

(1984) 08 BOM CK 0033
In the Bombay High Court
Case No : Criminal Appeal No. 403 of 1983

Baliram Ganpat Janvilkar and Another	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 27-08-1984

Acts Referred:

Evidence Act, 1872 — Section 101, 3, 32(1)
Penal Code, 1860 (IPC) — Section 302

Citation : (1984) 2 BomCR 633

Hon'ble Judges : V.V. Vaze, J; V.S. Kotwal, J

Bench : Division Bench

Advocate : R.N. Mishra, for the Appellant; S.S. Phase, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.S. Kotwal, J.—At about 9.30 P.M. on August 6, 1980 a person claims to be moving all alone in Jogeshwari locality when he was accosted by a group of four persons and questioned as to why he was talking with the boys on the street and to his utter surprise it is claimed that one of them assaulted him with fist while the other inflicted a stab blow on the head causing bleeding injury. The victim, therefore, ran in the opposite direction where is located a shop known as Rajesh Tailoring Shop. One of the said four persons, one parted company while three chased the victim and caught hold of him near the said shop. One of them who is original accused No. 1 assaulted with fist on the face and pressed his head downwards on the road whereafter accused No. 2 is alleged to have inflicted stab blows which landed on the abdomen and the chest and original accused No. 4 inflicted blows with iron rod which landed on different parts of the person of the victim. This incident is claimed to have been witnessed by certain persons who were standing in the vicinity though no one tried to intervene or go to the rescue of the victim. After the alleged assault the assailants fled away from the spot and it is thereafter that the witnesses rushed near the victim. Among the witnesses happened to be the brother-in-law of the victim who is the complainant Vijay

who was accompanied by his friend Sitaram Mahadik. The other group of two witnesses namely Anant and Ranjan appeared to have arrived at the scene after the entire incident was over though Ranjan tried to make out a case giving label as an eye-witness. Anant is the brother of complainant Vijay.

2. As per the prosecution case Anant and Ranjan placed the victim Ravindra in a three wheeler which was passing by the road and brought him to the Jogeshwari Police Station obviously with a desire to lodge the complaint. However, it is claimed that some one not belonging to the Police Force who was present in the compound of the said Police Station came near the auto-rickshaw which was halting outside and advised Anant to take the victim directly to the Hospital instead of lodging the complaint, which advice was accepted by Anant with the result that no Police Officer was informed of the incident but the victim was taken to Cooper Hospital where he was admitted as indoor patient. He had sustained bleeding injuries and the clothes were soaked with blood. In view of his condition he had to be subjected to a surgical operation. By that time, Vijay and Sitaram also went to the said hospital via Jogeshwari Police Station. A constable on duty at the hospital transmitted a telephonic message to the Police Station Officer attached to Jogeshwari Police Station about the arrival of an injured person in pursuance of which Sub-Inspector Rane rushed to the hospital. He made casual inquiries with some of the persons including the complainant. He also attempted to find out whether the victim was in a position to make a declaration but was told that his condition did not permit any such course. Vijay then brought to the Police Station where his complaint Exh. 10 was recorded. Thereafter the panchanama of the scene of offence was recorded when the spot was pointed out by Vijay. The further course of investigation commenced including recording the statements of the witnesses and attachment of blood stained cloths from the person of the victim and attachment of blood scrapings from the scene of offence. It is claimed that on next morning at about 11-30 A.M. Sub-Inspector Rane on instructions from Police Inspector Chavan went to the Hospital and recorded the statement of the victim Ravindra in the shape of a dying declaration which is at Exh. 25 which also contains an endorsement of the Medical Officer that the patient was in a fit condition to make the said statement, the endorsement being at Exh. 25-A, though the Medical Officer concerned could not be examined by the prosecution. In spite of the medical aid some complications arose and ultimately the victim succumbed to the injuries on the 10th of August. The offence which was initially registered u/s 326 read with section 34 of the Indian Penal Code was changed to u/s 302 read with section 34 of the Indian Penal Code. In due course the four accused persons came to be arrested. A disturbing development can be considered at this juncture. The muddemal articles including the blood stained clothes and blood scrapings which were lodged in the Police Station came to be completely damaged and wiped out due to the un-expected flood on account of which the water completely ruined the articles lodged in the Police Station in several cases with the result that those articles could not be transmitted to the Chemical Analyser for analysis. No

weapons are recovered in spite of the investigation.

