

(2021) 10 BOM CK 0019

In the Bombay High Court

Case No : Criminal Appeal No. 466, 750, 751, 752, 753 Of 2014, 455 Of 2018

Prakash @ Buddha Ramchandra Shinde And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 05-10-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 302
Evidence Act, 1872 — Section 21, 32, 33, 65B, 80, 155, 157 Code Of Criminal
Procedure, 1973 — Section 161, 174, 291A, 291A(1), 291A(2), 313

Citation : (2021) 10 BOM CK 0019

Hon'ble Judges : Sadhana S. Jadhav, J; Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : Anita A. Agarwal, Viresh V. Purwant, Satyavrat Joshi, Jaydeep D.
Mane, Geeta P. Mulekar

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J

1 The appellants herein are convicted for the offence punishable under section 120B, 302 read with section 34 of the Indian Penal Code and sentenced to suffer R.I. for the period of 3 years each for offence punishable under section 120B of the Indian Penal Code and further sentenced to suffer Imprisonment for Life and to pay fine of Rs. 10,000/- each I.d. to suffer R.I. for two years for offence punishable under section 302 read with section 34 of the Indian Penal Code, by Sessions Judge, Solapur in Sessions Case No. 164 of 2011 vide Judgment and Order dated 8/5/2014. Hence, these appeals.

2 Such of the facts necessary for the decision of these appeals are as follows :

(i) On 17/2/2011 at about 14.10 hours (2.10 p.m.) one Swapnil @ Dayanand son of Bajrang Dhavane (P.W. 2) lodged a report at Mohol Police Station alleging therein that on 16/2/2011 he was accompanying his father to Diksal village on their Hero Honda Splender Motor Cycle No. MH-13-AM-6769. His father Bajrang

was working as Secretary in Solapur District Secondary School Teachers and Employees Credit Society at Bale, Solapur. On the way, they have stopped to give list of grocery articles to shopkeeper. When they had crossed village Karamba, his father had received a phone call. On the way at about 12.30 p.m., two unknown persons on motorcycle apprehended them. His father was directed to halt the motorcycle by the pillion rider. When they stopped, the said pillion rider asked his father the name of the village from which he hails and suddenly mounted assault upon his father with knife and assaulted him on left and right side of his chest, right shoulder and forearm. The said person was wearing sky blue shirt and white pant. Thereafter, both the accused fled on the Pulsor motorcycle.

(ii) Thereafter, he had taken his father in a State Transport bus to Solapur. He was assisted by one Shaukat Shaikh and Mainabai for boarding the bus. In a private jeep, he has taken his injured father to Ganga Hospital. Thereafter, Laxman Yadav, Shashank Dhavane, his mother Minabai, Mukund Dhavane, Govind Patil had reached the hospital and then he had retired for home.

(iii) On 17/2/2011 at about 7 a.m. he learnt that his father has succumbed to the injuries in hospital. Thereafter, he had returned to village Diksal and after funeral had approached the police station on the next day and lodged the report against unidentified person. He had disclosed his ability to identify the accused in the eventuality of being shown to him.

(iv) On the basis of the said report, Crime No. 67 of 2011 was registered at Mohol Police Station. Accused No. 3 was arrested on 17/5/2011 and the other accused were arrested on 20/2/2011. After completion of investigation, charge-sheet is filed on 19/5/2011. Accused No. 2 was arrested on 11/12/2011 as per the charge-sheet.

3 At the trial, the prosecution has examined 12 witnesses to bring home guilt of the accused. It is the case of the prosecution that the original accused Nos. 3, 4, 5 and 6 had conspired to eliminate Bajrang Dhavane. That the accused Nos. 1 and 2 had assaulted him on the spot.

DIRECT EVIDENCE

4 The prosecution case mainly rests upon the direct evidence of P.W. 2 Swapnil @ Dayanand Dhavane, son of the deceased. According to him, distance between Bale and Diksal is 28 km. P.W. 2 was studying in 10th standard at the time of occurrence of the incident. He has deposed before the Court in consonance with his FIR. P.W. 2 has further stated that his father was having a cell phone with registration No. 9822651692 and Idea cellular is his service provider. He has stated that the accused No. 2 had caught his father by the collar and assaulted him on the left and right side of the chest. According to him, accused was in the age group of 25 to 30 years. The witness was allowed to leave the witness box and see faces of accused before the court. At that stage, he had pointed towards Prakash Shinde. He has also identified the driver of the motorcycle. He claims to

