
(2008) 02 BOM CK 0184

In the Bombay High Court

Case No : Criminal Appeal No's. 640, 685 and 510 of 2004

Prashant Narayanrao Chidam

APPELLANT

Vs

State of Maharashtra
 State of Maharashtra Vs
Prashant Chidam and Gajanan Tirpude
 Anil
Vishwanath Nagrale Vs Prashant Narayanrao Chidam,
Gajanan Tirpude, Sanjay Chidam and The State of
Maharashtra

RESPONDENT

Date of Decision : 16-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428

Penal Code, 1860 (IPC) — Section 149, 201, 302, 304, 304(II)

Citation : (2008) 02 BOM CK 0184

Hon'ble Judges : A.P. Lavande, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : Neeta Jog, in Criminal Appeal No. 510/204, T.A. Mirza, APP in Criminal Appeal No. 640/2004 and M.B. Agasti, in Criminal Appeal No. 685/2004, for the Appellant; T.A. Mirza, Assistant Public Prosecutor in Criminal Appeal No. 510/204 and for Respondent No. 4 in Criminal Appeal No. 685/2004, Neeta Jog and R.N. Khare, in Criminal Appeal Nos. 640 and 685/2004, for the Respondent

Judgement

A.P. Lavande, J.—All the above appeals are being disposed of by common judgment since they arise out of the judgment and order dated 28th July, 2004 passed by 2nd Adhoc Additional Sessions Judge, Wardha in Sessions Trial No. 11/2003. By the said judgment, the trial Court has convicted Prashant Chidam, the appellant in Criminal Appeal No. 510/2004 for offence punishable u/s 304(II) of the Indian Penal Code and sentenced him to suffer R.I. for 7 years and to pay fine of Rs. 500/-and in default to undergo R.I. for 15 days. Criminal Appeal No. 640/2004 has been filed by the State of Maharashtra challenging acquittal of Prashant Chidam and Gajanan Tirpude for offence punishable u/s 302 of the Indian Penal Code. Criminal Appeal No. 685/2004 has been filed by Anil Nagrale, the brother of the deceased Ramesh Nagrale challenging the acquittal of absconding accused Sanjay Chidam and Wilson.

2. Insofar as Criminal Appeal No. 685/2004 is concerned, though the appeal was admitted by this Court, the same is not maintainable under any of the provisions of the Code of Criminal Procedure. However, since the trial Court has acquitted absconding accused which is not permissible under any provisions of the law, Mr. Agasti, learned Counsel for the appellant -Anil seeks leave to convert the appeal into revision for which the learned Counsel for the respondents 1 and 2 have no objection. Accordingly, Criminal Appeal is allowed to be converted into revision. With the consent of learned Counsel for the parties, the same is being disposed of along with other two criminal appeals.

3. Briefly, the prosecution case is as under:

At about 3.00 p. m. on 10.3.2001 which was the next day of "Holi". PW 3 Sanjay Patil, PW 2 Sanjay Sontakke and PW 7 Rajhans Punekar were standing in front of the shop of Rajhans. Deceased Ramesh was present near the shop of his brother. Suddenly, Prashant Chidam, Gajanan Tirpude and absconding accused Sanjay Chidam and one Wilson came on scooter and motor cycle from S.T. depot and parked their vehicles near the stall of Anil Nagrale. Sanjay Chidam caught hands of deceased Ramesh Nagrale and Prashant stabbed him in stomach and back. Ramesh Nagrale shouted whereupon PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Punekar rushed towards him. Gajanan Tirpude and Wilson threatened them by showing knives and said "BICHAME KOI ANA NAHI" Ramesh Nagrale fell down. All the accused left the spot with their vehicles. Rajhans tied Dupatta to Ramesh and all three of them carried him to the General Hospital, Wardha. Thereafter Ramesh was taken to the hospital at Sewagram. PW 11 Prabhakar Vairagade, Head Constable, who was on duty at Sewagram Hospital, Wardha asked the Medical Officer whether the patient was fit to give his statement. The Medical Officer examined Ramesh Nagrale and found him fit to give statement and Shri Vairagade recorded his statement (Ex.51) On the basis of said dying declaration, offence vide Crime No. 79/2001 was registered against Prashant Chidam u/s 326 of the Indian Penal Code since in the said statement Ramesh stated that Prashant had stabbed him. On 11.3.2001 at about 7.30 a. m. Ramesh succumbed to the injuries. Thereafter offence u/s 302 of the Indian Penal Code was added. The Investigating Officer PW 14 Shri Yasankar rushed to Sewagram Hospital and conducted inquest panchanama (Ex.24)

The dead body of Ramesh was sent for post-mortem. PW 6 Dr. Bipinchandra Tirpude along with Dr. Pranab Choudhary conducted post-mortem on the dead body in the afternoon and found total seven injuries, out of which two were surgical injuries. The Investigating Officer also seized shirt and pant from accused Gajanan by seizure memo (Ex. 60)

Blood stained shirt and pant of accused Prashant Chidam were seized under seizure memo (Ex.61)

The spot panchanama (Ex.38) was conducted on 12.3.2001. On 13.3.2001 the Investigating Officer recovered a knife pursuant to confessional statement

(Ex.63) made by Prashant from the pit situated in Dhanoli (Gawande) Shiwar and the same was seized vide seizure memo (Ex. 64)

The blood stained clothes of the deceased were also seized vide seizure memo (Ex.48)

On 12.4.2001 the seized s were sent to Chemical Analysis. After completion of the investigation, the charge-sheet was filed against accused Prashant Chidam, Gajanan Tirpude and absconding accused Sanjay for the offences punishable under Sections 302, 326 read with Section 34 of the Indian Penal Code in the Court of Chief Judicial Magistrate, Wardha. The case was committed to the Court of Sessions. In Sessions Trial No. 11/2003 the Court of Additional Sessions Judge framed charge for offence punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code against Prashant Chidam and Gajanan Tirpude. Accused pleaded not guilty to the charge. In the Sessions Trial No. 11/2003 the prosecution examined 14 witnesses and produced several documents some of which were admitted by the accused. The defence of the accused is of total denial. Further, the accused also came with the defence that there was quarrel between PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Puneekar on one side and deceased Ramesh on other side on account of money and in that quarrel deceased Ramesh sustained injuries.

