A PANDURANG CHANDRAKANT MHATRE & ORS.

*v.*

STATE OF MAHARASHTRA

(Criminal Appeal No. 986 of 2007)

OCTOBER 8, 2009

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**[D.K. JAIN AND R.M. LODHA, JJ.]**

*Penal Code, 1860 – ss. 302/149, 326/149 and 148 – Conviction under – Rivalry between two political factions –* C *Accused armed with deadly weapons forming unlawful assembly – Murderous attack on one and injuries to other members – Acquittal by trial court – High Court upholding acquittal of five accused and convicting eight accused u/s. 302/149, 326/149, 148 and imposed imprisonment for life and* D *different period of sentence – On appeal, held: Order of trial court was erroneous – FIR not affected by legal infirmity – Evidence of eye-witnesses corroborated by medical evidence in respect of deceased as well as injuries sustained by them – Proved beyond doubt that eight accused guilty of offences* E *punishable u/s. 148 and s. 326/149 – Plea of alibi not proved – Thus, conviction and sentence awarded by High Court against A-2, A-3 and A-12 upheld – Conviction of A-4, A-5, A-6, A-10 and A-11 u/s.148 and 326/149 upheld but that u/s.302/149 set aside – Sentence u/s. 148 upheld and that u/s.* F *326/149 modified.*

**Two political parties were on inimical terms. On the fateful day workers of rival party armed with deadly weapons assaulted SA, PW-2, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-10-members of other party. SA sustained** G **serious injuries and later succumbed to his injuries. Other witnesses sustained injuries. Nineteen persons were tried for offences u/ss. 147, 148, 302/149, 302/34, 307/149 and s. 326/149 IPC. Trial court acquitted the appellants. High**

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**Court upheld the acquittal of five accused and convicted eight accused u/ss.302/149, 326/149 and s.148 IPC and imposed sentence of imprisonment for life and different period of sentence under other counts along with fine. Hence the present appeal.**

**Partly allowing the appeal, the Court**

**HELD: 1. The whole approach of the trial court in consideration of the evidence of eye-witnesses was faulty and flawed. The evidence is independently examined and it is found that the judgment of the trial court acquitting all the accused persons suffered from factual and legal errors justifying interference by the High Court in appeal within permissible limits. Thus, the conviction of A-2, A-3 and A-12 for the offence punishable under section 302 read with section 149 IPC and the sentence awarded to them by the High Court to suffer imprisonment for life is maintained. The conviction of A-4, A-5, A-6, A-10 and A-11 for the offence punishable under section 302 read with s.149 IPC is set aside. The conviction of the appellants under section 148 and section 326 read with section 149 IPC is upheld. The sentence awarded to them under section 148 IPC is maintained. However, substantive sentence for the offence punishable under section 326 read with section 149 IPC is modified and each one of them is sentenced to suffer RI for three years. The substantive sentences shall run concurrently. [Paras 65 and 66] [101-F-H; 102-A-B]**

**2.1. First Information Report is not a substantive piece of evidence and it can be used only to discredit the testimony of the maker thereof and it cannot be utilized for contradicting or discrediting the testimony of other witnesses. First Information Report cannot be used with regard to the testimony of other witnesses who depose**

A in respect of incident. The earliest information in regard to commission of a cognizable offence is to be treated as First Information Report. It sets the criminal law in motion and the investigation commences on that basis. Although FIR is not expected to be encyclopedia of
B events but an information to the police to be 'first information report' u/s.154(1) Cr.P.C. must contain some essential and relevant details of the incident. A cryptic information about commission of a cognizable offence irrespective of the nature and details of such information
C may not be treated as FIR. [Para 29]

2.2. In the instant case, PW-5 reached the police station at about 4.00-4.15 a.m. He gave information that several persons were assaulting members of their party; that the accused were armed with deadly weapons and
D that police should immediately leave for the place of occurrence. This information was entered in General Diary of the police station. Based on this information, PW-18-IO left for the place of occurrence alongwith PW-2 who had also reached the police station by that time. In an
E incident where large number of accused are involved in assaulting rival village folk, obviously the first task of the Police Officer is to ensure visit to the scene of occurrence and provide police help, if necessary. Rather, it would have been unnatural on the part of PW-18 to have insisted
F on taking down the entire incident by way of FIR when PW-5 reached the Police Station at about 4.00-4.15 A.M. for getting help for the victims. The immediate task for PW-18 was to focus on providing help to the victims who, as per the version of PW-5, were still being attacked. In
G such a situation, it cannot be said that the moment PW-18 left the police station, the investigation had commenced. In the circumstances, FIR is not affected by any legal infirmity. [Para 30] [85-B-C,F-H; 86-A]

2.3. As regards delayed receipt of the copy of FIR by
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**the Court of Magistrate on April 12, 1988, the FIR register indicates that copy of FIR was sent to the concerned Magistrate on April 3, 1988 itself. If the evidence of eye-witnesses is found cogent, convincing and credible, the delay in receipt of the copy of FIR by the concerned court would not be of much significance. [Para 31] [86-A-C]**

**3.1. The consideration of the evidence of PW-6 and PW-3-watchman, by the trial court, was not proper. The evidence of eye-witnesses-PW-2, PW-4, PW-5, PW-7, PW-8, PW-9, and PW-10 is broadly corroborated by the medical evidence in respect of the deceased as well as the injuries sustained by them. PW-11-Medical Officer examined PW-2, PW-7 and PW-10 and the injuries sustained by these witnesses is proved by the evidence of PW-11. As regard the injuries sustained by PW-6, PW-3, PW-4 and PW-8, the injury reports support their version. Examination of PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-10 shows that their presence at the time of incident cannot be doubted. [Paras 44, 36 and 64] [86-C-D; 90-B-C, 101-C-D]**

*Muthu Naicker and Others vs. State of Tamil Nadu* **(1978) 4 SCC 385;** *State of U.P. v. Ballabh Das and Others* **(1985) 3 SCC 703;** *State of U.P. v. Ram Swarup and Others* **1988 (Supp) SCC 262, Referred to.**

**3.2. From the prosecution case, it is clear that the incident took place between the two rival political factions and that all eye-witnesses, except PW-3 and PW-6 belong to victim party. Thus, PW-2, PW-4, PW-5, PW-7, PW-8, PW-9 and PW-10 can be stamped as interested witnesses. PW-6 deposed that the deceased was son-in-law of his eldest brother and to that extent he is also an interested witness. Before relying upon testimony of these witnesses, adequate assurance from other circumstances or materials is required to be seen. The evidence of such witnesses has to be examined with**

A **great care and caution to obviate possibility of false implication or over-implication. [Para 48] [93-C-D]**

**3.3. In cases involving rival political factions or group enmities, it is not unusual to rope in persons other than who were actually involved. In such a case, court should** B **guard against the danger of convicting innocent persons and scrutinise evidence carefully and, if doubt arises, benefit should be given to the accused. [Para 49] [93-E-F]**

C **3.4. Section 149 IPC creates a specific and distinct offence. Its two essential ingredients are commission of an offence by any member of an unlawful assembly and; such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew it be likely to be** D **committed. However, where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of s.149 IPC, this Court has applied rule of caution taking into consideration particular fact-situation and convicted** E **those accused whose presence was clearly established and overt acts were proved. [Paras 51 and 53] [94-F-G; 95-E-F]**

*Masalti vs. State of U.P.* **(1964) 8 SCR 133;** *Shere and* F *Ors. vs. State of U.P* **1991 Supp.(2) SCC 437;** *Musa Khan & Ors. vs. State of Maharashtra* **(1977) 1 SCC 733;** *Nagarjit Ahir vs. State of Bihar* **(2005) 10 SCC 369;** *Maranadu And Anr. vs. State by Inspector of Police, Tamil Nadu* **(2008) 16 SCC 529, referred to.**

G **3.5. Having carefully examined the testimony of eye-witnesses, it is found that prosecution has been able to establish that party of assailants comprised of more than five persons; that they formed unlawful assembly and that at least five persons chased the deceased and then** H **attacked him. These members of the unlawful assembly**

