accused appellant as on date, the efflux of time since the date of occurrence, we are of the view that while maintaining the conviction of the accused appellant the sentence imposed is modified to the period already undergone.

15. Accordingly, the appeal is allowed in part. The accused appellant is availing the benefit of bail by furnishing adequate sureties and bonds, the same stands discharged.

16. Lower Court record along with a copy of this judgement be sent back immediately to District Court concerned for compliance and further necessary action.

(2025) 5 ILRA 841
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.05.2025

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 1846 of 1983

Attar Singh & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri A.N. Mishra, Sri A.N. Mulla, Sri R.R. Singh, Sri Aditya Prakash, Sri Saurabh Chaturvedi, Sri V.S. Choudhary, Sri I.K. Chaturvedi (Sr. Adv.)

Counsel for the Opposite Party:
D.G.A., Sri Satish Kumar Tyagi

Occular evidence-Motive takes backstage in a case of direct ocular evidence -in the present case there are three injured witnesses whose presence on the spot is natural being family members.

Appeal dismissed. (E-9)

List of Cases cited:

1. Upendra Pradhan Vs St. of Orissa, 2015 (11) SCC 124

2. Balaka Singh & ors.Vs St. of Pun., AIR 1975 SC 1962

3. Darshan Singh Vs St. of Pun., 2010 (2) SCC 333

4. Krishna Mochi & ors.Vs St. of Bihar, (2002) 6 SCC 81

5. Masalti Vs St. of U.P., AIR 1965 SC 202

6. Darya Singh Vs St. of Pun., AIR 1965 SC 328

7. Appabhai & anr. Vs St. of Guj., AIR 1988 SC 696,

8. St. of A.P. Vs S. Rayappa & ors., (2006) 4 SCC 512

9. Satbir Singh & ors.Vs St. of U.P., (2009) 13 SCC 790

10. Jayabalan Vs U.T. of Pondicherry, 2010 (68) ACC 308 (SC)

11. Dharnidhar Vs St. of U.P., (2010) 7 SCC 759

12. Baban Shankar Daphal & ors.Vs The St. of Mah., 2025 SCC Online SC 137

13. Shahaja @ Shahajan Ismail Mohd. Vs St. of Mah., (2023) 12 SCC 558

14. Pahalwan Singh & ors.Vs St. of U.P., 2020 (6) ALJ 166

15. Kaptan Singh Vs St. of UP, 2020 (1) ADJ 106 (DB)

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Shri I.K. Chaturvedi, learned Senior Counsel assisted by Shri Aditya Prakash alongwith Shri Saurabh

Chaturvedi, learned counsel for the surviving appellants, Shri Satish Kumar Tyagi, learned counsel for the informant, Shri O.P. Dwivedi, learned AGA-I for the State of U.P. and perused the record.

2. Present Criminal Appeal has been filed against the judgment and order dated 02.08.1983, passed by Ist. Additional Sessions Judge, Ghaziabad in S.T. No. 73 of 1982 (State Vs. Attar Singh and Others) convicting and sentencing appellant Boondi and Khajan Singh to 18 months R.I. under section 148 of I.P.C. and sentencing the remaining appellant namely; Attar Singh, Bani Singh, Om Prakash, Nathu Singh son of Afimi, Harphool, Tej Ram, Tota Ram Chhattar, Buddha, Omi, Nathu son of Khacheru, Sarni, to one years R.I. under section 147 of Indian Penal Code and further sentencing all the appellants to life imprisonment under section 302 I.P.C. read with section 149 I.P.C. further sentencing all the appellants to undergo 5 years R.I. on each count under section 307 I.P.C. read with section 149 I.P.C. and further sentencing all the appellants to 6 month R.I. under section 323 I.P.C. read with section 149 I.P.C. The sentences on all the counts shall run concurrently.

3. Vide order dated 20.04.2012 the appeal stood abated in respect of appellant no.10-Boondi son of Harpal Singh and Appellant no.11-Harphool son of Chhajju; vide order dated 21.08.2017 the appeal stood abated in respect of appellant no.1-Attar Singh son of Johri Singh, appellant no.5-Nathu son of Khacheru, appellant no.6-Buddha son of Murari; vide order dated 09.09.2021 the appeal stood abated in respect of appellant no.4-Nathu son of Afimi, appellant no.8-Omi son of Sukhan, appellant no.14-Khazan son of Chhaju Singh; and vide order dated 03.04.2025 the appeal stood abated in respect of appellant no.12-Tej Ram son Phartey. Now the appeal is surviving only in respect of appellant no.2- Bani Singh son of Johari Singh, appellant no.3-Om Prakash son of Johari Singh, appellant no.7-Chittar son of Murari, appellant no.9-Serni son of Manglu, appellant no.13-Tota Ram son of Pratap Singh.

4. The prosecution story in brief is that accused Harphool and Nathu happened to be relatives of the first informant Brahmjeet. They had some dispute with Fagna, father of the first informant, for passage (Rasta) on account of which relations between them were strained. On 28.10.1981 at 8.00 PM informant-Brahmjeet, and his father Fagna and witnesses Ram Singh, son of Sukkhan, Chaman Lal, Dal Chand, sons of Hari Singh were sitting at the platform (Chabutara) of Fagna. When they were talking about the distribution potato, Atar Singh, Bani Singh, Om Prakash, Jai Singh, Nathu son of Afimi, Harphool, Tej Ram, Tota, Phool Singh, Boondi, Chhattar, Budha, Omi, Nathu son of Khacheru, Sarni, Khajan, Dharampal and Johari armed with lathis and ballam reached there and exhorted that they would see who stop them from passing through the passage and began to assault them with lathis and ballam. The father of the complainant-Fagna also wielded lathi in his self-defence whereupon the miscreants named above, surrounded Fagna and assaulted him with lathis and ballam. They dragged him to the Gher of accused Nathu S/o Afimi and after beating Fagna they killed and threw him in the house of Nathu S/o Khacheru. It was alleged in the FIR that the miscreants were breaking the house of Nathu by ‘Koomal’ or ‘Nakkab’ or ‘Saindh’. This report was lodged by Brahmjeet at police station on

29.10.1981 at 2.45 AM. On the basis of the said report Crime No. 756 A under Sections 147, 149, 302/149 IPC was registered and thereafter investigation was started by the Investigating Officer and after concluding the same a charge-sheet was submitted against the accused persons. The accused pleaded not guilty to the charge they claimed to have been falsely implicated due to enmity.

5. The prosecution has examined as many as 7 witnesses, namely, P.W.1-Dr. V.P. Agarwal, Medical Officer, who had examined the injured from the side of the prosecution, P.W.2- Brahmjeet, first informant as well as victim of the crime. P.W.3- Dal Chand and P.W.4- Ram Singh are the eye witnesses as well as the victim of the crime, P.W.5- Dr. L.M. Pareekh, P.W.6- S.I. Daya Ram Sharma, Investigating Officer, P.W.7-Head Constable Anokhey Lal who is the scribe of the first information report.

6. The prosecution has also submitted documentary evidence, which were marked as Exhibit Ka-1-Injury Report of Ram Singh, Exhibit Ka-2-Injury Report of Dal Chand, Exhibit Ka-3-Injury Report of Brahmjeet, Exhibit Ka-4-Injury Report of Chamanlal, Exhibit Ka-5-FIR, Exhibit Ka-6-Post Mortem Report, Exhibit Ka-7-Panchayatnama, Exhibit Ka-10-Site Plan with Index, Exhibit Ka-11-Recovery Memo of Bloodstained Bhusa, earth, Exhibit Ka-12-Recovery memo of bloodstained and plain earth, Exhibit Ka-13, Chargesheet Mool.

7. Shri I.K. Chaturvedi, learned Senior Counsel for the 5 surviving appellants, at the very outset, submits that the case was argued at full length before the Co-ordinate Bench of this Court of which one of us (Ms. Nand Prabha Shukla, J.) was a member. By drawing attention to orders dated 19.07.2023 and 20.07.2023 learned Senior Counsel submits that his full length argument has already been noted by this Court and he reiterates and reaffirms the same. Paragraph No.3 of the order dated 19.07.2023, and paragraph 2 of the order dated 20.07.2023 are quoted as under:-

Paragraph No.3 of the order dated 19.07.2023

"3. Sri I.K.Chaturvedi, learned Senior Advocate, submits as under :

(i) That in the house of the appellant - Nathu, Nakab was being made by the deceased Fagna for theft and as such action was taken by the accuseds - Nathu and others which resulted in the death of Fagna on 29.10.1981 at about 8 P.M. The accused - appellant immediately lodged a First Information Report No.756/1981 which was registered at about 2 A.M. under Sections 457, 511 IPC, PS. Hapur, Sub-District - Hapur, District Ghaziabad. The Investigating Officer proceeded on the spot after getting First Information Report. Subsequently, from the side of the deceased, a cross First Information Report No.756-A/1981, under Sections 147, 148, 149, 302 I.P.C. was lodged by Brahamjeet at the same police station, Sub-District Hapur, District - Ghaziabad. Based on this cross First Information Report, the appellants herein were prosecuted. Out of 18 accuseds, four accused, namely, Jai Singh, Phool Singh, Dharampal and Jauhari were acquitted by the trial court but on the same set of facts and evidences and charges, equally situated persons i.e. the present appellants 14 in number were convicted by the trial

court in S.T. No.73 of 1982 (State Vs. Atar Singh and others) by judgment and order dated 02.08.1983, passed by the First Additional Session Judge, Ghaziabad. Out of 14 convicted accused - appellants, 8 have died as has been noted in the order dated 12.07.2023 and appeal qua those accused - appellants has been abated. Now, this appeal survives only in respect of 6 surviving accused - appellants, namely, the accused - appellants no.2 - Bani Singh, accused appellants no.3 - Om Prakash, accused appellant no.7 - Chhittar, accused appellant no.9 Serni, accused appellant no.12 Tej Ram and accused-appellant no.13 Tota Ram. All these appellants have been convicted for the alleged murder of "Fagna" who is the accused in the first FIR No.756 of 1981. The accused appellants of the present appeal have been convicted by judgment and order passed by the Session Court in the aforesaid Session Trial arising out of cross case i.e. Case Crime No.756-A/1981. Since the accused in the first FIR no.756/1981 was only Fagna who died, therefore, the FIR was closed as the accused was dead.

(ii) After the aforesaid Fagna died, the persons of the side of the Fagna attacked in revenge in which four persons, namely, Ram Singh, Dal Singh, Bhramjeet (informant) and Chhaman Lal were injured and from the accused side Khazan Singh, Atar Singh, Jauhari and Jai Singh were injured. At this point of time, Bhramjeet (informant) lodged the cross First Information Report No.756/1981 at about 02.45 AM on the same day and in trial the appellants herein have been convicted. Out of four accused, injured accused Jauhari and the injured accused Jai Singh were acquitted by the trial court.

(iii) Pursuant to FIR No.756/1981 the I.O. proceeded and recovered on 29.10.1981 the dead body of Fagna from the back side of house of Nathu near Nakab which fact is evident from the recovery memo appearing at page 3 of the paper book and inquest report appearing at page 28 of the paper book.

(iv) He also recovered certain utensils near Nakab and also found that Nakab was made in the house from the side of the agricultural land. Pursuant to the cross First Information Report No.756-A, he took samples of blood found on the earth from the place of incidence Chabutara of the house of the deceased Fagna. He submits that the Chabutara of the house of Fagna is the place of subsequent incidence, in respect of which the cross First Information Report No. 756-A was lodged by Bhramjeet (informant). In support of his submissions he drew attention to the First Information Report and recovery memos etc. appearing at pages 2 to 5 of the paper book. The injuries received by four persons of the defence side were also examined by the Medical Officer which were also found to be simple as appearing on page nos.14 to 20 of the Paper Book.

(v) The inquest report prepared by the I.O. pursuant to the cross case crime No. 756-A contains recital that the death was caused by riot but he mentioned the recovery of utensils found pursuant to the first FIR No.756/1981. This shows that after Fagna died, the quarrel in revenge took place in which four persons from the side of the prosecution and four persons from the defence side were injured. The aforesaid Fagna died while making Nakab in the house of Nathu son of Khacheru – informant of the first FIR.

(vi) Thus the real incident was that the deceased Fagna was making Nakab for theft/criminal trespass in the house of Nathu son of Khacheru and in that incidence he died which fact is further proved from this evidence that the back side from where Nakab was made, was agricultural filed which was wet as noted by I.O. in recovery memo dated 29.10.1981 (page 5 of the paper book) and the description of the dead body of Fagna as noted in the inquest report (at page 28 of the paper book) that clay on the legs of Fagna was found. Therefore, the story of the prosecution pursuant to cross First Information Report No.756-A is totally inconsistent with the evidences found on the spot at the time of incidence.

vii) It is evident from the evidence of PW 2 and his cross examination read with inquest report that cross First Information Report No.756-A is ante time and was lodged by the Bhramjeet to falsely implicate the accused-appellant and to cover up the criminal act committed by his father Fagna and other persons of the prosecution side. Even the PW 2 could not state whether the thumb impression which on FIR is his or of any other person.

(viii) In paragraph 7 of his evidence the PW 2 has stated that police came at about 1 AM in the village and when in the morning at 9 AM the police returned to the police station then at the police station he came to know that the his father Fagna has been killed by the accused. This statement of the PW 2 informant read with the statement in paragraphs 2, 3 , 8, 10, 11 itself goes to show that the entire story of the prosecution is concocted.

(ix) In Para 11 of the evidence of PW 2 (cross examination) stated that Daroga Ji has not taken his statement either before or after lodging of the FIR. This goes to show that the statement recorded by the I.O. under Section 161 Cr.P.C. is concocted. No immediate motive for commission of alleged crime could be proved by the prosecution.

(x) Evidence of PW 2 in paragraph 19 that during scuffle candle was lighting and it was dark night. This evidence is in conflict with the cross examination of PW 3 Dal Singh, (paragraph 5) where he stated that the accused had shutoff the candle immediately and thereafter it could not be noticed that who beaten to whom. From the cross examination of PW 3 (para 8) it is evident that the deceased - Fagna was a habitual thief. Evidence of PW 3, PW 4 and PW 5 does not support the prosecution story."

Paragraph 2 of the order dated 20.07.2023

2. Sri I.K. Chaturvedi, learned Senior Advocate, submits as under:-

(i) As per medical examination report, the samples of blood stained earth taken by the Investigating Officer, from two places, have been found to be similar. According to the prosecution, one was taken from the Chabutara of the house of the deceased- Fagna and the other was taken from the room where the dead body of Fagna was found. But soil of both the places cannot be similar. This proves that blood-stained soil samples are of some other place. Hence, the prosecution has completely failed to establish the actual place of incident. Since the actual place of incident is neither ascertainable nor has been established by the prosecution, therefore, the entire story set up by the

prosecution becomes unreliable and the accused/appellants are entitled for benefit of doubt.

(ii) The accused persons never absconded rather they remained present during entire investigation before the Investigating Officer. Therefore their conduct has not been blameworthy and it shows that they have not participated in the commission of the alleged offence.

(iii) No incised wound with reverted margins was found on the body of the deceased-Fagna as evident from the Post Mortem Report and the evidence of PW-5. Hence, there was no injury by Ballam. Therefore, the case of the prosecution that the accused attacked by Ballam upon the deceased-Fagna is established to be unreliable.

(iv) There is no evidence that the "Kumal" was made by the accused. Even there is no recovery of any instruments from the accused, allegedly used by the accused for making "Kumal". Therefore, the story of making of "Kumal" by the accused has been concocted to give a different colour to the case on the basis of false evidence.

(v) Motive set up by the prosecution against accused that there was some dispute with respect to the passage/pathway, is baseless. As per prosecution the dispute arose about 20 years ago. No evidence has been led by the prosecution for any immediate cause. No evidence could be led by the prosecution to establish that any quarrel or litigation took place near to the date of incident or in immediate proximity of the incident. Therefore, the motive as alleged by the prosecution is totally unestablished. In the absence of any motive, the entire story set up by the prosecution has no legs to stand.

(vi) No recovery of weapon, allegedly used in commission of the offence, could be made.

(vii) Total 18 persons were falsely implicated and were made accused in the incident in question. On the same set of facts and evidence, four of them were acquitted on the ground of age and giving them benefit of doubt. Therefore, the appellants herein cannot be convicted on the same set of evidence.

(viii) As per evidence of PW-4, the body of the deceased-Fagna was dragged for about 90 steps. As per evidence of PW-5 (Doctor, who conducted the post mortem) grass and ordinary soil were found on the body of deceased. There is no description that the Dhoti and Kurta, which the deceased was wearing, were found torn as a natural consequence of dragging the body for about 90 steps. Therefore, the entire story of the prosecution that the quarrel took place at the Chabutara of the house in which injuries were caused to deceased-Fagna and thereafter he was dragged for 90 steps so to take him in the room where his body was found lying, is not supported by any credible evidence.

(ix) On the contrary the presence of the body of deceased-Fagna and the "Kumal" as found by the prosecution witnesses and also the fact that Fagna was habitual thief, leaves no manner of doubt that Fagna has made "Kumal" for theft and also took away some utensils, which were also recovered by the Investigating Officer, as evident from the recovery memo. No evidence regarding trail of blood stains for

90 steps while dragging the body allegedly from the Chabutara was found or could be led by the prosecution. Therefore the entire story of dragging the body of deceased-Fagna from Chabutara of the house to the room where body was found is totally unproved. Neither blood sample from the place of dragging was taken by the prosecution nor dragging was established by any scientific evidence. The death of Fagna was caused on account of house breaking in night, which is fully protected by the provisions of sections 104 & 105 I.P.C."

8. Shri Satish Kumar Tyagi, learned counsel for the informant submits that his argument have been noted by Co-ordinate Bench of this Court in its order dated 26.07.2023 and he reiterates and reaffirms the same. Paragraph no.2 of the order dated 26.07.2023 is quoted as under:-

"2. Shri Satsh Kumar Tyagi, learned counsel for the complainant submits as under:

(i) Recovery memo dated 29.10.1981 showing recovery of certain articles near 'Nakab' has not been exhibited and, therefore, the said recovery memo dated 29.10.1981 prepared by the Investigating Officer, cannot be read and relied by the accused-appellants.

(ii) Four persons from the accused side received simple injuries while four persons from the deceased side received simple injury and the deceased-Fagna died due to the injuries caused by the accused. Thus, it becomes undisputed that the incident took place on 29.10.1981 in the night of 28.10.1981 and due to the injuries caused by the accused, the deceased-Fagna died.

(iii) The prosecution has established its case beyond reasonable doubt and, as such, the conviction of the accused by the impugned judgement and order cannot be interfered with."

9. Shri O.P. Dwivedi, learned AGA has also reiterated and reaffirmed the argument advanced by the then learned AGA, which have been noted by the Co-ordinate Bench of this Court vide order dated 26.07.2023 in paragraph no.3. Paragraph no.3 is quoted as under:-

"3. Shri A.N. Mulla, learned AGA submits that the date and time of the incident cannot be disputed by the accused-appellants. The only dispute that may be raised is about the place of incident. The prosecution has established the guilt of the accused-appellants beyond reasonable doubt and, as such, the accused-appellants have been rightly convicted by the learned Trial Court."

10. Query put by the Court and reply thereof by the learned counsel for the complainant as well as learned AGA contained in paragraphs 4 and 5 of the order dated 26.07.2023 are also quoted as under:-

"4. On a query made by this Court to the learned counsel for the complainant and the learned AGA drawing their attention to the evidence of P.W.-2 (paragraph nos.7, 10 and 19) and the evidence of P.W.-3 (paragraph nos.5 and 7) that the date on which the incident took place was a dark night having no source of artificial light except one candle kept in a shelf ('Aala') near to the platform ('Chabutra') measuring 10 yds X 7 yds, which was immediately blown out by the accused persons the moment they came

and, thereafter, it is not known in the dark night that who beaten whom and by which weapon. Then, how the informant and other alleged eye witnesses could see 18 accused persons assigning them role/different weapons?

5. To this query, learned counsel for the complainant and the learned AGA jointly submitted that since the parties were known and related to each other, therefore, they could have identified them by the voice and body appearance. Therefore, dark night and non-availability of artificial light at the place of incident would not be fatal to the case of the prosecution, insofar as occurrence of the incident, recognizing the accused persons and other activities that took place, are concerned."

11. All the three learned counsels, however, taken us to the paper book and have refreshed their submissions by drawing attention to relevant parts of all the documents including reports, site plan and statement of witnesses.

12. That apart, elaborating and refreshing his argument the crux of argument of learned Senior Counsel is that when Koomal was being made in the house of Nathu for theft by deceased Fagna, action was taken by the accused side resulting in Fagna died on 29.10.1981 at about 8.00 PM. and in this respect a First Information Report No.756/1981 was registered from the side of deceased at about 2.00 AM, under sections 457, 511 IPC whereas from the side of accused, a cross First Information Report No.756-A/1981, under Sections 147, 148, 149, 302 IPC was registered. It was pointed that after Fagna died, the informant side attacked in revenge, wherein 4 persons, namely, Ram Singh, Dal Singh, Brahmjeet (informant) and Chhaman Lal were injured and from the accused side Khazan Singh, Atar Singh, Johari and Jai Singh were injured; the dead body of Fagna was recovered from the house of Nathu and utensils which were being taken away was found outside the house in the field just behind Koomal. Chabutara of the house of Fagna is the place of subsequent incident and it is incorrect to say that injures were caused to Fagna and even in presence of informant side Fagna was dragged to the house of Nathu; this clearly shows that Fagna died while making Koomal in the house of Nathu son of Khacheru and the first information report No.756A/1981 was lodged from the side of accused persons. He submits that this fact is supported by medical evidence as clay (wet soil) and grass on the body of Fagna was found. By drawing attention to various pages of the paper book it was submitted that subsequent FIR No.756A/1981 is ante time; there was no motive to commit such offence from the side of the accused persons; soil recovered from both places is similar which is not possible and as such place of incident is not ascertained and benefit of doubt must be given to the accused persons as per settled law; the accused never absconded after the incident that is also shows their bonafide that they have not committed any offence; there is no evidence that Koomal was fabricated by the accused side as alleged in the first information report; there was no recovery of any weapon in the present case; there was no trail of bloodstains in the entire passage of 90 steps as the allegation is that Fagna was beaten at his Chabutara and dragged 90 steps to the house of Nathu where the dead body was found; no bloodstained soil was recovered from this passage as such dragging of the body is not proved and is not corroborated by the ante-

mortem injuries suffered by Fagna. Lastly, it was submitted that there were total 18 accused persons whereas on the same set up facts, 4 accused persons have been acquitted on the ground of age and giving them benefit, therefore, the conviction of other accused persons is not sustainable in the eye of law.

13. In support of his argument learned Senior Counsel for the appellants has placed reliance upon the judgment of Hon'ble Apex Court in the case of Upendra Pradhan vs. State of Orissa, 2015 (11) SCC 124 to contend that on appreciation of law and evidence view favouring the accused persons is accepted as it is the human right of the accused persons. He has further placed reliance on the judgment of **Balaka Singh and Others vs. State of Punjab, AIR 1975 SC 1962** to contend that in case few accused have been acquitted on same set of facts, the entire prosecution version must be discarded and benefit of the same must be extended to the other accused persons also. It is a case of exercise of right to defence as the deceased Fagna was doing Koomal for the purpose of theft. He has also placed reliance on the judgement of Hon'ble Apex Court in the case of **Darshan Singh vs. State of Punjab, 2010 (2) SCC 333**, Paragraph 58 of the said judgment reads as under:-

"58. The following principles emerge on scrutiny of the following judgments:

(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.

(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened."

14. Per contra, Shri Satish Kumar Tyagi, learned counsel for the informant has refreshed his argument to the effect that the recovery memo dated 29.10.981 showing the recovery of certain articles near Koomal were not exhibited in the present case as the recovery memo was prepared in the first information report lodged by the accused persons No.756/1981 and law requires that unless it is exhibited in the present case, the same cannot be looked into and relied on by the accused persons. He has further submitted that in view of the fact that one person died and four persons received injuries from both sides clearly proves that the incident had taken place in the night of 28.10.1981 and in view of the recovery of bloodstained soil from two spots and shown in the site plan duly proved by the Investigating Officer clearly proves the date, time and place of occurrence and prosecution has proved his case beyond any shadow of doubt.

15. Learned A.G.A. adopting the argument raised by the learned counsel for the informant, however, submitted that date and time of the incident is not disputed and at the most dispute can be raised about the place of incident whereas the evidence of injured eye witnesses whose presence cannot be disputed, clearly proves the place of incident as well and nothing could be found contrary in the cross examination of the prosecution witnesses of fact as well as of the formal witnesses; the post mortem report and injury reports also support the prosecution version. Submission, therefore, is that the impugned judgment of conviction requires no interference.

16. Before proceeding further, it would be appropriate to refer to various relevant judgements of Hon'ble Apex Court as well as of this Court.

17. In **Krishna Mochi and others vs. State of Bihar, (2002) 6 SCC 81,** the Hon'ble Apex Court laid emphasis on realistic approach to be adopted by the criminal courts while appreciating evidence in criminal trial, paragraph 32 whereof is quoted as under:

"32. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it

equally suffers by wrong acquittals". I find that this Court in recent times has conscientiously taken notice of these facts from time to time……."

(Emphasis supplied)

18. In **Masalti vs. State of U.P.,** AIR 1965 SC 202, Hon'ble Apex Court in paragraph 14 observed as under:

"14. 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."

(Emphasis supplied)

19. **In Darya Singh vs. State of Punjab,** AIR 1965 SC 328, the Hon'ble Apex Court has also taken the view that related witness does not necessarily mean or is equivalent to an interested witness. A witness may be called interested only when he or she derives some benefit from the result of litigation; a decree in a civil case, or in seeing a person punished in a criminal trial, paragraph 6 whereof is quoted as under:

"6. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars."

20. In **Appabhai and another vs. State of Gujarat,** AIR 1988 SC 696, the Hon'ble Apex Court in paragraph 11 observed as under:

"11…….Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their, course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner….."

(Emphasis supplied)

21. Similar view has been taken in **State of A.P. vs. S. Rayappa and others,** (2006) 4 SCC 512 wherein it has been observed that it is now almost a fashion that public is reluctant to appear and depose before the court especially in criminal cases and the cases for that reason itself are

dragged for years and years, paragraph 6 whereof is quoted as under:

"6.....by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other reasons."

(Emphasis supplied)

22. **In Pulicherla Nagaraju @ Nagaraja Reddy v. State of AP**, (2006) 11 SCC 444, the Hon'ble Apex Court in paragraph 16 has held as under:

"16. In this case, we find that the trial court had rejected the evidence of PW1 and PW2 merely because they were interested witnesses being the brother and father of the deceased. But it is well settled that evidence of a witness cannot be discarded merely on the ground that he is either partisan or interested or closely related to the deceased, if it is otherwise, found to be trustworthy and credible. It only requires scrutiny with more care and caution, so that neither the guilty escape nor the innocent wrongly convicted. If on such careful scrutiny, the evidence is found to be reliable and probable, it can be acted upon. If it is found to be improbable or suspicious, it ought to be rejected. Where the witness has a motive to falsely implicate the accused, his testimony should have corroboration in regard to material particulars before it is accepted."

(Emphasis supplied)

23. In **Satbir Singh and others vs. State of U.P.**, (2009) 13 SCC 790, the Hon'ble Apex Court in paragraph 26 held as under:

"26. It is now a well-settled principle of law that only because the witnesses are not independent ones may not by itself be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon ..... "

(Emphasis supplied)

24. In **Jayabalan vs. U.T. of Pondicherry,** 2010 (68) ACC 308 (SC), the Hon'ble Apex Court in paragraph 21 held as under:

"21. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

(Emphasis supplied)

25. In **Dharnidhar vs. State of U.P**., (2010) 7 SCC 759, the Hon'ble Apex Court held that there is no hard and fast

rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case, paragraphs 12 and 13 whereof is quoted as under:

"12. There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of Jayabalan v. U.T. of Pondicherry [(2010)1 SCC 199], this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under:

" 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

…….

13. Similar view was taken by this Court in Ram Bharosey v. State of U.P. [AIR 2010 SC 917], where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the Court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown over-board, but has to be examined carefully before accepting the same.

14. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the Court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so called `interested witnesses' cannot be relied upon by the Court."

(Emphasis supplied)

26. In a very recent judgement rendered by Hon'ble Apex Court in **Baban Shankar Daphal and others vs. The State of Maharashtra**, 2025 SCC Online SC 137 in respect of testimony of witness which should not be discarded merely because of relation with victim, the Hon'ble Apex Court has, in paragraphs 27 and 28, held as under:

"27. One of the contentions of the learned counsel for the appellants is that the eyewitnesses to the incident were all closely related to the deceased and for prudence the prosecution ought to have examined some other independent eyewitness as well who were present at the time of the unfortunate incident. This was also the view taken by the Trial Court, but the High Court has correctly rejected such an approach and held that merely because there were some more independent witnesses also, who had reached the place of incident, the evidence of the relatives cannot be disbelieved. The law nowhere states that the evidence of the interested witness should be discarded altogether. The law only warrants that their evidence should be scrutinized with care and caution. It has been held by this Court in the catena of judgments that merely if a witness is a relative, their testimony cannot be discarded on that ground alone.

28. In criminal cases, the credibility of witnesses, particularly those who are close relatives of the victim, is often scrutinized. However, being a relative does not automatically render a witness "interested" or biased. The term "interested" refers to witnesses who have a personal stake in the outcome, such as a desire for revenge or to falsely implicate the accused due to enmity or personal gain. A "related" witness, on the other hand, is someone who may be naturally present at the scene of the crime, and their testimony should not be dismissed simply because of their relationship to the victim. Courts must assess the reliability, consistency, and coherence of their statements rather than labelling them as untrustworthy.

(Emphasis supplied)

27. In a recent judgement rendered by Hon'ble Apex Court in **Shahaja @ Shahajan Ismail Mohd. vs. State of Maharashtra**, (2023) 12 SCC 558 has observed that the appreciation of ocular evidence is a hard task and has summed up the judicially evolved principles for appreciation of ocular evidence in a criminal case, paragraphs 29 and 30 whereof is quoted as under:

"29. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

29.1 While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

29.2. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor

variations or infirmities in the matter of trivial details.

29.3 When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

29.4. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

29.5. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

29.6. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

29.7. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

29.8. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

29.9. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

29.10. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

29.11. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

29.12. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

29.13. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former

statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness. [See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : AIR 1983 SC 753, Leela Ram v. State of Haryana, AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012]

30. To put it simply, in assessing the value of the evidence of the eye-witnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."

(Emphasis supplied)

28. Paragraph 48 of **Pahalwan Singh and others vs. State of U.P.**, 2020 (6) ALJ 166 is quoted under:

"48. Thus, in view of aforementioned decisions of the Supreme Court, it is now a settled position of law that the statements of the interested witnesses can be safely relied upon by the court in support of the prosecution story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons who are closely related to the deceased. When their statements find corroboration by other evidence, expert evidence and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then there is no reason as to why the statement of so-called 'interested witnesses' cannot be relied upon by the Court. It would be hard to believe that the close relatives shall leave the real culprit and shall implicate innocent persons falsely simply because they have enmity with the accused persons.

(Emphasis supplied)

29. Insofar as the testimony of injured witness is concerned, this Court in **Kaptan Singh vs. State of UP,** 2020 (1) ADJ 106 (DB) has, in paragraph 20, observed as under:

"20. Close scrutiny of the evidence shows that the statements of (PW-1) Vimla Devi and (PW-2) Ram Singar Pandey are clear, cogent and credible. Theyhave been subjected to cross-examination, but they remained stick to the prosecution version and no such fact, contradiction or inconsistency could emerge, so as to create any doubt about their testimony. Keeping in view the fact that after incident, deceased as well as injured were taken to hospital and were admitted there and that on the same night

deceased Ram Niwas Rao has succumbed to injuries, it is apparent that the first information report of the incident was lodged without any undue delay. Version of (PW-1) Vimla Devi finds corroboration from testimony of (PW-2) Ram Singar Pandey and is fully consistent with medical evidence. It is also to be kept in mind that (PW-2) Ram Singar Pandey has himself sustained injuries in the same incident. In Jarnail Singh v. State of Punjab, (2009) 9SCC 719, the Supreme Court reiterated the special evidentiary status accorded to the testimony of an injured accused. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case, the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon. Similar view was expressed in the case of Krishan v. State of Haryana, (2006) 12 SCC 459. Hon'ble Supreme Court in Criminal Appeal Nos. 513-514 of 2014 Baleshwar Mahto and another v. State of Bihar and another, decided on 9.1.2017, has reiterated the law as under :

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone.

"Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881:1973 SCC (Cri) 563:AIR 1972 SC 2593], Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12], Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681], Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696], Bonkya v. State of Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113], Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163], Mohar v. State of U.P. [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472], Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302], Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] 29. While deciding this issue, a similar view was taken in Jarnail Singh v. State of Punjab [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107], where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the

reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2021] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana [(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the Courts below."

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein." In this very judgment, relationship between the medical evidence and ocular evidence was also discussed, based on number of earlier precedents, as under: "33. In State of Haryana v. Bhagirath [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] it was held as follows: (SCC p. 101, para 15)

"15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, the Court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the Court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

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because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein."

(Emphasis supplied)

30. In a recent judgement rendered by Hon'ble Apex Court in **Neeraj Sharma vs. State of Chhattisgarh,** (2024) 3 SCC 125 in respect of importance of injured witness in a criminal trial, the Hon'ble Apex Court has, in paragraphs 22 and 23, held as under:

"22. The importance of injured witness in a criminal trial cannot be over stated. Unless there are compelling circumstances or evidence placed by the defence to doubt such a witness, this has to be accepted as an extremely valuable evidence in a criminal Trial.

23. In the case of Balu Sudam Khalde v. State of Maharashtra 2023 SCC OnLine SC 355 this Court summed up the principles which are to be kept in mind when appreciating the evidence of an injured eye-witness. This court held as follows:

"26. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded."

(Emphasis supplied)

31. We have considered the submissions carefully and have gone through the statement of witnesses carefully.

32. PW.1-Dr. V.P. Agarwal is the doctor who has conducted the medical examination of injury suffered by Ram Singh, Dal Chand, Brahmjeet and Chamanlal, who were stated to be present

on the Chabutara when the fight had taken place. PW.2-Brahmjeet, PW-3-Ram Singh and PW.4-Dal Chand are of all injured eye witnesses and their injuries have been duly verified by PW.1-Dr. V.P. Agarwal. Perusal of their injury reports clearly shows that injuries on the upper part of the body may be simple in nature and as per PW.1 could have been caused by lathi at about 8.00 PM on 28.10.1981, therefore, their presence under these circumstances is not at all in doubt. It may also be seen that the defence version is that the several persons from the informant side were came there where such incident had taken place where they have received injuries in exercise of private defence and Harphool, one of the accused had admitted that he had gone to lodge the first information report with Nathu of the cross case.

33. The consistent stand taken by the prosecution witnesses, who were all injured eye witnesses, is that; first 18 persons from the accused side have came to Chabutara of the informant where the informant-Brahmjeet, Fagna, Ram Singh, Dal Chand and Chamanlal were sitting; all the accused persons armed with lathi and ballam and started beating them; deceased-Fagna also wielding lathi in his defence but he was surrounded by accused persons and dragged towards the house of Nathu and fabricated one Koomal (hole created in the house superstitiously to commit theft); all the injured prosecution witnesses, namely, PW.2-Brahmjeet, PW.3-Dal Chand, PW.4 Ram Singh are also intact even in their cross examination. Therefore, specific case is that Fagna was beaten at Chabutara and was dragged towards the house of Nathu. Site Plan clearly shows by arrow from Chabutara to the house of Nathu and 90 steps was marked where he was dragged.

34. PW.2-Brahmjeet had clearly stated that when they had gone to report the incident to police station the accused side was already present there and his report was not registered at that time. In his cross examination a suggestion was made to PW.2-Brahmjeet to the effect that they have gone to the house of Nathu to take away Fagna forcibly. This suggestion was categorically denied and with the denial it was stated that Dal Chand had informed them that Fagna had been killed by them and they are spreading utensils to create evidence. In respect of source of light on *Chabutara* it was clearly stated that there was a candle light and he could easily recognise the accused persons. It is not in dispute that both sides are very well known to each other and therefore, each one of them could have easily recognised each other even when the source of light is not so strong.

35. In his cross examination PW-3-Dal Chand had admitted to this extent only that when the accused persons have dragged Fagna to Nathu's house they have gone behind them with an object to free him, however, before that the accused persons have already fabricated Koomal and after seeing this they came back.

36. PW.4-Ram Singh narrating the same set of facts, in his cross examination has narrated the manner in which Fagna was taken to Nathu's house from *Chabutara*. He has clearly stated that by holding legs of Fagna they have dragged him; the distance is about 90 steps; he suffered injuries because of said dragging.

37. PW.5-Dr. L.M. Parikh have proved the post mortem report; there were as many as 16 ante mortem injuries on the body of the deceased; injuries no. 3, 4, 5 and 9 in the opinion of Doctor could have been caused by Ballam and he has further opined that injury no.10 and 13 could have been caused by dragging.

38. PW.6-Sub Inspector, Daya Ram Sharma has proved the *Panchayatnama* and the site plan prepared by him and the collection of bloodstained soil and plain soil. In his statement before the court he has categorically stated that he did not find any instrument made of iron for effecting *Koomal* (making hole for committing theft). He had also stated that *Koomal* which was effected was quite big and one person can easily pass through. He had also stated that Koomal was effected in bricks wall, therefore, his statement to the effect that no instrument to commit *Koomal* was found on the spot becomes important as *Koomal* could not have been made without any pointed iron rod or instrument.

39. PW.7-Head Constable Anokhe Lal have proved the chik report of the present first information report which was registered in G.D. No.10 at 2.45 AM. Nathu had lodged the first information report at 2.00 AM.

40. In the statement recorded under Section 313 Cr.P.C. accused Attar Singh in reply to question no.7 has stated that Fagna has committed theft; the villagers have gathered on the spot who caused injures to him and because of injuries caused by villagers, he died.

41. We have also gone through the site plan carefully. Site plan clearly indicates that *Chabutara* where the incident of fight had taken place as per the first information report, is about 90 steps away from the house of Nathu where the dead body of the deceased Fagna was found. It is also not in dispute that from the two first information reports it is clearly revealed that the incident had in fact taken place and both sides have received injuries. It is also not in dispute that dead body of the deceased Fagna was found inside the room near Koomal whereas the utensils which were allegedly being taken away by causing Koomal were shown and found outside the wall in the agricultural field. Admittedly, no instrument of effecting *Koomal* was found on the spot and was never recovered. Bloodstained soil was recovered from the spot i.e. *Chabutara* of the house of deceased Fagna. A challenge is being raised to the spot of occurrence to the effect that soil if collected from two spots must be different and therefore, the place of occurrence is not proved. The collection of bloodstained soil and plain soil from Chabutara of Fagna was duly proved by the formal witnesses. The dead body of the deceased was found inside the house of Nathu, therefore, this spot of occurrence is also not in question and soil was also recovered from that spot. Whereas the formal witnesses in this respect remain intact and minor discrepancy to the effect that the soil was not matching is of no consequence in case of direct ocular witnesses. In so far as the argument that bloodstained soil from the passage of 90 steps was not collected, therefore, dragging of the deceased from Chabutara to Nathu's house is not proved and this create doubt the entire prosecution version is concerned, it can be said to be a part of defective investigation, which in a case of ocular evidence of 3 injured witnesses is of no consequence. Further, 90 steps of passage is a passage used by public and when the

incident had taken place at 8.00 PM in the night undisputedly there must have been a huge movement on the passage in any case, of at least 18 persons from the side of the accused and several persons from the side of the informant. Moreover, being a common passage the same must have been used by the public as well, particularly because of the incident having been taken place as a common villagers have anxiety to go and watch as to what is happening, therefore, bloodstains on Kaccha passage must have fainted and not visible. Therefore, this by itself is sufficient to dislodge the ocular evidence of three injured witnesses. No doubt, the prosecution witnesses are the related witnesses, however, as the incident that had taken place on Chabutara of the deceased himself, the presence of his son and other related persons is quite natural that too after sunset at about 8.00 PM and coupled with the fact that they were injured witnesses and each of them have received injuries on the upper part of the body as well in the light of the judgments noted above their eye witness account of the incident cannot be doubted .

42. P.W.5-Dr. L.M. Parikh, who had conducted the post mortem, has stated that the injuries no.10 and 13 could have been caused by dragging. Use of Ballam, apart from the use of Lathi is also proved as he has clearly opined that injuries no.3,4,5 and 9 could have been caused by *Ballam*

43. It is the allegation of the prosecution that the first incident had taken place at the *Chabutara* of the deceased Fagna, thereafter, deceased was dragged towards Nathu's house by 18 accused persons. Four persons have suffered injuries from the informant side and when the informant went to lodge the first information report to the police station, which is about 7 km. Away, Nathu son of Khacheru was already sitting there. In the first information report it is alleged that after dragging the deceased Fagna to Nathu's house the accused persons were creating Koomal and therefore, it is clear that they were creating evidence in their favour and were present at the police station first to lodge the first information report, therefore, the information could not be registered. It is also on record that on lodging of the first information report by the accused side the Investigating Officer/Police Officer immediately left for the place and was present on the spot for quite long. Statement of PW.6-Sub Inspector-Dayaram Sharma reveals that on the basis of the first information report lodged at 2.00 AM, he had already proceeded to place of incident for investigation on the basis of the report lodged by Nathu son of Khacheru and PW-2-Brahmjeet has also stated that when he had gone to lodge the first information report Nathu is already sitting in the Police Station. It is, therefore, clear that he had reached the Police Station but the police did not lodge his report and therefore, it is not proved that the first information report was ante-time.

44. In so far as the source of light on *Chabutara* of the deceased Fagna is concerned, the prosecution case is that there was a candle light. The omission of the source of light in the first information report by itself is not material discrepancy in the case of prosecution inasmuch as the first information report is not an encyclopedia and once 18 persons have attacked and several persons have injured and one person has died it cannot be said that there was absence of light and dim light is sufficient as all the persons resident

of same village and were known to each other and could have recognised each other easily.

45. In so far as motive is concerned, although motive has been clearly alleged in the prosecution case, however, motive takes backstage in a case of direct ocular evidence and in the present case there are three injured witnesses whose presence on the spot is natural being family members.

46. So far as the argument that on the same set of facts, four persons have been acquitted, for this purpose, we have gone through the judgment of the trial court and in paragraph no.21 we find that accused Johari and Phool Singh were aged about 80 years and 75 years respectively whereas accused Dharampal and Jai Singh were aged about 14 years at the time of incident. Johari was aged about 90 years at the time of recording his statement under section 313 Cr.P.C., Jai Singh and Dharam Pal were aged about 16 years when their statements were recorded, the trial court has categorically taken into account the argument that all the four persons their old age and tender age was incapable of committing such offence and is given only benefit of doubt on the basis of their age and for this purpose the trial court has not considered any other facts on record and their acquittal is purely on the basis of their old age and tender age. For this purpose, the trial court has observed that the principle of *falsus in uno, falsus in omnibus* does not apply in India and therefore, they were accorded benefit of doubt.

47. In this view of the matter, the judgment relied on by the learned Senior Counsel for the appellants only relates to the law laid down by the Hon'ble Apex Court as to how the evidence is to be considered and perused. There is no quarrel with the law laid down, however, we find that on fact the judgment of Balaka Singh (supra) relied on by the learned Senior Counsel for the appellants is of no help to the appellants.

48. At this stage, we have also gone through the judgment of the trial court and we find that reasoning given by the trial court is perfectly just and proper. We, on our own appreciation of evidence on record, find no merit in the present appeal.

49. The appeal is accordingly **dismissed**. The conviction of surviving appellants no.2- Bani Singh son of Johari Singh, appellant no.3-Om Prakash son of Johari Singh, appellant no.7-Chittar son of Murari, appellant no.9-Serni son of Manglu, appellant no.13-Tota Ram son of Pratap Singh is confirmed. Since the appeal has been dismissed and conviction and sentence awarded by the trial court has been confirmed by us, their bail bonds are cancelled and sureties are discharged. The Chief Judicial Magistrate concerned is directed to take the surviving appellants into custody and send them to jail to serve out the sentence awarded by the trial court and confirmed by us.

50. Let a copy of this order be communicated by the Registrar (Compliance) to the Chief Judicial Magistrate concerned for compliance within a week.

51. The Chief Judicial Magistrate, is also directed to send his compliance report within one month to this Court.

52. Lower court record be sent to the concerned Court forthwith.