has defended the impugned judgment by taking the following grounds:

- (i) If the testimony of the of the witnesses in entirety will be taken into consideration, it cannot be said that the impugned judgment suffers from any error.
- (ii) Merely because the Investigating Officer has not been examined, it cannot be said that the prosecution has failed in view of the fact that the judgment of conviction is based on the testimony of eye witnesses, i.e., P.W. 1, P.W. 4, P.W. 5 and P.W. 8.
- (iii) The learned trial Court has considered the testimony of these witnesses, who are the eye witnesses, and their testimony fully supports the prosecution version and as such, their judgment of conviction is not fit to be interfered with.

13. The learned counsel appearing for the State, based upon the aforesaid, has submitted that the impugned judgment, therefore is not fit to be interfered with, hence the present appeal needs to be dismissed.

Analysis:

- 14.** We have heard the learned counsel for the parties and appreciated the arguments advanced on their behalf.
- 15.** This Court is to consider the following issues:
- (i) whether the prosecution has been able to prove the charge beyond reasonable doubt,
 - (ii) whether the learned trial Court has well appreciated the testimony of the witnesses, both the witnesses led on behalf of the prosecution as well as the defence.
- 16.** Both the issues, since are interlinked, and as such both are taken together for its consideration, but before considering the said issue, it would be apt to discuss the testimony of the witnesses.
- 17. PW 1** has stated that the incident took place 2½ years ago. Her father-in-law Abdul Rehman Mian had taken the field of Vakil Mian. He was digging it with a spade. Meanwhile Najbul Hoda reached there with a tangi, Fakrul Hoda with a Khanti, Yusuf Hoda with an Farsa, Rafiq with an Farsa, Ghulam Bari with a spear, Khurshid and Halima Begum with a stick. Accused, Minhaj was also there with them.

The accused said that the field will remain fallow for parking the tractor. Rabi crops will not be sown in it. Khursheed caught Abdul Rehman's hand. Najbul first hit him on the head with the sharp edge of Tangi four times. Fakhrul Hoda broke his right hand

by hitting him with a khanti. On falling, Rafiq Mian cut his left hand in two places with an axe. Yusuf swung the Farsa and hit him. Ghulam Bari hit him a spear. Halima Begum broke his tooth by hitting him with a Lathi.

Fakhrul Hoda started hitting her father-in-law on the head with an axe and pulled out his brain matters. Nazmul Hoda hit her husband with Lathi twice. Because of her protection, one stick did not hit him. She had further testified that Fakhrul Hoda hit her also on the shoulder and waist with the khanti. He went to her house and hit her mother-in-law Hamida Khatun with a khanti. Khurshid hit her daughter Naushaba Banu, aged 10, with a stick/Lathi. She had further stated that her father-in-law died in the next morning due to the beating.

- 18.** She had further stated that her husband does his own farming and they used to eat and drink separately from her father-in-law. She had stated that she cannot say how much land her father-in-law used to cultivate on Batai basis but this land belonged to Vakil Miya. She had further testified that the accused used to quarrel with her father-in-law earlier also.
- 19.** She had further testified that her father-in-law was working alone on the land and leveling the land with a spade. She had further testified that she and her husband was also sitting there. She further testified that when we reached there, no one was there except us and the accused and all the accused were arguing with

my father-in-law and the argument went on for about 5 minutes, meanwhile no one from the village reached there.

20. In cross examination she stated that Khurshid stood up holding both the hands of her father-in-law. The accused had surrounded her father-in-law from all sides. Her husband was trying to free him. But Najmul did not agree. All the accused attacked him continuously. She could not count in the crowd how many blows Fakhrul hit him with khanti. She further testified that her father-in-law fell down and became unconscious. She too was injured while trying to free herself. Her husband also fell down but did not become unconscious. Blood oozed out of him too.

21. She further testified that her mother-in-law arrived there after about 5 minutes. The accused went to the door and beat her mother-in-law as well. She did not see her mother-in-law being beaten. When her father-in-law fell, Nazmul Hoda was about to cut his neck, but She saved him by hiding in her *Aanchal*. Her daughter was also injured after being beaten. The incident took place at 5 o'clock. People from her village reached at 6 o'clock. She had deposed that even before the villagers arrived, the accused had gone to their home. She cannot tell the names of all those who came. Her father-in-law was brought home by her husband and her brother-in-law Jalauddin. She had stated that she went to the police camp and immediately called the police and brought them the same day. Her husband gave a statement to the police at home itself. She

cannot say whether he signed his statement or not. Her statement was not recorded with the police. The police had questioned her about the incident. She brought medicine from the market and fed it to the girl and her mother-in-law. She had deposed that there had never been any dispute on the land where the incident took place. Four accused were arrested the same night.

22. She told the police that Khurshid caught her father-in-law's arm and that Najmul hit him four times with axe and when her father-in-law fell, he hit him with a spear and removed his brain and that Fakhrul hit her on the shoulder with a spear and that he went to their house and hit her mother-in-law and that Khurshid hit her daughter with a Lathi and that Ghulam Bari hit her father-in-law with a spear and that Halima broke his tooth with a stick/Danda and that Minhaj broke his rib bone by stepping on his heart and that Fakhrul broke her father-in-law's right hand by hitting him with a spear.
23. She had testified that after falling unconscious due to the beating, he did not regain consciousness and died. She had further stated that it is untrue that the accused did not beat her father-in-law and that She did not see anything and she has given a false statement. Minhaj has filed a case against her husband for arson. It is not true that she told lies out of frustration.
24. **PW 2** has stated that the incident happened 2½ years ago. She was praying namaaz in her house. It must have been around 6 o'clock.

After praying again, she was lighting the lamp in the house. Nallu alias Fakhru Hoda hit her with a stick three times on her left arm, and also hit her with the lathi side of a khanti on her hand and two sticks on her waist twice and no one else hit her. The incident happened with her husband. She recognized the accused. (The witness shows the broken elbow of the left arm).