**who chased and attacked the deceased definitely shared common object of causing murder of SA. [Para 58] [97-F-G]**

**3.6. The High Court observed that common object of the said unlawful assembly was to cause grievous hurt. It held that common object of the unlawful assembly was to make murderous attack on the deceased. At first blush, there seems to be some inconsistency in the judgment but on a deeper scrutiny, it is not found so. For determination of common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly before and at the time of attack is of relevant consideration. At a particular stage of the incident, what is object of the unlawful assembly is a question of fact and that has to be determined keeping in view the nature of the assembly, the arms carried by the members and the behaviour of the members at or near the scene of incident. The accused persons (nineteen in number) armed with deadly weapons came to the scene of occurrence sharing the common object of causing grievous hurt to the victim party. A closer scrutiny of evidence shows that A-2, A-3, A-4, A-5, A-6, A-10, A-11 and A-12 assaulted the prosecution witnesses-some of them sustained grievous injuries. However, when the deceased and prosecution witnesses ran helter and skelter, at least five members of the unlawful assembly chased the deceased and they attacked him with the weapons in their hand. The purpose and design of these members of unlawful assembly in chasing SA and a murderous assault by them on him may not have been shared by other members of unlawful assembly. In such a case although having regard to facts, the number of participants could not be less than five, it is better to apply rule of caution and act on the side of safety and convict only A-2, A-3, and A-12 under section 302 read with section 149 IPC whose presence as members of**

A party of assailants is consistently mentioned and their overt acts in chasing and assaulting the deceased are clearly proved. A-4, A-5, A-6, A-10 and A-11 get the benefit of doubt with regard to offence under section 302 read with section 149 IPC since evidence against them in
B chasing and assaulting the deceased is not consistent. However, all the eight appellants are guilty of the offences punishable under section 148 and section 326 read with section 149, I.P.C. This is proved beyond doubt and the High Court cannot be said to have erred in
C holding so. [Para 59] [97-G-H; 98-A-H;99-A]

3.7. There is no merit in the plea of alibi set up by A-2. The plea of alibi set up by A-2 was not even accepted by the trial court. The presence of A-2 in the incident is established. He has been identified holding the iron bar.
D The prosecution witnesses have given specific involvement of A-2 in the incident. On the basis of the deposition of some of the eye-witnesses, the evidence of DW-1 cannot be said to have been wrongly rejected by trial court as well as by High Court. In cross-examination,
E DW-1 admitted that there was no supervisor at night on that date. Original document was not produced and name and designation of the officer who is said to have signed the said certificate was not disclosed nor the person who issued the certificate was produced. As a matter of fact,
F plea of alibi has not at all been probabilised by A-2 much less proved. [Para 60] [99-B-D]

3.8. From the prosecution evidence it is clearly established that the temple was illuminated due to annual fair and there were other lights at the temple. It was full
G moon night. The submission that there was not enough light at the place of incident and, therefore, the incident could not have been seen cannot be accepted. [Para 61] [99-E-F]

H 3.9. The submission that site plan of the scene of

**offence could not have been accepted as PW-1 deposed that he prepared the site map as per the information supplied by the police is devoid of any substance. No objection was raised when the said document was being exhibited. Moreover, the investigating officer has not at all been cross-examined in this regard. [Para 62] [99-G-H; 100-A]**

*Ramratan and others v. State of Rajasthan* **(1962) 3 SCR 590;** *Chhotu vs. State of Haryana* **(1996) SCC Crl. 1161, Held inapplicable.**

**3.10. The submission that the High Court was not justified in interfering with the judgment of acquittal as the view taken by the trial court was the possible view cannot be accepted. The view which the trial court took on the basis of the evidence on record is neither possible nor plausible. There could not be more perversity in the consideration of the evidence of eye-witnesses by the trial court. [Para 63] [100-B-C]**

*Mahtab Singh & Anr. v. State of U.P.* **JT 2009 (5) SC 431;** *Meharaj Singh (L/Nk.) v. State of U.P* **(1994) 5 SCC 188;** *T.T. Antony v. State of Kerala & Ors.* **(2001) 6 SCC 181;** *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra* **(2007) 13 SCC 501;** *State of Haryana v. Prabhu & Ors* **AIR 1979 SC 1019;** *Sarwan Singh & Ors.etc. v. State of Punjab* **AIR 1978 SC 1525;** *Ram Anjore and Others. v. State of U.P.* **AIR 1975 SC 185;** *Gokul & Others v. State of Rajasthan* **AIR 1972 SC 209;** *Md. Isak Md. & Others v. State of Maharashtra* **AIR 1979 SC 1434;** *Ninaji Raoji Baudha & Another v. State of Maharashtra* **AIR 1976 SC 1537;** *Nattan v. State of Tamil Nadu* **AIR 1976 SC 2197;** *Mariadasan & Others v. State of Tamil Nadu* **AIR 1980 SC 573;** *Bharwad Bhikha Natha & Others v. State of Gujarat* **AIR 1977 SC 1768;** *Harshadsingh Pahelvansingh Thakore v. State of Gujarat* **AIR 1977 SC 710** *Bhajan Singh and Others v. State of Punjab* **AIR 1978 SC 1759;** *Bansropan Singh and Others v. State of Bihar* **AIR 1983**

A **SC 166** *Sarman & Others v. State of M.P.* **AIR 1 993 SC 400.**; *Ishwar Singh v. State of U.P* **AIR 1976 SC 2423**; *Radhakrishnan Nair v. State of Kerala* **1995 Suppl (1) SCC 217**; *Chotu v. State of Haryana* **1996 SCC (Crl.) 1161**; *Palia v. State of Punjab;* **1997 SCC (Crl.) 383**; *Bathula* B *Nagamalleswara Rao And Ors. v. State rep. by Public Prosecutor* **(2008) 11 SCC 722**; *Mahmood and Anr. v. State of U.P.* **(2008) Crl. Law Journal 696** ; *State of Punjab v. Avtar Singh* **(2008) 14 SCALE 368**; *State of Punjab v. Gurdip Kaur* **(2009) 1 SCC 120**; *Chandu v. State of Maharashtra* **2002 (9)** C **SCC 408**; *Kashiram & Ors. v. State of M.P* **2002 (1) SCC 71**; *Harijana Thirupala & Ors. v. Public Prosecutor A.P., Hyderabad* **2002 (6) SCC 470**; *Ram Ratan & Others v. State of Rajasthan* **1962 (3) SCR 590**; *Dharma Rama Bhagare v. State of Maharashtra* **(1973) 1 SCC 537**; *Vikram v. State of* D *Maharashtra* **JT 2007(7) SC 215, referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(1994) 5 SCC 188** | **Referred to.** | **Paras 16, 24** |
| **(2001) 6 SCC 181** | **Referred to.** | **Paras 16, 25** |
| E **(2007) 13 SCC 501** | **Referred to.** | **Paras 16, 26** |
| **AIR 1979 SC 1019** | **Referred to.** | **Para 21** |
| **AIR 1978 SC 1525** | **Referred to.** | **Para 21** |
| F **AIR 1975 SC 185** | **Referred to.** | **Para 21** |
| **AIR 1972 SC 209** | **Referred to.** | **Para 21** |
| **AIR 1979 SC 1434** | **Referred to.** | **Para 21** |
| **AIR 1976 SC 153** | **Referred to.** | **Para 21** |
| G **AIR 1976 SC 2197** | **Referred to.** | **Para 21** |
| **AIR 1980 SC 573** | **Referred to.** | **Para 21** |
| **AIR 1977 SC 1768** | **Referred to.** | **Para 21** |

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| AIR 1977 SC 710 | Referred to. | Para 21 |
| AIR 1978 SC 1759 | Referred to. | Para 21 |
| AIR 1983 SC 166 | Referred to. | Para 21 |
| AIR 1 993 SC 400 | Referred to. | Para 21 |
| AIR 1976 SC 2423 | Referred to. | Para 22 |
| 1995 Suppl (1) SCC 217 | Referred to. | Para 22 |
| 1996 SCC (Crl.) 1161 | Referred to. | Para 22 |
| 1997 SCC (Crl.) 383 | Referred to. | Para 22 |
| (2008) 11 SCC 722 | Referred to. | Para 22 |
| (2008) Crl. Law Journal 696 | Referred to. | Para 22 |
| (2008) 14 SCALE 368 | Referred to. | Para 22 |
| (2009) 1 SCC 120 | Referred to. | Para 22 |
| 2007 (13) SCC 501 | Referred to. | Para 22 |
| 2002 (9) SCC 408 | Referred to. | Para 22 |
| 2002 (1) SCC 71 | Referred to. | Para 22 |
| 2002 (6) SCC 470 | Referred to. | Para 22 |
| 1962 (3) SCR 590 | Referred to. | Para 22 |
| (1973) 1 SCC 537 | Referred to. | Para 27 |
| JT 2007(7) SC 215 | Referred to. | Para 28 |
| 1978 (4) SCC 385 | Referred to. | Para 45 |
| (1985) 3 SCC 703 | Referred to. | Para 46 |
| 1988 (Supp.) SCC 262 | Referred to. | Para 47 |
| 1964 (8) SCR 133 | Referred to. | Paras 52, 53 |
| 1991 Supp. (2) SCC 437 | Referred to. | Para 54 |

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| **1977 (1) SCC 733** | **Referred to.** | **Para 55** |
| **2005 (10) SCC 369** | **Referred to.** | **Para 56** |
| **2008 (16) SCC 529** | **Referred to.** | **Para 57** |
| **1962 (3) SCR 590** | **Distinguished** | **Para 62** |
| **1996 SCC Crl. 1161** | **Distinguished** | **Para 63** |
| **JT 2009 (5) SC 431** | **Referred to.** | **Para 63** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 986 of 2007.

