

(2010) 09 BOM CK 0132

In the Bombay High Court

Case No : Criminal Appeal No's. 646, 650 and 691 of 2002

Nitin Anant Upade

APPELLANT

Vs

State of Maharashtra (at the instance)
 Anant
Shantaram Upade Vs State of Maharashtra (at the instance of
Vaibhavwadi Police Station), Anant Shankar Upade and
Shankar Pandurang Upade
 State of Maharashtra Vs
Anant Shantaram Upade and Others

RESPONDENT

Date of Decision : 09-09-2010

Acts Referred:

Arms Act, 1959 — Section 25, 3
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (2010) 112 BOMLR 3987

Hon'ble Judges : B.H. Marlapalle, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Girish Kulkarni, instructed by M.K. Kocharekar, in Appeal Nos. 646, 650 and 651 of 2002 and M.M. Deshmukh, APP for State in Appeal No. 691 of 2002, for the Appellant; M.M. Deshmukh, APP in Appeal Nos. 646, 650 and 651 of 2002, for the Respondent

Final Decision : Dismissed

Judgement

B.H. Marlapalle, J.—All these appeals arise from the order of conviction and sentence as well as acquittal passed by the learned Additional Sessions Judge, Sindhudurg-Oros on 30th April, 2002 in Sessions Case No. 44 of 1999 for the offences punishable u/s 147, 148, 149, 452, 324, 323, 504, 506, 307 and 302 of I.P.C. and Section 3 read with Section 25 of the Arms Act. In the said case in all 11 accused were put on trial and accused No. 1 has been convicted for the offences punishable u/s 307, 323, 324 of I.P.C. and Section 3 read with Section 25 of the Arms Act. He has been sentenced to suffer R.I. for life for the offence u/s 307 of I.P.C. Hence he has filed Criminal Appeal No. 650 of 2002. Accused No. 5 has been convicted for the offences punishable u/s 302 and 307 of I.P.C. and has been sentenced to suffer R.I. for life. Hence he has filed Criminal Appeal No.

659 of 2002. Accused Nos. 1, 4, 5 and 6 have been convicted for the offences punishable u/s 452 of I.P.C., and sentenced to suffer R.I. for six months each and hence accused No. 6 has filed Appeal No. 646 of 2002 whereas the accused No. 4 did not prefer an appeal and has undergone the sentence of six months. Criminal Appeal No. 691 of 2002 has been filed by the State Government against all the accused. Except the Appellant (Accused No. 5) in Appeal No. 651 of 2002 all the other appellants in the Appeals have been released on bail pending the appeals.

2. As per the prosecution case there was a rivalry in two political groups in village Upale. One group was headed by accused No. 1-Anant Shantaram Upade whereas the other group was headed by Bhaskar Upade. Accused No. 5 is the younger brother of accused No. 1 and accused No. 1 normally resided at Mumbai and had visited Upale about 10 days prior to the date of incident. Six months before the incident the elections to the village Panchayat were held and accused No. 5 and Bhaskar Shantaram Upade had contested for the post of Sarpanch and on that count there was a rivalry between the two groups. It appears that Bhaskar Upade was assaulted by the group of accused No. 1 and the party of the accused No. 1 was prosecuted. P.W.14-Shankar Pandurang Upade is the cousin of Bhaskar Upade and he resided with his wife and children. On 20th May, 1998 there was a programme of "Pachpartavana" in the house of Dnyaneshwar Upade on account of his daughter's marriage and while P.W.14 Shankar and his family members had attended the said programme and while he was in his house at about 10.15 p.m., the accused Nos. 1,2,4,5 and 6, entered his house. Accused No. 5 caught hold of the sister of P.W.14, Accused No. 1 was armed with chopper in his right hand and a revolver in his left hand. He gave threats to kill P.W.14 and asked about his son Santosh. Accused No. 1 used the handle of chopper and inflicted injuries on the person of P.W.14 and, therefore, he raised hue and cry. His nephew Jaidas Upade, P.W.18, reached the spot and while he was trying to enquire, accused No. 1 stabbed P.W.18 with chopper on his back. He escaped and ran away to the house of Dnyaneshwar Upade and gave message to Santosh. While Santosh was rushing towards the house, accused No. 5 shot him and he was lying at about 25 ft. away from the house. Anant Gangaram Upade, Bhikaji Dhondur Upade (PW 20), Nitin Manohar Upade (PW 21), Jaishri Anant Upade and Sambbha Kokate had also received bullet injuries. They were rushed to Umbarde hospital. It is further alleged that accused No. 1, accused No. 2 and 5 had opened fire. Santosh and Jaishri were also taken to the hospital at Umbarde. Santosh was declared dead. P.W.22 Dr. Marchant examined and found Santosh, Jaishri and Nitin in serious conditions and hence they were immediately shifted to the Rural Hospital at Kankavali. Other injured witnesses were treated at Umbarde hospital and were discharged, whereas Nitin and Jaishri were shifted to Kankavali and then referred to the Government Hospital, Goa for further treatment, but while under treatment Jaishri died on 22/5/1998 at 12.15 hrs. P.W.14 registered his complaint (F.I.R. at Exhibit 118) with the Vaibhavwadi Police Station on the next day i.e. on 21st May, 1998 at about 12.30 p.m. for the offence punishable under Sections 307, 452, 324, 323, 143, 147, 148, 149, 504 and 506 of IPC and

Sections 3 and 25 of the Arms Act. P.W. 16-Ramesh Janardan Upade after seeing the firing rushed to the house of P.W.17-Anant Sitaram Mandavkar, who was the Up-Sarpanch of village Upale and both of them went to Vaibhavwadi Police Station and met P.W.19-Madhukar Rajaram Desai, Police Sub Inspector. P.W.29-Madhukar Rajaram Desai rushed to the spot and shifted the injured to the Umbarde Primary Health Centre where P.W.22 Dr. Najakat Mehabub Marchant, Medical Officer found that the conditions of Santosh, Jaishri and Nitin, P.W.21 were serious. P.W.29 recorded the statement of P.W. 24 at Umbarde past midnight on the basis of which the F.I.R., came to be registered. The investigation was then handed over to Circle Police Inspector-Madhukar Yashvant Kadam P.W.32 by the District Superintendent of Police late in the night on 21st May, 1998. P.W.28-Dr.Shashikant Shamrao Bhise conducted Postmortem on the body of Santosh and P.W.23 Dr. Edemundo Josef Rodrigues conducted the postmortem on the body of Jaishri. P.W.32-Madhukar Yashvant Kadam, during the course of investigation arrested the accused persons and at their instance purportedly recovered the weapons. On completion of investigation he filed a charge sheet in the Court of the learned Judicial Magistrate, Kankavali, who committed the case to the Court of Sessions.

