
(2012) 08 BOM CK 0150
In the Bombay High Court
Case No : Criminal Appeal No. 363 of 2010

Pramod Kendale and Others	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Arms Act, 1959 — Section 25, 4, 5
Bombay Police Act, 1951 — Section 37
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302

Citation : (2013) ALLMR(Cri) 274 : (2012) BomCR(Cri) 682

Hon'ble Judges : A.V. Nirgude, J;A.H. Joshi, J

Bench : Division Bench

Advocate : Satej S. Jadhav in Criminal Appeal No. 363 of 2010 and Mr. V.R. Dhorde in Criminal Appeal Nos. 391 of 2010, for the Appellant; B.V. Wagh, Assistant Public Prosecutor in Criminal Appeal Nos. 363 and 391 of 2010, for the Respondent

Judgement

A.V. Nirgude, J.—Both these appeals can be decided by this common judgment. Criminal Appeal No. 363 of 2010 is filed by original accused Nos. 1 to 11 and 16 of Sessions Case No. 1 of 2008 and Criminal Appeal No. 391 of 2010 is filed by original accused No. 13 of same case. The appellants were convicted for offences punishable under sections 143, 147, 148, 302, 307, 323, 324, 325 read with section 149 of the Indian Penal Code. They were sentenced to suffer imprisonment for life and to pay a fine of Rs. 1000/- with a default clause for offence punishable u/s 302 read with section 149 of the Indian Penal Code. They were also sentenced to suffer rigorous imprisonment for six years and to pay a fine of Rs. 500/- each with a default clause for the offence punishable u/s 307 read with section 149 of the Indian Penal Code. They were further sentenced to suffer rigorous imprisonment for three years for offence punishable u/s 148 of the Indian Penal Code, but they were not separately sentenced for offences punishable under sections 143, 323, 324, 325 read with section 149 of the Indian Penal Code.

2. In addition to this, original accused Nos. 6 - Popat & accused No. 7 - Rambhau (appellant Nos. 6 & 7 in Criminal Appeal No. 391 of 2010) are also convicted for the offence punishable u/s 4 read with section 25 of the Arms Act and were sentenced to suffer rigorous imprisonment for one year.

3. There were originally 16 accused in the Sessions of the Trial and the case against him got abated. Accused No. 15 was separately charge-sheeted being a juvenile offender and was not therefore before the Sessions Court. Original accused No. 12 was acquitted.

4. The case of the prosecution was as under :-

For the sake of convenience, we are referring the appellants by their original designation in the Trial Court.

Before October, 2007, accused formed a political group for the purpose of election of Grampanchayat against a political group headed by one Ashok Jagtap in village Nevasa, Dist. Ahmednagar,

On 29th October, 2007, at about 9.15 p.m. first informant P.W.1-Narayan and his friends were standing in front of Pavan Ganpati Temple of village Nevasa. Suddenly a mob consisting of the accused and others arrived there armed with weapons like swords, guptis, sticks etc. and assaulted first informant P.W.3-Kailas and others. In the melee, Narayan and other prosecution witnesses sustained injuries; whereas two of his friends, Dnyaneshwar and Vilas were killed.

Soon after the incident P.W.1-Narayan lodged his first information report before Police of Tophkhana Police Station, Ahmednagar. The offence was registered formally there but was sent for investigation to Nevasa Police Station in whose local limits the alleged incident took place. It was registered as Crime No. 245 of 2007.

During the investigation, accused were arrested and in due course of time, the charge-sheet was sent against them. After committal of the case to the Court of Sessions, the trial took place prior to 30th October, 2010 and as noted above, accused (appellants) were ultimately convicted and sentenced.

5. During the pendency of these appeals, accused No. 3-Ishwar, accused No. 10-Baba, accused No. 11-Sadashiv, accused No. 13-Sunil & accused No. 16-Kishan were released on bail. Rest of the accused are in custody.

6. Prosecution examined 29 witnesses. The case, however, depends mainly on the depositions of eye witnesses viz. P.W. Nos. 1 to 4. We would, therefore, first give gist of their depositions.

7. P.W.1 - Narayan is the informant and also an injured. He deposed that on 29th October, 2007, at about 9 to 9.15 p.m., he had gone to Pawan Ganpati Temple. He was accompanied by his friends Dnyaneshwar (deceased), Vilas (deceased), Kailas (P.W.3), Raju (P.W.2) & Ganesh (P.W.4). At that time 10-15 persons came there. They were armed with swords, sticks, guptis and they immediately started

attacking him and his friends. He saw among them accused No. 1-Pramod, accused No. 2-Sandeep, accused No. 4-Nitin, accused No. 5-Sachin, accused No. 6- Popat, accused No. 7-Rambhau, accused No. 8-Appa, accused No. 9-Anna, accused No. 10-Baba, accused No. 11-Sadashiv & accused No. 13-Sunil.

Accused No. 6-Popat, accused No. 7-Rambhau and expired accused No. 14-Anil were armed with sword. Accused No. 4-Nitin, accused No. 5-Sachin, accused No. 8-Appa & accused No. 9-Anna were armed with guptis and others were having sticks. Accused No. 5-Sachin gave a blow of gupti on his hip. Accused No. 8-Appa, accused No. 3-Sunil and expired accused Anil delivered blows of sword and sticks on his person. All the accused named above showered blows on Dnyaneshwar, Vilas, Raju, Ganesh and Kailas, who were with him. He sustained bleeding injuries on his hip, legs, fingers and head. Some bystanders informed about the incident on telephone to one Anna, who immediately came to the spot and took him and other injured persons to Nevasa hospital.