25. In her cross-examination, she had stated that she was not treated by a doctor of Pratappur. The police did not question her. They had a previous quarrel with Ghulam Bari and Rafiq. Fakhrul Hoda and Najmul had testified on behalf of Ghulam Bari. It is untrue that she has given false testimony. She had further stated that she was not with her husband at the time of his death. Her husband died 2-3 days after Diwali.
26. **PW 3** has stated that his signature was there on this Inquest Report. It was prepared in the same process as the original. The signature is marked Exhibit-1. He had signed before the police inspector in the Police Station in front of dead body. He had taken the dead body from the house.
27. **PW 4 is the son of the deceased**, has stated that the incident took place about 2 years and 9 months ago. His father was levelling the land taken on lease from Vakil Mian. He was also working with him. Around 5 in the evening, Najmul Hoda was carrying a Tangi, Fakhrul Hoda was carrying a Khanti, Rafiq Alam was carrying an axe, Ghulam Bari was carrying a spear, Yusuf Karbari was carrying

an axe and Wasir Alam was carrying a stick/Lathi. Wasir had already caught hold of his father's both hands. These people came abusing and said that he cannot plough the field. Their tractor will be parked here.

28. He had deposed that first of all, Nazrul Hoda hit his father on the forehead with the sharp edge of the axe four times and due to which lot of blood oozed out. Fakhrul Hoda broke his right arm by hitting him with the sharp edge of the axe. Rafiq Mian cut his left arm from above and below the elbow with an axe. A lot of blood oozed out. Yusuf turned the axe upside down and hit him on the ribs of his right and left side and thereafter his father fell down.
29. He had further deposed that Halima Begum had also come there. Minhajul Hoda came on top of his father and when he fell, he punched him with his shoe and broke his rib. He had further deposed that Nazmul Hoda hit him on the forehead with a Tangi 2-3 times Once with the sharp edge and twice from the blunt side, his forehead was cut. Blood started flowing. Yusuf hit him on the hind wing with an axe. Khurshid Alam hit him on the back of my waist with a stick.
30. He had further testified that his wife Shairun Khatun also reached there. Khurshid and Fakhrul Hoda hit her with the stick part of the Khanti stick. His Father died on the spot. On hearing of noise/hulla, her mother came out of the house. Fakhrul Hoda hit her right wrist with a Khanti and broke her wrist. The accused ran away after

beating her. He further testified that the accused had not own the tractor but they are tractor mechanics and wanted that the customer's tractor would be parked on this land.

- 31.** In his cross-examination, he has stated that immediately after getting beaten up, he went home and offered Namaz and among the attackers, Fakhrul Hoda followed him. He had further testified that they beat and injured his mother. He had further testified that he did not lock the door after entering the house and came out of the house after the accused left. His father was taken to Tongkar and Jalaluddin, his younger brother, was brought inside the house. He specifically stated that they beat him for about 10 minutes and Jalaluddin did not come to save him. He was watching the incident from his turn.
- 32.** He stated that his wife screamed while the incident was taking place. But no one from the village came. The voice did not reach anyone; they had gone to harvest paddy. He further deposed that when he took his father at home at that time his father was breathing. He went to the doctor in the evening but no doctor came. There is a police camp at the school in his village-Monia. He testified that the police came at around six in the evening and arrested Nazmul Hoda, Fakhrul Hoda, Yusuf Karbari, Khurshid Alam. The accused were at home and the police caught them at their home.

- 33.** He further testified that when the police first arrested the accused, they took the statement of his wife Shairun Khatoon and thereafter he gave his statement. The Jamadar did not take their signatures on the statements. Again he says that the Jamadar sahab did not write his and his wife's statements. The senior officer came to their house the next day. His statement was first written at the police station at around 10 o'clock. Other people also went to the police station with him.
- 34.** He stated that his father was being taken to Pratappur police station the next day. His father had died at Diwali time. He cannot say at what time he died. But it was around 7 in the night. He went to the police station on the second of the month. He was fully conscious. But he had become weak due to bleeding.
- 35.** He stated that his father had wounds on his right hand, left hand and forehead. His teeth were broken. There were four wounds on his forehead. There were marks of sticks, axes etc. on his back. He had stick wounds on his right, left wrist, forehead and back of his right thigh. He reached the police station at around 10 am with the dead body. The accused were also taken there by the Jamadar Sahib. His statement was recorded at the police station. The statement was written and signed by him there. He had deposed that he, Ghulam Rabbani and probably Naeem had also signed it. He did not read out the paper. He just signed it and went to the hospital. He alone went to the hospital as an injured person. He did

not faint in the hospital. He was in the hospital for 5-6 days. He was admitted in the government hospital Pratappur. Since people from home kept coming regularly, he remained informed about the matters at home even while staying in the hospital.

36. He had testified that before this incident, Rafiq Mian had filed a case against him and he was on bail in that case. He, his father and his brothers Naeem, Ekram etc. are the accused in it. He does not know whether the accused are witnesses in it.
37. He had further testified that Rabbani Miyan had gone to call the watchman at night but he was not at home. The watchman came at about 7 in the morning. He did not tell the watchman about the incident. He had further testified that due to fear of the accused, no one from Vakil Miyan's (now dead) or his family will testify on their behalf on the point of Batai-dari and there is no documentary evidence of this.
38. The witness had further stated that at the time of the incident, there was one doctor named Dr. Rakesh Singh in his village. He went but he did not come out of fear. The inspector was shown the blood-soaked soil. He had also seen the blood-soaked clothes.
39. He had deposed that it is false that he had told the inspector that Rafiq and Ghulam Bari have no role in this case and that both of them were ill and that at the time of the incident they were getting treatment somewhere outside and that since they had filed a case under section 379, he has given their names and that he had also

given an affidavit to this effect on 23.1.95. He had signed on a plain paper and it is false that after taking the statement the inspector had also got his signature on it. He had further stated that it is untrue that Ghulam Bari was under the treatment of Dr. Girindra Kumar Singh from 28.10.94 to 3.11.94 and that accused Rafiq was undergoing treatment under Dr. K.B. Sahay in-charge of Referral Hospital, Dumriya from 12.10.94 to 8.11.94.

