



2026:AHC-LKO:6382-DB

**HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW**

A.F.R.

Reserved on: 30.10.2025

Delivered on: 29.01.2026

CRIMINAL APPEAL No. - 84 of 2010

Kallu @ Raj Kumar And Another

.....Appellant(s)

Versus

State of U.P.

.....Respondent(s)

Counsel for Appellant(s)	:	Rajiv Singh, Kunwar Mukul Rakesh, Kunwar Sushant Prakash, Smriti
Counsel for Respondent(s)	:	Govt. Advocate

Along with :

1. Criminal Appeal No. 2695 of 2009:

Khushi Ram

Versus

State of U.P.

2. Criminal Appeal No. 212 of 2010:

Chatra Pal

Versus

State of U.P.

HON'BLE ABDUL MOIN, J.

HON'BLE MRS. BABITA RANI, J.

(Delivered by Hon'ble Mrs. Babita Rani, J.)

1. Heard Sri Kunwar Mukul Rakesh assisted by Sri Kunwar Sushant Prakash, Sri Harish Chandra, learned Amicus Curiae, and Ms. Smriti, learned counsels for the appellants, Sri Umesh Verma along with Sri G.D. Bhutt, learned Additional Government Advocates, in Criminal Appeal Nos. 84 of 2010, 2695 of 2009 and 212 of 2010 respectively.

2. This common judgment will dispose of the CrI. Appeal Nos. 2695 of 2009 in re: Chhatra Pal v. State of U.P., 84 of 2010 in re: Rajkumar @ Kallu v. State of U.P. and 212 of 2010 in re: Omkar v. State of U.P. which have been directed against the judgment and order dated 30.10.2009 passed by learned Additional Sessions Judge, Court Number 5, Unnao in trial number 181/2005, in re: State v. Chhatra Pal and others bearing crime number 1022/2004 wherein charges were framed under Sections 396 and 412 of

Indian Penal Code, 1860, Police Station Kotwali, District Unnao and whereby the appellants/accused have been convicted for the commission of offence punishable under Section 396 of the Indian Penal Code, 1860 and have been sentenced for life imprisonment and a fine of Rs. 20,000/- each and two years simple imprisonment in case of non-payment of fine. However, the appellants were acquitted from the charges of section 412 of Indian Penal Code, 1860. Accused Omkar was acquitted of all charges levelled against him. Hence, instant appeals have been filed by accused Chhatra Pal, Kallu, Mannilal and Khushi Ram, against conviction recorded under Section 396 of Indian Penal Code.

3. The First Information Report (Exhibit Ka.2), in the instant case was lodged by the informant PW3 Balwant Singh on 25.7.2004 at 3:15 AM on the basis of Tahrir (Exhibit Ka.1), written by him with the thumb impression of Krishna Sharma, at Police Station Kotwali, District Unnao.

4. Brief facts of the case relevant for the purpose of disposal of these appeals are that on 24/25.7.2004, at 2:30 AM, when Smt. Krishna Sharma and her family members were sleeping on the rooftop of their house, some unknown criminals illegally entered their house and reached on the rooftop with lathis and dandas (Exhibit Ka8 and Ka9). Upon being resisted by her son, namely Ved Prakash, and husband, Shivkumar, the unknown criminals attacked all of them with lathis and danda and inflicted several serious and fatal injuries on Krishna Devi, Kalpana, Ved Prakash, and Shiv Kumar and fled away from the scene. While the injured victims were being taken to the hospital, one of the injured namely Ved Prakash succumbed to injuries on the way and Kalpana and Shivkumar were referred to District Hospital, Kanpur for further treatment as they were in critical condition. Meanwhile, Krishna Sharma was admitted in Civil Hospital, Unnao.

5. On the basis of the above tehrir (Exhibit Ka.1), a case under Section 460 of the Indian Penal Code, 1860 (IPC) was registered at 3:15 AM on 25.07.2004. The investigation proceedings were initiated and during the investigation, the offence under Section 460 of IPC was converted into Section 396 of IPC. After the death of the injured, namely, Kalpana Sharma, Ved Prakash, and Shiv Kumar was reported, the inquest proceedings and post-mortem examination of dead bodies were conducted. During investigation, the statement of eye witness Kumari Shail (PW2) and injured Krishna Sharma (PW1) were recorded. The accused, Kallu @ Rajkumar and

Chhatra Pal were arrested on 07.08.2004. They made the disclosure statement and in consequence to it, the recovery was affected on the pointing out of accused.

6. Accused Khushi Ram was arrested on 09.08.2004 and he also made a disclosure statement leading to recovery of looted articles and danda used in commission of offence. Since the names of the accused Suresh Bengali and Man Singh surfaced in the confessional statements of accused Kallu, Chhatra Pal and Khushi Ram as well, they were arrested and put to test identification parade which was conducted in presence of Krishna Sharma and Kumari Shail. On not being identified as an accused by Krishna Sharma and Kumari Shail, investigation against both was dropped accordingly.

7. Since the remaining accused could not be arrested during the investigation, therefore, after completion of necessary investigation and necessary formalities, charge-sheet under Section 173 of Code of Criminal Procedure, 1973 (CrPC) was presented in the court against accused Chhatra Pal, Kallu and Khushi Ram, to face trial under Section 396 and 412 of IPC. Subsequently, accused Omkar was also arrested and after completion of investigation against him, supplementary charge sheet was filed against him.

8. Copies of the chargesheet were provided to the accused. The case was committed to the Court of Sessions. On finding a prima facie case involving commission of offence punishable under Sections 396 and 412 IPC, the accused were charge-sheeted accordingly. They pleaded not guilty to the charges and claimed trial.

9. To substantiate its case, the prosecution examined as many as 12 witnesses, namely Krishna Sharma (PW1), Kumari Shail (PW2), Balwant Singh (PW3), Vishvanath (PW4), Dr. Rameshpati Tiwari (PW5), Inspector Devendra Mishra (PW6), Inspector Suresh Babu (PW7), Inspector Suryanath Yadav (PW8), Dr Anil Kumar Tiwari (PW9), Inspector in Charge (PW10), Chottelal Pal (PW11) and Dr Ram Kishore (PW12) in all, besides placing reliance upon the documentary evidence, and thereafter, the prosecution evidence was closed by learned Additional District Government Counsel.

10. Thereafter, statements of the accused under Section 313 of CrPC were recorded. They pleaded innocence and denied the incriminating circumstances appearing against them. However, the accused chose not to adduce any ocular evidence in support of their innocence. They filed the

copies of telegrams addressed to higher authorities, in order to prove their innocence in the documentary evidence.

11. Upon appraisal of the evidence produced on record and considering the contentions raised on behalf of accused and prosecution, the learned Trial Court, while acquitting the appellants under Section 412 of IPC, found them guilty for commission of the offences punishable under Section 396 of IPC and sentenced them for life imprisonment, vide judgement and order dated 13.10.2009. However, co- accused Omkar was acquitted from all the charges.

12. Being aggrieved by the impugned judgement and order dated 13.10.2009, appellants-accused have preferred the instant appeals.

13. Although arguments advanced across the bar, in this case, are prolix enough but we propose to deal with only those arguments which have a bearing on the merits of case.

14. Learned counsels for the appellants vehemently argued that the impugned judgment of conviction and order on quantum of sentence was liable to set aside as the findings given by learned trial court were perverse being based on mis-appreciation of evidence produced on record. The learned trial court had ignored several material lacuna of prosecution which had rendered the prosecution story highly improbable and doubtful. First Information Report is ante-dated and ante-timed, which clearly emerges from a perusal of record and from material contradictions in the statements of PW3 and PW4, but this factum has not been addressed by learned trial court in the impugned judgment. It has been further emphasized in the arguments that although presence of PW1 and PW2 on the place of occurrence may not be disputed, but their evidence regarding the complicity of accused in commission of offence and their identification of the accused in the darkness of night, was highly improbable, unnatural, and unworthy of any credit. No source of light has been established on record, therefore, there was no occasion for PW1 and PW2 to identify the real offenders.