He said Vilas died on the spot; whereas Dnyaneshwar died on his way to hospital. He was then taken to civil hospital, Ahmednagar and was admitted for treatment. Police of Ahmednagar came to him and recorded his complaint. His bloodstained clothes were removed from his person and were taken in charge by the police under a panchanama. He then identified the accused and the weapons (muddemal) in the Court.

8. In support of the above deposition, P.W.23-Dr. Deshmukh deposed that on 29th October, 2007, at about 11.45 p. m. P.W.1 (first informant) Narayan was brought to him in injured condition and following injuries were found on his person:-

(i) Incised wound extended from right buttock to left thigh.

12cm x 4 cm x 2 cm in size, caused by sharp edged weapon, (Simple)

(ii) Incised wound extending from right knee joint to right leg.

10 Cm x 4cm x 2 cm in size, caused by sharp edged weapon, (simple)

(iii) Incised wound on right ankle joint 2 cm x 4 cm x 2 cm. in size, caused by sharp edged weapon (simple)

(iv) Contusion on left elbow 2cm x 2 cm.

(v) Contused Lacerated Wound - Left parietal region 2cm x 2 cm caused by hard and blunt object (simple).

In the cross examination he admitted that the depth of the injury could not be measured because it was "deep penetrated" (in other words it was too deep to probe and take measurement). The Medical Officer, Dr. Deshmukh referred this witness further for x-ray examination, but found that this witness did not suffer fracture of bone.

9. Having carefully gone through deposition of P.W. No. 1, we found that he

named accused No. 5-Sachin as author of injury No. 1 described above. He specifically mentioned that a blow of gupti caused him this particular injury on his hip. This witness suffered three more injuries and he stated that accused No. 8-Appa, accused No. 13 and expired accused Anil had delivered blows of sword and stick on his person. This witness thus has given account at least for the injuries he has sustained.

10. Accused pointed out that P.W.1-Narayan did not mention to police in his statement that accused No. 5-Sachin dealt a gupti blow on his hip and that accused No. 13-Sunil and accused No. 8-Appa used stick and sword. Indeed, these improvements in his deposition have been brought on record. The question is - whether these improvements would affect his credibility? The answer is in the negative. In an incident of this nature the victim would remember the details of incident to the extent of his own involvement. Besides, the medical evidence proved that he did suffer such injuries on his person. On this aspect we are inclined to believe him.

11. Unfortunately Sachin too suffered minor injuries at the relevant time and was apprehended immediately. So exaggeration as far as it related to accused No. 5-Sachin would not make any difference to this witness's credibility. Same can be said about accused No. 13-Sunil as he was similarly found injured and was apprehended soon. This circumstance on record subject to further discussion would lead us to hold that these two accused and accused No. 8 were also present and were members of unlawful assembly and were having weapons in their hands.

12. P.W.2-Rajendra in his deposition stated that he knew all the accused since prior to the incident and that he belonged to the political party of complainant Narayan. He, at the time of incident, was in his pan bidi shop near Ganpati temple. Dnyaneshwar, Vilas and Narayan were standing in front of his shop and were talking to him. About 15-16 persons of appellants' family came there carrying weapons. Some of them came there using motor cycle. He named all the accused except accused No. 12-Dattu. He said accused No. 1-Pramod and accused No. 8-Appa had gupti like weapons in their hand. Accused No. 16-Kisan had iron rod in his hand and others were having sticks. He then specifically asserted that accused No. 2-Sandeep dealt a blow of gupti on his back. Accused No. 6-Popat dealt a sword blow on his abdomen, with the result, part of his intestine came out of the wound. Accused No. 6-Popat had taken sword from the hand of accused No. 7-Rambhau. Accused No. 16-Kisan dealt a blow of iron rod on left side of his head and on left hand. He, thus, specifically mentioned as to who amongst accused gave blow of their weapons on his person.

13. P.W.23-Dr.Deshmukh deposed that on that day he examined P.W.2-Rajendra at Rural Hospital, Nevasa and noticed four injuries on his person. They were:-

(i) Stab wound over abdomen 4cm x 3 cm x visceral deep, (grievous).

(ii) Incised wound over left upper arm. 5cmx 2cmx 2cm, caused by sharp edged

weapon (simple).

(iii) Incised wound left fronto-parietal region 2cm x 2cm, caused by sharp edged weapon (simple)

(iv) Incised wound in intra scapular region 2cm x 2cm x 2cm, caused by sharp edged weapon. (simple)

These injuries, essentially their locations, would support this witness's deposition about authorship of the injuries given by him to accused No. 2-Sandeep, accused No. 6-Popat and accused No. 16-Kisan. As regards accused No. 16-Kisan, there can be some discrepancy in his deposition. He very clearly stated that accused No. 16 dealt blows of iron rod on his head and left hand but injuries found on these part of the body were apparently caused by sharp edged weapon. So, at the most his deposition as regards the role attributed to accused No. 16-Kisan is rather uncertain.

This witness admittedly did not disclose the details of the incident to the police or to anyone while he was taken to hospital. He admitted in cross-examination that even after he was admitted to Ahmednagar hospital, he did not disclose the details of the incident even to his own parents. He also stated that the police also did not ask him about the incident. Ultimately, his statement was recorded by the police rather belatedly, after he came out of the hospital. There is thus considerable delay in recording his statement.

Learned Advocate appearing for the accused asserted that due to this delay the testimony of this witness should be discarded as afterthought etc. We are not inclined to accept this argument mainly because this witness suffered a very serious injury in the incident and looking to the nature of the injury, he, himself as well as Investigating Officer etc. would be more keen to provide him medical help rather than record his statement. The priority thus was quite natural. The Investigation Officer cannot be blamed for not recording statement of this witness immediately after the incident. He had sufficient excuse not to do so. No one can find fault on this witness's conduct that he did not disclose details of the incident while he was in serious condition lying in the hospital. At that time, probably he was not in position to make coherent statement. The delay in recording his statement by the police, thus, will not affect credibility of this witness.

During the cross-examination, because of peculiar line of cross examination, this witness could get an opportunity to reiterate that accused No. 6-Popat had a sword in his hand when he assaulted him.

In the cross-examination, it is brought on record that this witness for the first time disclosed that he saw that P.W.1-Narayan was assaulted with the help of gupti. This, thus, is clear improvement from his previous statement and has to be disbelieved. According to him, P.W.1-Narayan was assaulted by accused Nos. 2,9 & 13. However, this part of his deposition is not shown to be an exaggeration

or material omission in his previous statement.

The medical evidence did not support this witness's case as it relates to blows of sticks on his legs. No injuries were found on his legs soon after the incident. However, the injuries on head, hand, back and abdomen were prominently mentioned and according to this witness, accused No. 6-Popat caused the stab injury on his stomach. Accused No. 2-Sandeep caused injury on his back (intra scapular region) and accused No. 16-Kisan dealt blows of iron rod on his head and hand. We are aware that the injuries on hand of this witness was incised wound; whereas he said that accused No. 16-Kisan dealt a blow of iron rod on his hand. There is no corresponding injury caused by hard and blunt object on his hand. We are, therefore, inclined to believe that this witness probably forgot that accused No. 16-Kisan dealt blows of sharp edged weapon on his head and hand. For this discrepancy, we are not inclined to disbelieve him.

This witness, thus, gave clinching evidence against accused No. 2,6 and 16 as authors of the injuries on his person. We have, therefore, no doubt about presence of these accused at the time of the incident. Same thing can be said about accused No. 9 and 13. This witness very clearly stated that he saw these accused assaulting P.W.1-Narayan. The only discrepancy is that he for the first time said that they used gupti like weapon in the assault. Even P.W.1-Narayan very clearly attributed role to accused No. 13-Sunil saying that he was one of his assailants.

14. P.W.3-Kailas is also an injured witness. He deposed that at the time of incident he was sitting near pan bidi shop of P.W.2-Rajendra, who is his nephew. His friends Dnyaneshwar, Vilas, Narayan, Ganesh and Jalindar were sitting near the Pan Bidi shop. He said while they were talking to each other, the accused came there holding deadly weapons like sticks, sword, axes, iron bar etc. Accused No. 5-Sachin and accused No. 9-Pintu had swords in their hands. All the accused attacked his friend Dnyaneshwar and Vilas with the result, both of them fell down in injured condition. He said accused No. 5 and accused No. 2-Sandeep delivered sword blows on his person and remaining accused showered stick blows on his person. He sustained injury on his head due to sword blow and fell down. His friends Narayan and Jalindar were also attacked by the accused.

P.W.23-Dr.Deshmukh confirmed that on that day during night time, he examined P.W.3-Kailas and found one injury on his person which was a CLW over forehead admeasuring 7cm x 1cm x 1/2 cm. The injury was caused apparently by sharp edged weapon, but it was a simple one. Although this witness mentioned that accused No. 2- Sandeep and accused No. 5-Sachin delivered sword blows on his person, he did not state specifically as to who amongst them was the author of injury described above on his head. He clearly mentioned that he sustained a blow of sword on his head. He could have easily given authorship of his injury to either accused Nos. 2 - Sandeep or accused No. 5 - Sachin but since he has not exaggerated his account in that fashion, his deposition is quite trustworthy. However, he did not describe who, in particular, assaulted victim Dnyaneshwar

and Vilas. He made a general statement that all accused assaulted them.

In the cross-examination of this witness, it is that when his friends Dnyaneshwar and Vilas were assaulted, he tried to run away from the spot. This contradiction sought to be brought on record is not at all helpful to the accused, mainly because, this witness did not particularly state as to how and who amongst the accused dealt blows on the person of deceased Dnyaneshwar and Vilas. His testimony is already narrated above and is very short. He made specific allegation only against accused No. 2-Sandeep, accused No. 5-Sachin & accused No. 9 Pintu. The deposition of this witness is worthy of reliance, mainly because he is an injured witness. Secondly, this witness did not exaggerate the narration by implicating more accused. He simply stated that he saw all the accused and in particular he saw accused No. 5-Sachin and accused No. 9-Pintu were having swords in their hands. This was not an omission or contradiction. This witness also stated that accused No. 2-Sandeep and accused No. 5-Sachin assaulted him with sword. As mentioned above, he did not specifically mentioned as to who amongst them dealt a sword blow on his head. The witness did suffer large but simple incised injury on his head, which was certainly caused by a weapon like sword or gupti. So, he clearly proved active participation of accused No. 2-Sandeep, accused No. 5-Sachin and accused No. 9-Pintu in the incident.

15. P.W.4-Ganesh too is an eye witness. However, apparently, there is nothing on record to show that he sustained injuries during the incident and that he was referred for medical examination during that night like other earlier three prosecution witnesses. He narrated the incident stating that at the relevant time, he was in his house. On hearing alarm he rushed towards spot in front of the temple and saw the incident in tube light fixed in front of the temple. He named all the accused being assailants. He noticed accused No. 5-Sachin, accused No. 6-Popat, accused No. 7-Rambhau, accused No. 8- Appa & accused No. 9-Anna amongst assailants. He knew them by their names, but other accused were not known to him by names. Some of the accused were having swords, some were having sticks in their hands, some were having axes and some were having iron rods. He then specifically mentioned that he saw accused No. 7-Rambhau and accused No. 9-Anna in the assault were using swords. Accused No. 5-Sachin was seen assaulting with stick. Accused No. 8- Appa was having weapon like gupti and he assaulted him. Accused No. 5-Sachin and accused No. 8-Appa dealt blows on his head with their weapons. He sustained bleeding injuries on head and hand. He became unconscious. He regained consciousness in the Government Hospital, Nevasa. He was taken to Civil Hospital, Ahmednagar.