3. After completing the investigation the four accused persons were charge-sheeted in the Court of the learned Metropolitan Magistrate whereafter commitment they were tried in Session Case No. 18 of 1981 before the learned Additional Sessions Judge, Greater Bombay, for an offence u/s 302 read with section 34 of the Indian Penal code.

4. Pleading not guilty to the charge each of the accused came out with a stout denial of all the adverse allegations. In effect, they denied their presence at the spot in any manner much less their participation in the alleged assault. They further came out with the grievance that they have been falsely implicated by the witnesses who formed a group and who are interested in the deceased and had an animosity against them. All of them thus claimed to innocent.

5. The learned Additional Sessions Judge on the analysis of the evidence led by the prosecution was pleased to accept the same only partially in effect, the evidence given by P.W. 3-Anant has been completely discarded so much so that it is held un-safe to place any reliance on that witness. Further the learned trial Judge has fully exonerated accused Nos. 3 and 4 of all the charges and for that purpose he has not accepted the evidence of the alleged eye-witnesses as well as the recitals in the dying declaration. He, however, accepted the prosecution evidence vis-a-vis original accused Nos. 1 and 2 only and on that basis held both of them guilty of the said charge imposing the sentence of imprisonment for life. It is this order dated July 8, 1983 that is being placed under challenge in this appeal on behalf of the said accused.

6. Shri R.N. Misra, the learned Counsel for the appellants, has canvassed multi-fold contentions. According to him the entire story is improbable. Further the presence of the alleged eye-witnesses in the vicinity is extremely doubtful and suspicious and it cannot be a co-incidence or accident that only such witnesses who normally could not have been at that spot happened to flock together right from the time of the alleged incident and those witnesses equally co-incidentally happened to be friends of each other, had interest in the deceased and what is of importance is that they had animosity against the accused persons. According to him, this pattern is followed even in respect of the panch witness Bhagwanji Shah P.W. 4 regarding the panchanama of the scene of offence and the panchanama is at Exh. 14 when this witness also happened to have a serious grudge against the accused persons and this according to the learned Counsel could not be a co-incidence. It is further contended that the scene of offence has been completely shifted and there was nothing to prevent the police to forward the articles to the Chemical Analyser before 21st of August, in which event some corroboration would have been derived at least to fix the scene of offence. The conduct of the witnesses at the time of the alleged incident is also assailed. The so called dying declaration contends Shri Mishra, also appears to have been a product of tutoring or prompting by the interested persons. It was ultimately submitted that there was absolutely no motive for the accused persons to

commit the alleged serious offence. Shri Phanse, the learned Public Prosecutor for the State, adopts more or less the same reasons assigned by the learned trial Judge mainly relying on the three witnesses and the so-called dying declaration.

7. As stated at the threshold the prosecution very much rely on the direct evidence of the three witnesses-Vijay Karghutkar, the complainant P.W. 1, Sitaram Mahadik P.W. 5 and Ranjan Hosalkar P.W. 2 Bhagawanji Shah P.W. 4 is the panch witness regarding the panchanama of the scene of offence. Anant Karghutkar P.W. 3, the brother of Vijay admittedly arrived on the scene after the incident. Sub Inspector Rane P.W. 8 has investigated the offence. The medical evidence consists of two Doctors namely P.W. 6 Dr. Sayed Abdul Sami who carried the autopsy with the post-mortem notes at Exh. 17 and Dr. Shah P.W. 7 who the first to examine the victim in Cooper Hospital. The victim's dying declaration is at Exh. 25. This in short is the pattern of the prosecution evidence.