have taken his father up to the door of the S.T. Bus. Thereafter, he was helped by Shaukat Shaikh and Mainabai Yadav to board his father in the bus. He claims that his father was admitted in Raut Hospital at about 1.30 to 2 p.m. and from there, he was transferred to Ganga Hospital. It is admitted that although the incident had occurred on 16/2/2011 in the noon, the report was lodged to the police station on 17/2/2011 since his father was undergoing treatment in the hospital and he was in a frightened state of mind. That the test identification parade was held on 18th May, 2011 in Tahasildar Office. He had identified accused Prakash Shinde. On 16th February, 2012, second test identification parade was held and he had identified the accused No. 2 who was driving the motorcycle at the relevant time. It is reiterated that he had identified the accused No. 1 as the assailants of his father. It is elicited in the cross-examination that his clothes were not stained with blood, although his father had sustained bleeding injuries. He had feigned ignorance as to whether police had arrived in the hospital and whether he had returned to the hospital again. He had met his mother in the evening and had disclosed the incident to her. Funeral was performed at village Diksal. He had not accompanied his mother and sister to the funeral, but had gone independently. The funeral was performed at about 1.30 noon and thereafter, P.W. 2 alongwith his mother and maternal uncle had been to the police station to lodge the report. He would not recollect as to whether he was called for test identification parade on 3/1/2012, 19/1/2012 and 21/1/2012, but he had gone for test identification parade on 16/2/2012,

5 It is the case of the prosecution that accused Nos. 1 and 2 were hired by accused Nos. 3 to 6 to eliminate Bajrang Dhavane. The motive was that, in the capacity of Secretary of the Credit Society, the deceased was not behaving properly with the other staff members. Moreover, the accused Nos. 4 to 6 were in the fray to be nominated as the Secretary of the Credit Society.

ELEMENT OF CONSPIRACY

6 In order to establish element of conspiracy, the prosecution has examined P.W. 4, P.W. 6, P.W.7 and P.W. 8.

7 According to P.W. 4 Shivraj Barkul, on 16/2/2011 when he was at home, he was informed by Mr. Mohite, the chairman of the Society that Bajrang Dhavane had been assaulted with knife. Upon enquiry with clerk in the office, he had learnt that the injured was admitted in Ganga Hospital. He therefore, visited the hospital at about 4 p.m. to meet the injured. He had noticed injuries on his chest, shoulder etc. and at that stage, the injured had divulged to him that due to rivalry in the department, assailants were sent by the accused Nos. 4 to 6 to assault him. The deceased has purportedly named Gahininath Dhavane, Prakash Sawant and Pandharinath Pawar. The deceased is also said to have disclosed to P.W. 4 that they were frequently picking up quarrels with him and they were extending threats of killing him. According to the prosecution, said disclosure is treated as dying declaration.

8 It is pertinent to note that P.W. 4 had supplied photo copies of the complaint filed by the staff including accused Nos. 3 to 6 to the Chairman of the Society and the said complaint is marked at Exh. 103. According to P.W.4, the complaint is in the handwriting of Pandharinath Pawar. It is also admitted that the said complaint is also signed by P.W. 4.

9 Upon perusal of the copy of the complaint, it is clear that what was given to the investigating agency was the carbon copy of the complaint but original signature of P.W. 4 appears to be on the carbon copy, which clearly indicates that he has subsequently signed the complaint without the knowledge of other staff members including the accused. Hence, he has admitted that his signature appears at Sr. No. 18 in Exh. 103.

10 P.W. 4 has reiterated that accused Nos. 4, 5 and 6 did not have cordial relations with the deceased. They were also picking quarrels with him and hurled abuses at him and the said incidences were witnessed by him. It is also submitted that all the three accused were suspecting foul play by the deceased in the transactions of purchasing properties as well as in distributing dividends to the members. They were aspiring to become secretary of the Society. The accused Nos. 4, 5 and 6 were arrested on 20/2/2011. It is pertinent to note that on 20/2/2011 accused 4, 5 and 6 were arrested and on the same day, a special meeting was summoned and P.W. 4 was nominated as the Secretary of the Society.

11 It is further pertinent to note that P.W. 4 happens to be a panch to the inquest panchanama, which was conducted on 17/2/2011 at about 10.30 a.m.. The inquest panchanama is at Exh.

