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HIGH COURT OF CHHATTISGARH, BILASPUR

DIVISION BENCH

CORAM: HON'BLE MR. T.P. SHARMA AND
HON'BLE MR. R.N. CHANDRAKAR, JJ.

Criminal Appeal No.12 of 2007

(Reserved for judgment on 16-1-2012)

APPELLANT:
(Presently on bail)

Khetro son of Deen Bandhu Sahu aged about 20 years, Occupation Labour resident of Behind the Priyadarshini Market, Jyoti Nagar, Khursipar, Police Station Chhaoni, District Durg (C.G.)

Versus

RESPONDENT:

State of Chhattisgarh, through District Magistrate, Durg, District Durg (C.G.)

Criminal Appeal No.14 of 2007

APPELLANT:
(Presently on bail)

Narayan S/o Shri Mahesh Sahu aged about 23 years Occupation Student Caste Sahu R/o L.A.V. Quarter No.15-D Zone-2, Khursipar, Police Station Chhawani District Durg (C.G.)

Versus

RESPONDENT:

State of Chhattisgarh Through District Magistrate District Durg (C.G.)

Criminal Appeal No.23 of 2007

APPELLANTS:
(In Jail)

1. Bhim Sen @ Bhim, son of Vrindavan Sahu, aged about 22 years, by caste Sahu, by profession Factory Worker.
2. Nilanchal Sahu, son of Vrindavan Sahu, aged about 23 years, Occupation Contractorship,

Both resident of Priyadarshini Market, Zone-II, Kursipar, P.S. Chhawani, District Durg (C.G.)

Versus

RESPONDENT:

State of Chhattisgarh Through Police Out Post Kursipar, P.S. Chhawani, District Durg (C.G.)

Criminal Appeal No.42 of 2007**APPELLANTS:**
(In Jail)

(Presently on bail)

1. Pradeep Sahu S/o Shri Baman Sahu aged about 19 years Occupation Supervisor Caste Sahu R/o Priyadarshini Market, Zone 2, Police Station Chhawani, District Durg (C.G.)
2. Rajendra Prasad @ Tukna S/o Shri Madhusudan Malik aged about 20 years Occupation Contractor R/o Priyadarshini Market Khursipar, P.S. Chhawani, District Durg (C.G.)

Versus**RESPONDENT:**

State of Chhattisgarh Through District Magistrate District Durg (C.G.)

AND**Criminal Appeal No.331 of 2007****APPELLANT:**
(Presently on bail)

Nagesar, S/o Sunder Rao, aged about 19 years, Occupation Contractorship in the Plant resident of Qr.No.16-A, Zone-2, Khursipar, Bhilai District Durg (C.G.)

Versus**RESPONDENT:**

State of Chhattisgarh through District Magistrate, District Durg (C.G.)

{Criminal appeals under Section 374 (2) of the Code of Criminal Procedure, 1973}

Present:

Mrs. Indira Tripathi, counsel for the appellant in Cr.A.No.12/2007

Mrs. Fouzia Mirza, counsel for the appellant in Cr.A.No.14/2007 and appellant No.2 in Cr.A.No.42/2007.

Miss Sharmila Singhai, counsel for the appellants in Cr.A.No.23/2007.

Mrs. Kiran Jain, counsel for appellant No.1 in Cr.A.No.42/2007.

Mr. B.P. Singh, counsel for the appellant in Cr.A.No.331/2007.

Mr. D.K. Gwalre, Govt. Advocate for the State/respondent.

JUDGMENT

(31 January, 2012)

The following judgment of the Court was passed by T.P. Sharma, J: -

1. Since all the above criminal appeals are arising out of the common judgment of conviction & order of sentence dated 7-12-2006 passed by the 10th Additional Sessions Judge (FTC), Durg, in Sessions Trial No.232/2005, they are being disposed of by this common judgment.



