2026:AHC-LKO:42488-DB

HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW

CRIMINAL APPEAL No. - 538 of 2011

1. Anwar Ali
2. Ramu *alias* Ram Kumar
3. Ram Sajivan Patel .....Appellant(s)

Versus

State of U.P. .....Respondent(s)

Counsel for Appellant (s)	:	Shishir Pradhan, Alok Kumar Mishra, Ashok Kumar Singh, Ishika Srivastava, Jagdish Prasad Upadhyay, Jaikaran, Lalit Kumar Singh, Nagendra Mohan, Sangeeta Singh, Saurabh Srivastava, Sharda Verma, Shrawan Kumar, Simi Jha, Sushil Kumar, Sushil Kumar Dwivedi, Udai Prakash
Counsel for Respondent(s)	:	Govt. Advocate

Connected with
CRIMINAL APPEAL No. - 550 of 2011

1. Rati Pal Patel
2. Paras Nath Patel
3. Udai Raj
4. Shankar Nai .....Appellant(s)

Versus

State of U.P. .....Respondent(s)

Counsel for Appellant (s)	:	P.K. Singh, Alok Kumar Mishra, Ashok Kumar Singh, Dilip Kumar Pandey, H S Tiwari, Ishika Srivastava, Jagdish Prasad Upadhyay, Jaikaran, Piyush Shrivastava, Sandeep Kumar Srivastava, Sangeeta Singh, Saurabh Srivastava, Shailendra Kumar Singh, Sheo Prakash Singh, Simi Jha, Sudhir Kumar Misra, Surya Nath Singh, Sushil Kumar, Vivek Kumar Tripathi
Counsel for Respondent(s)	:	Govt. Advocate

Court No. -10

Reserved on 19.03.2026
Delivered on 01.07.2026

A.F.R.

HON'BLE RAJNISH KUMAR, J.
HON'BLE ZAFEER AHMAD, J.

(Per : Rajnish Kumar, J.)

(1) The aforesaid criminal appeals under Section 374 (2) of the Code of Criminal Procedure, 1973 (here-in-after referred to as "***Cr.P.C.***") have been filed against the judgment and order dated 03.02.2011 passed by Additional District and Sessions Judge/ F.T.C.-III, Raebareli, in Session Trial No. 01 of 2003; *State Versus Anwar Ali and others,* emanating from Case Crime No. 119 of 2002, under Sections 147, 148, 302, 376, 323 read with Section 149 of the Indian Penal Code, 1860 (here-in-after referred to as "***I.P.C.***") and Section 3(ii)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (here-in-after referred to as "***SC/ST Act***"), Police Station Unchahar, District Raebareli, wherein the accused/appellants, Anwar Ali, Ramu *alias* Ram Kumar, Ram Sajivan Patel, Rati Pal Patel, Paras Nath Patel, Udai Raj and Shankar Nai, have been convicted and sentenced in the manner as stated here-in-below :-

Name of Accused Persons	Conviction	Sentence
Udai Raj Anwar Ali Shankar Nai Paras Nath Patel Ram Sajivan Patel Ratipal Patel Ramu alias Ram Kumar	Under Section 147 read with 149 I.P.C.	1 year's R.I.
	Under Section 148 read with 149 I.P.C.	2 year's R.I.
	Under Section 323 read with 149 I.P.C.	6 months' R.I.

Anwar Ali Shankar Nai Paras Nath Patel Ram Sajivan Patel Ratipal Patel	Under Section 376 (2) (g) I.P.C. read with Section 3 (ii) (v) of S.C./S.T. Act	Life imprisonment and a fine of Rs.10,000/-. In default of payment of fine to undergo additional one year's simple imprisonment
	Under Section 302 read with Section 149 read with Section 3 (ii) (v) of S.C./S.T. Act	Life imprisonment and a fine of Rs.10,000/-. In default of payment of fine to undergo additional one year's simple imprisonment
Udai Raj Ramu alias Ram Kumar	Under Section 376 (2)(g) I.P.C.	Life imprisonment and a fine of Rs.10,000/-. In default of payment of fine to undergo additional one year's simple imprisonment
	Under Section 302 read with Section 149 I.P.C.	Life imprisonment and a fine of Rs.10,000/-. In default of payment of fine to undergo additional one year's simple imprisonment

It has further been provided that half of the fine shall be disbursed to victim of the incident and the period already undergone would be adjusted in the period of sentence.

FACTS

(2) The prosecution case, in short, is that complainant, Banwari Lal son of Nazeer Lal, resident of village Mansa-Ka-Purwa, Police Station Salon, District Raebareli, had submitted written report (Ext. Ka.1) at police station Unchahar, district Raebareli on 25.05.2002, alleging therein that they (complainant and his companions) move from place to place and live by setting up temporary camps. On 24.05.2002, they had shifted from village Kakriha, police station Sangramgarh, district Pratapgarh to village Hariharpur, a hamlet of Nigoha, Police Station Unchahar and set up their camps at 03:00 p.m., in the field of Raja Ram Maurya, located to the south of Gram Pradhan Jagat

Narayan's house. Due to storm and rains in night, their camp collapsed, on account of which, some people were sleeping in the verandah in front of the shop of Pradhan; some people were awake and some people were in camp. Meanwhile, 3-4 persons were seen coming from the southern side towards the village. They (assailants), upon reaching the camp, started beating with *danda* (sticks), then, they (complainant and others) ran shouting, upon which the assailants dragged the victim (wife of Sitaram) to some distance. Pokhai son of Nazeer Lal ran to rescue her, therefore, one of the assailant fired at him (Pokhai) with a country-made pistol (कट्टा). Pokhai, shouting and running, fell down in a ditch (खन्ती) aside the road and died. Among them (complainant and his companions), Teerath Nath son of Pokhai, Bhungi son of Chattrapal, Shobnath son of Navrangi, Lalalu Navrangi and Jokhai son of Langad, resident of village Mansa-Ka-Purwa and Mithilesh Kumar son of Sitaram and Suresh Kumar son of Nandlal and Sanjay Kumar son of Rampher and others of Hariharpur etc., ran shouting and identified the assailants, but on account of fear, they (complainant and others) could not go ahead. They would identify the assailants, if came before them. After taking the victim to some distance and committing wrongful act with her, the assailants left her. This incident is of 25.05.2002 at about 01:30 in the night. Report may be registered and legal action may be taken.

(3) On the basis of the aforesaid written report (Ext. Ka.1), F.I.R., bearing Case Crime No. 119 of 2002, under Sections 302, 376 and 323 I.P.C., was registered at police station Unchahar, district Raibareli against 3-4 unknown persons on 25.05.2002, at 05:30 in the morning.

(4) The investigation of the case was conducted by Sub-Inspector R.P. Saroj. He started the investigation of the case on the date of F.I.R. itself i.e. on 25.05.2002. After collecting check F.I.R. and recording the statement of the complainant, he reached the place of occurrence along with police personnels. He inspected the place of occurrence and prepared recovery memos of blood stained soil and plain soil, blood stained and semen stained *ghaghra* (घाघरा) of the victim and one empty cartridge 12 bore and Rs.60/-. He, thereafter, prepared site plan on the pointing out of the complainant and the victim. On his dictation, S.I. Anil Kumar Pandey had prepared inquest (*panchayatnama*) of the dead body of the deceased Pokhai and sent it for post-mortem along with constable. He also sent the victim for medical examination along with constable.

(5) The medical examination of the victim was conducted by Dr. Vineeta Singh at District Female Hospital, Raebareli on 25.05.2002 at 05:20 p.m. In her medico-legal report dated 25.05.2002 (Ext. Ka.2), she noted as under :-

> "MI-(1) Black mole on front of fore arm Rt. 3 cm below elbow joint.
>
> (2) Black mole on Left cheeck 6 cm in front of Left ear.
>
> General Exam- Ht. 4' 10½" Wt.-38 Kg. Teeth 14/14 Breast well developed Axillary hair present.
>
> Internal Exam- Pubic hair present hymen torn at 7 O'clock position .3 cm x .1 cm bleeds on toutch.
>
> Vagina admits 1 finger with difficulty. No discharge no bleed P/V.
>
> (1) Vaginal smear taken & sent to pathologist for exam of sperms and gonococci.
>
> (2) Case referred to Radiologist for x-ray both wrist & elbow for estimation of age.
>
> (3) Referred to EMO District Hospital for external injuries.

Conclusion – (1) Examination is suggestive of penetration by some blunt object report of pathologist awaited.

(2) Report of radiologist awaited for estimation of age."

(6) On reference by Dr. Vineeta Singh, EMO, District Female Hospital, Raebareli, the external injuries on the body of the victim were examined by Dr. R.K. Mishra on 25.05.2002 at 06:00 p.m. at District Hospital, Raebareli. In the injury report (Ext. Ka.4), following injuries have been noted :-

(1) Multiple linear scratches on the left forearm laterally and dorsally over the lower two third area. Pink to dark pinkish colour.

(2) Multiple blotchy abraded contusion on the upper third both the sides of the back widely spread. Irregular patterned pink to darkish pink.

(3) Linear patterned contusion 7 cm x 2 cm on the right upper and lateral rim far back. Pink to darkish pink.

(4) Linear patterned contusion 11 cm x 1½ cm on the right lower thigh laterally and the knee antero laterally. Pink and dark pink.

Injury no. (1) through (4) are due to hard and blunt object. The duration is from three fourth of a day to one day and the nature is simple.

(7) On receipt of x-ray report and pathological report, Dr. Vineeta Singh had prepared supplementary report dated 28.05.2002(Ext. Ka.3), in which she noted as under :-

"X-ray report – (1) x-ray both elbow- epiphysis around the elbow joint are fused.

(2) x-ray both wrist ephiphysis of lower end of Radius and ulna are not fused.

Pathological report – Vaginal smear is negative for sperms and gonococci.

Conclusion – (1) exam and pathological report is suggestive of penetration of vagina by some blunt object.

(2) Age according to pathological report & by appearance is about 16 years.

(8) The post-mortem of the dead body of the deceased Pokhai son of Nazeer was conducted by Dr. Sanjay Kumar Pandey and Dr. C.H. Agarwal on 25.05.2002 at 04:00 p.m. at District Hospital, Raebareli. In the post-mortem report (Ext. Ka.5), the following ante-mortem injuries have been noted :-

(1) L.W. oval .5 cm x .5 cm medial & below Lt. side nipple depth is upto chest wall.

(2) L.W. oval .5 cm x .5 c.m. in midline below xiphisternum. 12 cm from umbilical. Singing present.

(3) L.W. oval .5 cm x .5 cm ċ singed margin over manubrium in midline.

(4) Abrasion of 2 cm x 2 cm ċ central location .5 cm x .5 cm on Right side in mid clavicular junction bone.

(5) Abrasion of 2 cm x .5 cm at base of neck Rt. side."

As per opinion of Dr. S.K. Pandey and Dr. C.H. Agarwal, the cause of death was shock and hemorrhage as a result of ante-mortem fire arm injury.

(9) The further investigation of the case was entrusted on 29.05.2002 to Circle Officer Sri Chiranjiv Nath Sinha on account of addition of offence under Section 3 (ii) (v) of S.C./S.T. Act against the accused persons. He, after collecting material evidences, recording statements of witnesses including previous Investigating Officer Sri R.P. Saroj, submitted the charge-sheet No. 18 of 2002 dated 08.06.2002 against accused Udai Raj son of Brijlal Dhobi, Shankar Nai son of Ramesh Nai, Ramu alias Ram Kumar son of Raghunath Dhobi, Paras Nath Patel son of Kallu Patel, Ram Sajivan Patel son of Budhuram Patel and Ratipal Patel son of Bhagwandeen Patel, under Sections 147, 148, 149, 302, 376 (G), 323 I.P.C. and Section 3 (ii)(v) of S.C./S.T. Act.