The accused did not lead any defence evidence. The trial Court, upon appreciation of the evidence led by the prosecution, relied upon the dying declaration and held that offences under Sections 302 and 201 read with Section 34 of the Indian Penal Code was not made out against the accused and consequently acquitted them of the said offences. However, the trial Court held accused Prashant Chidam guilty for offence punishable u/s 304 (II) of the Indian Penal Code and sentenced him as above. The trial Court acquitted absconding accused Sanjay and also said Wilson, who was not even named as absconding accused in the charge-sheet.

4. We have heard learned Counsel Ms. Jog, Mr. Khare, Mr. Agasti and learned A. P.P. Mr. Mirza.

5. Mr. Mirza, learned A. P. P. submitted that the trial Court erred in not relying upon the evidence of three eye witnesses PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Puneekar, whose presence at the spot has been established by the prosecution beyond reasonable doubt. He submitted that there is inter se corroboration of the evidence of these three witnesses which clearly proves that Prashant committed murder of deceased Ramesh by assaulting him with knife and that accused Gajanan shared common intention inasmuch when these witnesses tried to intervene Gajanan threatened them not to intervene which clearly establishes that both accused shared common intention to commit offence of murder of Ramesh.

According to Mr. Mirza, reasons given by the trial Court for not accepting the evidence of the above three eye witnesses are untenable in law and the evidence

of the three eye witnesses clearly establishes complicity of Gajanan in the commission of crime. Mr. Mirza further submitted that although PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Puneekar were friends of deceased Ramesh, by itself, could not make them interested witnesses and their evidence being cogent has to be accepted. In support of his submissions, Mr. Mirza relied upon the following authorities:

- (I) Israr Vs. State of U.P.,
- (ii) 2003 Cr.L.J. (Lallan Rai and other v. State of Bihar);
- (iii) 2003 Cr.L.J. (Hukam Chand v. State of Haryana); and
- (iv) Namdeo Vs. State of Maharashtra,

6. Ms. Jog, learned Counsel appearing for the accused Prashant submitted that PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Puneekar are interested witnesses and as such cannot be relied upon. She further submitted that according to the prosecution police were present near the spot and, therefore, the evidence of the alleged eye witnesses has to be looked with suspicion in the absence of evidence of independent witnesses near the spot. She further submitted that the eye witnesses claimed that they carried deceased to hospital but there were no blood stains on their clothes which clearly falsifies their version that they were present on the spot. She further submitted that if the said witnesses were really present on the spot at least one of them would have lodged report to the police but admittedly no such report has been filed which makes their presence on the spot doubtful. She further submitted that proper investigation has not been carried out inasmuch as Dupatta which is alleged to have been used to cover injury on the body of deceased Ramesh was not seized during the investigation and further spot panchanama was conducted almost after 36 hours of the alleged commission of the crime. She further submitted that no blood was found on the knife alleged to have been recovered at the instance of Prashant and, therefore, recovery of the knife alleged to have been recovered at the instance of the accused does not help the prosecution. She further submitted that dying declaration on which reliance has been placed by the trial Court cannot be accepted inasmuch as neither time of recording dying declaration has been mentioned nor the doctor alleged to have examined the deceased has been examined as witness. She further submitted that the defence taken by the accused before the trial Court is probable and, therefore, the accused Prashant deserves to be acquitted. She further submitted that non-examination of Anil Nagrale and Mahendra Pakhale, who according to the Investigating Officer had carried the deceased to the hospital is fatal to the prosecution. In the alternative, she submitted that the sentence imposed upon accused Prashant is harsh having regard to the fact that the conviction is u/s 304 (II) of the Indian Penal Code. In support of her submissions, Ms. Jog relied upon the following authorities:

- (i) Hem Raj and Others Vs. State of Haryana, and

(ii) AIR 2004 SC 1080 State of Rajasthan v. Taran Singh and Anr.;

6A. Mr. Agasti, learned Counsel on behalf of Anil Nagrale, the brother of deceased Ramesh submitted that the acquittal of Sanjay Chidam -absconding accused by the trial Court is clearly unsustainable in law inasmuch as absconding accused can never be acquitted at the conclusion of the trial. He further submitted that insofar as Wilson is concerned, he was not even shown as absconding accused in the charge-sheet filed by the police and as such the question of acquitting him by the trial Court does not arise.

6B. Mr. Khare, learned Counsel appearing for accused Gajanan Tirpude supported the impugned judgment and order. According to Mr. Khare, the trial Court was right in not placing reliance upon the three witnesses, who claimed to be eye witnesses since their presence on the spot was doubtful. According to Mr. Khare, there is no inter se corroboration between the testimonies of the three witnesses. He further submitted that the dying declaration does not attribute any role to Gajanan and, therefore, no reliance can be placed on the testimonies of these three witnesses. He further submitted that the knife which was alleged to have been used by Gajanan in the commission of the crime has not been seized which also creates doubt about the presence of the three witnesses on the spot. He further submitted that the presence of the three witnesses is also doubtful inasmuch as according to these witnesses their clothes were not blood stained although they took the deceased to hospital. According to Mr. Khare, deceased Ramesh mentioned about one injury caused by Prashant and there is absolutely no explanation coming forth about the other four injuries on the deceased Ramesh. He further submitted that the trial Court was right in acquitting accused Gajanan by not placing reliance upon the evidence of the three witnesses PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Puneekar. Mr. Khare urged that the said three witnesses being friends of deceased Ramesh, have implicated Gajanan in the commission of the crime. Lastly, learned Counsel submitted that the findings given by the trial Court are not perverse and, therefore, having regard to the principles laid down by the Apex Court in the matter of interference by the High Court in appeal against acquittal, no interference is called for with the acquittal of the accused Gajanan.

7. We have carefully considered the submissions made by learned Counsel for rival parties and perused records and judgments relied upon.

8. Insofar as homicidal death of deceased Ramesh Nagrale is concerned, there is no serious dispute. The evidence of PW 6 Dr. Bipinchandra Tirpude, who conducted post mortem on the dead body of Ramesh on 11.3.2001, deposed that on external examination, he found the following injuries:

(i) Surgically stitched wound present over mid line vertically directed from 23 cm. below the supra sternal notch, extent up to just below the umbilicus, total length was 23 cm. with 19 stitches. After releasing the stitches, wound margin are cut and it is cavity deep.

(ii) Surgically stitched wound with 10 stitches present horizontally started from the mid line at the level of 8th stitch of injury No. 1, length was 13.5 cm. On releasing the stitches margins of the wound are clean cut and it is cavity deep. It is on the right anterior abdominal wall.

(iii) Surgically stitched wound present on the right upper anterior abdominal wall on the sub coastal region, 4 cm. below the coastal margin on anterior axillary line, slightly obliquely placed, measuring 4.5 cm. in length. After releasing the stitches it is measuring 3.5 cm. x 1.5 cm. x cavity deep, directed downwards, margins are clean cut, lower end of the wound is acute and other end slightly blunt.

(iv) Surgically stitched wound present over the left side of the epigastic region 1 cm. below the coastal margin, 2 cm. away from the mid line, obliquely placed with three stitches. The length was 4 cm. On cutting the stitches margins are clean cut, measuring 3.5 cm. x 1 cm x cavity deep. Directed downwards. One end is acute and one end slightly blunt.

(v) Surgically stitched wound with two stitches present on the left side posterior trunk, 13 cm. below the inferior angle of scapula 4 cm. away from mid line. Size 3 cm. in length. After releasing the stitches measuring 3 cm. x 1 cm. x muscle deep. obliquely placed, margins are clean-cut, lower end acute and upper end slightly blunt;

(vi) Surgically stitched present on the sacral region right side, at the level of lumbar, 2nd and 3rd vertebra with three stitches measuring 3 cm. x 1 cm. muscle deep. Margins are clean cut, and

(vii) Surgically drainage catheter with plain rubber catheter present with oozing of blood from the right iliac fossa.

He further deposed that he found fracture of 10th rib on the right side and both lungs were pale. On internal examination he found that there were internal injuries corresponding to the injuries 1, 2, 3, 4 and 7 mentioned in column No. 17. There was collection of 250 ml., of blood in the peritoneal cavity. According to him, the cause of death was hemorrhage and shock due to stab injuries on the abdomen. He identified his signature on post-mortem report (Ex.42). He further submitted that injuries mentioned in Column Nos. 17, 20 and 21 were sufficient to cause death. He further stated that he could not state whether the injuries mentioned in the report could have been caused by the knife which was shown to him. He stated that the Medical Officer, who had seen the injuries before operation could give his opinion. The witness further deposed that after external examination he found whitish brown colour shirt with checks and light blue colour pant on the body of the deceased. There was a tear present on right lower part of the shirt with irregular margins. The tear was 16 cm., away from the last button and 9.5 cm., in length in irregular shape and there was one more tear mark present on the right lower part 2 cm., above which was obliquely placed 1 cm., above to the tear No. 2. The said tear was 3.5 cm., in length. He also found

four tear marks on the clothes of the deceased. All tear marks were mentioned in column No. 7. The shirt and pant were stained with dried blood with radish pink colour and bluish colour. In cross-examination by the accused he stated that blood of the deceased was taken for alcohol estimation and for blood grouping and for cross-matching. The prosecution has also relied upon the evidence of PW 5 Dr. Dilip Gupta. He deposed that on 21.3.2001 he received weapon in sealed condition with a letter from P.S. Wardha. Accordingly, he examined weapon (knife). The length of weapon was 40.5 cm., length of metal blade was 28.5 cm., and the breadth was 5 cm. The blade was pointed out and rusted at most of the parts.

He further deposed that he had received injury report, death certificate and post-mortem examination report of Ramesh. He further deposed that the injuries mentioned in post-mortem report could have been caused by the said weapon. He identified his signature on the report (Ex. 40).

9. The scrutiny of the evidence of the above two witnesses discloses that the injury Nos. 1 and 7 are surgical injuries whereas other five injuries could have been caused by the knife. The evidence of PW 6 Dr. Tirpude clearly establishes that death of Ramesh was on account of haemorrhage and shock and due to stab injuries into abdomen. Thus, the prosecution has been able to establish homicidal death of Ramesh on account of stab injuries in the abdomen.

10. The inquest panchanama (Ex. 24) which was conducted on 11.3.2001 also discloses that there were cut marks on various places on the front and back side of the shirt which was worn by deceased and it was smeared with blood and there was colour on it. The inquest panchanama also discloses that there were bandages of the hospital on the back, on the left side above the waist and at the middle portion which were smeared with blood. Thus, the evidence of the above referred two witnesses and inquest panchanama clearly proves that deceased Ramesh died on account of injuries on the abdomen which could have been caused with knife (Article 5).

11. The trial Court has relied upon the dying declaration recorded by PW 11 Prabhakar Vairagade. He deposed that on 10.3.2001 he was working at Police Station, Sewagram and was on duty at Medical College, Sewagram. On that day, Ramesh Nagrale was admitted in the hospital. He rushed to the doctor and inquired with him whether the patient was fit to give his statement. The doctor examined the patient and he was permitted to record the statement of Ramesh Nagrale. The doctor certified that the patient was fit to give his statement. The witness identified requisition (Ex.50), at the foot of which there is an endorsement read as follows:

Patient is fit for giving statement at present.

Time : 5.00 P. M.

Date 20.3.2001

Sd/- (Illegible).

The witness further deposed that the patient disclosed his name as Ramesh Vishvnath Nagrale, resident of Gorakshan Ward, Wardha, Occupation Panthela. Ramesh further stated that on 10.3.2001 his Panthela had remained closed. He was standing near Panthela at Panthar chowk at about 3.00 p. m. Suddenly, Prashant Chidam, resident of Hind Nagar, Wardha had scuffle with him and in that scuffle Prashant Chidam stabbed him in the stomach of Ramesh by knife and ran away. Persons in the neighbourhood came to him and carried him to Government Hospital, Wardha. Thereafter he was referred to Medical College, Sewagram. The witness further stated that he recorded the statement and read over the same to the patient and he admitted it to be true and correct. At that time there were salines to both hands and as such he was unable to sign and, therefore, right hand thumb impression was obtained on the statement. Thereafter he put his signature. The witness identified the thumb impression of Ramesh and his signature on Ex. 51. In cross- examination the witness stated that he recorded the statement of Ramesh at about 4.00 p. m. and about 15 minutes were spent in recording the statement. He further deposed that Ramesh was admitted in General Ward and neighbourers from Panthar chowk were present in the hospital. After about two hours of recording statement, P. S. I. Yesamkar rushed to hospital and he recorded names of persons, who were present in the hospital and who were inhabitant of Panthar chowk but he did not know their names. He further deposed that Ramesh was talking as usual and after recording his statement Ramesh was also in good condition. No medicine was offered to the patient in his presence. The patient was treated after his statement was recorded. The witness denied that the sentence on D.D. that the patient is unable to sign due to saline was added later on. The witness also denied the suggestion that he obtained thumb impression on blank paper and later on it was prepared. He also denied that the statement was recorded as per the say of the persons who were present along with Ramesh. He further stated that he did not remember the name of the doctor. The dying declaration has been assailed on the ground that the witness stated that he recorded the statement at 4.00 p. m. whereas the endorsement of the doctor indicates that the patient was examined at about 5.00 p. m. Further the doctor who certified that the patient was fit for giving statement has not been examined by the prosecution. One more ground for attack is that there is an addition of sentence "patient was unable to sign due to salines" in the statement.

12. Upon close scrutiny of the evidence of PW 11 Prabhakar, we find that none of the grounds of attack has any merit. The evidence of this witness has not been shaken in cross- examination. Nothing has been brought on record to suggest as to why this witness should make false claim of recording dying declaration. The difference in time is not such as to completely discredit the testimony of the witness and moreover, it is to be noted that the witness has given an approximate time. One more aspect which has to be borne in mind the evidence of this witness was recorded on 30.4.2004, almost three years after recording

the statement and as such it cannot be expected of the witness to remember minute details. The fact that the doctor who certified the patient fit for giving statement has not been examined is not fatal to the prosecution case in view of the cogent evidence of PW 11 Prabhakar. We have no hesitation to accept the testimony of Prabhakar that he recorded statement after getting the certificate of fitness from the doctor and upon perusal of the dying declaration, we find it difficult to accept the defence of the accused that the sentence -.the patient was unable to sign statement due to salines., is added later on. Moreover, in cross-examination of the witness, it has been suggested that he obtained thumb impression of Ramesh on blank paper and later on prepared statement. In other words, thumb impression of Ramesh was obtained has not been disputed by the accused. This being the position, we find ourselves unable to agree with the submission made by learned Counsel for the accused that dying declaration is not truthful and as such does not inspire confidence. We, therefore, hold that the dying declaration is truthful and inspires confidence. The dying declaration clearly proves that it was accused Prashant who inflicted stab injury in the stomach of Ramesh by means of knife.

13. The next question, which arises for consideration is whether the evidence of the three witnesses namely PW 2 Sanjay Sontakke, PW 3 Sanjay Patil and PW 7 Rajhans Puneekar who claim to be eye witnesses can be accepted. PW 2 Sanjay Sontakke deposed that he knew deceased Ramesh as well as both accused and Sanjay Chidam. He further deposed that on 10.3.2001 at about 3.00 to 3.15 p. m. at Panthar chowk near Panthela of Anil Nagrale he was present along with Sanjay Patil and Rajhans Puneekar when the incident had taken place. From ST depot four persons namely Sanjay Chidam, Prashant Chidam, Gaju Tirpude and one unknown person came on scooter and one on motor cycle. He knew the said unknown person by face. They parked their vehicles near Panstall of Anil. Sanjay Chidam caught Ramesh Nagrale. Prashant Chidam took a knife from his waist and stabbed on the stomach and on the back of Ramesh Nagrale. Ramesh shouted "BACHAW BACHAW". He along with others tried to rescue Ramesh but accused Gajanan and one unknown person took out knife and said "BICHAME KOI ANEKA NAHI".

Thereafter all left the spot. Ramesh fell down. The witness identified the knife (Article 5) which was shown to him. In cross-examination he stated that the deceased was not related to them but the deceased was inhabitant of the same locality. He stated that every year there used to "Bandobast on every Holi festival". He denied that at the relevant time there was "Bandobast". He admitted that deceased Ramesh was his friend and also friend of PW 3 Sanjay Patil and PW 7 Rajhans Puneekar. He denied the suggestion that on the day of incident he along with deceased Ramesh, Rajhans and Sanjay were heavily drunk. He did not know whether other persons were present at Panstall of Anil Nagrale. At the relevant date Panstall of Anil Nagrale was closed and also all other shops including his shop were closed but the people were passing by the said road. He further stated that he along with Anil, Sanjay and Rajhans carried

Ramesh to General Hospital, Wardha. He further stated that his clothes were not stained with blood nor clothes of Sanjay Patil and Rajhans were stained with blood. The witness volunteered that Rajhans Puneekar had tied Dupatta to the injuries of Ramesh Nagrale and as such their clothes were not stained with blood. He further claimed 100 persons were assembled on the spot but he could not state Ramesh was conscious after admission in the hospital. He stated that he visited the hospital to visit Ramesh but he was not allowed to visit him. He denied the suggestion that on the date of the incident he along with Sanjay Patil, Rajhans Puneekar and deceased Ramesh Nagrale were restricting the road passers and were robbing them due to which quarrel took place among four of them and in that scuffle that took place Ramesh sustained injuries. He denied the suggestion that to save himself he deposed falsely against the accused. He further stated that he did not know whether the spot was having blood stains and he was not present while spot panchanama was recorded by the police. He further denied that no incident as deposed by him had taken place.

14. PW 3 Sanjay Patil deposed that he knew both the accused. On 10.3.2001 at about 3.00 p. m., he was present in front of welding shop of Rajhans and Rajhans Puneekar and Sanjay Sontakke were also present there. He further deposed that he knew Ramesh who was standing in front of Panstall near cement pole. At that time both the accused along with Sanjay Chidam and one unknown person came there on two vehicles. He knew the said unknown person by face and he came to know his name as Wilson r/ o Hindngar, Wardha. They parked their vehicles near the Panstall. Sanjay Chidam caught hold of Ramesh Nagrale. Prashant Chidam took out the knife and stabbed in his abdomen and back of Ramesh whereupon Ramesh shouted. They proceeded to save him. Gajanan Tirpude and said unknown person were holding knives in their hands. They threatened them saying "KOI BICHAME NAI ANA". Ramesh fell down and all the persons fled away on their vehicles. He further deposed that his cycle store is situated at Gorakshan Ward, Wardha. He was resident of the said Ward since his birth. He further stated that Panstall of Anil Nagrale and Ramesh Nagrale is situated at Gorakshan road at Panthar chowk. He identified the knife (Article 5) as the same knife. In cross-examination he stated that the incident had taken place on the next day of "Holi". He stated 30 that Police Bandobast used to remain there during Holi festival. Deceased Ramesh was his friend. He denied the suggestion that he along with Sanjay and Ramesh had consumed liquor. He claimed that no one except three of them had seen the incident. There was no traffic on all four roads from Panthar chowk. He did not know whether the blood of Ramesh had fallen on the road. He stated that he along with Sanjay and Rajhans had lifted Ramesh. He stated that his clothes were not blood stained while lifting Ramesh. He also denied that Ramesh was on talking terms. After admission he did not visit him in the hospital. About 50 people gathered on the spot. Anil, Mahendra Pakhale, Naresh Bhagat, Mangesh Sontakke, Raju Watkar, and Ram Kauri, Sandeep Manthanwar and others were gathered. He narrated the incident to Anil Nagrale and others. He denied the suggestion that on the date of

incident he along with Sanjay and Rajhans were obstructing the people and on account of dispute regarding money quarrel took place amongst them and during the scuffle Ramesh sustained injuries and to save himself he falsely implicated the accused. He denied the suggestion that neither Prashant Chidam had stabbed nor Gajanan had threatened them. The witness further stated that he was not present when the police had seen the spot and he did not know when police inspected the spot.

15. PW 7 Rajhans Puneekar deposed that he knew both the accused. The evidence of PW 7 is on similar lines as that of PW 2 Sanjay Sontakke and PW 3 Sanjay Patil. He stated that Sanjay caught hold of both hands of Ramesh and Prashant took sharp knife from his waist and stabbed Ramesh twice in the stomach. Ramesh shouted "BACHAV BACHAV" and thereafter Gajanan Tirpude and Wilson took out their knives from the waist and threatened them saying "KOI BICH MEH AANA NAHIN". Ramesh Nagrale fell down and all the accused left the spot. He tied Dupatta to the stomach of Ramesh. He identified the knife shown to him. In cross-examination he admitted that deceased Ramesh and PW 2 Sanjay Sontakke and PW 3 Sanjay Patil were his friends. Every year police used to arrange bandobast at Panthar chowk at colour festival. He stated that he know Prashant Chidam by face. He did not know whether relations between Ramesh Nagrale and Prashant Chidam were strained. He could not state whether the persons other than he himself Sanjay Patil and Sanjay Sontakke were present at the time of incident. He denied the suggestion that at that time Ramesh Nagrale was in talking condition. He denied the suggestion that his clothes were having blood stains of Ramesh while tying Dupatta to his stomach. He did not visit Ramesh in the hospital. He denied suggestion that he along with Ramesh, PW 2 Sanjay Sontakke and PW 3 Sanjay Patil had consumed liquor and were robbing the people at the relevant time. He also denied the suggestion that on account of dispute regarding money there was scuffle in which Ramesh sustained injuries. He further denied the suggestion that they had filed false case against the accused to save themselves. He further denied that he was present at the time of spot panchanama. He denied the suggestion that Gajanan Tirpude had not threatened the public as stated by him.

16. It is pertinent to note that the trial Court in paragraphs 12 and 13 of the judgment has stated that though there is slight variation in the testimonies of the above three witnesses, the evidence of these witnesses could not be doubted, insofar as the role played by accused Prashant is concerned. However, in paragraph 33 the trial Court observed that insofar as the role played by absconding accused Sanjay and accused Gajanan is concerned, reliance could not be placed upon the evidence of these witnesses. We are unable to appreciate the approach adopted by the trial Court. Once the trial Court accepted the evidence of three witnesses as trustworthy insofar as the role of Prashant is concerned, in the absence of any cogent reason, it is difficult to reject their testimonies regarding their version regarding the role played by accused Gajanan.

17. The evidence of the above three witnesses has been assailed on the ground that they are admittedly friends of deceased Ramesh. In this connection, it would be appropriate to refer to the judgment of the Apex Court in *Namdeo v. State of Maharashtra* (supra) relied upon by learned A.P.P. In the said judgment, the Apex Court observed that a witness who is relative of the deceased cannot be regarded as an interested witness. The term "interested postulates" that the person concerned must have some direct interest in seeing that the accused is somehow or other convicted either because he has some animus with the accused or for some other oblique motive. The Apex Court further observed that the evidence of relative witness has to be scrutinized carefully and in case his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the sole testimony of such witness. In our opinion, the same principle should apply to the witness who claims to be friend of the deceased. Unless it is shown that the friend of the deceased has any oblique motive to falsely implicate the accused, friendship, by itself, cannot be a ground to disbelieve the testimony of such witness. No doubt, the evidence of witness who claims to be friend of the deceased or victim of crime must be carefully scrutinized and in case his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy inspiring confidence such evidence must not be discarded by the Court. In the present case, upon close scrutiny of the evidence of the above three witnesses, we are satisfied that their version that they were present on the spot of incident at the relevant time cannot be doubted. The mere fact that none of them lodged report or their clothes were not stained with blood, by itself, would not be a ground to reject their testimonies, if the same are otherwise trustworthy.

18. It is pertinent to note that according to the defence, all the three witnesses were present along with accused at the relevant time but according to the defence, they were extorting money from the passers by on account of which there was dispute amongst themselves which was followed by a scuffle in which deceased suffered injuries. The defence taken by the accused, having regard to the circumstances brought on record, appear to be improbable and, therefore, needs to be rejected. Moreover, it is also to be noted that the statements of all the three witnesses were recorded on the next day of the incident and, therefore, it cannot be said that these three witnesses have falsely implicated not only accused Prashant but also accused Gajanan. It is difficult to hold that all these three witnesses have falsely stated about their presence on the spot of the incident. There is inter se corroboration in the testimonies of these three witnesses regarding role played by both the accused. The version given by these three witnesses cannot be said to be falsified by spot panchanama (Ex.38) which was conducted on third day having regard to the fact that the incident in question had taken place on road. The presence of the blood could not be expected on the spot on third day of the incident. The mere fact that independent witnesses were not examined, by itself, would not be sufficient to hold that the testimonies of three witnesses are untrustworthy. The judgment in

Hem Raj's case (supra) upon which reliance has been placed by Ms. Jog does not advance the case of the accused inasmuch as the factual situation in the said case is entirely different. Similarly, the judgment in State of Rajasthan v. Taran Singh and Anr. (supra) also does not come to the rescue of accused Prashant inasmuch as the facts in the said case are entirely different.

19. Thus, the evidence of PW 11 and the above referred three eye witnesses clearly establishes that it was accused Prashant who caused injuries to deceased Ramesh which resulted in his death and accused Gajanan threatened the above referred three witnesses not to intervene when they tried to come to the rescue of deceased Ramesh.

20. The next question which arises for consideration is whether Section 34 of the Indian Penal Code is attracted in the present case. In this connection, it would be appropriate to quote paragraphs 20 to 22 in Lallan Rai's (supra) relied upon by learned A. P.P. They are as under:

20. A plain look at the Statute reveals that the essence of Section 34 is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. It is trite to record that such consensus can be developed at the spot. The observations above obtain support from the decision of this Court in Ramaswami Ayyangar and Others Vs. State of Tamil Nadu, .

21. In the similar vein the Privy Council in AIR 1925 1 (Privy Council) stated the true purport of Section 34 as below:

The words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things they also serve who only stand and wait.

22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused -though the same, however, depends upon the fact-situation of the matter under consideration and no rule steadfast can be laid down therefore.

The evidence of all the three eye witnesses establishes beyond reasonable doubt that when all three of them tried to intervene after deceased Ramesh was assaulted by Prashant, accused Gajanan and absconding accused took out their knives and threatened them not to interfere and thereafter fled away. The said

act on the part of Gajanan clearly establishes that he shared common intention along with accused Prashant to cause injuries to deceased Ramesh. Having regard to the cogent evidence of the three eye witnesses which clearly establishes the role played by both the accused in the commission of the crime, we are satisfied that the prosecution has been able to establish that both the accused shared common intention to cause injuries to deceased Ramesh though actually injuries were inflicted by accused Prashant by stabbing him with knife.

