
(2015) 12 BOM CK 0087

In the Bombay High Court

Case No : Criminal Appeal Nos. 1102, 1129 and 1134 of 2007

Amit and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-12-2015

Acts Referred:

Evidence Act, 1872 — Section 134, 27
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2016) 1 BomCR(Cri) 760

Hon'ble Judges : V.K. Tahilramani, Actg. C.J. and Dr. Shalini Phansalkar Joshi, J.

Bench : Division Bench

Advocate : Amit Sale, Swapnali Pokale and Joshna Borges, for the Appellant;
A.S. Shitole, APP, for the Respondent

Judgement

Dr. Shalini Phansalkar Joshi, J.—As these three appeals are arising out of one and the same judgment and order dated 28th August, 2007 of Sessions Judge, Sangli, in Sessions Case No. 38 of 2007, they are being decided by this common judgment.

2. By the impugned judgment, appellants, who are original accused Nos. 1 to 6 are convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay compensation of Rs. 50,000/- each in default to suffer rigorous imprisonment for two years. Out of said compensation amount of Rs. 50,000/-, the amount of Rs. 25,000/-, is directed to be paid to the parents of deceased Sanjay and remaining amount of Rs. 25,000/-, is directed to be paid to the wife of the deceased Somnath.

3. By these appeals, the appellants are challenging their conviction and sentence. For the sake of convenience, the appellants in these appeals are referred to by their original nomenclature as accused Nos. 1 to 6.

4. Brief facts of the appeals can be stated as follows:--

"Deceased Sanjay was the younger brother of P.W. 1 Dhananjay. The another deceased Somnath was Sanjay's friend. Sanjay was a rickshaw driver. Accused persons were residing in the same vicinity. In September, 2006, a dispute arose between deceased Sanjay and accused No. 1 Vijay on account of motorcycle. Since then, the relations between Sanjay and accused No. 1 were not cordial."

5. On the day of incident on 7.11.2006 at about 11.00 a.m. when P.W. 1 Dhananjay was about to leave his house, in order to go to his shop of gold smith, P.W. 4 Firoz Mujawar, came running to his house and informed him that at Tiwari galli, 4 to 5 persons including accused No. 1 Vijay, were assaulting deceased Sanjay and Somnath. Hence P.W. 1 Dhananjay went running upto Tiwari galli and witnessed that accused Nos. 1 to 6 were assaulting his brother Sanjay and Sanjay's friend Somanth with knives and sickle. Accused No. 1 Vijay gave blow of sickle on the head of Sanjay with such a force that Sanjay fell down on the ground with bleeding injury to his head. Other accused were piercing Sanjay with knives in their hands, they were also assaulting Somnath with the weapons in their hands. When P.W. 1 Dhananjay tried to intervene, the persons gathered there did not allow him to do so, they held him up. As a result, assault was going on for 5 to 7 minutes. After both Sanjay and Somnath fell down on the ground in totally injured condition, appellants left the spot, leaving behind some of the weapons in their hands. P.W. 1 Dhananjay then went near his brother and noticed that his brother Sanjay had received injuries on head, neck, chest and hand. He gave a call to Sanjay, however, Sanjay was not responding. Immediately he took Sanjay in a rickshaw to Civil Hospital. There Doctor examined and declared him dead. Simultaneously Somnath was brought to Civil Hospital and he was also declared to be dead on admission. P.W. 1 Dhananjay then went to City Police Station and lodged a detailed report of entire incident vide his complaint Exh. 36. On his complaint C.R. No. 218 of 2006 was registered initially against accused Nos. 1 to 4 only.

6. On registration of the offence, investigation of the same was taken over by P.W. 22 Police Inspector- Shankar Jadhav. He alongwith, P.W. 1 Dhananjay went to Civil Hospital. There, inquest panchnamas on the dead bodies of Sanjay and Somnath were drawn vide Exh. 30 and 31. The dead bodies were thereafter handed over to P.W. 12 Dr. Arjun Patil for postmortem.

7. P.W. 22 PI Kadam, then went to the spot of incident alongwith P.W. 1 Dhananjay. There, in the presence of panchas, he collected some weapons which were found lying on the spot. He also collected the blood stained soil from the spot with the help of cotton swab, under scene of offence panchnama Exh. 46. The clothes of both the deceased were seized under panchnama Exh. 32 and 33. A thorough search of accused and also of the eye witnesses to the incident was taken but on that day none of the accused could be traced. On the next day, however, accused Nos. 1 to 4 came to be arrested under panchnama Exh. 52.

8. On 9.11.2006, P.W. 1 Dhananjay again went to the police Station and gave supplementary statement to the effect that after the funeral when he tried coolly

to remember the entire incident in its proper perspective in chronological order, he remembered that accused No. 5 Amit and accused No. 6 Rohit were also involved in the said incident, as accused No. 6 Rohit was holding Sanjay while accused No. 5 Amit was assaulting Sanjay with knife, alongwith others. In view of the supplementary statement of P.W. 1 Dhananjay, accused Nos. 5 Amit and 6 Rohit were also arrested on 10.11.2006.