- 40.** He stated that his father died the next day on the way to the hospital. He cannot say at what time he died. He stated that he had given statement to the police twice. He testified that he had told the police that Khurshid caught hold of his father and that Najrul Hoda hit him with a Tangi after catching him. He had also informed about each accused holding weapons respectively and that Fakrul Hoda broke the hands by hitting with a khanti and that Rafiq Mian cut the hands and elbows by hitting with a Farsa.
- 41.** He had testified that it is untrue that no incident took place at the place and as he has said and that no fight took place and that they used to commit crimes against Harijans and hence the extremists killed them and that he has filed a false case.
- 42. PW-5** has stated that the incident took place on one evening of Diwali, three years ago. His uncle Rehman Miyan was levelling the field. He had taken Vakil Miyan's field on sharecropping. Meanwhile, Najmul Hoda, Fakhrul Hoda, Minhajul Hoda, Yusuf, Khurshid, Rafiq Miyan, Ghulam Bari Miyan, Halima Bibi came. He

saw that they were beating his uncle Rehman and threw him on the field and he died on the spot. After this, they entered Salauddin's house and killed his mother and daughter Naushabba.

43. He has stated in his cross-examination that the incident took place about 8-10 days before Diwali. He had testified It is untrue that Rehman Miyan (deceased) never used to be a sharecropper with Vakil Miyan. He has not seen any sharecropping papers.
44. He further stated that his statement was recorded at the police station on the day of the incident. He did not tell the police that Rehman Miyan was levelling the sharecropping land of Vakil Miyan. He had told the police that at that time all the accused came there and that Rehman Miyan died on the spot due to the beatings of the accused. But he did not tell the police that they entered the house and beat up Salauddin's mother and daughter as well. He had further stated that the police took the dead body to the police station in the morning. The witness has stated that Rafiq Miyan has also filed a case of theft against him.
45. He deposed that at around 6 in the evening, the police arrested the accused and took them away. There are no Naxal activities here but at the time of the incident, the police had camped there for about 5-6 days. He cannot say why the police were there. He does not know that hundreds of people have been killed by Naxalites in Pratappur police station.

46. He had further deposed that it is untrue that the accused have not killed his uncle and deceased had enmity with the Naxalites and that the Naxalites killed him and by keeping the dead body in the house, the accused have been implicated falsely. This witness further stated that he does not remember that he had told the police that his uncle died on the way to the police station the next day.

47. PW-6 is the tendered witness.

48. PW-7 is the tendered witness.

49. PW 8 has stated that the incident took place about 3 years ago at 5 p.m. The place of incident is Vakil Mian's Bari. His father was preparing the field for sowing wheat. He ran from the house on hearing the noise of fighting. Najbul Hoda hit his father on the head with the sharp part of the axe 2-3 times. Fakhrul Hoda broke his father's right arm by hitting him with a khanti. Yusuf turned the axe upside down and hit his father with its back part. He had deposed that Khurshid had caught hold of Abba and the accused were beating him. Rasik cut off Abba's left hand with an axe. Ghulam Bari also hit Abba with an axe. He had further testified that his father fell to the ground after being beaten. A lot of blood oozed from his wounds. He had also stated that Halima Begum broke his father's teeth with a stick and after this, Minhaj climbed on his father's chest and pressed it forcefully and due to such assault, his father went into a semi-dead state.

- 50.** Further, this witness had stated that Najbul Hoda and Fakhrul Hoda ran to kill him with a Khanti. Fakhrul Hoda entered into his house with a knife and beat and injured his mother Hamida Khatun. He had further stated that his father stayed at home the whole night and he died on the way to Pratappur police station in the morning.
- 51.** In his cross-examination, he had stated that the plaintiff Salauddin is his real brother. He and his father (deceased) were preparing the field two-three days before the incident. He was not preparing the field on the day of the incident but he was also involved in preparing the field before the incident. On the day of the incident, he came later after hearing the noise. When he reached there, Najmul Hoda and Fakhrul Hoda threatened him that if he comes, they would kill him. So, out of fear, he stood aside and kept watching the fighting. These people kept beating his father, brother and his middle sister-in-law for five to eight minutes. They killed his father and beat up his brother Salauddin and made him unconscious and injured his sister-in-law. He had further deposed that the accused surrounded his father from all sides and caught him. They surrounded him and started beating him. After beating him, they moved aside and went away and despite the noise, no one from the village came at the place of occurrence.
- 52.** He had testified that after the accused left, he went to his father but he could not talk to him as he was unconscious. He was in a critical condition and was not in a condition to go to the doctor. So, he was

not taken to the doctor for treatment. However, the compounder was called but he did not come. His Father died the next morning. He went to the police station later. The police took the body from the house. He testified that it is untrue that Vakil Mian did not give us land for farming. There is no documentary evidence of this. He cannot say whether any member of Vakil Mian's family can come to court and testify or not. He had further testified that the police took his statement on the second day of the incident.

53. He had stated that it is untrue that he has not given a statement to the police that his father was preparing the field for sowing wheat and Najmul Hoda hit him on the head with the sharp edge of the tangi and hit his father two-three times with the tangi. He stated that he told the police that Najmul Hoda and Fakhrul Hoda chased him with a Khanti and but he ran away. He told the police that while being taken to Pratappur police station, father died on the way.

54. He had stated that the accused Rafiq Miyan has also filed a criminal case against tem even before this incident in which he was also made an accused. He had stated that it is untrue that at the time of the incident Rafiq Miyan and Ghulam Bari were not in the village and were getting their treatment done elsewhere. He further stated that the police came to the village on the second day. He was in the village when the police came. He and his brother showed the police the crime scene. The police took the body away that day. He had

testified that it is untrue that he did not see the incident and that he never saw any accused being killed and that he gave false testimony due to enmity.