8. As stated at the out set, the learned trial Judge was not prepared to place any reliance whatsoever on the evidence of Anant. The evidence of that witness is of significance as according to him while in the hospital Ravindra made an oral declaration before him giving the details of the incident and the names of the assailants and this part of his evidence has been completely discarded by the learned trial Judge and in our opinion rightly so. On going through the evidence of Anant we fully endorse the said finding and firmly hold that it is impossible to place any reliance on the testimony of this witness and there is a deliberate attempt on his part to make an absolutely un-true statement about the oral declaration alleged to have been made by Ravindra in the hospital. This would indicate that the witness is capable of improving the prosecution case on a very major point and thereby he tried to tender an absolutely un-true item of evidence in the shape of oral dying declaration. In that behalf it must be observed that the dying declaration itself makes it very clear that Ravindra after the incident could not have been in a conscious state when he was picked up and taken to the hospital whereafter he was soon subjected to surgical operation. It is also clear from the evidence that an attempt by Sub-Inspector Rane to record his declaration on the same night had to be abandoned because Ravindra was unconscious all along. Ravindra is claimed to have stated at Exh. 25 that it is only later on that he learnt that he was removed to the hospital by Anant and others. This would clearly mean that immediately after the incident he had become unconscious or did not know what happened and was not in a position to say anything. This fits in with the medical evidence as also the evidence of Sub-Inspector Rane. If that be so, then it is impossible to expect that he could have divulged any statement to P.W. 3 Anant in the hospital soon after he arrived. Significantly, Ranjan who had accompanied Anant does not refer to such any declaration though he was altogether with them. If Ravindra was really in a position to speak then it is not understood as to why no query was made to him and no answer was given while he was taken in the Auto Rickshaw to the hospital. The entire story in that behalf is obviously suspect and has been rightly discarded by the learned trial Judge. This would, therefore, strongly indicate that

the prosecution witnesses have a fertile imagination even to think of a case though un-true to suit their convenience and this must have the necessary impact while considering other part of the story as it would not be proper to consider different facets of the evidence each in isolation.

9. The complainant Vijay tried to make out a case that at the relevant time after his work was over he had gone to Rajesh Tailor's shop which is located in Janata Colony along with his friends Sitaram Mahadik P.W. 5 and one Prabhakar Nikharke. The three of them stood outside for a while when at about 9-00 p.m. he went inside the house of one Sayyed Abdul Latif and watched a News Bulletin of a television set whereafter he came out. At about 9-30 p.m. they heard shouts and commotion and saw that Ravindra was being chased by three accused persons and he was caught hold of near the shop of Rajesh Tailor when accused No. 1 gave a first on the face and then pressed his head down-wards on the road making him impossible to move whereafter accused No. 4 inflicted stab blows on the chest and abdomen and accused No. 4 inflicted blows with iron rod. Thereafter, these persons ran away. Anant and Ranjan arrived at the scene and they picked up Ravindra and carried him to the Police Station and then to the Hospital. According to him, he and Mahadik later on went to the Police Station but were informed that Ravindra was already taken to the hospital and, therefore, they also went to the hospital where Sub-Inspector Rane arrived and orally interrogated them. Then he was taken to the Police Station where lodged his complaint at Exh. 10. It is this witness who had shown the spot of offence to Sub-Inspector Rane which is treated as the scene of offence. The evidence of P.W. 5 Sitaram Mahadik is more or less on the same pattern and, therefore, need not be re-produced. In so far as Ranjan P.W. 2 is concerned, he claims to be an eye witness. According to him, he was first waiting near the Pan Shop and on hearing the commotion he rushed near the Tailor's shop and saw the incident hardly from a distance of six feet and had described the incident almost in the same manner. After the arrival of Anant both of them took Ravindra first to Jogeshwari Police Station and on the advice of the member of the public they removed him to Cooper Hospital where he stayed for the whole night. The evidence of Anant is already indicated and which has been rightly discarded by the learned trial Judge. For obvious reasons the evidence of these three witnesses does not inspire sufficient degree of confidence in view of the several infirmities which are not properly explained by the prosecution and which are rightly relied upon by Shri Mishra, the learned Counsel for the appellants.

10. To start with the complainant has stated that he had attended his duty upto 7-30 p.m. though his normal duty hours would have been over by 5-30 p.m. and he had to do some extra works. He then instead of going to his own house directly went near the locality of Rajesh Tailor's shop where he met his friends Sitaram and Prabhakar. After such a strenuous day's work with an over time extra work, the witness normally would have been expected first to go back to his house, have a wash or relax and have some snacks or a cup of tea and thereafter he may go out for the other relaxation and to have a chit-chat with his

