

(2016) 07 BOM CK 0083
In the Bombay High Court
Case No : Criminal Appeal No. 59 of 2007

Mohan Ganpati Sathe

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-07-2016

Acts Referred:

Arms Act, 1959 — Section 30
Penal Code, 1860 (IPC) — Section 300, 307

Citation : (2016) 3 AIRBomRCri 290 : (2016) ALLMRCri 3972 : (2016) 5 MhLJCri 182

Hon'ble Judges : Smt. V.K. Tahilramani and Smt. Anuja Prabhudessai, JJ.

Bench : Division Bench

Advocate : Mr. Rajiv Patil, Senior Advocate with Ms. Priyanka S. Thakur i/b. Mr. Sanjeev P. Kadam with Mr. R.P. Hake Patil, Advocates, for the Appellant in Criminal Appeal No. 59 of 2007; Mr. Sanjeev P. Kadam, with Mr. R.P. Hake Patil, Advocates, for the Appellants

Final Decision : Allowed

Judgement

Smt. Anuja Prabhudessai, J.—These appeals arise from judgment dated 29.12.2006 passed by the learned Additional Sessions Judge, Satara in Sessions Case No.53 of 1998. The appellant in Criminal Appeal No.59 of 2007 was the accused No.1 whereas the appellants in Criminal Appeal No.110 of 2007 were the accused Nos.3 to 8 in Sessions Case No.53 of 1998 and shall be hereinafter referred to as accused as arrayed before the trial court.

2. The aforesaid accused along with one Shivprasad Sathe (accused No.2) were tried for offences punishable under sections 147, 148 and 326 r/w. 149 of the IPC. The accused No.1 was also charged for offence punishable under sections 302 and 307 of the IPC and section 30 of the Indian Arms Act.

3. By the impugned judgment the learned Additional Sessions Judge has convicted and sentenced the accused as under:

(i) accused No.1 guilty of offence under sections 302 and 307 of the IPC and section 30 of the Indian Arms Act. The accused No. 1 has been sentenced to undergo rigorous imprisonment for life and fine of Rs. 2000/- i/d. simple imprisonment for three months for the offence punishable under section 302 of the IPC, RI for 7 years and fine of Rs. 2000/- i/d. SI for three months for offence punishable under section 307 of the IPC and RI for six months and fine of Rs. 1000/- i/d. SI for two months for offence punishable under section 30 of the Indian Arms Act.

(ii) The accused Nos. 1 and 3 to 8 have been held guilty of offence punishable under section 325 r/w. 34 of the IPC and have been sentenced to suffer RI for 5 years and fine of Rs. 1000 each i/d. to undergo SI for 1 month.

(iii) The accused No.2 has been acquitted in respect of all the charges.

4. Being aggrieved by the conviction and sentence the accused Nos. 1 and 3 to 8 have preferred the aforesaid appeals. The accused Nos. 6 and 8 died during the pendency of the appeal. Consequently by order dated 1.2.2016, the appeal against these two accused is held to be abated.

5. The prosecution case in short is as under :

The accused Nos. 1 and 3 to 6 are related to each other and accused No. 8 is the uncle of accused No. 7. The deceased Manik was the son of Bajrang and the brother of the complainant PW6 and PW11. PW8 is their paternal uncle and PW10 is a friend of PW6. The accused as well as the deceased Manik, PW6 Sambhaji Yadav and the eye witnesses viz. PW8 Shankar Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav are the residents of Durgalwadi, Taluka Koregaon, Dist.Satara. According to the prosecution on 17.11.1997, the accused Nos.3, 4 and 5 assaulted PW10 Mahendra for having teased the sister of accused no. 3 Rajendra. PW10 told the accused that he was not involved in any such incident. He also apologised to the accused for preconceived misunderstanding, if any. PW10 narrated this incident to his friend PW6 Sambhaji on the same day. PW6 told PW10 to forget the incident since he had already apologised.

6. On 19.11.1997 at about 8.00 p.m. PW6 and PW10 went to a Pan shop and thereafter sat at Janai Devi Temple till about 9.00 p.m. While they were returning home and had reached near the house of Hanmant Desai, they heard some people saying "hana mara" (thrash/assault). They turned back and saw accused Nos. 3 to 8 advancing towards them armed with gupti, cycle chain, sticks, etc. The accused Nos. 3 to 8 assaulted them and took them to the rear side of the house of Hanmant Desai. The accused also assaulted Bajrang, Shankar (PW8), Pandharinath (PW11), and Manik (the deceased), who had come to the place of the incident on hearing the shouts of PW6 and PW10.

7. In the meantime, the accused No. 1 came near the place of the incident with a gun and that he fired a gun shot at Manik. Said Manik sustained injuries and fell on the ground. The accused No. 1 fired another gunshot in the direction of

Pandharinath and thereby attempted to cause his death. The accused thereafter left the place of the incident. PW6 Sambhaji and PW8 Shankar took the injured to the hospital.

8. PW13 Ishwar Sutar, A.P.I., who was on duty at Rahamatpur police station, received a phone call from the police patil of Durgalwadi that some people were involved in an incident of assault and requested him to send the police force. PW13 made an entry in the station diary and proceeded to Durgalwadi along with the police staff. On reaching the place of incident, he learnt that there was an incident of firing and that the injured persons were already shifted to the Civil Hospital, Satara. He posted two constables to guard the scene of offence and proceeded to the civil hospital, Satara. He learnt that one of the injured persons Manik Yadav was declared dead. He recorded the FIR at Exh.58 as narrated by PW6 Sambhaji Yadav. Pursuant to the said FIR PW13 Sutar, A.P.I. registered Crime No. 55 of 1997 for offences punishable under sections 143, 147, 148, 302, 307, 326, r/w. 149 of the IPC and section 30 of the Indian Arms Act.

9. PW13 Sutar, A.P.I. conducted the inquest panchanama at Exh.45 over the body of Manik and referred the body for post mortem. PW9, Mr. Suresh Shinde, Medical Officer at the Civil Hospital, Satara, conducted post mortem on the body of Manik Yadav and prepared the autopsy report (Exh.69). Manik yadav had following external and internal injuries:

External injuries :

(1) Penetrating wound, 6 in Nos. over epigastric region in 3 horizontal lines. The penetrating wounds were 3 entry wounds on top, 2 in the middle and one at the bottom. Each penetrating wound was circular in shape and measuring 1 cm in diameter. Its edges were ragged and burn out. Directions were upwards and posteriorly towards right side.

(2) Wounds of exit on back :5 in numbers, elliptical, present on the back over 10th and 11th rib on right side lateral aspect, blood oozing present, hard pellet held below the skin in the above area, each wound was measuring 1 cm x ? cm. Though penetrating wounds of entry were 6 in numbers wounds of exit were 5 in numbers only, because one pellet was found in the body below the skin.

Internal injury :

(i)Thorax

(a) Walls, ribs, cartilages, injuries as mentioned in column No.17 of the P.M. report.

(b) Plura:Plural cavities contains blood around the litre.

(c) Heart with weightlet chamber of heart empty.

(ii) Abdomen:

(a)Peritoneum-Peritoneum contain blood around 2 litre.

(b) Liver-Place both lobes of liver ragged and torn in pieces.

(c) Kidney-Right kidney ruptured at the upper portion and middle part. He has opined that the said injuries were ante mortem and cause of death was due to shock and hemorrhage as a result of rupture of liver and right kidney due to firearm injury.

10. PW6 Sambhaji Yadav, PW8 Shankar Yadav and PW10 Mahendra Gadekar were treated in the civil hospital at Satara whereas PW11 Pandharinath was subsequently referred to Sasoon Hospital, Pune for further treatment. PW9 Dr. Suresh Shinde had conducted medico legal examination of the injured viz. Bajrang, PW6 Sambhaji, PW8 Shankar, PW10 Mahendra, PW11 Pandharinath and issued injury certificates at Exhs.64 to 68. The injured were found to have following injuries :

Injuries sustained by Bajrang:

(1) Incised wound over occipital region, oblique, bone deep measuring 10 x 3 x 2 cms. with a fracture of bone underneath. The said injury was caused by sharp object within 6 hours.

Injuries sustained by PW6 Sambhaji :

(1) CLW over right index finger, lateral aspect, 2 x 2 cms.

(2) Contusion over right temporal region 5 cm in diameter.

(3) contusion over frontal, dorsals aspect, 3 cm. in diameter.

(4) CLW over left upper arm, medial aspect, 2 x 1 x ? cm.

All the injuries were caused by hard and blunt object within 6 hours.

Injuries sustained by PW8 Shankar:

(1) Incised wound on right side of back at the level of 11th rib measuring 5 x 2 cm, muscle deep and bleeding.

(2) Contusion on right shoulder 2 x 2 cm. These injuries were caused by sharp object within 6 hours.

Injuries sustained by Mahendra PW10:

(i) Interrupted linear abrasion over left forearm 10 cm in length.

(ii) contusion over right temporal region. The injuries were caused by hard and blunt object within 24 hours.

Injuries sustained by Pandharinath PW11:

(1) CLW/clean incised wound over lateral aspect of chest 7 x 5 x 2 cms. lung parenchyma deep

(2) Contused lacerated wound over left forearm.

(3) Contused lacerated wound over forehead above left eyebrow 2 x 1 cm scalp deep.

11. On 20.11.1997 PW13 Sutar, A.P.I. proceeded to the place of the incident and prepared the scene of offence panchanama at Exh.52 in presence of PW3 Murlidhar Kale. The place of the incident was behind the house of Hanmant Desai. There were bloodstains at the place of the incident. Some wooden sticks, pair of slippers, gupti, cycle chain, empty cartridge etc. were lying at the place of the incident. All the incriminating material found at the place of the incident was seized under the said panchanama.

12. PW13 Ishwar Sutar, A.P.I. arrested the accused on the same date and seized their clothes under panchanama at Exhs.96 to 100. He also seized the gun and cartridges handed over by the accused no. 1 under panchanam at Exh.49 drawn in presence of PW1 Mansingh Pawar. The statements of the witnesses came to be recorded and all the incriminating material was forwarded to CFSL, Nagpur for chemical analysis. The said articles were examined and analysed by the chemical analyser PW12 Cahndrashekhar Kshatriya. He submitted the report at Exh.90 stating that the double barrel shot gun which was received in sealed condition from Rahamatpur police station was in working condition and was used for firing prior to the receipt in laboratory. He had further opined that the empties (Exhs.3 and 4) were fired from 12 bore shotgun (Exh.1).

13. Upon completing the investigation PW13 submitted the charge sheet against the aforesaid accused. The case being sessions triable, the same was committed to the court of sessions at Satara. Charge was framed and explained to the accused. The accused pleaded not guilty and claimed to be tried. The prosecution examined 13 witnesses, including the injured witnesses viz. PW6 Sambhaji Yadav, PW 8 Shankar Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav. The statements of the accused came to be recorded under section 313 Cr.P.C. The accused filed statement under section 233(2) of Cr.P.C. and examined 5 defence witnesses.

14. The defence of the accused is that Mahendra PW10 was involved in eve teasing the sister of the accused No. 3 Rajendra Chavan. On 17.11.1997, PW10 sent a message to the sister of Accused No. 3 Rajendra Chavan, asking her to come to the house of Vijay. She informed her brother and parents about the same. The accused No.3 and his mother brought this fact to the notice of mother of PW10. Aggrieved by this, on 18.11.1997 Mahendra Gadekar (PW10) and his friend Prashant Jawal quarreled with the accused No. 3 Rajendra Chavan and accused No. 5 Sambhaji Sathe.

15. The accused have further claimed that on 19.11.1997 PW10 Mahendra, PW6 Sambhaji Yadav and his father, uncle and brothers viz. Bajrang, Shankar, Pandharinath and Manik followed accused No. 3 Rajendra and accused No.5 Sambhaji till the house of Hanmant Desai and assaulted them with deadly weapons such as axe, cycle chain, gupti, sticks, etc. It is stated that on hearing

their cries the accused No.1 went to the place of the incident with the gun. It is further stated that PW11 Pandharinath and the other injured witnesses assaulted the accused No.1. The accused no.1 has denied having fired the gun at Manik. He has claimed that he was assaulted by PW8 Shankar and PW11 Pandharinath, as a result he fell down and that the gun fired accidentally while PW8 Shankar tried to snatch the gun from his hand. The accused No.1 had also lodged a cross complaint against the injured witnesses, pursuant to which crime No.54 of 1997 was registered.

16. Upon considering the evidence on record, the learned Sessions Judge convicted and sentenced the accused as stated above. It may be mentioned here that by judgment and order dated 29.12.2006 passed in Sessions Case No.66 of 2002 arising from the cross complaint filed by accused No. 1, the learned Judge has acquitted all the injured persons from offences punishable under sections 143, 147, 148, 149, 323, 324, 504 and 506. The accused have challenged the said order in appeal No. 161 of 2008.

17. Mr. Patil, the learned senior counsel for the Appellant has submitted that the prosecution has suppressed the fact that DW1 PSI Maneri attached to Satara police station had already recorded the statement of PW6 prior to the registration of the FIR at Exh.58. He therefore, claims that the report at Exh.58 cannot be construed as FIR under section 154 of Cr.P.C. and consequently the case could not have been investigated on the basis of the said statement at Exh.58.

18. The learned senior counsel has submitted that the evidence of the witnesses suffers from material contradictions and omissions. The evidence of the witnesses is not consistent and hence, cannot be relied upon. Mr. Patil, the learned senior counsel has submitted that accused no. 1 had gone to the place of the incident on hearing cries of the other accused persons who were being assaulted by the prosecution witnesses. He has submitted that the accused No. 1 did not have any intention of causing death of Manik Yadav or firing gunshot at any other prosecution witnesses. He has submitted that the said firearm was accidentally discharged when the prosecution witness had tried to snatch the gun from the hands of accused no. 1. Mr. Patil, the learned senior counsel has further submitted that the evidence of PW9 also indicates that the track of the pellets was in upward direction, which fact proves that the injury could have been caused due to an accidental mishap. He has submitted that the medical evidence as well as the evidence of ballistic expert supports the defence of accidental death.

19. The learned senior counsel for the appellants has submitted that the prosecution has not explained the injuries sustained by the accused. He has further submitted that the prosecution has also not proved that the accused were aggressors. He has submitted that prosecution witnesses have suppressed the material facts and having failed to explain the genesis of the incident, the prosecution story cannot be believed.

20. Mr. Dedia, the learned APP has submitted that the case of the prosecution rests on the testimony of the eyewitnesses, who were also injured in the said incident. He has submitted that these injured witnesses had no reason to falsely implicate the accused and to shield the real culprit. He has further stated that the accused No.1 had gone to the place of the incident armed with a loaded gun and that the testimony of the injured witnesses proves beyond reasonable doubt that he had fired two gun shots. He has submitted that the story put forth by the accused No.1 that it was a case of accidental firing is negated by the evidence of the eye witnesses. The learned APP further submitted that the testimony of the injured witnesses cannot be disbelieved on the basis of some minor omissions or discrepancies. He has further submitted that the injuries sustained by the accused were minor and that non explanation of such injuries is also not a ground to outright reject the evidence of the prosecution witnesses. He has relied upon the decision of the Apex Court in *Mrs. Shakila Khader And Ors. v. Nausheer Cama And Ors.* 1975 4 SCC 122 and *Sucha Singh and Anr. v. State of Punjab*, (2003) 7 SCC 643.

21. We have perused the records and considered the submissions advanced by the learned counsel for the Appellants and the learned APP for the Respondent-State.

22. At the outset, it may be mentioned that the present case was registered on the basis of the FIR at Exh.58, lodged by PW6 Sambhaji. Relying upon the testimony of DW1 API, Maneri, the learned senior counsel Shri Patil has submitted that the report at Exh. 58 was not first in point of time and hence cannot be construed as FIR. It is pertinent to note that the incident had occurred on the night of 19.11.1997. The testimony of PW13 reveals that he had received information about the said incident at about 9.30 p.m. and thereafter he had proceeded to the place of the incident. Upon being informed that the injured were shifted to the hospital, he proceeded to the hospital and recorded the FIR at Exh.58 lodged by PW6 Sambhaji. PW13 thereafter returned to the police station and registered the crime No.55 of 1997 on 20.11.1997 at about 2.00 a.m. PW13 Sutar, A.P.I. has admitted in his cross examination that API Maneri had recorded the statement of PW6 Sambhaji Yadav and other witnesses. He was however, unable to state whether the said statements were recorded before he had reached the hospital. He has stated that he had received the said statements subsequently. He has denied the suggestion that he was aware that API Maneri had already recorded the statement of the complainant before he had visited the hospital.

23. The evidence of DW1 API Maneri reveals that on 19.11.1997 he was on duty at Sadar Bazar police chowki, Satara. He had received information from PSO of Wakade police station, Satara, that one person had died in a firing incident within the jurisdiction of Rahamatpur police station. He was further informed that the other injured persons were admitted in the civil hospital at Satara. The testimony of this witness reveals that he had visited the civil hospital and recorded the

statement of PW6 Sambhaji and the other injured persons and had requested the executive magistrate to record the dying declaration of the injured persons.

24. It is pertinent to note that DW1 Maneri had recorded the statement of PW6 Sambhaji on 20.11.1997. The said statement does not bear any endorsement indicating the time at which it was recorded. DW1 was unable to state the time at which he had recorded the said statement. He has admitted in his cross examination that there is no evidence to show that the statements recorded by him were prior in point of time. He has admitted that he had not registered the crime/FIR on the basis of the statement of PW6 Sambhaji Yadav. He has admitted that there was no hurdle to register the crime by zero number and to forward the same to Rahamatpur police station. He has admitted that if the crime is registered in respect of any offence then the other police station cannot register the crime under zero number.

25. It is pertinent to note that the incident had taken place within the jurisdiction of Rahamatpur police station. At the relevant time PW13 PSI Sutar was on duty at Rahamatpur police station. On being informed about the incident he had visited the hospital and recorded the statement of PW6 Sambhaji Yadav pursuant to the said FIR (Exh.58) he registered the crime No.55 of 1997. Though DW1, who was attached to Satara City Police Station, had also recorded the statement of PW6 Sambhaji on the same day, there is no evidence on record to prove that the said statement was prior in point of time. Furthermore, DW1 had neither forwarded the statement to Rahamatpur police station nor registered any crime on the basis of the statement recorded by him. Under the circumstances, the said statement cannot be construed as FIR under section 154 of the IPC. Consequently, there was no legal hurdle to investigate the case on the basis of the FIR at Exh.58.

26. Now coming to the charges levelled against the accused no.1, it is the case of the prosecution that on 19.11.1997 at about 9 to 9.30 pm, while accused no.3 to 8 were assaulting PW10 and PW6 and his family members, the accused no.1 came to the place of the incident armed with a gun and fired a gun shot at Manik and another gunshot in the direction of PW11 Pandarinath and thereby committed murder of Manik and attempted to commit murder of Pandarinath. It is pertinent to note that the accused no.1 has not disputed having gone to the place of the incident with a loaded gun. The accused have also not disputed the fact that Manik died as a result of a single gunshot injury in an incident of 19.11.1997. The only controversy is whether the accused No. 1 had fired the shotgun at the deceased Manik or whether the gun went off accidentally while PW6 and PW8 tried to snatch the gun from the accused no.1. Thus, in the light of these facts and the specific defence raised by the accused, the question that falls for consideration is whether the death of Manik was homicidal or accidental.

27. The prosecution in support of its case has examined the injured witnesses viz. PW6 Sambhaji Yadav, PW8 Shankar Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav whose presence at the place of the incident is not

seriously disputed. The testimony of PW6 Sambhaji Yadav reveals that a couple of days prior to the incident his friend PW10 Mahendra Gadekar had informed him that the accused had assaulted him for eve teasing the sister of the accused no.3. Pw10 had denied having indulged in such incident and apologized to the accused for preconceived misunderstanding if any. PW6 had told PW10 to forget the incident since he had already apologised.