107. However, it is clear from the record that at that stage, P.W. 4 had not disclosed to the Investigating agency about the statement made to him by the deceased suspecting accused Nos. 4 to 6 to be the persons who had attacked through accused Nos. 1 and 2. The statement of P.W. 4 is recorded on 23/2/2011 as per charge-sheet. It is admitted in the cross-examination that Fauzdar Chawadi Police Station is situated near Ganga Hospital, but he had not lodged any complaint to the police station in respect of the suspicion expressed by the deceased. It is also admitted that at the time of inquest panchanama also he had not disclosed to the police. According to him, all the accused had taken loan from the Credit Society and had stood surety for each other. That the deceased was secretary of the society since 1992, whereas P.W. 4 had joined the society in the year 1999. It is also admitted that although there were allegations in respect of the misconduct against the deceased, no steps were taken by the Managing Committee to remove the deceased from his post. It is also elicited that the distribution of dividends was the exclusive decision of the Managing Committee. Similarly, the decision to purchase property was also taken by the Managing Committee and the deceased was in no way concerned with the transactions of purchasing the properties or distribution of dividends.

12 P.W.6 Mukund Dhavane happens to be the cousin of the deceased. According to him, accused Gahininath hails from his brotherhood. According to him, a day before the incident, he had met the deceased who disclosed to him that he had quarreled with accused Gahininath Pawar and Sawant, as they were troubling him at the work place. The quarrel was over the issue that the accused Nos. 4, 5 and 6 were insisting upon the deceased to resign from the post of the secretary. On 16/2/2011 he claims to have received the phone call from his nephew (P.W.2). He claims to have visited the injured in the hospital. That he had met P.W. 2 Swapnil in the hospital and had asked him to go home. According to him, accused Gahininath, Pawar and Sawant had engaged two unknown persons to assault him. P.W. 4 and P.W. 6 claimed to have met the accused in the hospital when purported statement was made by the deceased.

13 Statement of P.W. 6 Mukund Dhavane was recorded on 17/2/2011. P.W. 6 denies the fact that his statement has been recorded by the police. Despite the disclosure made by the deceased, he had also not reported to the Faujdar Chavadi Police Station, neither visited the police station nor lodged the complaint. However, he had admitted that the accused Gahininath happens to be their relative and his land is situated at Diksal and he cultivates the said land. He has reiterated and asserted that his statement was not recorded by the police on 17/2/2011.

14 P.W.7 Chetan Patil was working as a nodal officer with Bharati Airtel Ltd.. According to P.W. 7, except nodal officer and his team, no other person has access to the information stored in the server of service providing company. The entries are restricted to the user name and password. According to him, he has given information to the investigating agency as per their request letter dated 16/1/2014. He has also issued a certificate as contemplated under section 65B of the Indian Evidence Act. A certificate showing names of customer, SIM Number, address, activation date is at Exh. 115. The chart of call details is collectively marked at Exh. 116. It is pertinent to note that Exh. 113 and 114 do not indicate the name of the user of the said cell phone. Exh. 115 shows that cell No. 9096992509 is registered in the name of Pandhari Dattatray Pandit; Cell No. 8600384486 is registered in the name of Prakash Ramchandra Shinde, whereas Cell No. 9766646455 is registered in the name of Raju Khandu Kamble. It is pertinent to note that investigating officer has not recorded statement of either Pandhari Pandit or Raju Kamble under section 161 of the Code of Criminal Procedure.

15 P.W. 8 Dattaram Shantaram Hangre was working as Nodal Officer with Idea Cellular Company. He has also issued certificate under section 65B of the Indian Evidence Act. The call details record is at Exh. 120.

EVIDENCE IN RESPECT OF TEST IDENTIFICATION PARADE

16 In the substantive evidence, both the witnesses have not deposed before the Court in respect of the contents of Exh. 115. It is admitted position that the

actual assailants were unknown to P.W. 2 Swapnil, the complainant. In view of this, it is the case of the prosecution that test identification parade was conducted in which the complainant had identified the actual assailants and driver of the motorcycle. It would therefore be incumbent upon the prosecution to establish that P.W. 2 had indeed identified the accused persons. It is pertinent to note that the prosecution has not examined Special Executive Magistrate who had conducted test identification parade, but instead has examined P.W. 9 Pandit Rokade and P.W. 3 Suresh Bhat.