2. By these appeals the appellants have challenged legality & propriety of the judgment of conviction & order of sentence dated 7-12-2006 passed by the 10th Additional Sessions Judge (FTC), Durg, in Sessions Trial No.232/2005, whereby & whereunder the Additional Sessions Judge after holding the appellants guilty for formation of unlawful assembly armed with deadly weapons having its common object to commit murder of Korma Rao and in furtherance of common object of the assembly for committing the murder of Korma Rao, convicted the appellants under Sections 147, 148 & 302 of the IPC and sentenced each of them to undergo RI for one year & pay fine of Rs.1,000/-, in default of payment of fine to further undergo RI for two months; to undergo RI for one year & pay fine of Rs.2,000/-, in default of payment of fine to further undergo RI for three months; and to undergo imprisonment for life & pay fine of Rs.3,000/-, in default of payment of fine to further undergo imprisonment for six months, respectively.
3. Conviction is impugned on the ground that without any iota of evidence to connect the appellants with the crime in question, the trial Court has convicted & sentenced the appellants as aforementioned and thereby committed illegality.
4. As per case of the prosecution, on 13-6-2004 in the evening, unfortunate deceased Korma Rao was sitting along with Pramod (PW-1) & Pradeep near Priyadarshini Market Chowk, Khursipar, Bhilai. The accused/appellants were consuming ganja and liquor which was objected by Korma Rao (since deceased). During course of objection, Korma Rao slapped on appellant Rajendra @ Tukna on which appellant Rajendra called the accused/appellants and altercation took place between accused Pitambar & Korma Rao (since deceased). Korma Rao left the place along with Pramod (PW-1) and Pradeep by scooter. Again he came back to the spot at about 11.45 p.m.. All the accused/appellants who were present on the spot planned and accused Pitambar threw chilli powder on the eyes of Korma Rao, thereafter, Pitambar assaulted him by sword. When Korma Rao fell down, accused Pitambar took out a stone and assaulted Korma Rao by stone over his head. M. Gopi Rao (PW-8) tried to save his cousin Korma Rao then the appellants assaulted him also. Appellant Bhimsen assaulted him by stick. Ram Lalit Yadav (PW-9) has witnessed the incident. M. Gopi Rao (PW-8) informed the incident to M. Bhaskar Rao (PW-5) and took injured Korma Rao with Ram Lalit

for treatment, and they brought him to BSP Hospital, Bhilai. During course of treatment, Korma Rao died at 3 p.m. Korma Rao was examined firstly by Dr. S.K. Bhoi (PW-4) vide Ex.P-4 and following injuries were found: -

- (1) Incised wound of 14 c.m. x 2 c.m. x 2 c.m. over right side of head, part of right ear was found cut.
- (2) Lacerated wound of 10 c.m. x 2 c.m. x 2 c.m. over back of head with fracture of scalp bone.
- (3) Lacerated wound of 3 c.m. x 1 c.m. below left eye.
- (4) Lacerated wound of 2 c.m. x 1 c.m. over nose.
- (5) Lacerated wound of 3 c.m. x 1 c.m. over nose.
- (6) Nasal bone was broken.
- (7) Lacerated wound just above right eye.
- (8) Lacerated wound over lower lip.
- (9) Mandible and chin were fractured.
- (10) Superficial injury of 15 c.m. in length over back.
- (11) Superficial injury of 5 c.m. x 2 c.m. over back of head.
- (12) Lacerated wound over right wrist.

5. Dr. S.K. Bhoi (PW-4) has also examined M. Gopi Rao (PW-8) vide Ex.P-5 and found lacerated wound of 3 c.m. x 1 c.m. over back of head. M. Gopi Rao (PW-8) was under observation for two hours and, thereafter, he was discharged.

6. FIR was lodged by M. Bhaskar Rao (PW-5) – brother of deceased Korma Rao. Death of Korma Rao was intimated by the doctor vide Ex.P-32. Finally FIR was recorded vide Ex.P-24.