28. The sequence of events as disclosed by PW6 and PW10 is that on 19.11.1997 at about 8.00 p.m. they went to a pan shop and thereafter sat at Janai Devi Temple till about 9.00 p.m. While they were returning home, they heard some persons shouting "Hana mara sodu naka" (thrash/assault them, do not leave them). When they turned around, they saw accused Nos.3 to 8 armed with bicycle chain, gupti, sticks, etc. The accused Nos. 3 to 8 rushed towards them and assaulted them and took them towards the rear side of the house of Hanmant Desai. They have deposed that the accused No.5 Sambhajiwas armed with a gupti, Accused No.3 Rajendra had a cycle chain, and that the other accused were armed with sticks. The accused assaulted them as well as PW8 Shankar Yadav, PW10 Mahendra Gadekar, PW11 Pandharinath Yadav, Manik and Bajrang, who had arrived at the spot on hearing their cries.

29. PW6 Sambhaji Yadav and PW10 Mahendra Gadekar have deposed that accused No.3 Rajendra Chavan had caught hold of the neck of Manik Yadav. The accused No.1, who had come near the place of the incident with a gun, told the accused No.3 Rajendra Chavan to leave Manik Yadav and stated that he would deal with him. Rajendra Chavan pushed Manik Yadav and immediately thereafter, the accused No.1 fired a gun shot at Manik. As a result, said Manik sustained injuries and fell on the ground. Accused No.1 thereafter fired another gun shot in the direction of PW11 Pandharinath. Thereupon PW8 Shankar Yadav caught hold of the gun to prevent the accused No.1 from firing again. Soon thereafter the accused left the place of the incident. PW6 took the injured to the hospital and lodged the FIR at Ex.58.

30. PW6 Sambhaji Yadav and PW10 Mahendra Gadekar have denied the suggestion that on 19.11.1997 at about 9 to 9.15 p.m. while the accused Nos.3 and 5 were proceeding towards the field of accused No.1, they and the family members of PW6 Sambhaji Yadav followed and assaulted them with weapons like axe, gupti, cycle chain, sticks, etc. These witnesses have denied that the accused No.1 had come to the place of the incident on hearing the commotion and that PW6 and PW8 had caught hold of the accused No.1 and tried to snatch the gun from his hands. PW6 Sambhaji Yadav and PW10 Mahendra Gadekar have also denied the suggestion that Pandharinath had inflicted a blow of gupti on the hands of accused No.1 and that Bajrang had given a blow of the handle of the axe on his back. PW6 Sambhaji Yadav and PW10 Mahendra Gadekar have denied the suggestion that the accused No.1 had not fired a gun shot at Manik or Pandharinath. They have denied that two gunshots were accidentally fired when PW6 and Shankar had tried to snatch the gun from the hands of accused No.1.

31. PW8 Shankar Yadav is the uncle of PW6 Sambhaji Yadav. He has deposed that on the night of 19.11.1997, while he was at his residence, he heard some commotion towards the house of Hanmant Desai. He went to the place of the incident and saw the accused Nos.3 to 8 assaulting PW6 Sambhaji and PW10 Mahendra. As he intervened and tried to prevent the accused from assaulting them, someone fired a gun shot from northern side of house of Hanmant Desai, The bullet hit Manik and as a result thereof he sustained injuries and fell down. As he was going towards house of Hanmant Desai, there was another gunshot. He saw the accused No.1 standing with a gun near the house of Hanmant Desai. PW8 Shankar Yadav held the gun, which was in the hands of accused No.1, at which time the accused no.1 called the other accused. He has stated that accused No.5 Sambhaji gave a blow of gupti at his back. He has stated that some of the accused also assaulted him with sticks. He has deposed that he had requested the accused No.1 not to fire again. He has stated that thereafter all the accused went away from the place of the incident.

32. PW8 Shankar Yadav has admitted in his cross-examination that the accused no.1 had lodged a complaint against him and others in respect of the same incident. He has denied the suggestion that he and his family members had assaulted the accused. He has denied that accused No.1 had come to the place of the incident on hearing shouts of Rajendra Chavan (accused No.3). He has denied the suggestion that the accused No.1 had not fired a gun shot and that the gun had accidentally discharged while he was trying to snatch the gun from the hands of the accused no.1. He has stated that he had tried to snatch the gun from the hands of accused No.1 only after the accused No.1 had fired two gunshots.