17 The Prosecution has examined P.W. 9 Pandit Rokade as a panch for test identification parade conducted in the office of the Tahasildar. No reason is assigned by the prosecution for not examining Special Executive Magistrate who had conducted test identification parade. According to P.W. 9, P.W. 2 Swapnil had identified Prakash Shinde accused No. 1. Test identification parade is marked at Exh. 124. It is elicited in the cross-examination that the first room of the Tahasildar office is used by Mr. Padole, P.I. of Crime Branch i.e. Investigating Officer in the present case and the second part is in the use of police station and third part is in the use of Tahasildar. It is pertinent to note that there is categorical admission of P.W. 9 that the people who were invited to act as dummies were standing in a row when he had gone to bring the accused. The witness P.W. 2 was already present when the dummies arrived. It was therefore, easy for the witness to identify the accused who was purportedly brought under a veil since the witness has already seen the dummies. In fact, the topography of the office would show that the office of the Tahasildar is adjacent to the police station and there was single entry. It is stated in the cross-examination that two witnesses had arrived for participating in test identification parade. It is not true to suggest that five witnesses had arrived for participating in the parade.

18 Similarly, P.W. 3 Suresh Bhat has acted as a panch for the test identification parade, which was held on 18/5/2012. P.W. 3 is also panch for the arrest of accused Prakash Shinde as well as for seizure of the articles which are exhibited at Exh. 84 and Exh. 85 respectively. According to him, test identification parade was conducted in the Tahasildar's office, which is adjacent to the police station. Six persons were called by Tahasildar in one hall. Six dummies and Tahasildar alongwith panch witnesses were present in the hall and at that time, another panch Shivaji Mhaske was asked to bring the accused in the hall. The accused stood in between the dummies. The witnesses were sitting in the office of Sanjay Niradhar Yajana, which is at a distance of 60 ft. from Tahasildar office. According to him, one witness was approximately 12 to 13 years old boy. He seems to be P.W. 2. At that stage, the witness had identified assailant of his father. The topography of Tahasildar Office and the police station is as per the narration of P.W. 9. It is admitted that the police lock-up has door of iron bars. In answer to the question by Court, the witness has stated that the accused was brought up to the hall by police guard, but accused was not accompanied by police guard when he was brought in the hall. The witness was confronted with the recitals of the panchanama, wherein it is mentioned that the accused was brought in the

Chamber of Tahasildar by police guard. Reply of the witness is as follows : "Even if it is mentioned in the panchanama, the guard did not enter in the chamber of Tahasildar." It is admitted that dummies had arrived after the panchas had reached to participate for the test identification parade. However, according to P.W. 3 witness was brought only after the accused was taken to the room and taken his place with the other dummies.

MEDICAL EVIDENCE

19 The prosecution has examined P.W. 5 Dr. Santosh Bhoi who has performed autopsy on the dead body of Bajrang and P.W. 12 Prabhakar Shankar who runs Ganga Institute of Neuro Science and Trauma Care. According to P.W. 12, Bajrang was referred to Ganga Hospital by Dr. Manmath Raut on 16/2/2011 at about 2.30 p.m.. The patient was brought by his son Dayanand @ Swapnil with history of multiple stab injury on person at about 11 a.m.. The patient was conscious but blood pressure was unrecordable. Following injuries were on his person.

(i) On the left side of the chest above the nipple admeasuring around 8 x 5 x 3 cms.

(ii) Incised wound on the right shoulder 5 x 3 x 3 cms.

(iii) Incised wound on the posterior aspect of right shoulder around 3 x 3 x 5 cms.

(iv) Incised wound on the right elbow 5 x 3 x 3 cms.

The patient's consciousness started deteriorating after 6 p.m.. The patient was in a position to speak between 3 p.m. to 6 p.m.. He placed on record the case papers including admission card, particulars of the treatment rendered to the patient and they are marked at Exh. 138/1 to 35. P.W. 12 has admitted that "It is true that looking at the nature of the injury at Sr. No. 1 patient ought to have gone into shock." It is also admitted that when patient is admitted in ICU visitors are not allowed to meet the patient.

20 P.W. 11 Shrikant Padole is the Investigating Officer.

According to him, on 16/2/2011 he had received telephonic information that Bajrang Dhavane was assaulted with the help of knife. He deputed ASI Babar to ascertain the truth. Mr. Babar sought written permission of the medical officer to record dying declaration of the victim. At about 11.50 p.m. on 16/2/2011 the medical officer endorsed that the patient is not able to give any statement personally. According to him, on the next day i.e. on 17/2/2011 Bajarang was admitted in the hospital at about 6.30 a.m. That after the funeral of Bajarang his son Swapnil @ Dayanand lodged report with the police station on the basis of which C.R. No. 67 of 2011 was registered. He has recorded statement of the witnesses on 17/2/2011 and 18/2/2011. The FIR is lodged against unknown person. He has further deposed that on 21/4/2011 he had requested Executive Magistrate to hold test identification parade. The accused Sonya Metkari was

arrested on 11/12/2021¹¹. It had transpired that he was using mobile phone No. 8975249078 which was registered in the name of his friend Gopinath Narayankar. Supplementary charge-sheet was filed on 3rd March, 2012 in respect of accused No. 2. It is elicited in the cross-examination that Mohol Police Station is situated in the compound of Tahasildar office and that the lock up cell is abutting the police station, doors of which are made up of iron rods and the constables posted in Mohol Police Station are appointed as guards to the lock up. It is candidly admitted by P.W. 1 in the cross-examination that no station diary entry was taken in respect of telephonic information received by him on 16/2/2011, although it was intimated that it was a cognizable offence nor there is any entry to show that an officer was deputed to visit scene of offence or for recording statement of the victim. It is also admitted that he had not visited spot of incident on that day, although he had deputed ASI Babar to visit the spot of incident.

21 The learned Counsel for the parties have submitted as follows :

(i) There is no record or evidence to show that the injured was brought to Raut Hospital by State transport bus. Prosecution has not examined Shaukat and Mainabai. Medical case papers of Raut Hospital are not on record.

(ii) There is an unexplained inordinate delay in lodging FIR. The family members who had visited the deceased in the hospital during his life time have also not set the law into motion. However, P.W.11 had started investigation prior to registration of FIR such as inquest panchanama and scene of offence panchanama were conducted. There is no evidence on record to show that P.W. 4 and P.W. 6 had in fact visited the injured in the hospital. That the oral dying declaration cannot be relied upon and hence, oral dying declaration is concocted piece of evidence.

(iii) No implicit reliance can be placed upon the test identification parade as the maker of the document i.e. Executive Magistrate has not been examined.

(iv) That there are material omissions and contradictions on record which go to the root of the matter.

(v) There is no evidence of conspiracy except the complaint made to the chairman of the Credit Society against the misdemeanor and misbehavior of the deceased.

(vi) That there is no cogent evidence that there was communication between the accused Nos. 3 to 6 and accused Nos. 1 and 2 since the cell phone seized from the accused No. 2 was registered in the name of Kalyankar and yet the Investigating Officer has not recorded the statement of Kalyankar.

(vii) Mr. Purwant submits that the accused No. 3 has been acquitted on the same set of evidence which indicates that the learned Sessions Judge has placed implicit reliance upon the oral dying declaration although the oral dying declaration is a weak piece of evidence.

22 Per contra, learned APP submits that there are no lacunas in the investigation or at the trial. The evidence on record shows that P.W. 2 was a young boy of 16 years old at the time of incident. He was frightened and therefore, did not lodge the FIR. It is argued that the panch has proved the test identification parade and in any case, if there are any lacunas in the test identification parade, it cannot be considered for the simple reason that test identification parade is only a corroborative piece of evidence and the accused were identified in the court and that identification in court is a substantive evidence. It is further argued that there was conspiracy hatched by accused Nos. 3 to 6 since they were all aspiring to become Secretary of the society. Learned APP further submits that there are call details record to show that the accused Nos. 3 to 6 were in constant contact with accused Nos. 1 and 2. As far as the acquittal of accused No. 3, it is the contention of learned APP that accused No. 3 was not named by the deceased when he expressed the suspicion against the conspirators and therefore, he has been acquitted. In short, the dying declaration has been relied upon by the learned Judge.

23 Perused original record and proceedings. Firstly, P.W. 2 happens to be the eye witness. He is the only witness who could throw light upon the incident. According to him, he had taken the injured to the hospital by State Transport bus with the help of one Shaukat and Mainabai. He admitted the injured in Raut Hospital from where he was referred to Ganga Hospital. But medical case history of Raut Hospital is not on record. The medical case papers of Ganga Hospital shows that at the time of admission, history of RTA (Road Traffic Accident) was given. There were no blood stains on the clothes of P.W. 2, although it is the specific case of the prosecution that the injured was bleeding profusely.

24 Perused Exh. 138. The deceased was admitted in the hospital at 2.25 p.m. with alleged history of RTA (Road Traffic Accident) and the patient was shifted from Raut Hospital. The clinical status of the patient was as follows : "The patient was conscious, imbalance." It is pertinent to note that initially the word was written semi-conscious and then the word was scored of and written as conscious. The same is not endorsed by the doctor. The blood pressure was 60/00. There is scoring over that. In the column of wound description also there is scoring of the description. The medical notes taken on 16/2/2011 at 2.30 p.m. shows that the patient is in shock, stabbing left mammary area with active bleeding and fresh clots. Deeper extent cannot be defined. It further states that stab injury chest, mammary area with hemothorax. Around 1000 ml. Hemothorax drained. The notes further shows that at 3.45 p.m. the patient was taken for right upper limb arteriole Doppler. He was then examined by Dr. Chimanchode, who observed that right upper limb multiple stab injury with hypovolemic shock. It was further advised that "the wound to be evaluated in detail once the patient becomes hemothermally stable." He was again taken for ultra sonography. It was observed in the case papers that 'the patient is unstable'. The patient's blood group was AB+ and at 6 p.m. on the same day, the patient was given O2 support and it was recorded that 'his general condition was

poor'. On 16/2/2011 he was given blood transfusion at 6.45 p.m. In fact, case papers further show that at 11.15 a.m. on 16/2/2011 an undertaking was taken from the relatives of the deceased namely, brother Satyawane Dhawane, brother-in-law Satish Bhadale that poor prognosis of patient was explained, that there has been excessive bleeding from the chest of the patient and they would prefer to take risk of undergoing ICD (Inter-costal Drainage tube)surgery. It appears that his relatives Samadhan Dhumal, nephew was also in the hospital. On 17/2/2011 in the morning at 9 a.m. the patient was put on ventilator. He was injected Adrenalin at 3.30 p.m. He succumbed to the injuries on 17/2/2011.

25 Moreover, patient was given blood transfusion on 3 occasions between 2.15 p.m. on 16/2/2011 to 9 a.m. of 17/2/2011. None of the 3 persons who had signed consent forms had made any efforts to lodge FIR with the police station and hence, the FIR was lodged only after funeral was conducted. Inquest panchanama was conducted under section 174 of the Code of Criminal Procedure, 1973 and was registered as 0 of 2011. The medical case papers also show that the injured was in a hypovolemic shock. Therefore, it naturally flows that there has been inordinate delay in setting the law into motion and there is no plausible explanation for the same.

26 Considering the state of the injured as reflected in the medical case record, it cannot be said that he was in a position to talk between 3 to 6 p.m. on 16/2/2011. He was admitted in the hospital at about 2.30 p.m. and he was immediately admitted in ICU. This has to be read in consonance with the fact that P.W.12 Dr. Prabhakar Shankar has categorically stated that no visitors are allowed in ICU and at that time, as per the medical case records, the patient was in a hypovolemic shock. At 3.45 p.m. he was taken for Doppler test. In any case, oral dying declaration is a weak piece of evidence and in the eventuality, it was disclosed immediately the written statement of the deceased could have been recorded. Even at the stage of admission, blood pressure was not recordable.

27 The next most important issue is in respect of identification of the accused in the present case. Learned Counsel for the appellants has vehemently submitted that the executive magistrate was not examined and therefore, test identification parade is not reliable. It is true that the panch P.W. 3 is only a witness to the fact that test identification parade was conducted. But he cannot prove the memorandum of test identification, as he is not the maker of the said document. Exh. 93 is the memorandum of the test identification parade. The exhibition of the said document is only for the purpose of identification of the document and that by itself would not prove the contents of the document. It is true that test identification parade is in the nature of corroborative evidence and identification in the court would be substantive evidence. However, in the present case, the accused Nos. 3 to 6 were the colleagues of the deceased. They were working with the deceased for more than a decade and therefore, were naturally known to P.W. 2. Moreover, accused Gahininath Dhavane happens to be a distant relative of the deceased and he is the resident of Diksal. Only two strangers were

there amongst accused who were identified by P.W. 2. The question is whether identification of the assailants in the court is sufficient evidence to convict the accused. The learned APP has placed reliance upon the Judgment of the Supreme Court in the case of Raja v/s. State by Inspector of Police AIR 2020 SC254 and has highlighted observations of the Apex Court in paragraph-23 which reads as follows :

"23. As has been repeatedly laid down by this Court, what is important is the identification in Court and if such identification is otherwise found by the Court to be truthful and reliable, such substantive evidence can be relied upon by the Court."

In the same Judgment(cited supra), the Apex Court has considered the Judgment of the Supreme Court in the case of State of Maharashtra vs. Suresh(2000)1 SCC 471, the Apex Court held that -

"We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes; The object of conducting test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

In the present case, there is no substantial evidence to the effect that the memorandum of test identification parade was correctly recorded.

In any case, the accused were shown to the witness in the course of test identification parade and therefore, it would not be difficult to identify the accused at the trial. The question in the present case is as to whether memorandum of test identification parade can be relied upon in the absence of recording the evidence of Executive Magistrate who has conducted the test identification parade and the answer would be in the negative.

28 It is in this background, Bill No. XXXV of 1994 was introduced in the Rajya Sabha and was passed whereby Section 291-A was inserted in the Code of Criminal Procedure, 1973. Section 291A contemplates as follows :

291-A. Identification report of Magistrate:

"(1) Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:

Provided that where such report contains a statement of any suspect or witness to which the provisions of Section 21, Section 32, Section 33, Section 155 or Section 157, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), apply, such statement shall not be used under this sub-section except in

accordance with the provisions of those sections.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report.]"

It is therefore, clear that the said documents can be read in evidence, provided that the provisions of sections 21, 32, 33, 155 or 157 or as the case may be of the Indian Evidence Act are followed. In the present case, it can be clearly stated that the provisions of section 21, 32, 33, 155 or 157 of the Indian Evidence Act are not applicable in the present case and therefore, the said document cannot be read in evidence.

29 In this case, the statement of P.W. 3 was not recorded after conducting the test identification parade and therefore, he cannot be contradicted by his previous statement. Exceptions 2 of section 21 of the Indian Evidence Act makes it clear that the omissions and contradictions cannot be brought on record. Moreover, it clearly contemplates that an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission. In the present case, section 32 of the Indian Evidence act is not attracted, since there is no material on record to show that the person i.e. the maker of the memorandum i.e. Special Executive Magistrate was dead or could not be found. Section 33 of the Indian Evidence Act correlates to section 32 of the Act. Moreover, the proviso to section 33 of the Evidence Act provides for the circumstances in which the evidence can be read and that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. The credibility of witnesses can be impeached under Section 155 of the Indian Evidence Act.

30 In the above mentioned circumstances, there would be no application of section 291A of the Code of Criminal Procedure, 1973. Moreover, the memorandum of test identification parade is not a document as contemplated under section 80 of the Indian Evidence Act. Sub-section 1 of section 291A of the Code of Criminal Procedure, 1973 cannot be read in isolation without giving thoughtful consideration to sub-section 2 of 291A of Code of Criminal Procedure, 1973. By virtue of sub-section 2 of 291A of Code of Criminal Procedure, 1973, it cannot be said that it is a negative legislation and that section 291A of Code of Criminal Procedure, 1973 is designed to prevent recording of evidence of the Magistrate who conducts the test identification parade. It is not a negative change sought by the criminal amendment. The Special Executive Magistrate is also a party to the investigation and hence, the accused would loose his right to cross-examine Executive Magistrate in respect of the rules followed in conducting the test identification parade. The Criminal Manual of State of Maharashtra lays down the procedure to be followed at the time of conducting test identification parade. It would therefore, be necessary to examine Executive Magistrate on

oath to substantiate that he had followed the procedure as contemplated in the Criminal Manual. Moreover on plain reading of the panchanama, it is clear that the accused was brought from the police station which was abutting to the Tahasildar office.

31 Thirdly, learned APP has relied upon call details record. However, the phones were registered in the names of the persons who have not been examined either by the prosecution or by the defence at the time of trial. Therefore, it is doubtful as to whether the said persons were known to accused Nos. 3 to 6 and therefore, charge of conspiracy would fail. It is pertinent to note that the Nodal Officers P.W. 7 and P.W. 8 have not given names of registered owners in their substantive evidence.