7. Investigating Officer after summoning the witnesses vide Ex.P-7 prepared inquest over dead body of the deceased vide Ex.P-8. Bloodstained & plain soil, bloodstained stone and broken pieces of bloodstained bricks were recovered from the spot vide Ex.P13. Dead body was sent for autopsy to Community Health Centre, Gunderdehi. Dr. Padmakar Mishra (PW-13) conducted autopsy vide Ex.P-26 and found following injuries: -

- (1) Incised wound of 4 c.m. x 1 c.m. x 1 c.m. over back of head with fracture of bone.
- (2) Two incised wounds of 2 c.m. x ½ c.m. x 1 c.m. and 2 c.m. x ½ c.m. over back of head.

- (3) Incised wound of 7.5 c.m. over left temporo parietal region.
- (4) Incised wound of 9 c.m. length over right parietal region.
- (5) Incised wound of 4 c.m. length just below right eye.
- (6) Incised wound over upper part of nose.
- (7) Fracture of right and left mandible bone.
- (8) Incised wound over ring finger of 2 c.m. in length with fracture of metacarpal bone.
- (9) Incised wound of 2 c.m. x ½ c.m. over wrist.
- (10) Incised wound of 20 c.m. x ½ c.m. over back.
- (11) Haematoma of fronto parietal bone of 20 c.m. length.

Injuries were ante-mortem in nature and mode of death was shock.

8. During course of investigation, appellant Rajendra Prasad @ Tukna was taken into custody, he made discloser statement of wooden plank vide Ex.P-10 and same was recovered at his instance vide Ex.P-22. Appellant Pradeep @ Kallu made discloser statement of stone vide Ex.P-11. Appellant Bhimsen @ Bhima made discloser statement of stick vide Ex.P-12 and same was recovered at his instance vide Ex.P-16. Accused Pitambar made discloser statement of sword & clothes vide Ex.P-23 and sword was recovered at his instance vide Ex.P-14. Bloodstained clothes of Pitambar were seized vide Ex.P-15. Bloodstained clothes of Rajendra Prasad @ Tukna were seized vide Ex.P-17. Bloodstained clothes of Bhimsen @ Bhima were seized vide Ex.P-18. Bloodstained clothes of Nilanchal were seized vide Ex.P-19. Bloodstained clothes of Khetro were seized vide Ex.P-20. Bloodstained clothes of Pradeep were seized vide Ex.P-21. Seized articles were examined by Dr. Padmakar Mishra (PW-13) vide Exs.P-27 to P-30. Spot map was prepared by the Patwari vide Ex.P-31. Investigating Officer also prepared spot map vide Ex.P-37. Morgue was recorded vide Ex.P-33 and on the basis of merg, FIR was registered vide Ex.P-6 and morgue was registered vide Ex.P-25.
9. Seized articles were sent for chemical examination vide Ex.P-38 and presence of blood over sword, clothes and stick of the appellants was confirmed vide Ex.P-40. Statements of the witnesses were recorded under Section 161 of the CrPC.
10. After completion of investigation, charge sheet was filed before the Court of Judicial Magistrate First Class, Durg, who committed the case to the Court of Sessions, Durg from where the Additional Sessions Judge

received the case on transfer for trial. Charge sheet against accused Pitambar was filed before the Juvenile Justice Board on account of his age.

11. In order to prove the guilt of the accused/appellants, the prosecution has examined as many as seventeen witnesses. The accused persons were examined under Section 313 of the CrPC in which they denied the circumstances appearing against them and pleaded innocence & false implication in the crime in question.
12. After providing opportunity of hearing to the parties, the Additional Sessions Judge convicted & sentenced the appellants in the aforesaid manner.
13. We have heard learned counsel for the parties, perused the judgment and record of the trial Court.
14. Learned counsel for the appellants vehemently argued that in the present case, evidence adduced on behalf of the prosecution is not sufficient for drawing inference that the appellants have committed the aforesaid offence. Evidence of M. Gopi Rao (PW-8) has not been relied upon by the trial Court, even for injury to him, therefore, his evidence is not sufficient to draw inference that the appellants have committed the offence. Alleged injured witness M. Gopi Rao (PW-8) has informed the incident to M. Bhaskar Rao (PW-5) – brother of the deceased who has lodged FIR vide Ex.P-6, but names of appellants Rajendra Prasad @ Tukna, Narayan, Nagesar & Khetro have not been mentioned in the FIR. Even the alleged witnesses i.e. M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) who claimed that they have witnessed the incident have not named appellant Khetro. They have deposed substantially against accused Pitambar who is juvenile offender. Even as per their evidence, Pitambar has caused fatal injuries over head of Korma Rao. Initially, as per evidence of these witnesses, the accused persons were consuming ganja & liquor which was objected by Korma Rao (since deceased), then the incident took place on sudden quarrel without any premeditation. The accused persons were not holding any weapon, alleged Pitambar was having sword and has caused injuries by sword & stone. Mere presence of the appellants is not sufficient to connect them for commission of offence or formation of unlawful assembly having its common object of committing murder of Korma Rao. Even there was no