9. During the course of further investigation, the weapons of assault came to be seized at the instance of accused Nos. 1 & 2 under Section 27 of the Evidence Act. In the custodial interrogation of accused Nos. 1 to 6, role of accused Nos. 7 to 9 was also transpired, as they were found involved in destroying evidence after commission of the offence, by burning clothes of the accused, which were stained with blood. Hence accused Nos. 7 to 9 also came to be arrested. All the seized muddemal articles were sent to Chemical Analyzer. On the receipt of Chemical Analyzer's reports Exh. 121 to 130 and postmortem notes at Exh. 66 and 67, chargesheet came to be filed in the Court, for the offence punishable under Section 302 read with 34 of the Indian Penal Code against accused Nos. 1 to 6, and for the offence punishable under Section 201 read with section 34 of the Indian Penal Code against accused Nos. 7 to 9.

10. On committal of the case to the Sessions Court, the trial Court framed charge against accused vide Exh. 5. The accused pleaded not guilty and claimed to be tried raising defence of denial and false implication.

11. In support of its case, prosecution examined in all 22 witnesses. But most of them turned hostile and as a result prosecution relied mainly on the evidence of single eye witness P.W. 1 Dhananjay and corroborating evidence of his friend P.W. 4 Firoz. The accused, to substantiate their defence, examined one witness by name Dr. Basappa Koli to prove M.L.C. register entry No. 7079 and 7980 dated 7.11.2006 showing that history of the deceased was not given in the hospital by P.W. 1 Dhananjay, but by his father. Thus, an attempt was made by the accused to show that P.W. 1 Dhananjay was not present at the time of incident and he has not witnessed the incident.

12. On appreciation of this evidence, the trial Court was pleased to acquit accused Nos. 7 to 9 in the absence of sufficient incriminating evidence on record against them. The trial Court, however, was pleased to convict accused Nos. 1 to 6 for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced them as aforesaid.

13. This judgment of the trial Court is challenged in these appeals by accused Nos. 1 to 6. During pendency of the appeals, accused No. 1 Vijay Pawar has expired on 17.10.2010, hence as per order dated 9th October, 2015, appeal stands abated against him.

14. In these appeals, we have heard learned counsels for appellants, who have assailed the impugned judgment of the trial Court on the count that except for the solitary testimony of P.W. 1 Dhananjay, there is absolutely no iota of

evidence on record against accused. It is urged that in order to base conviction on the evidence of single eye witness, his evidence must be of an unimpeachable character. According to learned counsels for accused, the evidence of P.W. 1 Dhananjay, is not of a such a sterling quality as it suffers from several infirmities and lacuna. As to his presence at the time of incident except for the F.I.R. lodged by him, there is no other documentary evidence on record. Even in the history given before the Doctor at the time of admission of Sanjay and Somanth, the name of P.W. 1 Dhananjay is not appearing as the informant. The rickshaw in which P.W. 1 Dhananjay claims that he has brought injured Sanjay to the hospital is not seized by the police. Even the blood stained clothes of P.W. 1 Dhananjay are not seized. The spot panchnama does not mention the place from which P.W. 1 Dhananjay has allegedly witnessed the incident. It is also urged that he has implicated accused Nos. 5 and 6 in this offence, three days after the incident. Therefore, his testimony cannot be considered as of sterling worth to convict the accused on this solitary piece of evidence. In short, according to learned counsels for accused, the evidence on record in the present case, is not at all convincing, reliable and of unerring tendency; the trial Court has, therefore, committed an error in convicting the accused on the basis of such evidence, therefore, the impugned judgment of the trial Court needs to be quashed and set aside.

15. Per contra, learned APP has fully endorsed and supported the judgment of the trial Court by submitting that as per well crystalised principle of law evidence has to be weighed and not counted. According to learned APP, double murder of Sanjay and Somnath took place in the broad day light on the road in a most brutal manner which has created terror in the mind of the people. The Investigating Officer has therefore, deposed that no one was coming forward to give statement. At the time of trial also independent witnesses examined by the prosecution have not supported the case of prosecution, having been declared hostile. In such situation, the evidence of solitary eye witness cannot be discarded on some imaginary, assumptions, presumptions and groundless reasons. According to learned APP, evidence of P.W. 1 Dhananjay gives all the details of the incident. F.I.R. which is lodged immediately after the incident gives all the details of the incident. Therefore, it is submitted by learned APP that the trial Court has rightly placed reliance on the evidence of P.W. 1 Dhananjay to prove guilt of the accused and no interference is warranted in the well reasoned judgment and order of the trial Court, which had an opportunity to observe the witnesses, their demeanour and to appreciate their evidence at the first instance.

16. In our considered opinion, for proper appreciation of the rival submissions advanced by learned counsels for accused and learned APP, it would be useful to refer to the factual aspects of the case as brought on record through the evidence of witnesses.

17. This is a case of double murder, speaking of utmost brutality. Though defence counsels are not disputing the factum of homicidal death of Sanjay and Somanth,

just to understand brutality of assault, it would be useful refer to evidence of P.W. 12 Dr. Arjun Patil, who has conducted postmortem on the dead bodies. His evidence will not only prove the gravity and brutality of the assault but also the fact that in the said assault 5 to 6 persons were involved, otherwise number of injuries which were found on the bodies of the deceased Sanjay and Somnath cannot be explained, especially when the assault was made simultaneously on both of them. It leaves no manner of doubt about the involvement of not less than 5 to 6 persons in the assault. Just to reproduce evidence of P.W. 12 Dr. Arjun Patil, the external injuries he found at the time of postmortem and are noted in the postmortem reports Exh. 65 and 66 of Sanjay and Somanth are as follows:--

In respect of deceased Sanjay, P.W. 12 Dr. Patil, has noticed following external injuries:--

? Injury No. 1 : Incise wound over mid forehead, spindle shaped vertically oblique 2 cms x 1 cm x bone deep with bleeding. No fracture of skull bone.