33. PW11 Pandharinath Yadav is the brother of PW6 Sambhaji Yadav. He has deposed that on the relevant day he had gone to a fair price shop of Malan Hajare to purchase kerosene. He heard some clamor towards the house of Hanmant Desai. He therefore proceeded to the place of the incident. He saw the accused Nos.3 to 8 assaulting PW6 Sambhaji Yadav and PW10 Mahendra Gadekar with sticks, cycle chain and gupti. He has deposed that Rajendra Chavan (accused No.3) had a bicycle chain. Sambhaji Sathe (accused No.5) had a gupti and the other accused were armed with sticks. He intervened and tried to prevent the accused from assaulting PW6 Sambhaji Yadav and PW10 Mahendra Gadekar. In the meanwhile, his other family members reached the place of the incident. He has stated that Rajendra Chavan (accused No.3) had caught hold of Manik and was assaulting him. Mohan Sathe (accused No.1) who was standing a little distance away from the spot of the incident, told Rajendra Chavan (accused No.3) to leave Manik and said that he would deal with him. Rajendra (accused No.3) pushed Manik and went aside. Thereafter the accused no.1 fired a gun shot at Manik Yadav. The bullet hit Manik, he sustained injuries and fell down.

34. PW11 Pandharinath has deposed that the accused No.5 Sambhaji Sathe had assaulted Bajrang with a gupti. He has stated that in the meanwhile accused

No.2 flashed the torch at him. Apprehending that the accused No.1 would fire at him he moved aside and thus missed the second gun shot fired by accused no.1. He has deposed that accused No.5 Sambhaji Sathe gave a blow of gupti on his forehead and left forearm and left side of the chest, as a result of which he sustained bleeding injury and was unconscious. He has stated that he regained consciousness on the next day in the hospital.

35. PW11 Pandharinath Yadav has admitted in the cross examination that the accused has also filed a complaint against him and his family members in respect of the incident on 19.11.1997. He has denied the suggestion that the accused had not assaulted PW6 Sambhaji Yadav and PW10 Mahendra Gadekar. He has also denied the suggestion that he along with the other family members had assaulted accused No.3. He has denied the suggestion that on the 19.11.1997 at about 9.00 p.m. when the accused Nos.2 and 3 were proceeding towards the house of accused No.1, he along with his brothers and PW6 and PW10 followed them and assaulted them by gupti, axe, cycle chain, etc. He has denied the suggestion that the accused no.1 had come to the place of the incident on hearing the clamor and had questioned them as to why they were assaulting the accused Nos.3 to 5. He has further denied the suggestion that he and his family members had surrounded the accused no.1 and that Shankar had held the gun, which was in the hands of accused No.1. He has denied the suggestion that he had assaulted accused No.1 with a gupti and that Bajrang had assaulted him by giving a blow by the handle of axe on his back. He has also denied the suggestion that there was an accidental gunshot while Sambhaji and Shankar had tried to snatch the gun from the hands of accused No.1. He had denied that the accused no.1 had not fired two gunshots.

36. The testimony of PW6 Sambhaji Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav indicates that the accused no.1 had come near the place of the incident and told accused No.3 Rajendra to leave Manik and further stated that he would deal with him and thereafter fired a gunshot at Manik from a distance of about 35 ft to 40 ft. This evidence is not corroborated by PW8 Shankar Yadav. His evidence does not indicate that he had heard the accused no.1 telling the accused No.3 to leave Manik (the deceased) and saying that he would deal with him or that he had seen the accused No.1 firing at Manik. On the contrary PW8 Shankar Yadav has stated that after hearing the gunshot he went towards the house of Hanmant Desai and saw the accused no.1 standing with a gun in his hand. The testimony of this witness indicates that the accused No.1 had fired the gun while standing near the house of Hanmant Desai which is at a distance of about 35 ft to 40 ft from the place of the incident. The testimony of this witness is thus not consistent with the evidence of PW6 Sambhaji Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav.

37. It is also pertinent to note that PW6 Sambhaji Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav had not stated in their statement under section 161 Crpc that before firing at Manik, the accused no.1 had told the

accused No.3 Rajendra Chavan to leave Manik and that he would deal with him. This omission and improvement has been brought on record and proved through the investigating officer. It is true that the witnesses cannot be branded as wholly unreliable and their evidence cannot be jettisoned in its entirety because of minor omissions or variations. Nevertheless, in the instant case, the above referred omission, which has been brought on record, cannot be dubbed as a marginal variation, omission or improvement. This is a material omission and improvement, which raises serious doubts about the truthfulness of the prosecution witnesses and negates the prosecution version that the accused no.1 had aimed the gun at Manik and fired the gunshot with a clear intention of causing his death.

38. It is also pertinent to note that the medical evidence reveals that Manik had sustained penetrating wound over epigastric region. The evidence of PW9 Dr. Suresh Shinde vis-a-vis the post mortem report indicates that the pellets had travelled in upward direction posteriorly towards the right side with exit wounds on the back over 10th and 11th rib. PW9 Dr. Suresh Shinde has opined that the location of the entry/penetrating and exit wound indicates that the gun was held below the penetrating/entry wound on the front side with the muzzle in upward direction.

39. The location and the nature of the injury as well as the upward track of pellets, as deposed by PW9 Dr. Suresh Shinde, rules out the possibility of the accused firing the gun in standing position but indicates that the gun was fired in sitting posture or that the victim was at an elevated position. The evidence of PW6 Sambhaji Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav does not indicate that the accused no.1 had fired the gunshot in sitting positing or from ground level or that the deceased was at an elevated level. Had the accused no. 1 fired the gun in standing position or from the same level, the track of the injury would not have been in upward direction. The prosecution has failed to explain this material discrepancy. As stated earlier, the defence of the accused No.1 is that after he was assaulted by PW8 Shankar and PW11 Pandharinath, he fell down with the gun in his hand and that the gun got accidentally discharged while PW8 Shankar tried to snatch the gun from his hands. The nature and location of the injury, particularly, the upward track of the pellet supports the defence.