occasion for causing such injuries to Korma Rao by the appellants. Even if evidence of M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) is considered as gospel truth, the act attributed to Pitambar and other appellants is separable and distinguishable.

15. Mr. B.P. Singh, learned counsel for appellant Nagesar in Cr.A. No.331/2007, submits that as per para 16 of evidence of M. Gopi Rao (PW-8), appellant Nagesar was not present on the spot. As per para 11 of evidence of Uday Chandrika (PW-10), appellant Nagesar was coming along with appellant Narayan, both these appellants were behind the mob and this witness has not seen appellant Nagesar assaulting anybody.

16. Mrs. Indira Tripathi, learned counsel for appellant Khetro in Cr.A. No.12/2007, submits that name of appellant Khetro has not been mentioned in the FIR and no description has been given by M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) of this appellant. In absence of any identification and description, evidence adduced on behalf of the prosecution is not sufficient to connect appellant Khetro with the crime in question.

17. Miss Sharmila Singhai, learned counsel for the appellants in Cr.A. No.23/2007, placed reliance in the matter of **Anjani Chaudhary v. State of Bihar**¹ in which the Supreme Court has held that absence of injury by pistol or lathi excludes the possibility of presence of accused who was armed with pistol and lathi, therefore, his conviction cannot be sustained. Miss Sharmila Singhai further placed reliance in the matter of **Sabbi Mallesu & Ors. v. State of Andhra Pradesh**² in which the Supreme Court has held that in absence of name of some accused in the FIR and in absence of proof of specific overt act attributed to said accused persons, conviction of the appellants with the aid of Section 149 of the IPC is not proper, however, accused whose names find place in the FIR and evidence relating to role attributed to them, are liable for conviction. Miss Sharmila Singhai also placed reliance in the matter of **Kuldip Yadav & Ors. v. State of Bihar**³ in which the Supreme Court has held that in case of discrepancy in medical and ocular evidence on material aspects, failure to examine witnesses present at scene of occurrence

¹ AIR 2011 SC 292

² AIR 2006 SC 2747

³ 2011 AIR SCW 2404

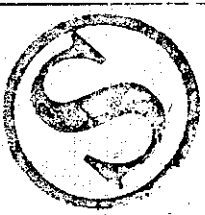
and failure to explain injuries on accused, conviction is not sustainable. Miss Sharmila Singhai relied upon the matter of **State of Karnataka v. Babu and others**⁴ in which the Supreme Court has held that if delay in lodging FIR is not explained and the prosecution failed to produce important witnesses, conviction is not sustainable. Miss Sharmila Singhai further relied upon the matter of **Shaji and others v. State of Kerala**⁵ in which the Supreme Court has held that in order to convict the appellants with aid of Section 149 of the IPC, the prosecution is required to prove common object and that the object was unlawful, in absence of such finding and proof as also any overt act on part of accused persons, mere fact that they were armed would not be sufficient to convict them with aid of Section 149 of the IPC. Miss Sharmila Singhai also relied upon the matter of **State of Rajasthan v. Arjun Singh and others**⁶ in which the Supreme Court has held that in case of clear evidence against some assailants and no clear evidence against other accused, other accused are entitled for acquittal.