? Injury No. 2 : Incise wound - 6 cms lateral to left eye, spindle shaped vertically oblique 2 1/2 cms x 2 cms x bone deep with bleeding. No fracture of bone.

? Injury No. 3 : Incise wound over left cheek, spindle shaped vertical 2 cms x 1 cm x muscle deep with bleeding.

? Injury No. 4 : Incise wound over left clavicular fosses region, horizontal oblique. 6 cms x 2 cms x muscle deep.

? Injury No. 5 : Incise wound on left upper arm lower 1/3rd region, Horizontal, spindle shaped, 2 cms x 1 cm x muscle deep, clotted blood.

? Injury No. 6 : Incise wound over left thumb palm aspect vertical, spindle shaped, 1 cm x 1/2 cm x muscle deep clotted blood.

? Injury No. 7 : Incise wound 5 cms above and lateral to left breast horizontal oblique, spindle shaped, 6 cms x 3 cms to cavity deep bleeding present.

? Injury No. 8 : Incise wound 4 cms medial to and below left breast vertical, spindle shaped, 5 cms x 4 cms x cavity deep with bleeding present fracture forth rib.

? Injury No. 9 : Incise wound over left 6th rib region laterally and 6 cms below left breast, horizontal oblique, 5 cms x 2 cms x cavity deep with bleeding.

? Injury No. 10 : Incise wound left epigastric region, horizontal oblique, spindle shaped, 5 cms x 2 cms x cavity deep with bleeding.

? Injury No. 11 : Incised wound left buttock region, lower and laterally, vertical oblique, spindle shaped, 5 cms x 2 cms x muscle deep with bleeding.

? Injury No. 12 - Incised wound 6 cms below and lateral to injury No. 11, vertical oblique, spindle shaped wound, 5 cms x 2 cms x muscle deep.

? Injury No. 13 : Incised wound 2 cms below injury No. 12, vertical oblique ed pindle shaped 3 cms x 1 1/2 cms x muscle deep bleeding.

? Injury No. 14 : Incised wound over right upper arm medial third posteriorly, horizontal, spindle, shaped, 3 cms x 1 1/2 cm x muscle deep bleeding.

? Injury No. 15 : Incised wound over mid of right palm, horizontal oblique, spindle shaped, 4 cms x 1 1/2 cms x muscle deep bleeding.

? Injury No. 16 : Incised wound 3 cms lateral to right breast vertical to oblique, spindle shaped, 5 cms x 3 cms x muscle deep bleeding.

? Injury No. 17 : Incised wound over right lower axillary region, 5th, 6th rib, vertical oblique, spindle shaped 5 cms x 3 cms x cavity deep, bleeding.

? Injury No. 18 : Incised wound over mid occipital region, horizontal, spindle shaped 8 cms x 3 cms x bone deep, bleeding.

? Injury No. 19 : Incised wound - 2 cms below injury No. 18, horizontal, spindle shaped 3 cms x 2 cms x bone deep with bleeding.

? Injury No. 20 : Incised wound over mid of left shoulder region, spindle shaped, 3 cms x 2 cms x muscle deep with bleeding.

? Injury No. 21 : Incise wound 2 cms medial to injury No. 20, oblique spindle shaped, 4 cms x 2 cms x muscle deep with bleeding.

? Injury No. 22 : Incised wound below left scapula and mid back, horizontal oblique, spindle shaped 9 cms x 4 cms x cavity deep with bleeding.

? Injury No. 23 : Incised wound over lateral to medial border of left scapula, vertical oblique, spindle shaped, 4 cms x 2 cms x bone deep with bleeding.

? Injury No. 24: Incised wound - 6 cms below and lateral to injury No. 22, horizontal oblique, spindle shaped, 4 cms x 2 cms x muscle deep with bleeding.

? Injury No. 25 : Incise wound just left lateral to vertebral column at T12 to L12 Region, vertical oblique, spindle shaped, 5 cms x 3 cms x cavity deep with bleeding.

? Injury No. 26 : Incised wound just below and lateral to injury No. 25, vertical oblique, spindle shaped, 4 cms x 2 cms x muscle deep with bleeding.

? Injury No. 27 : Incised wound 2 cms below injury No. 24, horizontal oblique, spindle shaped, 4 cms x 2 cms x muscle deep with bleeding.

? Injury No. 28 : Incised wound left iliac region, vertical oblique, spindle shaped, 5 cms x 3 cms x muscle deep with bleeding.

? Injury No. 29 : Incised wound over right mid lumbar region, horizontal oblique, spindle shaped- 5 cms x 2 cms x muscle deep with bleeding."

According to him, all the injuries were antemortem in nature and are sufficient to

cause the death in the ordinary course. The cause of death was shock due to injury to vital organs.

There were corresponding internal injuries on his body as under.

"? Fracture 4th rib on left anterior chest corresponding to injury No. 8.

? Rupture on both sides corresponding to injury Nos. 16, 17, 7, 8, 9, 4 and 22.