32 Fourthly, it is also pertinent to note at this stage that P.W. 4 was also a signatory to Exh. 103, which is a complaint to the chairman against misdemeanor and misbehavior of the deceased in his official capacity. That soon after the demise of the deceased P.W. 4 was made a secretary of the Credit Society vide Resolution dated 20/2/2021. The implication of accused Nos. 3 to 6 naturally benefited P.W. 4. His statement was recorded by police on 23/2/2011. Despite that being the panch of the inquest panchanama, he had not disclosed to the police at that stage that a statement was made by the deceased to him when he was admitted in ICU implicating the accused Nos. 4 to 6. The conduct of P.W. 4 in non-disclosure of the said fact at the earliest given point of time would show that there was an attempt to concoct the story as the maker of the statement was purportedly not alive. The case papers also do not show that there was any visitor who met the deceased in ICU. And this fact is corroborated by the case papers as well as the substantive evidence of the doctors. Hence, P.W. 4 and P.W. 6 are not reliable witnesses.

33 Fifthly, the most important aspect in this case is the faulty procedure followed in recording of the statement of the accused under section 313 of the Code of Criminal Procedure, 1973. In this case, there were six accused persons. However, learned Sessions Judge has proceeded to ask questions collectively to all the accused. Each accused has not been put to a different set of questions, although they are being charged under different heads and the act attributed to them are at variance. The charge against the accused Nos. 1 and 2 is that of assaulting the deceased with a knife on his neck on 16/2/2021 at 11.30 a.m.. The charge against accused Nos. 3 to 6 is of conspiracy to eliminate the deceased. According to the prosecution, the accused Nos. 1 and 2 had been hired by accused Nos. 3 to 6 to eliminate the deceased and to substantiate this allegation, the prosecution has relied upon the call details records. The prosecution examined the Nodal Officers. None of these questions have been put in particular to the accused persons. In a criminal trial, the purpose of examining the accused under section 313 of the Code of Criminal Procedure, 1973 is to give him an opportunity to explain the allegations against him, to understand as to whether he had followed the case of the prosecution against him and it is necessary to

put every incriminating circumstances to the accused.

34 In the case of Rajkumar Singh @ Raju @ Batya v/s. State of Rajasthan(2013) 5 SCC 722, the Apex Court has held as follows :

"In a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and have to be excluded from consideration."

35 In the present case, attention of the accused has not been drawn to the specific allegations in the charge and in the evidence of the prosecution witnesses. The collective questioning to six accused persons would show that every accused was not given an opportunity to defend himself against every incriminating circumstance brought on record against him through the prosecution witnesses. Each accused had a different role to play and there cannot be vicarious liability.

36 In the case of Ashraf Ali v/s. State of Assam (2008) 1 SCC 328 the Apex Court has held that -

"Section 313 of the Code casts a duty on the Court to put in an enquiry or trial, questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it."

The emphasis is on putting questions to the accused specifically, distinctly and separately. The accused were not afforded any opportunity to answer the material allegations against them.

It is further held that -

"What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the

purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him".

37 In the present case, it can be said that there is a perfunctory examination under section 313 of the Code of Criminal Procedure, 1973. It has been treated as an idle formality and the exercise under section 313 of the Code of Criminal Procedure, 1973 has not been followed in its letter and spirit, which would naturally vitiate the trial. For example-

Q. No. 16: He has stated that, the knife was carried by the assailants with them. What do you desire to say about it ?

Ans. No.1: It is false.

Ans. No.2: ----"-----

Ans. No.3: ----"-----

Ans. No.4: ----"-----

Ans. No.5: ----"-----

Ans. No.6: ----"-----

No particulars of the prosecution witnesses has been mentioned as to what is the contention of each of the prosecution witnesses. This has undoubtedly caused prejudice to the accused and would naturally vitiate the trial. The circumstances, which were relied upon by the Court for convicting the accused was never brought to the notice of particular accused. Therefore, the examination under section 313 of the Code of Criminal Procedure, 1973 has been rendered as an idle formality. The irregularity in recording the statement of accused u/sec. 313 of the Code of Criminal Procedure, 1973 in the present case would vitiate the trial. The appellants are in custody since February, 2011.

38 In view of the above discussion, Judgment passed by the trial Court deserves to be quashed and set aside.

39 Hence, following order is passed :

ORDER

(i) The appeals are allowed.

(ii) The conviction and sentence imposed upon the appellants vide Judgment and Order dated 8/5/2014 passed by Sessions Judge, Solapur in Sessions Case No. 164 of 2011 is hereby quashed and set aside.

(iii) The appellants are acquitted of all the charges levelled against them. The appellants be released forthwith if not required in any other case.

(iv) Fine amount be refunded, if paid.

(v) The appeals are disposed of accordingly.