40. Furthermore PW9 Dr. Suresh Shinde has admitted in the cross examination that the injuries sustained by Manik could be caused due to accidental firing of a gunshot. The medical evidence is therefore not only contrary to ocular evidence but probablises the defence. It is well settled that when the evidence of the prosecution witnesses is totally inconsistent with the medical evidence, it amounts to a fundamental defect in the prosecution case and unless it is reasonably explained may discredit the entire case of the prosecution.

41. It is also pertinent to note that the double barrel gun (Art.29), two empty cartridges (Arts.5 and 13) and six live cartridges were sent to the ballistic expert

PW12. The testimony of this witness indicates that residue of fire ammunition nitrate was detected in both the barrel washings of said shotgun thereby indicating that the said shotgun was used for firing prior to its receipt in the laboratory. He has further deposed that the characteristics features of the said empty cartridges tallied with two empty cartridges, which were test fired by him. He has deposed that the empties at Article 5 and 13 were fired from both the barrels of the shotgun. The fact that the gunshots were fired from the said gun is not in dispute. The question is whether it was fired intentionally or accidentally. In this regard, the evidence of PW12 Chandrashekhar Kshatriya does not indicate that he had checked whether the safety mechanism of the said gun was in working condition. He has also admitted in his cross-examination that the said gun could have been accidentally discharged in the course of the scuffle. PW12 Chandrashekhar Kshatriya, the expert witness therefore does not rule out the possibility of the accidental firing of the gun.

42. The evidence of PW9 Dr. Suresh Shinde indicates that he had examined the accused No.1 on 20.11.1997. The testimony of PW9 Dr. Suresh Shinde visàvis the medical certificate at Ex.73 reveals that the accused No.1 Mohan Sathe had sustained following injuries:

1) Contused lacerated wound over left and ring finger middle phalanx on ventral aspect 2 x 1 x 1 c.m. Bone deep, bone pieces seen.

2) Abrasion over right index finger proximal inter pharyngeal traverse 1? c.m. x ? cm X-ray No. 9247/48 dated 21/11/1997 was suggestive of fracture of left middle pharynx of left ring finger. He has opined that the age of said injuries was within 24 hours and cause of injuries was hard and blunt object.

43. The medical evidence therefore proves that the accused had sustained grievous injuries in the same incident. The prosecution witnesses have denied having assaulted or inflicted the said injuries on the accused no.1. The prosecution has failed to explain these injuries. In Takhaji Hiraji v. Thakore Kubersing Chamansing & ors. (2001) 6 SCC 145 the Apex Court has held that :

"In Rajendra Singh & Ors. v. State of Bihar, (2000) 4 SCC 298, Ram Sunder Yadav & Ors. v. State of Bihar, (1998) 7 SCC 365 and Vijayee Singh & Ors. v. State of U.P., (1990) 3 SCC 190, all 3 Judges Bench decisions, the view taken consistently is that it cannot be held as a matter of law or invariably a rule that whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved. Before non-explanation of the injuries on the person of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions : (i) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question. Non-explanation of injuries assumes greater significance when the evidence consists of interested or partisan witnesses or where the

defence gives a version which competes in probability with that of the prosecution. Where the evidence is clear cogent and credit worthy and where the Court can distinguish the truth from falsehood the mere fact that the injuries on the side of the accused persons are not explained by the prosecution cannot by itself be a sole basis to reject the testimony of the prosecution witnesses and consequently the whole of the prosecution case."

44. Reverting to the facts of the present case, factum of the accused no.1 having sustained a grievous injury at the time of the occurrence of the incident, is well established. The fact that the accused no.1 had sustained injuries on fingers of both hands and failure to explain these injuries lends support to the defence that the incident had occurred in the manner stated by the accused and thus probabalises the defence that the gun had discharged in the course of the scuffle.

45. It is also pertinent to note that the prosecution witness PW8 Shankar Yadav is the uncle and PW6 Sambhaji Yadav, and PW11 Pandharinath Yadav are the brothers of the deceased, whereas PW10 Mahendra Gadekar is a close friend of PW6 Sambhaji Yadav. It is true that the evidence of these witnesses cannot be discarded outright on the ground that they are interested witnesses. Nonetheless, having carefully scrutinised and analysed the evidence of these witnesses, we are of the considered view that their evidence suffers from material omissions and variations and is far from being credible. The evidence on record also indicates that there was previous acrimony between both groups over the incident of alleged eve teasing. In such a fact situation, suppression of facts as well as the genesis of the incident assumes greater significance and renders the defence plausible. In our view all the above factors, which cast a genuine doubt on prosecution version, justify extending benefit of doubt to the accused No.1. Consequently, conviction of the accused No.1 for offences under sections 302 and 307 of the IPC and section 30 of the Indian Arms Act cannot be sustained.