From the Judgment & Order dated 10.4.2007 of the High Court of Judicature at Bombay in Criminal Appeal No. 132 of 1990.

R. Sundravardhan, A.K. Srivastava, Shekhar Naphade, P.S. Narsimha, Shivaji M. Jadhav, Rahul Joshi, Brijkishor Sah, Lenin S. Hijam Abdul Tamboli, Rahul Thakur, Naresh Kumar, Santosh Paul, Arvind Gupta, K.K. Bhat, Sriharsh N. Bundela, C.K. Sasi, Sudhanshu S. Chaudhari, Sunil Kumar Verma, Madhavi Divan, Ravindra Keshavrao Adsure for the appearing parties.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. This criminal appeal by special leave is directed against the judgment of the High Court of Judicature at Bombay whereby the Division Bench of that Court upturned the judgment of acquittal passed by the IInd Additional Sessions Judge, Raigad in respect of the present appellants and convicted them for the offences punishable under Section 302 read with Section 149, section 326 read with 149 and Section 148, IPC and sentenced them to suffer imprisonment for life and different period of sentence under other counts along with fine and default stipulation.

2. Nineteen persons were arraigned before the Trial Court for the offences under Sections 147, 148, 302 read with

Section 149, section 302 read with section 34, section 307 read with section 149 and section 326 read with section 149, IPC. Trial Court acquitted all of them. The prosecution challenged the judgment of acquittal before the High Court of Judicature at Bombay. The High Court granted leave to appeal against fourteen accused persons only. As against remaining five accused, leave was refused. During the pendency of appeal, one of the accused, against whom leave was granted, died. Of the remaining thirteen accused, the Division Bench affirmed acquittal of five. The Division Bench convicted eight accused as indicated above.

3. Before dealing with the points raised in the appeal, it is appropriate to set out very briefly the prosecution case. Phunde, a small village in Taluka Uran, District Raigad, Maharashtra has two groups; one group is politically associated with the Peasants and Workers Party (PWP) while the other group has alliance with the Congress (I) Party. The party of the assailants belong to PWP and the prosecution witnesses belong to Congress-I party. The deceased was also a Congress-I party worker. The relations between the two groups due to party politics seem to have been strained for quite some time. Several criminal cases have been lodged by these two groups against each other. On the outskirts of the village Phunde, there is a temple popularly known as Gurbadevi Temple. The said temple celebrates every year an annual fair with pomp and show; a Jagran is held in the night on the said occasion. On April 2, 1988, the annual fair at Gurbadevi Temple was being celebrated; the idol was adorned with ornaments and the entire temple complex was illuminated with electric lights. In the night, the villagers gathered in the temple for Jagran. The group belonging to Congress (I) party took active part in the management of the said fair. The celebrations continued until midnight. Thereafter, most of the villagers left the temple. However, 15-20 persons who were in management of the said festival stayed back to keep watch over the ornaments adorned by the idol. Few of those who stayed back were chit-chatting in

A Sabhamandap, while some of them were simply resting and others kept themselves awake by playing cards. In the intervening night of April 2, 1988 and April 3, 1988 at about 3 - 3.15 A.M., Ramesh Mhatre (A-3) came to the temple, had a look around and then left. A-3 did not speak to anybody. About
B 15-20 minutes thereafter, A-3 returned to the temple with a group of about 20 persons. All of them were allegedly armed with weapons like iron bar, swords, pharashi, sticks etc. As soon as they reached, they are said to have started attacking the people assembled there. Pandurang Chandrakant Mhatre
C (A-2) and Ramesh Mhatre (A-3) gave iron-bar blows on the back of Nandkumar Mhatre (PW-2) but he escaped and ran towards the village. The accused persons started shouting 'dhara-dhara' 'mara-mara'. Then, they assaulted Suresh Atmaram Gharat (deceased), Sudin Mhatre (PW-4), Namdeo
D Mhatre (PW-5), Laxman Mhatre (PW-6), Gopal Thakur (PW-7), Mahindra Mhatre (PW-8) and Mahesh Bhoir (PW-10). Suresh Atmaram Mhatre, ran towards Uran-Panvel Road but the accused persons chased him. Maninath Shanker (A-12) assaulted him with sword. The other accused persons assaulted
E him with sticks and iron bars. As a result of that assault, Suresh Atmaram Gharat sustained serious injuries. PW-2 rushed towards village and shouted for help by saying that PWP workers were assaulting their (Congress-I) Party members. Hearing this, the villagers rushed towards Gurabadevi Temple.
F PW-2 then went to Nhava Sheva Police Station where he reached at about 4.15 A.M. (April 3, 1988). On reaching at Nava Sheva Police Station, PW-2 found that Namdeo Mhatre (PW-5) was already sitting in the police station who had conveyed to the police that persons from rival party (PWP) have assaulted the persons from their party and, that arrangements be made
G in sending the Police Party. PSI Anil Tamaichekar (PW-18) alongwith two police constables and PW-2 immediately left for the temple in a police jeep. On his way to village Phunde, PW-18 made enquiries from the persons who were crying and he came to know that the injured persons have been taken to Uran
H Dispensary. When he reached Uran Dispensary, he was

informed that seriously injured persons have been sent to Sion Hospital, Bombay. PW-18 then went to the place of occurrence and from there he proceeded for Nhava Sheva Police Station. On his way, PW-18 came across one ambulance carrying injured persons. PW-18 was informed that one of the injured persons viz., Suresh Atmaram Gharat was dead. PW-18 and PW-2 then immediately went to Nhava Sheva Police Station. PW-2 lodged the complaint (Exh. 31) based on which a criminal case (C.R. No. 17/88) was registered at 6.00 A.M. on April 3, 1988 for the offences under Sections 302, 147, 148, 149, 323, 114, 307 and 326, IPC. The investigation into the crime was commenced by PW-18; he prepared inquest Panchnama (Exh.67); spot Panchnama (Exh. 32); and recorded the statements of some witnesses in the vicinity of scene of offence. The investigation was then taken over by Shantaram Waghmare, Assistant Commissioner of Police (PW-17) and changed hands as PW-17 was transferred. As the accused persons were not traceable, the Investigating Officer searched them vigorously. Six accused persons were arrested on May 26, 1988; nine were arrested on May 28, 1988 and the remaining four were arrested on August 16, 1988. For the period from May 28, 1988 to August 18, 1988, on different dates at the instance of different accused persons, weapons of assault were recovered. The investigation took long time of about 4-5 months.

4. The postmortem of dead body of Suresh Atmaram Gharat was conducted on April 3, 1988 by Dr. Bhujang Bawa (PW-11), Medical Officer, Uran Dispensary. PW-11 also medically examined injured witnesses on the same day; six of them were sent to the Sion Hospital, Bombay for treatment as they received serious injuries. Upon completion of all necessary formalities in the investigation, the Challan was submitted by the Investigating Officer before the Judicial Magistrate, First Class, Uran against Kamlakar Shrawan Thakur (A-1), Pandurang Chandrakant Mhatre (A-2). Ramesh @ Raman Chandrakant Mhatre (A-3), Parshuram Chandrakant Mhatre (A-

A 4), Ashok Yadav Mhatre (A-5), Damodar Vasant Gharat (A-6), Vinod Trimbak Mhatre (A-7), Prakash Pandurang Thakur (A-8), Mahesh Pandurang Gharat (A-9), Ramchandra Raghunath Mhatre (A-10), Mahesh Shankar Gharat (A-11), Maninath Shankar Gharat (A-12), Mukund Moreshwar Mhatre (A-13), B Ganpat Raghunath Mhatre (A-14), Bhushan Balchandra Mhatre (A-15), Dayanand Mahadeo Mhatre (A-16), Rupendra Shripat Mhatre (A-17), Nitin Kamalakar Thakur (A-18) and Prakash Madhukar Mhatre (A-19). As offences like 302 and 307 were exclusively triable by the Court of Sessions, the Judicial C Magistrate, First Class, committed the aforesaid accused persons to the Court of Sessions Judge, Raigad-Alibagh. The case was transferred to the Court of IInd Additional Sessions Judge, Raigad-Alibag for trial.