55. PW 9 has stated that he identifies the signature and handwriting of Dr. B.N. Tiwari on this post-mortem report, marked as Ext.-2. He identifies 2 injury reports in ink and pen of Dr. B.C. Banerjee marked as Ext. 3 and 4, respectively.

56. In cross-examination, he stated that the P.M. was not held in his presence. He knows nothing about the case. It was not written in his presence. He knows Dr. B.C. Banerjee personally. He did not write in his presence.

57. PW-10 has stated that this formal FIR and Inquest Report is in the handwriting and signature of Police Station In-charge, Pratappur Jagdish. He recognizes it, marked as Ext. 5 and 6, respectively.

Defence Witnesses:

58. DW-1 has stated that he knows both sides. Salauddin is his cousin. Rehman Mian was his father of Salauddin who died. He does not know how he died. He was in Ranchi when he died. He further stated that when he returned, he came to know from Rabani Miyan that his brother Abdul Rehman was kidnapped and killed by the Naxalites. His body was found two days later. He had deposed that land on Batai was never given to the deceased.

59. In the cross-examination he stated that the deceased Rehman was not his own uncle but his cousin uncle. He had stated that he had not asked anything from the accused yet he has come to testify when the accused called me. No one has taught him anything.
60. He stated that he did not testify to the police. He came to the village a week after the incident. He did not get any information about the beating of Rehman's (deceased) wife. He did not go to see the deceased's family. It is untrue that he has given false testimony to save Rehman's murderers.
61. **DW-2** has stated that there was Abdul alias Rehman Miyan in their village. The militants kidnapped him on Sunday night and also kidnapped his son Salauddin. The militants killed him in the forest and injured his son. Vakil Miyan lived in his village. He used to do his own farming.
62. In cross-examination he had stated that he cannot tell the exact date and time of Abdul Rehman's kidnapping and murder but the month was of Kartik and the kidnapping happened on Sunday and his body was found on Monday. He did not see the kidnapping and he was not there at the time of kidnapping and since there was no need he has not mentioned the kidnapping anywhere till date.
63. **DW-3** has stated that this medical certificate is in the handwriting and signature of Dr. Girindra Kumar Sinha and he recognizes it, marked as Exhibit 'A'. He stated that this was not written in front of him. He saw the doctor in Khusro.

- 64.** DW-4 has stated that this medical certificate is in the handwriting and signature of Dr. Krishna Bhushan Nath, he recognized it, marked as Exhibit-A/1'. He stated that this was not written in his presence. He used to get treatment from him regularly.
- 65.** This Court first has gone through the findings recorded by the learned trial Court in the impugned judgment, in order to consider the legality and propriety of the impugned judgment with the settled law and on assessment of the fact, as to whether the learned trial Court has properly appreciated the testimony in order to come to the conclusion that the prosecution has been able to prove the charge beyond all reasonable doubt.
- 66.** The learned trial Court, based upon the testimonies of the witnesses, particularly on consideration of the testimony of P.W. 1, P.W. 4, P.W. 5 and P.W. 8, who have been considered to be eye witnesses have found the charge proved against the appellants and in consequence thereof, the accusation made against them have been found to be proved, hence they have been convicted under Section 302 with the aid of Section 149, while they have been acquitted under Section 307 and 149 of the IPC, based upon the ground as referred on behalf of the parties.
- 67.** Before entering into merit of the case it would be apt to go through the contentions of learned counsel for the parties. It has been emphatically contended by the learned counsel for the appellants that defence version as narrated by defence witnesses wherein it

has been stated that said land upon which was in center of dispute had never been rented to the deceased, has not been properly appreciated by the learned trial court rather their evidences as brought forth by them in support of their plea of alibi has also been thrown out in mechanical manner. Further the Investigating Officer has not been examined, due to which the appellants have seriously been prejudiced, reason for prejudice is that the place of occurrence has not been ascertained. Further the death of the deceased occurred in another place, while the inquest report was prepared in the concerned Police Station, and the doctor who had carried the post-mortem has also not been examined. It has been contended that there is no attributability, said to be committed, by one or the other appellants in commission of crime showing the common object.

68. Further it has been submitted that the allegation against the assault is mainly upon Najmul Hoda, who is no more, the other appellants have been convicted with the aid of Section 149 of the IPC, but very surprisingly all the appellants have been acquitted under Section 307 read with 149 IPC. The learned trial Court has not taken into consideration the angle of previous enmity as the accused person had lodged a case against the informant and as such false accusation cannot be ruled out.
69. Further in the entire evidence no documentary evidence has been brought by the prosecution regarding the said land has been rented

(batai) to the deceased or his family and the alleged owner of the said land has not been examined in this regard as also no independent witness has been examined herein and all the witnesses who have been examined are the interested witness.

70. Per contra the learned counsel for the state has submitted that If the testimony of the of the witnesses in entirety will be taken into consideration, it cannot be said that the impugned judgment suffers from an error and only because the Investigating Officer has not been examined, it cannot be said that the prosecution has failed in view of the fact that the judgment of conviction is based on the testimony of eye witnesses, i.e., P.W. 1, P.W. 4, P.W. 5 and P.W. 8.
71. This Court, in order to appreciate the submissions advanced on behalf of all the appellants with respect to the culpability of the appellants, of commission of alleged offence under Section 302 the Indian Penal Code vis-à-vis the evidences adduced on behalf of the parties, deems it fit and proper to refer certain judicial pronouncements in context of contention raised by the learned counsel for the parties.
72. The ground has been taken by the learned counsel for the appellant that the deposition of defence witness has not properly been considered by the learned trial court.
73. There is no dispute about the legal position of law that the testimony of the defence witness is to be given treatment at par with the testimony of the prosecution witness as has been held by

Hon'ble Apex Court in the case of *Munshi Prasad v. State of Bihar*, reported in **(2002) 1 SCC 351** at para 3 which reads hereunder as:—

“3. Without attributing any motive and taking the evidence on its face value, therefore, it appears that the place of occurrence was at 400-500 yards from the place of Panchayat and it is on this piece of evidence, the learned advocate for the State heavily relied upon and contended that the distance was far too short so as to be an impossibility for the accused to be at the place of occurrence — we cannot but lend concurrence to such a submission : a distance of 400-500 yards cannot possibly be said to be “presence elsewhere” — it is not an impossibility to be at the place of occurrence and also at the Panchayat meet, the distance being as noticed above : the evidence on record itself negates the plea and we are thus unable to record our concurrence as regards acceptance of the plea of alibi as raised in the appeal. Before drawing the curtain on this score, however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness ought also

to be attributed to the defence witnesses on a par with that of the prosecution — a lapse on the part of the defence witnesses cannot be differentiated and be treated differently than that of the prosecutors' witnesses."