friends. However, he directly went to the locality in question apparently for no ostensibly plausible reason. Then there is apparent deficiency as to whether all of them went to the house of Sayed Abdul Latif and witnessed T.V. show. It is also rather difficult to accept that the witness of this calibre would be more interested only to the listening of news bulletin instead of watching any other T.V. programmes which preceded or followed that bulletin and if that be so then normally all these persons watched the T.V. show inside the house of Sayed Abdul Latif. However, the witness wants us to believe that he went inside the house hardly for 15 to 20 minutes merely to hear the news bulletin and as soon as it was over he came out. This itself sounds rather artificial in order to make his presence believable outside the house on the road near the alleged scene of offence. As stated, there is also discrepancy whether all went inside or he alone had gone and the witnesses are not unanimous on that point. Then the conduct of all these three witnesses spells out uniformly an artificial manner just taking a stance of silent spectators. Thus they had seen Ravindra being chased by three assailants and they claimed to have identified Ravindra. The victim was the brother-in-law of Vijay while Sitaram and Ranjan were previously knowing the victim even by name and thus Ravindra was no stranger to them, Ravindra was shouting for help and even then these people rested content in observing eloquent silence and un-concerned attitude so must so that even though the two of them came to be near at a distance of two feet while the third at a distance of three feet and they did not bother to move an inch for the rescue of the victim. A specious stance has been trotted out that the assailants were armed with weapons and therefore they were scared of them. It is an admitted position as available on record that several shops are located in the locality and most of them were open and which is not an un-common phenomenon in this metropolis and the shop keepers very much present in their respective shops. Even then the witnesses did not bother to ask for help from the shop keepers. They also did not make any gesture except the claim of Sitaram that he alone shouted towards the assailants not to assault Ravindra. Ranjan tried to make out a similar case that he also shouted which however is fully contradicted by Vijay and Sitaram.

11. It is then in evidence as to how the account of the assault was given by the three witnesses. According to them, Ravindra came running with a bleeding injury on his head when accused No. 1 intercepted him, gave him a fist blow on his face, caught his head and pressed it forcibly down-wards and the evidence makes it further clear that he was made to sit on the road completely in a bent position almost touching the head across the road. This is the unanimous account of the witnesses and it is thereafter that accused No. 2 is alleged to have inflicted stab blows which were entirely on the front side namely the chest and the abdomen. If the position adopted by Ravindra on account of the act of accused No. 1 is accepted then it is very difficult to accept further that the stab blow could land on the chest and abdomen when those were not exposed in any manner but were covered completely in view of that position taken by the victim. This, therefore, does not fit with the medical evidence as those injuries are

entirely on the front side and those could not have been caused in the manner in which it has been described by the witnesses .

12. Then the further striking feature relates to the assault by accused No. 4 with an iron rod. All the three witnesses have unanimously asserted that accused No. 4 inflicted successive blows with iron rod on the person of the victim after he had fallen down. They are positive that those blows landed on his person and therefore there is no scope to infer that there might be merely brandishing by the said weapon without touching the person of the victim. Some witnesses say that about 4 to 5 blows were inflicted while some have given the number as three, as those landed on the back, arm and leg. If that be so, then it is very significant to note that the medical evidence falsifies this account. The certificate issued by Dr. Shah as also the post-mortem notes along with the substantive evidence of the two Medical Officers made it explicitly clear that no injury was detected which could have been caused by the iron rod inasmuch as all the injuries were incised wounds. The injuries were not against the bony surface as such so as to create a mistaken impression about the existence of incised wound. The Medical Officers are positive that there was no injury such as weal mark or contused lacerated wound or contusion which could be caused by iron bar. The witnesses, therefore, are completely falsified even as regards the assault by iron rod just as with regard to the assault with the knife. The conduct of the witnesses after the incident is also doubtful inasmuch as no one bothered to go to the house of Ravindra though the complaint is his brother-in-law as his sister is married to Ravindra.

13. Sitaram Mahadik though to the police as most of the time he was in the hospital and though contacted by the police on the same night, still his statement came to be recorded at 2-30 p.m. on the next day and there is hardly any plausible explanation for this omission more so as it is apparent from the evidence that the Police Officer had conducted the other relevant part of the investigation already and had ample time to record the statement of the material witnesses at the earliest opportunity when they were very much available physically for interrogation. Sitaram admits in terms that he is the close friend of the complainant and that a similar admission is extracted from prosecution witness Ranjan. There is also discrepancy in that according to them the incident occurred actually on the Ota of the Rajesh Tailor's Shop while according to the prosecution and the panchanama it happened on the road may be in the close vicinity. As stated, several persons had gathered as admitted by the witnesses even when the incident was in progress, while several shops were open and yet none from that category has been examined by the prosecution. P.W. 5 Sitaram Mahadik works in a laundry. He completed his work at about 6.30 p.m. and for no apparent reason right from 6-30 p.m. he was just waiting near the Rajesh Tailor's Shop upto 9-30 p.m. He does not claim to be interested in witnessing a T.V. show even for whiling away the time is difficult to accept that he would be stationary at the same spot. He has also trotted the same line in that accused No. 4 inflicted blows with iron rod and his account of accused No. 2 inflicting that