5. PW-11 found following injuries on the body of the D deceased :

"(1) Incised wound over the left Iliac fossa, vertical skin deep, 8 X ½ cm.

E (2) Incised wound over the head 4 cm above the Occipital. Vertical 3 x ½ cm. Bone deep

(3) C.L.W. over the right upper arm in the middle on lateral side (4 x 4 cm.) with fracture of the right humerus m/3.

F (4) C.L.W. just below the right Tibial Tuberosity 3 x 3 cm. Irregular with fracture of Tribia and fibula U/3.

(5) C.L.W. over the right shin over lower/3 on anterior side 2 x 2 cm. with a fracture of tibia and fibula L/3.

G (6) Fracture of left Radius and Ulna L/3."

The aforesaid injuries on the body of deceased were found ante-mortem by PW-11.

6. Laxman Mhatre (PW-6) was initially taken to the Uran

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Dispensary and from there he was taken to Sion Hospital, Bombay on April 3, 1988 itself. He was found to have sustained following injuries (vide Exh. 87) : A

"(i) CLW (R) FO Region 2" x 1" BD

(ii) S/7/D (L) Ulna m/3 no. DWD B

CLW 1" x ½" SCD L/3rd ulna PW m/3 Ulna clinically # m/3 Ulna Contamination +

(iii) open injury (R) elbow CLW 2" x 1" BD C

vertically splitting olecranon with impression # (R) trochlea

No DWD

(iv) S/7/D (R) Ankle no DWD D

(v) tenderness (R) gluteal region.

(vi) No.# spine/pelvis/ribs/clinically

x-ray # (L) Ulna m/3; # (R) Olecranon compo vertical; soft tissue (R) ankle injury." E

7. Vithal Pandurang Mhatre (PW-3) was also taken to Sion Hospital, Bombay on April 3, 1988. He was discharged on May 14, 1988. At the time of admission in the hospital, the following injuries were found on his person (Vide Exh. 88) : F

"(1) Amputation (R) thumb with thumb held by skin tag.

(2) I/W (R) thigh subcutaneous deep 1" x ½"

8. Sudin Mhatre (PW-4) was admitted in Sion Hospital on April 3, 1980. He remained there as indoor patient for three days and was discharged on April 6, 1988. At the time of his admission in the Sion Hospital, he was found to have sustained the following injuries (Vide Exh. 89) : G

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A "(1) CLW vertex 10 cm

(2) Outer table # skull "

9. Mahindra Lalji Mhatre (PW-8) was admitted at Sion Hospital on April 3, 1988 and was discharged on April 5, 1988. B At the time of his admission in Sion hospital, he was found suffering from the following injuries (Vide Exh. 90) :

"(1) CLW sintered forehead 1 ½"

C (2) CLW occipital 1 ½"

(3) CLW mucosal aspect lower lip area

(4) Multiple inj on back"

D 10. Namdeo Yadav Mhatre (PW-5) sustained the following injuries :

"1. Abrasion over the back at lumbar region 2 x 2 cm with irregular margin.

E 2. Abrasion over Rt.intra-axillary area 3 x 3 cm with irregular margin.

3. Abrasion over the Left elbow jt. 1 x 1 cm irregular in margin."

F 11. Mahesh Kashinath Bhoir (PW-10) was also injured in the incident and he suffered the following simple injuries :

"Wheelmark over the Epigastric region 6 x 2 cm vertical with irregular margin."

G 12. The prosecution sought to establish its case by tendering nine eye-witnesses in evidence, viz., PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-10. Many of them were injured. The accused persons denied that they had anything to do with the offences charged. Their defence was H

that a false case has been made against them by the aforesaid prosecution witnesses. A-2 pleaded alibi in his defence. A

13. The trial court rejected the evidence of eye-witnesses holding that because of a sudden attack, all the prosecution witnesses ran helter-skelter and everybody tried to run away from the accused to save their life and in a situation like this they must not have been in a position to see actually who assaulted them. The trial court held that the evidence regarding assault on Suresh Atmaram Gharat was not specific and as he (deceased) ran from the temple, the attack on him took place at some distance from the temple and being a night time, none of the witnesses could see the attack on the deceased from the short distance, say about 5' to 10'. The trial court observed that although PW-5 reached the Nhava Sheva Police Station at about 4 to 4.15 a.m. and gave information about the incident, but the FIR was registered at 6.00 a.m. at the instance of PW-2. From this, the trial court drew the inference that PW-18 and PW-2 must have pondered over the matter for false implication of the accused in the offence. The trial court, thus, acquitted all the accused persons. B C D E

14. The High Court, however, reversed the conclusion of the trial court in respect of eight accused persons. The High Court held that in the intervening night of April 2, 1988 and April 3, 1988 at about 3 to 3.30 a.m., there was an unlawful assembly of which A-2, A-3, A-4, A-5, A-6, A-10, A-11 and A-12 were the members. The High Court also held that all the accused were armed with deadly weapons like sword, iron bars, pharshi, sticks and their common object was to make a murderous attack on Suresh Atmaram Gharat. The High Court, after setting aside the order of acquittal against A-2 to A-6, A-10, A-11 and A-12, convicted them for the offence punishable under Section 302 read with 149, I.P.C. and sentenced them to suffer imprisonment for life. The High Court also convicted these accused persons for other offences and punished them for lesser sentence with fine and default stipulations. F G H

15. Mr. R. Sundaravardan, learned Senior Counsel addressed the principal arguments before us on behalf of appellant nos. 1 to 3. Mr. A.K. Srivastava, learned Senior Counsel made submissions for appellant nos. 4 to 6 and Mr. Shekhar Naphade, learned Senior Counsel argued for appellant no. 8.

16. Mr. R. Sundaravardan, learned Senior Counsel submitted that FIR (A-31) is no FIR in law as it is hit by the prohibition contained in Section 162 of Cr.P.C. He would submit that FIR (A-31) is of doubtful authenticity as it lacks spontaneity and delay in its registration. According to him, FIR ought to have been registered in the first instance on the information of PW-5 or in any case on the information given by PW-2 at 4.30 a.m. Instead, PW-18 (IO) takes PW-1 to the scene of occurrence, meets the villagers and ambulance on the way, dispatches the dead body to the hospital for the post-mortem, goes to the village and thereafter proceeds to the police station along with PW-2 and registers the purported FIR (A-31) with coloured version, exaggerated accounts and concocted story against whom the prosecution party has a grudge. Learned Senior Counsel also submitted that there was gross violation of Section 157, Cr.P.C. inasmuch as FIR in the Court was received on April 12, 1988, although the occurrence took place on April 3, 1988. He relied upon the decisions of this Court in *Meharaj Singh (L/Nk.)* v. *State of U.P.*[1]; *T.T. Antony* v. *State of Kerala & Ors*[2]. and *Ramesh Baburao Devaskar & Ors.* v. *State of Maharashtra*[3]. The learned Senior Counsel, thus, submitted that there is genuine doubt as to the time, date and manner in which purported FIR (A-31) was recorded and police is guilty of having not disclosed the whole correct story to the court.

17. Learned Senior Counsel would contend that the

1. (1994) 5 SCC 188.
2. (2001) 6 SCC 181.
3. (2007) 13 SCC 501.

evidence of witnesses, who professed themselves as eye-witnesses deserved to be rejected as they belong to rival political parties in a faction ridden village. Moreover, they are related to each other as well as the deceased. These witnesses have been examined at much belated stage by police; some of them after nine days. Learned counsel would urge that one or other of these prosecution witnesses are themselves accused in sessions case; in some cases accused were witness/complainant against them and some of the prosecution witnesses' parents were convicted for life. Their testimony is also not corroborated by any doctor from Sion Hospital as no doctor from that hospital was examined and that their evidence suffers from vital contradictions, omissions, exaggerations and improvements. In this regard, the learned Senior Counsel took us through the evidence of PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9. He also submitted that evidence of PW-3, PW-4 and PW-8 is hearsay evidence and, therefore, no evidence in the eye of law.