74. Further, the Hon'ble Apex Court has reiterated the same view in a judgment rendered in the case of **Mahendra Singh v. State of Madhya Pradesh** reported in **(2022) 7 SCC 157**.
75. Herein from the testimony of DW.1 who is the son of said Wakil Mian who was the owner of the said land has categorically stated that the land which was in center of the alleged occurrence had never been rented to the deceased and no any document is available in this regard. The aforesaid statement of this witness has fully been substantiated by the prosecution because no documentary evidence has been brought on record by the prosecution in this regard.
76. Further DW.1 had stated that when he returned, he came to know from Rabani Miyan that his brother Abdul Rehman(deceased) was kidnapped and killed by the Naxalites. This statement of DW.1 has been corroborated by the testimony of DW.2. Further it needs to refer herein that P.W.6 although has been tendered by the prosecution has specifically stated by him that Abdul Rehman(deceased) and Sallauddin (son of the deceased and informant) was taken away by the Naxalites and Abdul Rehman

was killed by Naxalites. For ready reference the relevant paragraph of testimony of the P.W.6 is being quoted as under:

प्रतिपरीक्षण:- जैपुर के रहमान मियाँ एवं सलाउद्दीन मियाँ को M.C.C. पकड़ ले गये। रहमान मियाँ की हत्या कर दिये और सलाउद्दीन को वे जखमी कर दिये। वकील मियाँ स्वयं खेती करता था।

77. At this juncture it would be apt to refer herein that the evidence of hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence but required to be subjected to close scrutiny. Reference in this regard may be taken from the judgment rendered by the Hon'ble Apex Court in the case of **C. Muniappan and Ors v. State of T. N reported in AIR 2010 Supreme Court 3718**. The relevant paragraphs i.e. 82 to 83 of the aforesaid judgment are being quoted as under:

"82. In State of U. P. v. Ramesh Prasad Misra and Anr., AIR 1996 SC 2766 : (1996 AIR SCW 3468), this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra (2002) 7 SCC 543 : (AIR 2002 SC

3137 : 2002 AIR SCW 3619); Gagan Kanojia and Anr. v. State of Punjab (2006) 28 2025:JHHC:5812-DB 13 SCC 516; Radha Mohan Singh @ Lal Saheb and Ors. v. State of U. P. AIR 2006 SC 951 : (2006 AIR SCW 421); Sarvesh Naraian Shukla v. Daroga Singh and Ors., AIR 2008 SC 320 : (2007 AIR SCW 6843); and Subbu Singh v. State, (2009) 6 SCC 462 : (2009 AIR SCW 3937).

83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

- 78.** Thus, on the basis of the aforesaid it is evident that the land which was in center of the dispute has not been rented by way of any document to the deceased or informant and further the land owner, i.e., Wakil Mian has not been examined by the prosecution but son of the Wakil Mian has been examined and he had substantiated the fact that land has not been rented to deceased.
- 79.** Further contention has been raised by the learned counsel for the appellant that Investigation Officer has not been examined in this case and it caused prejudice to the appellants.
- 80.** It is settled position of law that the Investigating Officer is responsible for gathering evidence, recording statements and preparing the case for trial. The testimony of the Investigating Officer is important for explaining the investigating process, the

evidence collected and how it connects to the accused. In absence of these elements, it certainly causes prejudice to the accused and they would be unable to properly defend themselves and it could lead to acquittal.

81. Reference in this regard be made to the judgment rendered by the Hon'ble Apex Court in the case of ***Munna Lal v. State of U.P., (2023) 18 SCC 661*** wherein it has been held that whether or not non-examination of investigating officer has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. For ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

39.--- It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eyewitnesses i.e. PW 2 and PW 3, not being found by this Court to be wholly reliable. The missing links could have been provided by the investigating officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the investigating officer could not depose as a witness, as told by PW 4, is that he had been sent for training. It was not shown that the investigating officer under no circumstances could have left the course for recording of his deposition in the trial court. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the investigating officer.

40. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW 2 and PW 3 not being

wholly reliable, this Court holds the present case as one where examination of the investigating officer was vital since he could have adduced the expected evidence. His non-examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case.

82. The Hon'ble Apex Court in the case of ***Lahu Kamlakar Patil v. State of Maharashtra, (2013) 6 SCC 417*** has observed the certain circumstances where the examination of investigating officer becomes vital and the explanation regarding non-examination of the I.O. must be satisfactorily explained. The relevant paragraph of the aforesaid Judgment is being quoted as under:

18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar [(1996) 2 SCC 317 : 1996 SCC (Cri) 271] , this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In Bahadur Naik v. State of Bihar [(2000) 9 SCC 153 : 2000 SCC (Cri) 1186] , it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the

court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in Arvind Singh v. State of Bihar [(2001) 6 SCC 407 : 2001 SCC (Cri) 1148] , Rattanlal v. State of J&K [(2007) 13 SCC 18 : (2009) 2 SCC (Cri) 349] and Ravishwar Manjhi v. State of Jharkhand [(2008) 16 SCC 561 : (2010) 4 SCC (Cri) 50] , has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.