stab blows also became problematic. The statement of this witness was obviously recorded late as stated earlier. This witness no doubt tried to make out a case that he has seen Ranjan running to the scene of offence which however has not been stated by him before the police. P.W. 2-Ranjan makes an absolutely unimpressive performance in the witness box. According to him, at about 9-30 P.M. he was just idling the time near the Pan Shop of one Hande which was 100 feet away from Rajesh Tailoring Shop. He heard the commotion and, therefore, ran close to the shop of Rajesh Tailor and saw the incident from a distance of about 6 feet. He has given practically the same account and thus has followed and carried forward the same infirmities. In fact, he has gone to the extent of asserting that accused No. 4 inflicted not less than 4 to 5 blows with iron bar which actually landed on different parts of the person of the victim. He wanted to take credit that he at least shouted against the assailants which has been contradicted by the other two witnesses. He also assumed the character of a passive on-looker. He has admitted that his statement was read over to him a day earlier of his examination in Court and he was told by the police to give evidence only and article on the lines of that statement. He had no talk with the assailants and so also the other witnesses. He has admitted that his statement was recorded by the Police Officer on the next afternoon. This comes in conflict with the evidence of Sub-Inspector Rane that it was recorded on the same night. It is impossible to accept that a witness would make a mistake whether his statement was recorded on the night or during the day time. The most prominent feature as regard this witness is to the effect that the complainant Vijay and prosecution witness Sitaram have made a positive assertion which is reiterated in cross-examination also that this witness Ranjan definitely arrived at the scene or in the vicinity when the entire incident was over and when all the accused persons had already fled away. They have not only not seen this witness when the incident was in progress as they could not have missed his presence when they were close to each other but there is a positive statement made by them that they saw this witness arriving at the scene of offence only after the entire incident was over. If this is the account given by the two other witnesses, then the account of this witness Ranjan claiming to be an eye-witness completely topples on the ground.

14. The defence have seriously disputed the validity of the prosecution case vis-a-vis the scene of offence as it is expressly suggested that the incident occurred somewhere else as the deceased had consumed liquor and he might have been assaulted over some other count at an entirely different place. As stated, the Sub-Inspector did collect the blood scrapings from the road near the scene of offence and those came to be attached as also the clothes of the deceased from the hospital. All these articles were lodged with police at the Police Station. There was absolutely no hurdle in transmitting these articles to the Chemical Analyser till 21st of August as it is claimed that on that day an un-expected even occurred when most of the muddemal articles lodge in the Police Station came to be wiped out or destroyed or damaged and those articles included the blood scrapings and

the clothes in question . The result is that these articles were not sent to the Chemical Analyser for analysis. Under the circumstances, therefore, the most vital piece of evidence that could be available for fixing the scene of offence has been lost to the prosecution on account of the subsequent event and has been equally denied to them by their inaction for quite some time. We are thus left with the substantive evidence on record in that behalf and to find out whether that would be enough to fix the scene of offence in the absence of this vital material. The complainant Vijay is the person who is alleged to have shown the scene of offence to the police on the same night. He admits that a writing was prepared at that time but it was not signed by any one. He further admits that apart from himself and two Police Officers there was no third person present and his evidence makes it further clear that the panch witnesses were definitely not present nor was the document which could be styled as the panchanama signed on the spot by the panch witnesses. This is the evidence led by the prosecution themselves. We have then on record the evidence of the panch witness Bhagwnji Shah P.W. 4. For obvious reasons his evidence cannot be accepted and not only that but procuring the witness of this type adds to the infirmities of the prosecution and makes the investigation itself suspect. According to him, he runs a grocery shop. At about 11-30 p.m. on that night he went outside of the house just for stroll. While returning home he was called by Sub-Inspector Rane at the said spot. The other panch was also called. He noticed blood at that spot and blood scrapings were collected in the bottle. Various measurements were taken and then a panchanama was drawn which is at Exh. 14. In the first instance, it is very difficult to accept his claim that he was casually proceeding for a stroll at that odd hour of the night and it was he who was sighted by Sub-Inspector Rane and was taken as a panch. The matter however does not rest there inasmuch as he signing the panchanama does not appear to be accidental. Co-incidentally, he is a person who is no stranger to Vijay and Anant, it is fully borne out by the learned trial Judge that this witness along with prosecution witness Anant was prosecuted for a criminal offence in a Criminal Court for having assaulted the maternal uncle of accused No. 1 wherein accused No. 1 was figured as a witness. Though he claims that he and Anant were acquitted in that case, that claim is utterly false as is apparent from the certified copies of the judgment which shows that he was convicted u/s 323 of the Indian Penal Code while Anant was convicted u/s 324 of the Indian Penal Code and both were sentenced to certain amount of fine. The positive assertion of Anant and this witness suggesting that both were acquitted is obviously untrue to their knowledge. Merely because no substantive sentence was imposed, it does not mean that they were acquitted. What is of relevance is that on the night in question the said prosecution was pending in the Court of the learned Magistrate. He has further admitted that Anant is his friend. It is apparent that both himself and Anant had a serious grievance and grudge against accused No. 1 and accused No. 4 who are related inter se. Therefore, finding of such a convenient person to act as a panch at that odd hour of the night sounds rather problematic and read in the context of the admission given by the complainant his presence at the spot becomes further

suspect. Significantly, the said criminal case was initiated by the police attached to Jogeshwari Police Station itself and, therefore, it is not as if that Sub-Inspector Rane was not knowing the involvement of this witness in the said offence. The other panch has not been examined. There is also discrepancy since the witnesses says that a kerosene lamp was brought and the measurements were taken and panachanama was ascribed while the other witness completely contradicts him. Under the circumstances, even the substantive evidence on the question of scene of offence is not available to the prosecution. Thus both these counts are denied to the prosecution by their own conduct. If that be so, then a vital feature or piece of corroboration to the other witnesses is completely lost and this becomes more material in the face of the defence suggestion that the incident had occurred somewhere else when the deceased had gone to consume liquor. It is worth noting that the deceased, according to the prosecution, was first assaulted at some other place when he sustained bleeding injury on the head and he ran and ultimately was further assaulted at a different place near Rajesh Tailor's Shop and, therefore, it stands to reason that there might be blood stains at different places. Even then Sub-Inspector Rane feigned ignorance whether any blood was detected at the first spot of assault.

15. The sum and substance of this situation is capable of following harmoniously certain apparent deduction to the effect that the witnesses ostensibly had no occasion or reason to be in the vicinity. In fact, prosecution witness Sitaram Mahadik stays entirely in different locality at Kandivli and he could not have been near about the spot. In any event, they could not have whiled away their time after the work was over right upto 9-30 P.M. They assumed the character almost as silent on-lookers even though their friend has been assaulted and that too by the persons who were inimically deposed against them. Prosecution witness Ranjan has obviously made a false claim of being an eye-witness. The account of the assault given by the witness apart from being improbable does not fit in with the medical evidence. All the witnesses were interested in the deceased; they were interested inter se being friends of each other and furthermore all had an animosity against the accused persons. It is almost mysteriously found that such a set of witnesses could assemble right at the appropriate time and place to witness the incident and that was only for the propose of witnessing the incident without in any manner trying to involve themselves to save the victim who was their friend. The independent witnesses though admittedly present were not examined. On the top of it even the panch witness falls in the category of the same set of witnesses being the friend of the witness and had a strong animosity against accused No. 1. This again cannot be a matter of just accident or co-incident. There are discrepancies in their evidence inter se on merits also. There is apparent false involvement of accused No. 4 which has been accepted by the learned trial Judge who however did not go to the logical end to examine the impact of the same against the case of accused Nos. 1 and 2. The scene of offence is not fixed to the one as suggested by the prosecution. No weapons are traced with any of the accused.

16. It is also submitted by Shri Mihsra, the learned Counsel for the appellants, that the F.I.R. Exh. 10 could not have been lodge by Vijay at the time as mentioned in the document. The learned Counsel submits in that behalf that according to Sub-Inspector Rane he had gone to Cooper Hospital and he learnt from Doctor that Ravindra was in a position to make any statement. This was some time after 10 minutes past 11. Thereafter he came back to Jogeshawri Police Station along with the complainant and then recorded the complaint which according to him was concluded by about 11-40 p.m. The learned Counsel, therefore, submits that the timings do not synchronise and it is suggested that this complaint was lodged some time later and not at the time as suggested by the prosecution. This submission cannot be lightly brushed aside for obvious reasons which requires no further comments. However, further criticism levelled by Shri Misra, the learned Counsel, that this could not be real F.I.R. carries no conviction. According to him, a phone message was transmitted by the constable on duty in the hospital to the Police Station and that could be treated as F.I.R. As to what was transmitted is a matter of guess work and in any event all the requirements for constituting the First Information Report did not find place in the cryptic message transmitted on phone because the constable himself did not know the details of the incident as he merely informed that an injured person was brought to the hospital. The other contention that the complainant was orally interrogated in the hospital and as such that interrogation should be treated as F.I.R. has also no substance. For obvious reasons, there was no detailed interrogation as such and secondly, it was not reduced to writing.

17. As regards the last category pertaining to the alleged dying declaration Exh. 25, the matter does not appear to be free from doubt. It is in evidence that on that night the victim was not in a position to make any statement. No doubt, the statement is claimed to have been made by him at about 11-30 a.m. on the next morning before Sub-Inspector Rane P.W. 8. Apparently the document does contain an endorsement purported to have been made by Dr. Khope who was incharge suggesting that the patient was in a fit condition to make a statement. Dr. Khope was not examined as being not available as he has left the service. Whatever may be the reason it is apparent that the defence has to face the handicap as the doctor was not available for cross-examination. Further the factum about the condition of the patient cannot be held proved merely on the basis of proving the signature and the handwriting of that endorsement. It is also brought to our notice that there is no evidence worth the name, not even Sub-Inspector Rane that before interrogation the doctor had examined the patient to find out his condition. This appears to be so and it is not so mentioned in the said endorsement or the case papers. Furthermore, no other Medical Officer has been examined to suggest as to what could be the condition of patient's post-operation at that time and as to whether he was under the spell of the medicines including the anaesthesia which were administered at the time of the operation and as to whether he had experienced agonies and pain of the injuries. The physical and mental stability would be necessary also as to form rations thinking

before making the statement. Apart from that it is clear from the evidence that at least some of the witnesses including Ranjan and especially Anant were in the hospital not only during the whole night but also on the next morning before the statement was recorded. This would, therefore, legitimately justify the defence to submit that the victim must have been contacted by the witnesses including Anant and it is this witness Anant who has a very strong grudge against the accused and it is this witness Anant who was capable of making a false claim as discussed earlier on the other count regarding the oral dying declaration. Similarly prosecution witness Ranjan who also claims to be present in the hospital has made out a false case styling himself as an eye-witness. Consequently one cannot say with that degree of confidence that the declaration was not an outcome of any prompting or tutoring. It also cannot be over-looked that according to the statement the victim was first stabbed on the head whereafter he started running and he travelled a considerable distance whereafter he was assaulted by accused No. 1 and was forced to bend down on the road meaning thereby that as to who assaulted him thereafter would be difficult for him to see and appreciate. He also might have been physically exhausted on account of the first injury. It is in that context that his statement that he did not know what happened thereafter as he learnt subsequently that he was taken to the hospital by Anant assumes importance. In spite of that we find that the said declaration contains such a wealth of details which significantly ostensibly appears to be in consonance with the account given by the witness and in that there exists an under-current of untrue statement about the assault by accused Nos. 3 and 4 with iron rod on two different places. It thus appears that the line adopted by the witnesses which is unacceptable has been trotted out by the victim also and, therefore, consistency in that infirmity also cannot be accidental. The manner in which the statement has been couched gives an impression that it was not as if that a cryptic statement was made but a lengthy statement was recorded by the Investigating Officer on the same pattern as he would have recorded a statement of prosecution witness during the course of investigation which contains some unnecessary details. Furthermore, it is not clear as to in which language the statement was given by the victim as it does not appear that he has given such a lengthy statement in English whereas the document contains the English statement. It is also not in the question and answer form. No independent witness or panch was present at that time. Some of the statements therein could not have been of the personal knowledge of the victim while some statements are obviously untrue. In fact, the said declaration has been practically discarded by the learned Judge vis-a-vis the accused Nos. 3 and 4.