Insofar as the absence of blood on the knife recovered at the instance of the accused is concerned, in our opinion, the same is not sufficient to discredit the dying declaration and the cogent evidence of the three witnesses. Insofar as the argument of Mr. Khare that the knife alleged to have been shown by Gajanan to the three eye witnesses has not been recovered is concerned, in our opinion, the absence of weapon used in the commission of offence cannot be said to be fatal in view of the cogent evidence of the three eye witnesses. Similarly, non-examination of Mahendra Pakhale and Anil Nagrale cannot be said to be fatal to the prosecution case having regard to the cogent evidence led by the prosecution.

21. We shall also consider the argument of Mr. Khare that dying declaration recorded by PW 11 Prabhakar does not attribute the role to accused Gajanan and, therefore, the order of acquittal cannot be faulted. It is pertinent to note that the evidence on record establishes that two accused along with absconding accused and one more person came to the spot and accused Prashant stabbed deceased Ramesh and when the three witnesses tried to intervene, Gajanan and other accused took out their knives and threatened them not to intervene. The mere fact that deceased Ramesh did not state about the role played by Gajanan, by itself, is not sufficient to hold that accused Gajanan did not threaten the three witnesses with knife. Deceased Ramesh after the assault with knife must have been taken by shock and it could not be expected of him to minutely observe what had happened thereafter in the surrounding. Moreover, in the dying declaration what is expected of a person to state who is author of the injury caused to him. Therefore, the fact that in the dying declaration no role has been attributed to accused Gajanan, by itself, cannot be a ground to exonerate him in view of cogent evidence of the three witnesses referred above.

22. Insofar as the number of injuries found on the person of the deceased is concerned, as stated above, there were five injuries found on the deceased, out of which three were on the front side and two on the back side. The evidence of three witnesses cannot be brushed aside on the ground that they have not stated that five injuries were caused by the assault of accused Prashant on the deceased. It is to be noted that there was a sudden assault by accused Prashant on deceased Ramesh by knife and deceased Ramesh has clearly stated in the dying declaration that it was Prashant, who caused injuries to him by assaulting him with knife. This being the position, the only legitimate inference which can be drawn that it was the accused Prashant who caused all the injuries with knife, more particularly, in the absence of any material on record as to probable cause

of the other injuries on the person of the deceased Ramesh.

22-A. As regards discovery of knife allegedly used in the crime, PW 1 Naresh Bhagat, a panch witness, on confessional statement of accused Prashant, in his evidence before the Court stated that in his presence accused Prashant had confessed to produce knife which was kept in the scooter. This witness was not declared hostile by the prosecution nor the said witness on the aspect of placing of knife in the scooter was disputed by the prosecution. The other prosecution witnesses PW 12 Mahendra and PW 3 Sanjay Patil are the panchas for discovery of knife but then both of them have turned hostile and the Court, therefore, relied upon the testimony of the Investigating Officer for proof of discovery. No doubt, the testimony of the Investigating Officer can be relied upon even if the panch witnesses turn hostile. But in the instant case the knife which has been seized pursuant to discovery statement is without any blood. We ourselves have seen the knife. Looking to the length and breadth of the external injuries and having regard to the knife seized, it is impossible that the injuries were caused with such a big knife having breadth of 10 cms. at the hilt and 5 cms. in the front. For the above reasons therefore, it is not possible for us to believe that the said knife was used in the commission of crime.

23. Having held that Prashant stabbed deceased Ramesh with knife and accused Gajanan shared common intention with accused Prashant, the next question which arises for consideration is what offence is made out against both the accused. The trial Court has held that offence u/s 304 (II) of the Indian Penal Code has been made out against accused Prashant. The trial Court has held that accused Prashant caused single injury to the stomach in the scuffle but it could not be said that he had intention or knowledge to cause his death of Ramesh but the knowledge could be attributed to Prashant that the injury by knife was likely to cause his death. Insofar as the finding of the trial Court that accused Prashant had caused one injury to deceased Ramesh is concerned, we are not in a position to accept the said finding in view of our earlier finding that all the five injuries were caused by accused Prashant. However, having regard to the nature of the injuries, we are of the considered opinion that the trial Court is right in holding that accused Prashant did not intend to cause death of deceased Ramesh but definitely he could be attributed knowledge that the injury by knife was likely to cause death of Ramesh. We are, therefore, of the considered opinion that offence u/s 304 (II) read with Section 34 of the Indian Penal Code is made out against both accused. The judgment laid down in *Hukumchand Chand*'s (supra) by learned A. P.P. does not advance the case of the prosecution inasmuch as the said case although the accused has given solitary blow with pharsa on the head of the deceased, the Apex Court held that case of murder was made out against the accused. The factual situation in the said case is entirely different and, therefore, the same is not of any help to the prosecution.

24. Having regard to the nature and place of the injuries, we are of the considered opinion that offence u/s 304(II) read with Section 34 of the Indian

Penal Code has been proved beyond reasonable doubt against both accused, Prashant and Gajanan. We are of the considered opinion that the findings given by the trial Court for acquitting accused Gajanan are absolutely perverse and cannot be sustained. We are aware of the ratio laid down by the Apex Court in catena of decisions that the Appellate Court should be slow to interfere with an order of acquittal passed by the trial Court. However, the Apex Court has also laid down that in case the findings given by the trial Court for acquitting the accused are perverse and unsustainable in law, it is the duty of the Appellate Court to upset the order of acquittal. In the present case, we find that the reasons given by the trial Court for acquitting accused Gajanan are absolutely unsustainable in law and, therefore, we reverse the order of acquittal passed by the trial Court against accused Gajanan. Insofar as the acquittal of Sanjay Chidam and Wilson is concerned, we fail to understand as to how the trial Court could have acquitted Sanjay Chidam and Wilson. Indisputably, Sanjay Chidam was shown as absconding accused and as such he could not have been acquitted by the impugned judgment and order. Insofar as Wilson is concerned, neither charge-sheet was filed against him nor he was shown as absconding accused. As such, the question of acquitting him did not arise. Therefore, the acquittal of Sanjay Chidam and Wilson ordered by the trial Court is liable to be quashed and set aside and accordingly is quashed and set aside.