15. In this regard, it is apt to state that the legal position regarding the significance of FIR in a criminal case has been elaborately discussed by the Hon'ble Supreme Court and the Hon'ble High Courts at several occasions. One such instance is the case of ***Thulia Kali v. State of Tamil Nadu (1972) 3 SCC 393***, wherein the Hon'ble Supreme Court made the following

observations:

"12....First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as name of eye witnesses present at the scene of occurrence."

16. It was vehemently argued that for the offence punishable under Section 396 of IPC, there must be five or more than five persons involved in the offence for recording the conviction and therefore, the learned Trial Court erred in invoking and applying Section 396 of IPC against the appellants. Accordingly, the judgment of conviction and order on sentence deserves to be set aside on this ground alone. Reliance has been placed on the judgment of **Manmeet Singh Alias Goldie vs. State of Punjab 2015(7) SCC 167**, wherein the Hon'ble Supreme Court found the charges under Section 396 of IPC levelled against the accused as unsustainable as the fact of involvement of five or more persons in the commission of the offense had not been proved.

17. Further reliance in this regard has been placed on **Raj Kumar alias Raju v. State of Uttaranchal (Now Uttarakhand) 2008 SCC OnLine SC 631** wherein the Hon'ble Supreme Court held that the offense of dacoity cannot be said to be established in the absence of a finding to the effect of involvement of five or more persons.

18. The contention of the appellants is that in absence of any material on record pertaining to the offence under Section 396 of IPC, the investigating officer filed charge sheet only against three accused persons under Section 396 and 412 of IPC. Further contention is that in spite of the fact that the ingredients of Section 396 IPC were not satisfied, the learned court concerned while taking cognizance on the case, committed it to the Court of Sessions and learned Court of Sessions, framed the charges against the appellants. Therefore, the conviction and sentence order passed by learned trial court deserves to be set aside in light of law laid down by the Honble Apex Court in **Manmeet Singh** (supra) and **Raj Kumar** (supra).

19. Further contention is that the investigating officer has conducted the investigation in a casual and lackadaisical manner and no test identification

parade pertaining to appellants was conducted during investigation. If during the investigation, no identification parade was conducted, then a witness identifying the accused for first time in the court can neither be treated as reliable, nor is it proper to base any conviction on such identification.

20. The significance of the test identification parade in criminal jurisprudence has been discussed by the courts in a catena of cases. The test identification parade is an essential element of investigation and the Hon'ble Supreme Court, in the case of ***Dana Yadav @ Dahu v. State of Bihar, (2002) 7 SCC 295*** made the following observations regarding the evidence of identification for the first time in court:

"38. In view of the law analysed above, we conclude thus:-

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

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(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first Information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

(Emphasis by Court)

21. It has also been argued that the medical evidence pertaining to Krishna Sharma PW1 did not establish that she got injured during the commission of offence as she has been admitted via accidental register. Learned counsel for appellants further argued that appellants Kallu and Mannilal were kept in illegal detention and ultimately shown to be arrested on 07.08.2004, per which telegrams were sent to high-ups by their family members, but learned

trial court failed to appreciate these facts and circumstances and passed the conviction order and recorded the order of sentence, merely on the basis of whims and caprices, ignoring the fundamentals of criminal jurisprudence. During trial, statement of accused under Section 313 of CrPC was not recorded according to the procedure prescribed and therefore accused could not avail proper opportunity of being heard. With these broad submissions, it was argued that the impugned judgement was liable to be set aside, the appeals deserved to be accepted, and the appellants acquitted of the offences for which they had been held guilty and convicted. To fortify the argument, learned counsel for appellants placed reliance on judgments of ***Manmeet Singh Alias Goldie v. State of Punjab, 2015 (7) SCC 167; Marudanal Augusti v. State of Kerala 1979 SCC OnLine SC 199; Kalicharan & Others v. State of Uttar Pradesh, 2022 SCC OnLine SC 1718; Dr S. L. Goswami v. State of Madhya Pradesh, 1972 SCC OnLine SC 11 and Hasanbhai Valibhai Qureshi v. State of Gujarat.***

22. Per contra, it was argued by learned AGA for respondent – state that the findings given by learned trial court were well discussed and reasoned. The evidence produced on record has been properly appreciated and no fault could be found in the same. From the testimony of PW1 and PW2, the complicity of the accused in the commission of the offence has been fully established and no contradictions as such regarding identification of accused in the testimony of PW1 and PW2 have surfaced on record. The gravity of the offence committed by the accused can be assessed by the fact that while committing the offence of the dacoity, the accused inflicted injuries not only on PW1, but also on her husband, son and daughter-in-law in such brutal manner that shortly thereafter, the three of them namely Shiv Kumar, Ved Prakash and Kalpana succumbed and the only surviving injured Krishna Devi was admitted in hospital for about a week for treatment. It was, therefore, argued that the appeals being devoid of any merit are liable to be dismissed.

23. We have given due deliberations to the contentions as raised by learned counsel for appellants and learned AGA and have scrutinised the materials available on record with their able assistance.

Findings:-

24. Admittedly, the offence was committed in the night when almost every

ordinary person was supposed to be in deep sleep. The version of the prosecution, which is not in dispute, is that on 24/25.07.2004, when Smt. Krishna Sharma was sleeping on rooftop of her house with her family at about 2:30 AM, some unknown offenders entered in her house and committed the offence of dacoity. During the commission of the offence and as a result of expression of protest by family members, the offenders indiscriminately attacked with lathi and danda, which they were carrying at the time of offence and resultantly, husband of Krishna Sharma namely Shiv kumar, her son Ved Prakash and daughter-in-law namely Kalpana died shortly after occurrence and Krishna sustained life threatening injuries. PW1 was admitted in civil hospital, Unnao at about 4.40 AM.

25. The First Information Report was registered in the concerned police station at about 3:15 AM against unknown persons by PW3. It brooks no dispute that the accused persons were not named in the FIR and at the time of registration of the FIR, they were not known to the informant PW3. It is during investigation that name of the appellants came to light.

26. After registration of the FIR, the investigation was handed over to the senior inspector Shri Ram, who had conducted the inquest proceedings of deceased Ved Prakash and prepared the inquest report. During investigation, he prepared the site plan of the place of occurrence vide Exhibit Ka.7. On 27.07.2004, the investigation was handed over to inspector Suresh Babu PW7. After taking over the investigation, PW7 recorded the statement of PW2 and thereafter, of PW1. On the basis of statement made by PW1 and PW2, the investigating officer PW7 arrested the accused Kallu and Chhatra Pal. The arrested accused made disclosure statement and consequent of that, recovery of robbed articles and dandas were effected at their pointing out vide recovery memo Ex. Ka.8, Ka.10 and Ka.6 respectively, used in the commission of crime which were discovered in pursuance of the disclosure statements. On the basis of the confessional statement made by the accused named above, remaining accused, namely Suresh Bangali and Mansingh were arrested whose identification parade was conducted by the identification magistrate in the jail and accordingly, accused Suresh Bengali and Man Singh were arraigned in the identification parade, but having not been identified by the injured PW1 and eye witness PW2, they were released from the charges of commission of offence providing them benefit of principle of presumption of innocence, while the appellants faced trial.

27. During trial, the statement of injured Krishna Devi as PW1 and Kumari Shail as PW2 were recorded and relying on the statement of PW1 and PW2 and other incriminating circumstances, learned trial court found the appellants guilty and convicted them.

28. Here in the instant case, firstly, the prosecution was required to prove that victim Shivkumar, Ved Prakash and Kalpana Sharma died due to homicidal injuries inflicted by the accused and Krishna Sharma suffered grievous injuries in the incident. On the perusal of medical evidence produced on record in form of testimony of PW 5 Dr. Ramesh Pati Tiwari and PW 9 Dr. Anil Kumar Tiwari, who conducted post-mortem examination of deceased Kalpana, Shiv Kumar and Ved Prakash and prepared the post-mortem reports Ex. Ka. 4, Ka.5 and Ka. 11, as well as inquest report of above victims being prepared by PW 10 In-charge Inspector Vijay Bahadur Singh as Ex. Ka 13, Ka.17 and Ka.23 respectively, it stands proved that cause of death of all the three deceased was multiple injuries which they sustained on their vital parts and same were found ante-mortem in nature and sufficient to cause death in ordinary course of nature. The prosecution version was that these injuries were caused to the victims due to assault by accused using lathi and danda. The post-mortem reports of all the victims show that they had sustained several lacerated wounds on their heads and on other parts of their bodies, leading to fracture in the bones of the head. It is not the case of appellants that deceased suffered injuries in accident. The nature of injuries clearly indicate that the same cannot be accidental or self-inflicted. Testimony of PW 5 and PW9 with regard to these injuries has remained unshattered and unblemished, who observed that the injuries sustained by the victims were sufficient to cause death in the ordinary course of nature and death was due to shock and haemorrhage. Therefore, the fact that deceased Shiv Kumar, Ved Prakash, and Kalpana had died a homicidal death due to sustaining injuries caused by hard and blunt object, stood proved.

29. Next question that crops up for consideration is as to whether the time, place and occurrence have been established on record and whether there is any error in the observation of the trial court in this regard. As per prosecution, the offence had occurred in the early morning of 25.07.2004 at about 2:30 AM, when Krishna Sharma and her entire family was sleeping on the roof top of the house. During the arguments, learned counsel for appellants did not assail the version of prosecution to the extent of time, date

and place of the offence. Therefore, the above facts stand not being disputed and being admitted and thus, no illegality or perversity is found in the observations of learned trial court in this regard.

30. Since in the above discussion, it is not in dispute that incident occurred on the relevant date, time and place during which the victims were killed, now the question is whether the incident was committed by the accused and whether the conviction recorded by the trial court by holding the accused responsible for the incident is proper or not. Considering the submissions advanced by both the parties and to bring a well-reasoned observation, we have been taken through the testimony of independent witnesses and disclosure of appellants and recovery thereof, pertaining to the offence committed.

31. First of all, this court has to assess the circumstances available on record in light of arguments advanced by appellants regarding the anti-timed FIR and alleged false involvement of the appellants. Contention of appellants is that the offence was committed by unknown persons and appellants have been falsely roped in the case despite having not even an iota of evidence against them. During trial, a different story has been brought to bear in this case and prosecution has attempted to overcome the difficulty of First Information Report against unknown person by deposing against the appellant. Further contention is that the prosecution has disowned the registration of the FIR and PW1, who is said to be an injured and eye witness of the occurrence, has herself admitted that she has not lodged any FIR. As a corollary to that, informant PW3 also declined the fact of scribing of tahrir by his own volition or under the dictation of injured Krishna Sharma, rather has stated that he wrote tahrir under the dictation of police, therefore, the testimony of PW1 and PW3 itself is detrimental for prosecution and has given blow to the roots of the case.

32. In the light of this submission, upon examining the record, it was found that PW1 specifically testified that she never dictated the terms of the FIR to PW3 Balwant Singh, nor she got her statement to this effect recorded to the investigating officer PW7. She has testified that she became unconscious on the spot due to injuries suffered on her person and could regain consciousness in the hospital itself. With regard to her thumb impression on the tahrir, she answered that when she was admitted in hospital due to injuries, the police concerned had taken her thumb impression on a blank

piece of paper. PW3 admittedly is scribe of tehrir on the basis of which, the first information report was registered. However, this prosecution witness has also not proved the contents of FIR and has alleged that same was written by him under the dictation of the police inspector. He has also corroborated statement of PW1 to the effect that he did not take any instructions from injured Krishna Sharma before or at the time of scribing the tehrir and that she was admitted in the hospital while the complaint was written by him in the police station. PW-1 also supported the version made by PW-3 and corroborated the fact that she did not instruct PW-3 to lodge the FIR. PW3 specifically testified that even the paper and pen was also provided to him by the police inspector, though it is not disputed that written complaint was in his handwriting. From the perusal of statement of PW1 and PW3, it has been demonstrated that both witnesses have corroborated this fact that the first information report was not lodged according to their accord, rather it was written on the dictation of police and they did not give the version recorded in the first information report. Consequently, it is established on record that the first information report of the instant case lose its corroborative and probative value and first information report appears to be doubtful document and cannot be relied upon to support the prosecution case.

33. The law in this regard is fairly settled and it may be purposeful to refer to certain rulings enumerating the legal position on the evidentiary value of an FIR which appears to be tainted, ante-timed and reflecting the version of the police rather than that of the informant. In the case of **State of A.P. v. Punati Ramulu and Others 1994 Supp (1) SCC 590**, the Hon'ble Supreme Court made the following observations:

"5. According to the evidence of PW 22, Circle Inspector, he had received information of the incident from police constable No. 1278, who was on 'bandobast' duty. On receiving the information of the occurrence, PW 22 left for the village of occurrence and started the investigation in the case. Before proceeding to the village to take up the investigation, it is conceded by PW 22 in his evidence, that he made no entry in the daily diary or record in the general diary about the information that had been given to him by constable 1278, who was the first person to give information to him on the basis of which he had proceeded to the spot and taken up the investigation in hand. It was only when PW 1 returned from the police station along with the written complaint to the village that the same was registered by the circle inspector, PW 22, during the investigation of the case at about 12.30 Noon, as the F.I.R., Ex. P-1. In our opinion, the complaint, Ex. P-1, could not be treated as the F.I.R. in the case as it certainly would be a statement made during the investigation of a case and hit by [Section 162](#), Cr.P.C. As a matter of fact the High Court recorded a categorical finding to the effect that Ex. P-1 had not been prepared at Narasaraopet and that it

had "been brought into existence at Pamidipadu itself, after due deliberation". Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stooped to fabricate evidence and create false clues. Though we agree that mere relationship of the witnesses PW 3 and PW 4, the children of the deceased or of PW 1 and PW 2 who are also related to the deceased, by itself is not enough to discard their testimony and that the relationship or the partisan nature of the evidence only puts the Court on its guard to scrutinise the evidence more carefully, we find that in this case when the bona fides of the investigation has been successfully assailed, it would not be safe to rely upon the testimony of these witnesses either in the absence of strong corroborative evidence of a clinching nature, which is found wanting in this case."

(Emphasis by Court)

34. In Ram Sut Yadav alias Lavkush Yadav and Others v. State of U.P. 2010 SCC OnLine All 450, a coordinate bench of this Court made the following observations:

"Another submission of Sri Viresh Misra is that the F.I.R. has not been proved to have been scribed at the dictation of the complainant Dharas Yadav and the whole prosecution case falls to the ground on this ground alone. We find sufficient merit in this submission. The complainant Dharas Yadav (P.W.4) stated that the F.I.R. was not lodged by him and it does not bear his signatures. He claimed that he was not present at the time of incident. The scribe of the F.I.R. Muntazir Ahmed (P.W.3) also turned hostile and stated that the F.I.R. was written by him at the police station Madhuban on the dictation of S.H.O. Sri Mritunjay Mishra. He was cross-examined by learned prosecutor wherein he stated that he works at a dispensary till 7 : 30 - 8 : 00 p.m. When he returned home from the dispensary, he came to know that firing had taken place at the house of Dharas Yadav. He went on the spot and thereafter went to the police station where he found the injured Jairam and Jai Kishan. It is obvious from the statement of this witness that the F.I.R. was not scribed in the village, but was written by Muntazir Ahmed (P.W.3) at the police station allegedly on the dictation of S.H.O. The complainant Dharas Yadav has clearly denied his signatures on the F.I.R. The prosecution has not led any evidence to show that the signatures on the F.I.R. belong to Dharas Yadav. Even Jairam (P.W.5) was not questioned by the prosecution on this point. He could have been asked to identify the signatures of his brother Dharas Yadav, but that was not done. There is nothing on record to show that F.I.R. bears the signatures of Dharas Yadav or that the same was scribed on the dictation of the complainant. On the other hand, the statement of Muntazir Ahmed (P.W.3) clearly shows that the F.I.R. was scribed at the dictation of S.H.O. Mritunjay Mishra, who had enmity with the appellants Yudhisthir alias Dharm Raj Yadav, Ram Sut Yadav alias Lavkush Yadav, their father Ram Naresh and appellant Ram Avtar Yadav. The possibility that the appellants were named in the F.I.R. at the instance of S.H.O. Mritunjay Mishra and S.I. Vasudeo Singh can not be ruled out. Since the F.I.R. has not been proved according to law and is a suspicious document, the whole case falls to the ground and no reliance can be placed on the same."