The prosecution, however, did not prove through medical evidence that this witness sustained injuries. P.W.23-Dr.Deshmukh did not have occasion to examine, treat and jot down the injuries of P.W.4-Ganesh. We did not find any injury certificate of this witness on record. Therefore, there is serious doubt about his presence on the spot during the incident. He stated that after he heard alarm he rushed from his house to the spot. Besides this, P.W.1-Narayan, the

complainant admittedly did not mention in the F.I.R. this witness's name as one of the injured/victim of the crime. However, in his deposition he stated that P.W.4-Ganesh was with him since prior to the incident as occurred. This assertion is contrary to the deposition of P.W.4-Ganesh himself. The presence of P.W.4-Ganesh on the spot and his being an eye witness appears to be exaggeration. This part of the prosecution case thus is not trustworthy and we discard the deposition of P.W.4-Ganesh as untrustworthy.

16. This leaves us with three depositions of P.W.1 to 3. These witnesses are natural witnesses because they sustained serious injuries at the time of incident, during which two other persons got killed.

17. Let us now come to the prosecution evidence in respect of the causes of death of the victims, namely, Vilas and Dnyaneshwar. As said above, P.W.1 to 3 made omnibus statements that the accused attacked these two persons in their presence, caused fatal injuries to them due to which they fell down at the spot of incident. Let us now find out as to who took the deceased victims and the injured victims to hospital/police station etc. On this factual aspect of the case, we would again place reliance on the deposition of prosecution witness No. 1, who stated that after the incident Anna Lashkare from village Nevasa came to the spot took him and others to Nevasa Rural Hospital. Anna Lashkare is not examined as witness. Soon after the victims were brought to Rural Hospital, Nevasa, P.W.23-Dr. Deshmukh examined them.

18. Dr. Deshkukh examined even the deceased Vilas and Dnyaneshwar. He said that during that night at about 11.45 p.m. he examined Dnyaneshwar and noticed as many as eight injuries on his person. He said, Dnyaneshwar was then referred to Government Hospital, Ahmednagar, but he kept the record of the injuries. He, therefore, clearly mentioned that Dnyaneshwar was alive till he examined him at about 11.45. This witness very specifically mentioned that Dnyaneshwar had suffered incised wound on right forearm admeasuring 10 cm x 6 cm. He said the injury was deep, resulting in cutting of right radial artery. It has come on record that before Dnyaneshwar could be taken to Ahmednagar hospital, he died.

19. P.W.24 is Dr. Gosavi who performed postmortem examinations. This witness described following injuries on the person of Dnyaneshwar :-

(i) Right forearm lower anterior 1/3rd shows vertical stab injury lancet shaped, penetrating posteriorly over lateral and outer posterior one third of forearm with skin flap elevated. Margins are clean, which was due to sharp, double edged pointed object. Size of wound - 8 cm x 2 cm x penetrating deep-stab penetration.

(ii) Right forearm-over posterior 1/3rd vertical stab exit injury size 8 cm x 2 cm penetrating deep due t sharp double edged weapon exciting out 3 cm away from injury No. 1. Both injury Nos. 1 & 2 are due to single stab leading to radial artery cut injury.

- (iii) Lancet shaped elliptical incised wound over left hand thumb base posteriorly 2 x 0.5 x 0.5 cm with clean margins - sharp edged weapon.
- (iv) Linear abrasion over left forearm lower 1/3rd posteriorly 8 x 0.2 cm probably sharp pointed object.
- (v) Incised wound with gaping of size 6 x 3 x 2 cm elliptical with pointed ends with clean margins over right tibial anterior border upper 1/3rd running downwards from lateral to medial probably due to sharp edged weapon.
- (vi) Incised wound elliptical with pointed ends with gaping over right knee joint lateral aspect of size 2 x 1 x 0.5 c.m. Probably sharp edged weapon.
- (vii) CLW with ragged margin of size 3 x 1 x 0.5 cm just above the No. (6) injury over right knee laterally, probably hard and blunt object.
- (viii) Incised wound of size 4 x 2 x 1 cm elliptical with pointed ends over right thigh lower and outer 1/3rd sharp edged weapon.
- (ix) Incised wound elliptical pointed ends in right popliteal fossa over outer and lateral part 4 x 2 x 1 cm sharp edged weapon.
- (x) Incised wound - elliptical right thigh lower and medial 1/3rd of size 2 x 1 x 0.5 cm with pointed ends, probably due to sharp edged weapons.
- (xi) Abrasion elongated and circular over back lower left side 3 x 1 cm hard and blunt object.
- (xii) Abrasion left shoulder posteriorly over deltoid region 10 cm x 0.5 cm, hard and blunt object.
- (xiii) Abrasion on left arm middle and lateral 1/3rd of size 0.5 x 0.5 cm, hard and blunt object.

This Medical Officer very clearly mentioned that the cause of death of Dnyaneshwar was due to cardio respiratory failure due to acute hemorrhagic shock, which resulted from multiple incised and stab wounds including injury to right radial artery. In other words, one can easily say that Dnyaneshwar died mainly because his right radial artery was cut due to injury he sustained during the incident.

Other victim was Vilas, who according to the eye witnesses died on the spot. His dead body was sent for postmortem and P.W.24-Dr. Gosavi described the injuries as under :-

- (i) Elliptical (lancet) shaped horizontally placed, stab injury 3 cm x 1 cm x penetrating deep with clean margins. On deeper dissection it reveals cut through and through over left third rib horizontal over and near sternal end of rib which was shown in the diagram in the postmortem report. On palpation cut margins of the third rib were palpable. The injury was ante mortem in nature.

On internal examination-scalp and skull vault were normal. In thoracic internal examination, thoracic wall shows stab injury single on left third rib which is through and through cut injury corresponding to overlying stab injury. Parietal visceral pleura cut at the level below the third rib. Left lung shows cut injury on anterior border at the level of 3rd rib. Pericardial cavity was filled with blood. On examination of heart, shows cut stab injury-elliptical lancet shaped over left atrium penetrating pulmonary artery from inside of left atrium. Left atrium and pulmonary artery stab injury led to collection of blood in pericardial cavity and cardiac tamponade.

This witness further expressed his opinion as to the cause of death in following words :-

Opinion as to cause of death - death due to cardio respiratory failure due to acute hemorrhagic shock due to stab injury penetrating chest wall and heart anterior side leading to injury to left atrium and pulmonary artery due to sharp edged and pointed weapon mostly double edged sharp pointed weapon.

From this evidence it is clear that victim Vilas had practically no chance of surviving and he died on the spot soon after he sustained the fatal injury on his chest, which was caused by a double edged weapon like gupti and which pierced his heart. In addition to the fatal injuries caused to Dnyaneshwar and Vilas, it is amply proved that P.W.2-Rajendra too sustained near fatal injury on his abdomen, mention of which is already made above. Even P.W.1-Narayan sustained serious injury on his hip and thigh. Comparatively, injury of P.W.3-Kailas were not serious.

20. In addition to this evidence, other circumstantial evidence that has come on record against the appellant in short can be narrated as under :-

Some of the accused also sustained injuries at the relevant time and they have not denied this fact. They were examined by P.W.25-Dr. Santosh Doiphode on 30th October, 2007. He said that on 30th October, 2007, police sent to him accused Nos. 2-Sandeep, accused No. 4- Nitin, accused No. 5-Sachin & accused No. 9-Anna for medical examination and treatment. He found above mentioned accused in injured condition.

He found following injuries on the person of accused No. 2-Sandeep :-

Abrasion on left lower leg on skin of tibia. The injury was possible by sharp edged weapon like knife, but was also possible by rough surface.

He found following injuries on the person of accused No. 4-Nitin:-

Dark reddish patch of blunt trauma infero lateral to right scapular.

The injury was possible by stick.

He then described the injury on the person of accused No. 5 as under :-

(i) Small 0.05 cm x 0.05 cm cutting wound very superficial 2 cm lateral to vertex

on right side.

(ii) Reddish dark patches over lower back probably beaten by stick.

He said these injuries were possible by stick.

He then said that on examination of accused No. 9-Ankush, he found two injuries on his person which are described as under :-

Two patches of reddish colour probably made by stick on both sides of lower back.

He also certified that these injuries were caused within 10-12 hours before the time of examination.

In addition to this, it is further admitted during cross-examination that in addition to four accused mentioned above he examined two more persons, whose names were Sunil Hiwale-accused No. 13 and Vijay Sahebrao Bhosle-juvenile accused No. 15. He added in the cross-examination that the record in respect of description of injuries of these two accused was not with him, but he said that these two accused were also having minor injuries. Since this information was solicited in cross examination conducted by accused Nos. 1 to 9, it can safely be said that P.W.25-Dr. Doiphode proved that on next date of incident, he found this accused No. 13 and 15 named above in injured condition and that the injuries sustained by them were quite minor and negligible in nature.

None of the accused named above suffered stab or sharp edged weapon injury. From the line of cross-examination, it is clear that the accused were not denying the fact that they were taken to this witness for medical examination on next day and that they had suffered some minor injuries. As said above, through cross-examination, they brought on record that in addition to four accused accused Nos. 13-Sunil & accused No. 15-Vijay were also taken to hospital in injured condition. The circumstance is quite important and more on it would be discussed in subsequent paragraphs of the judgment.

21. The next circumstance against the appellant is the spot panchanama Exh.119. P.W.6-Kailas Alkute amply proved it saying that on 30th October, 2006, police called him near Ganpati temple at 9 a.m. and in his presence panchanama was recorded. He also mentioned that he noticed bloodstains and scattered foot-ware on the spot. He also noticed some wooden logs there. This amply proves that the incident had taken in front of the temple.

22. One more circumstance against accused is arrest and seizure panchanama proved by P.W.11-Ramesh. He said, on the very day of incident in his presence police took away clothes and mobile phone handsets from accused No. 2-Sandeep, accused No. 4-Nitin, accused No. 5-Sachin, accused No. 9-Pintu and accused No. 13-Sunil. He also said that the clothes were separately wrapped and sealed (panchanama Exh.147).

23. Another circumstances against accused No. 7- Rambhau is that in presence of panch P.W.14-Babasaheb, he disclosed that he would produce weapon and

accordingly he led the I.O. and panch to a place near scene of offence and from bushes he took out a sword. It was found stained. This weapon was then seized and was sealed in presence of panch P.W.14.

24. On 2nd November, 2007, P.W.16-Suresh stated that in his presence, accused No. 4-Nitin made a statement that he would produce a weapon. Then accused No. 4 led him and police to a place near Kalubai temple, removed soil from a corner of wall and took out a large knife. This knife was then seized and sealed.

25. P.W.17-Amol (panch witness) stated that on 2nd November, 2007, accused No. 1-Pramod, who was in police custody, made statement in his presence that he would produce a weapon. Accordingly accused No. 1 then led him and police to a place to Sambhaji Nagar. Accused No. 1 - Pramod took out a large knife from stones kept in a corner near a temple. The weapon was seized and sealed.

26. P.W.20-Ravindra-panch witness stated that on 3rd November, 2007, in his presence police interrogated accused No. 13-Sunil and he stated that he would show the place where weapons were kept. Accordingly, accused No. 13 -Sunil led him and police in police vehicle towards Nevasa phata. Accused No. 13-Sunil then took them to a secluded place and from under a bush took out weapons. They were three handles of spade and one axe. These weapons were then sealed separately.

27. P.W.21-Mohan-panch witness stated that on 3rd November, 2007, accused No. 5-Sachin made statement to the police that he would produce weapon. Accordingly, accused No. 5-Sachin led him and police to his house and from tin sheet roof he took out a long knife. The knife was then seized and sealed.

28. It has thus come on record that the weapons and clothes of certain accused seized by police were sent for chemical analysis. It is further brought on record through chemical analysis report (Exh.24) that the shirt of accused No. 4-Nitin was found stained with human blood of group "B" and "O". It has also come on record that the blood group "O" is of P.W.1-Narayan, P.W.2-Rajendra and deceased Dnyaneshwar and Vilas. P.W.3-Kailas has blood group "B".

It has also come on record that although accused No. 4-Nitin has blood group "A", his shirt was found with stains of blood of group "B" and "O", which are blood groups of prosecution witnesses and deceased Dnyaneshwar and Vilas.

Although blood group of accused No. 2-Sandeep is "A", his shirt was found stained with blood of group "O". On the other hand, accused No. 5-Sachin has blood group "O", but his shirt was found with washed bloodstains.

The Chemical Analyst also found that wooden log which was recovered at the instance of accused No. 13- Sunil was found stained with blood group "B", which is blood group of P.W.1-Narayan and P.W.3-Kailas.

29. In the background of this evidence, we would now consider the submissions made by the accused. Though the cross-examiner of all the accused tried to

suggest that accused were not present at the spot at the time of incident, learned Counsel for the accused suggested that there are circumstances on record which would suggest that only few accused were probably present on the spot and they were assaulted first and probably in retaliation they could have attacked the victims. The argument also suggests that the prosecution witnesses should not be believed mainly because they did not disclose as to what was the genesis of the incident. It is further suggested that these witnesses besides being partisans ones, did not explain at all as to how some of the accused sustained injuries.

30. Firstly we would find out as to whether this is a case where the prosecution witnesses and the deceased were aggressors and the accused retaliated in defence? There is practically nothing on record to suggest that the prosecution witnesses and the deceased victims initiated the dispute or had weapons in their hands and attacked the accused first. Prosecution Witness Nos. 1 to 3 clearly stated that they and others were passing leisure time near Pan Bidi shop and suddenly they were attacked. This is the way they explained as to how the incident started. There is nothing on record to suggest that these witnesses were suppressing something which could have taken place before the actual attack. There is not a single circumstance brought on record from defence either through scene of offence panchanama or through the prosecution witnesses that before the attack took place, the prosecution witnesses or the deceased did something which provoked the accused. The cross-examiner of the accused did not suggest the prosecution witnesses that something took place prior to the incident.

31. The only circumstance that would go in favour of the accused is non-explanation of injuries found on the person of some accused. As stated above accused No. 2- Sandeep, accused No. 4-Nitin, accused No. 5-Sachin, accused No. 9-Pintu @ Anna and Accused No. 13 Sunil were found injured immediately after the incident. We have described the injuries found on them and we have also noticed that these injuries were minor in nature. Yet, it is equally true that the injuries on them are not explained by the prosecution witnesses. The accused themselves did not suggest in cross-examination that they were assaulted by the prosecution witnesses etc. So, the question is, how these accused could have sustained injuries? But we have a plausible answer to this question.

32. The manner in which the attack took place and number of persons involved in the attack and incident, would suggest a possibility that during the melee the accused too got injured. The injuries were caused because of weapons which were with either themselves or their companions. In this case, the injuries are so negligible that this could be the only plausible explanation about it and would not prove fatal to prosecution case. Besides, except one injury on the person of accused No. 5, all other were found to have been caused by hard and blunt object. Even the injury of Accused No. 5 was superficial in nature. The nature of these injuries indicates that they were accidentally caused to the accused in the melee. It is more probably that these injuries were not caused due to assault by

the opponents.

33. Learned Judge of the Trial Court discussed this judgments of High Court and Supreme Court and we agree with the conclusion he has drawn. The law on the subject is now quite settled that there is no hard and fast rule that simply because prosecution did not explain injuries on the person of accused, entire evidence should be discarded. The Supreme Court in the case of Bhaba Nanda Sarma & Ors. Vs. The State of Assam, AIR 1972 S.C. 2252, held that before adverse inference could be drawn against the prosecution for their failure to explain the injuries on the persons of the accused, it must be shown that in all probabilities, the injuries were caused to the accused in the same incident. It is further held that the prosecution is not obliged to explain the injuries on the person of the accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case.

34. The question, therefore, in this case is whether due to this circumstance, the prosecution case becomes reasonably doubtful. The answer to this is in negative.

35. Prosecution Witness Nos. 1 to 3 are natural witnesses and their depositions though are different than each other but are not exaggerated. Whatever they have stated is their personal ocular version of the incident. When an incident involves several attackers and several victims, every participant of such incident would face different situation. He would not be able to see what was occurring to other persons. A victim would generally be able to say as to what happened to him first and then to others. He would be concerned to his own safety, pain and injuries.

36. There can be no dispute that the accused and their companions formed unlawful assembly and the object of the unlawful assembly was to cause murderous attack on the victims. There can be no doubt on this object because victim-Vilas sustained fatal injury and he died on the spot. Victim-Dnyaneshwar sustained several injuries, however, fatal one was rupture of vital artery. The third victim was P.W.2-Rajendra, who also received near fatal injury on his abdomen.

37. No prosecution witness stated specifically as to who caused which injury on the persons of deceased Dnyaneshwar and Vilas. This shortcoming in the narration of evidence of prosecution is certainly not fatal to the prosecution case because it is amply proved that the accused who were members of unlawful assembly had common object of causing murder of the victims. The object of this assembly was mentioned above and it was none other than to commit murder and to cause grievous injury etc. to their victims. It is also clear that the victims were caught unaware. They were not expecting this assault. They were neither armed with weapons. It has amply proved that even the victims and prosecution witnesses have criminal background. They are history sheeters. Had they been prepared for this attack, they would have certainly caused similar damage to their opponents. But this time they were simply victims. They practically did not

offer any resistance. In this background the members of the unlawful assembly are vicariously liable for the acts they committed.

38. Learned Judge of the Trial Court in this regard made certain observations and we would quote them with approval.

33. The essence of the offence is the common object of the person forming the assembly. Common object of the unlawful assembly can be collected from the nature of assembly or arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. Even if no overt act is imputed to a particular person, when the charge is u/s 149 of I.P.C. the presence of the accused as a part of unlawful assembly is sufficient for conviction.

39. Section 149 of the Indian Penal Code reads as under :

Section 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object :- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members or that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

This section has two parts. First part deals with commission of offence by a member of unlawful assembly in prosecution of common object of that assembly. Second part deals with the liability of the members of such unlawful assembly, who knew that the offence was likely to be committed in prosecution of common object for which they had assembled. Learned Counsel appearing for the appellants asserted that in order to hold members of such unlawful assembly, vicariously or constructively liable for the acts/offences committed by the members of such assembly, proof of common object from the conduct of the accused persons distinct from common intention should be a condition precedent. However, the golden rule of appreciation of evidence is the quality and not the number of witnesses. The law laid down on this point in the judgment of Masalti Vs. State of U.P., is consistently followed thereafter. The rule of prudence which emerges there from is that when an accused is being convicted for being liable as a member of unlawful assembly for acts done by other members of the assembly, his pinpointed identification is imperative. Such identification has to be done on positive evidence and hence it is better to rely on more witnesses than one. So, benefit of doubt would go in favour of the accused, whose identity as members of unlawful assembly is doubtful. Applying this principle to the facts of this case, we hold that the following accused amongst the appellants can be said to be members of unlawful assembly, which committed offences of riots, riots with deadly weapons, attempt to commit murder, causing

injuries, causing murders etc.

40. There can be two groups amongst the accused. Those who are injured and those who are not. Those who are injured cannot escape the liability because of the very fact that their presence is proved and participation is not disproved. After careful analysis of evidence we have found that some of them were members of unlawful assembly. The list of the accused against who there is sufficient evidence is as follows:-

(A) ACCUSED WHO ARE INJURED :-

(a) Accused No. 2 - Sandeep

(i) P.W.2 - Rajendra and P.W.3-Kailas very specifically stated that they saw accused No. 2- Sandeep armed with gupti or sword.

(ii) P.W.2 - Rajendra attributed a role to him. He said that by sharp edged weapon he assaulted him on his back and injury was found on his back.

(iii) P.W.3-Kailas also stated that accused No. 2 assaulted him with sword and one injury on his person was found.

(iv) He was also found injured.

(v) After his arrest, his clothes were seized and his shirt was found stained with human blood of group "O", which was blood group of victims Vilas, Dnyaneshwar, P.W.1-Narayan and P.W.2- Rajendra.

(vi) At his instance a knife was recovered which was found stained with blood of "O" group.

(b) Accused No. 4 - Nitin

(i) He is prominently named by P.W.1-Narayan and P.W.2-Rajendra. They stated that he attacked deceased with sharp edged weapon in his hand.

(ii) He was also found injured after the incident.

(iii) After his arrest his shirt was seized. The Chemical Analyst found blood of group "B" and "O" on his clothes though his blood group is "A". He had blood of victims on his clothes.

(iv) He also produced a knife which was found stained with human blood.

(c) Accused No. 5 - Sachin

(i) He was named by all three prosecution witnesses. All of them stated that he had gupti or sword in his hand.

(ii) P.W.1-Narayan deposed he delivered blow of his gupti on his hip. P.W.1-Narayan did sustain incise wound on his right buttock. Size of the injury was also quite large.

(iii) P.W.1-Narayan deposed he assaulted deceased Dnyaneshwar and Vilas also.

(iv) P.W.3-Kailas also stated that he delivered a blow of sword on his person and medical evidence established that P.W.3-Kailas sustained injury by sharp edged weapon.

(d) Accused No. 9 - Pintu @ Anna

(i) P.W.1 to 3 named him.

(ii) P.W.1 said he saw gupti in his hand and that with that gupti he assaulted him.

(iii) P.W.2-Rajendra mentioned that he saw a stick in hand of this accused.

(iv) P.W.3-Kailas said that he saw sword in his hand.

(e) Accused No. 13 - Sunil

(i) Both P.W.1-Narayan, P.W.3-Kailas and P.W.2- Rajendra named him.

