
(2010) 10 BOM CK 0052
In the Bombay High Court
Case No : Criminal Appeal No. 26 of 2005

Deepak @ Oharilal Joshi and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Arms Act, 1959 — Section 25, 4
Bombay Police Act, 1951 — Section 135, 37(1)
Criminal Procedure Code, 1973 (CrPC) — Section 162
Evidence Act, 1872 — Section 11, 27
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (2010) 112 BOMLR 4620

Hon'ble Judges : A.R. Joshi, J;A.H. Joshi, J

Bench : Division Bench

Advocate : A.V. Gupta, for the Appellant; B.P. Maldhure, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Present criminal appeal is preferred by all the six accused against the judgment and order of conviction passed by 3rd Adhoc Additional Sessions Judge, Nagpur. The impugned judgment and order was passed in Sessions Trial No. 422 of 2002 on 6th December 2004. By the said judgment and order, all the six accused were convicted for the offences punishable under Sections 302, 149, 147 and 148 of the Indian Penal Code. The major punishment awarded against the appellants/accused is that of life imprisonment and fine of Rs. 3000/-, in default, to suffer further rigorous imprisonment for six months for the offence punishable u/s 302 read with Section 149 of the Indian Penal Code and six months and fine of Rs. 500/- for offences each under Sections 147 and 148 of the Indian Penal Code. Accused were, however, acquitted of the offences punishable u/s 4 read with Section 25 of the Arms Act and Section 37(1) read with Section 135 of the Bombay Police Act.

The State of Maharashtra did not prefer appeal against the said acquittal.

2. Heard rival arguments at length. Perused record & proceedings of the matter and also perused the reasoning given by learned 3rd Adhoc Additional Sessions Judge while holding all the accused guilty of the offence punishable u/s 302 read with Section 149 of the Penal Code and other allied offences.

3. The case of prosecution, in nutshell, is as under.

4. All the accused are residents of Mehandibagh, Joshipura within the limits of Panchpaoli Police Station, Nagpur. Accused Nos. 1 to 5 are sons of real sister-in-law whereas accused No. 6 is the real brother-in-law of complainant Jaiwantibai. Complainant Jaiwantibai was residing at Yerkheda, Gondpura, Kamptee, District Nagpur with her two sons i.e. deceased Rakesh and Rajesh and a daughter by name Rekha.

5. The incident of deadly assault on deceased Rakesh occurred in a broad daylight in the afternoon on 13th May 2002. On that afternoon, at about 12.00 noon, Rakesh went with his mother Jaiwanti (P.W.1) to the house of one Amrutlal Joshi (P.W. 6). There was mundan ceremony at the house of Amrutlal Joshi. Deceased Rakesh came back on his motor-cycle after leaving his mother for the said ceremony. When he was coming back, he was assaulted by all accused persons near grocery shop. After the initial assault, Rakesh ran towards the courtyard of Kasubai (P.W. 9), all the accused chased him with weapons in hand and in the court-yard of Kasubai, he was assaulted by hitting him with slab of grinding stone and grinding boulder which are Article Nos. 5, 6 and 7. Due to said assault, deceased Rakesh died on the spot.

6. Rakesh had sustained almost 24 injuries amongst which major injuries are two lacerated wounds, eight contusions and contused abrasions, eight stab wounds and six incise wounds on all parts of the body, commuted fracture to skull of vault involving all bones and radiating downward, forward to involve the middle caranial fossa, transversing horizontally involving the greater wind of sphonord laterally and body of sphenoid in the median area and were injuries to the brain.

7. As per the case of prosecution, said assault was witnessed by almost five eye witnesses i.e. P.W. 1 Jaiwantibai, P.W. 2 Kavita (cousin sister of deceased Rakesh), P.W. 3 Tarak, P.W. 4 Roshan and P.W. 11 Rekha,

8. At or about 01.00 pm, after witnessing that the Rakesh was being assaulted, P.W. 2 Kavita rushed to the house of Amrutlal and informed P.W. 1 Jaiwantabai regarding assault on Rakesh. P.W. 1 Jaiwantabai then rushed to the spot. Complainant saw all the accused persons assaulting her son Rakesh by use of weapons like knife and grinding stones i.e. Articles 5, 6 and 7. She tried to intervene, however, was warded away by the accdused. After the assault, all the accused left the spot.