3. The prosecution examined in all 32 witnesses and the accused examined one witness Shankar Ramchandra Narkar, D.W.1. The accused in their statement recorded u/s 313 of the Cr.P.C. stated that on account of group rivalry they were roped in a false case by the party Ramesh Upade. Accused No. 1 took an additional plea that he was not present in the village when the incident had taken place and in support of his plea of alibi D.W.1 came to be examined.

4. On the assessment of the evidence both oral and documentary the learned trial Judge held that Santosh Upade and Jayashri Upade died of homicidal death on account of bullet injuries they had received. On the night of 20th May, 1998 at Upale accusedNo. 1, 4, 5 and 6 had committed tress-pass by entering in the house of Shankar Pandurang Upade, P.W.14 after having made preparation for causing hurt to him and the accused No. 1 had caused hurt to him by Kukari. It was further held that accused No. 1 voluntarily caused hurt to Jaidas with Kukari. The trial Court held that the prosecution has proved that the accused No. 5 has committed the murder of Santosh and Jaishri and accused Nos. 1 to 5 in furtherance of their common intention had caused bodily injuries to Nitin Manohar Upade, P.W.21 and Bhikaji Dhondu Upade, PW.20 And and causing hurt with such an intention and under such a circumstance that if by that act the accused No. 1 would have caused the death of Jaidas and held them guilty of the offences punishable u/s 307 read with Section 34 of the I.P.C. Accused No. 1 was individually held guilty in the course of course of same transaction of unlawfully possessing fire arms.

5. The prosecution case is based on the evidence of the eye witnesses Shankar Pandurang Upade, .W.14, Jaidas Sitaram Upade, P.W.18, Bhikaji Dhondu Upade, P.W.20, Nitin Manohar Upade as well as Ramesh Janardan Upade, P.W.16, Anant

Sitaram Mandavkar, P.W.17 and Manohar Sakharam Upade, P.W.19. P.W.1 to 16 were panch witnesses and P.W.1 Ankush Dhakatu Sakpal, P.W.2 Ashok Balkrishna Sakpal, P.W.3 Prakash Keshav Raorane, P.W.4 Satyashodhak Rajaram Raorane, P.W. 6 Prakash Shankar Sangavekar, P.W.9 Prakash Yashwant Bawadekar, P.W.10 Dipak Vithoba Sutar had turned hostile and did not support the prosecution case. Whereas P.W.5 Vinod Krishnappa Gandhi, P.W.7 Ravindra Dhaku Paste, P.W.8 Babu Pandurang Kharat, P.W.17 Anant Sitaram Mandavkar, P.W.12 Tanaji Tukaram Hadasi and P.W.13 Baliram Sitaram Upade supported the seizure recovery of cloths/arms and memorandum of panchanama, etc. P.W.17 Anant Sitaram Mandavkar and P.W.19 Manohar Sakharam Upade are claimed to be eye witnesses as well as panch witnesses. P.W.22 Dr. Najakat Mehabub Marchant, P.W.23 Dr. Edemundo Josef Rodrigues, P.W. 15 Hambirrao Shankarrao Jadhav, P.W. 27 Dr. Jude C.R. Rodrigues and P.W. 28 Dr. Shashikant Shamrao Bhise were medical officers, whereas P.W. 24 Prakash Anantrao Mishal was the arms dealer and P.W. 25 Tanaji Balu More and P.W.26 Anant Gopal Supal, P.W. 29 Madhukar Rajaram Desai,, P.W.30 Rajendra Murari Rane, P.W.31 Vitthal Anna Jadhav and P.W. 32 Madhukar Yashvant Kadam were the police personnel. In so far as the first issue of homicidal death of Santosh and Jaishri is concerned, postmortem was conducted by P.W.28 Dr. Shashikant Shamrao Bhise on the dead body of Santosh and he had signed the postmortem report at Exhibit 208. The cause of death was "shock due to intracranial hemorrhage due to brain laceration. Injury Nos. 1 and 2 were noticed on the parietal region and were fire arm injuries. As per the certificate issued by him at Exhibit 207 he opined that the said injuries were possible by the bullets fired. It is not disputed that Santosh died on account of the injuries caused by fire arm. P.W.23-Dr. Edemundo Josef Rodrigues conducted the postmortem on the body of Jaishri on 23rd May, 1998 at Goa Medical College between 2.20 to 4.00 p.m., and he signed the postmortem report at Exhibit 152. Before her death Jaishri was operated by Dr. Jadhav and pellets he had recovered from her body were handed over to the police. Even during postmortem he had recovered pellets from the body of Jaishri which were handed over to police in sealed envelope. As per him the cause of death was shock as a result of hemorrhage and peritonitis consequent to firearm injuries to abdomen associated with fracture of both legs. Thus Jaishri died a homicidal death on account of fire arm injuries is not in dispute.

6. It would be appropriate to set out the injuries noticed on the dead body of Santosh and Jaishri by P.W.28 Dr. Shashikant Shamrao Bhise, and P.W.23 Dr. Edemundo Josef Rodrigues

Injuries on the body of Santosh

1. C.L.W. on right parietal region, round in shape about 2 x 1 cm. edges irregular and inverted, brain deep. Burns near edges. Hair burnt near edges.
2. C.L.W. on the left parieto occipital region. 3X2 cm Brain deep. Behind and upper the left ear, irregular lacerate edges and wound is everted.

3. C.L.W. on the left parietal region 3 x 1 cm.
4. C.L.W. on the right ankle on the medical aspect 5x1 cm.
5. Contusion on both shoulder 3x1 cm.
6. Abrasion on the right flank 3x1 cm.
7. Abrasion on the right hand at the middle phalynx and on the middle phalynx.
8. Abrasion on the right, wrist 2x1 cm. on dorsal aspect.
9. Punched in irregular depressed in skull on the right parietal region x2 x 1 cm. Direction from outside inwards.
10. Punched out irregular fracture in skull on the left parietal occipital region from inside outwards 3 x 2 cm.
11. Irregular fracture of ethroad bone from right to left.

Injuries on the body of Jaishri

1. Lacerated punctured wound 1 cm x 1 cm. of firearm entry wound with inverted margin situated in left iliac fossa at the level of symphysis pubis, 4 c.m. to left of mid line and 86 cms. above left heel. There was no abrasion or contusion collar, no scorching. The entry wound has made puncture in the mesentry and intestines which is resected and sutured with anastomosis by surgeon. The trak of wound is horizontal from left to right with effusion of blood in the posterior part of abdominal muscles in right renal angle. No firearm missile recovered. However, the same is seen on x-ray and is removed by surgeon.
2. Stitched surgical vertical median incised wound of 22 cms. X stitched on either side of umblicus. There are also two surgical drainage wounds with malecot drains in situ in both iliac fossae.
3. Superficial lacerated punctured wound of 5 x 5 mm. in mid medial aspect on right arm with effusion underneath and no missile recovered.
4. Lacerated punctured wound 1 x 1 cm. in upper medical aspect of left thigh with through and through track of missile in the thickness of muscle with effusion of blood and with exit wound of 1.2 c.m. diameter in upper medial aspect of the left thigh over its back portion, total depth is 15 cm. and the exit wound is everted with puckering of margin. The direction is from before backwards, downwards and medial words.
5. Two lacerated punctured wounds of 1 cm. X 1 cm. each in upper front of right thigh outer part, 4 cm., apart with inverted margin with corresponding wound track from before backward in the thigh muscle and with two exit wounds of 1.2 c.m. each with everted margin, in middle outer back of right thigh. The direction is from before backward, downward and outward with total depth of 14 cms. each. There is effusion of blood along with track of wound.