83. Herein admittedly due to non-examination of investigating officer the place of alleged occurrence has not been ascertained and further the statement of the witnesses recorded under 161 Cr.P.C has also not been fully substantiated. Further herein even the blood-stained soil or the weapon which has been used in alleged commission of crime has not been sent to the FSL. Further due to non-examination of the investigating officer/police officer the veracity of inquest report has not been fully established.
84. Thus, in the aforesaid circumstance the testimony of the Investigating Officer is important for explaining the investigating process, the evidence collected and how it connects to the accused. In absence of these elements, it certainly causes prejudice to the accused as they would be unable to properly defend themselves.
85. Further it is admitted case of the prosecution that the Doctor who had conducted autopsy on the body of deceased has not been examined and even post-mortem report has not been brought on record which is the vital piece of evidence in order to substantiate the testimonies of the eyewitnesses.

86. It needs to refer herein that the Division Bench of the High Court of the Jharkhand, in the case of **Sowam Kisku and others Vs. The State of Bihar 2006 Cri LJ 2526**, has observed that it is no doubt true that in spite of the steps taken, the prosecution could not procure the attendance of the doctor who conducted autopsy over the dead body, but that could not have precluded the prosecution from examining some other doctor from the same hospital who knew the handwriting and signature of the doctor who conducted autopsy.
87. Admittedly in the instant case prosecution had examine other doctor as P.W.9 who had identified the signature and handwriting of Dr. B.N. Tiwari on the post-mortem report and he also identified the writing of Dr. B.C. Banarjee on the two injuries report but at the same time he had stated that post-mortem was not held in his presence and the Dr. B.C. Banarjee had not written in his presence. For ready reference the testimony of this witness has been quoted herein which reads as under:

1 identify the signature and handwriting of Dr. B.N. Tiwari on this post mortem report Marked Ext. 2

2. There are two injuries reports in ink and pen of Dr. B.C Banerjee. I identify both of them. Marked Exhibits-3 and 4 respectively.

XXX Cross-examination XXX

3. P.M. was not held in my presence. I know nothing about the case. It was not written in my presence

4. I know Dr. H.C. Banerjee personally He did not write in my presence. I do not know anything about the case”

88. It needs to refer herein that though Section 294 Cr.P.C provides for no formal proof of certain documents, but it cannot take the place of direct evidence of the doctor.
89. In the case of ***State of U.P. v. Lakhmi, (1998) 4 SCC 336***, the Hon'ble Apex Court has observed that no doubt it is the duty of the prosecution to prove post-mortem findings in murder cases, if they are available. Absence of such proof in the prosecution evidence in a murder case is a drawback for prosecution. For ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

15. Learned counsel for the respondent, however, pointed out that as the doctor who conducted post-mortem examination on the dead body was not put in the witness-box in this case and it was argued on its strength that in the absence of legally proved medical evidence no finding can be reached that the deceased died due to blows inflicted with "phali". No reason is seen noted by the trial court or the High Court for the non-examination of the doctor who conducted the autopsy. No doubt it is the duty of the prosecution to prove post-mortem findings in murder cases, if they are available. Absence of such proof in the prosecution evidence in a murder case is a drawback for prosecution.---"

90. On consideration of the above legal preposition, we are of the considered view that, non-examination of a competent medical practitioner, would virtually amount to denial of valuable right of the accused to cross-examine the medical practitioner, who could have addressed the intricacies of the said report.
91. Even 'non-examination of the Investigating Officer and Medical Officer does not ipso facto mean that the factum of murder will fail,

but it definitely weakens the case of the prosecution. Therefore, this Court has to go the other materials available on record and then see the credibility of the testimony of the witnesses in order to see as to whether the case of the prosecution has been proved beyond all reasonable doubt.

92. Further, it is evident from the testimony of P.W. 4, who is the informant has sustained injury and along with him the injury has also said to be sustained by Saira Khatoon, Naushaba Khatoon and Hamida Khatoon. The injury report of P.W. 4 is available, said to sustain injury in the back portion of his body.
93. The learned trial Court, based upon the aforesaid injury report, has considered the testimony of P.W. 4 to be a reliable piece of evidence and found in corroboration, which has been said to be corroborated with the testimony of P.W. 1, P.W. 5 and P.W. 8.
94. While on the other hand, the defence has also examined 4 witnesses. D.W. 1 is the cousin brother of P.W. 4, Md. Salauddin who has deposed that the deceased and the P.W. 4, Md. Salauddin were kidnapped by the MCC personnel (Naxalites), who killed Abdul Rahman and freed Md. Salauddin after causing injuries.
95. We have considered the testimony of D.W. 1 in entirety and particularly, the cross-examination as has been done by the prosecution so as to assess the reliability of the version which has been deposed by DW 1 in the examination-in-chief, but has found that even no question has been put with respect to the version

which has been said by the P.W. 1 on the issue of kidnapping of Abdul Rahman and Md. Salauddin, P.W. 4.

96. Merely, a question has been put that whatever has been said by him in the examination-in-chief that is incorrect, meaning thereby, the version of DW 1 so far as the place to the kidnapping of the deceased and the P.W. 4, namely Md. Sallauddin cannot be disbelieved if no question contrary to that have been put by the prosecution.
97. The DW 2, Ram Narayan Singh, has also corroborated the version of DW 1 by saying the same thing of kidnapping of deceased and the Md. Sallauddin, P.W. 4.
98. The question therefore is that by considering the testimony adduced on behalf of the prosecution and the defence is as to whether the learned trial Court has been able to consider the witnesses adduced on behalf of both the sides in proper manner or not.
99. The reliability of the testimony adduced on behalf of the prosecution and defence on the basis of the corroboration needs to be seen in order to come to the conclusion.
100. The version of defence witnesses is that the deceased and the P.W. 4 were kidnapped and Abdul Rahman had been killed while Mohd. Sallauddin, after causing injury to him, had been freed.

