
(2015) 09 BOM CK 0105

In the Bombay High Court

Case No : Criminal Appeal Nos. 552, 658 and 1037 of 2008 and 424 of 2009

Rahul Ramesh Burte and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-09-2015

Acts Referred:

Arms Act, 1959 — Section 25, 4

Bombay Police Act, 1951 — Section 135, 37

Criminal Procedure Code, 1973 (CrPC) — Section 110, 294, 313, 374

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 141, 142, 143, 143, 144

Citation : (2015) 09 BOM CK 0105

Hon'ble Judges : B.P. Dharmadhikari, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Daulat G. Khamkar, for the Appellant; H.J. Dedhia, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J—In these appeals filed under Section 374 of Cr. PC. 1973, accused Nos. 2 and 6 together accused No. 1, accused No. 4 and accused No. 5 challenge the Judgment and Order dated 11/4/2008 delivered by Sessions Judge - 5, Pune in Sessions Case No. 366 of 2002 holding them guilty of offence punishable under Section 302 read with Section 149 of IPC and sentencing them to suffer life imprisonment and to pay fine of Rs. 5,000/-. In default of payment of fine, further RI for one year has been ordered. They are also convicted under Section 307 read with Section 149 of IPC and sentenced to suffer RI for ten years and to fine of Rs. 3,000/- or in default further RI for six months. They are also punished under Section 323 read with Section 149 of IPC and sentenced to suffer RI for six months and to pay fine of Rs. 500/- or in default to undergo further RI for one month. They have been convicted for offence punishable under Section 148 read with Section 149 of IPC and sentenced to suffer RI for two years and fine of Rs. 2,000/- or in default to undergo further RI for three

months. They are convicted under Sections 143 and 147 read with Section 149 of IPC, but no separate sentence is passed in view of sentences mentioned supra. They have been punished under Section 4 read with Section 25 of Indian Arms Act and sentenced to suffer RI for six months and fine of Rs. 1,000/- or in default to undergo further RI for three months. They have been acquitted of offence punishable under Section 37 read with Section 135 of the Bombay Police Act. All substantive sentences of imprisonment are directed to run concurrently.

2. As per the case of prosecution complainant PW 1 - Santosh Wadkar is brother of victim of the crime, deceased - Navnath and injured victim witness PW 4 - Nilesh Wadkar. He has one other brother by name Darvesh. There is one more victim of the crime, namely, deceased Prashant Katurde. Complainant, his brothers and injured victim witnesses by name Ganesh Kahar (PW 2), Sachin (PW 3) and deceased Prashant all reside at Janata Vasahat, Parvati, Pune. Seven accused persons before trial court also reside in that locality. On 31/5/2002 at about 10.30 a.m. accused No. 3 - Nilesh Shinde received slight dash from complainant's brother PW 4 - Nilesh Wadkar and there was hot exchange of word. Others then present pacified the parties. The dash was of a foot/leg of Nilesh Wadkar while dancing. In the afternoon, in marriage ceremony of one Sandip More, who resided in same locality, while dancing again similar incidence occurred between the two. This led to quarrel between Nilesh Wadkar and accused No. 3 - Nilesh Shinde. Sandip More, the groom, intervened and settled the matter. After marriage, parties came back.

3. The incidence of crime occurred in the same evening between 6.30 to 7 p.m. Complainant's brother Nilesh, deceased Navnath and Prashant, PW 2 - Ganesh Kahar and PW 3 - Sachin Walhekar were sitting on a platform of Omkareshwar Mandal near house of Navnath. After some time, Nilesh and Prashant started for their respective homes. They went about 100 ft. and in front of Om Provision Stores, accused persons along with juvenile offenders by name Rajesh and Baban arrived. They started quarreling and assaulting Navnath, Prashant and Nilesh Wadkar. They were armed with sword, long knife (gupti), chopper, hockey stick, iron bars etc. and with those weapons a serious assault was made on these three persons. One Jagan Mohite witnessed this attack and he rushed to the house of complainant - Santosh Wadkar. After getting its knowledge, complainant and his brother Darvesh rushed to the spot. Their mother Rekha also followed them. They saw accused persons assaulting PW 4 - Nilesh Wadkar, deceased Navnath and deceased Prashant with sword, gupti, chopper, hockey sticks, iron bars etc. They requested accused persons not to do so and tried to intervene. However, accused persons rushed to assault them. During assault, Sachin Walhekar and Ganesh Kahar had sustained injuries. Complainant Santosh Wadkar, Ganesh Kahar and Sachin Walhekar got frightened and ran towards Jai Bhavani Nagar to save their lives. They went in auto-rickshaw to Dattawadi Police Chowky. Incidence was informed to police and they returned to spot along with police. By that time, injured Navnath Wadkar, Nilesh Wadkar and Prashant Katurde were taken by mother Rekha and one Vilas Dighe to Poona Hospital.

Complainant Santosh Wadkar along with police, Sachin Walhekar and Ganesh Kahar came to the Poona Hospital where Prashant Katurde succumbed to his injuries. Navnath expired while undergoing medical treatment. PW 4 - Nilesh Wadkar had become unconscious and was in critical condition till he regained consciousness on 9/6/2002.

4. API Pratibha Joshi recorded statement of complainant Santosh Wadkar at Poona Hospital itself. She has reached there after receipt of information. Crime No. 145 of 2002 then came to be registered at Swargate Police Station and further investigation was then taken up by PI Dilip Thorat. Spot panchanama was made in night in the presence of panchas and blood stained earth, pair of slipper and footwear, sword, iron pipe, bamboo stick and the cover of sword, all having blood stains, were seized from spot. All accused were arrested on 1/6/2002 and their blood stained clothes were seized under panchanama. Thereafter recoveries under Section 27 of Evidence Act have been effected at the instance of accused No. 1 - Ganesh Surve, accused No. 6 - Rakesh Burte, accused No. 2 - Rahul Burte and accused No. 3 - Nilesh Shinde. All seized muddemal articles were sent to Chemical Analyzer who found human blood on it. After completing investigation, charge-sheet was filed and in due course, learned Magistrate committed it to Sessions Court.

5. Though the charge-sheet was against seven accused and charge was framed against them accordingly, after recording evidence of about 7 to 8 prosecution witnesses, accused No. 1 - Ganesh Surve, accused No. 3 - Nilesh Shinde and accused No. 7 - Nitin Surve absconded. Non-bailable warrants were issued and accused No. 1 was found in jail in Crime No. 264 of 2007 at Sahakar Nagar Police Station. Accused Nos. 3 and 7 could not be traced out and their sureties also could not be served. In this situation, trial court separated case of accused Nos. 3 and 7 and sessions trial proceeded against accused Nos. 1, 2, 4, 5 and 6.

6. In this background, we have heard Advocate Mr. D.G. Khamkar for appellants and APP Mr. Dhedia for State.

7. Mr. Khamkar submits that PW 1 - Santosh Wadkar, while lodging report, has disclosed only four persons as accused. Names of accused Nos. 2, 5 and 6 did not figure in that information/FIR. Thus, names of three appellants out of total five before this Court, were missing. He contends that later on, information which has come on record through supplementary statement of said Santosh Wadkar could not have been accepted and hence finding on unlawful assembly by trial court is unsustainable. The prosecution also could not bring on record any previous meeting of minds to show an intention to commit murder of Prashant and Navnath. In both episodes earlier in point of time on that day, dispute arose with PW 4 - Nilesh Wadkar and deceased Prashant Katurde or Navnath were not parties to it. It is, therefore, stated that S. 302 or S. 149 has been incorrectly invoked and applied. Our attention has been invited to the criminal background of PW 1 - Santosh Wadkar, his brothers and his colleagues who are injured prosecution witnesses. Because of that background and rivalry

between two groups i.e. group of accused persons and group of Santosh Wadkar, the evidence of PW 1 or injured witnesses cannot be accepted and relied upon. Advocate Mr. Khamkar submits that unless and until that evidence is corroborated, this court should not act upon it. He argues that none of the so called eye witnesses or injured witnesses assigned any specific role or any specific weapon to any of the accused.

8. He states that alleged eye witness PW 1 - Santosh Wadkar learnt about the alleged fight between two groups after it had begun through one Jagan Mohite. That Jagan Mohite has not been examined by the prosecution. PW 1 - Santosh states that thereafter he ran towards the spot and tried to pacify the quarrel but failed. Fearing attack on himself, he along with two injured witnesses, namely, PW 2 and PW 3 went to police chowky in a auto. That auto driver has also not been examined. He came to spot, as alleged, along with police but this coming back is also not corroborated by producing any document from police chowky or then by examining police officer Mr. Holkar, who allegedly accompanied him back to the spot. His mother Rekha, who is claimed to have followed Santosh to the spot and then carried Nilesh Wadkar, Navnath and Prashant to Poona Hospital has also not been examined. These injured victims were placed in the auto with assistance of one Vilas Dighe and the labourer. Said Vilas Dighe or labourer are also not examined.

9. The second statement of PW 1 - Santosh has been recorded after discussion and deliberation with injured witnesses and other family members and accused Nos. 2, 5 and 6 have been falsely implicated. He further submits that weapons allegedly used by accused persons during attack are not pointed out to these witnesses and have not been identified. Our attention is invited to his cross-examination to show that he even did not know name of accused No. 5 - Vilas Bhuvad. The fact that crowd had gathered there expressly brings on record availability of independent witnesses and prosecution has not examined them.

10. Evidence of PW 2 - Ganesh Kahar, who is allegedly injured in the incidence is then read out to show that he claims injury to his forearm but has failed to substantiate that it was during attack. His presence on the spot at the time of attack itself is not established. He does not point out respective accused persons and has not pointed out weapon. As claimed by him, he went to spot after hearing shouts and at that time mob had already gathered there. Medical certificate at Exhibit 175 is also challenged by urging that doctor there has not specified age of injury and Ganesh has been examined belatedly i.e. long after alleged attack.

11. Objection to deposition of other injured witness - PW 3 - Sachin is on same lines. He claims to be injured by a bamboo but then does not assign any particular role to a particular accused and he is not aware about fatal attack on Navnath. His deposition shows reference to only accused No. 1 - Ganesh Surve, accused No. 2 - Rakesh Burte and one juvenile accused. It is alleged that his evidence, therefore, does not help prosecution at all. Medical certificate at Exh.

176 issued to him showing that he was injured is assailed on same grounds as noted supra while mentioning Exh. 175. Our attention is also drawn to his deposition to urge that this witness also points out that he had told police that he himself, Navnath Wadkar and accused No. 3 - Nilesh Shinde and Nilesh Wadkar were sitting on a platform of Omkareshwar Mitra Mandal. He could not assign any reason for omission of this fact in his statement. It is thus contended that accused No. 3 - Nilesh Shinde has been falsely implicated by PW 3 - Santosh.

12. PW 4 - Nilesh Wadkar was in hospital till 17/6/2002. It is pointed out, even as per this witness, that Navnath arrived at the spot later on and there was darkness at that place. It is submitted that thus this person has remained in hospital for quite some time and after regaining consciousness on 9/6/2002 had a meeting with reporter PW 1 - Santosh Wadkar. Police recorded his statement after such meeting i.e. after giving PW 1 and PW 4 an opportunity to fabricate a story.

13. Evidence of PW 11 - Dr. Kishor Pedgaonkar is attacked as biased as said doctor has not given correct age of injury when he examined PW 2 - Ganesh Kahar or PW 3 - Sachin.

14. Drawing attention to evidence of PW 13 - Dr. Suvarna Bhal, Advocate Mr. Khamkar submits that she treated PW 4 - Nilesh immediately after he was brought in injured condition and also issued certificate at Exh. 183. She found that he had sustained multiple stab injuries on head and further pointed out that he was conscious when he was admitted. The certificate at Exh. 183, therefore, has been challenged as incorrect. It is pointed out that the injuries would not have led to death as prompt medical treatment was given to PW 4. It is further pointed out that as per evidence of this doctor, patient was admitted to the hospital by one Ravindra Ghule, relative of patient. The prosecution has not examined said Ravindra Ghule.

15. PW 9 - Dr. Bhagwant Narkede has performed postmortem on bodies of Navnath and Prashant. This doctor was not shown weapons allegedly recovered by prosecution from accused persons or from spot and no effort has been made to co-relate the injuries/wounds with any particular weapon. It is further urged that though Prashant had nine injuries and Navnath had twelve injuries, most of their injuries were abrasions and no particular injury has been labeled as lethal. Cause of death is shock due to multiple injuries and hence, no particular accused as such can be blamed or held guilty of an offence under Section 302 in relation to death of either Prashant or Navnath.

16. Recoveries from spot are questioned by pointing out that PW 6 - Ashok Khamkar has pointed out that at spot a holder of sword, one sword without handle, one wooden ply, "D" shape holder of sword and one sword cover were found by police. It is also pointed out that two slippers, blue in colour and one white slipper as also two leather chappals were seized from spot. Police has not made any investigation and attempted to associate those slippers or chappals

with any victim or accused. It is further stated that the articles seized from spot were shown to this person and he has identified the same. This witness does not point out that articles seized were sealed at spot or then blood stains and earth collected from spot were sealed and labeled.

17. Our attention is then drawn to recoveries from respective accused under Section 27 of the Indian Evidence Act. PW 5 - Amol who claims to be panch to memorandum of admission and subsequent recovery from accused No. 1 - Ganesh Surve has not pointed out that weapons produced by Ganesh Surve were sealed as per law. He has also pointed out seizure of gupti. Confusion of this witness about number of swords and sword-stick is also pressed into service.

18. Evidence of PW 8 - Dattatray Pawar who has witnessed seizure of bamboo stick and the log and clothes is also pointed out to urge that he has not supported case of prosecution about recovery thereof from accused No. 6 - Rakesh Burte. Clothes produced by him have not been shown to witness and, therefore, have not been brought on record of trial court.

19. Evidence of PW 10 - Dnyaneshwar Ubhay about recovery of wooden log from accused No. 2 is pressed into service to urge that though this witness has identified accused and wooden log, nobody else has pointed out use of any wooden log by any accused. It is further submitted that deposition of this witness does not prove contents of Exh. 169 and hence there is no substantive evidence about the same on record. It is urged that at the most his signature thereupon may be held to be proved.

20. PW 12 - Sunil has been examined to prove recovery of hockey stick from accused No. 3. Accused No. 3 Nilesh Shinde is absconding and trial against him already separated.

21. PW 7 - Rohidas Kale has witnessed seizure of clothes on person of seven accused in police station. This witness identified accused persons but was not knowing their names. He also stated that he would identify the clothes and also, when clothes were shown to him, identified them as article Nos. 23 to 36. Learned counsel Mr. Khamkar submits that this witness is not in a position to point out and has not deposed which pair of clothes was seized from which particular accused. His cross-examination is also pressed into service to urge that accused persons were not present before him while preparing panchanama. He was also not aware of contents thereof. Panchanama of seizure at Exh. 157 is also pressed into service to urge that it records seizure of all clothes only from one person. It is contended that when this witness deposed, juvenile accused Rajesh and accused No. 7 were not present in trial court and still PW 7 has deposed that all accused were present. Evidence of PW 16 - Investigating Officer Smt. Joshi is challenged by pointing out that she does not explain visit by PW 1 - Santosh to police chowky and officer Mr. Holkar accompanying PW 1 - Santosh to the spot. She has independently gone to spot and from there she came to hospital. Though she reached hospital at 8.15 p.m., she recorded statement of

PW 1 - Santosh at 10.30 p.m. thereby allowing parties to develop the story. Omissions in her deposition in relation to PW 1 - Santosh are also pointed out. The reference to deposition of PWs 14, 15 and 17, in her deposition, is also relied upon.

22. Though C.A. report is on record, material appearing therein has not been put to any accused and hence the said report cannot be used against them in the matter. It is pointed out that in C.A. report blood group of accused No. 6 and accused No. 4 remained inconclusive, while blood group of absconding accused No. 7 is found to be "B". Blood group of accused No. 1 - Ganesh Surve could not be determined as the sample was found unsuitable. Same is position in relation to sample of blood of accused Nos. 2, 3 and 5.

23. In this background, the report of blood on weapons allegedly recovered from respective accused is also shown to this court. It is submitted that blood thereupon has not been shown to be that of deceased and, therefore, that report cannot be used against accused Nos. 1, 2, 3 and 6.

24. Inviting attention to report of C.A. on clothes of accused, Mr. Khamkar submits that blood of deceased is not found on clothes of any accused persons.

25. He points out that blood group of deceased Prashant and Navnath could not be determined, while blood group of injured witness PW 4 - Nilesh Wadkar was found to be "A". No blood was found on items Nos. 6 and 18 collected from spot. Finding of a blood of particular group on body of deceased is, therefore, urged to be irrelevant in this background.

26. Advocate Mr. Khamkar also points out that inquest panchanama of two bodies of two persons is not on record and seizure of clothes of victims has not been proved in accordance with law. Prosecution did not issue any notice under Section 294 Cr. P.C. to accused. Hence, there is no evidence available on record to corroborate version of PW 1 - Santosh Wadkar.

27. Our attention is invited to certificate at Exh. 173 from record of trial court to show that PW 4 - Nilesh Wadkar does not show his presence at the spot. All four witnesses have given different version of incidence and hence test laid down by Hon'ble Apex Court in its judgment reported at Masalti Vs. State of U.P., AIR 1965 SC 202 : (1964) 8 SCR 133 is not satisfied. The omission of prosecution to put weapons to respective witnesses is alleged to be deliberate. As report of postmortem does not co-relate injuries with weapons or deposition, Advocate Khamkar submits that it needs to be rejected. He has relied upon judgments reported at (Masalti and Ors. v. State of Uttar Pradesh-supra), Narayan Kanu Datavale and others Vs. State of Maharashtra, (1997) BomCR(Cri) 138 : (1997) CriLJ 1788 . On Section 149 of IPC, judgment of Hon'ble Apex Court reported at Akbar Sheikh and Others Vs. State of West Bengal, (2009) 6 JT 315 : (2009) 6 SCALE 745 : (2009) 7 SCC 415 : (2009) 7 SCR 518 : (2009) 6 UJ 2610 is pressed into service.

28. Without prejudice to these contentions, he submits that even if unlawful assembly is accepted, as author of any particular injury is not proved, at the most an offence under Section 304 Part I can be said to have been committed. On cause of death as mentioned in postmortem report, learned counsel has placed reliance on Mummidi Hemadri and Others Vs. State of Andhra Pradesh, AIR 2007 SC 2528 : (2007) 4 JT 356 : (2007) 4 SCALE 431 : (2007) 13 SCC 496 : (2007) 4 SCR 30 : (2007) 1 UJ 398 : (2007) AIRSCW 4507 : (2007) 2 Supreme 978 and Sarwan Singh and Others Vs. State of Punjab, AIR 1978 SC 1525 : (1978) CriLJ 1598 : (1978) 4 SCC 111 : (1978) SCC(Cri) 549 : (1979) 1 SCR 383 . To buttress his alternate submission on Section 304 Part I, he has placed reliance upon judgment reported at Ramkishan and others Vs. State of Rajasthan, AIR 1997 SC 3997 : (1998) CriLJ 54 : (1997) 7 JT 722 : (1997) 6 SCALE 6 : (1997) 7 SCC 518 : (1997) 3 SCR 700 Supp .

29. APP Mr. Dedhia in his reply submits that PW 1 - Santosh being elder brother immediately ran towards spot and attempted to stop the fight. His deposition, therefore, is normal and natural. As one of his brothers was killed and younger brother was seriously injured, while reporting matter in hospital, he forgot mentioning certain names and he added those names voluntarily in his supplementary statement. These added accused find mention in deposition of other witnesses. PW 2 - Ganesh Kahar has assigned specific role to each accused and hence addition of names of certain accused persons later on has not prejudiced the consideration. PW 4 - Nilesh Wadkar has again taken names of accused and pointed out how the incidence occurred. He relies upon judgment reported at Munivel Vs. State of Tamil Nadu, AIR 2006 SC 1761 : (2006) CriLJ 2133 : (2006) 4 JT 356 : (2006) 4 SCALE 134 : (2006) 9 SCC 394 : (2006) 1 UJ 493 : (2006) AIRSCW 1949 : (2006) 3 Supreme 377 to urge that in this situation it is not necessary to find out who caused fatal injury. To rebut contentions of Advocate Mr. Khamkar on witnesses being interested, absence of any overt act or absence of independent witnesses, he seeks support from 2004 ALL MR (Cri.) 2573 (S.C.) (Narayan Kanu Datavale and Ors. v. State of Maharashtra).

30. He submits that it is not necessary to show weapons recovered under Section 27 of the Indian Evidence Act or from spot to witnesses and cites Santosh Jaywant Takawane Vs. The State of Maharashtra, (2013) 3 ABR 1068 : (2013) ALLMR(Cri) 2882 : (2013) ALLMR(Cri) 2875 : (2014) 2 BomCR(Cri) 789 . Hem Raj Vs. State of Haryana, (2014) 2 JT 399 : (2014) 1 SCALE 48 : (2014) 2 SCC 395 is pressed into service to urge that lapse, if any, on the part of the prosecution does not confer any advantage in favour of accused. In fact, finding human blood on weapons, clothes of accused is sought to be explained by inviting attention to Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853 : (1991) CriLJ 2653 : (1991) 3 Crimes 82 : (1991) 3 JT 151 : (1991) 2 SCALE 80 : (1991) 3 SCC 627 : (1991) 3 SCR 1 .

31. Defence of false involvement by the accused persons as they had complained about illegal liquor trade of the PW 1 - Santosh and his accomplices is urged to

be afterthought. Accused persons have never in past made any such complaint to police or any other authority. It is pointed out that accused No. 6 - Rakesh Burte has taken a defence that as PW 1 - Santosh and his accomplices used to harass young girls and women in the locality, incidence occurred. Learned APP contends that, however, there is no cross-examination of any of the prosecution witnesses about alleged illegal liquor trade or about alleged harassment. He, therefore, prays for dismissal of appeal.

32. In reply arguments, advocate Mr. Khamkar has attempted to explain how precedents cited by learned APP are distinguishable.

33. Before commenting upon evidence of PW-1 Santosh Wadkar, we find it proper to look into depositions of injured witnesses viz. PW-2 Ganesh Kahar, PW-3 Sachin and PW-4 Nilesh Wadkar.

34. Ganesh Kahar has deposed about first incident in the morning of 31.5.2002. He has stated that on that day Prashant Katurde, Sachin Walhekar, Santosh Wadkar and Nilesh Wadkar were chit-chatting on platform of Omkareshwar Temple. At that time leg of PW-4 Nilesh Wadkar touched leg of Accused Nilesh @ Salakhya Shinde. There was some altercation which was pacified by them at about 10.30 a.m. in the morning. In the evening there was marriage of one Sandip More and hence, in the afternoon PW-2 Ganesh Kahar, Navnath Wadkar, Prashant Katurde, Sachin Walhekar and Prashant Wadkar went for lunch. There again quarrel took place between accused Nilesh Shinde and Nilesh Wadkar on account of a push during dancing.

35. On the same day at about 7.00 p.m. PW-2 Ganesh Kahar, Navnath Wadkar, Prashant Katurde, Sachin Walhekar and Nilesh Wadkar were sitting on platform of Omkareshwar Temple. After some time, Prashant Katurde and Nilesh Wadkar started for their homes. When they had gone about 100 feet away from above temple and in front of shop Om Provisions, Accused No. 1 Ganesh Surve, Accused No. 7 Nitin Surve, Accused No. 3 Nilesh Shinde, Accused No. 2 Rahul Burte and Accused No. 4 Santosh Shigwan came there and started quarrel with Nilesh Wadkar and Prashant Katurde. Hence he, Sachin Walhekar, Navnath Wadkar ran to that spot. At that time Nilesh Shinde, Ganesh Surve and others were beating PW-4 Nilesh Wadkar and Prashant Katurde. They attempted to rescue them. At that time Accused No. 3 Nilesh Shinde inflicted hockey stick blow on his forearm and he also beat Sachin Walhekar. Hence, they came "behind them". Accused No. 3 Nilesh Shinde started beating Nilesh Wadkar by hockey stick. Ganesh Surve was holding sword and Nitin Surve was holding long knife (gupti) and both of them were beating Prashant Katurde. Accused No. 4 Santosh Shigwan was holding sword and Accused No. 2 Rahul Bhurte was holding bamboo stick and they were beating Navnath Wadkar. Other 4 - 5 friends of accused were beating all of them.

36. After seeing all this, PW-1 Santosh Wadkar and his mother (Rekha) came from their house shouting. Accused persons pounce upon both of them. Hence,

he himself, Santosh Wadkar and Santosh Walhekar ran towards Jaibhavani Nagar, from there they went to Dattawadi Police Chowky and brought police on spot in a rickshaw. In the meanwhile, Rekha and one Vilas Dighe had carried injured to Poona Hospital. Then all of them went to Poona Hospital where they learnt that Prashant Katurde died before starting medical treatment while Navnath Wadkar and Nilesh Wadkar were receiving medical treatment. After some time Navanath also succumbed to his injuries. Thereafter, he went to Sassoon Hospital for treatment. He identified requisition (yadi) at Exhibit 130, with which he was sent for medical treatment.

37. His cross-examination shows that he was not aware whether there were any blood stains on his shirt or not and he did not observe other injuries also. He accepted that Police recorded his statement in Poona Hospital alongwith other injured persons viz. Santosh Wadkar and Sachin Walhekar. He also accepted that PW-1 Santosh Wadkar lodged report after death of Navnath Wadkar and Prashant Katurde. 4 criminal cases are pending against him and in murder charge he was acquitted. Alongwith him, Sachin Walhekar, Santosh Wadkar, Darvesh Wadkar were accused in that charge. He accepted that all prosecution witnesses turned hostile and hence, they were acquitted. He also accepted that Santosh Wadkar was in prison during trial and he himself (PW-2 Ganesh) was externed for one year. He also accepted that apart from Section 110 of Cr.P.C., 2 to 3 criminal cases were pending in the Court of J.M.F.C. (8th Court). He denied that all of them constitute a gang and indulging in gundatism at Janata Vasahat.

38. His further cross-examination shows that incident occurred on road with heavy traffic. He accepted that Accused Santosh Shigwan was not present during earlier two quarrels. He denied knowledge of fact that many gangs were operating in Janata Vasahat. He denied knowledge of fact whether Santosh Shigwan was a BJP worker. He accepted that in the evening he went to spot after hearing shouts and at that time people had gathered there. He accepted that he himself Prashant Katurde and Navnath Wadkar belong to one group. He also accepted that he did not name accused No. 2 Rahul Burte in his police statement. He further stated that bamboo stick used to assault might be 2 and 1/2 feet in length and they saw it when they reached the spot. He was at spot for about 10 to 15 minutes when incident was going on. He felt that he should intervene and rescue but did not make any attempt to rescue them. He accepted that he has other friends excluding witnesses. He also accepted that he himself, Nilesh Wadkar, Prashant Katurde, Sachin Walhekar and Navnath Wadkar were only sitting on platform of Omkareshwar temple. He was not knowing public which gathered at the spot or then owner of Om Provisions. He denied that they had beaten owner of Om Provisions before incident. It took about 10 minutes for them to reach Dattawadi Police Chowky and about 15 minutes to come back to spot. Police did not note down the complaint and they had informed police that accused were beating injured. He did not tell police that they were beating the injured. They reached spot at about 7.45 p.m. PW-1 Santosh Wadkar as also Jagan Mohite knew Accused No. 2 Rahul and he knew Jagan Mohite. However, he

could not tell whether Jagan Mohite was in the crowd which had gathered at spot. He accepted that Santosh Wadkar was not with them before the incident. They learnt that Jagan Mohite informed about assault to mother of Santosh Wadkar. He accepted that Jagan Mohite knows Rahul Burte. Immediately after reaching hospital he learnt about death of Prashant Katurde and about injuries sustained by Nilesh Wadkar and Navnath Wadkar. Navnath Wadkar died between 10.00 p.m. to 10.30 p.m. He denied that Rahul Bhurte was not one of the assailants. He denied that Rahul Bhurte had good name in locality as he was trying to prohibit criminal activities. He accepted that he had friendly relations with Santosh Wadkar, Navnath Wadkar and Prashant Katurde. He stated that in incident Prashant Katurde was being assaulted by Nilesh Surve alongwith his 3 - 4 friends. He accepted that he did not tell names of those persons to police. He accepted that those persons were assaulting Prashant Katurde with weapons. As he was not knowing their names therefore, he could not tell the same to police. He deposed that assault continue for 4 to 5 minutes continuously and large number of crowd had gathered. He denied knowledge of fact whether deceased Navnath Wadkar had liquor shop in Janata Vasahat and whether any case for illegal distillation was going on against Navnath Wadkar.

Thus, this deposition brings on record attack by 4 to 5 unknown persons with accused 1 on deceased Prashant. Two pairs of slippers & two leather chappals found on spot may be of those unknown persons. Apparently the prosecution could not connect it with the victims or the accused. His statement that he did not intervene in quarrel & did not attempt to rescue victims of assault shows a possibility that he might not have been injured in alleged attack at all.

39. PW 3 - Sachin Walhekar is another injured witness. He claims that he knows all accused. He has spoken about incidence in the morning and then incidence in the afternoon in marriage ceremony of Sandip More. In the evening, on that day, he himself, PW 4 - Nilesh Wadkar, deceased Prashant Katurde, PW 2 - Ganesh Kahar and deceased Navnath were sitting on platform of Omkareshwar Temple. They were talking and in the meanwhile Nilesh Wadkar and Prashant Katurde told them that they were going home. When Nilesh Wadkar and Prashant Katurde reached Om General Stores, accused No. 3 - Nilesh Shinde, accused No. 1 - Ganesh Surve, accused No. 7 - Nitin Surve, accused No. 5 - Vilas Bhuvad, accused No. 4 - Santosh Shigwan and juvenile accused - Baban Nalavade encircled both of them. They were abusing Nilesh Wadkar and Prashant Katurde. Seeing this, they (persons sitting on platform) immediately went to the spot. When they reached the spot, there was "fracas" between accused and these two. Accused were beating Nilesh Wadkar and Prashant Katurde by taking out sword, gupti, iron bar and bamboos. When they tried to intervene, he sustained injury by bamboo. Accused No. 3 - Nilesh Shinde was holding hockey stick, accused No. 1 - Ganesh Surve was holding sword, accused No. 7 - Nitin Surve was holding gupti, juvenile accused - Baban was holding iron bar and accused No. 5 - Vilas Bhuvad was holding sword. As they sustained injuries, they kept them aside ie they maintained safe distance. That time PW 1 - Santosh Wadkar and his mother

came to spot. Accused persons abused them and threatened to assault. Hence, he, PW 2 - Ganesh Kahar and PW 1 - Santosh went to Dattawadi Police Chowky and narrated incidence to police and brought police to the spot. When they returned to the spot, by that time mother of Santosh Wadkar by name Rekha had taken Navnath Wadkar, Nilesh Wadkar and Prashant Katurde to the hospital in rickshaw. They came to know that Prashant Katurde succumbed to injuries while taking treatment. After some time they learnt that Navnath also expired. Santosh Wadkar gave report to police in Poona Hospital only. He went to Sassoon Hospital for treatment with yadi (requisition) at Exh. 132. He identified accused persons before the court. It is also recorded that accused No. 2 Rahul Burte, juvenile accused - Baban Nalavade and accused No. 1 - Ganesh Surve were not present in the court. His chief itself demonstrates that he sustained alleged injury by a bamboo while attempting a rescue & he was not a target.

40. His cross-examination shows that some criminal cases have been filed against him and he was acquitted therein. He also accepted that the chapter proceeding was filed against him in 2002 and criminal cases were pending against deceased Navnath Wadkar. He had good relations with Navnath. He also knew Ganesh Surve and Nitin Surve. He was not aware whether they were doing social work in the locality. He denied that there was heavy traffic at the spot of occurrence. He could not assign any reason as to why name of Rahul Burte did not figure in his police statement. He also accepted that accused No. 3 - Nilesh Shinde was brought before the court when his cross-examination was going on. He accepted that he told police that he himself, Navnath Wadkar, Nilesh Shinde and Nilesh Wadkar were sitting on platform. He could not assign any reason why it was not mentioned in his police statement. He accepted that he did not tell police that they saw Nilesh Shinde and others from platform. He denied that he was deposing falsely that accused Nilesh Shinde was holding hockey stick, while accused Vilas Bhuvad was holding sword. He was not aware whether accused - Santosh Shigwan was a BJP worker. He accepted that he was accused in one murder case and he was in jail. He denied that there was any quarrel between him and Sandip More, Vijay More and Vikas More. However, he accepted that More had cut off his right hand during quarrel. He denied that he was doing any liquor business. He denied that unknown persons have assaulted Navnath Wadkar. He volunteered that accused - Nilesh Shinde and Vilas Bhuvad were assaulting Navnath. He stated that there was no discussion between himself and Santosh Wadkar on the next day of the incidence.

Thus, as per evidence of PW-2 Ganesh & 3 Sachin, accused - Nilesh Shinde was on Onkareshwar platform with them when PW-4 Nilesh Wadkar & deceased Prashant left said platform for their respective homes. Accused Rahul Burte was not present on spot. Hence, these witnesses caste a serious doubt about the genesis & truth in the story of prosecution.

41. PW 4 - Nilesh Wadkar is brother of PW 1 - Santosh Wadkar. He deposes about quarrel with Nilesh Shinde in the morning and then in the afternoon of

31/5/2002. About the incidence in the evening, he has deposed that he himself, Navnath Wadkar, Ganesh Kahar, Prashant Katurde and Sachin Walhekar were on Omkareshwar Platform. At 6.30 p.m. he and Prashant Katurde started towards their home for having tea. At that time accused No. 3 - Nilesh Shinde suddenly came there and inflicted blow of hockey stick on the backside of his head. Thereafter accused No. 4 - Santosh Shigwan came with sword, accused No. 6 - Rakesh Burte and juvenile accused Rajesh Shinde came with bamboo and assaulted him. Accused No. 1 - Ganesh Surve started beating his friend Prashant Katurde by sword and his brother accused No. 7 - Nitin Surve was beating Prashant with sharp weapon. Accused No. 2 - Rahul Burte was beating Prashant with bamboo. His brother Navnath Wadkar came to the spot and juvenile accused - Baban Nalavade started beating him with sword and accused No. 5 - Vilas Bhuvad was holding iron rod. Thereafter all accused persons started beating them by encircling. He became unconscious and regained consciousness on 9/6/2002. Police recorded his statement on 13/6/2002. He was discharged on 17/6/2002. He sustained injury to his head and a fracture of leg which was in plaster for about one month.

42. His cross-examination shows that after receipt of blow from hockey stick, he did not become unconscious and did not sustain a bleeding injury. He stated that accused persons were beating simultaneously and he was defending himself. He accepted that PW 1 - Santosh Wadkar came to him after he regained consciousness. He denied that PW 2 - Ganesh Kahar and PW 3 - Sachin Walhekar came in hospital to meet him. He had no discussion with Santosh Wadkar when he came to meet him. He learnt about death of Navnath Wadkar and Prashant Katurde after police came for recording his statement. He denied that he gave statement to police as directed by PW 1 - Santosh Wadkar.

43. Cross-examination of PW-4 Nilesh reveals that Santosh Wadkar had told him about lodging of police report, that he received blow of hockey stick suddenly and it was heavy blow. He denied that he fell down after receipt of that blow. He denied that he was deposing falsely that accused No. 6 - Rakesh Burte gave him a blow of bamboo stick. He knew accused No. 6 - Rakesh Burte and other accused as they resided in the vicinity. He denied that he was deposing falsely that all accused persons encircled and beat them. He stated that Santosh Wadkar never came to hospital on 9/6/2002. He was not aware against whom complaint was lodged. There was no talk between him and Santosh Wadkar about incidence in the hospital. His further cross-examination shows that since 1998 some criminal cases are pending against him for assaults. Proceedings under Section 110 of Cr. P. C. are also pending and he gave bond before the Assistant Police Commissioner. He accepted that he was beaten up near Datta Mandir. He also accepted that he did not see the persons who assaulted him as they assaulted him from backside. He volunteered that he immediately turned back and saw faces. Prashant Katurde was assaulted near salt factory. Datta Mandir is located towards right side of road while proceeding to his house from East to West. Distance between Datta Mandir and spot is not 100 ft. but only of one shop. He

accepted that salt factory is on right side of the road while going to his house and Datta Mandir and Salt Factory are located on same road. Incidence lasted for 10 to 15 minutes and at that time there was fighting amongst all. He denied that he was conscious during this incidence and had not sustained any injury. He accepted that they have liquor shop in the locality. He denied that accused - Ganesh Surve and Nitin Surve had attempted to persuade them on many occasions as a part of their social work not to indulge in liquor business.

44. In paragraph 10 of cross-examination, PW 4 - Nilesh Wadkar has stated that it was not dark at the spot of offence on the day of the incidence. He accepted that passers-by had gathered. He denied that as he had sustained injury, he was not in a position to see the assault. He was not aware whether accused - Santosh Shigwan was a worker of BJP. He accepted that he himself and his brother was working for Congress-I party. He has accepted that in Janta Vasahat there were 4 to 5 gangs of criminals. He denied that on many occasions Wadkar gang had fought with Darwatkar gang, Mhaske gang and other gangs. He denied that Abu More had complained of harassment against them to police.

45. When FIR Exh. 108 which contains statement of PW 1 - Santosh Wadkar is looked into, it shows that when he reached the spot, many people had gathered on both sides of road and in front of salt factory. Nilesh Salakhya was beating his brother Nilesh Wadkar with hockey stick, while accused No. 4 - Santosh Shigwan was beating Navnath with sword and accused Nos. 1 and 4 were beating Prashant with sword on head. 4 to 5 other friends of accused No. 3 - Nilesh Salakhya were attacking with swords in their hands & with bamboo. Hence, he and friends of his brother, namely, PW 2 - Ganesh Kahar, PW 3 - Sachin Walhekar tried to stop the fight but seeing them, accused persons abused and charged towards them. Fearing attack, PW 1 - Santosh Wadkar, PW 2 - Ganesh Kahar and PW 3 - Sachin Walhekar started running towards Jaibhavani Nagar. They sat in a hired rickshaw and came to Dattawadi Police Chowky. They carried police to the spot of quarrel. Till then Nilesh Wadkar (PW 4), Navnath Wadkar and Prashant Katurde (both deceased) were carried by Vilas Dighe and his mother Rekha to Poona Hospital. Hence he came to Poona Hospital with police. When he saw Navnath, Nilesh and Prashant, they had injuries on head and unconscious. His brother Navnath expired and thereafter his friend Prashant also expired. At the time when he lodged report, Nilesh was unconscious.

46. Exhibit 108 does not give the time at which said report was lodged. On its 3rd page, there is a distinct head "supplement" where it is mentioned that it is statement of complainant Santosh Sambhaji Wadkar. Below the same remaining part of the statement appears where he has stated that his brother Nilesh, Navnath and their friend Prashant were attacked and killed by Nilesh Salakhya - accused No. 3, Santosh Shigwan - accused No. 4, Ganesh Survey - accused No. 1, