

(2007) 07 BOM CK 0045

In the Bombay High Court

Case No : Criminal Appeal No. 332 of 1995

Jaspalsing Charansing Saini and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-07-2007

Acts Referred:

Arms Act, 1959 — Section 25, 3

Criminal Procedure Code, 1973 (CrPC) — Section 161, 212, 313, 464

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2007) 07 BOM CK 0045

Hon'ble Judges : S.R. Dongaonkar, J;K.J. Rohee, J

Bench : Division Bench

Advocate : R.M. Daga, for the Appellant; A.D. Sonak, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Dongaonkar, J.—Appellants, have been convicted for the offences punishable u/s 302 read with Section 149 of the Indian Penal Code and also for the offence u/s 326 read with 149, besides Section 147, 148 of the Indian Penal Code. Each of them is sentenced to suffer life imprisonment and to pay fine of Rs. 10,000/-, in default to suffer R.I. for 2 years for the offences u/s 302 read with Section 149 of the Indian Penal Code. No separate punishment has been awarded for the conviction of other offences. It may be mentioned that they are acquitted of the offence punishable u/s 3 read with Section 25 of the Arms Act read with Section 149 of the Indian Penal Code. This judgment of their conviction in Sessions Case No. 28/1995 dated 13.9.1995 delivered by the Additional Sessions Judge, Khamgaon is challenged in this appeal.

2. Facts leading to the prosecution of the appellants accused, are as under:

Deceased Purushottam Thakre was owning a hotel on National High Way No.6, which was run under the name and style Geeta Dhaba. Purushottam Thakre was the younger brother of Bhika P.W. 6 and Dinkar P.W.4. They used to help him in

running the said Dhaba. In 1993 he had purchased 2.5 acres agricultural land in village Chikhli. Appellant -accused no. 6 Shrikrushna Onkar Raipure was keen to purchase that land. However, he could not succeed and the same was purchased by deceased Purushottam. Hence there was enmity brewing between them. It is alleged that appellant No. 1 accused Jaspalsing was running another Dhaba by name Pala Samaj Dhaba. in front of Geeta Dhaba public road was in between. It is alleged that appellant no. 6 was helping appellant No. 1 Jaspalsing to run said Dhaba in competition with deceased Purushottam Thakre and his Geeta Dhaba. Business rivalry had developed between these persons. There was a raid under Narcotic Drugs & Psychiatric Substances Act on Geeta Dhaba, so also on the Dhaba of appellant No. 1. i.e. Pala Samaj Dhaba. Due to criminal cases, suspecting each others' hand, they had developed enmity. About couple of days prior to the incident i.e. in the night of 28.12.1994, some of the accused i.e. accused No. 1 Jaspalsing, accused No.4 Shrikrishna Pachpande, accused no.6 Shrikrushna Raipure, accused No. 7 Rajaram Puri, accused No. 8 Samadhan Sabe [present appellants] had been to Geeta Dhaba with a view to attack Purushottam Thakre (the deceased). At that time he ran away from the spot as he saw assailants approaching Geeta Dhaba. He escaped at that time. At that juncture nephew of Purushottam Thakre named Dilip Vasantrao Gaikwad and one servant had received injury in the assault. Report was lodged to the Police Station by Dilip Gaikwad (P.W. 10). It is alleged that, following this incident, the incident in question had taken place on 30.12.1994.

3. According to the prosecution, on 30.12.1994 at about 9.00 a.m. Appellants / accused persons having deadly weapons in their hands started from Dhaba of appellant No. 1 and after crossing the road they reached Geeta Dhaba. It is alleged by the prosecution that appellant No. 1 Jaspalsing was having Farshi, axe, appellant no.6 Shrikrushna Raipure was having Farshi Axe, appellant No. 2 Harichand Singh was having sword, appellant No. 7 Rajaram Puri was having pipe, appellant No. 8 Samadhan was having iron rod in his hand, appellant no.5 Samadhan was having a stick, appellant no.3 Baliram Pachpande was having sword in his hand appellant no.4 Shrikrushna Pachpande was having pipe. Such were arms in the hands of the respective appellants. P.W. 6 Bhika Thakre came ahead with a view to make these appellants stop. However, appellant no.6 Shrikrushna Raipure and appellant no.3 Baliram Pachpande assaulted P.W. 6 Bhika Thakre and he suffered injuries. P.W. 4 Dinkar Thakre and deceased Purushottam Thakre went there to rescue P.W. 6 Bhika. But he was also attacked by the appellants /accused and he received injuries. On seeing the attack by the appellants on Bhika and Dinkar Thakre, Purushottam Thakre and his two nephews Dilip (P.W. 11) and (P.W.9)Pradip Gaikwad, started running from the spot. Appellants then left Bhika Thakre and Dinkar Thakre and started chasing Purushottam Thakre. Some time thereafter, within short time of about half an hour, P.W. 9 Pradip Gaikwad returned back and told his maternal uncle P.W.4 Dinkar that dead body of Purushottam was lying near Nala. It is the case of the prosecution that P.W. 9 Pradip Gaikwad, Dilip Gaikwad P.W.11 and deceased

Purushottam Thakre had initially ran away in the same direction, however, subsequently, Dilip Gaikwad and Pradip Gaikwad overtook deceased Purushottam Thakre. Thereafter Dilip Gaikwad ran away, crossed Nala and disappeared, whereas Pradip Gaikwad concealed himself behind bush and witnessed appellants attacking deceased Purushottam. Dilip Gaikwad had also seen one of the assailants attacking deceased Purushottam. After the incident was over, when P.W. 9 Pradip Gaikwad came and told about the incident to P.W.4 Dinkar, they went there. P.W. 9 Pradip Gaikwad had stopped one S.T. Bus and P.W. 4 Bhika Thakre (injured) was taken to Khamgaon. On reaching Khamgaon, he initially was taken to police station and later on to hospital and at that time Pradip Gaikwad had told the police as to what had happened. Khamgaon Police was also informed as to what had happened. Khamgaon Police through wireless message informed about the incident to Jalamb Police Station, which had jurisdiction over the spot of incident. Police officials of Jalamb Police Station were asked to reach the spot of occurrence immediately. It is necessary to mention that distance between Geeta Dhaba and Khamgaon Police Station is about 7.00 k.m., whereas distance between Geeta Dhaba and Jalamb Police Station is about 15 k.m. Although Geeta Dhaba comes within the jurisdiction of Jalamb Police Station, for all practical purposes, it is convenient to reach police station at Khamgaon as it is well connected by road. it is also necessary to mention that the conveyance is also readily available from the place Geeta Dhaba to Khamgaon Police Station. Thereafter, Police Jeep from Police Station Khamgaon reached to the spot of incident which was incidentally followed by Police Jeep from Police Station Jalamb. P.W. 4 Dinkar Thakre who was there, was questioned and enquired with and he then gave report to Jalamb Police officials P.W. 14 Chavan which is at Ex. 39. As jurisdiction was with Police Station Jalamb, it started investigation. Some of the accused were arrested immediately thereafter and some later on. It is alleged that they made memorandum statements to discover weapons concealed and accordingly they were seized. The clothes of the injured as well as the deceased Purushottam Thakre were also collected in due course. Dead body of Purushottam Thakre was sent for postmortem examination after the inquest Panchnama. P.W.6 Bhika who had received head injury was referred to hospital at Akola. It may be mentioned that Ex. 39, contains names of all the appellants as assailants. Therefore, one by one all the appellants were arrested. During investigation spot Panchnama was prepared, the articles were seized from the spot and these articles were referred to Chemical Analyser for Chemical Analyser's opinion which was received by the I.O. After due investigation, charge sheet was submitted for the aforesaid offences against all appellants.

4. In turn the said case was committed to the court of sessions bearing Sessions Case No. 28/1995. Learned Additional Sessions Judge, Khamgaon framed the charge for the aforesaid offences and the same was explained to the appellants/accused. They pleaded not guilty to the same. Their defence is that of denial. It is necessary to mention that in addition to the defence of denial, appellant No. 8 Samadhan " Balu Sable has raised defence of "alibi" saying that at the relevant

time he was on duty with one Vijay Narkhede (D.W.2) to Chikhli and he was not present on the spot.

5. Prosecution led evidence of as many as 14 witnesses in order to bring home the guilt of the appellants. It may be stated that P.W.4 Dinkar, P.W. 6 Bhika, P.W.9 Pradip and P.W. 10 Dilip, are the alleged eye witnesses to the incident, wholly or in part. P.W. 4 Dinkar and P.W. 6 Bhika are the injured witnesses as well. P.W. 1 Chandrashekhar is witness to memorandum statements of the accused and seizure in consequence to that. P.W. 13 Shriram Rane is also a witness to the memorandum statement of some of the accused and consequent seizure of iron pipe and also seizure of some clothes from appellant no. 5 Samadhan Dhanorkar and appellant no 8 Samadhan Sabe, as per Ex. 20 and 21. The relevant documents are at Ex.24 to 30. P.W. 2 Shrikrishna More is panch witness to the seizure of clothes of the deceased Ex. 34 and shirt and pajama of the appellant no.4 Ex. 35. P.W. 3 Kailash Bhatkar is witness to the seizure of clothes from P.W.6 Bhika, P.W. 5 Darbarsingh is panch witness to spot Ex.44 and Inquest Ex. 44 and seizure of articles from the spot as per Ex. 46. P.W. 7 Dr. Kamal Wankhede has conducted medical examination of P.W. 6 Bhika and deposed about of bed head ticket of said Bhika Ex. 51. P.W. 8 Dr. Vilas Sonone is also a witness on that point. He has been examined to prove; noticing of injury recorded on the bed ticket & regarding enquiry with P.W. 6 Bhika about the incident Ex. 53. P.W. 12 Dr. Keshav Mendhe is Medical Officer of Khamgaon who had issued injury certificate in respect of P.W. 4 Dinkar and P.W. 6 Bhika i.e. Ex. 62 and 63, on their medical examination. He has also conducted Postmortem on the dead body of deceased Purushottam. The relevant report is at Ex. 64. He has also told about the case papers of P.W.6 Bhika. P.W. 11 Head Constable More is police witness who had carried seized and sealed articles to Chemical Analyser. P.W.13 P.W. Rane is also witness to memorandum statement of consequent seizure of some articles an axe from appellant no.6, vide Ex.68 to 71. P.W. 14 P.S.I. Chavhan has recorded the statements of P.W. 4 Dinkar which was treated as FIR (Ex. 39). He has also deposed regarding spot Panchnama, inquest Panchnama, seizure memos, etc.

6. Defence has also led evidence of two witnesses. D.W. 1 Dr. Eknath Choudhari has been examined to show that on 30.12.1994, he was attached to Khamgaon General Hospital and he had examined P.W.6 Bhika Sadashiv Thakre. He further stated about his consciousness and fitness to depose and issuing certificate to that effect as per Ex. 113. This witness has also deposed about Ex. 113 which is alleged dying declaration of this P.W. 6 Bhika. D.W. 2 Vijay Narkhede has been examined by the defence particularly appellant No. 8 to show that on the date of incident, he was working on his vehicle No. MH 28 A 6698 and he had taken that vehicle at the relevant time in the morning to mechanic and thereafter to Nilgaon to take one Babarao Balwant Deshmukh and thereafter the matador had gone to Daryapur and this appellant Balu Sable had returned on 31.12.1994 at about 9.00 p.m. Thus to show that he was not present at the time of incident and but he was attending the duty allotted by his employer D.W. 2 Vijay Narkhede.

7. The learned trial Judge after considering the evidence on record found that from the evidence it is established that the appellants in prosecuting their common object and making unlawful assembly with arms in their hands, had caused the murder of deceased Purushottam. They have also caused grievous hurt to P.W. 2 Bhika Thakre. Therefore, he held the appellant guilty for the offences, u/s 302 read with Section 149 as well as Section 147, 148, 149 and 326 read with Section 149 of the Indian Penal Code and they were convicted and sentenced accordingly. He however, found that the appellants are not guilty of the offences punishable u/s 3 and 25 of the Arms Act read with Section 149 of the Indian Penal Code. He has also awarded compensation to the widow of deceased Purushottam from the fine recovered and also to victim Geeta.

8. This judgment of conviction is challenged by the appellants in this appeal.

9. Learned Counsel for the appellant Shri R.M. Daga, has submitted that evidence of alleged eye witnesses to the incident is totally unreliable. There are material discrepancies, omissions and contradictions pointed out by the cross examination of these witnesses, so also in the report of P.W. 4 Dinkar. According to him, P.W.9 Pradip who is stated to be an eye witness from beginning to end is not reliable and cannot be held trustworthy. According to the learned Counsel, report lodged by P.W. 4 Dinkar was very late and it was not a FIR at all. He has contended that telephonic message sent by Police Station, Khamgaon to Police Station, Jalamb can only be treated as FIR upon which the officials of Police Station Jalamb had come to the spot. Therefore, the value of Ex.39 that is alleged report of P.W. 4 Dinkar, is reduced to a statement u/s 161 of Cr.P.C. and therefore, the same can not be relied upon for corroborating his version as regards the incident. Learned Counsel has further submitted that the statements of the witnesses were recorded quite late and therefore, they had opportunity of concocting the case against appellants. It is also the submission for the appellants that there is no charge in respect of the injuries caused to P.W. 6 Bhika, on the contrary charge was for the injuries to P.W. 4 Dinkar. Therefore, defence is prejudiced. They have been wrongly convicted for causing injuries to P.W. 6 Bhika. It is also contended that P.W. 6 Bhika in his dying declaration had made out a case of assault, against only three persons i.e. appellant No. 1 Jaspalsing, appellant No. 3 Baliram and appellant no.6. Shrikrushna. Therefore conviction of other appellants for his injuries was bad. According to the learned Counsel he had not seen the assault on the deceased. His statement was also recorded quite late i.e. after about 18 days and because of such similar circumstances in respect of other alleged eye witnesses, their evidence is totally untrustworthy. It is also contended that the appellants have been implicated falsely, in view of the business rivalry between the parties. Referring to the evidence of panch witnesses it is submitted that the evidence of these witnesses is far from reliance and they are the witnesses under the thumb of the police and therefore, no value should be attached to them and the same cannot corroborate the prosecution version. As such it is submitted that appeal be allowed and appellants be acquitted.

10. Learned Counsel for the appellant has relied on some authorities in support of his contentions:

- 1] Thulia Kali Vs. The State of Tamil Nadu,
- 2] Karunakaran Vs. State of Tamil Nadu,
- 3] Panda Nana Kare Vs. State of Maharashtra,
- 4] Govind Narain and another Vs. State of Rajasthan,
- 5] AIR 2004 SC 4592 Ramsewak and Ors. v. State of M.P.
- 6] 2003 ALL MR (CRI) 590 SC Lallu Manjhi and Anr. v. State of Jharkhand
- 7] Shankarlal Vs. State of Rajasthan,
- 8] 2004(3) CRIMES 132 Shankarlal v. State of Rajasthan
- 9] 2004(3) CRIMES 136 State Rep. by Inspector of Police v. N.M.T. Joy Immaculate
- 10] 2004(3) CRIMES 157 Harjinder Singh " Bhola v.State of Punjab
- 11] 2004(4) CRIMES 248 SC Parsuram Pandey and Ors. v. State of Bihar
- 12] AIR 2000 Crimes 508 Ismail Sheikh " Khayapa v. State of West Bengal
- 13] 2006 ALL MR (CRI)1689 Ramkrishnan " Pintu " Ramkishan s/o Marotrao Gavane and Ors. v. State of Maharashtra
- 14] 2006 ALL MR (CRI) 3345 Mangesh " Balya Pralhad Bitode and Ors. v. State of Maharashtra
- 15] 2007 ALL MR (CRI) 314 Akbar Intijarul Ansari v. State of Maharashtra

11. These authorities have been referred by the learned Counsel to contend that when there is delay in report, it may not lead credence to the prosecution case. If the eye witnesses do not disclose names of the assailants immediately after the occurrence, their evidence would not be reliable. Evidence of sole eye witness is to be accepted with caution, particularly when he is a chance witness and when the conduct of the witnesses is unnatural, they can not be believed. Some of the authorities have also been referred to contend that the delay in recording statements of P.W.s vitiates the evidentiary value of the witnesses and also defect in charge has led to the prejudice of the appellants. It is also submitted that when there is defect in charge, failure of justice is caused to the appellants, the trial is vitiated. We would refer these authorities in the course of the judgment as would be necessary.

12. Learned A.P.P. has submitted that the judgment of the trial Judge calls for no interference inasmuch as the learned Judge has taken right view of the matter. According to him, although the witnesses are related to the deceased and the injured, they are reliable and the prosecution has established its case beyond

reasonable doubts. He has also referred to the judgment of the learned trial Judge, to contend that the topography of the place of incident is such that the persons would normally go to Khamgaon Police Station which is convenient and not to Police Station Jalamb which is inconvenient for travelling in case of urgency. Learned A.P.P. has submitted that "alibi" of appellant No. 8 is not established and therefore, no benefit can be accorded to him and consequently to other appellants. It is further contended by him that the report which is referred by the learned trial Judge as FIR is the only FIR and it cannot be thrown away simply because there was telephonic message to Jalamb Police Station by Khamgaon Police Station, as it was just a caution information asking Jalamb Police Station to come to the spot, which was not a specific information of cognizable offence given to the police station calling for further action and investigation. It is also submitted that the prosecution has rightly established beyond reasonable doubts, that because of earlier crimes of appellants and deceased and business rivalry, there was enmity between deceased Purushottam and his family members on one side and the appellant No. 1, appellant no.6 and other appellants, on the other. He has submitted that this is a case of brutal attack on the deceased as well as P.W. 6 Bhika and mere defect in charge for no reason whatsoever, will not vitiate the trial nor it will discredit the evidence of the prosecution witnesses. As such he has submitted that the judgment of the learned trial Judge, in convicting the appellants for the aforesaid offences is correct and not liable to be interfered in the appeal.

13. In the beginning, we propose to consider the submissions of the learned Counsel for the appellants that the trial is vitiated because no charge was framed by the learned trial Judge against appellants for the offence which was allegedly committed by causing injuries to P.W. 6 Bhika. He has submitted that the charge was framed in respect of the injuries caused to the complainant P.W. 4 Dinkar. Whereas, conviction of the appellants has been awarded for the injuries caused to P.W. 6 Bhika.

14. In order to appreciate the contention of the learned Counsel, it is necessary to peruse the relevant part of the charge. Learned trial Judge has framed the relevant charge as under: Fifthly, you all the accused being members of an unlawful assembly, on the same date, time and place, did an act to injure the complainant Dinkar Sadashiv Thakre with such intention and under such circumstances that if by that act you had caused the death of Dinkar and you would have been guilty of murder of the said person, and thereby committed an offence punishable u/s 307 read with 149 of Indian Penal Code, and within the cognizance of this court. It clearly means that the charge was in respect of the injuries caused to P.W. 4 Dinkar and not in respect of the P.W. 6 Bhika.

15. The judgment and consequently the order of the learned trial Judge, reads thus:

56. In the instant case, I have already arrived at the conclusion that the accused persons by forming an unlawful assembly committed murder of Purushottam

Thakre and so also caused one grievous injury to his brother Bhika Thakre P.W. 6.

The relevant order is to the effect:

Accused no.s 1 to 8 are also convicted for an offence punishable u/s 147, 148, 149, and so also u/s 326 read with Section 149 of the I.P.C.

16. Therefore, the learned Counsel for the appellants has contended that there was "no charge" in respect of the commission of the offence in respect of P.W. 6 Bhika and the appellants cannot be convicted for the said offence.

17. In the instant case, although the appellants are convicted for the offences u/s 326 read with other relevant sections, no separate punishment is awarded to them.

18. It would be seen that although there was no specific charge in respect of the injuries caused to P.W. 6 Bhika, P.W. 6 Bhika and other witnesses have led evidence regarding injuries caused to the said Bhika. Prosecution has examined Medical Officers in respect of his injuries and admission to the hospital, as well as treatment. In section 313 Cr.P.C. examination of the accused, the relevant questions on the strength of this; were put to the appellants for seeking explanation. The notes of arguments of the defence does not show that the defence had raised any specific plea regarding non-framing of charge in respect of offence relating to the injuries caused to P.W. 6 Bhika.

19. The record clearly shows that the appellants had taken part in the trial, with due understanding of the allegations of the prosecution that they had caused grievous injuries to P.W. 6 Bhika, and had he suffered death in this incident, they would have been liable for the offence of causing murder.

20. In such circumstances, therefore, it is necessary to find out as to whether the trial is vitiated for non framing of charge against the appellants for the offence in respect of causing injuries to P.W. 6 Bhika.

21. Learned Counsel for the appellant has taken us through the observations of Calcutta High Court in 2000(4) (Crimes) 508 Ismail Sheikh v. State of West Bengal. In that case, the appellant Ismail Shaikh was convicted for the offence u/s 302 of the I.P.C. The relevant charge in the said case has been extracted in paragraph 5 of the said decision. It would be seen that no time, and place of occurrence was mentioned in the said charge which was mandatory u/s 212 of the Code of Criminal Procedure. The court in paragraph 10 has held thus:

10. After considering the respective submissions on behalf of the Appellant and the State and provisions of the code of Criminal Procedure mentioned above we have no hesitation in holding that the charge as framed by the learned trial Court has not been framed in accordance with law for non-mentioning of the time and place of occurrence in the charge as framed by the learned Trial Judge which is mandatory u/s 212 of the Code of Criminal Procedure and a failure of justice has been accused in respect of the Appellant vitiating the entire trial. The matter was

remanded back to the Sessions Court for de-novo trial.

22. In the present case the appellants do not insist for de-novo trial seeking the remand of the matter.

23. Apart from this, in our opinion, provisions of Section 464 of the Code of Criminal Procedure would be attracted, wherein it has been provided: No finding sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. In our opinion, in the present case, the appellants were, in the knowledge while the evidence was being led that the said Bhika was allegedly injured in the said incident. With this the evidence on record of P.W. 4 Dinkar, P.W. 6 Bhika, P.W. 9 Pradip and P.W. 10 Dilip, the appellants were allowed to cross examine the said witnesses. They were in clear knowledge that the case against them, was in respect of the injuries to Bhika also. The charge sheet of this case also shows that the allegations against the appellants were that they had injured P.W. 6 i.e. Bhika and therefore, they were required to defend themselves for this offence also. In such circumstances, it would be difficult to hold that there is any failure of justice in fact occasioned because of non- mentioning the name of Bhika and also regarding his injuries in the charge. In our opinion, observations of the Calcutta High Court, would not be attracted inasmuch as there is no failure of justice in fact. Because the appellants were charge sheeted for the offence in relation with the injuries caused to P.W. 6 Bhika, evidence was led to that effect through P.W.6 Bhika and other witnesses, including Medical Officers /witnesses; questions were put up to them u/s 313 of Code of Criminal Procedure , to seek explanation about the same, detailed notes of arguments were filed by the prosecution as well as defence in the trial court and after that the judgment was delivered. Even otherwise, the appellants did not pray for retrial, in respect of this offence. We do not see any sufficient reason to hold that there is any failure of justice or a case for remand and retrial. Therefore, this submission of the learned Counsel for the appellants is far from acceptance.

24. Most important aspect in this case is as to whether the report in the shape of statement of P.W. 4 Dinkar Ex. 39 can be said to be FIR ? If yes, whether it can be said to be delayed one, so as to cast doubts on the prosecution case and whether this aspect of the case, will make us to throw away the case of the prosecution, inasmuch as, if it is not held to be the FIR, the prosecution case may loose its ground as the prosecution has not produced the information which was actually received by Police Station, Jalamb which has jurisdiction over the area of the incident, or even by Police Station Khamgaon which were earlier intimated about the incident.

25. In the case in hand, learned trial Judge has taken into consideration all the material aspects in this regard. It has been observed by him that considering the

topography of the place of incident, for all practical purposes, Police Station, Khamgaon is more accessible than the Police Station, Jalamb though as stated above place of incident falls within the jurisdiction of Police Station, Jalamb. He has clearly observed that it is to be taken into consideration the factual aspect of three spots i.e. Geeta Dhaba, Khamgaon Police Station and Jalamb Police Station. He has observed that Khamgaon Police station is at a distance of about 7-8 K.M. whereas Police Station Jalamb is at a distance of about 15 k.m., though Geeta Dhaba comes in jurisdiction of Police Station Jalamb for all practical purpose it is easier to reach Police Station Khamgaon, from Geeta Dhaba. Geeta Dhaba and Khamgaon Police Station are situated on National Highway No.6 and conveyance is readily available for Geeta Dhaba and Khamgaon Police Station. In case of earlier incidents also P.S. Khamgaon seems to have been approached first.

26. Learned Counsel for the appellant has referred to the decision of the Apex Court in Thulia Kali Vs. The State of Tamil Nadu, wherein importance of FIR is considered. It has been observed in paragraph 12 as under:

12. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police. In respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay the report not only gets bereft of the advantage of spontaneity danger creeps in of the introduction of coloured version exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.

It has been further observed:

Neither of them nor any other villager who is stated to have been told about the occurrence by Valenjiaraju and Kopia made any report at the police station for more than 20 hours after the occurrence even though the police station is only two miles from the place of occurrence. The said circumstance in our opinion would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused appellant upon it.

27. In the instant case, it is necessary to peruse the evidence of P.W. 14, P.S.I. Chavhan. He stated that at the relevant time he was working as PSI at Jalamb Police Station. On 13.12.1994 at 9.20 a.m. he received wireless message from Khamgaon Police Station that a quarrel was going on near Geeta Dhaba and Jaspal Dhaba, so he went to the said scene of offence in police jeep. At about

10.00 a.m. he reached there and on spot, Dinkar Sadashiv Thakre lodged report. In the said report, the details of the incident were given. He has also confirmed that Ex. 39 is the report lodged by Dinkar and it bears his counter signature and that the said report was reduced into writing as per narration of Dinkar and printed FIR of crime No. 82/94 is the same.

28. It is necessary to mention that Khamgaon Police Station had informed that there was quarrel going on near Geeta Dhaba. There appears no mention, in the message received that Purushottam Thakre has been killed or Bhika and Dinkar were injured. There is nothing in his evidence to show that he had already received information about the offence in question. In the cross examination also there appears nothing specific to show that he is hiding the information regarding the first information about the offence he has received. Section 313 Cr.P.C. statement of the appellants also does not show that there is possibility that the wireless information being different than one suggested by I.O. Here is the case, where P.W. 4 Dinkar is not alleged to have gone to Police Station for lodging report. In fact police had reached to the spot of incident and there the statement of this P.W. 4 Dinkar was recorded which was treated as FIR. It is not suggested by the defence that P.W. Dinkar had gone to the police station for lodging any report. It does appear from the record that whatsoever information was given to Khamgaon Police Station, was sent to Police Station, Jalamb and therefore, they had arrived at the scene of offence and got the report of P.W. 4 Dinkar on the spot.

29. In these circumstances, it is not possible to hold that said Ex. 39 cannot be treated as FIR and FIR was something different, which was recorded in the earlier point of time.

30. Our attention is drawn to the evidence of P.W. 9 Pradip, in which he has stated that he narrated the incident to Police orally and police reduced it into writing and while he was narrating the incident to police, Vilas Sananshe took Bhika to the Hospital. It is tried to suggest that there are two versions of the prosecution, one through P.W.4 Dinkar and other through P.W. 9 Pradip. It is further suggested that this report has been suppressed and it is not filed along with charge sheet raising presumption that it may not connect the accused and therefore suspicion is raised against prosecution.

31. The version of P.W. 9 Pradip needs to be seen carefully. As regards this, he stated that when he went at Dhaba, he saw P.W.4 Dinkar Thakre taking Bhika Thakre up to the road, he thereafter brought Bhika Thakre in ST Bus to Khamgaon Police Station, at that time one Vilas Sananshe Milkman also accompanied him, he narrated the incident to police orally, police reduced it into writing, while he was narrating the incident to police Vilas Sananshe took Bhika to the hospital and thereafter along with police he came up to Government Hospital. Meaning thereby he had narrated the incident to Police of Khamgaon. This version, according to the defence, has been suppressed by the prosecution. However, it is difficult to hold that any adverse inference can be drawn because

of suppression of that information. It is pertinent to note that witness Dinkar had given the version of the incident before Police at the scene of the offence itself. He was in the attempt to make arrangement to take injured Bhika to the hospital. He had come to know about the death of the deceased Purushottam Thakre. He was told about the incident by P.W. 9 Pradip. In such circumstances, it is not possible to hold that suppression of oral information given by the said Pradip to Khamgaon Police Station, is sufficient to draw any adverse inference against the prosecution. It is not pointed out that his signature was taken on the said statement so as to treat it FIR. Here is the case where, Police Officials of Police Station Khamgaon as well as Police Station, Jalamb had gone to the scene of offence after learning that there was quarrel near Geeta Dhaba. The jurisdiction of Khamgaon Police Station was not over the scene of offence. It is not clear as to whether any offence was registered on the report of P.W. Pradip, though at .0. number as jurisdiction of the said scene of offence with Police Station Jalamb and it was sent to Police Station Jalamb. In our opinion, the discrepancy in this behalf, cannot lead to the definite opinion that the report of P.W. 9 Pradip has been suppressed & it might have been inconsistent with the version of P.W. Dinkar and therefore, any adverse inference against the prosecution case is justified.

32. As stated above, the learned Counsel for the appellant has relied on the decision of the Apex Court reported in Thulia Kali Vs. The State of Tamil Nadu, wherein the aspect of the fact of delay in FIR on the prosecution case has been considered.

33. In our opinion in the present case there appears to be no delay in lodging the report, in the circumstances mentioned above. At the cost of repetition it may be stated that the incident as alleged was that about 8 appellants with arms like sword etc. had first assaulted Bhika and Dinkar and then on seeing Purushottam chased him and immediately thereafter, he was noticed dead with multiple injuries. The injuries on the person of Bhika were also serious and the said prosecution witness particularly Dinkar was in hurry rather in disturbed mental condition while attempting to take P.W. 6 Bhika to the hospital. It is not expected that at that very moment, he would try to go to the police station to lodge report. In fact, the police had come to the spot of incident, within an hour or two and therefore, the statement of P.W. 4 Dinkar was recorded, which would obviously be treated as FIR. The circumstances of the case do not warrant an inference that the said report was delayed so as to lend any benefit to the defence as such.

34. This takes us to consider the aspect of the death of Purushottam i.e. whether it is homicidal or not and seriousness of the injuries of P.W. 6 Bhika. It is not disputed that the deceased Purushottam died of multiple injuries as noticed by P.W. 12 Dr. Keshav Mendhe and which are referred in P.M. Report Ex.64. He has recorded injuries found on the person of the deceased which included the fracture of skull and incised wound. Opinion regarding cause of death is also

recorded by him, which is hemorrhagic shock due to brain injuries with destruction. -He has also deposed that the injuries, were fresh, and were caused within 12 hours. He was also asked to give an opinion as to whether the articles axe and sword i.e. article No. 1 and 2 could have caused the injuries sustained by Purushottam Thakre, he had stated that in his certificate, he has mentioned that these injuries might have been caused by this weapon.

35. Considering the nature of the injuries found on the person of the deceased Purushottam, it goes without saying that he had suffered homicidal death.

36. So far as the injuries on the person of Bhika are concerned, P.W. 12 Dr. Mendhe has stated that on examination of this Bhika at about 11.00 a.m. he had noticed one head injury. He has stated that he had issued certificate Ex.63 mentioning the nature of injuries found on his person showing fracture of occipital part of skull and referring him to General Hospital, Akola for expert opinion and further treatment. The relevant medical officers P.W. 7 Dr. Wankhede and P.W. 8 Dr. Sonone of Akola have been examined. P.W. 7 Dr. Wankhede has stated that said Bhika was referred to the hospital from Khamgaon General Hospital and she found head injury fractured skull. He was treated there. He had given history of assault. P.W. 8 Dr. Sonone stated that he was being treated for that injury.

37. This takes us to consider the evidence of eye witnesses, which is led by the prosecution. P.W. 9 Pradip is the alleged eye witness to the whole of the incident including assault on deceased Purushottam, for which he claimed that he had hidden himself near bush and from that site he saw the appellants beating with sword etc. the deceased. The evidence of P.W.4 Dinkar is regarding the incident, but as deceased Purushottam had tried to escape from the scene of offence, he is not witness to the assault on deceased Purushottam. But immediately after incident he had seen deceased Purushottam dead with injuries. P.W. 6 Bhika, is the witness to assault on him by the appellants. He is not witness to the assault on the deceased. Therefore, it appears that the witness P.W. 9 Pradip is the only witness who had seen actual assault on deceased Purushottam by the appellants of which he had given details and later on informed to P.W. 4 Dinkar.

38. At this stage, it is necessary to note that the learned trial Judge has observed that P.W. 9 Pradip, can not be believed totally. He has observed that he is of the opinion that he must not have seen as to what had happened to deceased Purushottam Thakre. In his opinion, there was clear improvement made by the I.O. while recording the statement of P.W. 9 Pradip Gaikwad as it was recorded quite late i.e. after about 13 to 14 days.

39. Learned Counsel has taken us through authorities on the subject Panda Nana Kare Vs. State of Maharashtra, , Govind Narain and another Vs. State of Rajasthan, , Shankarlal Vs. State of Rajasthan, 2003 ALL MR (CR) 590 SC Lallu Manjhi and Anr v. State of Jharkhand and 2004(3) CRIMES 157 SC Harjinder Singh " Bhola v. State of Punjab, to contend that as there was delay in recording

the statement of this P.W. 9 Pradip, the evidence of the sole eye witness who happened to be a chance witness, can not be relied upon for basing conviction of the appellants for the offence u/s 302 of the Indian Penal Code.

40. With this background, the learned Counsel for the appellant has contended that this is a case of sole eye witness who is related to the deceased and his credibility has been considered as shaky by the trial court itself & therefore, the prosecution case falls to ground.

41. Learned trial Judge has held that from the evidence of P.W. 9 Pradip, upto assault on Bhika Thakre can be believed and latter part of his deposition need not be considered. In these circumstances of the case, considering the totality of the evidence, on record, although there appears to be practically no eye witness to the actual assault on the deceased Purushottam, it is necessary to find out whether there are unerring circumstances proved on record which clearly lead to the finding of the guilt of the appellants for the offence u/s 302 of the Indian Penal Code for committing murder of deceased Purushottam.

42. The authorities cited by the learned Counsel for the appellants as regards basing the conviction on the sole testimony of an eye witness are not attracted. It is pertinent to note that while appreciating the evidence of the witnesses, every discrepancy cannot be treated as fatal to the prosecution and discrepancy which do not affect the prosecution case materially, does not create any infirmity. *Surender Singh Vs. State of Haryana*, .

43. Further, it is necessary to bear in mind that principle of "falsus in uno, falsus in omnibus" is not a rule of evidence and it is the duty of the court to disengage the truth from falsehood to shift the grain from chaff, vide 2006 (2) SCC Criminal 178 *Tiloknath v. State of U.P.*

44. Learned trial Judge while considering the evidence on record and appreciating the circumstances, which are proved, has found that the case of business rivalry including the suspicion of lodging criminal cases against each other was there, between some of the accused on one side and deceased Purushottam on the other. Their Dhabas were in front of each other with road in between. They had some criminal cases of which suspicion of lodging report was on the other side. He found that lodging of report of the earlier incident which took place in the night between 28.12.1994 and 29.12.1994 has been proved. As regards lodging report at the instance of deceased and the prosecution witnesses, same has been established. In fact, learned trial Judge after considering everything on record has opined that he definitely felt that investigating officer i.e. Police Station Officer of Jalamb Police Station could have avoided the said offence by taking prompt action at the proper time. In the night of 28th and 29th December, 1994, some of the accused persons had gone to Gita Dhaba with clear intention to kill Purushottam Thakre. As Purushottam Thakre could successfully flee away from the spot, no serious crime had taken place. He has observed that prompt preventive action could have saved life of Purushottam

Thakre. It appears that investigating officer had taken the incident which took place in the night of 28th and 29th December, 1993, very lightly. Serious weapons like sword were used in that incident. All these circumstances would clearly lead to a conclusion that the appellants had nurtured ill will and intention to kill said Purushottam.

45. The incident as alleged is, first all the appellants entered into Gita Dhaba. They first assaulted Dinkar P.W.4 and Bhika P.W. 6 and thereafter on seeing Purushottam they chased said Purushottam and latter on immediately thereafter, he was found dead in brutally injured condition. This means that accused appellants, had sufficient reasons for causing death of deceased Purushottam. The eye witness had seen them and in fact two of them were injured while coming to the Gita Dhaba and then chasing Purushottam, immediately thereafter who was found dead.

46. It is no doubt suggested by the defence that deceased Purushottam had also serious criminal cases against him, but fact remains that there is no material on record to suggest that at the time of incident, the other persons could have killed him. In fact, the injuries caused to P.W.4 Dinkar and P.W. 6 Bhika just prior to fatal injuries to Purushottam by the appellants, would clearly mean that they were the assailants and none others, who were responsible for the death of the deceased who was chased and found dead of injuries.

47. Learned trial Judge, although did not consider the evidence of P.W. 9 Pradip sufficient for basing the conviction, he has found circumstances on record conclusively to have proved the guilt of the appellants. In this regard, it is well settled that the normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. *Trimukh Maroti Kirkan Vs. State of Maharashtra*,

48. In this case, injuries to P.W. 4 Dinkar and P.W. 6 Bhika are sufficient to show that they were injured in the incident. Cumulative effect of the evidence of these witnesses is to the effect that the appellants had rushed towards Gita Dhaba with the weapons in their hands. P.W. 4 Dinkar who has first seen the appellants just before the killing of deceased Purushottam had seen appellants coming. He has stated that Dilip Gaikwad, Pradip Gaikwad his nephews were in Gita Dhaba at the relevant time. At that juncture from the hotel of Jaspalsingh Pala himself, Shrikrushna Raipure, Harchandsingh Pala, Baliram Pachande, Rajaram Puri, Balu Sable, Saamadhan Dhanorkar and Shrikrushna Pachpande came upto Gita Dhaba by crossing the road. He has further deposed as to what where the weapons in their hands, saying Jaspalsingh Pala accused No. 1 was having one Farshi axe with him. Shrikrushna Raipure accused no.6 was having one Farshi axe in his hand. Harchandsingh Pala accused No. 2 was having a sword in his hand. Rajaram Puri accused No. 7 was having a pipe in his hand, accused No. 8 Balu Sable was having an iron rod in his hand, accused No. 5 Samadhan Dhanorkar was having a

stick in his hand. Dnyandeo Raipure was having a pipe in his hand and was holding one container chilly powder. Baliram Pachpande accused No. 3 was having a sword in his hand.

49. Thereafter, he has stated that his brother Bhika received head injury due to attack by Shrikrushna Raipure and Baliram Panchpande. His evidence is corroborated by lodging of F.I.R. Ex.39 supported by medical evidence. Thus, it is clear that the unlawful assembly of the appellants was armed with the weapons, like sword, farshi-axe etc. and they had been to Geeta Dhaba. Earlier night's incident, had shown their intentions & object to kill deceased Purushottam. Said Purushottam was later on killed by following this incident of injuring P.W. 4 Dinkar and P.W. 6 Bhika. Therefore, it is a clear case of Sections 147, 148, 302, read with Section 149 of the Indian Penal Code and also 326 of the Indian Penal Code for injuries to P.W.6 Bhika.

50. The question now would be whether all of them can be held guilty of these offences or whether the plea of appellant No. 8 Samadhan of alibi can be accepted and whether he can be held to be not on the spot at the relevant time.

51. In his statement u/s 313 of Criminal Procedure Code, he has stated that he was on duty on the vehicle of D.W. 2 Vijay Narkhede. This defence witness in his cross examination has stated that he does not maintain any record of his vehicle, nor he had any record to show that this appellant was in his service. He has stated that Balu Sable had gone to mechanic, after routine cleaning of the vehicle from the mechanic's shop on that day of Apparao Balwantrao Deshmukh and along with said person had gone to Daryapur and thereafter he had returned on 31.12.1994. In absence of cogent and convincing corroborative evidence on record and because this Apparao Deshmukh is not examined nor said mechanic, it is difficult to accept the plea of alibi of appellant No. 8 for his name is referred in FIR Ex.39. It is not possible to hold that this P.W.4 Dinkar would have thought to implicate appellant No. 8 at that time falsely. As there is no reliable evidence as regard the presence of the appellant No. 8 Samadhan, elsewhere, so as to negative his presence at the time of offence, his this plea can not be accepted.

52. Apart from this, it does appear that this plea is not accepted by the trial court for good reasons. It is needless to mention that we are also unable to accept that appellant No. 8 has been able to show that he was on duty with D.W. 2 Narkhede as alleged, so as to negative his presence at the time of assault. We concur with the view of learned trial Judge in this behalf.

53. As regards other appellants, the only defence is of denial. We have already found that evidence of P.W. 4 Dinkar is corroborated by the other evidence on record including the medical evidence. The discrepancies in the evidence of P.W. 4, P.W. 6 Bhika, P.W. 9 Pradip and P.W. 10 Dilip are not such so as to make us to disbelieve the substratum and core of the prosecution case and even if the evidence of P.W.9 Pradip is not considered, for basing conviction, being sole eye witness, there are circumstances on record which are proved; which unerringly

point out the guilt of the appellants for the offence of murder in respect of deceased Purushottam. Therefore, the appellants including appellant No. 8 are held guilty accordingly.

54. Turning to the question of offence in respect of P.W. 6 Bhika, i.e. causing grievous hurt to him. Learned trial Judge with the aid of Section 149 of the Indian Penal Code, has convicted the appellants for his injuries, for the offence u/s 326 of the Indian Penal Code. He has however, not awarded any punishment to them, in view of the punishment, awarded to them for offence punishable u/s 302 and relevant sections of the Indian Penal Code.

55. Here is the case where P.W. 6 Bhika had suffered skull fracture in the assault by the appellants. Evidence of P.W. 4 Dinkar that all these appellants had rushed in the Dhaba of the deceased with various weapons as pointed out above and he was the first victim though all the appellants have not assaulted him together or one by one. Some of these appellants inflicted those injuries. The seriousness of the injuries on the head of the said P.W. 6 Bhika can not be disputed. In fact Ex.63 clearly show that the said injury was serious and there was fracture of occipital part of skull and he was referred to General Hospital, Akola. Only because of luck, he was saved, for timely treatment. Appellants armed unlawful assembly had common object. In these circumstances, although, we are of the opinion that the offence u/s 307 of the Indian Penal Code is possibly made out, we are not inclined to interfere with the order of the lower court holding the appellants guilty of the offence punishable u/s 326 read with other relevant sections, as the State has not preferred any appeal. Suffice it to say that although, the intention of the unlawful assembly of the appellants possessing deadly arms in the hands of the members, may not be to kill said Bhika, the assault by itself will show that relevant assailants who were members of this armed unlawful assembly, had intention to wipe him out which appears obvious from the nature of the injuries and the place of the body on which assault was made. The objects and the intentions, have to be inferred from the consequence and the result of the act, unless otherwise established. In this view of the matter, therefore, as there is no State appeal, we are confirming the order of the learned trial Judge in this respect also.

56. As a result of the above finding and discussion, the appeal has to be dismissed. The same is dismissed.

57. Appellants to surrender their bail within a period of 4 weeks to undergo the balance sentence.