(Emphasis by Court)

35. It should also not be out of place to mention at this juncture that as per evidence of PW4, constable Vishwanath, he had registered the FIR initially under Section 460 of IPC on the basis of tahrir written and submitted by PW3. The FIR Ex. Ka.2 has been said to be registered at 3:15 AM on 25.07.2004 and same was entered at 3:15 AM in general diary vide Ex. Ka.3, and investigation was carried out immediately after registration of the first information report. PW4 constable Vishwanath has proved registration of first information report and its entry in general diary. On the contrary, PW3 testified that the tahrir was written by him under the dictation of police inspector between 8-8:30 a:m, which is clearly contrary and in material contradiction of evidence of PW4, according to whom the first information was recorded at 3:15 AM. Since the evidence of PW3 regarding presentation of tahrir is contrary to that of evidence of PW4, therefore, it cannot be accepted as gospel truth that first information report of the occurrence was registered at 3:15 AM.

36. One more glaring fact which gives support to the doubt about timings of lodging of FIR emerging from the record is that the injured PW1 was admitted in hospital at 4:40 AM by the police itself, but there is no mention about the registration of the FIR in the medical papers pertaining to injured Krishna Sharma. Had the FIR been lodged at 3:15 AM and in pursuance of the FIR, the police reached on spot and brought the injured to hospital for medical treatment, then there would have been entry of FIR in the medical papers of the injured. Moreover, PW4 has admitted that there was no entry in the general diary of any other case on the date of occurrence. If on the date of registration of FIR, entries in the general diary of some other cases would have been found, then it could have been accepted that report was registered at 3:15 AM. However, admittedly no entry has been found, therefore, the arguments of defence regarding ante- timed FIR cannot be ignored and the possibility of manipulation in record cannot be ruled out. Keeping in view of above discussion, it is established that the first information report has not been proved to be registered on 3:15 AM dated 25.07.2004, as alleged.

37. In **Mehraj Singh vs State Of U.P., (1994) 5 SCC 188**, the Hon'ble Supreme Court made the following observations:

"12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of

the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been 'ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8.'

(Emphasis by Court)

38. In the case of **Mohd. Muslim v. State of U.P. Criminal Appeal No.1089 of 2011**, the Hon'ble Supreme Court made the following observations regarding the evidentiary role of an FIR.

"The check FIR report was sent to the Court on 08.08.1995 with the delay of about 4 days. It is worth mentioning that FIR in a criminal case and particularly in a murder case is a vital and a valuable piece of evidence especially for the purpose of appreciating the evidence adduced at the trial. It is for this reason that the infirmities, if any, in the FIR casts a doubt on its authenticity. The FIR in such cases may also lose its evidentiary value. In Meharaj Singh and Ors. Vs. State of U.P. and Ors., it has been opined that on account of the infirmities such an ante-timing of the FIR loses its evidentiary value. Thus, this entitles the accused to be given the benefit of doubt."

(Emphasis by Court)

39. So far as the complicity of the accused in commission of crime is concerned, while observing the guilt and conviction of appellants, learned trial court relied on chain of following two circumstances:

i. ocular evidence of PW1 and PW2, who allegedly identified the accused

while committing the offence

ii. disclosure statement made by accused person and consequential recovery thereof.

40. For determination of first circumstance, we have been taken through the testimony of these two star witnesses. PW7 second investigating officer testified that complicity of accused Kallu and Chhatarpal surfaced out in the commission of crime initially in the statement of Km. Shail, which was recorded by him on 27.04.2004 and subsequently in the statement of Krishna Sharma recorded on 02.08.2004 after being discharged from hospital. On the basis of above, both accused were arrested on 07.08.2004 and accused Khushi Ram on 09.08.2004. As per PW7, investigating officer, no test identification parade of the accused was conducted, as the accused were already named by the injured Krishna Sharma and eye witness Kumari Shail PW2. It is to be seen here whether the prosecution has pressed into service the involvement of appellants by the ocular evidence of PW 1 and PW2.

41. Undisputedly, PW1 Krishna Sharma is an injured and eyewitness of the entire episode committed on the fateful night. Law is settled that evidence of an injured witness is always kept on higher pedestal than an ordinary witness and evidence of an injured witness is ordinarily considered reliable because the injury sustained by such witness implies his or her presence on the spot. However, the reliability of such witness depends on opportunity to see the assailants, lightning conditions if occurrence is of night, state of mind of the witnesses etc. Court has also to determine as to whether the injured witness was in position to identify the accused in darkness, specifically when she himself along with her family members suffered injuries in sudden attack and under an atmosphere of fear and shock around.

42. In the case of **Jodhan v. State of M.P., (2015) 11 SCC 52**, the Hon'ble Supreme Court made the following observations regarding the importance of the testimony of an injured witness:

"29. From the aforesaid summarisation of the legal principles, it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence. Thus perceived, we really do not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as untrustworthy by the learned trial Judge."

(Emphasis by Court)

43. In the case of **Bollavaram Pedda Narsi Reddy v. State of Andhra Pradesh 1991 SCC OnLine SC 183**, the Hon'ble Supreme Court emphasized on the importance of prevailing lighting conditions where event of occurrence takes place during the night and accused persons are unknown to the witnesses. The Hon'ble Supreme Court made the following observations:

"9. In the present case, the appellants are admittedly persons with whom the two witnesses had no previous acquaintance. The occurrence happened on a dark night. When the crime was committed during the hours of darkness and the assailants are utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance. The necessity to have the suspects identified by the witnesses soon after their arrest also arises. According to the prosecution, the attack on the deceased was sudden and simultaneous and the assailants slipped away in no time. Both PWs 1 and 2 had deposed that they were attracted by the explosion and when they turned back, the assailants surrounded the deceased and inflicted the stab injuries. PW 1 was pushed aside. He fell on the fence of the barbed wire of the transformer, received scratches. His dhoti stuck to the wire. He left it there and ran to the police station in utter confusion. His statement Ex. P-1 does not disclose that PW 2 accompanied him, though PWs 1 and 2 stated before court that they went together. The possibility of the companions of the deceased having been scattered and gone in different directions cannot be ruled out. Even in Ex. P-1 statement what PW 1 said is that six persons attacked the deceased; they were villagers; they were wearing dhoti and kurta. One was about 45 years of age and of dark complexion, another was 30 years of age lean and yet another was also a lean person. These may be the vague impression the witness had on seeing the assailants suddenly. It is not however in evidence that the description given by PW 1 in Ex. P-1 fits in with the description of any one of the appellants. When the magistrates recorded the statements of the witnesses, they could not give any characteristic feature of any one of the assailants. The entire case depends on the identification of the appellants and the identification is founded solely on the test identification parades."

(Emphasis by Court)

44. Now, this court has to analyse the evidence adduced by PW 1 and PW2, who got their statements recorded during investigation to the effect that they could only identify accused Kallu and Chhattra Pal at the scene and not others. On the contrary, they testified before the court that they identified the accused namely Kallu, Chhattra Pal, Khushi Ram and Manni Lal at the scene, in the light of bulb and torches. Therefore, both added a new fact relating to accused Mannilal and Khushi Ram in their evidence, while this fact was not stated earlier to the police during the investigation. Without offering any explanation, the statement, contrary to one's earlier statement will be treated as a serious inconsistency and an improvement, and the improved testimony

of witnesses will fall under the category of discredited evidence. Another circumstance which has drawn our attention is that accused Manilal was not found involved in commission of crime by the investigating officer, during investigation and chargesheet was filed against accused Kallu, Chhatra Pal and Khushi Ram and it is only in the chief examination of PW1, that name of accused Manilal had emerged and on request of prosecution, he was summoned by court exercising powers under Section 319 of CrPC to face the trial as additional accused. Again, PW7 investigating officer stated that he found the complicity of accused Khushi Ram only on the basis of confessional statement given by accused Kallu and Chhatra Pal and after his arrest in this case, he made disclosure statement leading to the recovery of incriminating articles pertaining to dacoity committed at the house of PW1. However, during trial, it was stated by both factual witnesses that accused Khushi Ram and Munnilal were also present on the scene with accused Kallu and Chhatrapal. Further, PW1 has testified that the police concerned were not conducting the investigation properly, and therefore she had sent the representations in this regard to the higher authorities. However, nothing is on record that alleged representation was ever sent by her to the higher authorities and action has ever been taken. Therefore, placing on record the photo copies of representation allegedly sent by PW1 to the higher authorities at the stage of trial, may not carry any probative value.

45. Another factor which needs to be considered is the factor of visibility around the place of occurrence at the relevant time. As per prosecution, accused Kallu and Chhatra Pal were recognised by the husband and son of injured Krishna Sharma at the time of resisting the alleged offenders. It is averred that victim Shiv Kumar and Ved Prakash named the accused Kallu and Chhattar Pal during the commission of the offense and said that they should not do it. PW1 testified that on hearing noises, she woke up and saw that some unknown accused had snatched the bangles of her daughter-in-law namely Kalpana and heard the names of accused Kallu and Chhatra Pal from her son and husband. She also identified the accused in the light coming from adjoining houses and torches of accused. PW2 also corroborated version of PW1. Here in the given circumstances, if the witnesses stated that the accused were identified by them in the light coming from nearby houses, then the court has to examine this very fact as to whether the victims and injured were in the position and had any occasion of recognising the accused. It must be considered as to whether there was light in nearby

houses, and if yes, then again, whether that light was sufficient for the victim to identify the accused, despite sudden and violent attack?

In this regard, when PW1 was put in cross examination, she admitted that there had been an electricity connection in her house since about one year to the incident. On being examined about the source of street light available adjoining to her house, PW1 admitted that for about 15 days prior to the incident, the bulb installed on electric pole outside her house was not working and had been switched off at the request of neighbour. Therefore, it is apparent from her admission itself that the street light installed in front of house of PW1 was not in a working condition during the night of occurrence. It is not the case of prosecution that witnesses identified the accused in light coming from their own rooftop. It has also not been indicated that there was any other source of light on the rooftop. In such circumstances, it is established on record that there was no question of any light on the rooftop of their house as well from street light.

46. In this regard, it will be useful to refer to the judgment of ***Thanedar Singh v. State of Madhya Pradesh (2002) 1 SCC 487***, wherein the Hon'ble Supreme Court, while reiterating the view laid down in the case of ***Mehraj*** (Supra), made the following observations regarding the importance of establishing the source of light in cases where the alleged incident takes place at night involving unknown persons:

"8. However, on the aspect of identification, the High Court may be justified in commenting, based on Nathuni Yadavs Vs. State of Bihar (1998 (9) SCC 238) that the approach of the Trial court is faulty. In Nathuni Yadavs case (supra), this Court pointed out that under certain circumstances, the lack of moonlight or artificial light does not per se preclude identification of the assailants. Thomas J. speaking for the Court observed :-

Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace.

9. While the possibility of identification of the accused-appellant cannot be ruled out in the present case too having regard to the fact that the accused was not stranger and the occurrence was at an open place, there is one more factor which creates some difficulty in the matter of identification. PW 6 was sleeping on a cot at a little distance from the spot where the victim was sleeping. PW 6 stated that as many as five persons including the appellant surrounded his son and two of the accused were standing in front of his cot. In this situation, assuming that there was faint light emanating from the open sky, would it be possible for PW 6 to observe the appellant firing the shot from the rifle? The possibility seems to be remote. At any rate, this aspect ought to have engaged the attention of the High Court before reversing the trial courts finding on the point of identification by PW 6."

(Emphasis by Court)

47. The next issue now is whether there were houses nearby, and if so, whether those houses had electricity connections, and finally, whether the time of incident, sufficient light was coming from those houses to enable the witnesses to identify the accused? To explore possibilities in his favour, cross-examination was conducted by the accused, in which PW1 admitted that there were no houses to the east or west side of her house and there was a school under construction towards the northern side of the house. It is further stated that there is rikshaw company having 2-3 feet high walls, adjacent to her house. The witness further admitted that there were no houses in the immediate vicinity rather the houses were at a distance. Even the site plan Ex. Ka.7, prepared by the investigating officer immediately after commission of offence, has not demonstrated any house nearby. However, it is true that there is no evidence to show that PW1 alone had a house there. Possibility cannot be ruled out that there were other houses nearby, as the PW1 herself had admitted, but there is no evidence to establish that any such house was so close that the light was coming from the house and accused were identified in that light. There is also no specific version of prosecution as to from which neighbour's house the light was coming by which the accused were identified. In such circumstances, it is not proved that there were any nearby houses or that any electricity light was available on those houses. Therefore, statement of PW1 and PW2 of identifying the accused in the light coming from the houses of neighbours are unworthy of belief. As far as the claim that the accused were identified in the torchlight switched on by the accused is concerned, it has no substance because in a situation of sudden attack and bloodshed, it doesn't appear natural for a witness to identify the accused.

48. As is clear from the above analysis, no basis has been found to show that

there was any source of light in the vicinity on the night of incident. At this juncture, it should also be considered whether there exist any circumstances or possibility in which the accused were identified by their body description, gait, etc. PW1 and PW2, in their chief examination stated that accused Mannilal and Kallu were known to them being their distant relatives and both of them were operating a rickshaw company adjoining to their house. It was stated by both factual witnesses that they knew accused Chhattra Pal and Khushi Ram since the time they used to drive rickshaw in the rickshaw company opened next to their house. They specifically testified that the accused named above committed the offence and during the commission of the offence and upon being identified, accused Chhattra Pal and Kallu shouted that they had been identified and thus, raised a cry to finish all the family members. Thus, the witnesses categorically stated that accused named above committed the offence and they identified the accused on the spot. So far as question of the appellants having been identified by the PW1 and her relationship with appellants is concerned, when she was put in cross examination on this fact, it was stated by her that neither she had any relationship with accused Mannilal and Kallu, nor she ever visited their home or village . She further admitted that she was not on talking terms with accused Mannilal and Kallu, and neither of them ever visited her house. On being questioned about the management of rickshaw company, she replied that accused Kallu was operating the rickshaw company while accused Mannilal was serving in the railways. From the cross examination, it has been demonstrated that the assertion of PW1 of accused Mannilal and Kallu being her distant relatives is contradicted by her own statement, therefore, evidence of PW1 to this extent is not reliable.

49. Another interesting fact that emerged from the evidence of PW1 and PW2 is their admission that accused Manni Lal and Kallu had their faces covered at the time of incident while accused Chhattra Pal was wearing a monkey cap. It is beyond imagination of a prudent person as to how a person with covered face could be identified in absence of light and more particularly when he is not acquainted. The investigating officer PW7 stated in his evidence that he did not conduct the test identification parade of the accused despite the fact that the FIR had been registered against unknown persons. The reason that was given by the investigating officer PW7 for not conducting test identification parade was that the names of the accused had emerged during investigation. Once the FIR of a case is registered against

unknown persons, whatsoever situation may be, it is obligatory on the part of investigating officer to conduct the test identification parade of the accused found involved in commission of a case. Purpose of test identification parade is to check the truthfulness of witnesses and further having occasion of identifying the accused whom the witness claims to have seen at the time of incident. The identification in test identification parade serves as corroborative evidence to support the identification of accused later made in the court. In the instant case, admittedly, there is no evidence that accused were previously known to each other. When accused had muffled their faces and source of light was absent on the place of occurrence and incident happened in the darkness of night, absence of test identification parade during investigation and identification of accused in court shall bring the evidence unsafe to rely upon.

50. The test identification parade assumes greater significance in cases where the accused and the witnesses are unknown to each other or are not well acquainted to each other and where the alleged incident takes place in the darkness of night. In **Wahid v. State Govt. of NCT of Delhi 2025 INSC 145**, the Hon'ble Supreme Court made the following observations,

"22. Normally, where accused persons are unknown and are not named in the FIR, if the prosecution case as regards the manner in which they were arrested is disbelieved, the Court should proceed cautiously with other evidence and objectively determine whether all other circumstances were proved beyond reasonable doubt. In this light we shall now consider the evidence relating to identification of the accused persons. Admittedly, this is a case of night incident. Though seven eye witnesses of the incident were examined by the prosecution, only three (i.e., PW-1, PW-5 and PW-6) identified the accused in court. Out of the remaining four, three including the driver categorically stated that the accused persons are not those who robbed the passengers that night. The fourth one stated that it was too dark, therefore, he is unable to recognise. PW-1, at whose instance the arrest of the accused persons was allegedly effected, during cross-examination, stated that he saw the accused persons first on the date of the incident and second on the date fixed in the case. Admittedly, no test identification parade was conducted and the statement of PW-1 was recorded in court on 28.05.2013, that is, after 16 months of the incident. In such circumstances, not much reliance can be placed on his statement."

(Emphasis by Court)

51. It has also emerged in the cross examination of PW1 that test identification parade of accused Khushi Ram and Chattra Pal was conducted in jail. However, the investigating officer PW 7, refuting the version of the PW1, specifically stated that no test identification parade of accused was conducted. Therefore, statement of PW-1 and PW-7 pertaining to the fact of

test identification parade is found contradictory to each other. It would not be out of place to mention here that accused Khushi Ram assailed his involvement in the subject crime and moved an application before learned court concerned to have his test identification parade conducted and the learned court concerned directed the investigating officer to conduct the test identification parade of the accused. However, no test identification parade was conducted despite the order of the learned magistrate concerned. It is the case of prosecution that initially FIR was registered against unknown persons and during the investigation, names of accused facing trial emerged. On the contrary, PW1, placing entire different version, stated in her testimony that she had identified the accused at the time of commission of offence itself. It has not been stated by PW1 in chief examination that the investigating officer had recorded her statement, regarding the offence during investigation, rather in her cross-examination, she stated that her statement was not recorded during investigation. Thus, according to PW1, her statement was not recorded during investigation. Keeping in view of her admission regarding non-recording of her statement before investigating officer during investigation, the fact of involvement of accused has emerged before the court for the first time. Any statement made by a witness before the court for the first time, ignoring the facts brought during investigation, is sufficient to draw adverse inference not only against the investigation conducted, but also provides reason to court to not rely upon the testimony of witness.

52. One more significant fact has been placed by PW2 in her testimony before the court to the effect that after commission of the offence, the accused fled away from the spot and thereafter she along with her sister came down and raised an alarm. Consequently, the neighbours assembled on the spot and apprehended the accused Munnilal and Chattra Pal in their rickshaw company. She identified the accused Munnilal and Chhatrapal with blood stained clothes. The police also reached on the spot and took away the accused. When the witness was put in cross examination, it was admitted by her that no such statement was made by her to the investigating officer during the course of investigation. It is settled principle of law that any statement, inconsistent to the earlier statement, made first time before will come within ambit of material omission and improvement and hence cannot be taken as reliable. PW2 admitted that under fear and shock, she covered herself underneath the bed-sheet at the time of commission. She

further stated that she along with her grandmother and younger sister came down and saw that accused Chhatrapal and Munnilal were apprehended by the public and handed over to the police. She continued to state that after the incident and upon her raising alarm, some neighbours fired and people assembled around. Admittedly, PW2 was ten years old at the time of commission of offence, therefore, her statement should be analysed with care and caution. Although, there is no rule that a child witness is not a competent witness and evidence of such witness can be treated reliable, if such evidence squarely appears unblemished and impeccable. However, in the instant case, statement of PW2 bears material contradictions and infirmities, therefore, her statement cannot be taken as gospel truth in absence of any corroborated evidence. Moreover, at the time of commission of offence, her age was ten years, so keeping in view the panic scene in absence of source of light, it appears that she was fairly incapable to identify the accused. Therefore, in the incident that took place in the darkness and accused having their faces muffled, yet being identified by witnesses, and even by deceased, who allegedly called them by name does not appear credible for any person of ordinary prudence.

53. Another circumstance required to be dealt with in the instant case is testimony of PW3, who is not only informant of the case, but also has claimed himself having been present on the place of occurrence immediately after the incident. He stated that upon hearing noise, he immediately rushed to the place of occurrence and found accused Chhatrapal and Kallu in the custody of public, assembled on the spot. Further, it has been stated by him that the police also reached on spot and took away the accused to police station and injured to hospital. Now the question that arises for consideration is that where an informant, who during investigation was projected only as a person who lodged the first information report, but during the trial claims to have been present at the spot immediately after the occurrence, then what will be the probative value of evidence of such witness? Admittedly, during registration of first information report and investigation thereto, nothing is on record that the informant PW3 also reached on the spot after the incident and it is for the first time before the court that the witness has stated so, therefore, it amounts to material improvement as it appears that witness has attempted to strengthen the prosecution case. Presence of a witness at the scene after the incident and witnessing the accused being taken into police custody, is a vital fact which is not supposed to be ignored by informant or

any person of ordinary prudence and in case such vital fact is missing in tehrir, then certainly, it will be inferred that informant was not present on the scene. Reason why this court has observed so is clear as PW3 would have ample opportunities to make a statement to investigating officer regarding his presence on spot, if any, but he did not choose to get his statement recorded and remained silent throughout the time. Therefore, his silence is a sign of acceptance that he did not reach on the place of occurrence after the incident, hence, there was no occasion for PW3 to observe the custody of accused Chhatrapal and Kallu with public assembled on the spot. The courts have consistently held that improvement affecting the core of prosecution case render the witness unreliable and such evidence can be accepted only to the extent it is corroborated by the trustworthy material on record.

54. Where contradictory statements and improvements are made by eye-witnesses in their testimonies before the court, such evidence becomes unreliable and cannot become the sole basis of conviction. In **S. Govindaraju v. State of Karnataka, (2013) 15 SCC 315**, the Hon'ble Supreme Court enunciated the following principles in para 23:

"It is well settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not affect the core of the case of the prosecution, must not be made a ground for CRLA.1736/2018 C/W rejection of evidence in its entirety. The trial court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in reviewing the same, without providing justifiable reasons for doing so. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witnesses also make material improvements before the court in order to make the evidence acceptable, it would not be safe to rely upon such evidence. The discrepancies in the evidence of eyewitnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, the witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with the other evidence available or with a statement that has already been recorded, then in such a case, it cannot be held that the prosecution has proved its case beyond reasonable doubt."

(Emphasis by Court)

55. In **Sunil Kumar Sambhudayal Gupta & ors v. State of Maharashtra, 2010 (13) SCC 657**, the Hon'ble Apex Court made the following observations:

"32. The discrepancies in the evidence of eye-witnesses, if found to be not minor in nature, may be a

ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that prosecution proved its case beyond reasonable doubt. (Vide: Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334).