25. We, therefore, hold accused Prashant Chidam and Gajanan Tirpude guilty for offence punishable u/s 304 (II) read with Section 34 of the Indian Penal Code. Insofar as sentence imposed upon accused Prashant is concerned, we find that sentence of seven years rigorous imprisonment imposed on Prashant for offence punishable u/s 304 (II) of the Indian Penal Code is rather harsh considering the facts and circumstances of the case. It would be just and proper to reduce the sentence from R.I. seven years to R.I. five years and maintain the sentence of fine imposed by the trial Court. Needless to mention that accused Prashant is entitled to set off u/s 428 of the Code of Criminal Procedure.

26. For the reasons aforesaid, Criminal Appeal No. 510/2004 and 640/2004 are partly allowed. Criminal Appeal No. 685/2004 which has been treated as revision is also partly allowed.

27. Since we are reversing the order of acquittal insofar as accused Gajanan is concerned, we deem it appropriate to hear him on the point of sentence.

28. By the judgment pronounced yesterday, we held accused Prashant s/o Narayanrao Chidam guilty of the offence punishable u/s 304 (II) of the Indian Penal Code. At the request of Advocate Shri Khare appearing for accused Gajanan s/o Udhavrao Tirpude and Shri Mirza, learned A. P.P. appearing for the State, the matter was adjourned for hearing on the point of sentence to 16.02.2008. Advocate Shri Khare submitted that he would like to make submissions on behalf of accused Gajanan, since the accused does not wish to make any submission personally. Advocate Shri Khare submitted that the main role in the commission of offence has been played by accused Prashant and

having regard to the role played by his client, he deserves to get lesser sentence than the one awarded to accused Prashant. He further submitted that accused Gajanan does not have any criminal record and, therefore, considering all these circumstances, lenient view may be taken against accused Gajanan.

Shri Mirza, learned A. P. P. for the State submitted that since accused Gajanan has been held guilty with the aid of Section 34 of the Indian Penal Code, the punishment imposed on Prashant has to be imposed on him. According to Shri Mirza, once accused is convicted with the aid of either Section 34 or Section 149 of the Indian Penal Code, the Court is bound to impose the same sentence as one imposed on the main accused. In support of his submission, he relied upon the judgments of the Apex court reported in *Surinder Singh alias Chhinda and Another Vs. State of Punjab*, and 2004 ALL MR (Cri.)1153 (*Chacko alias Aniyankunju and Ors. v. State of Kerala*). Refuting the argument of Shri Mirza, learned A. P.P., Advocate Shri Khare submitted that as his client is convicted with the aid of Section 34 of the Indian Penal Code, the Court is entitled to impose sentence different than the one imposed on the main accused Prashant. In support of his submissions, Shri Khare has placed reliance upon the judgment of the Apex Court reported in *Tukaram Dnyanu Gurav and Others Vs. State of Maharashtra*, .

29. We have carefully considered the submissions made by Advocate Shri Khare and learned A. P.P. Shri Mirza. In *Tukaram Gurav's* case (*supra*) relied upon by Advocate Shri Khare, the sentence imposed on the appellants for offence u/s 307 of the Indian Penal Code was reduced to two years on the ground that they had not used weapons in the commission of the crime although they were held guilty with the aid of Section 149 of the Indian Penal Code. From the said judgment, it appears that higher sentence was imposed on the main accused who had used the weapon in the commission of the crime. The Apex Court held that the fact that appellants had not used weapon in the commission of the crime was a mitigating circumstance. Therefore, the ratio laid down in the said judgment is squarely applicable in the present case. In our considered opinion, in a case where the accused is held guilty with the aid of Section 34 or 149 of the Indian Penal code, it is possible for the Court to impose different sentence than the one imposed on the main accused who uses the weapon in the commission of the crime.

30. Having perused the authorities relied upon by Shri Mirza, learned A.P.P., we find that no ratio as such has been laid down in both those cases. In both the cases, same punishment has been imposed on the accused who has been held guilty with the aid of Section 34 of the Indian Penal Code.

31. Considering the facts and circumstances of the case and the role played by accused Gajanan, we are of the considered view that substantive sentence of three years Rigorous Imprisonment would meet the ends of justice.

32. Accused Gajanan s/o Udhavrao Tirpude is accordingly sentenced to undergo Rigorous Imprisonment for three years and to pay fine of Rs. 1,000/- (Rupees

One Thousand Only) in default to suffer Rigorous Imprisonment for one month. Mr. Khare seeks suspension of sentence for a period of four weeks. The substantive sentence of imprisonment imposed on the accused is suspended for a period of four weeks. Bail bond executed by accused Gajanan shall stand cancelled only after accused Gajanan surrenders before the Trial Court. In case accused Gajanan fails to surrender within a period of four weeks, the trial Court shall take steps to take accused Gajanan in custody to suffer the punishment imposed by this Court. We grant time of fifteen days to the accused to deposit the fine in the trial Court. Needless to mention that both accused are entitled to set off in terms of Section 428 of the Code of Criminal Procedure.

Criminal Appeals stand disposed of accordingly.