18. Learned Senior Counsel vehemently contended that investigation in the present case is an example of one of the most unfair investigation inasmuch as the certificate regarding A-2, as to his absence from scene though procured by PW-17, yet, was kept away from the Court. He also cited late recording of the FIR after having taken several steps of investigation as yet another glaring example of unfair investigation. On top of it, he would submit that FIR reached the concerned court after nine days of incident.

19. Mr. R. Sundaravardan, learned Senior Counsel also contended that plea of alibi set up by A-2 is established by the evidence of DW-1 who is an officer of NAD. Learned Senior Counsel also submitted that from the prosecution evidence, the doubt about the place of occurrence has not been cleared and that prosecution has failed to establish the availability of adequate light at the site which could have enabled the witnesses in fact see the incident.

A 20. Learned Senior Counsel strenuously urged that the trial court has given cogent and convincing reasons for acquitting the appellants but the High Court without justifiable reasons and, rather, on flimsy grounds interfered with the judgment of the acquittal.

B 21. Lastly, learned Senior Counsel, without prejudice to the afore-noticed submissions, urged that there was no evidence to show that there was common object of the unlawful assembly to commit murder of Suresh Atmaram Gharat. He invited our attention to the finding recorded by the High Court at page 39 C of the SLP paper book wherein the High Court recorded that common object of the unlawful assembly was to cause grievous hurt. Learned Senior Counsel would urge that there was no specific evidence to show that Suresh Atmaram Gharat died because of any particular blow. According to him, the High D Court although held that for six injuries on the person of deceased, as per post-mortem report, nine accused cannot be held guilty yet the High Court came to the conclusion that common object of the unlawful assembly was to commit murder. The learned Senior Counsel submitted that when there was E doubt as to who inflicted the fatal blow, as in the present case, safe course is to convict the accused under Sections 326 or 304 Part-II, IPC. In this regard, the learned Senior Counsel relied upon large number of decisions, viz., *State of Haryana* v. *Prabhu & Ors*[4]*; Sarwan Singh & Ors.etc. v. State of Punjab*[5]*;* F *Ram Anjore and Others. v. State of U.P.*[6]*; Gokul & Others v. State of Rajasthan*[7]*; Md. Isak Md. & Others v. State of Maharashtra*[8]*; Ninaji Raoji Baudha & Another v. State of Maharashtra*[9]*; Nattan v. State of Tamil Nadu*[10]*; Mariadasan*

4. AIR (1979) SC 1019.

G 5. AIR 1978 SC 1525

6. AIR 1975 SC 185

7. AIR 1972 SC 209

8. AIR 1979 SC 1434

9. AIR 1976 SC 1537

H 10. AIR 1976 SC 2197

*& Others v. State of Tamil Nadu*[11]*; Bharwad Bhikha Natha & Others v. State of Gujarat*[12]*; Harshadsingh Pahelvansingh Thakore v. State of Gujarat*[13]*; Bhajan Singh and Others v. State of Punjab*[14]*; Bansropan Singh and Others v. State of Bihar*[15]*; Sarman & Others v. State of M.P*[16]*.*

22. On behalf of appellant No. 8 (A-12), separate written submissions have been filed. While adopting the arguments advanced by Mr. R. Sundaravardan, it is contended on behalf of appellant No. 8 that the unexplained delay in dispatch of FIR would create suspicion about the contents of the FIR and the evidence of the eye-witnesses. In this regard, reliance has been placed on : *Ishwar Singh v. State of U.P*[17]*; Radhakrishnan Nair v. State of Kerala*[18]*; Chotu v. State of Haryana*[19]*; Palia v. State of Punjab*[20]*; Bathula Nagamalleswara Rao And Ors. v. State rep. by Public Prosecutor*[21]*; Mahmood and Anr. v. State of U.P.*[22]*; State of Punjab v. Avtar Singh*[23]*; State of Punjab v. Gurdip Kaur*[24] and *Ramesh Baburao Devaskar And Others v. State of Maharashtra*[25]. It is also contended that although the trial court recorded the finding to the effect that there was

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11. AIR 1980 SC 573
12. AIR 1977 SC 1768
13. AIR 1977 SC 710
14. AIR 1978 SC 1759
15. AIR 1983 SC 166
16. AIR 1993 SC 400.
17. AIR 1976 SC 2423
18. 1995 Suppl (1) SCC 217
19. 1996 SCC (Crl. 1161
20. 1997 SCC (Crl.) 383
21. (2008) 11 SCC 722
22. (2008) Crl. Law Journal 696
23. (2008) 14 SCALE 368
24. (2009) 1 SCC 120
25. 2007 (13) SCC 501

violation of mandatory provisions contained in Section 157 of Cr.P.C. which is fatal for prosecution case, the High Court has not considered this aspect at all which is a serious infirmity. In this regard, reliance has been placed on *Chandu* v. *State of Maharashtra*[26]; *Kashiram & Ors. v. State of M.P.*[27] *and Harijana Thirupala & Ors. v. Public Prosecutor A.P., Hyderabad*[28]. A contention has also been raised on behalf of the appellant No. 8 about the inadmissibility of site plan (Exh. 29). Reliance has been placed in this regard on the decision of this Court in the case of *Ram Ratan & Others* v. *State of Rajasthan*[29].

23. On the other hand, Ms. Madhavi Divan, State Counsel, supported the judgment of the High court.

24. In *Meharaj Singh*, this court explained the consequences that may ensue due to delay in dispatching FIR to the Magistrate in the following words:

> ".....One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf....."

25. In the case of *T.T. Antony,* it has been held by this Court that there can be no second FIR. While dealing with Section 154 and other relevant provisions, this Court said:

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26. 2002 (9) SCC 408

27. 2002 (1) SCC 71

28. 2002 (6) SCC 470

29. 1962 (3) SCR 590;

"18. An information given under sub-section (1) of Section 154 Cr.P.C is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 Cr.P.C, as the case may be, and forwarding of a police report under Section 173 Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report — FIR postulated by Section 154 Cr.P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 Cr.P.C. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of Cr.P.C.....

19. The scheme of Cr.P.C is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 Cr.P.C on the basis of entry of the first information report, on coming to know of the

A commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 Cr.P.C, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) Cr.P.C. B However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral C or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, D 162, 169, 170 and 173 Cr.P.C only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every E subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in F the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more G reports as provided in Section 173 Cr.P.C."

26. In the case of *Ramesh Baburao Devaskar*, this Court observed :

"**18.** A First Information Report cannot be lodged in a H murder case after the inquest has been held. The first

information report has been lodged on the basis of the statements made by PW 11 to the informant himself at the spot. If the said prosecution witness who claimed himself to be the eyewitness was the person who could lodge a first information report, there was absolutely no reason as to why he himself did not become the first informant. The first information report was recorded on the basis of his information given to the first informant at the spot. All information given by him to PW 13 was made before the investigating officer himself. What prevented him from lodging the First Information Report is beyond our comprehension. PW 11, we may place on record, categorically stated that he had disclosed the details of information to all concerned. Therefore, it is expected that the first informant was informed thereabout. We have noticed hereinbefore that the information given by PW 13 had at least been recorded by the police in the crime register and he categorically stated a few facts viz. the main accused Accused 9 committed murder of his brother Shivaji Patil and one Baburao Patil. Even the place where the murder took place was known to him. If we are to believe the investigating officer, he recorded the statement after holding inquest. The detailed report in regard to the nature of injuries as also the place where the injuries were inflicted was known to him as inquest report had already been prepared. Such an attempt on the part of the investigating officer has been deprecated by this Court in a large number of decisions. All other witnesses including the panch witnesses must have been present there. If despite the same, according to panch witnesses, at least in respect of Baburao, unknown persons are said to be his assailants, it is evident that PW 11 did not disclose the names of the assailants; at least all of them before PW 9 as also the investigating officer."

27. In *Dharma Rama Bhagare* v. *State of Maharashtra*[30],

30. (1973) 1 SCC 537

this Court held that FIR is never treated as a substantive piece of evidence; it can only be used for corroborating or contradicting its maker when he appears in Court as a witness.