9. According to the complainant, present incident was also seen by Vijay Joshi (P.W.8) who is also a pancha witness and also eye witness Tarak (P.W. 3) and Roshan (P.W. 4), an eye witness. Rukhmibai (P. W. 7) was alleged eye witness.

10. P.W. 1 Jaiwantabai lodged complaint to police which was treated as First Information Report (exhibit 35). Offence was registered at Crime No. 249/02.

11. During investigation, spot panchanama was prepared. Articles 5, 6 and 7 which are the grinding stones, one dupatta and foot-wear were taken charge of. Inquest panchanama (exhibit 21) was drawn. Dead body of Rakesh was sent for post-mortem at Mayo Hospital, Nagpur.

12. Accused Nos. 1, 3 and 4 were arrested in the same afternoon. One knife was seized from the possession of accused No. 1 Deepak under the panchanama (exhibit 44. P.W. 3 Tarak who is also an eye witness, acted as a pancha. P.W. 3 Tarak also acted as a pancha witness for recovery of knife respectively from accused Nos. 2, and 3 on 15th May 2002. Said recovery was u/s 27 of the Evidence Act.

13. Other accused were arrested on the next day i.e. on 14th May 2002. Clothes of the deceased and clothes of the accused persons were taken charge of under panchanamas. One saree of Smt Rukhmibai was also taken charge of under the panchanama.

14. During investigation, statements of P.W. 11 Rekha, elder sister of deceased Rakesh was recorded by taking the help of one interpretor Madhurika (P.W. 10) as Rekha is dumb and deaf. During investigation, clothes and weapons were sent for opinion of the medical officer. So also, articles were sent for chemical analysis. On completion of investigation, charge-sheet was filed against all the accused for the offence of murder, rioting and unlawful assembly. Matter was committed to the Court of Sessions being Sessions Trial No. 422/02 and after recording evidence of 14 witnesses for prosecution and 3 witnesses for defence, impugned judgment and order was passed.

15. P.W. 3 did not support the case of prosecution so far as seizure of knife from accused No. 1 is concerned. Rukhminibai (P.W. 7) turned hostile to the case of prosecution.

16. Provisional post-mortem report (exhibit 25) and final post-mortem report (exhibit 27) are admitted by the accused during trial.

17. During arguments, learned Advocate for the appellants/accused raised following points:

(i) Exhibit 35 is not the First Information. Police had arrived on the spot and had made enquiry with P.W. 1 Jaiwantabai and other persons and it was ascertained as to the names of assailants and commission of the cognizable offence i.e. murder. What was reported on the spot is FIR whether recorded or not. However, FIR was not recorded on the spot. As such, the alleged FIR exhibit 35 being in the nature of statement recorded by police, cannot be treated as a document which can be used by the prosecution for corroboration and it can only be used for contradiction or omission as contemplated u/s 162 of the Criminal Procedure Code.

(ii) Independent witnesses are not examined though according to all the prosecution witnesses who had allegedly witnessed the incident and large crowd had gathered on the spot during the incident.

(iii) There are inter-se contradictions in the evidence of eye witnesses i.e. P.Ws. 1,2,3,4 and 11.

(iv) Eye witnesses are falsified by medical evidence on record. More-so, when allegedly the grinding stones (Articles 5,6 and 7) were used by the assailants and were dropped on the head of the deceased when he was lying on the ground with his face downward.

(v) Defence witnesses examined on behalf of the accused ought to have been accepted as trustworthy and plea of alibi raised by accused Nos. 3 and 4 should have been accepted.

18. In order to narrow down the discussion on the points raised by the defence, certain admitted position can be referred as under :

(i) Four witnesses have turned hostile to the case of prosecution viz. P.W. 5 Shivprasad, P.W. 7 Rukhmibai, P.W.8 Vijay and P.W. 9 Kasobai.