- 101.** This Court has considered the post-mortem report and found therefrom that the time of death has been shown to be 36 to 42 hours and the FIR has been instituted on 02.11.1994, wherein the reference of the occurrence has been said to there at 5 P.M. on 01.11.1994, while the time of institution of the FIR is in the morning hours at about 11 A.M. on 02.11.1994.
- 102.** If the deposition of the defence witnesses will be taken into consideration, it is evident that two days from the date of institution of FIR, the incidence of kidnapping of the deceased and the P.W. 4 have been caused by the Naxalite and dead of the deceased was found on Monday.
- 103.** The question is that whether deceased and PW 4 had been kidnapped two days prior to the institution of the FIR which is being corroborated by the post-mortem report showing the time of death for 36 to 42 hours prior to the 36 hours from the time of the conducting the autopsy of the body of the deceased. The time which has been assessed by the doctor, who had conducted the autopsy is matching to the witnesses adduced on behalf of the defence .
- 104.** This Court after going through the testimony of the prosecution witnesses and the defence witnesses, has found that there are two versions, both are contradictory to each other and in these circumstances, so as to have a question to be put in course of the trial so that the truth may come as there was non-examination of

the Investigating Officer. Such a situation has caused great prejudice to the accused.

105. But this aspect of the matter has not been taken into consideration by the learned trial Court rather the finding has been given that the non-examination of the Investigating Officer does not assume any bearing, since the case is based upon the testimony of the eye witnesses but when two contradictory versions have been produced by way of an evidence adduced on behalf of the prosecution and defence, then it is incorrect on the part of the learned trial Judge to have a finding when the case since is based upon the testimony of the eye-witnesses hence no prejudice will be said to be caused that could have been said to be correct if there are no non-examination of the witnesses on behalf of the defence and the case if was based upon the testimony of the prosecution witnesses only, but that is not the case, hence, the examination of the Investigating Officer assume importance for the purpose of proper consideration to prove the acquisition made against the present appellant.

106. Further, non-examination of the doctor in the light of such a contradictive version in between the prosecution side and the defence also assume bearing but this aspect of the matter has not been taken into consideration by the learned trial Court.

107. The non-examination of the Investigating Officer also assumes bearing since there is delay in institution of FIR but the said aspect

of the matter has been dealt by the learned trial Court that merely due to non-registration of the FIR, no prejudice will be said to be caused, in view of the provision as contained under Section 157 of the Code of Criminal Procedure wherein the police, on getting information of any offence in either cognizable or non-cognizable may rush to the place of occurrence and start investigation under the power conferred under the Cr.P.C.. There is no denial upon the aforesaid provision of law but merely there is statutory provision is there, the issue of prejudice cannot be giving go by rather the issue of prejudice is to be taken into consideration depending upon the facts and circumstances involving in each and every case.

108. This Court based upon the aforesaid discussion is of the view that it is not such a case, that is in the light of the contradiction in between the testimony of the witnesses adduced on behalf of the prosecution and the defence who have made out two different cases, since the prosecution has made out a case that due to dispute over a land, the occurrence took place while the defence witness has adduced in the testimony that the deceased and the informant were kidnapped and the deceased was killed while PW 4 was freed after causing injuries to him.

109. This Court is of the view that there are two contradictory issues, then the **non-examination** of the Investigating Officer cannot be considered to cause no prejudice caused to the defence by taking aid of Section 157 the Code of Criminal Procedure.

- 110.** After going through the Trial Court Records, it is evident that P.W. 4 has sustained injury and injury report of P.W.4 is available on record but there is no injury report of other injured prosecution witnesses. Since PW 4 has sustained injury, as such his testimony is to be believed by learned trial Court but at the same time other evidences available on record has been ignored which cannot be said to be proper course of appreciating the evidence by the learned trial Court.
- 111.** Further it appears from the impugned order that weightage has been given to the evidence adduced on behalf of the prosecution by the learned trial court which is contrary to the settled law that there cannot be any discrimination in consideration of the evidence in between the evidence adduced on behalf of the prosecution and defence rather the evidence either produced on behalf of the prosecution or the defence are to be considered on parity.
- 112.** It needs to refer herein that the learned trial Court has convicted these appellants under Section 302 IPC with the aid of Section 149 IPC, but acquitted them under Section 307 read with Section 149 of IPC.
- 113.** There is no dispute that the conviction can be said to be there with the aid of Section 149 but the specific attributability is to be there of showing the commission of offence with a common object.
- 114.** If the charge has been framed under Section 307, 302 read with 149 IPC then the ingredients of Section 149 IPC is to be taken into

consideration for proving the charge under Section 307 and 302 of the Indian Penal Code and the accusation so made under Section 149 of the Indian Penal Code cannot be segregated on the basis of the accusation either made under Section 307 or 302 of IPC.

115. Herein if the accusation made under Section 149 of IPC as not found available while assessing the testimony to prove the charge under Section 307 IPC against the appellants then from where the accusation made under Section 149 will be said to be there for proving the charge under Section 302 of IPC. The moment the accusation has not been found under Section 149 of IPC and while acquitting the appellants under Section 307 then there cannot be accusation again said to be there under Section 149 proving the charge.

116. The learned trial court below have also overlooked the fact that the most important witness namely Wakil Mian who had been named as a witness in the First Information Report and also said to have rushed to the place of occurrence being a resident of neighbourhood of the place of occurrence after hearing the alarm raised by the informant party at the time of assault and it was further stated that he, too, had sustained injuries at the hands of the appellants when he tried to intervene has not been examined. Further as per the FIR the alleged occurrence was happened in broad day light but surprisingly no independent witness like villagers had not been examined.

117. However this Court has conscious with the fact that if there is cogent evidence adduced on behalf of eyewitness is available on record then non-examination of independent witness has no bearing upon the case of the prosecution but in the instant case there is lot of contradiction between the eyewitnesses and further doubt has also been crept up regarding the genesis of the alleged occurrence as the son land owner who had been examined as DW.1 had stated that the said land has not been rented to the deceased or the informant.

118. Further there is vital contradiction between the recital of FIR vis-a-vis the testimony of the eyewitnesses. According to the First Information Report, Abdul Rahman after sustaining injuries on his person caused by the appellants on 1.11.1994 at 5 p.m. remained at his house in an unconscious state but alive, but on the following morning i.e. 2.11.1994 he was taken by the informant and his brother P.W. 5 Md Nayeem and others to the police station and on way he succumbed to the injuries. When the P.Ws reached to the Police Station, they had brought the dead body of Abdul Rahman with them but surprisingly in course of trial the witnesses have deposed the before the court that Abdul Rahman after receiving the injuries, had fallen unconscious and after some time he died at the place of occurrence on 1.11.1994.

119. This Court is conscious with the settled position of law that minor discrepancies, embellishments and contradictions in the evidence

of the eyewitness do not destroy the essential fabric of the prosecution case, the core of which remains unaffected. But at the same time, it is equally settled that the discrepancies which go to the root of the matter and shake the basic version of the witnesses that can be annexed with due importance. More so when there is need of corroboration of the testimony of eyewitness from other available evidences, Reference in this regard be made to the judgment rendered by the Hon'ble Apex Court in case of ***Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra, (2010) 13 SCC 657***, wherein Apex court has dealt material contradiction, which is quoted for ready reference-

30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan¹.)

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide State of Rajasthan v. Rajendra Singh².)

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it

cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide Mahendra Pratap Singh v. State of U.P.³)

33. In case, the complainant in the FIR or the witness in his statement under Section 161 CrPC, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide State v. Sait⁴.)

34. In State of Rajasthan v. Kalki⁵, while dealing with this issue, this Court observed as under : (SCC p. 754, para 8)

“8. ... In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.”

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See Syed Ibrahim v. State of A.P.⁶ and Arumugam v. State⁷.)

36. In Bihari Nath Goswami v. Shiv Kumar Singh⁸ this Court examined the issue and held: (SCC p. 192, para 9)

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.

120. Thus on the basis of discussion made hereinabove this Court has considered view that the alleged charges has not been proved beyond reasonable doubt against the present appellants.

121. The Hon'ble Apex Court in catena of decision has propounded the proposition that in the criminal trial, there cannot be any conviction if the charge is not being proved beyond all reasonable doubts, as has been held in the case of **Rang Bahadur Singh & Ors. Vrs. State of U.P.**, reported in **(2000) 3 SCC 454**, wherein, at paragraph-22, it has been held as under:-

"22. The amount of doubt which the Court would entertain regarding the complicity of the appellants in this case is much more than the level of reasonable doubt. We are aware that acquitting the accused in a case of this nature is not a matter of satisfaction for all concerned. At the same time we remind ourselves of the time-tested rule that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits. We really entertain doubt about the involvement of the appellants in the crime."

122. Likewise, the Hon'ble Apex Court in the case of **Krishnegowda & Ors. Vrs. State of Karnataka**, (supra), has held at paragraph-26 as under:-

"26. Having gone through the evidence of the prosecution witnesses and the findings recorded by the High Court we feel that the High Court has failed to understand the fact that the guilt of the accused has to be proved beyond reasonable doubt and this is a classic case where at each and every stage of the trial, there were lapses on the part of the investigating agency and the evidence of the witnesses is not trustworthy which can never be a basis for conviction. The basic

principle of criminal jurisprudence is that the accused is presumed to be innocent until his guilt is proved beyond reasonable doubt."

123. Further, it needs to refer herein the principle of 'benefit of doubt' belongs exclusively to criminal jurisprudence. The pristine doctrine of 'benefit of doubt' can be invoked when there is reasonable doubt regarding the guilt of the accused, reference in this regard may be made to the judgment rendered by the Hon'ble Apex Court in the case of **State of Haryana Vrs. Bhagirath & Ors.**, reported in **(1999) 5 SCC 96**, wherein, it has been held at paragraph-7 as under: -

"7. The High Court had failed to consider the implication of the evidence of the two eyewitnesses on the complicity of Bhagirath particularly when the High Court found their evidence reliable. The benefit of doubt was given to Bhagirath "as a matter of abundant caution". Unfortunately, the High Court did not point out the area where there is such a doubt. Any restraint by way of abundant caution need not be entangled with the concept of the benefit of doubt. Abundant caution is always desirable in all spheres of human activity. But the principle of benefit of doubt belongs exclusively to criminal jurisprudence. The pristine doctrine of benefit of doubt can be invoked when there is reasonable doubt regarding the guilt of the accused. It is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the accused at the end of the criminal trial. Benefit of doubt is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertains doubt regarding the guilt of the accused."

124. It needs to refer herein that the Hon'ble Apex Court, in the case of

Allarakha K. Mansuri v. State of Gujarat reported in **(2002) 3 SCC 57** has laid down the principle that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted, for reference, paragraph 6 thereof requires to be referred herein which reads hereunder as :-

“6. -----The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. —”

125. It needs to refer herein before laying down the aforesaid view, the Hon’ble Apex Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra** reported in **(1984) 4 SCC 116** has already laid down the same view at paragraph 163 which is required to be referred which read hereunder as

“163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt.---”

126. This Court, therefore is of the view that the learned trial Court has not followed the principle of proving the charge beyond all reasonable doubt, rather has convicted the appellant by surmises or conjecture and with pre-occupied mind.

127. Accordingly, the impugned order needs interference, as such, the impugned judgment passed by learned Ist Additional Sessions Judge at Chatra in Sessions Trial No. 19/1996 is hereby quashed and set aside.

128. The present appellants are hereby acquitted from the charges as levelled against them.

129. In consequence thereof, the instant appeal stands allowed and appellants are discharged from the liability of their bail bonds.

130. Pending Interlocutory Applications, if any, stands disposed of.

131. Let lower Court records be transmitted to the Court concerned, forthwith.

(Sujit Narayan Prasad, J.)

(Rajesh Kumar, J.)

Samarth/**A.F.R.**