28. In the case of *Vikram and Ors. v. State of Maharashtra*[31], this Court noticed :

> "It may be true that P.W. 2 had informed the officer in charge of the Police Station on telephone, but the circumstances in which the said call had to be made has been noticed by us heretobefore. The Head Constable states that he had written down the same but then it must have been a cryptic report and only for the purpose of visiting the scene of occurrence.He as well as the Investigating Officer did not say that it was a detailed report. If, in the aforementioned premise, another First Information Report which was a detailed one came to be recorded, no exception can be taken to the same being treated as a First Information Report."

29. It is fairly well settled that First Information Report is not a substantive piece of evidence and it can be used only to discredit the testimony of the maker thereof and it cannot be utilized for contradicting or discrediting the testimony of other witnesses. In other words, the First Information Report cannot be used with regard to the testimony of other witnesses who depose in respect of incident. It is equally well settled that the earliest information in regard to commission of a cognizable offence is to be treated as First Information Report. It sets the criminal law in motion and the investigation commences on that basis. Although First information Report is not expected to be encyclopedia of events but an information to the police to be 'first information report' under Section 154(1), must contain some essential and relevant details of the incident. A cryptic information about commission of a cognizable offence

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31. JT 2007 (7) SC 215

irrespective of the nature and details of such information may not be treated as First Information Report. The question is: whether the information regarding the incident (Ex.61) entered in the General Diary of Nhava Sheva Police Station given by PW-5 is the First Information Report within the meaning of Section 154, Cr.P.C. If the answer is in affirmative, obviously First Information Report (A-31) is hit by section 162 Cr.P.C.

30. It is true that PW-5 reached the police station at about 4.00 – 4.15 a.m. He gave information that several persons were assaulting members of their party; that the accused were armed with deadly weapons and that police should immediately leave for the place of occurrence. This information (Ex.61) was entered in General Diary of the police station. Based on this information, PW-18 left for the place of occurrence alongwith PW-2 who had also reached the police station by that time. The circumstances in which PW-18 had to leave before recording a formal first information are obvious as the first priority before him was to control the incident since by that time none had died. In a situation such as the present one, it cannot be said that the moment PW-18 left the police station, the investigation had commenced. The object and purpose of giving information (Ex.61) by PW-2 was to request the officer in charge of the police station to reach the place of occurrence. No doubt PW-18 (IO) had left for scene of occurrence on the basis of entry in the General Diary (Ex.61) recorded at the instance of PW-5 and he visited the scene of occurrence and dispensary but effectively neither the inquest was carried out before registration of FIR nor any step towards investigation was taken before the lodging of First Information Report (A-31). In an incident where large number of accused are involved in assaulting rival village folk, obviously the first task of the Police Officer (PW-18) is to ensure visit to the scene of occurrence and provide police help, if necessary. Rather, it would have been unnatural on the part of PW-18 to have insisted on taking down the entire incident by way of First Information Report when PW-5 reached the Police Station at about 4.00 to 4.15 A.M. for getting help for

A the victims. The immediate task for PW-18 was to focus on providing help to the victims who, as per the version of PW-5, were still being attacked. In the circumstances, FIR (A-31) is not affected by any legal infirmity.

B 31. As regards delayed receipt of the copy of FIR by the Court of Magistrate on April 12, 1988, in the first place Exhibit 84 - FIR register indicates that copy of FIR was sent to the concerned Magistrate on April 3, 1988 itself. Secondly, and more importantly, if the evidence of eye-witnesses is found cogent, convincing and credible, the delay C in receipt of the copy of FIR by the concerned court would not be of much significance.

32. It is, therefore, important to examine whether High Court committed any error in accepting the evidence of PW-2, D PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-10. The learned Senior Counsel criticised the testimony of these eye-witnesses for various reasons viz., that they belong to rival political parties in a faction ridden village; that they are related to each other as well as deceased and that most of these E witnesses themselves have been accused in sessions case and that their evidence suffers from vital contradictions, omissions, exaggerations and improvements. Before we deal with the evidence of PW-2, PW-4, PW-5, PW-7, PW-8 and PW-9, we deem it proper to consider the evidence of PW-3 and PW-6 first. F

33. Both, PW-3 and PW-6, sustained injuries. PW-6 at the relevant time was a watchman in construction company. His hut was at a distance of 10' to 15' from the temple. In the intervening night of 2nd and 3rd April, 1988, at about 3.30 A.M. G while he was on duty, he saw 20-25 people, armed with sticks and iron bars entering the Sabhamandap. He also saw the people who were doing Jagran running from the Sabhamandap. Suresh Atmaram Gharat (Deceased) came running to the place near him and he saw that the deceased was being chased by H A-1, A-2, A-3, A-4 and A-12. A-12 was armed with sword while

others were armed with iron bars and sticks. All of them started attacking the deceased with the respective weapons in their hands. The deceased fell on the ground. PW-6 deposed that when he went ahead, A-3 gave iron bar blow on his head, A-9 gave iron bar blow on his waist and A-12 gave sword blow on his head but he held both his hands on his head and received the sword blow on his left hand while resisting the blows. PW-6 deposed that after some time, villagers came and took injured persons including him to Uran Medical Dispensary and from there they were taken to Sion Hospital in an ambulance. He remained in Sion Hospital until April 11, 1988. His statement was recorded by the Police on April 16, 1988. The deceased was son-in-law of his eldest brother. The witness has been cross-examined at quite some length and except minor contradictions or omissions, his deposition has not at all been shaken.

34. PW-3, a watchman, was on night duty in one private company at a distance of about 15'. On April 2, 1988 he had gone for his duty at 7.00 P.M. He saw that there was Jagran at Gurbadevi temple. The singing and dancing in the temple continued upto 1.00 A.M. and, thereafter, except 18-20 villagers, who stayed back at the temple, all others left. At about 3.30 A.M., A-3 holding iron bar in his hand started giving blows to him on his left leg. According to him, he resisted the attack but at that time A-12 came there with the sword and to resist the attack from A-12, he held his right hand on his head but A-12 gave sword blow on his head and his thumb got cut. A-2 and A-3 gave blows by iron bar on his back. He has not given details of attack on others, particularly, the deceased.

35. The trial court commented on the evidence of PW-3 and PW-6 thus :

> "I want to make some comment that what was the business for P.W.6 Laxman Mhatre and P.W. 3 Vithal Mhatre to leave their place of duty and witness the incident and get

A themselves involved and injured during the course of incident? When they were doing the job of watchman which is a responsible job, it was not desirable for them to leave the place of their employment. In such circumstances there was a risk on their part to loss their job also. It is quite B obvious that during the course of the incident both of them had left their place and had also got injured. The first reaction of their employer would be that they would have dismissed them from their job. The watchman would not have risked their job at the cost of the villagers with whom C they had no concern. So one part of the matter is that these witnesses must not have left their place and if they had left their place, they are deposing falsely."

36. We are afraid, the consideration of the evidence of PW-6 and PW-3 by the trial court, particularly in the light of the D observations noticed above, was not proper.

37. We shall now examine the evidence of other eye-witnesses. PW-2 is the person at whose instance FIR was registered. In his deposition he stated that in the intervening E night of April 2 and April 3, 1988, he along with few other persons were waiting in the temple for Jagran. A-3 came to the temple at about 3 to 3.15 A.M. and after having a look at the place, he left immediately. After about 10-15 minutes, A-3 returned alongwith 15-20 other persons. Those persons were F known to him as they belonged to the same village. A-3 and the other persons accompanying him were holding weapons like iron bars, sticks, rods, swords and they started assaulting those who were present in the Sabhamandap. A-2 and A-3 were holding iron bars and they assaulted him on his back. He G managed to escape from the said place and went towards village and while going he saw that A-1, A-2, A-3, A-4, A-12, A-13 and A-18 were armed with weapons.