18. On the other hand, learned State counsel vehemently opposes the appeals and submits that in the present case, initially there was no motive of common object but when deceased Korma Rao objected consuming of ganja & liquor, to the appellants, all the accused persons got annoyed, appellant Rajendra Prasad @ Tukna called all other accused persons, they came with sword and wooden plank/stick, and caused fatal injuries to deceased Korma Rao. This evidence is sufficient to establish that after some quarrel/altercation of the deceased with appellant Rajendra Prasad @ Tukna, all the appellants formed unlawful assembly and they came with sword and other dangerous weapons, otherwise there was no propriety for coming with deadly weapons and some members of the assembly have caused fatal injuries to Korma Rao. This clearly shows that all appellants have formed unlawful assembly and they were having definite knowledge of common object of the assembly. Object of the assembly was unlawful and in furtherance of common object of the assembly, members of the assembly have caused fatal injuries to Korma Rao. Learned State counsel further submits that evidence adduced on behalf of the prosecution is sufficient for conviction

⁴ AIR 1994 SC 31

⁵ (2011) 2 SCC (Cri) 857 : (2011) 5 SCC 423 : 2011(4) C.G.L.J. 121 (SC)

⁶ (2011) 9 SCC 115



of the appellants and by convicting and sentencing the appellants, the trial Court has not committed any illegality.

19. In order to appreciate the arguments advanced on behalf of the parties, we have examined the evidence adduced on behalf of the prosecution.

20. In the present case, homicidal death of Korma Rao as a result of fatal injuries found over his body has not been substantially disputed on behalf of the appellants. Even otherwise, it is established by evidence of Dr. S.K. Bhoi (PW-4), injury report Ex.P-4, evidence of Dr. Padmakar Mishra (PW-13) and autopsy report Ex.P-26 that death of deceased Korma Rao was homicidal in nature.

21. As regards complicity of the appellants in the crime in question, conviction of the appellants is substantially based on evidence of M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) – alleged eyewitnesses.

22. As per evidence of M. Gopi Rao (PW-8), on 13-6-2004 at about 11.45 p.m. all accused/appellants were sitting at Priyadarshini Market Square, they were consuming cigarette & ganja, his brother Korma Rao (since deceased) objected appellant Rajendra Prasad @ Tukna, at that time Pramod (PW-1) & Pradeep were also present, thereafter, deceased Korma Rao left the place of incident along with Pramod (PW-1) & Pradeep, and after leaving them at their houses, Korma Rao again came back to the spot. Juvenile offender Pitambar @ Patro threw chilli powder over the eyes of Korma Rao and thereafter assaulted him by sword, other appellants Bhimsen, Nilanchal & Pradeep also assaulted him by sword & stick, and remaining appellants were also present on the spot. M. Gopi Rao (PW-8) reached to the spot. The accused persons also threw chilli powder over him and assaulted him. Bhimsen assaulted him by sword over back, Pitambar assaulted him by stick and Nilanchal & Pradeep also assaulted him on which he rushed towards his house for calling relatives. After some time, he came back and at that time, Korma Rao was lying unconscious. Pitambar @ Patro after throwing a big stone over Korma Rao fled away from the spot along with all appellants. He along with Ram Lalit Yadav (PW-9) brought Korma Rao to Sector-9 hospital and during course of treatment Korma Rao died. Ram Lalit Yadav (PW-9) has substantially corroborated the evidence of M. Gopi Rao (PW-8). Defence has cross-examined M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) at length.

23. While convicting and sentencing the appellants under Section 302 read with Section 149, 147 & 148 of the IPC, the trial Court has acquitted them of the charge under Section 307 read with Section 149 of the IPC relating to witness M. Gopi Rao (PW-8). Judgment of the trial Court reveals that evidence of M. Gopi Rao (PW-8) relating to injuries caused to him i.e. by which appellant and by which weapon, has not been proved. Likewise, as per his evidence when he tried to save deceased Korma Rao, he was assaulted by Bhimsen which shows that the appellants have not formed unlawful assembly for committing attempt to commit murder of M. Gopi Rao (PW-8). However, the trial Court has relied upon the evidence of M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) for commission of murder of Korma Rao in furtherance of common object of the assembly.