? Rupture on right lung lower lobe and hilar region corresponding to injury Nos. 16 and 17.

? Rupture of left lung lower lobe anteriority and inferiority corresponding to injury Nos. 7, 8, 9.

? Rupture over left ventricular area.

? Rupture of left ventricle at apical region corresponding to injury No. 8.

? Rupture and Ascending aorta anteriority corresponding to injury No. 8

? Rupture in left epigastric region, corresponding injury No. 10.

? Rupture anteriority corresponding to injury No. 10."

In respect of deceased Somnath, P.W. 12 Arjun Dr. Patil, has noticed following external injuries:--

"? Injury No. 1 : three Incised wounds over right parieto temporal region (confluent mixed) intermingled with each other, over the area of 14 cms x 5 cms x cavity deep, with multiple fractures of skullness (4 pieces) and depressed inside with rupture of brain coverings and laceration to brain matter. Portion of brain matter protruding outside with blood clots and bleedings.

? Injury No. 2 : Incised vertical wound 1 cms to medial to injury No. 1, 3 cms x 2 cms x bone deep with bleeding, no fracture below it.

? Injury No. 3 : Incised vertical wound 1 cms below to injury No. 1 over mid forehead, 4 cms x 2 cms x bone deep with bleeding, no fracture below.

? Injury No. 4 : Incised wound - over left parieto occipital area, 5 cms x 3 cms x bone deep with bleeding, no fracture below it.

? Injury No. 5 : Over nape of neck. Horizontally oblique irregular abrasion with contusion over region - 4 cms x 3 cms with clotted blood.

? Injury No. 6 : Incised wound over dorsum of left hand - vertical -extending from mid wrist to base of middle finger- 7 cms x 2 cms x inside deep with bleeding.

? Injury No. 7 : Incised wound over lower phalanx of middle finger - horizontal oblique - 2 cms x 1 cm x bone deep with bleeding.

? Injury No. 8 : Incise wound over mid phalanx of left ring finger -horizontal

oblique, 2 cms x 1 cm x bone deep with bleeding.

? Injury No. 9 : Incised wound tip of left little finger, 1 cm x muscle deep x cut through and through distal portion missing bleeding.

? Injury No. 10 : Incised wound postero lateral aspect of right forearm, vertical 7 cms x 3 cms x muscle deep with bleeding.

? Injury No. 11 : Incised wound mid occipital area, vertical 5 cms x 2 cms x bone deep with bleeding, no fracture.

? Injury No. 12 : Incised wound 1 cms medial to injury No. 11 vertical 4 cms x 2 cms x bone deep with bleeding no fracture."

There were corresponding internal injuries on his body as under.

"? Incised wound under the scalp corresponding to injury Nos. 1, 2, 3, 4, 11 and 12.

? Fracture of skull on right side, multiple fractures (4 pieces) on right parieto temporal region with depression inside fracture bones corresponding to injury No. 1.

? Rupture and coverings of brain corresponding to injury No. 1.

? Laceration of brain matter and protruding portion of brain outside corresponding to injury No. 1."

18. These injuries were also found to be antemortem and sufficient in the ordinary course to cause death. The cause of his death was also found to be shock due to cranio cerebral injury.

19. As per evidence of P.W. 12 Dr. Arjun Patil, in case of Sanjay there were 8 injuries namely Injury Nos. 7, 8, 9, 10, 16, 17, 22 and 25 which were independently sufficient to cause death; whereas in case of Somnath injury No. 1 which consists of three incised wounds intermingled with each other, resulting into multiple fractures of skull bones, was found to be sufficient to cause the death. According to P.W. 12 Dr. Arjun Patil, these injuries found on the dead body of Sanjay and Somnath must have been caused by sharp edged weapons. Injury No. 1 on the dead body of Somnath was likely to be caused by sickle. Similarly injuries found on the body of Sanjay were also possible by sickle and knives.

20. The evidence of P.W. 1 Dhananjay goes to prove that he has seen that the brain matter was protruding out of head of Somnath due to breaking of skull and head. One can therefore realise the ferocity of the assault. As deposed by Dr. Patil, death of both Sanjay and Somnath was instantaneous and must be within five minutes of the assaults. It may be stated that as per evidence of P.W. 1 Dhananjay, assault itself took place for about 5 to 7 minutes and that too by about 6 to 7 accused persons.

21. Learned counsels for accused, to be fair on their part are also not shying

away from the fact that both the deaths were homicidal ones. The above said evidence led by prosecution, in our opinion, further proves that the assault was brutal and ferocious made with sharp edged weapons, clearly and purely with an intention to ensure that both Sanjay and Somnath are done away with instantaneously, without leaving any scope for survival and that too in most cruel and brutal manner.

22. The real issue posed by learned counsels for accused is about ability of prosecution to prove the involvement of the accused, in this brutal assault. As stated above, the entire case of prosecution stands on the sole testimony of P.W. 1 Dhananjay. The brutality of the assault was such that, as deposed by P.W. 22 Investigating Officer PI Shankar Jadhav, though several persons were present at the time of incident, no-one was coming forward to give statements about witnessing the assault; all of them had as if gone underground and shelved themselves away. A sort of terror was created in the vicinity, right from beginning, as a result though the incident had taken place in broad day light in thickly populated area and though very large number of persons had witnessed the incident, police can record statements of only four eye witnesses and that too, two days after the incident. It is pertinent to note that at the time of trial also, except P.W. 1 Dhananjay and P.W. 4 Firoz, none of the witnesses have supported prosecution case. P.W. 13 Mahesh Chavan to P.W. 19 Sanjay Jadhav, who were having their shops in the vicinity and must have been witnessed the incident, have outrightly disowned the prosecution case and despite cross examination by learned APP, not supported the prosecution.