38. PW-4 has also narrated the incident in a similar way. According to him, in the intervening night of April 2 and April H 3, 1988, while he was sitting in the Sabhamandap, he was

assaulted on his head from the back side. He fell down and immediately went away. He stated that while going, he saw that A-12 was having the sword with him while A-3 was having an iron bar. A-8 and A-9 were holding sticks. A

39. PW-5 is another injured eye-witness. He stated that he saw A-12 giving sword blow to PW-8 and A-10 giving Pharshi blow to Gopal Thakur. He stated that A-2 gave iron bar blow to him near his waist. He deposed that he immediately rushed to Nhava Sheva Police Station and asked the police to visit the place of incident. The fact that he reached Nhava Sheva Police Station at 4.15 A.M. is corroborated by the station diary entry (Exh. 57). B C

40. PW-7 deposed that A-2, A-3 and A-12 assaulted Suresh Atmaram Gharat. He also deposed that A-12 was having sword with him and he saw deceased Suresh Atmaram Gharat being assaulted by these accused persons. According to him, A-10 and A-13 gave pharashi blow from reverse side on his right thigh and ran away from the place. D

41. Yet another eye-witness is PW-8. According to him A-2 gave iron-bar blow while A-12 gave a blow with sword on his head. When he tried to run away, A-2 held him and A-1 and A-3 gave blow on his back with iron bar. He deposed that A-3 caught hold of Suresh Atmaram Gharat and A-12 assaulted him with sword. That he sustained multiple injuries is seen from Ex-19. He remained indoor patient at Sion Hospital from April 3, 1988 to April 5, 1988. E F

42. PW-9 has deposed that A-12 was holding sword and he saw A-2, A-3, A-11 and A-12 assaulting Suresh Atmaram Gharat. Although his name is not mentioned in the FIR, but his statement under Section 161, Cr.P.C. was recorded at the first available opportunity on April 3, 1988. G

43. PW-10 deposed that he saw A-1, A-2 and A-3 giving iron-bar blow to PW-2. He also deposed that A-1, A-2, A-10, H

A A-11, A-12, A-13 and A-17 assaulted the deceased. His evidence is silent about the details of the incident. However, he also seems to have suffered a couple of simple injuries as is seen from Medical Certificate (Exh. 51).

B 44. As a matter of fact, the evidence of these eye-witnesses is broadly corroborated by the medical evidence in respect of the deceased as well as the injuries sustained by them. PW-11, Medical Officer at Uran Dispensary examined PW-2, PW-7 and PW-10 and the injuries sustained by these witnesses is, accordingly, proved by the evidence of PW-11. Insofar as C injuries sustained by PW-6, PW-3, PW-4 and PW-8 are concerned, the injury reports, namely, Exhibit-87, Exhibit-88, Exhibit-89 and Exhibit-90 support their version. It does not appear from the record that the accused persons questioned the correctness of Exhibit-87, Exhibit-88, Exhibit-89 and Exhibit-D 90.

45. In *Muthu Naicker and Others* vs. *State of Tamil Nadu*[32], this Court held that where an occurrence takes place involving rival factions, it is but inevitable that the evidence would be of E a partisan nature and rejection of such evidence on that ground may not be proper. This Court put a word of caution that such evidence needs to be examined with utmost care and caution. This is what this Court said :

F "**6.** Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence as in this case is undoubtedly partisan evidence, the distinct possibility of innocent being falsely included with G guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on

32. (1978) 4 SCC 385

H

the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation as it unfolds in the case before us, the easy tendency to involve as many persons of the opposite faction as possible by merely naming them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed and, therefore, the evidence has to be examined with utmost care and caution. It is in such a situation that this Court in *Masalti* v. *State of U.P.*(AIR 1965 SC 202) adopted the course of adopting a workable test for being assured about the role attributed to every accused. To some extent it is inevitable that we should adopt that course."

46. In the case of *State of U.P.* v. *Ballabh Das and Others*[33], this Court held that evidence of interested witnesses may be relied upon if such evidence is otherwise trustworthy. This Court said :

"3.....What the law requires is that where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. We might also mention that the evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence is as good as any other evidence. It may also be mentioned that in a faction-ridden village, as in the instant case as mentioned by us earlier, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses. This Court in *Badri* v. *State of U.P.(AIR 1975 SC 1985)* made the following observations:

33. (1985) 3 SCC 703

A [AIR Headnote] (SCC p. 616, para 6)

> In case where a murder takes place in a village where there are two factions bitterly opposed to each other, it would be idle to expect independent persons to come forward to give evidence and only partisan witnesses would be natural and probable witnesses to the incident. In such a case, it would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or another. Their evidence has to be assessed on its own merits

**4.** .....

**5.** The dominant question to be considered in the instant case is whether the witnesses, despite being interested, have spoken the truth and are creditworthy. Once it is found by the court, on an analysis of the evidence of an interested witness that there is no reason to disbelieve him then the mere fact that the witness is interested cannot persuade the court to reject the prosecution case on that ground alone."

47. A similar view has been echoed by this Court in *State of U.P.* v. *Ram Swarup and Others*[34] wherein this Court held :

> ".....There is no rule of law to the effect that the evidence of partisan witnesses cannot be accepted. The fact that the witnesses are associated with the faction opposed to that of the accused by itself does not render their evidence false. Partisanship by itself is no ground for discarding sworn testimony. Interested evidence is not necessarily false evidence. In a small village like the one under consideration where people are divided on caste basis, the prosecution may not be able to get any neutral

34. 1988 (Supp) SCC 262

witness. Even if there is any such neutral witness, he will be reluctant to come forward to give testimony to support one or the other side. Therefore, merely because the eyewitnesses are associated with one faction or the other, their evidence should not be discarded. It should, no doubt, be subjected to careful scrutiny and accepted with caution."

48. From the prosecution case, it is clear that the incident took place between the two rival political factions and that all eye-witnesses (except PW-3 and PW-6) belong to victim party. In a way, therefore, PW-2, PW-4, PW-5, PW-7, PW-8, PW-9 and PW-10 can be stamped as interested witnesses. PW-6 has deposed that the deceased was son-in-law of his eldest brother and to that extent he is also an interested witness. In the light of legal position noticed above before relying upon testimony of these witnesses, adequate assurance from other circumstances or materials is required to be seen. The evidence of such witnesses has to be examined with great care and caution to obviate possibility of false implication or over-implication.

49. In cases involving rival political factions or group enmities, it is not unusual to rope in persons other than who were actually involved. In such a case, court should guard against the danger of convicting innocent persons and scrutinise evidence carefully and, if doubt arises, benefit should be given to the accused.

50. A critical examination of the evidence of PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-10 would show that their presence at the time of incident cannot be doubted. Most of them got injured in the incident. PW-2 has named A-1, A-2, A-3, A-4, A-12, A-13 and A-18 being armed with the weapons. He has not spoken of any assault by them on the person of the deceased. PW-3 has spoken of the presence of A-2, A-3 and A-12. According to him, A-12 gave sword blow on his head and A-2 and A-3 gave blows by iron- bar on his

A back. PW-3 has also not deposed of any actual assault by these accused persons on the deceased. Insofar as PW-4 is concerned, he has spoken about the presence of A-3, A-8, A-9, A-12 and A-19. He has also not stated about the attack by these persons on the deceased. PW-5 has stated about the B presence of A-2, A-10 and A-12. He did state about the injury caused by A-2 on his waist. According to him, A-12 attacked PW-8 and A-10 caused pharshi blow on Gopal Thakur. PW-6 deposed that A-1, A-2, A-3, A-4 and A-12 chased the deceased; A-12 was armed with sword while others were C armed with iron bars and all of them started attacking the deceased with their respective weapons in their hands. He also deposed about the injury caused to him by A-3, A-9 and A-12. PW-7 has stated about the assault by A-2, A-3 and A-12 on the deceased and by A-10 and A-13 on him. PW-8 has stated D that A-3 caught hold of the deceased and A-12 assaulted him (deceased) with sword. He has also stated that A-1, A-2 caught hold of him (witness) and A-1 and A-3 gave blow on his back with iron bar. PW-10 deposed that A-1, A-2, A-10, A-11, A-12, A-13 and A-17 assaulted the deceased and A-1, A-2 and A-3 gave blow by iron bar to PW-2. The testimony of these E witnesses is corroborated from the medical evidence.

51. Section 149 IPC creates a specific and distinct offence. Its two essential ingredients are :

F (i) commission of an offence by any member of an unlawful assembly and;

(ii) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly G knew it be likely to be committed.

52. In *Masalti* vs. *State of U.P.*[35], this Court exposited:

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35. (1964) 8 SCR 133

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A "……What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC Section 142 provides that whoever, being aware of B facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified C by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While D determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly….."

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53. The legal position laid down in *Masalti* admits of no doubt and has been followed time and again. However, where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, this Court has applied rule of caution F taking into consideration particular fact-situation and convicted those accused whose presence was clearly established and overt acts were proved.

54. In *Shere And Ors.* vs. *State of U.P*[36], this Court held: G

"……But when there is a general allegation against a large number of persons the Court naturally hesitates to

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36. 1991 Supp. (2) SCC 437

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A convict all of them on such vague evidence. Therefore we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the abovementioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also
B to whom overt acts are attributed....."