24. In his detailed cross-examination, M. Gopi Rao (PW-8) has deposed in para 6 of his evidence that he has seen the incident from 250 mtrs. and he was hiding himself, at the time of incident there was light, but subsequently light was put off. In para 7 of his evidence, he has admitted that although he brought injured Korma Rao from the place of incident to Sector-9 Hospital, Bhilai, after passing in front of Police Stations Khursipar, Bhilai Nagar & Supela, but he has not lodged FIR or informed the police over phone; he has explained that at the time of bringing injured Korma Rao to the hospital, Korma Rao was serious. Injury report clearly reveals that Korma Rao was badly injured. This witness has admitted in para 10 of his cross-examination that they have also engaged a counsel to represent them. In para 11, he has further deposed that first time he is deposing the fact that appellants Bhimsen, Nilanchal & Pradeep have assaulted the deceased by stick & sword. He has informed the police about throwing of chilli powder over his eyes. As per para 14 of his cross-examination, the appellants assaulted 6-7 times with stick & sword over his head and they have also assaulted by hands & fists. He has denied the suggestion in para 15 that on account of previous enmity with other persons, unknown persons had caused injuries to Korma Rao and to him. In para 16 of his evidence, he has admitted that at the time of incident, there was a marriage function in the ward, there was light facility, Nagesh was not present on the spot and he came later on.

25. In para 6 of cross-examination, Ram Lalit Yadav (PW-9) has deposed that there was light facility. He has admitted in para 7 of his evidence that he along with M. Gopi Rao (PW-8) had taken injured Korma Rao to hospital. In para 8, he has admitted that appellant Bhimsen has not assaulted Korma Rao.
26. As per evidence of these witnesses, they have not informed the police immediately, and they have informed M. Bhaskar Rao (PW-5) – brother of the deceased, who has lodged FIR vide Ex.P-6 at 1 a.m. in the night after 1.15 hours of the incident.
27. Injuries found over the body of Korma Rao reveal that fatal injuries including multiple fractures were found on vital part of head. In these circumstances, it was work of emergency for these witnesses to save the life of Korma Rao. Therefore, non-lodging of FIR by these witnesses immediately is not fatal. As held by the Supreme Court in **Babu's** case (supra), delay in lodging FIR by itself is not fatal to the prosecution, if it is explained properly.
28. Names of accused Pitambar, appellants Bhimsen, Nilanchal & Pradeep have been mentioned in the FIR Ex.P-6. Statement of M. Gopi Rao (PW-8) under Section 161 of the CrPC has been recorded vide Ex.D-1 on same day i.e. 14-6-2004 which reveals names of Pitambar, Bhimsen, Nilanchal, Pradeep, Narayan, Nagesh & Rajendra Prasad @ Tukna. As per Ex.D-1, Pitambar after throwing chilli powder over the eyes of Korma Rao assaulted him by sword and also threw stone over his head. As per Ex.D-1, aforesaid accused/appellants were present on the spot, they were called by appellant Rajendra Prasad @ Tukna, earlier they were not present and when they came, at that time, they were having chilli powder and sword.
29. M. Gopi Rao (PW-8) has very specifically deposed that at the time of incident all appellants were present on the spot and they were consuming cigarette & ganja. Altercation took place between Korma Rao (since deceased) & Rajendra Prasad @ Tukna, thereafter, Korma Rao left the place along with Pramod (PW-1) & Pradeep and after leaving them, he again came back to the spot, at that time accused Pitambar threw chilli powder over his eyes and assaulted him by sword & stick, and again accused Pitambar assaulted Korma Rao by a big stone over his head.