(10) Thereafter, further investigating was entrusted to Circle Officer Avadh Bihari Rakesh on 09.07.2002 against accused Anwar Ali. He, after collecting material evidences and recording statement of accused Anwar Ali at District Jail, Raibareli, submitted charge-sheet No. 18A/2002 dated 16.07.2002 against accused Anwar Ali under Sections 147, 148, 149, 302, 376 (G), 323 I.P.C. and Section 3 (ii)(v) of S.C./S.T. Act.

(11) The learned Chief Judicial Magistrate, Court No.9, Raebareli, took cognizance on the aforesaid charge-sheets and committed the case to the Court of Session on 02.01.2003, where the case was registered as Session Trial No. 1 of 2003; *State Versus Anwar Ali and others.*

(12) Learned Additional Session Judge-II, Raebareli, framed charges against accused Shanker Nai, Paras Nath, Ram Sajivan, Ratipal and Anwar Ali under Sections 147/149, 148/149, 302/149, 376, 323/149 I.P.C. and Section 3 (ii) (v) of S.C./S.T. Act and against accused Udai Raj, Ramu alias Ram Kumar under Sections 147, 148, 302, 376 and 323 I.P.C. by means of order dated 24.01.2003, respectively. All the aforesaid accused persons denied the charges framed against them and pleaded for trial. Hence the trial commenced.

(13) The prosecution, in support of its case, examined twelve witnesses, who are as under :-

P.W.1	Victim
P.W.2-Banwari	Complainant
P.W.3-Dr. Vineeta Singh	Examined the victim and proved medico-legal report and supplementary report prepared by her (Ext. Ka. 2 and Ext. Ka.3)
P.W.4-Teerath Raj alias Tirath Lal	Eye witness/Son of deceased Pokhai
P.W.5-Dr. R.K. Mishra	Examined the external injuries of the victim and proved injury report (Ext.

	Ka.4)
P.W.6-Dr. Sanjay Kumar Pandey	Conducted post-mortem of the deceased Pokhai and proved the post-mortem report (Ext. Ka. 5)
P.W.7-Dr. H.L. Sharma	Conducted x-ray of the victim and proved the x-ray report (Ext. Ka. 11) and x-ray plate (Material Ext.1).
P.W.8-S.I. Arun Kumar Pandey	Prepared *panchayatnama* of the dead body of the deceased Pokhai and also prepared photo lash, challan lash, letter to R.I., letter to C.M.O. and proved Ext. Ka. 6 to Ext. 10.
P.W.9-S.I. R.P. Saroj	1st Investigating Officer
P.W.10-Constable Moharrir Om Prakash Tripathi	Prepared check F.I.R. on the basis of written report submitted by the complainant and proved check F.I.R. (Ext. Ka. 14) and carbon copy of corresponding G.D. entry (Ext. Ka. 15)
P.W.11-Circle Officer Chiranjiv Nath Sinha	2nd Investigating Officer and proved charge sheet no. 18/2002
P.W.12-Avadh Bihari Rakesh	3rd Investigating Officer and proved charge-sheet no. 18A/2002

(14) In order to prove its case, the prosecution placed on record and proved the following documentary evidence :-

Ext. Ka. 1	Written Report
Ext. Ka. 2	Letter to the Chief Medical Superintendent for medical examination of the victim and submit report.
Ext. Ka. 3	Medico-legal and supplementary medical report of victim by Dr. Vineeta Singh (P.W.3), District Woman Hospital, Raebareli
Ext. Ka. 4	External Injury Report of victim by Dr. R.K. Mishra (P.W.5), District Hospital, Raebareli.
Ext. Ka.5	Post-mortem Report of the deceased Pokhai
Ext. Ka.6	Inquest Report (*panchayatnama*) of the dead body of deceased Pokhai
Ext. Ka.7	Challan lash
Ext. Ka. 8	Photo lash
Ext. Ka. 9	Letter to C.M.O., Raebareli
Ext. Ka. 10	Letter to Reserve Inspector, Raebareli
Ext. Ka. 11	X-ray Report
Ext. Ka. 12	Recovery Memo of blood stained soil and plain soil and Ghaghra of victim with blood and semen.
Ext. Ka. 13	Recovery Memo of empty cartridge 12 bore
Ext. Ka. 14	Check F.I.R.
Ext. Ka. 15	Carbon Copy of G.D. entry
Ext. Ka. 16.	Charge-Sheet No. 18/2002 dated 08.06.2002
Ext. Ka. 17	Charge-sheet No. 18A/2002 dated 16.07.2002
Ext. Ka. 18	Site plan

(15) In addition to the aforesaid, the prosecution also placed on record x-ray plate of the victim as material exhibit-1 and proved it.

(16) After closure of evidence of prosecution, the statement of accused persons under Section 313 Cr.P.C. was recorded on 09.11.2010, in which they stated that the case has been instituted against them on account of enmity and conspiracy of police.

In addition, accused Udai Raj, in his statement, has stated that he is innocent. He has been implicated in the murder case of Rajendra Maurya, in which he was acquitted. After being acquitted in that case, he had written letter against the police officials, due to which the police bore a grudge against him.

Accused Ramu, in his statement, has stated that he was not involved in the incident. The police, on account of malice, have falsely challaned him.

Accused Anwar Ali, in his statement, has stated that he was not involved in any such incident.

Accused Shankar Nai, in his statement, has stated that he was falsely implicated in the murder case of Rajendra Maurya, in which he was acquitted and he had taken action against the police, on account of which he has been falsely implicated.

Accused Paras Nath, in his statement, has stated that he did not commit any incident. He was working at Kamlesh's brick kiln and was staying there on that night. The police have falsely challaned him.

Accused Ram Sajeevan, in his statement, has stated that he did not commit any incident. Earlier, the police of Police Station Unchahar had implicated him in the murder of Rajendra

Maurya and after being acquitted from that case, he had written letter against the police, on account of which, the police has falsely implicated him in this case.

Accused Rati Pal has also stated in his statement that in the murder case of Rajendra Maurya, the police of Police Station Unchahar had falsely implicated him after being acquitted in that case, he had taken action against the police, on account of which, the police has again falsely implicated him.

(17) In defence, one witness, namely, Mithilesh Kumar was examined as D.W.1 in oral evidence. In documentary evidence, a certified copy of the order passed in Case Crime No. 294 of 2004 of Police Station Unchahar, District Raebareli, was placed on record.

(18) The trial Court, after hearing learned Counsel for the parties and considering oral and documentary evidence on record, convicted and sentenced the accused persons by means of the impugned judgment and order dated 03.02.2011 in the manner as stated in paragraph-1 here-in-above in this judgment.

(19) Feeling aggrieved by the aforesaid judgment and order dated 03.02.2011, accused/convicts Anwar Ali, Ramu alias Ram Kumar and Ram Sajivan Patel have preferred Criminal Appeal No. 538 of 2011 and accused/convicts Rati Pal Patel, Paras Nath Patel, Udai Raj and Shanker Nai preferred Criminal Appeal No. 550 of 2011.

(20) Since both, Criminal Appeal No. 538 of 2011 and Criminal Appeal No. 550 of 2021, arising out of a common case crime number and common judgment and order dated 03.02.2011 and common facts, therefore, they have been clubbed, heard and are

being decided together by means of this common judgment and order.

(21) It is pertinent to mention that appellant no.1-Rati Pal Patel in Criminal Appeal No. 550 of 2011 is on bail granted by Hon'ble Supreme Court vide order dated 04.02.2025 passed in Criminal Appeal No. 574 of 2025; *Rati Pal Patel Versus State of U.P.,* whereas other appellants in both the appeals are in jail.

Arguments :

(22) Heard Shri Jagdish Prasad Upadhyay, learned Counsel for the convicts/appellants and Shri Pawan Kumar Mishra, learned A.G.A. for the State.

Submissions on behalf of the appellants:

(23) Learned counsel for the appellants submitted that the impugned judgment and order has been passed by the trial Court against the law and facts as well as against the weight of evidence on record, recording perverse and erroneous findings on the basis of surmises and conjectures. The prosecution has failed to prove it's case beyond all reasonable doubt and apparently no case, under which the conviction could be made, is made out against the appellants. He further submitted that the appellants were not named in the FIR, which was lodged against 3-4 unknown persons, but subsequently seven persons were implicated, without any identification parade from prosecutrix (name is not being given as she is victim), on account of police enmity with the connivance of police because the victim belonged to *Banjara* community and had come with the group on the same day, therefore, she could not have personally known to the appellants and identified. She also could not personally identify the appellants in Court room. He further submitted that the victim was major in age and the medical report does not

corroborate the prosecution story, therefore, the allegation of gang rape is false. It has also been submitted that the *ghaghra* of the victim was allegedly seized, but the petticoat was sent for forensic examination, which renders recovery doubtful and also bellies the prosecution case because the victim was not wearing anything under *ghaghra.*

(24) Learned counsel for the appellants further submitted that the prosecution witnesses of fact are interested witnesses and does not inspire any confidence and all other witnesses are formal witnesses. There is no corroborative evidence. The post-mortem report and medical of the victim does not support the prosecution case. Learned trial court has failed to consider and rely eye account of the defence witness. PW.1 and PW.2 have not assigned any role of firing to the appellants, hence the allegation under Section 302 I.P.C. is not corroborated by statement of witnesses. Even otherwise, it has been submitted that the prosecution witnesses have unequivocally deposed that assailant had fired on Pokhai, when he chased the culprit attempting to take away the victim, therefore, the murder was not premeditated so the conviction could not have been made under Section 302 IPC and it could have been made only under section 304 IPC, if the Court was of the view that the offence of murder proved all beyond reasonable doubt.

(25) Learned counsel for the appellants further submitted that there is no evidence on record to prove essential elements to constitute unlawful assembly as defined under Section 141 I.P.C. The FIR and the statements under section 161 Cr.P.C. shows involvement of only 3-4 persons and the purpose of unlawful assembly has not been proved, therefore, the provisions of section 149 I.P.C. are not attracted. It has further been submitted that the conviction could not have been made

separately under Sections 147 and 148 I.P.C. together for the same offence, for the reason that if the accused is being convicted in an aggravated form of offence under section 148 I.P.C., he could not have been convicted separately under section 143 I.P.C. or 147 I.P.C.

(26) Learned counsel for the appellants further submitted that this Court may take judicial notice of certain universal, social, legal and behavioural facts for evaluating the prosecution case, such as the natural basic instinct of living and non-living being for sexual desire for which they involve themselves in all kinds of fear and foul play. It is also recognized by the international covenant on human rights. It has also been submitted that to fulfill the said desire the partners may go to any extent, even causing murder, if obstructed in any manner. The laws, relating gender equality and protection to weaker section and female are being misused instead of following in letter and spirit. The courts have already observed that the police is an organized group of dacoits in uniform. The witnesses may lie but circumstances do not. Thus, it has been submitted that victim may have been seen with her partner by her uncle, therefore, he would have killed her uncle and the appellants have falsely been implicated due to police enmity.

(27) Learned counsel for the appellants further submitted that the provisions of SC/ST Act are not attracted in the present case because neither deceased nor the victim belonged to any of the cast notified as SC or ST by the State Government. It has also not been proved that the crime was committed only because the victim or the complainant belonged to SC or ST community. It has also been submitted that the charge-sheet was submitted under the provisions of S.C./S.T. Act also, therefore, the trial should have been held before the Special Court under the

S.C./S.T. Act but it was held before a F.T.C. Court. Thus, the impugned judgment and order is liable to be set-aside only on the ground of without jurisdiction.

(28) Learned counsel for the appellants further submitted that the entire investigation was tainted and made in a very casual manner only to implicate the appellants only without following the due procedure, therefore, on the basis of said investigation neither the charge-sheet could have been filed nor the appellants would have been convicted. Thus, learned counsel for the appellants submitted that the impugned judgment and order is not sustainable in the eyes of law and liable to be set aside and the appellants are liable to be acquitted of all the charges.

(29) Learned Counsel for the appellants relies on **Gireesan Nair Vs. State of Kerala**; AIR OnLine 2022 SC 919, **Dana Yadav @ Dahu & others Vs. State of Bihar;** 2002 (7) SCC 295, **Bhagwan Singh & others Vs. State of M.P.**; 2003 (3) SCC 21, **Allauddin Mian and others Sharif Mian and another Vs. State of Bihar;** (1989) 3 SCC 5, **Sukhbir Singh Vs. State of Haryana**; (2002) 3 SCC 327, **Bhimrao alias Ramesh Pandhari Bhade and others Vs. State of Maharashtra;** (2003) 3 SCC 37, **Vijay Padurang Thakre Vs. State of Maharashtra;** AIR 2017 SC 897, **Abraham John Vs. State;** 1969 Cri.L.J. 1577 (Ker)**, Ram Narain Vs. State of Punjab;** AIR 1975 SC 1727, **Piara Singh Vs. State of Punjab;** AIR 1977 SC 2274, **Sharad Birdhi Chand Sharda Vs. State of Maharashtra;** (1984) 4 SCC 116, **Ramanand Yadav Vs. Prabhu Nath Jha;** (2003) 12 SC 606, **Rudrappa Ramappa Jainpur and others Vs. State of Karnataka;** (2004) 7 SCC 422, **State of Punjab Vs. Hakam Singh;** (2005) 7 SCC 408, **Vaibhav Vs. State of Maharashtra;** 2025 INSC 800, **Nandlal**

Vs. State of Maharashtra; (2019) 5 SCC 224, **Paul Vs. State of Kerala;** (2020) 3 SCC 115, **Balu Sudama Khalde Vs. State of Maharashtra;** AIR 2023 SC 1736, **Prabhat Kumar Mishra alias Prabhat Mishra Vs. State of U.P.;** AIR 2024 SC (Criminal) 632, **Shashikant Sharma Vs. State of Uttar Pradesh;** 2024 (1) ALJ 579, **Patan Jamal Vali vs. The State of Andhra Pradesh;** AIR 2021 SC 2190, **Ram Das and others Vs. State of Maharashtra**; (2007) 2 SCC 170 and **Khuman Singh Vs. State of Madhya Pradesh**; AIR 2019 SC 4030.

Submissions on behalf of the State:

(30) Learned A.G.A. vehemently opposed the submissions of learned counsel for the appellants. He submitted that the PW1, PW2 and PW4 have supported the prosecution case and the post-mortem report as well as medical report of the victim corroborates the prosecution case. Thus, the prosecution has proved the case beyond all reasonable doubt. The submissions advanced by learned counsel for the appellants in regard to the applicability of the legal provisions is totally misconceived and not tenable in the eyes of law. The contention that this Court may take judicial notice of certain facts, as stated by learned counsel for the appellants, is misconceived and not tenable; firstly because the same are based on unauthenticated documents and secondly judicial notice, if any, can be drawn only of the facts in terms of section 57 of the Evidence Act. Thus, the contentions raised by learned counsel for the appellants are highly misconceived and not tenable in the eyes of law. The learned trial court has passed the impugned judgment and order, considering and dealing the evidence and material on record appropriately by a reasoned and speaking order, which does not suffer from any error or illegality. The

appeals have been filed on misconceived and baseless grounds, having no merit, liable to be dismissed.

ANALYSIS

(31) We have cogitated on the submissions of learned counsel for the parties and examined the records.

(32) The facts, on which there seems no dispute on the basis of submissions of learned counsel for the parties and records, are that the victim and the complainant belonged to a nomadic (*Banjara*) community, which roam around place to place with their group for livelihood and live setting up their camps, which is called '*Dera'*. On 24.05.2002, they shifted from village Kakriha, Police Station Sangramgarh, Pratapgarh to Hariharpur, a hamlet of Nigoha. Police Station Unchahar, Raibareli. The camps were set up at about 3.00 PM in the field of Raja Ram Maurya, located in the South of Gram Pradhan Jagat Narayan's house. There was an storm and rains on that very night, on account of which the camps had collapsed, consequently some people were sleeping in the veranda in front of the shop of the Pradhan, some people were awake and some people were in their camps. An incident occurred in the intervening night of 24/25.05.2002, on account of which an FIR was came to be lodged by the complainant on the basis of a written complaint against 3-4 unknown persons. Thus, the first contention raised by learned Counsel for the appellants is that since FIR was lodged only against 3-4 persons, 7 persons have wrongly and illegally been implicated on account of enmity with the police and with their collusion, therefore, the prosecution case is not sustainable on this ground alone and impugned judgment and order is liable to be set aside.

(33) The aforesaid contention of learned counsel for the appellants is misconceived and not tenable only on the aforesaid ground of increase in numbers of the accused persons during investigation because it is settled in law that FIR is not an encyclopedia of the prosecution case. It is only the first information of the occurrence, as is apparent from the nomenclature FIR; First Information Report of the occurrence, meaning thereby it is only to inform to the police as to what kind of incident has taken place. Thus, it is neither expected nor required that the FIR would contain every minute detail of the occurrence and the number of the persons also, particularly where the occurrence had taken place under the darkness of night.

(34) The evidence on record shows that the complainant (P.W.2), the victim (P.W.1) and son of deceased Pokhai (P.W.4), who are witnesses of fact, were persons of a nomadic community residing temporarily in the camps along with their group, which roam around and had come to the place of occurrence only on the previous day of occurrence at about 03:00 in the afternoon and they were not previously acquainted with the persons of area and know them or the assailants. Thus, when the accused were unknown, it is natural that their names did not find place in the F.I.R. However, the prosecution is required to prove the involvement of all the accused persons in the alleged crime, surfaced during investigation, beyond all reasonable doubt with their identity on the basis of cogent evidence, particularly in the facts and circumstances of the case in which the FIR was lodged, promptly after the incident by the person, who was witness to the incident of crime of murder, kidnapping and rape and no description of any of the assailant was given. This Court is also conscious of the fact that in such cases the Court is required to evaluate the evidence and material on record with

due care and caution keeping in mind the settled principles governing appreciation of testimony of the victim as well as other witnesses.

(35) The FIR of the incident, at about 1.30 AM, in the intervening night of 24/25.05.2002, was lodged on the basis of written complaint at 5:30 AM on 25.05.2002. According to the prosecution version, 3-4 persons were seen coming from the south towards the village and upon reaching the '*Dera',* they started beating by stick (danda), therefore, the complainant and other persons started shouting, upon which they dragged the victim wife of Sitaram to some distance. Pokhai son of Nazeer ran to get freed the victim, when a person from them fired on him by a country made pistol, on account of which he ran shouting and fell in a ditch near the road and died. Teerath Nath s/o Pokhai, Bhungi s/o Chhtrapal, Shobhnath s/o Navrangi, Lalau s/o Navrangi, Pokhai s/o Langad r/o Mansha ka Purwa and Mithilesh Kumar s/o Sitaram, Suresh Kumar s/o Nand Lal and Sanjay Kumar of Hariharpur etc. ran exhorting and identified, but on account of fear could not go behind them, however, they can recognise them on seeing. They took the victim to a long distance and after doing bad work left her.

(36) The victim appeared as PW1. She deposed that she is of *Mangta* caste. The *Dera* was set up at 3.00 in the noon. The storm and rain had come in the night after taking food. Some people went in Dera and some slept in the Verandah of Pradhan. She was in camp along with her uncle, aunt and son of her aunt and Pokhai, who was her grandfather, but subsequently referred him as uncle. At about 12:00–1:00 in the night, miscreants came and started beating. As she tried to ran, the accused, Anwar present in Court caught her. Pokhai ran to save her, then Anwar fired on him by country made pistol, on account of

which he died. Anwar handed her over to his colleagues, who dragged her to the bed of canal. Five miscreants came and all the seven plundered her dignity against her wishes and forcibly raped. Firstly Anwar raped her and thereafter the remaining persons raped her one by one. Thereafter, Anwar gave her Rs. 60/- to get her treatment done. He also asked not to tell about it to anybody and the accused persons left her at some distance. She was medically examined. She further deposed that after three days of the incident the police personals had shown her the photographs first and thereafter caught certain persons and brought. She identified. They had committed rape with her.

(37) P.W.1 further deposed that the night was alight. She could identify the accused persons. She identified 6 out of 9 accused persons present in court and deposed that they had committed rape with her. The trial Court has recorded that there are seven accused persons out of which one has given an application for exemption. The remaining are standing in the cage. Their names were asked, upon which they told their names as Shankar, Ratipal, Udairaj, Parasnath, Ram Sajeevan and Anwar. The defence raised objection on this proceeding.

(38) P.W.1 further deposed that she could identify all the accused. The accused Anwar had given her Rs. 60/-. She had objected to it. He, after giving Rs. 60/-, asked to get the treatment done of all the places, wherever she had got injuries. He had also given four tablets but she had not taken. The medicine and Rs. 60/- were given by her to the Constable, but subsequently she said that she had given it to Banwari, who gave to police. On the next date also, she identified all the accused persons, who were present in the trial Court. The trial Court recorded its observation that all the accused persons named in the charge-sheet are present.

(39) P.W.1 further deposed that on account of rape, her *ghagra* was blood stained, which was black, white, red, green and blue stripped. It was taken into custody by the police. Her medical examination was done in the District Hospital Raebareli and x-ray was also done.

(40) P.W.1 was extensively cross-examined. She deposed that she did not know the accused persons previously. They have no permanent residence. They had come in the village on the date of incident at 3:00 in the day. She further deposed that when the miscreants had come, they were sleeping. They had not made any robbery. She also deposed that they were beating by white lead. The miscreants had first started beating the people in camp. They had beaten all the persons in the camp but she could not tell as to how many persons were beaten. She had suffered injuries of stick over her whole body, which was shown by her to the doctor. She also deposed that on account of sudden attack many persons had left the place and ran away but she could not run because as soon as she tried to run she was caught by the miscreants. She also deposed that she does not have the knowledge of directions. She was taken out of the camps towards the canal and not towards the village. The canal is about one kilometer away and they did not took her across the canal. She was not taken dragging, rather the accused lifted her. Her uncle was shot by a country-made pistol, on account of which she could not cry.

(41) P.W.1 further deposed that there was no clothe on her body because the clothes were torn by the accused, however, the clothes were not thrown and given to her. She further deposed that she had told to the Inspector that when they took her lifting then she was naked. Her clothes were torn. If it was not written

by the Inspector in her statement, she cannot tell the reason. She also deposed that she had handed over to the police. She further deposed that neither her shirt was torn nor she had given it to the police. She further deposed that she had given the statement on the last date by mistake that at that time clothes were not on her body, clothes were torn, the clothes were not thrown by the accused but given to her. She is stating it on the memory and not on tutoring.

(42) P.W.1 also deposed that while she was being taken by the accused persons, she was throwing her legs and hands. Her bangles were broken, on account of which she had suffered injuries in the hands and she had shown them to the doctor. She also deposed that the canal, where she was taken, had no water. She had not seen that she was taken across the canal. She again reiterated that the accused persons had came to some distance and the accused had given her Rs. 60/-. She also deposed that the ground, where the rape was committed was uneven. She does not recollect as to whether there was any water. She did not wear anything under the *ghaghra*. She also deposed that at the time of rape also, she was objecting and throwing hands and legs. Accused persons did bite on her cheeks. The marks of the teeth and scratches were left on her body. She had not made any objection to the rape with her. She had not kept her leg on leg. The bad work was done by all seven accused persons. She does not recollect as to how much time they had taken in rape. The blood had come from vagina, which spread in the clothes. She had shown the marks of blood and scratch of nails to the police personals. She also deposed that she had not taken bath between the incident and going with the police.

(43) P.W.1 further deposed that she also does not recollect as to how much time she remained with the police personals. The medical

was conducted on the same day and she had not taken bath before medical. She further deposed that when she came back after the incident of rape, she came to know that her uncle has died. She, pointing out towards the accused Anwar, said that at the place of incident, he had asked not to flaunt, otherwise she would also be killed as her uncle has been killed. Before that she did not know that uncle has been killed. She further deposed that she had not told about the height, age, body etc. of the accused to the police. The identification of the accused persons was got done by the police in the police station Unchahar. At that time all the accused persons were lodged in police station Unchahar. Firstly, the photographs of the accused persons were shown to her but she could not identify. Secondly the police had got identified after 2-3 days, then she identified. She also deposed that she had gone with the Inspector at the place of incident of rape. The constable had also accompanied them. The place of incident of rape was at a distance of 10 – 15 steps from canal. A staple fibre (Phuchada) of *Ghaghra* was found at the place of incident. The police had taken it in custody. She denied the suggestion that any such incident had not happened and she has given false evidence on tutoring by the counsel. She also admitted that besides the government counsel, she has also engaged a private counsel.

(44) The victim, who appeared as P.W.1, is the star witness of the prosecution. However, there are contradictions and inconsistencies in her testimony, particularly in regard to identification of accused persons, place of incident of rape. It is apparent that she did not know the accused persons prior to the incident and she along with her group had come a day before the incident in the noon at the place of the incident. It is also reflected from her evidence that she was detained by the police for about three days and no test identification parade was

conducted and she could not identify the accused persons in photographs and had identified the accused persons in lock up of police station and thereafter in Court, but there is no explanation by the prosecution as to why the victim was detained by police and where she was kept for such a long period and as to why Test Identification Parade was not got done. Thus, it is to be seen as to whether identification of accused persons by her is in accordance with law or not complicity of accused/appellants is otherwise proved or not and other evidence, medical and material corroborates the evidence of P.W.1 and the prosecution case or not and effect of the contradictions and inconsistencies in the evidence of the victim.

(45) The complainant Banwari appeared as PW2. He is the real brother of Pokhai; the deceased and uncle of the victim. However, initially the victim had referred the Pokhai as her grandfather but subsequently as uncle. He has stated that 6-7 persons had come from South. He along with others had shouted. The accused persons had dragged the victim for about 10 steps. She was not going, therefore, they lifted her. Pokhai tried to get her freed, therefore, they shot him dead. It was moonlight. Looking to the accused, Anwar, he said that he had shot fire on Pokhai. His name is Anwar. Pokhai went 10 steps and fell in ditch and died. He further deposed that the accused present in court took the victim towards the south near the canal. The defence raised objection on the identification of the accused persons in the Court.

(46) P.W.-2 further deposed that they chased the accused persons but due to fear, they could not proceed further and returned. After about 1 to 1½ hours, the victim (P.W.-1) returned and told weeping that all the seven accused persons had committed wrong act with her one by one near the canal. The accused

persons had given Rs.60/- consisting of one note of Rs.50/- and another of Rs.10/- asking her to get the treatment done and did not tell to anybody about it. He further deposed that the victim had injuries in her hand, back and leg and was complaining of pain. Her *ghaghra* was stained with blood and was also torn a little. Thereafter, when the dawn broke and it became alight, he went to the house of a villager and got the report written. The incident was got written in the same manner as it was from that person, who read it over to him. After hearing it, he affixed his thumb impression thereon. The said application was given at the police station in the morning. He went to the police station alongwith Shobhnath, Bhungi, Pokhai, the victim and Lallau. He proved the written report as Paper No.3क/2 (Ext. Ka-1). On being read over to him, P.W.2 proved that the same was got written by him. He further deposed that the victim was detained at the police station and they had returned. The Inspector had come on the *dera* and recovered the empty cartridges near the ditch, where the Pokhai was lying dead. He had also recovered the plain and blood stained mud and kept in different boxes and the seizure memo were prepared. He further deposed that the Inspector had also taken custody of the *ghaghra* of the victim and Rs.60/-, which was given by the accused persons to her, which was given by her to him. The same was kept in an envelope and recovery memo was also prepared. He further deposed that the accused persons had come to the *dera* after the incident and asked for the compromise. They had also met while he had come to the Court and asked for the compromise.

(47) P.W.2 further deposed that the night was alight and everything clearly visible. However, in the cross-examination, he deposed that he does not recollect as to whether the moon was full or not. He had also not written in the report that the night was alight. The Investigating Officer had not asked from him as to

in which light he had identified the accused persons. He, on his own, had informed the Investigating Officer that he had identified in the moon light and if it is not written in statement, then he can not tell the reason for it. Thus, identification of accused persons by him at the time of incident is doubtful on account of contradictions in his evidence.

(48) P.W.2-Banwari further deposed that he knows the number and after counting, he stated that seven persons are standing in cage since he is coming from last many days in the case. He further deposed in his cross-examination that they used to keep their *dera* in the village of incident occasionally. He further deposed that they had made their *dera* at about 03:00 in the day on the date of incident. They had not gone to the populated area of village. They were keeping camps up to the night. Thereafter, they prepared food. He neither identifies anybody in the village Hariharpur nor knows the parentage of anybody. He does not know anybody named Mithlesh Kumar son of Sitaram. He also does not know Suresh Kumar son of Nand Lal and Sanjay Kumar son of Ram Pher. He also does not know from whom he got the report written. The person had met him near the shop, which was at a distance of 4 – 6 steps from *dera*, which was in a wooden gumti. It was night, lantern was alight and it was dark. He does not know as to what was kept and being sold in the shop. The shopkeeper was sitting in the shop alongwith alight lantern. The paper was given by the said shopkeeper. When the report was got written, it would have been 04:00 in the morning. The police had not come by that time. He had told to the person, who had written the report that 6 – 7 persons were involved. He had not got heard the report. He had got read over the written report by an outsider before four steps from the police station then he had heard that it was written in the report that 6 – 7 persons were involved. The witness was read over the

Ext. Ka-1 and told that involvement of 3 -4 persons is written, upon which, he stated that he had got written that 6 – 7 persons were involved. He had left the report at the Police Station and the copy was not given to him. Signatures were also not taken from him. He also deposed that he had told to the Inspector about involvement of 6 – 7 persons. Thus, the complainant could not tell as to from whom the F.I.R. was got written. He could also not tell properly about the source of light at the shop. He also could not tell the things sold in the shop. It all coupled with opening of shop at 04:00 in morning at a small place near village creates doubt about the place and person, who wrote the F.I.R., as he has also not been produced, particularly when a contrary defence evidence has been adduced, which could not be controverted.

(49) P.W.2-Banwari, on being pointed out towards the accused Anwar, stated that this man is of short, black coloured and double heavy body. However, he had not got written in the report that the person, who killed Pokhai by fire arm, was of short stature, black coloured and double heavy body. He had not got written the description of any accused and the clothes, which were worn by them. All the accused persons present in the Court are young. It was neither told to the Inspector nor got written in his statement. He further, in his cross-examination, denied the suggestion that he was demanding more money for the compromise from the accused persons, therefore, the compromise could not be made.

(50) P.W.2 also deposed that after the thunderstorm, 3 – 4 camps were again made. The *dera* was in the round shape and there was a distance of about a hand between two camps. Pokhai was lying in the verandah. The victim was in the dera of Shobhnath. The dera of Shobhnath was in the South of his dera at a distance

of 10 steps. Two – Three persons, namely, Shobhnath, Pokhai and wife of Shobhnath were lying in the verandah. Firstly, all the 6 – 7 accused persons had came to his dera and started beating all. He was also beaten by 1 – 2 sticks but it was not told by him to the Munshi in the police station. Pokhai had suffered a lot of injuries. He has died. He had not gone to the police station with him. Nobody else had got the injuries. He was not medically examined. He further deposed that the road is not between the dera and the verandah rather it is adjacent on the north. Thereafter, he stated that the road is in between the dera and the verandah. The ditch is on both the sides of road and Pokhai had fell down in the ditch on the south and died there. His dead body was also found there. Pokhai was shot from a distance of 10 steps by one fire. The person, who had shot, had ran away towards the south. The person, who had shot the fire, was present outside the dera. Pokhai had chased him towards south, when he had shot fired. Pokahi had chased him for about 10 steps but it was not told by him to the Inspector. He also deposed that they had ran towards the south of dera. He further deposed that the accused persons had firstly dragged the victim and thereafter lifted and took her as a dead body. She had returned on the same night at about 2:30 – 3:00. The report was got written after she had returned. She had told about the incident to him and that 6 – 7 persons had done bad work with her, which was got written by him in the report. He further reiterated his evidence given in the examination-in-chief in the cross-examination. Thus, there are contradictions and inconsistencies not only in the evidence of P.W.2 but between evidence of P.W.1 and P.W.2 also.

(51) P.W.-4, who was also a member of the group of the complainant and the victim, also gave his evidence similar to the evidence of P.W.-1 and P.W.-2. He is son of Pokhai, who was killed in the

incident. He deposed that the fire was shot from a distance of 4 – 5 steps and thereafter he went about 20 – 25 steps and fell down aside the road and died. They had chased the accused for about 2 – 4 steps but thereafter, on account of fear, they returned. They had gone lifting the victim near the canal, which was about a kilometer away on the south of dera. The victim had returned after about two to two and half hours and told that accused persons have done bad work with her. She also gave Rs.60/-. The first information report was got written by her uncle and thereafter the Inspector had come. He further deposed that he had identified the accused persons in the lighted night and subsequently also he identified them. He identified the accused persons in the Court. Out of which, one was short statured and present in the Court, who has told his name as Anwar. He had shot fire on Pokhai. The defence objected about the identification of the accused persons in the Court.

(52) P.W.4, in the cross-examination, deposed that he could not tell as to who had beaten whom, however, all were being beaten by sticks. He further, in his cross-examination, deposed that when the thunderstorm and the rains had come, the camps had fallen and when it started raining, some persons had gone in the room of Jagat Narain and some persons were in the dera. The room of Jagat Narain was in the north of dera at a distance of about 40 – 50 steps. He was in dera. The thunderstorm had come at about 09:00 – 10:00 in the night and rains had come about 10:00 – 11:00 in the night. The dera was at a distance of 20 – 25 steps from the road in the field. He also deposed that the victim was in the dera of Shobhnath. He had not seen any accused in the dera. He further deposed that the accused had not shot fire on his father immediately after entering but when they lifted the victim and were going, his father had chased them to get her freed, then he was shot by fire and he fell down in the ditch at a

distance of about 20 – 25 steps in the north. He further deposed that the victim was married at the time of incident. She was hale and hearty. She had returned at about 2:30 – 03:00 in the night and the police had come about 07:00 in the morning. The police had taken the dead body of his father to the police station. He further deposed that he does not recollect as to whether some police personnel had taken the dead body and some remained at the spot. He denied the suggestion that he was not on the spot, therefore, he is making an excuse of not knowing the things. He further deposed that when he had identified the accused persons during his evidence on that date, all the seven accused persons were present in the cage of the Court. Besides the said seven persons, one another accused was in the cage, who had no concern with the case. He also deposed that he does not recollect as to whether he had any talk with Banwari before the report was written or not and he had not told to the Banwari or the police that only 3 – 4 accused were involved in the incident. Thus, there are contradictions and inconsistencies not only in evidence of P.W.4, but with the evidence of P.W.1 and P.W.2.

(53) The aforesaid witnesses, on the one hand, have stated that all in the *dera* were beaten by stick (danda) and, on the other hand, that none other had received any injury. Except the victim and deceased, none other has been got examined medically. There is contradiction in distance, from which the fire was shot on the deceased and the distance, after which he fell and died. P.W.1 has also deposed in her cross-examination that she had not objected to rape and the accused had come to leave her near the *dera*, which could have been only if the alleged miscreant was known to her, otherwise it is highly improbable. It is also highly improbable that the unknown miscreants would give medicine and pay money for treatment. It is also apparent that there are

contradictions not only in the evidence of aforesaid witnesses, but between the evidence of aforesaid witnesses also.

(54) On perusal of the evidence of aforesaid three witnesses of fact i.e. the victim; star witness (P.W.-1), complainant (P.W.-2) and son of deceased (P.W.-4), who claims themselves to be eye-witnesses, it emerges that they had come to the village, where incident occurred, with their group in the previous afternoon of the intervening night of the incident at about 03:00, when they started making their camps and during that period they had not gone towards the populated area of the village. It also emerges from their evidence that they did not know the persons residing in the village or vicinity. P.W.-2 and P.W.-4 have identified the accused persons only in the Court during their evidence and from their evidence, it does not emerge that they had ever told the description of the accused persons or what was being worn by them at the time of incident to the police prior to that. Admittedly their evidence was recorded after about 5 – 7 years of the incident. The only identification of the accused persons, prior to that, has been made by the P.W.-1 i.e. the victim but not in the Test Identification Parade. Her testimony shows that firstly she was shown the photographs of the accused persons, when she could not identify them, thereafter, the accused persons were shown to her in the lock-up room of the police station, where she identified them. She has not deposed that the photographs, which were shown to her, were not of the accused persons, who got identified by her in the lock-up of the police station.

(55) The Test Identification Parade can be held under Section 9 of the Indian Evidence Act, 1872 for identification of the accused persons. The Test Identification Parade is required to establish the identity of an accused and it is relevant fact under Section 9

of the Indian Evidence Act, 1872. The purpose of Test Identification Parade is to test and strengthen trustworthiness of the substantive evidence of a witness in court, which belongs to the investigation stage and if it is done with adequate precaution and in proper manner, it may be used by Court as a corroborative evidence. However, if the identification of the accused, who was not caught at the time of the incident, is not made properly and in accordance with law and if there is doubt about the identification of the accused persons, the conviction cannot be made only on it's basis. Similarly, if the accused persons were not identified by the victim in Test Identification Parade or otherwise, their identification in the Court may not be sufficient for their conviction.

(56) The Hon'ble Supreme Court, in the case of **Umesh Chandra v. State of Uttarakhand;** (2021) 17 SCC 616, has held that test identification parade under Section 9 of the Indian Evidence Act, 1872 is not substantive evidence in a criminal prosecution but is only a corroborative evidence. The relevant paragraphs 9 and 10 are extracted here-in-below :-

> *"9. A test identification parade under Section 9 of the Evidence Act is not substantive evidence in a criminal prosecution but is only corroborative evidence. The purpose of holding a test identification parade during the stage of investigation is only to ensure that the investigating agency prima facie was proceeding in the right direction where the accused may be unknown or there was a fleeting glance of the accused. Mere identification in the test identification parade therefore cannot form the substantive basis for conviction unless there are other facts and circumstances corroborating the identification.*
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> *10. But more important than that, the test identification parade being a part of the investigation, has to be proved by the prosecution as having been held in accordance with law. The onus lies on the prosecution to establish that the TIP was held in accordance with law. It is only after the prosecution prima facie establishes a valid TIP having been held, the question of considering any objection to the same arises. If the prosecution has failed to establish that a TIP was properly held by examining the witnesses to the same, there is nothing for the accused to*

> *disprove. In the present case, a Magistrate is stated to have conducted the TIP. The Magistrate has not been examined. No explanation is forthcoming why the Magistrate was not examined. The only evidence available is that of PW 4 the Station House Officer that during the investigation the TIP was held in the District Jail, Nainital and he identifies the proceedings in the court. The identification of the proceedings is irrelevant as obviously he could not have been present during the TIP. The TIP, a part of the investigation, therefore cannot be said to have been proved much less that it was held in accordance with the law. Secondly there cannot be repeated TIPs till such time that the prosecution is successful in obtaining identification of the accused."*

(57) The Hon'ble Supreme Court, in the case of **Gireesan Nair Vs. State of Kerala (Supra)**, has held that if identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless. The relevant paragraphs 25 to 29 are extracted here-in-below:-

> "**25**. Analysis: Heard the learned counsel for the parties and perused the case records. We may, at the outset, note that the eyewitnesses questioned by the prosecution did not give out the names or identities of the Accused participating in the riot and involved in the destruction of public property. Therefore, the IO (PW84) had to necessarily conduct a TIP. The object of conducting a TIP is threefold. First, to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the crime. Second, to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Third, to test the witnesses' memory based on first impression and enable the prosecution to decide whether all or any of them could be cited as eyewitnesses to the crime (Mulla and Anr. v. State of U.P.19).
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> **26**. TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant (Matru alias Girish Chandra v. State of U.P.20; Mulla and Anr. v. State of U.P.21 and C. Muniappan and Ors. v. State of Tamil Nadu22). The evidence of a TIP is admissible under Section 9 of the Indian Evidence Act. However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained (State of H.P. v. Lekh Raj and Anr.23; and C. Muniappan and

> Ors v. State of T.N.24). 19 (2010) 3 SCC 508 (Paras 44, 45 and 55) 20 (1971) 2 SCC 75 (Para 17) 22 (2010) 9 SCC 567 (Para 42) 23 (2000) 1 SCC 247 (Para 3).
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> **27**. It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade. This is a very common plea of the accused, and therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as to why there was a delay (Mulla and Anr. v. State of U.P.25 and Suresh Chandra Bahri v. State of Bihar26).
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> **28**. In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form, i.e., physically, through photographs or via media (newspapers, television etc…), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh and Ors v. State of U.P.27 and Suryamoorthi and Anr. v. Govindaswamy and Ors.28).
>
> **29**. If identification in the TIP has taken place after the accused is shown to the witnesses, then not only is the evidence of TIP inadmissible, even an identification in a court during trial is meaningless (Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra 29). Even a TIP conducted in the presence of a police officer is inadmissible in light of Section 162 of the Code of Criminal Procedure, 1973 (Chunthuram v. State of Chhattisgarh30 and Ramkishan Mithanlal Sharma v. State of Bombay31)."

(58) The Hon'ble Supreme Court, in the case of **Dana Yadav @ Dahu & Others Vs. State of Bihar (Supra)**, has held that failure to hold test identification parade, which should be held with reasonable despatch, 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 for the first time in court by a witness should not be relied upon, 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 in 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. It has further been held that 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. The Hon'ble Supreme Court, in the case of **Bhagwan Singh & Others Vs. State of M.P. (Supra)**, has taken similar view.

(59) In view of above, the identification of the accused persons by the victim is not in accordance with law and in view of the allegations levelled on behalf of the appellants that they have been implicated on account of police enmity, it can not be ruled out in the facts and circumstances of the case and the manner, in which they have been got identified. The conduct of the Court in getting the accused persons identified in the Court is also not appreciable, which was also objected by the defence time and again. It has also not been clarified as to when none of the aforesaid witnesses of fact knew the accused persons and they have also not given any description of them and as to what clothes were worn by them at the time of incident, as to why and how the police got identified the appellants because the manner, in which the extra-judicial confession was recorded prior to identification is highly improbable. Even the statement of the victim (P.W.1) was not recorded for three days and only after getting the appellants identified in lock-up, her statement was recorded which is evident from evidence of the investigating officer, who appeared as P.W.9.

(60) The evidence of P.W.9, S.I. R.P. Saroj, the first Investigating Officer, shows that the statement of the victim was not recorded immediately after lodging of the F.I.R., though the place of incident was inspected and the site plan was prepared on her pointing out along with the complainant (P.W.2) on the same date. The statement of the victim (P.W.1) was recorded on the third day of the incident i.e. on 27.05.2002 and that too after the statements of the accused persons and getting them identified in lock-up by her, wherein they allegedly admitted having committed the crime against the victim (P.W.1). No explanation for this delay in recording the statement of the victim (P.W.1) has been offered. He also failed to disclose as to where the victim was kept for three days. This witness was recalled and in his re-statement, he confirmed that he had recorded the statement of the victim (P.W.1) on the third day. The statement of the complainant (P.W.2) was recorded on the same day. He deposed that he had prepared the recovery memo of Rs. 60/- on the spot.

(61) P.W.9 has also deposed that on 25th and 26th May, the names of any accused persons involved in the crime had not surfaced. He further deposed that in Parcha No. 3 dated 27.05.2002, since the accused persons had admitted the crime after being arrested in another case vide Case Crime Nos. 123 of 2002 and 124 of 2002 under Section 3/25 of the Arms Act, on the basis of the recovery of country-made pistols from Udai Raj and Shanker, the accused persons were arrested, he implicated them in the present case and started the investigation against them and upon their alleged admission of having committed gang rape of the victim, Ramu alias Ram Kumar and Paras Nath were also arrested accordingly. However, P.W.9 admitted that there was no independent witness to the arrest. He further deposed that family members of the complainant (P.W.2) were grazing cattle

there and were present at the spot, where they were arrested. He further deposed that the statements of the accused persons were recorded at the time of arrest, wherein the accused persons admitted their crime and their statements were recorded after their arrest. All four accused persons were arrested on 27.05.2002 at 17:00 hours. Before 17:30 hours, no evidence had been found against them. On the basis of the statement of the complainant (P.W.2) and those of other witnesses and at their pointing out, the remaining three accused persons were arrested while fleeing away. Their names were disclosed by the accused persons. He further deposed and admitted that no identification parade of any of the accused persons was conducted. The statements of the witnesses were recorded on the same day after the arrest of the accused persons. The victim had stated that accused Anwar had given her Rs. 60/-. However, Anwar had not been arrested by that time.

(62) It is very strange as to how the victim could have disclosed the name of accused Anwar at that time, when both the victim (P.W.1) and the complainant (P.W.2) have admitted that they did not know the persons of the village or nearby places nor had Anwar been arrested by that time. It is also evident from the evidence of P.W.9, the first Investigating Officer, that no identification parade was conducted for the identification of the accused persons. It is also not the case of prosecution that the family members, who were present at the place of arrest of some of accused, had identified them. Thus, it is highly improbable that the accused persons, while arrested in connection with recovery of arms, would admit of committing other heinous crime without any basis. Therefore, the possibility of false implication on account of police enmity or implication of appellants, to show good work, as they were arrested in some case, cannot be ruled out in the facts and

circumstances of the case. Thus, they could not have been convicted on the basis of such identification.

(63) It is also very strange that the victim was withheld at the police station after lodging of the first information report and as per testimony of the P.W.-1 and P.W.-2, the victim had returned after about 2 – 3 days and it has not been clarified as to why she was withheld and where she was kept, whereas her medico legal examination was got conducted in the evening of the date of lodging of the first information itself. In any case, evidence on record shows that the victim (P.W.1) was in custody of police during said period before identification in lock-up, therefore, identification of accused persons under influence of police can also not be ruled out.

(64) The first Investigating Officer; P.W.-9 also deposed that the F.I.R. was lodged under Section 302, 376 and 323 I.P.C. He has started the investigation on the same day. He went to the spot and inspected the place of incident and recovered blood stained and plain mud and ghaghra of the victim stained with blood and semen. He also recovered one empty cartridge 12 bore and Rs.60/- and prepared recovery memo of the same and got it signed by the witnesses. He inspected the place of incident on the pointing out of the victim and the complainant and prepared the site plan i.e. paper No. 6Ka/1 and 6Ka/2, which were marked as Ext. Ka-11, Ext. Ka-12 and Ext. Ka-13. He got the inquest report prepared dictating to Dr. Anil Kumar Pandey, which is Ext. Ka-6 and, thereafter, got prepared the Ext. Ka-7, Ext. Ka-8, Ext. Ka-9 and Ext. Ka-10 and signed them. He enquired for the accused persons on 26.05.2002 and got the statement of Gram Pradhan Jagat Narain on 27.05.2002. He recorded the statement of accused Udai Raj, Shankar Nai, Ramu alias Ram Kumar and Paras Nath Patel, in which they

admitted for crime. On the very same date, he recorded the statement of the victim and finding her of SC/ST community, he converted the case under the SC/ST Act and provisions of Section 3(2)(v) of SC/ST Act were invoked and the trial held for the same and conviction has been made.

(65) One of the arguments of learned counsel for the appellants is that the provisions of SC/ST Act were wrongly and illegally invoked as the victim and deceased are not of any category of SC/ST. For convenience, Section 3(2)(v) of SC/ST Act is extracted here-in-below :-

> *"**3. Punishments for offences atrocities.—***
>
> ***(1)……..***
>
> ***(2)** Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—*
>
> ***(i)……..***
> ***(ii)……***
> ***(iii)……***
> ***(iv)……***
> ***(v)** commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine"*

(66) The aforesaid Section 3(2)(v) of SC/ST Act has been amended by Act 1 of 2016 and by Section 4 of the said amending Act "knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member" has been substituted in place of "on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member" w.e.f. 26-1-2016 vide notification dated 18.01.2016. Thus, on the date of incident i.e. 25.05.2002, the offence under the said provision could have been said to have been committed only if a persons not being a member of SC/ST commits any offence under the I.P.C. punishable with imprisonment for a term of ten years or more

against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine, therefore, if the offence would have been committed on the ground that the victim is a member of SC/ST community or such property belongs to such member. Therefore, firstly the person, who has committed the crime, must know that the persons with whom he is committing the crime is a member of SC/ST community or the property, with which he is committing the crime, belongs to him/her and secondly, the crime should have been committed because the other party i.e. the victim is of SC/ST community or the property belongs to member of such community.

(67) In the present case, admittedly, the victim, complainant and the deceased had come to place of incident on the date of incident and as admitted they did not know anybody of village and vicinity or the accused persons prior to incident, therefore, the question of knowing about them by the accused persons also prior to incident is highly improbable. It has also not been proved that the accused persons knew the victim and the deceased and their group prior to the incident and that they are of SC/ST community, therefore, the question of committing crime on the ground of their caste does not arise. Even otherwise it has been argued by learned counsel for the appellants that the victim and the deceased do not belong to any of the SC/ST community of the State of Uttar Pradesh and have also placed reliance on the Government Order in this regard and nothing contrary could be pointed out by the other side. Thus, apparently, the victim and the deceased were not member of SC/ST community, therefore, the question of invocation of provisions of SC/ST Act itself is illegal and not tenable. The prosecution has also failed to disclose as to how the victim and

the deceased come under the SC/ST community of the State of Uttar Pradesh. Learned Trial Court has also failed to consider it. Thus, this Court is of the view that the conviction under Section 3(2)(v) of SC/ST Act against the appellants is not sustainable in the eyes of law.

(68) The Hon'ble Supreme Court, in the case of **Prabhat Kumar Mishra alias Prabhat Mishra Vs. State of U.P. (Supra)**, has quashed the proceedings under Section 3(2)(v) of S.C./S.T. Act on the ground that it is nowhere the case of the prosecution in the entire charge-sheet that the offence under I.P.C. was committed by the appellant upon the deceased on the basis of his caste. The relevant paragraphs 16, 17 and 18 are extracted here-in-below:-

> "**16**. At the outset, we may take note of the fact that the prosecution of the appellant herein for the offence under Section 3(2)(v) of the SC/ST Act is ex facie illegal and unwarranted because it is nowhere the case of the prosecution in the entire charge-sheet that the offence under IPC was committed by the appellant upon the deceased on the basis of his caste.
> **17**. This Court in the case of Masumsha Hasanasha Musalman v. State of Maharashtra1 considered this issue and held as under:-
> "9. Section 3(2)(v) of the Act provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Penal Code, 1860 punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. In the present case, there is no evidence at all to the effect that the appellant committed the offence alleged against him on the ground that the deceased is a member of a Scheduled Caste or a Scheduled Tribe. To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Penal Code, 1860 is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. In that view of the matter, we think, both the trial court and the High Court missed the essence of this aspect. In these circumstances, the conviction under the aforesaid provision by the trial court as well as by the High Court ought to be set aside."
> **18**. Thus, from the admitted allegations of the prosecution, the necessary ingredients of the offence under Section 3(2)(v) of the SC/ST Act are not made out so as to justify prosecution of the accused appellant for the said offence."

(69) The Hon'ble Supreme Court, in the cases of **Shashikant Sharma Vs. State of Uttar Pradesh (Supra)** and **Patan Jamal Vali Vs. The State of Andhra Pradesh (Supra)**, has taken similar view. Similar view has also been taken by the Hon'ble Supreme Court, in the case of **Ramdas and Others Vs. State of Maharashtra (Supra)**, in which it has been held that the mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. The Hon'ble Supreme Court, in the case of **Khuman Singh Vs. State of Madhya Pradesh (Supra)**, has also taken similar view in regard to Section 3(2)(v) of S.C./S.T. Act, however, on account of sudden fight, the Hon'ble Court converted offence under Section 302 I.P.C. to Section 304 Part II I.P.C. The relevant paragraphs 12 to 14 of **Khuman Singh Vs. State of Madhya Pradesh (Supra)** are extracted here-in-below:-

> "**12**. From the evidence and other materials on record, there is nothing to suggest that the offence was committed by the appellant only because the deceased belonged to a Scheduled Caste. Both the trial court and the High Court recorded the finding that the appellant-accused scolded the deceased Veer Singh that he belongs to "Khangar" Caste and how he could drive away the cattle of the person belonging to "Thakur" Caste and therefore, the appellant-accused has committed the offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Section 3 of the said Act deals with the punishments for offences of atrocities committed under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Section 3(2)(v) of the Act reads as under:-
> "Section 3 – Punishments for offences of atrocities – (1) ……
> (2) Whoever, not being a member of a Scheduled Caste or a Schedule Tribe, -
> …….
> (v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine".
> The object of Section 3(2)(v) of the Act is to provide for enhanced punishment with regard to the offences under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that the victim is a member of a Scheduled Caste or a Scheduled Tribe.
> **13**. In Dinesh alias Buddha v. State of Rajasthan (2006) 3 SCC 771, the Supreme Court held as under:-

> "15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine. As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable.
> **14**. Insofar as the conviction under Section 302 IPC is concerned, as discussed earlier, the conviction of the appellant under Section 302 IPC is modified as conviction under Section 304 Part II IPC. The appellant-accused has been serving the sentence in jail for more than twelve years. As per the jail certificate issued by the Superintendent, Central Jail, Gwalior, the appellant has served the actual sentence in jail for more than twelve years (as on 04.07.2018) and as on date, he has served the sentence of more than thirteen years. Considering the facts and circumstances of the case, for the conviction under Section 304 Part II IPC, the appellant is sentenced to undergo imprisonment to the period already undergone.

(70) It would be appropriate at this stage to deal the argument of learned counsel for the appellants that since the trial has not been held by the Special Court under the SC/ST Act, therefore, the trial itself stands vitiated. There is no doubt that the offences under the trial held against the appellants are triable by Session. Section 14 of SC/ST Act provides for Special Court and Exclusive Special Court for the purpose of providing speedy trial. The present provision of Section 14 has been amended by means of Act 1 of 2016 and prior to amendment by the Amending Act w.e.f. 18.01.2016, Section 14 was as under:-

> "**14. Special Court-** For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for each district a Court of Session to be a Special Court to try the offences under this Act."

(71) The aforesaid provision discloses that the Special Court was to be notified by the State Government with the concurrence of the Chief Justice of the High Court for the purpose of providing speedy trial to try the offences under this Act. Thus, the only purpose for notification of Special Court for the purpose of the SC/ST Act was for speedy trial and the Court, which was empowered to conduct the cases for the offences levelled against the accused, was to be notified for the aforesaid purposes, therefore, merely because the case has been tried in a Court, which was not notified, will vitiate the trial is highly misconceived and not tenable for the reason that otherwise it was empowered to try the case. It is also not the allegation that the Court, which has tried the trial, was not having jurisdiction for the trial of the offences levelled against the appellants. Even otherwise, the offences of the I.P.C. were to be tried under Section 3(2)(v) of SC/ST Act and it is to be seen as to whether the said offences have been committed on the ground that the victim or the deceased or their property belong to the member of SC/ST, but in the present case, as recorded above, it has also not been proved that they belong to SC/ST community, therefore, the question of committing the crime on the said ground does not arise. In any case, when the Court was having jurisdiction to try the offences, merely because it was not notified by the Government as a Special Court for trying of offences under the SC/ST Act speedily, it could not be a ground to hold that the whole trial is vitiated, consequently, the impugned judgment and order.

(72) By the amending Act 1 of 2016, Section 14 of SC/ST Act has been amended and a proviso has also been added that the Courts so established or specified shall have power to directly take cognizance of offences under this Act. In a case, in which the cognizance was taken by the Magistrate prior to committal

of case after amendment, the matter went up to the Hon'ble Supreme Court. The Hon'ble Supreme Court held that because of the restricted role assigned to the Magistrate at the stage of committal under the new Code, the non-compliance of the same and raising of any objection in that regard after conviction attracts the applicability of the principle of `failure of justice' and the convict-appellant becomes obliged in law to satisfy the appellate court that he has been prejudiced and deprived of a fair trial or there has been miscarriage of justice in the case of **Shantaben Bhurabhai Bhuriya Vs. Anand Athabhai Chaudhari and Others**; (2022) 15 SCC 228 and the Hon'ble Supreme Court held that it would be totally inapposite and inappropriate to hold that such non-compliance vitiates the trial. The Hon'ble Supreme Court further held that if issue is considered from another angle, the accused is to be tried for the offences under the Atrocities Act by Special Court / Exclusive Special Court constituted under Section 14 of the Atrocities Act. Even those rights are also available to the victim for the offences under the Atrocities Act, in which the trial is by the Special Court/Exclusive Special Court constituted under Section 14 of the Atrocities Act. Therefore, unless and until those rights which flow from Section 14 of the Atrocities Act are affected, the accused cannot make any grievance. Even otherwise in view of the provisions of Section 460 of the Cr.P.C., it can be an irregularity and not an illegality, therefore, entire proceedings and conviction cannot be accepted to have vitiated and is unsustainable.

(73) Applying the ratio of the aforesaid judgment of the Hon'ble Supreme Court on the present case, we are also of the considered view that the appellants have failed to show any prejudice to have been caused to them on account of trial not being held before the Special Court under the SC/ST Act and

that it resulted in failure of justice, therefore, the contention is misconceived and not tenable and liable to be repelled only and accordingly repelled, holding that the trial cannot be said to be vitiated on this ground and the impugned judgment and order cannot be set aside or quashed on this ground.

(74) P.W.9 i.e. the first investigating officer also denied the suggestion that the F.I.R. had not been lodged by the time of inquest and, therefore, Section 323 I.P.C. was not mentioned in the inquest report of the deceased and that only Sections 376 and 302 I.P.C. were mentioned and Section 323 I.P.C. was added subsequently. He further deposed that the inquest had been conducted under his dictation by Shri Arun Kumar Pandey under Sections 323, 302, 376 I.P.C. and Section 3(ii)(v) of the S.C./S.T. Act. In his earlier statement as discussed above, P.W.9 had stated that on 27.05.2002, after the admission of the accused persons and the statement of the victim, the case was found to attract Section 3(ii)(v) of the S.C./S.T. Act and was accordingly converted, whereas the inquest of the deceased Pokhai had been conducted on 25.05.2002 between 7:15 a.m.-9:15 a.m.

(75) P.W.9, in response to a query by the Court, further deposed that after the case was converted under Section 3(ii)(v) of the S.C./S.T. Act and the investigation was taken over by the Circle Officer, he continued to conduct further investigation under the directions of the Circle Officer. He also deposed that the place of incident shown in the F.I.R. is not reflected in the inquest report. The distance of the place of incident mentioned in the F.I.R. is 10 kilometres towards the east, whereas in the inquest report it has been shown as 6 kilometres. According to him, the distance shown in the check F.I.R. was by road, whereas the distance of 6 kilometers was the direct distance.

(76) P.W.9 further deposed that the place of occurrence of the rape was shown by the victim and was situated across the canal after proceeding from the side of the "dera". The victim had stated that she was raped by seven persons. He further deposed that the victim had described herself as the wife of Sitaram, whereas the victim stated in her testimony that she was not married at that time. Thus, his evidence is also contrary to the evidence of P.W.1 (the victim), who has stated that she was not taken across the canal and that the rape was committed aside the canal before reaching it. She had specifically stated that the accused persons had not taken her across the canal. P.W.9 also deposed that the complainant had not stated anything about the involvement of six or seven persons and that all the persons had stated that only three or four persons were involved. They had also not provided any description of the accused persons.

(77) In view of above, there are major contradictions and inconsistencies in the testimony of the first Investigating Officer (P.W.9) and with the testimonies of P.W.1, P.W.2 and P.W.4. P.W.1 has deposed that she was not married and P.w.4 has deposed that P.W.1 was married. It also shows that the investigation was conducted in a very casual manner and was tainted.

(78) The Circle Officer, who conducted the subsequent investigation after the conversion of the case under the S.C./S.T. Act, appeared as P.W.11. His evidence discloses that he had not recorded the statements of any of the witnesses, whose statements had been recorded by the earlier Investigating Officer during the course of the investigation, owing to his busy schedule, and that he had merely filed the charge-sheet under the S.C./S.T. Act on the basis of the evidence and material

collected during the investigation. The accused persons, who were arrested during his period of investigation were also examined by the earlier Investigating Officer. Thus, the evidence of P.W.11 does not throw any light on the case. Sri Avadh Bihari Rakesh, the then Circle Officer, who had filed the charge-sheet against Anwar Ali, appeared as P.W.12 and merely proved the filing of the charge-sheet. He admitted in cross-examination that he had not examined the witnesses who had been examined by his predecessors. Constable Om Prakash Tripathi; P.W.10 proved check F.I.R. and the corresponding G.D. Entry.

(79) It is not disputed that the deceased, Pokhai, was shot dead by a firearm injury. There were five ante-mortem injuries on the body of the deceased Pokhai, out of which two were abrasions and one was a firearm injury. One pellet was recovered from his body. The cause of death was shock and haemorrhage as a result of the ante-mortem firearm injury, which was proved by Dr. Sanjay Kumar Pandey, who appeared as P.W.6. The injury report of the victim (P.W.1) indicates four injuries. The first consisted of multiple linear scratches on the left forearm, laterally and dorsally, over the lower two-third area; the second consisted of multiple blotchy abraded contusions on the upper third of both sides of the back, widely spread; the third was a linear patterned contusion measuring 7 cm × 2 cm on the right upper lateral region of the back; and the fourth was a linear patterned contusion measuring 11 cm × 1½ cm on the right lower thigh laterally and extending to the anterolateral aspect of the knee. According to the opinion of doctor (P.W.6), all the injuries were caused by a hard and blunt object.

(80) According to the conclusion of the medico-legal report of Dr. Vineeta Singh (P.W.3), the examination was suggestive of

penetration by some blunt object. The supplementary report (Ext. Ka.3) further indicates that the vaginal smear was negative for spermatozoa and gonococci and that the age of victim was 16 years. The ghaghra of the victim was taken into custody by the Investigating Officer. However, the FSL Report dated 12.07.2002 (Paper No. 32 Ka-1) indicates that a petticoat was found in the sealed packet and that human blood and human semen were detected on it. This is not only contrary to the recovery memo relating to the *ghaghra*, as *ghaghra* was not found in the sealed packet sent for F.S.L. and a petticoat was found but inconsistent also with the medico-legal examination and pathological report of the victim. These discrepancies raises serious doubts not only about the prosecution story but also the investigation in the matter.

(81) P.W.3, Dr. Vineeta Singh, Senior Consultant, District Women Hospital, Raebareli, conducted the medical examination of the victim and deposed that she can not give any opinion regarding the allegation of gang rape. She further deposed that the injuries sustained by the victim could not have been caused by an accident, although no injury was found on the private parts of the victim.

(82) Dr. R.K. Mishra, Medical Officer, District Hospital, Raebareli, who conducted the medical examination of the external injuries of the victim (P.W.1), appeared as P.W.5. In his cross-examination, he deposed that there was no lacerated wound on the wrist of the victim. No injury caused by broken bangles was found on her wrist, whereas the victim (P.W.1), in her testimony, deposed that while she was being forcibly taken away by the accused persons, her bangles had broken and she had sustained injuries in her hand, whereas the medical was conducted on the very same date of incident. Similarly, no

injury attributable to broken bangles was found by Dr. H.L. Sharma (P.W.7), who proved the X-ray report of the victim. He also opined that the victim (P.W.1) was more than 16 years of age.

(83) In view of above, the medical also does not support the prosecution case. The Hon'ble Supreme Court, in the case of **Ramanand Yadav Vs. Prabhu Nath Jha and Others (Supra)**, has held that it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference. However, it may be of no relevance, if the case is otherwise proved by cogent evidence as the medical evidence is only an expert opinion.

(84) The Hon'ble Supreme Court, in the case of **Awadhesh and Another Vs. State of Madhya Pradesh (Supra)**, has held that though medical expert's opinion is not always final and binding, but in the said case it corroborates other circumstances, which indicate that the eye-witnesses had not seen the actual occurrence.

(85) The Hon'ble Supreme Court, in the case of **Piara Singh & Others Vs. State of Punjab (Supra)**, has held that evidence of a medical man or an expert is merely an opinion which lends corroboration to the direct evidence in the case. Where there is a glaring inconsistency between direct evidence and the medical evidence in respect of the entire prosecution story, that is undoubtedly a manifest, defect in the prosecution case. The Hon'ble Supreme Court, in the case of **Ram Narain Singh Vs. The State of Punjab (Supra)**, has taken similar view.

(86) In view of above, in criminal law, the case is to be proved by the prosecution by standing on it's own legs, primarily on the basis of ocular or circumstantial evidence as the case may be. The instant case is a case of ocular evidence as P.W.1, P.W.2 and P.W.4, the witnesses of facts, are the eye-witnesses. The Hon'ble Supreme Court, in the case of **Balu Sudam Khalde Vs. State of Maharashtra (Supra)**, has observed that the appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case have been enumerated in paragraphs 25 to 27, which are extracted here-in-below:-

> "**25**. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:
> "I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
> II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.
> III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.
> IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.
> V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence

of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.
VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.
XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

26. When the evidence of an injured eye-witness is to be appreciated, the under- noted legal principles enunciated by the Courts are required to be kept in mind:
(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.
(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.
(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.
(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.
(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction,

> exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.
> (f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.
>
> **27**. In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."

(87) The Hon'ble Supreme Court, in the aforesaid case, has also held that it is a cardinal principle of criminal jurisprudence that the initial burden to establish the case against the accused beyond all reasonable doubt rests on the prosecution. It is also an elementary principle of law that the prosecution has to prove its case on its own legs and cannot derive advantage or benefit from the weakness of the defence. However, on reaching to the conclusion that the evidence of the eyewitnesses inspires confidence and there is nothing in their evidence on the basis of which it could be said that they are unreliable witnesses, to fortify the view, the Court can definitely look into the suggestions made by the defence counsel to the eyewitnesses, the reply to those establishing the presence of the accused persons as well as the eyewitnesses. The main object of cross-examination is to find out the truth on record and to help the Court in knowing the truth of the case.

(88) Adverting to the facts of the present cast and upon considering the ocular evidence of P.W.1, P.W.2 and P.W.4 with the other

evidence and material on record, as discussed above, the evidence of aforesaid witnesses does not inspire confidence, in as much as there is no proper identification of the accused persons i.e. the appellants, who were not previously known to the complainant and victim.

(89) The complainant, Banwari (P.W.2), gave an application (Paper No. 134 Ka) for discharge of ten witnesses from tendering evidence on the ground that they had colluded with the accused persons and would not depose the truth before the Court. The said ten persons include Shobnath and Lallau, who had accompanied the complainant (P.W.2) with him for lodging the F.I.R. along with Bhungi, Pokhai, and the victim, whereas Pokhai had already died and the victim appeared as P.W.1. Bhungi has also not been produced.

(90) The defence produced Mithilesh Kumar, son of Sitaram, as D.W.1, who was a prosecution witness but was got discharged by the complainant. He deposed that about 60–70 "Mangta" had set up a dera in the field of Raja Ram Maurya. On the said night, there was a severe storm and rain, due to which the dera had collapsed. Some persons were inside the dera, some of whom were saved, while others were in the verandah of his house. He further deposed that he heard noise and cries near the *dera* of the Mangta at about 1:00 a.m. He came out and saw 3–4 persons dragging the Mangta. When a Mangta objected, he was shot dead. He further deposed that he saw 3–4 persons and in the light of a torch, he could see their faces and the accused persons present in Court were not those persons. He further deposed that he went along with 3–4 villagers and informed the police, whereupon the police came, by which time it was morning. On perusal of Ext. Ka.1, he deposed that it was written by him. In cross-examination, he deposed that Ext. Ka.1

was written on the dictation of some police personnel and not Banwari (complainant). He denied the suggestion that to save the accused persons, who were residents of his village, he had deposed in their favour. He also proved his signature on the inquest report of the deceased Pokhai (Ext. Ka.6). Ext. Ka.15, which is the corresponding G.D. Entry No. 6 of the F.I.R. dated 25.05.2002, indicates the presence of Mithilesh Kumar, son of Sitaram, along with others at the police station for lodging the F.I.R. Thus, the presence of D.W.1 Mithilesh Kumar at the police station at the time of lodging of the F.I.R., and the lodging of the F.I.R. against 3–4 unknown persons, cannot be disputed in the absence of any cogent and reliable evidence because the complainant (P.W.2) has given contrary and inconsistent evidence in regard to F.I.R. and the accused persons mentioned therein, which was given by him after it was read over to him, as deposed by him.

(91) One of the arguments advanced by learned counsel for the appellants is that this Court may take judicial notice of certain universal social, legal, and behavioural facts for evaluating the prosecution case, such as the natural and basic instinct of living beings for sexual desire, for which they may involve themselves in all kinds of fear and foul play. Thus, submission is that the victim, who was young, must have been indulged in satisfying her sexual desire with her friend and her uncle would have seen them together and on being objected by him, he must have been killed by friend of the victim. This argument has been advanced on the basis of certain unauthenticated documents from some research article and extract of journal without any evidence on the factual aspect as argued. It is vehemently been opposed by learned A.G.A.