18. Read in the context of these infirmities, the further admitted position that though the victim died on the 10th, no attempt was made by Sub-Inspector to get an additional declaration of the victim recorded before the Executive Magistrate assumes importance for which no explanation has been tendered by the prosecution on any count. It is true that there is no legal impediment as such

for the Investigating Officer to record a declaration nor there is any legal hurdle to accept the same. However, when there was enough opportunity at least subsequent to the said date to record a declaration by the Magistrate that omission assume importance in the context of other infirmities including the non-examination of the Medical Officer and further including that the statement on its own contains some untenable position coupled with the further fact that there is every reasonable probability of the victim being prompted and advised by his friends who are inimically deposing against the accused. Under the circumstances, it would be rather hazardous to rely on this piece of evidence which has been discarded at least partially by the learned trial Judge. As stated, the under-current of an absolutely untrue item in existence in this statement as also in evidence of the witnesses makes the suspicion further reinforced. It is also apparent that the active part is taken by prosecution witness Anant and even the victim was removed after this arrival as the other witnesses did not other to do anything and it is prosecution witness Anant who was with the victim much of the time. The witness obviously was inclined to involve the accused persons.

19. As regards the homicidal nature of death, there is hardly any dispute and that is also not seriously challenged by the defence. The evidence of Dr. Shah P.W. 7 refers to the injuries noted by him when the victim was admitted which contains several incised wounds on the chest and abdomen and the victim had to undergo a surgical operation. The evidence of Dr. Sayed Abdul Sami P.W. 6 along with post-mortem notes Exh. 27 make it further clear that there was extensive damage to the vital organs including the liver and the injury on the chest according to doctor was sufficient in the ordinary course of nature to cause death. That aspect, therefore, obviously is in favour of the prosecution though the crucial aspect about the authorship of the assault will have to be answered against the prosecution. Unfortunately this crucial aspect has not been properly considered by the learned trial Judge. It is well-settled that it is the quality of the evidence that is more relevant and germane rather than the quantity. The various circumstances catalogued herein above spell out serious infirmities in the prosecution evidence which make it absolutely unsafe to rely on the said witnesses with the result that the accused are entitled to get the benefit thereunder.

20. In the context of all these features, the last item wipes out the doubt, if any, in favour of the defence. There is absolutely no motive for the accused persons to perpetrate this crime on that night. The prosecution no doubt are aware of this difficulty. The complainant Vijay had suggested the motive to the effect that accused No. 1 had a grievance against Anant on account of the assault on the person of his maternal uncle and in order to take revenge the accused might have assaulted Ravindra. It is impossible to accept this by any yardstick for obvious reason that the grievance was against Anant and was certainly not against Ravindra. It is impossible to accept this by any yardstick for obvious reason that the grievance was against Anant and was certainly not against

Ravindra. Furthermore, Anant and Vijay who were present at the spot must have been noticed by the accused and if at all there was any grievance they could not have spared Vijay and also Anant if they had seen Anant, more so when the witnesses claim that their relations with Ravindra were absolutely strained and this was known to every one. Hence picking up Ravindra as the victim who had no cordial relation with Anant and Vijay whereas completely excluding Anant and Vijay against whom there was real grievance sounds highly improbable. In spite of that it is not suggested that they tried to assault Vijay who was hardly two feet away. Even the complaint suggests existence of such motive but in the most hesitant manner. In the declaration Exh. 25 Ravindra did not toe this line of Vijay but made out different case that since he was speaking with some boys on the road it was disliked by the accused and on that count only they assaulted him. Even this count of the suggested motive does not carry any conviction whatsoever. In our opinion, therefore, the utter absence of motive or the utter vulnerability of the motive as suggested by the prosecution in the context of the glaring deficiencies in the prosecution evidence completely tilt the balance in favour of the accused and against the prosecution.

21. Appeal allowed.

22. The order of conviction and sentence recorded against the appellants (original accused Nos. 1 and 2) on all counts is set aside and both of them are acquitted of the charges levelled against them. They are directed to be set at liberty forthwith if not required for any other purpose.