30. M. Gopi Rao (PW-8) is relative of Korma Rao (since deceased), but his evidence cannot be discarded only on the ground of his relation. Even otherwise, a close relative would be the last to screen the real culprit and falsely implicate an innocent person.
31. Ram Lalit Yadav (PW-9) has corroborated the evidence of M. Gopi Rao (PW-8) that all accused/appellants were present on the spot, accused Pitambar & others were assaulting Korma Rao by sword & stick, and Pitambar assaulted Korma Rao by throwing a big stone over his head.
32. As per Dr. Padmakar Mishra (PW-13), nine incised wounds were found over body of the deceased along with fracture and big haematoma. However, Dr. S.K. Bhoi (PW-4), who has examined injured Korma Rao (since deceased) for the first time at 12.35 a.m. in the night, has noticed twelve injuries and out of twelve, only one was incised wound and others were lacerated wounds.
33. As held by the Supreme Court in **Anjani Chaudhary's** case (supra) and **Kuldip Yadav's** case (supra), in case of substantive discrepancy and inconsistency between ocular and medical evidence, conviction is not safe.
34. Virtually, in the present case, both the doctors have noticed injuries over same parts of the body of the deceased, almost sizes were also same, but there is discrepancy relating to nature of injuries. As per Dr. Padmakar Mishra (PW-13), nine injuries were incised wounds and as per Dr. S.K. Bhoi (PW-4), only one injury was incised wound and remaining were lacerated wounds. As per evidence of both these witnesses/ doctors, most of the injuries were upon head where thin muscles wound be found and some times, lacerated wound appears as incised wound which can be termed as incised looking wound. Dr. S.K. Bhoi (PW-4) has examined badly injured Korma Rao at 12.35 a.m. and Korma Rao died at 4 a.m. (intimation given by the doctor vide Ex.P-32), within 2 ½ hours of such first examination. Considering nature of injuries, their size and emergency, it would not be possible for the examining doctor to record detailed and minute description of injuries, it was his primary duty to save the life of injured. Therefore, discrepancy relating to nature of injuries, whether it was incised or lacerated, would not effect the credibility of medical or ocular evidence.

35. In Ex.P-32, the doctor has recorded the history of assault that it was by sword and a big hard stone. He has not mentioned the name of any other weapon. As per the requisition for medical examination of Korma Rao, Ex.P-34, he was assaulted by sword & stone. These facts find support from evidence of M. Gopi Rao (PW-8) that Korma Rao was assaulted by sword and stone which also find in Ex.D-1. This shows that only accused Pitambar @ Patro has assaulted the deceased, however, all appellants were present on the spot. Korma Rao has not objected Pitambar @ Patro, but has objected the activities of appellant Rajendra Prasad @ Tukna. Rajendra Prasad @ Tukna has not immediately reacted, but Pitambar @ Patro has assaulted Korma Rao at the time of consuming cigarette or liquor or ganja. There was no propriety for keeping dangerous weapon sword or dangerous object chilli powder that too near the place where marriage function was going on. Sword is not a small article. In the present case, sword recovered from accused Pitambar was of 34" in length i.e. about 3 ft. and it was clearly visible to all appellants. Pitambar used the said sword. This shows that all appellants were having sufficient knowledge that injuries would be caused by use of sword, thereby sufficient injuries for causing homicidal death of the person would be caused. In the present case, Pitambar has not made single assault of sword, but this is a case of more than nine assaults by sword. As per evidence of M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9), the appellants chased Korma Rao and accused Pitambar assaulted him which shows their active participation in the commission of incident.

36. The deceased died as a result of aforesaid multiple injuries caused by sword & stone. This overt act and presence of the appellants along with accused Pitambar while he was causing injuries to Korma Rao and not objecting Pitambar, inter alia, promoting his act by chasing Korma Rao are sufficient to establish the fact that all appellants have formed unlawful assembly and its object was also unlawful, and that in furtherance of common object of unlawful assembly, Pitambar has caused injuries by sword and thereafter, he has assaulted the deceased by a big stone over his head. Definitely, at the time of causing injuries by sword to deceased Korma Rao by accused Pitambar, the appellants were having definite knowledge, and Pitambar has caused injuries to the deceased in furtherance of common object of the assembly. However,

Pitambar, after causing injuries with sword, took out a stone lying in the place of incident and by throwing it over the head of the deceased while he was lying on floor, has caused further injury to the deceased. This shows the grave intention of causing homicidal death of Korma Rao by accused Pitambar. However, the prosecution has not adduced any evidence to show that common object of the appellants was also of causing homicidal death with intent to cause death of Korma Rao.