(92) Section 56 of the Indian Evidence Act, 1872 (here-in-after referred to as "**Act, 1872**") provides that the fact judicially noticeable need not be proved. Section 57 of Act, 1872 provides the facts of which Court must take judicial notice, which is extracted here-in-below :-

> "**57. Facts of which Court must take judicial notice.—**The Court shall take judicial notice of the following facts :-
> (1) All laws in force in the territory of India;
> (2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;
> (3) Articles of War for the Indian Army, Navy or Air Force;
> (4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the States;
> (5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;
> (6) All seals of which English Courts take judicial notice: the seals of all the Courts in India and of all Courts out of India established by the authority of the Central Government or the Crown Representative]: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;
> (7) The accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette;
> (8) The existence, title, and national flag of every State or Sovereign recognized by the Government of India:
> (9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;
> (10) The territories under the dominion of the Government of India;
> (11) The commencement, continuance and termination of hostilities between the Government of India and any other State or body of persons;
> (12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates,

> attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it;
> (13) The rule of the road on land or at sea.
> In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.
> If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

(93) The aforesaid provision enumerates the facts of which judicial notice can be taken by the Court. It further provides that in all the said cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference. Thus, judicial notice of the facts enumerated above can be taken on the basis of appropriate books or documents of reference. It further provides that if the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

(94) In the present case, learned Counsel for the appellants has failed to produce any appropriate and authentic book or documents of reference and only photocopy of the research article and the extract of journal has been produced without disclosing it's authenticity. Thus, the contention of learned Counsel for the appellants is misconceived and not tenable. Even otherwise, if judicial notice of the said facts are taken by this Court, the necessary facts, for which Court is being called upon to take judicial notice were required to be proved by cogent evidence, which the appellants have failed to prove. Thus, the contention is misconceived and not tenable and accordingly rejected.

(95) One of the arguments of learned Counsel for the appellants is that there was no evidence on record to prove essential elements

to constitute 'unlawful assembly' as defined under Section 141 I.P.C. and in view of the allegations in the F.I.R. and the statements under Section 161 Cr.P.C., the involvement of only 3-4 persons have been shown, therefore, the provisions of Section 149 I.P.C. are not attracted and once conviction under Section 148 I.P.C. was made, appellants could not have been convicted separately under Sections 147 and 148 I.P.C.

(96) In the present case, all the appellants have been convicted separately under Section 147 read with Section 149 I.P.C., Section 148 read with 149 I.P.C. and Section 323 read with 149 I.P.C., whereas appellants, Anwar Ali, Shankar Nai, Paras Nath Patel, Ram Sajivan Patel and Ratipal Patel, under Section 302 read with Section 149 read with Section 3 (ii) (v) of S.C./S.T.Act and appellants, Udai Raj and Ramu alias Ram Kumar, under Section 302 read with Section 149 I.P.C.

(97) Section 141 I.P.C. provides that an assembly of five or more persons is designated as "unlawful assembly", if the common object of the persons composing that assembly for committing the offences provided from first to fifth provided therein. Section 141 I.P.C. is extracted here-in-below :-

> "**141. Unlawful assembly.—**An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—
> First.—To overawe by criminal force, or show of criminal force, 11[the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or
> Second.—To resist the execution of any law, or of any legal process; or
> Third.—To commit any mischief or criminal trespass, or other offence; or
> Fourth.—By means of criminal force, or show of criminal force, to any person, to take or obtain
> possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in

> possession or enjoyment, or to enforce any right or supposed right; or
> Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
> Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

(98) Section 147 I.P.C. provides punishment for rioting, which may extend to two years, or with fine, or both. Section 148 I.P.C. provides rioting, armed with deadly weapon, which may extend to three years, or with fine, or with both, which is aggravated form of Section 147 I.P.C. and the punishment is awarded with the aid of Section 149 I.P.C. As per Section 141 I.P.C. for constituting the 'unlawful assembly' five or more persons are required to have been assembled for the common object in committing the crime referred in Section 141 I.P.C.

(99) The record indicates that initially the F.I.R. was lodged under Sections 302, 376, and 323 I.P.C., but subsequently Sections 147, 148, and 149 I.P.C. were added during investigation, upon surfacing of 6–7 accused persons alleged to have been involved in the crime and assembled at the place of occurrence with common object, therefore, the contention of learned counsel for the appellants regarding the invocation of Section 149 I.P.C. is misconceived and not tenable, for the reason that during investigation, it can be done on the basis of evidence and material collected. However, it would have to be proved during trial, which the prosecution has failed to do. In any case, the contention regarding conviction and sentence separately under Sections 147 and 148 I.P.C. appears to be just and correct, because once the appellants are found to have committed the offence under Section 148 I.P.C., which is an aggravated form of Section 147 I.P.C., separate conviction and punishment under

Section 147 I.P.C. for the same act could not have been made and that too without recording any specific finding.

(100) The Hon'ble Supreme Court, in the case of **Vijay Pandurang Thakre Vs. State of Maharashtra (Supra)**, has enumerated ingredients required to be essentially established for invocation of Section 149 I.P.C. and also held that unless a person present in an unlawful assembly actively participates in the rioting or does some overt act with the necessary criminal intention or shares the common object of the unlawful assembly, Sections 147, 148 and 149 I.P.C. will not apply. The relevant paragraphs 14 and 15 are extracted here-in-below:-

> "**14**. As is clear from the plain language, in order to attract the provision of the Section, following ingredients are to be essentially established.
> (i) There must be an unlawful assembly.
> (ii) Commission of an offence by any member of an unlawful assembly.
> (iii) Such offence must have been committed in prosecution of the common object of the assembly; or must be such as the members of the assembly knew to be likely to be committed.
> If these three elements are satisfied, then only a conviction under Section 149, I.P.C., may be substantiated, and not otherwise. None of the Sections 147, 148 and 149 applies to a person who is merely present in any unlawful assembly, unless he actively participates in the rioting or does some overt act with the necessary criminal intention or shares the common object of the unlawful assembly.
> **15**. In the facts of the present case, we find that common object of the assembly, even if it is presumed that there was an unlawful assembly, has not been proved. The expression 'in prosecution of the common object' occurring in this Section postulates that the act must be one which have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. This expression is to be strictly construed as equivalent to in order to attain common object. It must be immediately connected with common object by virtue of nature of object. In the instant case, even the evidence is not laid on this aspect. As pointed out above, the courts below were influenced by the fact that one of the injuries on the person of Ashok was on his head which became the cause of death and from this, common object is inferred."

(101) The Hon'ble Supreme Court, in the case of **Rudrappa Ramappa Jainpur and Others Vs. State of Karnataka (Supra)**, has taken similar view in regard to Section 143, 147, 148 and 149 I.P.C. in the facts and circumstances of the said case.

(102) The Hon'ble Supreme Court, in the case of **Sukhbir Singh Vs. State of Haryana (Supra)**, has held that accused is vicariously guilty of the offence committed by other accused persons only if he is proved to be a member of an unlawful assembly sharing its common object. There is no dispute to the legal provision that once the existence of common object of unlawful assembly is proved, each member of such an assembly shall be liable for the main offence notwithstanding his actual participation in the commission of the offence. It is not necessary that each of the accused, forming the unlawful assembly, must have committed the offence with his own hands.

(103) The Hon'ble Supreme Court, in the case of **Allauddin Mian and Others Sharif Mian and Another Vs. State of Bihar (Supra)**, has held that in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. In regard to Section 149 I.P.C., it has been held that this Section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object. It has further been held that what is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed, there must be ingredients of the offence committed.

(104) The Hon'ble Supreme Court, in the case of **Bhimrao alias Ramesh Pandhari Bhade and Others Vs. State of Maharashtra (Supra)**, has held that in absence of any material to the contrary, it should be presumed that those members of the original unlawful assembly, who only shared the common object of assaulting deceased cannot be attributed with the subsequent change in the common object of some of the members of the assembly, who entered the house and caused grievous injuries to him and converted the offence under Section 326 I.P.C. read with Section 149 I.P.C. to Section 352 I.P.C. read with Section 149 I.P.C.

(105) Adverting to the facts of the present case, the prosecution case is that 3-4 persons had come at about 01:00 in the intervening night of 24/25.05.2002, who started beating all members of the group of the complainant (P.W.2), victim (P.W.1) and the deceased by sticks and one of the accused started dragging the victim (P.W.1). When her uncle Pokhai (deceased) chased them to get her freed, the said accused fired on him from country-made pistol and handed over the victim (P.W.1) to other accused persons, who took her towards canal and 7 persons in all committed rape with her, therefore, it could not be said that there was no common intention for unlawful assembly and charge sheet could not have been filed, but it could not be proved during trial, as discussed above. It also shows that the deceased was killed only because he chased the accused persons and tried to get the victim freed. Thus, the argument of learned Counsel for the appellants that conviction of the appellants under Section 302 I.P.C. is not sustainable as it could have been a case falling under Exception 4 of Section 300 I.P.C. Consequently, the said accused persons could have been convicted under Section 304 I.P.C. for culpable homicide not amounting to murder and not under Section 302 I.P.C. This

contention of learned Counsel for the appellants carries weight, when considered in the facts and circumstances of the case and evidence adduced and this Court is of the view that the conviction under Section 302 I.P.C. read with Section 149 I.P.C. could have been under Section 304 I.P.C. in view of the statutory provisions as well as law laid down by the Hon'ble Supreme Court, in the cases of **Sukhbir Singh Vs. State of Haryana (Supra), Balu Sudam Khalde Vs. State of Maharashtra (Supra), Paul Vs. State of Kerala (supra)** and **Nandlal Vs. State of Maharashtra (supra)** relied by learned Counsel for the appellants.

(106) However, as discussed above, the prosecution has failed to prove the involvement of the appellants in the crime beyond all reasonable doubt but learned trial Court, without considering the evidence and material on record properly and dealing with the evidence and material in a cursory manner, has convicted the appellants, which is apparent from the facts that though complainant (P.W.2) has deposed that he does not know the person, who had written the F.I.R. and D.W.1 also but learned trial Court has recorded finding that this is the same witness, who had written the F.I.R. on the dictation of the complainant (P.W.2), whereas he has admitted that he had written the F.I.R. as dictated by some police personnel and not complainant, but without considering it, the learned trial Court has discarded the evidence of D.W.1, whereas his presence in the police station at the time of lodging of F.I.R. with the complainant cannot be doubted as per the proved G.D. Entry and it has been accepted by learned trial Court also but the prosecution witnesses have denied any acquaintance with him. The learned trial Court has also failed to consider that the investigating officer had recovered *ghaghra* of the victim but in the sealed packet, which was opened by F.S.L., the petticoat was found and report was

submitted on the said basis. The money, medicine and phuchda seized by Investigating Officer have not been produced and proved. Learned trial Court has also failed to consider the contradictions and inconsistencies of the evidence of the prosecution witnesses, as discussed above, on the basis of the evidence and material on record. Thus, this Court is of the view that learned trial Court has passed the impugned judgment and order without considering the evidence and material on record and dealing it appropriately in cursory manner, which is not sustainable in the eyes of law and the appellants are liable to be acquitted on the basis of the benefit of doubt.

(107) In view of above, both the appeals are **allowed**. The impugned judgment and order dated 03.02.2011 passed by learned trial Court is hereby set-aside. All the appellants are acquitted from the charges framed against them.

(108) Appellant No. 1-Rati Pal Patel in Criminal Appeal No. 550 of 2011 is on bail. He needs not surrender in the instant case. His bail bonds are cancelled and sureties discharged.

(109) The other appellants, namely, Anwar Ali, Ramu alias Ram Kumar and Ram Sajivan Patel in Criminal Appeal No. 538 of 2011 and Paras Nath Patel, Udai Raj and Shankar Nai in Criminal Appeal No. 550 of 2011 are in jail. They shall be released forthwith in the instant case, in case they are not wanted in any other case. Their bail bonds are cancelled and sureties discharged.

(110) Pending application(s), if any, stands disposed of, accordingly.

(111) Appellants are directed to file personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A of the Code of

Criminal Procedure, 1973, corresponding to Section 481 of the Bhartiya Nagarik Suraksha Sanhita (BNSS), 2023.

(112) Let a copy of this judgment and original records be transmitted to the Trial Court concerned forthwith and in any case within a period of one week from today for information and compliance.

(Zafeer Ahmad, J.) (Rajnish Kumar, J.)

July 1, 2026
Ajit/Saurabh/-

Digitally signed by :-
AJIT KUMAR
High Court of Judicature at Allahabad,
Lucknow Bench