33. *In case, the complainant in the FIR or the witness in his statement under section 161 Cr.P.C., has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide: State Represented by Inspector of Police, Tamil Nadu v. Sait @ Krishnakumar, (2008) 15 SCC 440).*

34. *In State of Rajasthan v. Smt. Kalki & Anr., AIR 1981 SC 1390, while dealing with this issue, this Court observed as under:*

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

35. *The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (see: Syed Ibrahim v. State of A.P., AIR 2006 SC 2908; and Arumugam v. State, AIR 2009 SC 331)."*

56. PW3 has demonstrated his two-fold role before the court. First role is as scribe of tehrir and second role is his alleged arrival on spot and witnessing the custody of accused in the hands of public. Having glanced through his evidence, this witness has admitted that neither he is known to accused Mannilal, nor he ever visited the house of Manni Lal. He further admitted of having no personal knowledge pertaining to rickshaw company and its proprietor and his entire knowledge is based on source of hearsay. Thus, it is clear that he was not earlier acquainted with accused Mannilal or any of them. It is not the case of the prosecution that statement of this witness was recorded by the investigating officer during the investigation, therefore, his testimony regarding his presence on the spot immediately after commission of offence, being for the first time stated before the court, would be treated carrying material omissions, tutored and improvement and cannot be taken in support of prosecution as the law is well settled that any statement made before the court introducing the new material facts for the first time, cannot be accepted against the accused. Even otherwise, his statement regarding the police reaching on the spot and taking the accused to the police station after a while, is in material contradiction and negates the evidence of PW7, who arrested the accused Chhatrapal and Kallu on 07.08.2004. Statements of these two witnesses are mutually contradictory. It is apt to mention here that

in case, police and informant contradict each other, the prosecution must explain it and if no explanation is given, then court may draw an adverse inference benefiting accused. Presence of PW3 on the spot becomes suspect even in view of his statement of drizzling just before the incident thereby serving new story. Keeping in view the facts and circumstances of the case, we are of the view that evidence of this chance witness appears to be tutored and developed after knowing the version of prosecution witnesses during the trial.

57. Explaining value of evidence of chance witness, the Hon'ble Supreme Court in Harbeer Singh vs. Sheeshpal & Ors., (2016) 16 SCC 418, held as under:-

"23. The defining attributes of a 'chance witness' were explained by Mahajan, J., in the case of Puran v. State of Punjab, AIR 1953 SC 459. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

24. In Mousam Singha Roy and Ors. Vs. State of W.B., (2003) 12 SCC 377, this Court discarded the evidence of chance witnesses while observing that certain glaring contradictions/omissions in the evidence of PW2 and PW3 and the absence of their names in the FIR has been very lightly discarded by the Courts below. Similarly, Shankarlal Vs. State of Rajasthan, (2004) 10 SCC 632, and Jarnail Singh & Ors. Vs. State of Punjab, (2009) 9 SCC 719, are authorities for the proposition that deposition of a chance witness, whose presence at the place of incident remains doubtful, ought to be discarded. Therefore, for the reasons recorded by the High Court we hold that PW5 and PW6 were chance witnesses and their statements have been rightly discarded.

25. In the light of the above and other reasons recorded by the High Court, we hold that the evidence of the eye witnesses is not truthful, reliable and trustworthy and hence cannot form the basis of conviction. Their presence at the scene of occurrence at the time of the incident is highly unnatural as also their ability to individually and correctly identify each of the accused from a considerable distance, especially when it was dark at the alleged place of occurrence, is itself suspect."

58. The next circumstance relied upon by the prosecution for connecting the accused with the offence of dacoity with murder was disclosure statement made by them before Investigating Officer and consequent to that, recovery of incriminating articles pertaining to the offence. Before discussing the question of admissibility of evidence of prosecution witnesses in this regard, it will be proper to refer to certain provisions of law.

59. Section 25 of the Evidence Act, 1872 (hereinafter referred to as the "Act of 1872") mandates that no confession made to a police officer, shall be

proved against a person accused of an offence. Similarly, Section 26 of the Act of 1872 provides that confession made by an accused while in custody of a police cannot be proved against him. However, to the aforesaid rule of Section 25 and 26 of the Act of 1872, there is an exception carved out by Section 27 of the Act of 1872 based on the view that in effect, if some fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly, it was safely allowed to be given in evidence.

60. The scope and ambit of Section 27 of the Act were illuminatingly stated in **Pulukuri Kottaya and others v. Emperor, AIR 1947 PC 67**, which has become locus classicus wherein it was held that Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceeding Sections and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the Section into operation is that discovery of fact in consequence of information received from a person accused of any offence in custody of police officer must be deposed to and thereupon so much of information as relates distinctly to the fact thereby discovered may be proved. As observed in this case and various judicial pronouncements of Apex court and various High Courts, the well enunciated position of law is that for applicability of section 27 of Act, two conditions are prerequisite viz.

i Information must be such as has caused discovery of fact.

ii. Information must relate 'distinctly' to the fact discovered.

61. Under Section 27 of the Act of 1872, only so much of information as distinctly relates to the fact discovered thereby is admissible. While deciding applicability of Section 27 of the Act of 1872, the court has also to keep in mind, the nature of presumption under illustrations of Section 114 of the Act of 1872. The Court can, therefore, presume the existence of a fact which it thinks likely to have happened, regard being had to common course of natural events, human conduct, and public and private business, in their relation to the facts of a particular case. Keeping in view the above discussed position of law in mind, it is to be seen as to whether the accused are proved to have made the disclosure statements and further to have demarcated the place of occurrence.

62. According to PW7, accused Chhattra Pal and Kallu made disclosure

statements respectively in presence of Jagdish Kumar, Ramji and Kumari Shail and recovery of two golden bangles, one hand watch and a danda was effected at the instance of accused Chhattra Pal, while used clothes of children and a danda were recovered at the instance of accused Kallu in the presence of independent witnesses vide recovery memo Ex. Ka 8 and Ka.9 respectively. Subsequent thereto, accused Khushi Ram was arrested by PW8 inspector Suryanath and on the basis of disclosure statement made by him, two silver bangles were recovered at his instance, in presence of independent witnesses vide recovery memo Ex. Ka. 10. Lastly, accused Omkar was arrested on 09.06.2005 by PW 6 Inspector Davender Mishra and on the basis of his disclosure statement made by him, a pair of silver anklets was recovered at his pointing out vide recovery memo Ex. Ka.6. Admittedly, no separate memo of disclosure statement allegedly made by appellants have been prepared by either of the Investigating Officers nor the alleged recovery and preparation of recovery memo has been proved during trial. Even the prosecution has not adhered to examining the independent witnesses to the recovery memo. PW-1 & PW-2, in whose presence the alleged articles were said to be recovered and identified, have testified that neither alleged articles were recovered at the pointing out of accused, nor the same were placed before them for identification. Therefore, entire chain of circumstances speak itself that the alleged recovery cannot be taken adversely against accused persons.

63. In the case of **Subramanya v. State of Karnataka, 2022 SCC online SC 1400**, Hon'ble Supreme Court in para number 84 observed that in case the accused, while in custody, on his own freewill and volition makes a statement that he would lead to the place where he had hidden the weapon of offence, then the first thing that the investigating officer should do is to call for two independent witnesses, and in their presence, the accused should be asked to make an appropriate statement as to whether he desires to point out the place where he has hidden the weapon of offence, etc. Where the accused, while in custody, makes such a statement before the two independent witnesses, the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of Panchnama that the investigating officer may draw in accordance with law. The first part of Panchanama for the purpose of Section 27 of the Act of 1872 is always drawn at police station in presence of independent witnesses so as to lend credibility to that particular statement being made by accused in police

custody. Reliance can also be placed on the case of **Boby v. State of Kerala 2023,(1) S.C.R 335**, wherein Hon'ble Supreme Court refused to rely on recovery of articles pertaining to offence, in the absence of non-recording of confessional statement of accused under Section 27 of Act of 1872.

64. In **Wahid** (supra), the Hon'ble Apex Court had made the following observations regarding the standards for appreciating the evidence in cases where FIR is lodged against unknown persons:

"14. In cases where the FIR is lodged against unknown persons, and the persons made accused are not known to the witnesses, material collected during investigation plays an important role to determine whether there is a credible case against the accused. In such type of cases, the courts have to meticulously examine the evidence regarding (a) how the investigating agency derived clue about the involvement of the accused in the crime; (b) the manner in which the accused was arrested; and (c) the manner in which the accused was identified. Apart from above, discovery/ recovery of any looted article on the disclosure made by, or at the instance of, the accused, or from his possession, assumes importance to lend credence to the prosecution case."