23. The perusal of the judgment of the trial Court reveals that the trial Court was also constrained to observe that though on number of occasions summonses were police, the presence of those four eye witnesses could not be secured as they went underground and were not traceable. The reports filed at Exh. 71, 76, 79, 81 and 88 by APP to that effect are found to be self explanatory. The point, therefore, stressed is that this is not a case where prosecution has not attempted to lead corroborating evidence, but on account of the terror created in the vicinity, which is bound to be created, considering the brutality of attack on two persons at the hands of 5 to 6 persons with sharp edged weapons, no one was coming forward to depose. The prosecution was, therefore, helpless, and has therefore no option but to rely solely on the evidence of P.W. 1 Dhananjay, the solitary eye witness to the incident.

24. It is true that merely because prosecution could not bring other corroborating evidence of eye witnesses on record, the evidence of P.W. 1 Dhananjay a solitary witness, cannot escape from the closer scrutiny of his testimony by the Court. His evidence has to be assessed independently to find out whether it is of such a quality as is expected when the conviction has to rest on his sole testimony. The law to that effect is very well settled. It is laid down in ample number of authorities that it is the quality of evidence and not the quantity of witnesses which counts. At times, one credible witness outweighs the testimony of number

of other witnesses of indifferent characters.

25. Hence as laid down by the Apex Court in - *Vadivelu Thevar Vs. The State of Madras*, , there is no difficulty in relying on the sole testimony of a single witness to pass conviction if it is found to be above reproach or suspicion of interestedness or incompetence. Section 134 of the Evidence Act also lays down the sound principle of law that no particular number of witnesses shall in any case be required for the proof of any fact. Courts are ultimately concerned with the merits of the evidence of the witnesses and not with the number of witnesses examined by the prosecution. If the evidence of a witness gives true and correct version of the incident, then the Court can place reliance on his testimony to hold the prosecution case as proved. In other words acceptability of evidence and not numerical sufficiency of evidence is material. Of course the law expects that the evidence of sole eye witness should be scrutinized with caution and circumspection, but once his evidence crosses this test, then it can form the sole basis for conviction.

26. Here in the case, both the trial Court and this Court is also aware that evidence of P.W. 1 Dhananjay requires more scrutiny, not only because he is sole eye witness, but also because he is real elder brother of the deceased Sanjay. Hence he has to cross here the double test to place reliance on his testimony, though normally close relative of the deceased is the last person to screen real offender and implicate an innocent one.

27. The evidence of P.W. 1 Dhananjay reveals that on the day of incident at about 11.00 a.m. while he was about to leave the house in order to go to his shop, his friend P.W. 4 Firoz came running to his house and told him that in Tiwari Galli, 5 to 6 persons inclusive of accused No. 1 Vijay Pawar were assaulting Somnath and Sanjay. As per his evidence, he immediately went running to Tiwari Galli. It is brought on record from his cross examination and also from the spot panchnama Exh. 44 proved through the evidence of P.W. 2 Nana Jadhav that Tiwari Galli where the incident took place and Kanase galli, where P.W. 1 Dhananjay was residing are just adjacent to each other. There was hardly a distance of 150 feet between the house of P.W. 1 Dhananjay and the spot of incident. Hence it is but natural that he reached to the spot immediately on being informed by P.W. 4 Firoz.

28. There is corroborating evidence to this effect of P.W. 4 Firoz that when he was proceeding to the house of P.W. 1 Dhananjay, in order to go to Kolhapur, at the corner of Tiwari Galli, he heard shouts of quarrel. Hence he rushed to the spot and found accused No. 1 Vijay giving pushes to Sanjay and Somnath. Hence he went to the house of P.W. 1 Dhananjay and informed him about the incident. According to evidence of P.W. 4 Firoz, P.W. 1 Dhananjay started running towards the spot and told him to bring his motorcycle, then he searched key of the motorcycle and reached to the spot.

29. As per further evidence of P.W. 1 Dhananjay, when he reached Tiwari Galli,

he found accused Nos. 1 to 6 assaulting his brother Sanjay and Sanjay's friend Somnath with knives and sickle. Accused No. 1 Vijay assaulted Somnath with sickle on head with such a force that Somnath immediately fell down. The others were piercing Somnath and Sanjay with knives in their hands. According to him, he wanted to intervene, however, the persons gathered there did not allow him to do so, they held him back physically. As per his evidence, assault was going on for about 5 to 7 minutes. Thereafter the assailants ran away from the spot. Some of the assailants left behind the weapons. Then he went upto his brother Sanjay and noticed that Sanjay had received injuries on his head, neck, chest and hand. He called Sanjay. However, Sanjay did not respond.

30. This part of evidence of P.W. 1 Dhananjay also gets corroboration from the spot panchnama Exh. 44, which shows that on the spot there was pool of blood, various articles like the footwear, handle of the knife were lying there. At another spot where deceased Somath was assaulted, some portion of his head and skull was lying in a pool of blood with the blade of knife. The spot panchnama was conducted immediately after the incident and the spot was shown by P.W. 1 Dhananjay himself, as deposed by P.W. 22 PI Jadhav,

31. The evidence of P.W. 1 Dhananjay then proves that he took Sanjay in a rickshaw to Civil Hospital. It was the same rickshaw, which Sanjay used to drive as rickshaw driver. In Civil Hospital, Doctor declared Sanjay dead. Almost simultaneously Somnath was also brought into hospital. He witnessed that brain matter was protruding out of the head of Somnath due to the breaking of head. Somnath was also declared dead by the Doctor. Then P.W. 1 Dhananjay immediately went to City Police Station and lodged complaint Exh. 36. On this aspect, there is corroborating evidence of P.W. 22 PI Jadhav to prove that on the basis of this complaint, offence bearing C.R. No. 218 of 2006 was registered immediately at about 12.30 hrs and he rushed to the hospital alongwith P.W. 1 Dhananjay. In the complaint Exh. 36, the names of accused Nos. 1 to 4 as assailants of Sanjay and Somnath are clearly and correctly mentioned. In our considered opinion, this prompt lodging of F.I.R. immediately after the incident, thus, gives strong corroboration and assurance to the evidence of P.W. 1 Dhananjay. His evidence further reveals that after returning from funeral, he remembered about role of accused Nos. 5 and 6 also, that accused No. 6 Rohit holding his brother Sanjay and accused No. 5 Amit assaulting him with knife and he disclosed this fact to the police in his supplementary statement recorded on 9.11.2006. In evidence before the Court, he has identified all the weapons and also the accused.

32. This witness is subjected to incisive cross examination at the hands of defence counsels, but absolutely nothing worthwhile is elicited in his cross examination to disbelieve him. His evidence is having a ring of truthfulness, colour of consistency and sense of straightforwardness as a result of which it inspires confidence in the judicial mind. It is also not that his evidence is not corroborated at all on any aspect. As stated above, his evidence gets

corroboration in material particulars from the evidence of P.W. 4 Firoz, who immediately on witnessing the incident, had reached to inform him and then came to the spot following P.W. 1 Dhananjay. The evidence of P.W. 4 Firoz further reveals that when he followed P.W. 1 Dhananjay on motorcycle and reached Tiwari galli, he witnessed that P.W. 1 Dhananjay with the help of his uncle Uday Potdar was shifting Sanjay into rickshaw. P.W. 1 Dhananjay himself was driving the rickshaw; whereas Uday was sitting on rear side of injured Sanjay, who was kept on the seat. As per evidence of P.W. 4 Firoz, on the spot, he also found Somnath lying on the ground with injuries on his head. He had also followed P.W. 1 Dhananjay to the hospital on the motorcycle where Doctors declared Sanjay and Somnath to be dead. According to his evidence, he was frightened. He did not leave the house for two days and only after 2 days, police came to his house. When police came to his house, he went to police station where his statement was recorded.

33. No doubt in his cross examination, he has denied having seen the incident, but then the observations of his demeanour as made by the trial Court in respect of his answers, is very relevant. The trial Court has noticed that on the next day, when he appeared for further cross examination, he was found to be a totally changed person, either he was being pressurized, influenced or terrorized, but practically he was not the same witness who has given earlier deposition. In the words of trial Court, "he was a completely changed man when he was facing further cross examination on the next date". This observation of the trial Court cannot be overlooked as trial Court has an added advantage of observing witnesses live at the time of recording their evidence and therefore, the observations of the trial Court assume significance. It was the duty of learned APP to disown this witness after his cross examination, considering that he has turned hostile to the prosecution case, which phenomena was noticed in respect of other prosecution witnesses, but prosecution has not done so. In our considered opinion, however, even if the evidence of this witness is excluded from the consideration, there is no reason at all to disbelieve the evidence of P.W. 1 Dhananjay.

34. According to learned counsel for the accused, however, the presence of P.W. 1 Dhananjay at the spot is not proved beyond reasonable doubt in view of P.W. 4 Firoz turning hostile in cross examination and not being declared so and subjected to cross examination by APP. It is further urged that if P.W. 4 Firoz has not informed P.W. 1 Dhananjay about the incident, there is no explanation about source of information from whom he came to know about the incident, so as to reach to the spot. It is further urged that except for the F.I.R. there is no other documentary evidence to prove presence of P.W. 1 Dhananjay on the spot. Police had neither seized his blood stained clothes nor seized rickshaw in which he has allegedly carried Sanjay to the Hospital. The history given before Doctor is also by his father and not by this witness. Even the Station Diary Entries which are made and proved through the evidence, go to reveal that the information of the incident, according to C.M.O. Dr. Mahadeo Gore, was given by the father of

deceased Sanjay and not by P.W. 1 Dhananjay. Hence according to learned counsel for the accused, if P.W. 1 Dhananjay was an eye witness to the incident, then it was for him to provide history of the incident to the Doctor. The defence witness Dr. Basappa Koli, has proved that the history was given by the father of Sanjay and not by P.W. 1 Dhananjay. Thus, it is urged that if the presence of this only single eye witness is not established beyond doubt, no question arises of placing reliance on his evidence to pass conviction of the accused on this sole piece of evidence.

35. We have given our anxious consideration to this submission of the defence counsel and on close scrutiny of the same we are unable to accept the same. It need not be stated that when incident of such a magnitude was taking place, P.W. 1 Dhananjay who was residing just near the spot of incident is bound to come to know about it, as admittedly several persons in the vicinity had gathered there. Therefore, even if evidence of P.W. 4 Firoz, who has changed his colours in cross examination, is discarded, the fact remains that P.W. 1 Dhananjay, his father and other family members are bound to know about the incident. Especially when the actual assault was going on for about 5 to 7 minutes after P.W. 1 Dhananjay reached there, it must have been preceded for some minutes with pushes and blows. Therefore, it is but natural that P.W. 1 Dhananjay must have rushed to the spot. Admittedly even as per evidence of P.W. 1 Dhananjay, Sanjay was taken by him in the rickshaw with help of his uncle Uday. The other family members like father of Sanjay, Arun Potdar must have rushed to the hospital. In view of the precarious condition of Sanjay, Doctor must have immediately examined him and thereafter done the paper book of recording history and filling up M.L.C. register. Once Sanjay and Somnath were declared dead, the immediate concern for P.W. 1 Dhananjay was to go to the police station and lodge complaint against accused and accordingly he has rushed to the police station. As regards giving of history before Doctor or filling up M.L.C. register, it might have been done by his father and other family members.

36. Moreover, evidence of Defence witness Dr. Basappa Koli, proves that if patient is brought to the hospital by more than one person, then normal practice is to write the name of nearest relative, as person giving information and in such process names of all those others who had brought patient are not reduced in writing in M.L.C. register. Here in the case also when several other family members and especially father of the deceased Sanjay was very much present and when there is every possibility of P.W. 1 Dhananjay rushing to the police station to lodge complaint, there is nothing unnatural if the name of his father is mentioned in the M.L.C. register as the person giving information. It is also pertinent to note that Dr. Gore, who has made entry in the M.L.C. register Exh. 143 has been not examined due to his physical disability and Dr. Koli has admitted that he has no personal knowledge about the information made in the M. L.C. Register. Therefore, possibility of P.W. 1 Dhananjay giving history cannot be ruled out. Being eldest of family, his father's name might have been mentioned in the M.L.C. Register.

37. As regards Investigating Officer not seizing the rickshaw in which deceased was brought, it's seizure was not necessary as rickshaw was not used for commission of the offence. About non seizure of blood stained clothes of P.W. 1 Dhananjay, it can be considered as a lapse on the part of Investigating Officer. The law is well settled that if Investigating Officer has either negligently or deliberately committed lapses in investigation, then it cannot affect the credibility of the version of events given by prosecution witnesses. As held by Apex Court in case of Ram Bihari Yadav Vs. State of Bihar and Others, , "If primacy is given to a designed or negligent investigation or to the omission or lapses created as a result of faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency but in the administration of justice". It would amount to playing at the hands of Investigating Officer.

38. Moreover, for proving presence of a particular witness on the spot, presence of blood stains on his clothes not necessary. His evidence as to actually witnessing incident is required to be appreciated independently to see whether it has got credibility or not. The contents of F.I.R. Exh. 36 in the present case gives detailed account of the incident, including names of the assailants, and gives guarantee of the fact that it was lodged by someone who has witnessed the incident personally.

39. Here in the case, the evidence of P.W. 1 Dhananjay is challenged also on the ground that in the complaint, the names of accused Nos. 5 and 6 are not appearing and as admitted by him, he has stated their names and their roles, two days after the incident in his supplementary statement recorded on 9.11.2006. According to learned counsel for accused, the involvement of accused Nos. 5 and 6 in the incident is, thus, after thought and that demolishes the credibility of P.W. 1 Dhananjay, as it amounts an attempt on his part to falsely implicate as many number of persons as possible. In our considered opinion, however, considering the fact that he has honestly admitted that he has disclosed the role and involvement of accused Nos. 5 and 6 in his supplementary statement after two days, gives an inbuilt guarantee of truthfulness of this witness. Otherwise he could have stated that he has given their names, but police had not recorded them.

40. It must be remembered that F.I.R. in the present case is lodged within an hour after actual gruesome and ghastly incident of murderous assault on his younger brother and friend of his younger brother. As deposed by him, he was witness to the entire incident from close quarters. Though he wanted to rescue his brother from the assault, he was not allowed to intervene and save his brother as persons gathered there had caught hold of him. One can, therefore, imagine the impact of such incident on him. In the charged and excited state of mind, he must have rushed to the police station, on coming to know about death of his brother and brother's friend. It is but natural, therefore that at that time he might have missed to mention the names and involvement of accused Nos. 5 and 6 and only after funeral, when the said incident revived in his mind, it might

have occasioned to him that he failed to mention the names of two accused persons. Considering the impact of the incident, therefore, there is nothing unnatural if the witness has disclosed about role of these persons after two days.

41. Moreover, absolutely nothing is brought on record to point out any reason for him to implicate accused Nos. 5 and 6 falsely as an after thought. Admittedly his relations with either of the accused or even with accused Nos. 1 to 4 were not strained. The dispute was between his brother Sanjay and Somnath on one side and the accused No. 1 Vijay, but not between him and any of the accused. No evidence is brought on record to that effect. Therefore, the argument advanced that accused Nos. 5 and 6 are implicated subsequently and as an after thought, deserves to be rejected. When the witness is giving truthful account of the incident and also about the lapses on his part, then he should be believed instead of discarding his evidence as an improvement.