(ii) P.W.2 stated that this accused had stick in his hand and assaulted P.W.1-Narayan.

(iii) Immediately after the incident he was arrested. His shirt was seized for chemical analysis and it was found stained with blood group of "B".

(iv) In addition to this, this witness led police to a secluded place from where four weapons were recovered at his instance. Out of these, two were stained with blood group "B", which is blood group of victim P.W.3-Kailas.

(B) ACCUSED WHO ARE NOT INJURED :-

(B-a) Accused No. 1 - Pramod

(i) He was arrested after the incident on 30th October, 2007.

(ii) P.W.1-Narayan and P.W.2-Rajendra named him being part of unlawful assembly, but he has not been given any specific role by these two witnesses.

(iii) P.W.2-Rajendra simply said that he saw accused No. 1-Pramod having a gupti in his hand. (iv) Besides on his instance, a knife was recovered which was found stained with human blood.

(B-b) Accused No. 6 - Popat

(i) P.W. 2 very clearly stated that this accused delivered a stab with gupti, due to which intestine came out. Medical evidence supported this version. A deep penetrating injury on his abdomen was found by the Medical Officer.

(ii) P.W.1-Narayan also confirmed that he saw accused No. 6-Popat present and was having sharp edged weapon like sword in his hand.

(B-c) Accused No. 8 - Appa

(i) He was named by both P.W.1-Narayan and P.W.2- Rajendra. They both stated

that they saw gupti in his hand.

(ii) Besides P.W.1 stated that he attacked him with gupti and assaulted deceased also.

(B-d) Accused No. 16 - Kisan

(i) P.W. 2 - Rajendra is quite emphatic in deposing that accused No. 16 had iron rod in his hand and with such weapon he assaulted him on head and hand.

41. The evidence against appellants in Criminal Appeal No. 363 of 2010 i.e. accused No. 3-Ishwar, accused No. 7-Rambhau, accused No. 10-Baba and accused No. 11- Sadashiv is not sufficient in our view to hold that it is sufficient to derive conclusion that they were members of unlawful assembly. We are, therefore, inclined to give them benefit of doubt. The accused who are entitled to benefit of doubt are accused No. 3-Ishwar, accused No. 7- Rambhau, 10-Baba and accused No. 11-Sadashiv.

42. Accused No. 6 - Popat and accused No. 7 - Rambhau were also convicted for offence punishable u/s 4 read with section 5 of the Arms Act. Learned Judge of the Trial Court held that the prosecution could prove that these two accused carried sword and used them without licence and as such violated the provisions of section 4 of the Arms Act. But, we are of the view that such offence is not proved beyond reasonable doubt against these accused. The evidence is not consistent that these two accused had swords in their hands at the time of incident. Witness No. 2 stated that they had guptis. Besides, there is no recovery of sword from them. We are aware that we have accepted prosecution case that accused No. 6-Popat used sword and gave a blow on the abdomen of P.W.2- Rajendra and so we have held that atleast accused No. 6 used sword at the time of injury, but since the prosecution did not bring on record, the notification that was promulgated u/s 37 of the Bombay Police Act. We, therefore, set aside conviction of these accused under S.4 r/w S.25 of the Arms Act.

Hence, the appeals are disposed of as per following order:-

(1) Criminal Appeal No. 391 of 2010 is dismissed.

(2) Criminal Appeal No. 363 of 2010 is partly allowed.

(3) Accused No. 3-Ishwar, accused No. 7- Rambhau, 10-Baba and accused No. 11- Sadashiv are acquitted of the offences with which they were charged.

(4) Accused No. 6-Popat and accused No. 7- Rambhau are acquitted of the offence punishable u/s 4 read with section 25 of the Arms Act.

(5) Accused No. 1-Pramod, accused No. 2- Sandeep, accused No. 4-Nitin, accused No. 5-Sachin, accused No. 6-Popat, accused No. 8-Appa, accused No. 9- Pintu @ Anna, accused No. 13-Sunil and accused No. 16-Kisan are convicted for the offence punishable under sections 143, 147, 148, 302, 307, 323, 324, 325 read with section 149 of the Indian Penal Code.

(6) Accused No. 1-Pramod, accused No. 2- Sandeep, accused No. 4-Nitin, accused No. 5-Sachin, accused No. 6-Popat, accused No. 8-Appa, accused No. 9-Pintu @ Anna, accused No. 13-Sunil and accused No. 16-Kisan are sentenced to suffer imprisonment for life and to pay a fine of Rs. 1000/- (Rupees One Thousand Only), each, in default to undergo further rigorous imprisonment for two months for the offence punishable u/s 302 r/w section 149 of the Indian Penal Code.

(7) Accused No. 1-Pramod, accused No. 2- Sandeep, accused No. 4-Nitin, accused No. 5-Sachin, accused No. 6-Popat, accused No. 8-Appa, accused No. 9-Pintu @ Anna, accused No. 13-Sunil and accused No. 16-Kisan are sentenced to suffer rigorous imprisonment for six years and to pay a fine of Rs. 500/- (Rupees Five Hundred only), each, in default to undergo further rigorous imprisonment for one month for the offence punishable u/s 307 r/w section 149 of the Indian Penal Code.

(8) Accused No. 7-Rambhau be set at liberty, if not required in any other crime.

(9) The bail bonds of Accused No. 3-Ishwar, accused No. 10-Baba and accused No. 11- Sadashiv stand discharged.

(10) Accused No. 13-Sunil and accused No. 16-Kisan are directed to surrender to their bail immediately.

(11) Remaining operative part of the order passed by the Trial Court shall remain intact.