65. Considering the entire facts and circumstances, the learned trial court did not find the evidence regarding the allegedly recovery to be convincing and reliable and rejected the recovery and convicted the accused solely on the basis of eyewitness account. However, after scrutiny of evidence available on record and entire surrounding circumstances, we find that no strong, cogent or reliable evidence has come up on record to show that the eyewitnesses were able to identify the accused. Principles of law very clearly entail that if the case of the prosecution is not proved beyond reasonable doubt, the benefit thereof shall be given to the accused.

66. It is the pious duty of the police officers and the concerned investigation agency that where a heinous offense is alleged involving the death of three individuals and a fourth individual is seriously injured, then in such a case, the police should conduct the investigation with utmost diligence and all the steps must be taken in a timely manner to ensure that no piece of evidence is lost due to the laxity and lackadaisical attitude of the investigating officers. However in this case, this court is constrained to observe that there has been a serious lapse in investigation and the police has not followed its duties properly. The investigation is marred by defects such as failure to obtain a forensic report despite there being recovery of blood stained clothes and lathis, ante timed FIR, delay in arrest by the police authorities, improper recovery memos, disputed time of arrest, failure on the part of the police

authorities to call PW1 and PW2 for identification of accused as well as recovered items, among others.

67. Lastly, it was the submission of learned counsel of appellants that learned trial court erred in convicting the three accused persons under Section 396 of IPC whereas the sine qua non for invoking Section 396 IPC is the involvement of five or more persons. In light of this submission of appellants, the prosecution case must be judged on the touchstone of ingredients of offence of Section 396 of IPC.

68. Admittedly, the chargesheet was filed against three persons under Sections 396/412 of IPC and after committal of the case to the court of sessions, the charge was also framed initially against three accused. However, on subsequent development thereto, two more accused were added to face trial. After conclusion of trial and having heard both parties, the learned trial court convicted four accused, who are now appellants, while one was acquitted of the charges framed against him. The question arises for consideration before us is whether learned trial Court was in error in having convicted four appellants under section 396 IPC. For the purpose, Section 391 of IPC which defines dacoity and Section 396 of IPC are being reproduced herewith:

"391. Dacoity.—When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

396. Dacoity with murder.—If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

69. The appellants have emphatically relied on the judgment of the Hon'ble Supreme Court in **Manmeet** (supra) wherein the Court had made the following observations with regards to the essentials of Section 396 of IPC:

"33. The above pronouncements do acknowledge the extension of the concept of collective culpability enshrined in section 149, IPC in section 396, IPC contemplating murder with dacoity. An assembly of five or more persons participating in the offence is thus the sine qua non for an offence under section 396, IPC permitting conviction of any one or more members thereof even if others are acquitted for lack of their identity. In absence of such an assembly of five or more persons imbued with the common object of committing dacoity with murder, any member thereof cannot be convicted for the said offence irrespective

of his/her individual act of murder unless independently and categorically charged for that offence.

34. As adverted to hereinbefore above, the prosecution has completely failed in the instant case to either prove the participation of five or more persons in the commission of the offence or establish their identity. In that view of the matter having regard to the above principle of law as authoritatively laid down by this Court and in absence of a singular charge under section 302, IPC against the appellant sans the assembly, we are of the unhesitant opinion that his conviction for dacoity with murder punishable under section 396, IPC, in the facts and circumstances of the case, cannot be sustained in law. The attention of the courts below we understand had not been drawn to this vital and determinative facet of the case."

(Emphasis by Court)

70. Further, the appellants have relied on **Raj Kumar (supra)** wherein the Hon'ble Court had held as under:

"15. Having heard learned counsel for the parties, in our opinion, the appeal deserves to be allowed. It is not in dispute that charges were framed against six persons but even the trial Court was not convinced with the prosecution evidence about complicity of all the accused and granted benefit of doubt to two of them. It may be stated that the trial Court did not record a finding that there were six persons who committed dacoity and out of them, two accused could not be identified but the remaining four were identified and came to the conclusion that it was proved that there were six accused and all of them committed the offence of dacoity but in view of insufficient evidence as to identity, two of them were required to be acquitted. In such case, conviction of less than five accused can be sustained as in accordance with law. But, once the Court doubts the presence and participation of two out of six accused and grants benefit to them, there are less than five persons and no conviction can be recorded for an offence under Section 396, IPC against them. Let us consider the legal position on this aspect.

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21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons or even one- can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.

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35. In the instant case, as observed earlier, there were six accused. Out of those six accused, two were acquitted by the trial Court without recording a finding that though offence of dacoity was committed by six persons, identity of two accused could not be established. They were simply acquitted by the Court. In our opinion, therefore, as per settled law, four persons could not be convicted for an offence of dacoity, being less than five which is an essential ingredient for commission of dacoity. Moreover, all of them were

acquitted for an offence of criminal conspiracy punishable under Section 120B, IPC as also for receiving stolen property in the commission of dacoity punishable under Section 412, IPC. The conviction of the appellant herein for an offence punishable under Section 396, IPC, therefore, cannot stand and must be set aside."

(Emphasis by Court)

71. Thus, to constitute an offence under section 396IPC, it is essential that five or more persons must come together for commission of dacoity and during the course of commission of dacoity, one or more of said five persons has committed murder within the meaning of section 302 of IPC. From a perusal of the impugned judgement passed by learned trial Court, it is apparent that the learned trial court has not recorded any finding regarding the involvement of five or more persons in the subject crime and without recording such finding, convicted the appellants under Section 396 of IPC, which is clearly against the settled principles of law and does not satisfy the essentials of Section 396.

72. It is a settled principle that the prosecution has to prove its case beyond reasonable doubt and if the accused succeeds in creating reasonable doubt in the story of the prosecution, then the benefit will be averted to accused. However strong the doubt may be but it cannot take place of the evidence. From the analysis of all facts, circumstances and evidence on record, it is established beyond reasonable doubt that an offense did occur, but it has not been proved beyond reasonable doubt that the alleged offense was committed by the accused.

Conclusion:-

73. Upon judging the prosecution case on the touchstone of totality of the facts and circumstances, it does not generate the unqualified and unreserved satisfaction indispensably required to enter a finding of guilt against the appellants. Having regard to the evidence available on record as a whole, this court unhesitatingly holds that charges levelled against appellants have not been proved beyond reasonable doubt. The findings of the trial court are unnaturally stretched in favour of the prosecution by overlooking many irreconcilable inconsistencies, anomalies and omissions, thereby rendering the prosecution case unworthy of credit. This court is of opinion that prosecution has failed to prove the charges against the appellants to the hilt as obligated in law, and therefore, they are entitled to be given benefit of

doubt.

74. Accordingly, the appeals filed by appellants are **allowed**. Impugned judgement of conviction dated 13.10.2009 and order of quantum of sentence dated 13.10.2009 passed by learned Additional Sessions Judge, court no.5 , Unnao, are **set aside**. The appellants are acquitted of the offences punishable under Section 396 of IPC. The appellants be released forthwith from the custody, if not wanted in any other case, upon execution of bonds to the satisfaction of the learned trial court, which shall remain in force for a period of six months in terms of Section 437A of CrPC.

75. All the pending criminal miscellaneous application(s), if any, stand **disposed of**.

76. Let a copy of this judgement along with the trial court record be sent forthwith to the trial court. A copy of judgement, if applied for, shall be also made available to the appellants.

77. We appreciate the assistance rendered by Mr. Harish Chandra, learned Amicus Curiae, and we direct for payment of Rs.30,000/- (Thirty Thousand Only) towards his remuneration forthwith.

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(Mrs. Babita Rani,J.) (Abdul Moin,J.)

January 29, 2026
Reena/-