(ii) P.W. 5 Shivprasad allegedly took part as pancha during seizure of grinding stones vide exhibit 47, clothes of deceased Rakesh vide exhibit 48, clothes of accused No. 6 vide exhibit 49, clothes of accused No. 3 vide exhibit 50, clothes of accused No. 5 vide exhibit 51, clothes of accused No. 4 vide exhibit 52, clothes of accused No. 1 vide exhibit 53 and clothes of accused No. 2 vide exhibit 54. As such, P.W. 5 Shivprasad did not support the case of prosecution so far as seizure of clothes of all the six accused is concerned and also did not support the case of prosecution as to recovery of grinding stones and clothes of the victim.

(iii) Rukhminibai (P.W. 7) did not support the case of prosecution inasmuch as she denied having seen the accused persons running away with weapons after the incident of assault and also denied that due to physical confrontation with accused No. 1, her saree was blood-stained and that it was seized by the police.

(iv) P. W. 8 Vijay is alleged eye witness and also acted as a pancha, but did not support the case of prosecution. He denied having seen accused persons running behind deceased Rakesh and at that time they were holding weapons. He also denied as to accused persons assaulted deceased Rakesh by means of said weapons. However, he has admitted that he saw deceased Rakesh running by the lane adjoining to his house and mother of Rakesh was running behind him and Rakesh fell on the ground in the court-yard of Kasubai and had sustained bleeding injuries.

(v) Kasubai (P.W. 9) is alleged eye witness, but did not support the case of prosecution. She denied witnessing the incident of assault on deceased Rakesh by the accused persons. However, she deposed that Jaywantibai (P.W. 1), mother of deceased Rakesh came to her house and she was crying and that time, she

saw Rakesh lying in the court-yard and that subsequently when police came to her house, she gave her statement.

19. Considering the hostility of the pancha witnesses and specifically pancha witness Shivprasad (P.W. 5), what is relevant for the purpose of present appeal is the appreciation of evidence of alleged eye witnesses (P.Ws. 1,2,3,4 and 11). It is also to be mentioned that P.W. 14 Vithal Mohakar had also seen three accused persons running away from the spot. He has visited the spot on receiving intimation as to commotion taken place at Joshipura area. According to P.W. 14 Vithal, telephonic information was received at about 01.35 pm and he made station diary entry and went to the spot along with police staff and saw the accused running away with weapons in hand. He also saw Jaywantibai (P.W. 1) on the spot.

20. This Court has to see whether the evidence of said eye witnesses is properly appreciated by the learned Additional Sessions Judge while convicting the appellants/accused for the relevant offences. In doing so, the arguments advanced on behalf of the appellant/ accused are dealt with in detail hereunder.

21. State of Andhra Pradesh Vs. Punati Ramulu and others, was relied upon to urge that exhibit 35 not to be treated as First Information Report. It is argued that the Investigating Officer has not deliberately recorded FIR even after receiving information about the cognizable offence on the spot and as such, concoction and deliberation cannot be ruled out. It is further argued relying on this judgment that the evidence of interested witnesses is required to be scrutinised with care and caution and in doing so, eye witnesses in the present matter cannot be taken as trustworthy.

On this aspect, substantive evidence of P.W. 1 Jaywantibai and P.W. 14 Vithal is of much importance. Needless to mention that cryptic information as to the cognizable offence cannot be treated as a first information report in the strict sense. Moreover, there can be a possibility that actual recording of the FIR is postponed for some time though on the spot certain revelation is made by the first-informant regarding commission of cognizable offence. In the present case, though it appears that on the spot, Investigating Officer (P.W. 14) enquired with P.W. 1 regarding incident and apprised himself of the factual position, still he did not record it down then and there. However, immediately on reaching the Police Station, P.W. 1 Jaywantibai lodged her complaint and it was recorded as exhibit 35. The immediate proximate recording of such exhibit 35 ruled out the possibility of concoction and the alleged time gap of an hour or so could not be treated as mitigating circumstance to the case of prosecution so as to raise any doubt of false implication of all the six accused, though alleged by the appellants.

22. On the second argument as to failure to independent witnesses raises doubt, it may be mentioned that it is a question of appreciation of evidence of the witnesses examined and always it may not be possible that the person from the mob would come forward for giving statement to the police. Otherwise also, in

order to take advantage of circumstance of failure to examine independent witnesses, reasonable opportunity must always be given to the Investigating Officer as to why such witnesses were not questioned. It may not be lost sight of the situation that presence of witnesses on the spot is one thing and anybody coming forward to give statement to the police is another thing. Whenever a circumstance arises, as in the present case, as to brutal attack on the deceased by six persons armed with different weapons is witnessed by persons in the mob, all or any of them, may not come forward for many reasons including reason of the terror created by the assailants and the impact of the situation. Always in such type of cases, it can be seen that apart from close relatives of the victim, nobody comes forward to approach the police. If otherwise, the substantive evidence of other witnesses who are examined repose confidence, then non-examination of other independent witnesses cannot be treated as fatal to the prosecution. In our considered opinion, it is so in the present matter.

23. Next argument advanced on behalf of the appellants is that inter-se contradictions in the substantive evidence of alleged eye witnesses negate the case of prosecution and in that event, benefit of doubt must go in favour of the accused. On this aspect, we have gone through the substantive evidence of P.Ws. 1,2,3,4 and 11. It must be said that P.W. 1 Jaywantibai had reached the spot after getting the information from P.W. 2 Kavita. So also, P.W. 11 Rekha, real sister of the deceased also witnessed the incident and in fact, described the said event by giving a vivid description. Her evidence was recorded with the help of the interpretor Madhurika (P.W. 10). Certain portion from her substantive evidence is reproduced below:

1. Deceased was my brother. I know the accused persons sitting before the court. Accused Girjashankar is my uncle. The other accused are not related to me. I cannot tell as to when the incident took place. Incident took place during summer days and it was about 1.00 p.m. Some six persons were running behind my brother. I personally saw this. My brother entered in the bathroom and tried to close the door from inside. However, accused Bindra knocked the door and opened it and dragged him out of the bath room by pulling his hairs. The accused then assaulted him by pata. The accused Gopal and accused Bindra assaulted him by means of pata. I requested the accused Ghanshyam by folding hands not to beat my brother....

2. The accused persons assaulted the deceased by two weapons. They have assaulted the deceased on the stomach and lower portion of the stomach. Due to which the deceased fell on the ground. Thereafter all the accused persons put Tilak of blood of the deceased on their forehead and they laughed in a victorious manner. Thereafter the accused persons left that place. The accused persons present before the court are the same. I had stated these facts while recording my statement.

24. Certain contradictions are brought on record during cross-examination of the said witness to the effect that four persons were running behind her brother and

when she requested the accused not to beat her brother, they left her aside and only one person dragged him out of the bath-room. Though said P.W. 11 Rekha mentioned as not stating this fact to the police while recording her statement during investigation and could not give any reason why such portion appeared in her statement, still the oral evidence of said P.W. 11 is convincing and rightly so held by learned Additional Sessions Judge and the core of her evidence is to the effect as to witnessing the assault and chase given by the accused to the deceased on the relevant time.

25. On this aspect of inter-se contradictions in the evidence of these eye witnesses, it must be mentioned that there is always possibility that the same incident is described by different witnesses from the point of their perspective. In other words, part of the incident may be witnessed by a witness and unless specifically asked, witness may not depose as to the presence of other eye witnesses. In that view of the matter, arguments advanced on behalf of the appellants that each and every eye witnesses had not stated regarding presence of other eye witnesses on the spot, cannot hold good. On this aspect of contradictions and inconsistencies, shelter of following authority was cited on behalf of the State for canvassing the proposition that minor inconsistencies and contradictions are not material when substantially the case of prosecution is proved by overwhelming testimony of eye witnesses. The said authority is:

(2009) 10 SCC 636 Gamini Bala and Ors. v. State of A.P.

This judgment is relied by the State to canvass another proposition that medical evidence, when not strictly contradicting the ocular evidence, reliance can be placed on the ocular evidence.

26. Next argument advanced on behalf of the appellants/accused which is in fact emphasised much, is that the eye witnesses are falsified by the medical evidence on record. In order to appreciate this argument, certain factual position as to contents of post-mortem report as to the injuries on the deceased and ocular evidence of the eye witnesses, is required to be summarised.

27. From the cross-examination of eye witnesses, it is an accepted position that there was an assault on the deceased by means of heavy stone i.e. grinding stone weighing from 5-7 kg upto even 22 kg. These are the Articles at 5, 6 and 7 and apparently having human blood on them and they were seized from the scene of offence. However, significantly enough the blood grouping was inconclusive. Though result of the chemical analysis as to the inclusive blood grouping is favouring the appellants, still finding of human blood on these stones and use of such stones by accused for assaulting the deceased on his head, is a relevant aspect and which is required to be taken into consideration while considering the case of prosecution whether it has reasonably explained the involvement of the accused/appellants beyond reasonable doubt. During cross-examination, eye witnesses have accepted that the deceased was assaulted on his head on many occasions by these grinding stones and every time it hit the

target. It is also brought on record that during such assault, deceased was lying on the ground either his face towards the sky or towards the ground. By pointing out these admissions, it is strongly submitted on behalf of the appellants that the natural consequence of such assault would lead to almost crushing the skull portion and also lacerated wounds on the face.

28. It is seen that there were severe injuries on the skull and whether there were any fractures. Again, it cannot be expected that such assault shall always result in totally crushing injury of the head. In order to appreciate the above-referred arguments, the injuries narrated in the post-mortem report are worth mentioning which are as under:

17. Surface wounds and injuries, their nature, position, dimensions (measured) and directions to be accurately stated, their probable age and causes to be noted. If bruises be present what is the condition of the subcutaneous tissues? (N.B. When injuries are numerous and cannot be mentioned within the space available they should be mentioned on a separate paper which should be signed):

1) Lacerated wound, Right Parieto temporal region, oblique 5 cm x 1 cm x bone deep, fresh.

2) Contusion, left forehead 8 cm x 6 cm fresh.

3) Stab wound, Left eyebrow, lateral 1/3rd oblique, 1 cm x 0.5 cm x bone deep, Margins clean, angles, sharp Margins clean, angles, sharp directed medially & posteriorly, fresh.

4) Contusion, Left mazillary area, 5 cm x 4 cm, fresh.

5) Stab wound, Right Anterox axillary fold, 1 cm x 0.5 cm x muscle deep margins clean, angler sharp directed posteriorly, upwards & medially, fresh.

6) Stab wound, below the left medial end of clavicle by 2.5 cm, 1 cm x 0.5 cm x cavity deep, directed posterosly downward and medially, margins clean, angle sharp, fresh.

7) Stab wound, right Hypochondrium, in the midaxillary line, 1 cm x 5 cm x muscle deep, directed downwards and medially margins clean, angle sharp, fresh.

8) Stab wound, below the Inj (7) by cm in the midaxillary line 0.5 cm x 0.5 cm x muscle deep directed medially & posteriorly, margines clean, angle sharp fresh.

9) Stab wound below the inj. No. 8 by 1.5 cm in the midexillary line 1 cm x 0. 5 cm x muscle deep directed forward and medially, margins, clean, angle sharp, fresh.

10. Stab wound, right arm, antero medial aspect upper 1/3rd oblique, 1.5 cm x 0.5 cm x muscle deep directed posteriorly and laterally, margines clean, angle sharp, fresh.

11) Incised wound, right forearm, flexor aspect Lower 1/3rd radial side, oblique,

2 cm x 0.5 cm x Tendons deep, margins clean, fresh.

12) Incised wound, right wrist & Hypothenar muscle region, anteriorly, vertical, 2.5 cm x 0.5 cm x 0.5 cm x muscle deep, margins clear, fresh.

13) Incised wound, right wrist, posteriorly ulnar border, oblique, 1.5 cm x 0.5 cm x Tender deep, margins clean, fresh.

14) Contused abrasion, left arm, antero medial aspect, upper 1/3rd 6 cm x 0.5 cm, fresh.

15) Contused abrasion, left arm, postero-lateral aspect, middle 1/3rd, 3 cm x 2 cm, fresh.

16) Incised wound left forearm, lateral aspect, lower 1p 3rd, ulnar border, oblique, 2 cm x 0.5 cm x muscle deep, margins clear, fresh.

17) Multiple contused abrasion, left forearm lateral and posterior aspect size varies from 0.5 cm x muscle deep, margins clear, fresh.

18. Incised wound left hand anterior aspect, index & middle finger, proximal 1/3rd, 1 cm x 0.5 cm x muscle deep horizontal, margins clear, fresh.

19) Stab wound, right, back of 10.7 cm from the midline, size 2 cm x 0.5 cm x muscle deep, directed forward and anteriorly and laterally margins clear, angle sharp, fresh tailing at lower angle directed medially of size 4 cm x 0.5 cm fresh.

20) Contused abrasion, right trunk, posteriorly above the posterior superior iliac spine by 2 cm size 1 cm x 1 cm, fresh.

21) Incised wound, left trunk posteriorly at the level of L-1, in posterior axillary line, oblique, 3.5 cm x 1 cm x muscle deep margins clean, fresh.

22) Multiple abrasion, left thigh, anterior aspect, middle 1/3rd size varies from 0.5 cm x 0.5 cm to 1 cm x 1 cm, fresh.

23) Contused abrasion, left leg, medial aspect upper 1/3rd, 1.5 cm x 1 cm fresh.

24) Multiple contused lacerated wound, 5 in numbers, left leg posterior, middle 1/3rd of size 1 cm x 0.5 cm, each fresh.

29. Noticing the above described injuries which are reportedly ante-mortem as per P.W. 12 Dr Rajesh Bardale, it can hardly be accepted that the eye witnesses testimony is falsified by the medical evidence. This is more so while considering the injuries to the head. On this aspect of medical evidence falsifying the eye witnesses.

30. Authorities are cited on behalf of the appellants as to appreciation of evidence are:

(1) Mani Ram and Others Vs. State of U.P.,

(2) Amar Singh and Others Vs. State of Punjab,

31. We have seen that in *Mani Ram v. State of UP* (supra), there was a solitary eye witness and his evidence was found to be totally inconsistent with the medical evidence on record in that matter. Similar was the case in *Amar Singh v. State of Punjab* (supra). Therefore, considering the specific facts of the present matter as to almost five eye witnesses speaking about involvement of the appellants/accused and their testimony not contradictory to the medical evidence on record, the argument on this count also cannot be accepted in support of the appellants.

32. Again, on this aspect of medical evidence and ocular evidence, whether contradictory or corroborative, following authorities are cited before us on behalf of the State:

- (1) *Mahmood and Another Vs. State of U.P.*,
- (2) *Prajeet Kumar Singh Vs. State of Bihar*,
- (3) (2008) SCC 587 *Ponnusamy v. State of Tamil Nadu*

By pointing out the ratio propounded by the above authorities, it is strongly submitted by learned Additional Public Prosecutor that the presence of witnesses cannot be disbelieved only on the basis of medical evidence even if there is some inconsistency between the two. It is further argued that the ocular evidence in the present case is fully corroborated by the medical evidence on material particulars and there are no inconsistencies going to the root of the matter. Relying on these rulings, it is argued on behalf of the State that specific overtact of a particular accused need not be established when forming of the unlawful assembly is already established by the evidence of the eye witnesses. It is further brought to our notice that the involvement of all the appellants is spelt out by the eye witnesses and as such, by applying the rigor of Section 149 of the Indian Penal Code, all the appellants are rightly held guilty for the murder of deceased Rakesh.

33. Now, coming to the last argument on behalf of the appellants as to the alibi, so far as accused Nos. 2 and 4 are concerned, an attempt has been made to establish that the said accused were at some other place and not at the place of incident at the relevant time. Defence witnesses Sudhir Shrikhedkar (D.W. 1) and Dr Indrapalsingh (D.W. 2) were examined to prove alibi of accused No. 4 Gopal whereas D.W. 3 Raju Shende is examined to prove alibi of accused No. 2 Ghanshyam. It is brought on record that accused No. 4 Gopal was serving in the National Research Centre for Citrus, Amravati Road, Nagpur and at the relevant time, he was in his office. D.W. 1 Sudhir, working as Technical Assistant, was colleague of accused Gopal whereas D.W. 2 Dr Indrapalsingh was holding the post of Senior Scientist in whose office accused No. 4 Gopal was working. According to these witnesses, a roll-call was maintained twice a day, firstly at 08.00 am and secondly at 01.00 pm and on the day of incident, accused Gopal attended the office for his duty in a shift from 09.30 am to 05.00 pm and according to them, said Gopal was present when roll call was taken at 01.00 pm.

However, he had received telephonic message that his mother was serious and he obtained permission from D.W. 2 for going to his house. It is significant to note that though allegedly at 01.00 p.m., accused Gopal answered roll-call, immediately he left the office on receiving alleged telephone call. It is an admitted position brought on record that office of accused No. 4 is at a distance of 8 kms from Nagpur city. It is also brought on record that the Office of National Research Centre for Citrus is such an establishment having more than 250 acres of land, having office building, laboratory, farm and nursery and there was nothing on record through defence witnesses that all the time, accused No. 4 Gopal was in the office premises itself. On this aspect, the reasoning given by learned Additional Sessions Judge is perused by us. In our opinion, learned Additional Sessions Judge had doubted the authenticity of the register produced on record for want of official seal on the relevant page showing the entry as to the attendance of accused No. 4 at 01.00 p.m. Moreover, it must be mentioned that on that afternoon, accused No. 4 was permitted to leave and he was not there till the end of office hours. Definitely, it is a mitigating circumstance to the defence when a specific plea of alibi is raised. It is an accepted position that when a plea of alibi is raised on behalf of the accused, burden of proof of such alibi is more than that is usually on the accused for establishing any particular fact on preponderance of probability.

34. On the appreciation of evidence of alibi, following authority is cited on behalf of the appellants:

AIR 1985 SC 911 Dudhnath Pandey v. State of U.P.

Section 11 of the Evidence Act postulates the concept of alibi and in fact, puts more burden on the accused if such a case is put up to negate the case of prosecution. Again, on this plea of alibi raised by accused No. 4, it is relevant that such defence is belatedly taken and not when accused No. 4 was put under arrest by the police. Learned Additional Sessions Judge had doubted the conduct of accused No. 4 not immediately representing to the police or to the Magistrate after his arrest as to his presence in his office and not on the scene of offence. Even subsequently also, there were no steps taken by accused No. 4 through his office to establish his alibi.

35. So far as plea of alibi taken by accused No. 2 Ghanshyam is concerned, substantive evidence of D.W. 3 Raju is taken shelter of. According to him, on the day of incident, accused No. 2 came to his house at 10.30 a.m. for Abhishek Pooja of Lord Shiva and both of them went to purchase Pooja articles and subsequently at 12.00 noon Pooja was started which continued till 03.00 p.m. This evidence of D.W. 3 Raju is also not accepted by learned Additional Sessions Judge for the reason that there was nothing on record to suggest that accused No. 2 was continuously present all along with D.W. 3 Raju till 05.00 p.m.

36. In our considered opinion, the reasoning given by learned Additional Sessions Judge not accepting the plea of accused Nos. 2 and 4 cannot be doubted and

hence, on this count also, the arguments advanced on behalf of the appellants/accused cannot sustain.

37. In view of the above discussion on the points raised by both the parties, nothing is emerging which would warrant interference in the impugned order by setting aside the impugned judgment and order.

38. Hence, there are no merits in the appeal and the same is accordingly dismissed.