6. A superficial lacerated punctured wound of 5 x 5 mm. with round ball pellet underneath the upper medial aspect of right thigh with inverted margin.

7. Lacerated punctured wound of 1 x 1 cm. with inverted margin with comminuted fracture of lower third of left tibia corresponding exit wound of 1.2 cm. with everted margin in lower third back of left leg outer aspect with a track wound of 8 cm. from before backward. No missile recovered.

8. Two lacerated punctured wounds of 1 x 1 cm. each in lower middle front of right leg and lower third front of right leg with everted margins. Four deformed round ball marks, two big and two small recovered in the lower third back and lower middle back of leg with effusion along with round track with comminutive fracture and shattering of right tibia and fibula bones in lower third.

7. Jaishri had sustained in all 9 pellets injuries and fracture on her legs. P.W.23 stated before the Court that in normal course the fracture on legs would not cause death and Jaishri's death was on account of the fire arm injuries. P.W.27 Dr. J. Rodrigues was the Assistant Professor in Surgery in the Goa Medical College at the relevant time and he stated before the Court that on 21st May, 1998 a patient by name Nitin Upade P.W.21 was admitted in the surgical Ward No. 107 of the said Medical College and the admission record at Exhibit 203 was placed on record. The patient was complaining with breathlessness and chest pain and the pulse was of 130 P.M. On respiratory system examination he found right lower and midzone absent and upper zone present. The Chest X-ray shown right hemopneumothorax and bullet was seen in the right side of the chest. The limited C.T. Scan of the thorax was done to localise the bullet and the patient was operated. In the operation bullet was not taken out of the body as its removal could have endangered the patient's life. The patient was discharged on 1st June, 1998. Thus he remained in the hospital for about 10 days.

In his cross examination the witness admitted that the radiologist report indicated only a one foreign body and he was not able to indicate whether the injuries was by a bullet or by a pellets and obviously what remained in the body was a pellets or a bullet. He also stated that the injuries sustained by the patient was grievous.

The evidence thus brought on record went to show that Santosh as well as Jaishri died homicidal death caused by fire arms and P.W.21 survived despite receiving a gun shot injury and because of the medical treatment that he received.

8. To understand as to how the incident had taken place it would be appropriate to start from the evidence of P.W.25-Tanaji Balu More, who was the Police Station Officer from 10.00 a.m. on 20th May, 1998 to 6.00 p.m. on 21st May, 1998. In his deposition before the Court he stated that accused No. 5-Amrit Shantaram Upade reached the Police Station at about 1.45 a.m. on 21st May, 1998 and wanted to lodge a complaint. His complaint was reduced in writing as per his directions and C.R. No. 26 of 1998 came to be registered (Exhibit 164-A). On

investigation into the said C.R. the charge sheet was filed and on committal the case was registered as Sessions Case No. 37 of 2000. He further stated that P.S.I. Desai P.W.29 was not at the police Station when accused No. 5 had reached and a message was given to him about the firing incident that had taken place at village Upale. He had handed over the charge to P.S.I. Desai at about 12.35 noon on 21st May, 1998. He further admitted that at about 2.00 a.m., two persons from Upalewadi had reached the Police Station and wanted to lodge a complaint, but he could not remember their names. He also admitted that he did not record their complaint, despite the fact that he was a Police Station Officer and that it was a complaint of murder at Upalewadi. He also admitted that the complainant did not disclose the names of any of the accused, nor they had disclosed description of weapons used in the incident. He further admitted that when a cognizable offence was brought to his notice it was his duty to register the F.I.R. immediately, but he had communicated the said incident to the P.S.I. who was at his residence. He also admitted that the said information was also not recorded in the station diary though it was essential to take such entry. P.S.I. Desai visited the Police Station between 2.20 to 2.25 a.m. but did not record any complaint.

9. P.W.26-Anant Gopal Supal was the Police Head Constable with Vaibhavwadi Police Station at the relevant time. He stated before the Court that Bhaskar Upade and Anant Upade had contested the Grampanchayat election of Upalewadi against each other and accused No. 1 and accused No. 5 were trying to bring pressure on Bhaskar for withdrawal to which he did not respond and on that account, Bhaskar Upade, Sitaram Upade, etc., were assaulted by accused No. 1-Anant and accused No. 4-Jaising. On account of this incident Bhaskar Upade had lodged complaints and accordingly C.R. Nos. 53/97, 54/97 and 55 of 97 were registered with the said Police Station for the offences punishable under Sections 452, 323, 504 and 506 of I.P.C. Chapter Case No. 63/97 was also submitted in the Court of Executive Magistrate, Vaibhavwadi. On the date of the incident i.e. on 20th May, 1998 he was attached to the Vaibhavwadi Police Station. At about 7.00 a.m. on 21st May, 1998 he had come to know about the incident. He was directed to search out the house of the accused No. 1 and 5 and, therefore, with the assistance of two panchas the search was carried out and one handle of Kukari without blade and one gun and a live cartridge were found in a box. Ankush Sakpal and Ashok Sakpal were two pancha witnesses. The seized gun was bearing No. HIM-24490 and the seized articles were marked as Article Nos. 6, 7 and 8 and the panchanama was drawn at Exhibit 166. This witness further stated that on 29th May, 1998 i.e. 8 days later the accused No. 1 made a statement while in the lock-up that he would point out the concerned revolver at village Aainare. The police party went to the house of Shrikrishna Bhosale at Aainare and the accused No. 1 had taken them to the hilly area and he took out one revolver which was concealed under the rubbish near one Jambhul tree and was seized under the panchanama (Article No. 52).

In his cross examination he admitted that he knew deceased Santosh Upade and on his complaint dated 17th February, 1998 Santosh Upade was prosecuted on

the charges of behaving in disorderly manner under the influence of alcohol. He further admitted that there were other complaints against deceased Santosh.

10. From the evidence of PW.25 it is clear that the incident that had taken place at Upalewadi had started with the setting on fire of the cattle shed of Baliram Upade and in the very same incident the Armada Jeep of Anant Upade, accused No. 1, was also set on fire. This jeep was parked at the distance of 1/2 Km., away from the cattle shed of Baliram Upade (accused No. 3). On the basis of the complaint lodged by accused No. 5 complainant party in Sessions Case No. 44 of 1999 was tried and the F.I.R. arising from the complaint of P.W.14-Shankar Pandurang Upade was registered almost after 12 hours from the time of the F.I.R., filed by accused No. 5 was registered. It has come in the examination-in-chief of P.W.29 Desai that the complaint of P.W.14 was recorded at the Primary Health Centre at Umbarde between 2.30 to 3.00 a.m., on 21st May, 1998. But in the cross examination he admitted that it was recorded at the Police Station and C.R. No. 25/1998 was registered at 12.40 p.m. on 21st May, 1998. This witness also admitted before the trial Court that Umesh Upade met him in the Police Station between 2.30 a.m., to 3.00 a.m. and instead of recording his complaint he reached Upalewadi in the second round along with Umesh Upade between 3.40 to 4.00 a.m. and he had seen accused No. 5-Amrit in injured condition. He could not explain as to why he recorded the F.I.R. on the basis of the complaint of P.W.14 only around 12.40 noon on 21st May, 1998 and as to why he did not record the complaint on the basis of the information provided to him by Umesh Upade right at the Police Station. The Learned Counsel for the defence was, therefore, justified in saying that the C.R., on the basis of the complaint of P.W.14 was registered after due home work. Be that as it may, it is clear in our mind that in the incident both sides had suffered injuries and the incident had started with the setting on fire of the cattle shed of accused No. 3 and thereafter the Armada Jeep of accused No. 1 by the mob which as per the defence belonged to the complainant party. In such circumstances, the evidence of the prosecution will have to be read with care and caution. P.W.22 Dr. Najakat Mehabub Marchant admitted in her cross examination that she had examined Anant Upade, Jaishri Jagannath Jondhalekar, Sugandha Baliram Upade and Mrs. Suvarna Amrit Upade on 21st May, 1998 and they had all sustained injuries, though none of them had received any bullet injuries.

11. P.W.17 Anant Sitaram Mandavkar stated before the trial Court that accused Nos. 8, 9 and 11 were neighbours of deceased Jaishri and they were living under the same roof. He was not an eye witness and in his statement recorded on 22nd May, 1998 the defence brought out number of contradictions. He admitted that he had visited the Police Station and met P.S.O. More and specifically stated that accused No. 1 Anant and accused No. 5 Amrit had opened fire and in that Santosh had died on the spot and other 10-12 persons had received injuries. He also stated that as per his information entry at Exhibit 127 was recorded by the P.S.O. This was one more witness to confirm that despite the knowledge of cognizable offences having been taken place at Upalewadi neither the P.S.O., nor

the P.S.I. registered the C.R., either on the basis of the statement of P.W.17 Anant Sitaram Mandavkar, P.W. 16-Ramesh Janardan Upade or P.W.14-Shankar Pandurang Upade before 6.00 a.m. on 21st May, 1998 and despite the fact that P.W.27-P.S.I. Desai had visited the Police Station and the spot of incident on more than one occasions. There is reason to believe on the basis of the evidence, that the incident which started with setting on fire of the cattle shed resulting into gun fires.

12. P.W.22-Dr.Najakat Mehabub Marchant was the Medical Officer at Umbarde Primary Health Centre. She stated before the trial Court that on 21st May, 1998 Vaibhavwadi Police referred in all 10 patients and out of them 3 patients namely Santosh Shankar Upade, Jaishri Anant Upade and Nitin Manohar Upade were referred to Government Hospital, Kankavli as they were in serious condition. She had examined Jaidas Sitaram Upade, P.W.18, Sambhaji Pandurang Kokate, Mrs. Yeshoda Dattaram Kolate, Anant Gangaram Upade, accused No. 1, Mrs. Samruddhi Suryakant Chavan, Bhikaji Dhondu Upade, P.W.14-Shankar Pandurang Puade and Gangubai Rajaram Malap. She further stated that the injuries sustained by Mrs. Yeshoda Kolate, Shankar Upade, P.W.14, Jaidas Upade, P.W.18, Bhukaji Dhondu Upade, Mrs. Smruddhi S.Chavan and Gangubai Malap were not caused by fire arms. However, injury sustained by Sambhaji Pandurang Kokate was likely to be caused by fire arms. She further admitted that injury No. 1 suffered by Anant Gangaram Upade, was likely to be caused due to fire arms. Similarly, injury Nos. 2, 4 and 5 mentioned in the certificate issued in respect of Bhikaji Upade were likely to be caused by fire arms. The medical certificates issued by this doctor clearly indicated that all the witnesses of the complainant i.e. P.W.13, P.W.14, P.W.18 and P.W.20 had received simple injuries. P.W.14-Shankar had not received any fire arm injury. Having regard to this medical evidence it appears that both the sides were virtually on the streets and attacking each other and in the melee both sides received certain injuries. Deceased Jaishri sustained the injuries while she was just in front of her house and it is obvious from the injuries seen on the person of deceased Santosh, deceased Jaishri and P.W.21-Nitin Manohar Upade that more than one gun shots were fired.

13. The prosecution case is based on the evidence of injured witnesses namely P.W.13, P.W.14, P.W.20 and P.W.21. P.W.13-Baliram Sitaram Upade has, in fact, been used as a panch witness for the alleged disclosure made by accused No. 11-Deepak and further the recovery of iron bar (Article 57) on the basis of the memorandum of statement at Exhibit 115. He admitted in his cross examination that there was a quarrel between the accused party and the party of Bhaskar Upade on 20th May, 1998 and Jaidas Sitaram Upade, P.W.18 was his cousin. He also admitted that he himself, Jaidas P.W.20, Manohar Upade, P.W.19 and Suryakant Upade represented the party of Bhaskar Upade.

Coming to the evidence of P.W.14 and more particularly on the point of the incident of gun fire though he stated in his examination-in-chief that he had seen

accused No. 5 firing shots and had stated that accused No. 1 Anant was running with revolver to west direction, he admitted in his cross examination that in his statement recorded at Exhibit 118 he had not mentioned anything about the gun and he could not assign any reason. He further stated that Jaidas Upade, P.W.18 had received stab injury and the entire incident had lasted for about 10 minutes. As per him accused No. 5 had fired twice but he could not say whose gun shot was received by his son Santosh and he had seen accused No. 5 only firing. He had not witnessed Jaidas receiving fire arm injuries. He also admitted that Sub Inspector Desai had accompanied him to the Umbarde Hospital and his treatment had lasted only for 5 minutes and after his treatment his statement was recorded which lasted for about 30 minutes and he had not visited the Vaibhavwadi Police Station at any time on 21st May, 1998 and number of contradictions were brought out during his cross examination between his oral deposition before the Court and the complaint at Exhibit 118. He also admitted in his cross examination that the accused party was supported by only four families in the village. He also admitted that his son Santosh was residing normally at Mumbai and had returned about 3 months prior to the date of incident. The deposition of P.W.14 who was the complainant thus went to show that he was not aware as to how his deceased son had received the gun shots and whether they were fired by accused No. 5 or accused No. 1.