46. Though accused Nos. 1, 3 to 8 are also held guilty of offences under section 325 r/w. 34 of the IPC, the medical evidence does not indicate that the injuries sustained by PW6 Sambhaji Yadav, PW8 Shankar Yadav, PW10 Mahendra Gadekar and PW11 Pandharinath Yadav were of grievous nature. Bajrang, who had allegedly sustained a fracture has not been examined. Prosecution having failed to prove that any of these prosecution witnesses had sustained grievous injuries the accused could not have been held guilty of offence under section 325 of the IPC.

47. The testimony of PW9 Dr. Suresh Shinde reveals that he had examined the accused on 20.11.1997 at 2.45 a.m. The medical evidence reveals that apart from the grievous injury sustained by the accused no. 1 and minor injuries by the other accused, the accused no Popat had sustained contusion over left parietal region and the accused Rajendra had contusions over left as well as right scapula region and on left temporal region, being the vital part of the body. The fact that the prosecution witnesses as well as some of the accused had sustained

injuries in the course of the same incident clearly indicates that both groups were involved in a free fight ensued due to the previous incident of eve teasing. The prosecution having suppressed the genesis of the incident and further having failed to prove that the accused were aggressors, the accused cannot be held vicariously liable with aid of section 34 or 149 IPC and their liability has to be considered independently.

48. Coming now to the individual acts of the accused, we find that though the prosecution witnesses had sustained injuries, there is no cogent evidence as to which of these accused had caused these injuries. The accused No.5 Sambhaji Sathe is alleged to have caused injuries to the prosecution witnesses by gupti, the FIR at Ex. 58 does not indicate that the accused No.5 Sambhaji Sathe was armed with a gupti and that he had assaulted PW6 Sambhaji Yadav, Bajrang Yadav and PW11 Pandharinath Yadav by gupti. PW6 Sambhaji Yadav has deposed that the accused no.5 Sambhaji Sathe had given three blows of gupti on his left hand and one on right hand. The medical evidence does not indicate that the injuries sustained by PW6 Sambhaji Yadav were caused by a sharp weapon. On the contrary PW9 Dr. Suresh Shinde has opined that the injuries suffered by PW6 were caused by a hard and blunt weapon.

49. Similarly, there is material variation and improvement in the evidence of the other prosecution witnesses. PW8 Shankar Yadav has not attributed any specific role to the individual accused but has made a general statement that he had seen accused Nos. 3 to 8 assaulting PW6 and PW10. Furthermore, his testimony does not indicate that the accused had assaulted Bajrang and Pandharinath by means of a gupti. He has deposed that while he was trying to snatch the gun from the hands of accused no.1 Mohan Sathe, the accused No. 8 Dilip Jadhav, accused No. 7 Sanjay Jadhav, accused No. 6 Baban Chavan (deceased), accused No. 3 Rajendra Chavan, accused No. 4 Popat (deceased) came to the spot and one of these persons gave a blow of stick on his back. He has stated that Sambhaji Sathe (accused No.5) had assaulted him with gupti, however, this was not stated in the statement under section 161 Cr.P.C.

50. PW10 Mahendra Gadekar has deposed that the accused Rajendra had assaulted him and PW6 by cycle chain. This fact was not stated in the statement under section 161 of Cr.P.C. PW10 Mahendra Gadekar has further stated that the accused No.5 Sambhaji Sathe had given a forcible blow of gupti on the stomach of Pandharinath Yadav. His testimony does not indicate that the accused No.5 Sambhaji had also assaulted Bajrang and Shankar by means of gupti.

51. PW11 has claimed that accused Nos.3 to 8 had assaulted PW6 and PW10 with cycle chain, gupti and sticks. PW11 has deposed that accused No.5 Sambhaji had also given a blow of gupti on the neck of Bajrang. He has also stated that accused No.5 Sambhaji gave blows of gupti on his forehead, left forearm and on the left side of the chest and that he had become unconscious. PW11 has claimed that his statement was not recorded by PW13 P.I. Sutar. The said statement is falsified by PW13 PI Sutar, who has categorically stated that he

had recorded the statement of this witness under section 161 Cr.P.C. as per his say. Omissions have been elicited that PW11 had not stated that he had seen the accused assaulting PW6 and PW10 with gupti, cycle chain and sticks. He had also not stated that the accused No.5 Sambhaji Sathe had assaulted Bajrang with gupti and that the accused No.5 Sambhaji Sathe had assaulted him with gupti on his forehead and forearm.

52. The evidence of these eyewitnesses suffers from material contradictions and omissions. Each of these witnesses has improved upon the version stated in the FIR as well as statements under section 161 Cr.P.C. thus rendering the prosecution case doubtful and improbable.

53. The learned Sessions Judge failed to consider these serious infirmities and discrepancies in the prosecution case. The finding recorded in the impugned judgment, in our view, is unsustainable.

54. Under the circumstances, and in view of discussion supra, the appeals are allowed. The impugned order of conviction and sentence recorded against these accused is set aside. Bail bonds furnished by the accused are discharged.