42. Moreover, this is not a case where the evidence of P.W. 1 Dhananjay has is not supported from other source. As stated above, prompt lodging of F.I.R., the evidence of P.W. 22 Investigating Officer PI Jadhav and the various Station Diary Entries made during the course of investigation support his evidence. In addition thereto, there is medical evidence, discussed above, which proves not only involvement of 5 to 6 persons in the simultaneous attack on two persons but also proves the use of weapons which this witness has deposed in his evidence and also in his complaint. The medical evidence supports and corroborates evidence of this witness that deceased Somnath was assaulted on his head with sickle by accused No. 1 Vijay with force. His evidence that the other accused were assaulting Sanjay and Somnath with knives in their hands is also proved from the medical evidence which shows presence of several incise wounds. Thus, here the medical evidence goes hand in hand and completely fortifies the evidence of P.W. 1 Dhananjay, therefore his testimony is not a stand alone evidence.

43. There is also corroborating evidence about recovery of the weapons of assault, proved through testimony of P.W. 20 panch Avinash Jadhav and P.W. 22 PI Jadhav. As per their evidence, at the instance of accused No. 1 Vijay, weapons of assault, namely sickle, knife (dagger), two other knives bearing Article Nos. 16 to 19 were recovered in pursuance of memorandum panchnama and recovery panchnama at Exh. 90. These weapons were sent to Chemical Analyzer and as per Chemical Analyzer's reports Exh. 121 to 133, human blood stains were found thereon. Though the results of blood grouping may be inconclusive, but presence of human blood on the weapons of assault definitely gives corroboration to the case of prosecution, as deposed by P.W. 1 Dhananjay.

44. The last submission advanced by learned counsel for accused is that the complaint Exh. 36 lodged by P.W. 1 Dhananjay is not a real F.I.R. as the police had received information of the incident earlier to it and which was recorded in Station Diary Entry Nos. 23, 24 and 25, the extracts of which are produced on record vide Exh. 117. These extracts go to prove that First Information of the incident was received in police station at 11.20 a.m. to the effect that some fight

was going on at Tiwari Galli, hence police force was despatched to the spot. Second entry is made in Station Diary at 11.55 a.m. to the effect that C.M.O. Dr. Mahadeo Gore, informed that patients namely Sanjay and Somnath were brought to the hospital and father of Sanjay stated that at Panchmukhi Maruti Building, near Allopathic Dispensary, Sanjay was assaulted and died on the spot and Somnath was brought in injured condition around 11.45 a.m. and died at 11.50 a.m.. Third entry made at the same time shows that this information was given to P.W. 22 PI Jadhav. The fourth entry is made at 12.05 p.m. to the effect that API Shinde who had rushed to spot at 11.20 a.m., reported that on reaching the spot, he became aware of the fact that Sanjay and Somnath had been killed by accused No. 1 Vijay Pawar and his friends and the victims had been taken to Civil Hospital before API Shinde reach to the spot. Last Station Diary Entry is made at 12.20 p.m. about registration of the F.I.R. at Exh. 36 on the basis of the complaint lodged by P.W. 1 Dhananjay. Hence according to learned counsel for the accused, complaint lodged by P.W. 1 at Exh. 36 cannot be called as real F.I.R.

45. In our opinion, this contention advanced by learned counsel for accused also fails as it has now become crystallized position of law that the cryptic information as to commission of offence given to police by wireless message or on telephone, not disclosing sufficiently nature of the offence, the names of assailants, the manner in which incident occurred, cannot be treated as F.I.R. The F.I.R. must be of such nature which will enable the police to set investigation machinery in process. Mere information of the occurrence of some incident cannot be called as an F.I.R. In the instant case, the Station Diary Entries, as noted above, do not give details of the incident or the names of all the assailants and hence it has to be held that real F.I.R. of the incident is the complaint Exh. 36 lodged by P.W. 1 Dhananjay.

46. Thus, on reappraisal of entire evidence on record in the light of the submissions advanced by defence counsels, we are of the opinion that the evidence of P.W. 1 Dhananjay is completely reliable, it is thoroughly consistent, cogent and trust-worthy and hence we have no hesitation at all in placing reliance on him. His evidence also gets sufficient corroboration from medical evidence and the recovery of weapons and entire facts and circumstances of the case. The trial Court has considered and properly appreciated all these different shades and aspects of the evidence, as brought on record by prosecution and found prosecution case to be proved beyond reasonable doubt. On entire reappraisal of evidence on record, we also do not find any reason to take a view which can be different from the view taken by the trial Court. The appeals, therefore, hold no merit and hence stand dismissed, confirming conviction and sentence of the appellant Nos. 2 to 6, for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

47. As accused Nos. 2 to 4, are in jail undergoing sentence as imposed by the trial Court, no further order is required relating to them.

48. As regards accused No. 5 Amit @ Bandy and accused No. 6, Rohit Chavan,

who are on bail, their bail bonds stand cancelled and they are directed to surrender before the trial Court within 12 weeks from the date of passing this order, for undergoing the remaining part of their sentence, failing which the learned trial Court to take steps to arrest them to undergo the remaining sentence.