14. P.W.16 is the next eye witness relied upon by the prosecution. He was residing at Mumbai but about six months prior to the incident he had returned to the village. At the time of the incident he was in the house of his cousin Dnyanoba where the function was going on and he came to know about the incident through Jaidas P.W.18. He came to know that P.W.14 was beaten up by accused No. 1. In his examination-in-chief he had specifically stated that after he got the news from P.W. 20 he rushed towards the house of Santosh and when he was passing through the Panand, adjacent to the house of Bhikaji Dhondur Upade, P.W.20, he had seen accused No. 5 Amrit firing towards them and deceased Santosh received bullet injury and collapsed on the ground. Accused No. 5 fired one shot which hit Jaishri on her left leg and she also collapsed. Thereafter he went to the house of Anant Sitaram Mandavkar, P.W.17 and narrated the incident. He and Anand Mandavkar went to the Police Station on his scooter. They reached the Police Station at about 2.30 a.m. and submitted an oral report. He had seen Santosh unconscious and Jaishri was moaning when he left the spot. On the next day he had seen empty cartridges at a distance of 17.5 ft., away from the house of the complainant. In his cross examination he stated before the Court that when he went to the Police Station he was aware that accused No. 5 had fired with a gun and he was aware about the difference between a gun and a revolver and he had informed Anant also accordingly. He further stated that at the Police Station he had informed that Santosh Upade was killed with a revolver by accused No. 1-Anant Upade. He further stated that the name of accused No. 5 was given to the Police. He further stated that he had informed the Police that the firing was by gun and not by revolver. Thus this

witness contradicted his own evidence and he was not certain whether Santosh had received injuries by the revolver allegedly used by accused No. 1 or by the gun fired by accused No. 5 and he was also not aware whether Santosh had sustained fire arm injuries on account of a gun fire or revolver fire. He also admitted that Police had met him on 21st May, 1998 and 23rd May, 1998 and he was in the village right from 20th May, 1998 till 28th May, 1998, but his statement was not recorded by the Police.

15. P.W.17-Anant Sitaram Mandavkar was the Sarpanch of village Upale. At about 11.00 p.m. on 20th May, 1998 P.W.16 Ramesh Janardan Upade had gone to his house and gave information about the incident and he had gone with P.W.16 to the Police Station to give the information. He admitted in his cross examination that he was Shiv Sena candidate in the elections to the village Panchayat. He also admitted in his cross examination that it was P.W.16 Ramesh Janardan Upade who had told him that accused No. 1 Anant had fired with revolver. He also admitted that his statement was recorded by the Police for the first time on 22nd May, 1998. His statement regarding involvement of accused No. 5 was proved to be contracted and improved over his statement and thus he proved to be an unreliable witness of the prosecution.

16. P.W.18-Jaidas Sitaram Upade is nephew of P.W.14 Shankar Pandurang Upade and their houses were separated by a distance of about 20 ft. He heard the noise coming from the house of P.W.14 and, therefore, he came out of his house. He had seen accused No. 1 Anant Upade holding a chopper in his one hand and a revolver in another. He had seen accused No. 5 Amrit giving kicks to Gangubai. He had intervened, but accused No. 1 had stabbed on his back with a chopper. When he approached the house of Bhikaji Upade P.W.20 he heard the firing and he saw Jaidas had received bullet shots. He had seen accused No. 5 firing from the gun and accused No. 1 was instigating him to open fire. He had seen Santosh lying in injured condition.

In his cross examination he admitted that he had not received any bullet injuries and he admitted that his statement was recorded in which it was stated that he had received injuries of cartridges. He stated that he had not so told to the Police. By this cross examination the witness was proved to be unreliable. He admitted that he did not approach the Police Station on 21st May, 1998 and told that that he had seen the incident. He admitted that the cattle shed of Baliram was adjacent to his house and it was near the Panan and the house of P.W.14 as well as Dnyanadeo Upade. He was also aware that the cattle shed of Baliram was set on fire during the incident. He was not aware whether accused No. 5 had received 7 injuries during the incident and he was also not aware whether accused No. 6 Nitin had received injuries. Such a witness ought to be discarded, though claimed to be injured in the evidence.

17. P.W.19 Manohar, the father of P.W. 21 Nitin, is another witness relied upon by the prosecution. He stated before the trial Court that while he was at his house he was looking through the window and had seen accused No. 5 Amrit asking his

wife to hand over the gun and accordingly his wife had handed over the same. He then saw accused No. 5 Amrit going towards the house of P.W.14 and he had heard accused No. 1 instigating accused No. 5 to open fire. In his cross examination he admitted that he was one of the accused in Sessions Case No. 37 of 2000 but he was never arrested. He also admitted that there were two rival groups on account of village Panchayat elections. His statement that he had seen accused No. 5 and accused No. 1 through his window was falsified in his cross examination when he was confronted with his statement recorded by the Police. This was one more witness unreliable and ought to be discarded.

P.W.20-Bhikaji Dhondu Upade is another injured witness. He stated that during the incident he had seen accused No. 5 with a gun. When he tried to lift injured Jaidas the accused No. 5 opened fire and he had received four cartridges which sustained injuries on his left elbow. He, therefore, went back to his house. Police arrived at 4.30 a.m. and shifted the injured to the Umbarde Hospital. There were in all 8 injured persons. In his cross examination he admitted that he belongs to the party of Bhaskar. When he had received bullet injuries along with him Jaishri and six accused were on the spot. He further stated that the injured persons were treated at the Hospital between 7.00 to 8.00 a.m., and he was at the said hospital till 11.00 a.m. and returned to his village in the Police vehicle. He admitted that he was one of the accused in Sessions Case No. 37 of 2000. He also admitted that from his house the cattle shed of Baliram was visible. The defence brought out in his cross examination that he had not stated before the Police when his statement was recorded that he had seen accused No. 5 while firing by his gun and therefore, to establish the prosecution against accused No. 5, he would not be relied upon.

18. We now come to the last injured eye witness P.W.21-Nitin Manohar Upade. He stated that accused No. 1 was armed with a revolver and accused No. 5 was armed with a gun. He had seen Jaishri lying in an injured condition and was moaning and, therefore, he rushed to lift her. At that time, accused No. 1 fired with his revolver which hit him on his right chest. He was shifted to Kankavali hospital and thereafter to the Goa Medical College Hospital. In his cross examination he had admitted that he belongs to Bhaskar group. He was not aware as to who received the bullet injuries first. He further stated that when he had seen Santosh for the first time he was not aware whether he had received any bullet injuries and he never came to know if Santosh had received any such injuries. On seeing Jaishri injured, he had gone to save her and in that process he had received the bullet injury. He had heard in all three shots, one was by revolver and two of gun. He had seen the incident in the light of flames of cattle shed of Baliram. He had not seen the incident of Jaishri receiving the injuries. His statement was recorded for the first time on 26th May, 1998 and he admitted that part of his statement recorded was not correct. He further stated in his cross examination that he had never claimed that the firing in which Jaishri and he had sustained injuries was caused by accused No. 1. His statement so recorded was incorrect and he could not assign any reason as to why police recorded the same.

He reiterated that accused No. 1 Anant had fired at him with a revolver, but he could not give any reason why the same was not recorded in his statement before the Police. He admitted that there was a mob of 60 to 70 persons in the entire incident. The witness contradicted himself on the prosecution case that it was accused No. 1 who had fired at him by the revolver and injured the witness.

19. So far as recoveries are concerned, it is the case of the prosecution that the gun, cartridges and a Kukari were recovered from accused No. 1 and P.W.1-Ankush Dhakatu Sakpal and P.W.2-Ashok Balkrishna Sakpal were the witnesses for the said recovery. Both of them turned hostile and did not support the prosecution case. The prosecution further claimed to have recovered one gun from accused No. 1 and one muzzle loading gun from accused No. 8. P.W.8 Babu Pandurang Kharat was a panch witness and he did not turn hostile. On the country the revolver was claimed to have been recovered from accused No. 1 and Shri Prakash Yeshwant Bawdekar, P.W.9 was the panch witness for the same along with Deepak Sutar, P.W.10. Both of them turned hostile. Recovery of one Kukari from accused No. 1 was also claimed by the prosecution and P.W.11 Suresh Narayan Mandavkar was the witness for the said recovery. Thus the prosecution claimed to have recovered one gun and one Kukari from accused No. 5, one gun from accused No. 7, one muzzle loading gun from accused No. 8 and one country revolver from accused No. 1, thus making a total of 4 fire arms recovered from four accused. As the panch witnesses for the recovery of fire arms from accused No. 5 and accused No. 1 turned hostile the prosecution relied upon the evidence of three police officers i.e. P.W.26-Anant Supal, PHC, P.W.31 Vitthal Jadhav, P.I. and P.W.32-Madhukar Yeshvant Kadam, I.O. P.W.31 claimed that he had arrested accused No. 5-Amrit on 21st May, 1998 vide the arrest panchnama at Exhibit 234. He had recovered used cartridges from the spot of incident vide panchnama at Exhibit 121. P.W.32 Madhukar Kadam gave a detailed account of the recoveries of these weapons from accused No. 1, accused No. 7 and accused No. 8 on 29th May, 1998. In his cross examination P.W.32 admitted that there was no case diary maintained by the investigation in C.R. No. 26 of 1998 (Sessions Case No. 44 of 1999) he had visited Upadewadi on 22nd May, 1998 but had not taken any accused in custody and had not carried out search of the house of any of the accused persons or any adjacent places to their houses including the cattle shed. He also admitted that there were no seal on any articles which were attached during the investigation. He stated that accused Nos. 1, 3 and 4 had surrendered before the learned Judicial Magistrate, First Class on 28th May, 1998 and accused No. 6 had surrendered similarly on 3rd June, 1998. He admitted in his cross examination that the complaint of P.W.14 was recorded by him at the police station on 21st May, 1998 but P.W.14 in his cross examination had admitted that he did not visit the police station on 21st May, 1998 at any time. The defence proved that P.W.32, who was the I.O., did not act in fairness and by other witnesses of the prosecution. The complaint by the accused party was recorded by P.W.26 at 1.40 a.m. on 21st May, 1998 but it was registered by P.W.32 as C.R. No. 26/1998 whereas the complaint of P.W.14

registered at 12.40 p.m., on that day was registered as C.R. No. 25/1998. None3 of these three police officers could prove the recovery of any fired bullets at the country revolver from the spot, though gun fired pallets were so recovered.

20. The prosecution did not examine any ballistic expert so as to relate the pallets recovered from the body of the deceased to connect with the fire arms allegedly recovered during the investigation. However, it examined P.W.24 - Prakash Anantrao Mishal, an arms dealer. He stated that accused No. 5-Amrit had approached him on 3rd March, 1996 i.e. more than two years before the date of the incident showing the gun license in his name of 12 bore cartridges and had purchased ten cartridges for Rs. 323/- and an entry was taken in the Register (Exhibit 157). He further stated that the license produced by accused No. 5 was valid for 3 years (Exhibit 158). This witness proved that accused No. 5 had a gun license in his name and he had purchased 10 cartridges of 12 bore on 3rd March, 1996, but the extract of documents went to show that the armed license was granted to accused No. 5 on 31st December, 1996 and it was valid till 31st December, 1999. The daily sale register at Exhibit 160 went to show that on 24th May, 1996 accused No. 5 had purchased 50 cartridges.

21. Accused No. 1 examined D.W.1-Shankar Ramchandra Narkar in support of his claim that at the time the incident had taken place he was away from village Upale. D.W.1 stated before the Court that the accused No. 1 belongs to the Congress (I) party and he was from Shiv Sena. He was at the relevant time Upasabhapati of Panchayat Samiti, Vaibhavwadi and on account of the water scarcity issue he visited Upadewadi on 20th May, 1998 and he went to the house of Dnyanadeo Upade, who was the head of the Shiv Sena party. In the courtyard of the house of accused No. 1-Anant he had tea along with some other members of the village at about 8.30 p.m. on the same day. Thereafter all of them went to the house of Dnyanadeo Upade and gave present to his daughter. He was accompanied by accused No. 1. Thereafter, accused No. 1 had accompanied him to go to Vaibhavwadi by jeep as he had no diesel and he wanted to purchase diesel which was not available at Upalewadi. He had reached Vaibhavwadi at about 10.30 p.m. The distance between Upalewadi and Vaibhavwadi is about 40 - 45 Kms. In his cross examination there was nothing to impeach the testimony of this witness except to point out the doubt about the distance between Vaibhavwadi and Upalewadi. He denied that distance was only 22 Kms. The accused No. 1 having taken the plea of alibi examined D.W.1 and in his cross examination there was nothing brought out to doubt his statement that accused No. 1 was with him in the journey from Upalewadi to Vaibhavwadi and they reached Vaibhavwadi at 10.30 p.m. on 20th May, 1998. There are no justifiable reasons for the trial Court to discard or disbelieve the testimony of D.W.1 more so when the witness and accused No. 1 belonged to rival political parties.

As per P.W.21 Nitin Upade, accused No. 1 was armed with revolver and he had fired by the revolver on his chest. As per P.W.19 Manohar Sakharam Upade he had heard that accused No. 1 Anant was instigating accused No. 5 to open fire.

P.W.14 Shankar Pandurang Upade and P.W.18 Jaidas Sitaram Upade stated that accused No. 1 had assaulted P.W.14 with a chopper. The injury certificates of Shankar Pandurang Upade (Exhibit 145) and Jaidas Sitaram Upade (Exhibit 139) did not indicate any such injuries suffered by P.W.14 and P.W.18. In fact all the injuries suffered by P.W.14 were contusion, minor abrasion and they could have been caused by hard and blunt object. Similarly the injuries suffered by P.W.18 were simple in nature and all of them were caused by hard and blunt object except injury No. 1, which was believed to be sharp and pointed object though it was simple in nature. The claim made by P.W.21 Nitin Manohar Upade that accused No. 1 fired with revolver on his chest is not supported by any other eye witness relied upon by the prosecution. P.W.27 Dr. E. Rodrigues who had treated P.W.21 at the Goa Medical College Hospital on 21st May, 1998 admitted in his cross examination before the trial Court that he did not mention in his report regarding the presence of wound of entry on the person of P.W.21. He also admitted that he did not have the knowledge of ballistic. He also admitted that the date of discharge in the report at Exhibit 203 was overwritten. He also admitted that there was some foreign body in the x-ray films. Though this witness had stated in his examination in chief that he had stated that the bullet was seen in the right side chest of P.W.21, in his cross examination when he was confronted with a specific question he had stated that he had made such a statement on the face of the radiologist's report. He was not sure whether it was a bullet or a pellet. Thus there is no conclusive evidence brought out on record by the prosecution that P.W.21 had suffered a revolver fire injury or a gun fire injury. At the same time it failed to prove that he had suffered a bullet fire injury.

P.W.29-Madhukar Rajaram Desai in his deposition before the trial Court stated that when he visited the spot of incident in the wee hours of 21st May, 1998 he had found cartridges on the spot and recovery panchanama at Exhibit 121 was made. He had found accused No. 1 in injured condition and also the jeep of accused No. 1 as well as the cattle shed of accused No. 3 burning, but he did not enquire as to how they were set on fire. He also stated that he had found about 25-30 persons standing at the spot. When he reached there between 3.40 to 4.00 a.m., he did not enquire with any of them as to how the jeep and cattle shed were set on fire and how Jaishri and Santosh were ensured. In his cross examination P.W.32-Kadam admitted that the cartridges were purchased by accused No. 5 and not by accused No. 1 from P.W.24-Prakash Anantrao Mishal. He also stated that the gun license of accused No. 5 had the Gun No. and it tallied with the number found on the gun Article 68. He also admitted that he had investigated the cross case simultaneously i.e. C.R. No. 26 of 1998 registered on the basis of the complaint submitted by accused No. 5. He also admitted in his cross examination that in the course of investigation he had come to know that all the pieces of lead found at the spot were nothing but pellets.

22. It is also important for us to note that out the 5 eye witnesses relied upon by the prosecution i.e. P.W.14-Shankar Pandurang Upade, P.W.18-Jaidas Sitaram Upade, P.W.19-Manohar Sakharam Upade, P.W. 20-Bhikaji Dhondu Upade and

P.W.21-Nitin Manohar Upade, 3 of them i.e. P.W-18, P.W.19 and P.W.20 were accused in Sessions Case No. 37 of 2000 which arose from C.R. No. 26 of 1998 i.e. the cross complaint.

P.W.32 also admitted that the accused in C.R. No. 26/98 were not arrested and, therefore, the District Superintendent of Police had enquired about these arrests and the accused came to be arrested ultimately on 2nd November, 1998. He did not state that any of these accused in C.R. No. 26/98 were absconding. It has come in the evidence of P.W.17-Anant Mandavkar that accused No. 8, accused No. 9 and accused No. 11 are the neighbours of deceased Jaishri and they were staying in the different parts of the same area. Accused No. 1 was in fact the resident of Mumbai and about 10 days prior to the date of incident he had come to upadewadi. It is also in evidence that the party of the accused had assaulted Bhaskar Upade and, therefore, they were prosecuted prior to the incident. Though Santosh was declared dead at the hospital at Kankavli in the early hours of 21st May, 1998, the F.I.R. at Exhibit 118 was registered at 12.40 p.m. on the same day by P.W.32 was not for the offence punishable u/s 304 of I.P.C. P.W.26-Anant Gopal Supal, Police Head Constable admitted in his cross examination that deceased Santosh was prosecuted for behaving in an disorderly manner under the influence of liquor. He also admitted that there were complaints pending against deceased Santosh.

23. In the case of *Masalti v. State of U.P.* AIR 1965 SC 203 the Supreme Court held that where a criminal has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. The said decision was considered by the Supreme Court subsequently in the case of *Muthu Naicker and Others Vs. State of Tamil Nadu*, and it held that where an occurrence takes place involving rival factions, it is but inevitable that the evidence would be of a partisan nature and rejection of such evidence on that ground may not be proper. The Court observed:

6. Where there is a melee and a large number of assailants and number of witnesses claim to have witnessed the occurrence from different places and at different stages of the occurrence and where the evidence as in this case is undoubtedly partisan evidence, the distinct possibility of innocent being falsely included with guilty cannot be easily ruled out. In a faction-ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished if such an easy course is charted. Simultaneously, it is to be borne in mind that in a situation as it unfolds in the case before us, the easy tendency to involve as many persons of the opposite faction as possible by merely naming

them as having been seen in the melee is a tendency which is more often discernible and is to be eschewed and, therefore, the evidence has to be examined with utmost care and caution. It is in such a situation that this Court in *Masalti v. State of U.P.*, adopted the course of adopting a workable test for being assured about the role attributed to every accused. To some extent it is inevitable that we should adopt that course.

Recently in the case of *Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra*, the Supreme Court reiterated that in cases involving rival political factions or group enmities, it is not unusual to rope in persons other than those who were actually involved. In such a case, court should guard against the danger of convicting innocent persons and scrutinise evidence carefully and, if doubt arises, benefit should be given to the accused.

24. Having regard to the said legal position and on analysing the evidence of the claimed eye witnesses, we are satisfied that there is no evidence to prove beyond doubt that accused No. 1 was present at the spot, he participated in the incident and opened fire by a revolver. If we peruse the list of accused persons, it is clear that accused No. 1 is the husband of accused No. 2 and father of accused No. 6. Similarly, accused No. 1 and accused No. 5 are brothers and accused No. 9 and accused No. 11 are also brothers, whereas accused No. 10 is the wife of accused No. 5. Thus more than one members of the same family were sought to be roped in. The evidence on record also proved that accused No. 6 Nitin and accused No. 5-Amrit had sustained injuries during the incident. The evidence of most of the eye witnesses is exaggerated and the defence proved the improvements/contradictions on the basis of their statement recorded u/s 161 of the Cr.P.C. by the I.O. Accused No. 4 did not file any appeal and he suffered the sentence. Accused No. 1 and accused No. 6 are on bail. There is also contradiction in the evidence of P.W.21-Nitin Manohar Upade and his father P.W.19-Manohar Sakharam Upade. As per P.W.19 accused No. 1 was instigating accused No. 5 to open fire, whereas P.W.21 stated that accused No. 1 opened fire with revolver and fired at his chest. P.W.18-Jaidas Sitaram Upade did not assign any such act i.e. opening of fire of revolver by accused No. 1. He stated that accused No. 1 assaulted P.W.14 by chopper and accused No. 1 stabbed Jaidas Sitaram Upade, P.W.18 by chopper. He also stated that accused No. 1 was instigating P.W.5 to open fire by gun. As noted earlier the plea of alibi taken by accused No. 1 has been supported by him by examining the witness i.e. D.W.1 and this is where the trial Court, in our considered opinion, committed an error.

25. On the role of accused No. 6 regarding his participation in the assault on the complainant party, out of the six eye witnesses examined by the prosecution only P.W.21-Nitin Upade stated before the trial Court that the accused No. 6 was holding an iron bar and along with accused Nos. 1,5,3,4,7,8,9 and 11 was assaulting the deceased Santosh. He admitted in his cross examination that he had seen the incident in the light of flames of the cattle shed of accused No. 3. No other eye witnesses have supported this version of P.W.21 regarding

participation of accused No. 6 in the incident of assaulting the deceased or any other injured persons. Though it is a fact that accused No. 6 along with accused No. 5 had sustained injuries in the incident, but that by itself did not indicate that he had also participated in the assault on the complainant party. When at the incident there were 60-70 persons from both the parties and it occurred because of the political rivalry between two groups and some members of each of the group had sustained injuries, it could not be accepted that accused No. 1 along with accused No. 4 and accused No. 5 had attacked on the deceased Santosh. The prosecution, therefore, failed to establish its case against accused No. 1 beyond reasonable doubt and the trial Court was in error in accepting the prosecution case against the said accused. In our opinion accused Nos. 1 and 6 ought to get the benefit of doubts.

26. So far as the involvement of accused No. 5-Amrit Shantaram Upade in the incident and that too by resorting to fire by his gun is concerned, there is no reason to discard the recovery of the licensed gun from his house on 21st May, 1998. He himself had sustained multiple injuries in the incident. He had reached the Police Station at about 1.40 a.m., on 21st May, 1998 before the complainant party reached there and P.W.26 -Anant Gopal Supal had recorded his complaint at Exhibit 164-A. In the said complaint it was the case of accused No. 5 complainant therein (C.R. No. 26/1998) that after the marriage was over at about 10.00 p.m., on 20th May, 1998 the party of the present complainant along with deceased Santosh and Eknath Sakham Upade had come into his house and at that time deceased Santosh was holding a chopper and other members of his party were holding iron rods. It was his further case that deceased Santosh Upade along with Jaidas Upade had assaulted him by means of chopper on his head and sustained bleeding injuries. He was also beaten by other accused persons by iron rods in the presence of his wife and sister i.e. Suvarna Upade and Jaishree Jondhalekar who were also beaten by the complainant party. Accused No. 5, therefore, had a strong apprehension that the attack on him and his family members would be dangerous and they would kill him. Hence he picked up the gun and went to his courtyard and fired in the air. After the gun was fired the people ran away. Thus in the complaint at Exhibit 164-A filed by accused No. 5 and recorded by P.W.26 the accused No. 5 himself had admitted his presence at the spot, the injuries sustained by him and that he had opened fire by his gun. The circumstances that have been proved by the prosecution in Sessions Case No. 44 of 1999 went to show that accused No. 5 did not fire in the air. It is pertinent to note that deceased Santosh sustained head injuries, deceased Jaishri sustained injuries on the lower part of her body and few other witnesses sustained injuries on their legs on account of fire arms and such injuries could not have been caused if the gun was fired upwardly and in the air. Firing the gun in the air has a different connotation. He may not have aimed at any-one when the gun was fired and he has fired more than one shots. Nine pellets were recovered from the body of the deceased Jaishri and some pellets were recovered from the spot. He has certainly fired at the mob, which he

alleged that had surrounded his house and some members of the said mob had assaulted him. He did not take the plea in his statement recorded u/s 313 of Cr.P.C. that he fired in self defence and even otherwise the gun shots opened by him cannot support his case that firing was in the open air so as to disburse the mob. When he has fired more than one gun shots he is presumed to have the knowledge that in such firing some members of the mob would sustain fatal injuries. The way he has fired the gun shots, his knowledge that they would result in causing serious injuries to some members of the mob ought to be accepted and he opened gun shots with determination. The Sessions Case No. 37 2000 which arose from his complaint resulted in acquittal by the very same Court and he could not prove in the said case that the present complainant party had also opened fire or had caused some serious injuries to the members of his party except he himself and two others. As noted earlier, it appears that the incident initially was a fight between two rival groups and it arose because the cattle shed of accused No. 3 and Armada jeep of accused No. 1 were set on fire and the inference is that it was caused by some of the members of the complainant. At this stage accused No. 1 had opened fire by his licensed gun and atleast 4-5 persons received the fire injuries. Two of them died and P.W.21 Nitin survived because of the medical treatment. In addition, out of the injured witnesses i.e. PW 14 - Shankar Upade, PW 18 - Jaidas Upade, PW 20 - Bhikaji Upade and PW 21 - Nitin Upade have stated before the court that each one of them had seen accused No. 1 firing by his gun in the incident and, as noted earlier, Sessions Case No. 37 of 2000 was based on the prosecution case that the complainant therein and the present accused No. 5 had opened the fire by his gun, but the firing was in the open air. Hence we agree with the findings of the trial Court against accused No. 5, for his conviction u/s 302 and 307 of I.P.C. However, so far as the offence punishable u/s 452 of I.P.C. held to be proved by the trial Court is concerned, we do not find any material on record to hold that he trespassed into the house of P.W.14-Shankar Upade and assaulted any of his family members or P.W.14 himself. Accused No. 5, therefore, deserves to be acquitted for the offence punishable u/s 452 of I.P.C., and we ordered accordingly.

27. In the premises we hold that the trial Court was right in convicting accused No. 5 for the offences punishable u/s 307 and 302 of the I.P.C., and, therefore, we confirm the order of conviction and sentence passed against him to that extent. Criminal Appeal No. 651 of 2002, therefore, stands dismissed.

The conviction of accused No. 1 for the offences punishable under Sections 323, 324, 452 and 307 of I.P.C. and Section 3 read with Section 25 of the Arms Act is unsustainable and the same is hereby quashed and set aside. The conviction of accused No. 6 for the offence punishable u/s 452 of the I.P.C., is also unsustainable and the same is hereby quashed and set aside. Hence Criminal Appeal No. 650 of 2002 and Criminal Appeal No. 646 of 2002 are allowed and the order of conviction and sentence passed against accused No. 1 and accused No. 6 by the trial Court in Sessions Case No. 44 of 1999 is hereby quashed and set aside.

The acquittal of accused Nos. 1, 2, 3, 4 and 6 to 11 as recorded by the trial Court is hereby confirmed and Criminal Appeal No. 691 of 2002 filed by the State Government is hereby dismissed.

Bail bonds of accused No. 1 and accused No. 6 stand cancelled and Sessions Case No. 44 of 1999 stands dismissed against all the accused except accused No. 5.