55. In *Musa Khan & Ors. vs. State of Maharashtra*[37], this Court observed:

".....Thus a court is not entitled to presume that any and
C every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have
D anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial
E stages and shared the common object of the assembly at all these stages....."

56. In *Nagarjit Ahir* vs. *State of Bihar*[38], this Court applied rule of caution and in the facts and circumstances of the case, held that it may be safe to convict only those persons against
F whom overt act is alleged with the aid of Section 149, IPC lest some innocent spectators may get involved.

57. In *Maranadu And Anr.* vs. *State by Inspector of Police, Tamil Nadu*[39], this Court for determination of 'common object'
G of unlawful assembly stated the legal position thus:

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37. (1977) 1 SCC 733

38. (2005) 10 SCC 369

H 39. (2008) 16 SCC 529

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"……..For determination of the common object of the unlawful assembly , the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instanti."

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58. Having carefully examined the testimony of eye-witnesses, we find that prosecution has been able to establish that party of assailants comprised of more than five persons and that they formed unlawful assembly. It is also seen from the evidence that at least five persons chased the deceased and then attacked him. These members of the unlawful assembly who chased and attacked the deceased definitely shared common object of causing murder of Suresh Atmaram Gharat. A-1 had died during pendency of the appeal before High Court and, therefore, nothing further needs to be said about his role.

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59. The High Court in para 36 of its judgment observed that common object of the said unlawful assembly was to cause grievous hurt. A little later in para 37, the High Court held that

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A common object of the unlawful assembly was to make murderous attack on the deceased. At first blush, there seems to be some inconsistency in the judgment but on a deeper scrutiny, we find that it is not so. It is well-known that for determination of common object of the unlawful assembly, the B conduct of each of the members of the unlawful assembly before and at the time of attack is of relevant consideration. At a particular stage of the incident, what is object of the unlawful assembly is a question of fact and that has to be determined keeping in view the nature of the assembly, the arms carried C by the members and the behaviour of the members at or near the scene of incident. The accused persons (nineteen in number) armed with deadly weapons came to the scene of occurrence sharing the common object of causing grievous hurt to the victim party. A closer scrutiny of evidence shows that A-2, A-3, A-4, A-5, A-6, A-10, A-11 and A-12 assaulted the D prosecution witnesses – some of them sustained grievous injuries – and the deceased. However, when the deceased and prosecution witnesses ran helter and skelter, at least five members of the unlawful assembly chased the deceased and they attacked him with the weapons in their hand. The purpose E and design of these members of unlawful assembly in chasing Suresh Atmaram Gharat and a murderous assault by them on him may not have been shared by other members of unlawful assembly. In a case such as the present one, although having regard to facts, the number of participants could not be less F than five, it is better to apply rule of caution and act on the side of safety and convict only A-2, A-3, and A-12 under Section 302 read with Section 149 I.P.C whose presence as members of party of assailants is consistently mentioned and their overt acts in chasing and assaulting the deceased are clearly proved. A-G 4, A-5, A-6, A-10 and A-11 get the benefit of doubt with regard to offence under Section 302 read with Section 149 I.P.C. since evidence against them in chasing and assaulting the deceased is not consistent. However, all the eight appellants are guilty of the offences punishable under Section 148 and Section 326

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read with Section 149, I.P.C. This is proved beyond doubt and the High Court cannot be said to have erred in holding so. A

60. In what we have already discussed above, we see no merit in the plea of alibi set up by A-2. The plea of alibi set up by A-2 was not even accepted by the trial court. The presence of A-2 in the incident is established. He has been identified holding the iron bar. The prosecution witnesses have given specific involvement of A-2 in the incident. On the basis of the deposition of some of the eye-witnesses, the evidence of DW-1 cannot be said to have been wrongly rejected by trial court as well as by High Court. In cross-examination, DW-1 admitted that there was no supervisor at night on that date. Insofar as, document Article-8 is concerned, suffice it to observe that original document was not produced and name and designation of the officer who is said to have signed the said certificate was not disclosed nor the person who issued the certificate was produced. As a matter of fact, plea of alibi has not at all been probabilised by A-2 much less proved. B C D

61. Although, on behalf of the appellants it was sought to be argued that there was lack of light on the day of occurrence and, therefore, it was not possible for the witnesses to see the incident. However, from the prosecution evidence it is clearly established that the temple was illuminated due to annual fair and there were other lights at the temple. It was full moon night. We find it difficult to accept the submission of the appellants that there was not enough light at the place of incident and, therefore, the incident could not have been seen. E F

62. On behalf of appellant no. 8 (A-12), it was contended that site plan of the scene of offence could not have been accepted as PW-1 deposed that he prepared the sight map as per the information supplied by the police. The contention is devoid of any substance. As a matter of fact, no objection was raised when the said document was being exhibited. Moreover, the investigating officer has not at all been cross- G H

examined in this regard. The decisions namely *Ramratan*[40] *and others* v. *State of Rajasthan*, *Chhotu* vs. *State of Haryana*[41] have no application in the facts of the present case.

63. It was contended that the High Court was not justified in interfering with the judgment of acquittal as the view taken by the trial court was the possible view. Reliance, in this connection, was placed on a recent decision of this Court in *Mahtab Singh & Anr.* v. *State of U.P*[42]. The argument is only noted to be rejected. The view which the trial court took on the basis of the evidence on record is neither possible nor plausible. There could not be more perversity in the consideration of the evidence of eye-witnesses by the trial court when it observed :

> ".....All the witnesses deposed that they were lying or chit-chatting or just resting or playing cards in the temple at the time of the incident. It has also come on record that after the function was over at about 1.00 a.m. the prosecution witnesses remained in the temple for the purpose of 'Jagran'. All this shows that the prosecution witnesses must not be in a position to see who actually assaulted them. This is a broad picture that is projected by the evidence of all the eye witnesses. In such state of physical and mental tiredness, no witness will be able to tell specifically who actually assaulted him unless he sees from a very short or negligible distance, the attacking persons. Same thin can be said about the attack on Suresh Atmaram Gharat who is reported dead because of the incident. The evidence regarding assault on him is not at all specific. It is in short the evidence of all the prosecution witnesses that Suresh Atmaram Gharat ran from the temple with the fear of his life and he was chased

40. (1962) 3 SCR 590

41. (1996) SCC Cri. 1161

42. JT (2009) (5) SC 431

by the accused and was attacked at some distance near Uran Panvel road from the temple. It is an admitted position that it was night time. It is also proved fact that Suresh was caught by the accused at a considerable distance from the temple. None of the witnesses saw the attack on Suresh, by the accused from a short distance say of about 5' to 10'. This is natural because every prosecution witness was engaged and worried about his own life. So it is but natural that every witness should be running to safeguard his own life first and when he is in such state of mind, it is not at all possible to specify which accused gave blows to Suresh Atmaram Gharat on what part of his body and with what weapons."

64. With regard to evidence of PW-3 and PW-6, we have already noticed the reasoning of trial court in the earlier part of our judgment and, in our judgment, consideration of their evidence by the trial court was not proper.

65. The least that can be said is that the whole approach of the trial court in consideration of the evidence of eye-witnesses was faulty and flawed. We have independently examined the evidence for our satisfaction and we find that the judgment of the trial court acquitting all the accused persons suffered from factual and legal errors justifying interference by the High Court in appeal within permissible limits.

66. In the result and for the reasons stated, the appeal is allowed in part. The conviction of Pandurang Chandrakant Mhatre (A-2), Ramesh alias Raman Chandrakant Mhatre (A-3) and Maninath Shankar Gharat (A-12) for the offence punishable under Section 302 read with Section 149, IPC and the sentence awarded to them by the High Court to suffer imprisonment for life is maintained. The conviction of Parshuram Chandrakant Mhatre (A-4), Ashok Yadav Mhatre (A-5), Damodar Vasant Gharat (A-6), Ramchandra Raghunath Mhatre (A-10) and Mahesh Shankar Mhatre (A-11) for the offence punishable under Section 302 read with 149, IPC is

A set aside. The conviction of the appellants under Section 148 and Section 326 read with Section 149 IPC is upheld. The sentence awarded to them under Section 148 IPC is maintained. However, substantive sentence for the offence punishable under Section 326 read with Section 149 IPC is
B modified and each one of them is sentenced to suffer RI for three years. The substantive sentences shall run concurrently. The bail bonds of A-4, A-5, A-6, A-10 and A-11 are cancelled. They will now surrender within one month and undergo remaining part of the sentence, if any.

C N.J. Appeal partly allowed.