
(2017) 04 BOM CK 0004
In the Bombay High Court
Case No : Criminal Appeal No. 139 of 2016

Mohd. Hanif

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

Penal Code, 1860 (IPC) — Section 143, Section 144, Section 147, Section 148, Section 149, Section 302, Section 324

Citation : (2017) 2 BomCR(Cri) 541

Hon'ble Judges : B.R. Gavai and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Mr. R.K. Tiwari, Advocate, for the Appellants; Mr. M.J. Khan, Additional Public Prosecutor, for the Respondent; Mr. R.J. Mirza, Advocate to Assist prosecution, for the Appearing Party; Mr. A.V. Gupta, Senior Counsel with Mr. R.K. Tiwari, Advocate, for the Appellants; Mr. M.J. Khan, Additional Public Prosecutor, for the Respondent; Mr. R.J. Mirza, Advocate to Assist prosecution, for the Appearing Party

Final Decision : Allowed

Judgement

B.R. Gavai, J.—The appellants by way of these two appeals have approached this Court being aggrieved by the judgment and order passed by the learned Sessions Judge, Akola dated 8.6.2016 in Sessions Trial Nos. 144/12 & 233/14, thereby convicting them for the offences punishable under Sections 143, 144, 147, 148 and 324 read with Section 149 and Section 302 read with Section 149 of the Indian Penal Code. In so far as the offences under Sections 143 & 144 of the Indian Penal Code are concerned, the learned trial Judge has not given separate sentence for Section 143 and the accused have been sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/- and in default to suffer further R.I. for two months. In so far as offences under Sections 147 & 148 are concerned, no separate punishment is imposed for Section 147 of the Indian Penal Code. The accused have been sentenced to suffer rigorous imprisonment for two years each and to pay a fine of Rs.500/- and in default to

suffer undergo R.I. for two months. In so far as the offences under Section 324 read with Section 149 of the Indian Penal Code are concerned, the accused have been sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/- and in default to suffer further R.I. for two months. In so far as the offence under Section 302 read with Section 149 of the Indian Penal Code are concerned, the accused have been sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- and in default to suffer further R.I. for one year. No separate punishment is given for the offence punishable under Section 120B read with Section 149 of the Indian Penal Code. The accused persons Mohd. Ansar s/o Mohd. Habib and Mohd. Irfan @ Kaloo s/o Mohd. Kasam are convicted for the offence under Section 4 punishable under Section 25 of the Arms Act and are sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/- each and in default to undergo further R.I. for two months.

2. The prosecution case as could be gathered from the material placed on record is thus :

One Mohd. Irshad s/o Mohd. Ayub is unfortunate victim deceased in the present case. It is the prosecution case that PW.5 Mohd. Wasim Mohd. Akram had taken a loan of Rs.40,000/- from Mohd. Munaf s/o Mohd. Habib (accused no.1 in Sessions Trial No. 144/12) on interest of 15% per month. He was required to pay Rs.6000/- per month as interest and he was required to return an amount of Rs.40,000/- as principal amount. However, he was in arrears of interest for the month of May, 2012. Accused no.1 Mohd. Munaf had come to his house. He demanded interest and the principal amount from him. He said that he was not having money, thereupon he abused him and took away the laptop of Dell company and told him that unless he would give him interest, he would not give him the laptop. It is the prosecution case that thereafter he was persistently demanding money from PW.5 Mohd. Wasim. At one point of time, he had also snatched keys of his motorcycle and taken the vehicle with him. At that time, his wife was admitted in the hospital for delivery. The wife of PW.5 Wasim was discharged from the hospital and then he went back to his home. Deceased Mohd. Irshad who was his cousin had come along with his wife and children to see his wife. At that time, the accused no.1 Mohd. Munaf had come to his house with another person. He had demanded interest of two months and the principal amount. At that time, accused no.1 Mohd. Munaf had abused him loudly. After hearing the noise, Mohd. Irshad came out of the house. Mohd. Irshad enquired as to what had happened. He told him about what had happened. At that time, Mohd. Irshad persuaded accused Mohd. Munaf and told him that till 12th he will ask PW.5 Mohd. Wasim to return back the money to him.

3. On 12th July at around 7.30 p.m. Mohd. Irshad had come to the house of PW.5. His mother had collected amount of Rs.45,000/- from relatives and gave the amount to him. Then he had taken the vehicle of Unicorn model from his brother bearing no. MH30/AB7800. He was driving the vehicle and Mohd. Irshad was pillion rider. He had gone towards Subhash chowk via Akot bus stand. On the

square, he saw his cousin brother (real brother of Mohd. Irshad) Mohd. Ejaz PW.3 standing there. Mohd. Irshad had asked him to stop the vehicle there. He told Mohd. Ejaz as to why he was standing there and asked him to return back to home. Then he had taken his vehicle ahead on the road. When they reached near the mobile shop of accused Mohd. Munaf at Hashamseth library, they saw that Mohd. Munaf, his brothers and nephews were standing there. They abused him. Deceased Irshad told accused no.1 Mohd. Munaf that he had brought amount of Rs.45,000/- to return back to him. Thereafter Mohd. Munaf started abusing Mohd. Irshad also in loud noise. Mohd. Munaf told Mohd. Irshad that he required Rs.75,000/-. Thereupon, there was altercation between them. PW.5 Wasim was pushed down. He went towards Hashamseth library and stood there. Thereafter all the accused persons assaulted the deceased. The witness ran away.

4. According to the prosecution, PW.3 Mohd. Ejaz had also witnessed the incident and he had attempted to save his brother in which he received injuries. However, he ran away towards his house. From there, he along with his relatives came to the Police Station and lodged oral report below Exh. 96, on the basis of which printed FIR came to be registered below Exh. 97 for the offences punishable under Sections 143, 144, 147, 148, 149, 307, 302 of the Indian Penal Code against 11 accused persons. PW.11 Deorao Khanderao - Police Inspector in the meantime, had received information. He went to the spot, sent the body of the deceased Mohd. Irshad to the Government hospital wherein he was declared dead. He received the information that the brother of the deceased had come to the Police Station and came to the Police Station. The FIR was registered. Further investigation was carried out. It appears that the accused no.1 Mohd. Munaf, Mohd. Ansar, Mohd. Irfan Mohd. Kasam and Mohd. Amir Mohd. Azam came to be arrested. Initially upon completion of investigation, charge sheet came to be filed against them in the Court of learned J.M.F.C., Akola. Since the case was exclusively triable by the Court of Sessions, the same came to be committed to the Court of the learned Sessions Judge.

5. The learned trial Judge framed the Charges against the said four persons in Sessions Trial No. 144/12. They pleaded "not guilty" and claimed to be tried.

6. During the pendency of the trial of Sessions Trial No. 144/12, two more accused persons, namely, Mohd. Hanif s/o Mohd. Habib and Mohz. Azam s/o Mohd. Habib surrendered before the Court. As such, a separate charge-sheet came to be filed against them before the learned J.M.F.C., Akola. Since the learned J.M.F.C. committed the same to the learned Sessions Judge, the Sessions Trial No. 233/14 came to be registered against the said accused. The charges were framed against the two accused separately. They were read over to them and explained in vernacular. They also pleaded "not guilty" and claimed to be tried. The accused also denied to have any legal assistance from the State. As such, they were not represented in the matter.

7. At the conclusion of the trial, the learned trial Judge passed the order of conviction and sentence against the appellants, as aforesaid. Being aggrieved

thereby, the present appeals have been filed.

8. Heard Shri A.V. Gupta, learned Senior Counsel and Shri R.K. Tiwari, the learned Counsel appearing on behalf of the appellants. The learned Counsel submit that though the prosecution contends that there are four eyewitnesses, as a matter of fact, they could not have been eyewitnesses. It is submitted that out of the four eyewitnesses, statements of three eyewitnesses are recorded belatedly. It is submitted that the statement of the person who is said to have accompanied the deceased, i.e. PW.5 Mohd. Wasim, was recorded on the next day. It is submitted that in so far as PW.1 Mohd. Rizwan and PW.6 Sheikh Shakil Sk. Jalil are concerned, the explanation given by them with regard to delay in recording the statements belatedly is totally unpalatable. It is submitted that in so far as PW.3 Mohd. Ezaj and PW.5 Mohd. Wasim are concerned, they are respectively the real brother and the cousin of the deceased and as such, are highly interested witnesses. It is, therefore, submitted that merely on the testimony of such witnesses conviction would not be sustainable. The learned Counsel for the appellants submit that the conduct of these witnesses would also create a serious doubt as to whether they have really witnessed the incident or not.

9. Shri R.K. Tiwari, learned Counsel for the appellants, submits that the testimony of these witnesses would reveal that all these witnesses have given a parrot like version and the role attributed by them to all the 11 accused is totally identical. It is submitted that it is humanly impossible that all the four witnesses would remember the sequence in which all the accused have assaulted the deceased in an identical manner. It is, therefore, submitted that no reliance could be placed on the testimony of such eyewitnesses. The learned Counsel relies on the judgment of the Apex Court in the case of Lakshmi Singh and others etc. v. State of Bihar reported in AIR 1976 SC 2263, Rambilas and others v. State of Madhya Pradesh reported in AIR 1997 SC 3954 and Hemraj and others v. State of Haryana reported in 2005 CRI.L.J. 2152 in support of this proposition.

10. The learned Counsel further submit that there are several improbabilities in the prosecution case and as such, the prosecution case cannot be believed. Reliance is placed on the judgment of the Apex Court in the case of Dharam Singh and others v. State of Punjab reported in AIR 1993 SC 319.

11. The learned Counsel further submit that there is an inordinate delay of two days in recording the statements of witnesses and the same is fatal to the prosecution case. Reliance in this respect is placed on the judgment of the Division Bench of this Court in the case of Laxman Bapurao Ghaiwane v. The State of Maharashtra reported in 2012 ALL MR (Cri) 3605.

12. The learned A.P.P., on the contrary, submits that all the four witnesses, i.e. PW.1 Mohd. Rizwan, PW.3 Mohd. Ezaj, PW.5 Mohd. Wasim and PW.6 Sheikh Shakil have consistently supported the prosecution case. The learned A.P.P. submits that merely because the version given by them is identical cannot be a

ground to discard their testimony. The learned A.P.P. further submits that merely because two of the witnesses, i.e. PW.1 Mohd. Rizwan and PW.3 Mohd. Ezaj are related to the deceased also cannot be a ground to discard their testimony. The learned A.P.P. submits that as a matter of fact, the presence of the injuries on the person of the PW.3 Mohd. Ezaj corroborates his presence at the time of the incident. The learned A.P.P. relies on the following judgments :

- I. (2012) 6 SCC 581 : Abdul Nawaz v. State of West Bengal,
- II. AIR 2012 SC 2600 : Jagroop Singh v. State of Punjab,
- III. 2005 ALL MR (Cri) 786 (S.C.) : Sunil Kumar & another v. State of Rajasthan,
- IV. 2015 ALL MR (Cri) 2636 : Raju Maruti Dhumal & another v. State of Maharashtra,
- V. 2007 ALL MR (Cri) 2938 (S.C.) : State of Rajasthan v. Nana & others,
- VI. 2010 ALL MR (Cri) 3337 (S.C.) : Narinder Kumar v. State of J. & K.
- VII. 2010 ALL MR (Cri) 3872 : Amol Bhaskarrao Waghmare & others v. State of Maharashtra.

13. With the assistance of the learned A.P.P. as well as the learned Counsel for the appellants, we have scrutinized the entire evidence on record.

14. No doubt that the prosecution relies on the ocular testimony of four eyewitnesses. If the testimony of these four witnesses is found to be trustworthy, reliable and cogent, it will not be at all necessary for us to go into the other circumstantial evidence. As is a settled principle of law that even if the testimony of a solitary witness is found to be trustworthy, cogent and the one which inspires the confidence in the mind of the Court, conviction on the basis of the same could be rested. It is equally settled that merely because the witnesses are interested cannot be a ground to discard their testimony.

15. PW.3 Mohd. Ezaj is the first informant. He states in his evidence that on 12.7.2012 at around 8.30 p.m. he was standing near one Panstall which was close on the corner of Subhash chowk. He was waiting for his friend Sk. Farukh. At that time, his brother Mohd. Irshad and his cousin brother Mohd. Wasim both were going by motorcycle from Subhash Chowk to Tajnapeth. At that time, his brother Mohd. Irshad stopped the motorcycle on seeing him and told him to return back to home. Thereafter Mohd. Irshad and Mohd. Wasim went at some distance and he was about to return back to home. At that time, lights on electric pole were on and also the lights of the shops were on. Thereafter, he states thus :"

"When my brother was going ahead, his motorcycle was stopped near Lucky footwear by Mohd. Munaf Mohd. Habib. At that time Mohd. Azam Mohd. Habib was having sword in his hand. He had given blow of sword on Mohd. Irshad. Mohd. Harish Mohd. Habib was having sword in his hand and he had given blow

of sword to Mohd. Irshad. Mohd. Ayub Mohd. Habib was having sword in his hand. He had given blow of sword to Mohd. Irshad. Mohd. Muzaffar Mohd. Habib was having knife in his hand. He had given blow of knife to Mohd. Irshad. Mohd. Ansar Mohd. Habib was having knife in his hand. He had given blow of knife to Mohd. Irshad. Mohd. Hanif Mohd. Habib was having knife in his hand. He had given blow of it to Mohd. Irshad. Mohd. Irfan @ Kaloo s/o Mohd. Kasam was having stick sword in his hand and he had given blow of stick sword to Mohd. Irshad. Mohd. Awesh Mohd. Ayub was having stick sword in his hand and he had given blow of it to Mohd. Irshad. Mohd. Amir Mohd. Azam was having iron pipe in his hand and he had given blow of it to Mohd. Irshad. Mohd. Aman Mohd. Ayub was having iron pipe in his hand and he had given blow of it to Mohd. Irshad. Mohd. Afshan Mohd. Ayub was having iron pipe in his hand and he had given blow of it to Mohd. Irshad. Because of this assault by weapons, Mohd. Irshad was smeared with blood and fell down on earth. When I had tried to intervene to rescue my brother, Mohd. Azam Mohd. Habib had given blow of sword on my hand. When my brother fell down, Mohd. Munaf had picked up one big stone from a Peepal tree besides and hit it on the head of Mohd. Irshad several times and smashed it....."

Though in his examination in chief he states that PW.1 Mohd. Rizwan Mohd. Salim and PW.6 Sk. Shakil Sk. Jalil were present on the spot when the incident took place, the same is by way of an improvement. The said omission in his police statement is duly proved in the evidence of PW.11 Deorao Khanderao - Investigating Officer. Apart from that, there are other contradictions and omissions in his evidence. However, we would not like to go into the minor details.

16. The next is the evidence of PW.5 Mohammad Wasim s/o Mohammad Akram. It is the prosecution case that the entire incident is an outcome of the dispute between the accused no.1 and this witness. It is the prosecution case that this witness had taken a hand loan of Rs.40,000/- from the accused no.1 and was required to pay interest @ 15% per annum and since he had failed to pay the same, the accused no.1 had taken his motorcycle as well as laptop and was harassing him to pay the same. It is also the prosecution case that after his wife was discharged from the hospital the deceased had come to see her along with his family and at that time the accused had come there and started abusing him. At that time, the deceased came out and assured the accused that the money would be returned on 12th. It is further the prosecution case that on 12th at around 7.30 p.m. deceased came to his house, his mother had collected Rs.45,000/- and gave the amount to him. Then he had taken the vehicle from his brother. He was driving and Mohd. Irshad was a pillion rider. They went near Subhash Chowk. They saw PW.3 Mohd. Ezaj. Deceased asked Mohd. Ezaj to go home. Then he had taken the vehicle ahead on the road. At that time, lights of his vehicle, lights on the road and also of the shops were on. It will be relevant to refer to further part of his evidence, which reads thus :"

"When we reached near the mobile shop of accused Mohd. Munaf at Hashamseth library, we saw that Mohd. Munaf his brothers and nephews were standing there. I know them. They had stopped my vehicle. They were having swords, knives, stick sword and iron pipes in their hands. Thereafter Mohd. Munaf had abused me. Thereupon, Mohd. Irshad said to Mohd. Munaf that we had brought amount of Rs.45,000/- to return back to him. Thereupon Mohd. Munaf started abusing Mohd. Irshad also in loud voice. Mohd. Munaf said to Mohd. Irshad that he required Rs.75,000/-. Thereupon Mohd. Irshad said to him, why he was demanding excess amount. I know Mohd. Ayub, the brother of Mohd. Munaf. Mohd. Ayub had given me push. Thereupon I went (girtepadte) towards Hashamseth library and stood there. At that time Mohd. Azam Belim had given blow of sword on the hand of Mohd. Irshad. Mohd. Muzaffar Mohd. Habib Belim had given several knife blows on the chest of Mohd. Irshad. Mohd. Harish Mohd. Habib and Mohd. Ayub Mohd. Mohd. Habib had given blows of swords on the back, hands and legs of Mohd. Irshad. Mohd. Ansar Mohd. Habib, and Mohd. Hanif Mohd. Habib had given blows of knives to Mohd. Irshad. At that time my cousin brother Mohd. Ejaz came to save Mohd. Irshad, at that time Mohd. Azam Mohd. Habib had given blow of sword on the hand of Mohd. Ejaz. Due to this assault, Mohd. Irshad fell down in front of Lucky Footwear. He was smeared with blood. After he fell down, Mohd. Irfan Mohd. Ksam and Mohd. Awesh Mohd. Ayub had given blows of stick sword to Mohd. Irshad. Mohd. Amir Mohd. Azam, Mohd. Aman Mohd. Ayub and Mohd. Afshan Mohd. Ayub had given blows of iron rod to Mohd. Irshad on his back, legs and hands. At that time Mohd. Irshad was moving hands and legs and was trying to save himself. Thereafter Mohd. Munaf had brought a big stone which was lying below a Peepal tree besides the road and hit it several times on the head of Mohd. Irshad. At that time Mohd. Irshad had stopped movements of his hands and legs. Thereafter Mohd. Munaf, his brothers and his nephews ran behind myself and Mohd. Ejaz to kill us with the weapons in their hands....."

17. PW.1 Mohd. Rizwan Mohd. Salim states that he was doing the business of his truck bearing No. MH27/X2148 and he used to park his truck at Subhash chowk. He knew deceased Mohd. Irshad and Mohd. Wasim. He knows all the four accused. He knows them because they all belong to his community. He states that on 12th July at around 8.30 p.m. he had parked his truck near Subhash chowk and he was going for recharging his mobile phone at the shop by name "Muskan" of accused no.1 Mohd. Munaf. He was required to go from Subhash chowk by Tajnapeth road. He saw Mohd. Irshad and Mohd. Wasim going by motorcycle. Mohd. Wasim was riding the motorcycle. Mohd. Irshad was the pillion rider. He saw that Mohd. Munaf, his brothers, his nephews and other 34 persons were standing near Muskan shop with swords, stick sword, knife and iron rods. He saw Mohd. Ejaz PW.3 the younger brother of the deceased Mohd. Irshad standing at some distance from Subhash chowk. He stated that at that time Mohd. Munaf and others restrained the motorcycle of Mohd. Irshad and started making disputes with them on the count of some money transaction. Mohd.

Irshad tried to convince them. It will be relevant to refer to the further evidence of this witness, which reads as under :"

"At that time Mohd. Azam Mohd. Habib gave a blow of sword on the hand of Mohd. Irshad. Mohd. Harish Mohd. Habib and Mohd. Ayub Mohd. Habib gave blows of swords on the legs, back and hands of Mohd. Irshad. Mohd. Muzaffar Mohd. Habib had given several blows of knife on the chest of Mohd. Irshad. Mohd. Ansar Mohd. Habib and Mohd. Hanif Mohd. Habib gave blows of knife to Mohd. Irshad. Because of it, Mohd. Irshad got smeared with blood and fell on the road in front of Lucky Footwear. Thereafter Mohd. Irfan @ Kaloo s/o Mohd. Kasam and Mohd. Avesh Mohd. Habib had given blows of stick sword (Gupti) on his back, below chest. Thereafter Mohd. Amir Mohd. Azam, Mohd. Amaan Mohd. Ayub, Mohd. Afshan Mohd. Ayub had given blows of iron pipes on his back and legs. At that time Mohd. Irshad was making movements of his hands and legs to save his life. Thereafter accused No. 01 Mohd. Munaf had picked a stone from below the Peepal tree by the side of road and hit it on the head of Mohd. Irshad several times and smashed it. Because of it, Mohd. Irshad stopped movements of his hands and legs. During this Mohd. Ejaz Mohd. Habib had come there. At that time Mohd. Azam Mohd. Habib had given blows of sword to Mohd. Ejaz. Because of the sword blow, blood was oozing out from the hand of Mohd. Ejaz. Thereafter Mohd. Ejaz and Mohd. Wasim ran away to save their lives. Thereafter all the accused with their weapons ran away. I myself had witnessed this incident, therefore, I know about it....."

There are many contradictions and omissions in his evidence. Though he has stated in his deposition that PW.3 Mohd. Ezaj was standing at Subhash chowk, the same is by way of an improvement. The said omission in his police statement is duly proved in the deposition of the Investigating Officer. So also his deposition that at that time Munaf, his brothers and nephews were standing near Muskan mobile shop with sword, stick sword, knife and iron rods is also by way of an improvement.

18. PW.6 Shakh Shakil Sk. Jalil is an auto driver. He states that he knows the accused persons because previously he was residing in front of Hasamseth library. He states that on the day of the incident, i.e. 12th July, at around 8.30 p.m. he was coming from Tajnapeth towards Subhash chowk for searching passengers. He knew deceased Mohd. Irshad and PW.3 Mohd. Ezaj. He was going upto Hasamseth library. At that time, Mohd. Irshad was coming from Subhash chowk towards Hasamseth library on a motorcycle. He was a pillion rider and other boy was driving the motorcycle. He states that at that time, it was darkness, however, they could be seen from the light out of the shop and also from the street lights. At that time, Mohd. Munaf, his brothers and nephews having the weapons like knife, sword and gupti had restrained the motorcycle. He states that at that time Mohd. Munaf and others started quarrelling with Mohd. Irshad on the count of money. He stopped his auto by the side of the road and started seeing that. At that time, Mohd. Irshad was trying to convince him.

At that time, Mohd. Ejaj also reached there. It will be appropriate to refer to the following deposition of this witness :"

"Mohd. Ajam Mohd. Habib gave blow of sword to Mohd. Irshad on his hand. Due to which, he had sustained bleeding injury. At that time, Mohd. Harish Mohd. Habib and Mohd. Ayub Mohd. Habib had given blows of swords on his hand, leg and back of Mohd. Irshad. Mohd. Mujjafar Mohd. Habib had given several blows of knife on the chest of Mohd. Irshad. Mohd. Ansar and Mohd. Hanif had given blows of knives to Mohd. Irshad. Because of these blows, Mohd. Irshad sustained injuries and he fell in front of Lucky Footwear smeared with blood. Mohd. Avesh Mohd. Ayub and Mohd. Irfan @ Kalu s/o Mohd. Kasam had given blows of gupti to Mohd. Irshad below his chest and on his back. Mohd. Amir Mohd. Azam, Mohd. Aman Mohd. Ayub & Mohd. Afshan Mohd. Ayub gave blows of pipes to Mohd. Irshad. Mohd. Irshad was moving his hands and legs and was trying to avoid the blows. At that time, Mohd. Munaf had brought a big stone from below a peepal tree by the side of road and put it several times on the head of Mohd. Irshad. Thereafter, Mohd. Irshad's hands and legs had no movements. Mohd. Ajam s/o Mohd. Habib had given blows of sword to Mohd. Ejaz on his hand. At that time, the boy who was driving the motorcycle and Mohd. Ejaj ran away from the spot. Thereafter, those persons had left the place with their weapons...."

It could thus be seen that all these four witnesses have given totally identical version in so far as the role played by each of the 11 accused is concerned and that too in the very same sequence. It is to be noted that the incident is alleged to have taken place during the night hours. Even according to the prosecution, these four witnesses have witnessed the incident from four different places.

19. It will be apposite to refer to following observations of Their Lordships of the Apex Court in the case of Lakshmi Singh and others etc. v. State of Bihar (cited supra) :"

"10. These are the only witnesses who have proved the participation of the five appellants in the assault. No independent witness has been examined by the prosecution to support the assault. In fact P. W.1 Ramji Singh has admitted that when he reached the place of occurrence he found 6 to 7 persons of the village and yet none of them have been examined to corroborate the evidence of the interested or inimical witnesses examined by the prosecution. Moreover the evidence of P.Ws. 1 to 4 clearly shows that they gave graphic description of the assault with regard to the order, the manner and the parts of the body with absolute consistency which gives an impression that they have given a parrotlike version acting under a conspiracy to depose to one set of facts and one set of facts only....."

It could be seen that all the four witnesses have given graphic description of the assault with regard to the order, the manner and the parts of the body with absolute consistency. We find that in the present case also, the testimony given by the witnesses gives an impression that they have given a parrot like version

acting under a conspiracy to depose to one set of facts and one set of facts only. Similar are the observations made by Their Lordships of Apex Court in the case of Rambilas and others v. State of Madhya Pradesh (cited supra) which read thus : "....."

If we compare the evidence of these eyewitnesses it is immediately noticed that their evidence is just like a parrot, telling about what is taught. Even the omissions, contradictions and improvements are identical. The claim of these eyewitnesses is totally unbelievable when they testified that they had gone to the place of occurrence....."

Again in the case of Dharam Singh and others v. State of Punjab (cited supra), Their Lordships observed thus : "....."

"However, as noted above the statement of each witness is verbatim the same as that of others. Contradictions and omissions are the same. Narrations and sequence of events are meticulously in the same order. Therefore, we think it is not safe to place reliance on the evidence of these witnesses."

20. However, the puppet like version is not the only ground which should put doubt on the trustworthiness of these witnesses. We find that the conduct of these witnesses could also cause a serious doubt with regard to their credibility and a further doubt as to whether they have really witnessed the incident or not. It will be relevant to note that the deceased is not said to have any sort of enmity with the accused. It is the prosecution case that it is the PW.5 Mohd. Wasim, who had an enmity with accused no.1 on the issue of loan taken by him and nonpayment of interest and the principal amount. It is the prosecution case that on account of this, the accused no.1 had also taken the laptop and the motorcycle of the PW.5. It is the prosecution case that when the deceased had come to the house of PW.5 Mohd. Wasim to see the wife of PW.5 Mohd. Wasim, who had given the birth to a child, the accused no.1 had come there and was abusing him. At that point of time, the deceased came out of the house and enquired with PW.5 Mohd. Wasim. He pacified the accused no.1 and told him that the amount would be paid by 12th. It is further the prosecution case that on 12th the deceased came to the house of PW.5 Mohd. Wasim. The mother of the deceased who had arranged the amount, gave the amount to PW.5 and they went to the shop of the accused no.1 where they were assaulted. According to PW.5 Mohd. Wasim, at that time all the accused assaulted the deceased. He went on the side of the road and started looking at the incident. After the assault was over, he started running. He states that the accused might have followed him and PW.3 Mohd. Ezaj. They went running upto Telipura by the road and then he went ahead and he did not know where Mohd. Ezaj went. He went to home by running. He had told his mother, his wife and his brother about the incident. He states that he was not asked by his family members as to what had happened to Mohd. Irshad. He further states that the family members did not say anything about taking Mohd. Irshad to hospital. He further admits that on 12th only he learnt that Mohd. Irshad had expired. He further admits that on 12th neither he

went to Police Station nor he had made any phone call to police station. He further states that he had not told about the incident to anybody except his family members till his statement was recorded. We are of the considered view that the conduct of this witness is totally unnatural. Firstly, the enmity that the accused had was with him and not with the deceased. In any case, if the deceased was assaulted on account of the reason that he was helping this witness, then the least that was expected was immediately inform the police about the same. However, even not enquiring about what has happened to the deceased for the entire night till his statement is recorded by the police on the next day, in our considered view, depicts a very unnatural conduct and casts a serious doubt about the veracity of this witness.

21. PW.1 Mohd. Rizwan and PW.6 Sheikh Shakil Sk. Jalil are chance witnesses. Even from their conduct, it is doubtful as to whether they have really witnessed the incident or not. PW.1 Mohd. Rizwan clearly admits in the evidence that he knows the deceased as well as PW.3 Mohd. Ezaj and PW.5 Mohd. Wasim. He gives entire narration of the incident. However, he states that after witnessing such a deadly incident at around 9.15 p.m., he leaves with his truck for Jalgaon and returns back on the night of 13th at around 2 to 3 a.m. He states that when he had gone to Subhash chowk to take his vehicle, police had asked him whether he was knowing about the incident and when he stated in the affirmative, then he had called him to the Police Station and then recorded the statement. It is to be noted that the explanation which is given by him regarding the delay in giving statement is by way of improvement. PW.11 Khanderao in paragraph 19 of his cross-examination has admitted that he had recorded the statement of PW.1 Mohd. Rizwan on 14.7.2012 and had also asked these witnesses as to why they had come late to give their statements. We find that not mentioning of these facts in the police statement and stating the same for the first time in the deposition is only to cover up the delay in recording the statement.

22. The next witness is PW.6 Sk. Shakil Sk. Jalil. We have reproduced his version herein above. He states that after witnessing the incident he was frightened and he had taken his auto back and returned back after two days to Subhash chowk square. At that time, the police came there and asked him as to whether he was plying his auto-rickshaw at that place and as to whether on that day he had witnessed the incident. He answered to them as "yes" and thereafter his statement was recorded. He has also given explanation in the examination in chief that in the meantime his family member was not feeling well as at that time she was admitted in the hospital. It is to be noted that the explanation for not recording the statement is also an improvement and omission in the police statement. The Investigating Officer in his cross-examination has admitted that the statement of these witnesses is recorded on 15th of July and he was also asked about the reason for belated informing the police. It is to be noted that both the witnesses in their examination in chief have admitted regarding their criminal antecedents. We find that taking into consideration the unnatural conduct of these witnesses, it will not be safe to rely on their testimony. The

Division Bench of this Court in *Laxman Bapurao Ghaiwane v. The State of Maharashtra* reported in 2012 ALL MR (Cri) 3605 has observed on the point of delay as under :"

"18. The effect of delay in recording statements of witnesses under Section 161 of the Code of Criminal Procedure was examined by the Hon"ble Supreme Court in the case of *State of H.P. v. Gian Chand*, reported at AIR 2001 SC 2075 and it was observed :

"If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

The effect of delay was also considered by the Supreme Court in the matter of *Dilawar Singh v. State of Delhi*, reported at AIR 2007 SC 3234 : [2007 ALL SCR 2430] and it was observed :

"In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case."

23. That leaves us with the evidence of PW.3 Mohd. Ezaj, the first informant. He is the brother of the deceased. No doubt that merely because the witness is an interested witness cannot be a ground to discard his testimony. However, the evidence of such witness is required to be scrutinized with a greater caution and circumspection and a conviction could be awarded on the basis of same if the same is found to be trustworthy, cogent and reliable. No doubt that he is an injured witness and normally his testimony would have been sufficient enough to inspire the confidence in the mind of the Court. However, we find that the overzealousness and various glaring lacunae committed by the investigation have themselves brought the testimony of this witness in a shadow of doubt. It will be relevant to refer to the injuries sustained by this witness, which are as under :

- (1) Incised wound 3 x 0.5 x 0.3 cm. over right forearm,
- (2) C.L.W. 2 x 0.5 x 0.3 cm over right forearm,
- (3) linear abrasion 2 x 0.1 x 0.3 cm at the base of left hand palmer aspect,
- (4) linear abrasion 7 x 0.1 cm over right forearm and
- (5) Incised wound 5 x 0.1 x 0.1 cm over right hand palmer aspect.

The perusal of the cross-examination of PW.10 Dr. Vikramsingh Daberao would reveal that the thickness of the injuries are between .1 cm to .3 cm. He has admitted that all these injuries are skin deep injuries.

24. We have discussed in extenso the evidence of the other three eyewitnesses and for the reasons recorded, we have found the evidence of those three witnesses to be not trustworthy. We have also reproduced in extenso the examination-in-chief of all the four witnesses attributing the role to each of the accused. The role attributed by PW.3 Mohd. Ezaj is identical with the role attributed by all the three witnesses, which we have disbelieved. We, therefore, find that it will not be safe to rest the conviction solely on the basis of evidence of PW.3 Mohd. Ezaj without there being corroboration by any other evidence.

25. The prosecution relies on the seizure of blood stained clothes from the person of the accused and the weapons allegedly recovered from the person of the accused Mohd. Ansar, Mohd. Hanif and Mohd. Irfan on memorandum under Section 27 of the Indian Evidence Act. It is to be noted that all these memorandums are recorded by PW.11 Khanderao and proved in the evidence of PW.8 Syed Mazhar Syed Rustam. The consequent recovery panchnamas are also proved in the evidence of this witness. The memorandum of accused Mohd. Ansar is recorded in the Police Station Ramdaspath on 23.7.2012 between 13.40 to 13.45 hours. The knife is seized from his house on the same day between 14.05 to 14.40 hours. The memorandum of accused Mohd. Amir is between 13.46 to 13.51 hours and the recovery panchnama is between 14.05 to 14.50 hours under which a steel pipe is seized from him. The memorandum of accused Mohd. Irfan Mohd. Kasam is between 13.52 to 14.00 hours and the recovery panchnama is between 14.01 to 15.15 hours. The perusal of the recovery panchnamas would reveal that not only the Investigating Officer but the other staff and the panchas who were conducting these recoveries are also same. It could thus be seen that the I.O. was possessing some superhuman powers for conducting three recoveries simultaneously at three different places. We find that there could be nothing more farcical than such recoveries.

26. The recovery of the blood stained clothes of the accused is more interesting. The accused were arrested between 13th to 16th. However, the clothes are seized on 24th of July and sent to Chemical Analyzer on 6th of August. The cross-examination of the Investigating Officer on the belated seizure of the clothes of the accused is rather interesting. Though the I.O. admits in paragraph 18 of the cross-examination that if the blood stains are found on the clothes on the person of the accused at the time of arrest, they are required to be seized immediately, he states that he could not seize the clothes till 24th though they were in his custody, because their relatives had not brought the other clothes for them. To a suggestion he has clearly admitted that prior to 24th he had gone to the house of the accused during investigation. However, to a query as to why he did not collect the clothes from their house, he has stated that he had gone there for seizure of the weapons and, therefore, he had not collected the clothes. In this

respect, it will be appropriate to refer to the following observations of Their Lordships of the Apex Court in the case of Gopal Singh and another v. The State of Madhya Pradesh and another reported in AIR 1972 SC 1557, which read thus : ".....

Apparently, the High Court thought that corroboration was necessary and this it sought in the recovery of the blood stained shirt and bushshirt from the room of the appellants which the learned Sessions Judge had specifically discarded. We think that the learned Sessions Judge had given very satisfactory reasons for discarding this evidence and, in our opinion, the High Court was in error in taking a different view, especially, when the High Court had realised that there was something fishy in the manner in which a blood stained shirt was recovered from Hatesingh who had been acquitted. Hatesingh, like the appellants, had been arrested on the 10th. His shirt which he was wearing at the time was not seized. But next day his shirt was seized because some blood spots were noticed. It is rather extraordinary that the police should not see blood stains on the shirt when he was arrested but should notice them on the next day. The High Court, therefore, was right in discarding that evidence because it is plain enough that at the time of the arrest there must not have been really any blood stains on the shirt of Hatesingh....."

27. There is another angle. The FIR which is placed on record below Exh. 97 does not tally with the carbon copy of the FIR which is below Exh. 238, i.e. a part of the remand papers. It would show that in all other columns it could be seen that entries are in the carbon print, whereas the general diary reference and time in clause (c) of column 3 is written in ink. It could further be seen that in column no. 5 though in Exh. 97 the direction shown is south, in Exh. 238 it is shown as west. Though Investigating Officer has admitted about the same, no explanation for the same is coming forward. The perusal of paragraph 21 of his cross-examination would reveal that though an ample opportunity is given to the Investigating Officer to explain these lacunae, no explanation is coming forward from him.

28. We are aware that merely on account of lapses by the Investigating Officer, the prosecution case should not fail and the prosecution case which is otherwise proved, should not result in acquittal only on the ground of lacunae in the prosecution case. However, in the present case, we are at pains to observe that on account of overzealousness and on account of an attempt of Investigating Officer to create the evidence which is not there, the investigating agency has prevented a real picture coming before the Court. May be, on account of the fabrication, an otherwise good case which might have resulted into conviction of some of the real culprits is resulting into an acquittal only on account of the fabrication by the investigating agency. .

29. As already discussed herein above, there are number of lacunae in the prosecution case. If the prosecution version is to be believed, the question arises as to what had happened to the motorcycle on which the deceased and the PW.5

Mohd. Wasim had come to the spot. The question arises as to what has happened to Rs.45,000/- which were either with the deceased or with PW.5 Mohd. Wasim. There are many other questions unanswered. The prosecution has utterly failed to prove as to how all the 11 accused had gathered on the spot. The only evidence is of PW.5 Mohd. Wasim, who states that the deceased had assured the accused no.1 Mohd. Munaf that the amount would be returned prior to 12th. However, there is no evidence that the deceased or anyone had assured that the amount would be returned at a particular spot on 12th at around 8 to 8.30 p.m. It is another aspect that enmity, if any of the accused no.1 was with PW.5 Mohd. Wasim and not with the deceased. If the PW.5 was very much available, then why was he not assaulted and why the deceased was brutally assaulted, particularly when PW.5 was very much available and even according to him, very much standing at a short distance. We find that the investigating agency has withheld the real genesis of the incident and has concocted a totally different version so as to implicate the entire family of the accused persons.

30. It could be that there could have been a dispute between the deceased and PW.3 Mohd. Ezaj on one hand and some of the accused on the other hand, as a result of which the incident might have taken place. However, it appears that for the reasons best known to the investigating agency, totally different colour appears to have been given without there being any material to support such a version. We are at pains to say that the investigating agency has attempted to suppress the real picture coming to the Court which has resulted in culprits of the crime going unpunished.

31. In the result, we find that the prosecution has failed to prove the case beyond reasonable doubt. The accused are entitled to benefit of doubt. As such, the appeals deserve to be allowed.

32. The Criminal Appeals are allowed. The appellants are acquitted of the offences charged with. Fine amounts if paid by appellants be refunded to them. The appellants are directed to be set at liberty forthwith, if not required in any other case.