37. It appears from evidence of M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) that all of sudden accused Pitambar has taken out the stone and has caused further injury, but at the time of causing injury by sword, all appellants were having knowledge, inter alia, all appellants were having definite knowledge that by aforesaid injuries homicidal death of Korma Rao may be caused. Although there are discrepancies, contradictions and omissions in evidence of M. Gopi Rao (PW-8) & Ram Lalit Yadav (PW-9) and in their previous statements, but their evidence cannot be discarded only on the ground of trivial discrepancies, omissions and contradictions. Their evidence is sufficient to establish the fact that all appellants have formed unlawful assembly having its object to cause homicidal death of deceased Korma Rao. However, in absence of further evidence, common object of the assembly was not for commission of culpable homicide amounting to murder of Korma Rao and at the time of causing injury, accused Pitambar has exceeded the common object for which he may personally be liable. Initially, there was no propriety for causing such homicidal death of deceased Korma Rao and when the act of Rajendra Prasad @ Tukna was objected by Korma Rao, the appellants chased Korma Rao and accused Pitambar caused such injuries. Consequently, the acts attributed to all appellants squarely fall within the ambit of Section 304 Part-II of the IPC. In absence of any other evidence, it is difficult to hold that the appellants were armed with deadly weapons.

38. While convicting & sentencing the appellants under Sections 147, 148 & 302 of the IPC, the trial Court has not considered aforesaid facts and thereby committed illegality. Evidence adduced on behalf of the prosecution is sufficient to prove commission of offence under Sections 147 & 304 Part-II of the IPC against all appellants, but not sufficient to prove commission of offence under Sections 148 & 302 of the IPC.

39. Consequently, Cr.A.Nos.12/2007, 14/2007, 23/2007, 42/2007 and 331/2007 are partly allowed. Conviction & sentences imposed upon the appellants under Section 147 of the IPC are hereby maintained, however, conviction & sentences imposed upon them under Section 148 of the IPC are hereby set aside and they are acquitted of the said charge. Conviction of the appellants under Section 302 of the IPC is altered to Section 304 Part-II of the IPC and they are hereby sentenced to undergo RI for six years & fine of Rs.3,000/- each, in default additional RI for six months.
40. Appellants Khetro, Narayan, Nagesar & Rajendra Prasad @ Tukna are on bail. Their bail bonds are discharged and they shall surrender immediately before the Court of 10th Additional Sessions Judge, Durg or its successor-in-office, for serving remaining sentence.
41. Appellants Khetro & Narayan were in custody from 14-6-2004 to 28-9-2004 and from 7-12-2006 to at least till 19-3-2007. Appellant Nagesar was in custody from 14-6-2004 to 22-9-2004 and from 7-12-2006 to at least till 8-5-2007. Appellant Rajendra Prasad @ Tukna was in custody from 14-6-2004 to 12-10-2004 and from 7-12-2006 to at least till 19-3-2007. They are entitled for set off for the aforesaid period of detention already undergone by them.
42. Appellant Bhimsen @ Bhim was in custody from 14-6-2004 to 1-11-2004, thereafter, he is in custody since 7-12-2006. Appellant Nilanchal Sahu was in custody from 14-6-2004 to 12-10-2004, thereafter, he is in custody since 7-12-2006. Appellant Pradeep Sahu was in custody from 14-6-2004 to 18-10-2004, thereafter, he is in custody since 7-12-2006. They are also entitled for set off for the aforesaid period of detention already undergone by them.

Sd/-
T.P. SHARMA
Judge

Sd/-
R.N. Chandrakar
Judge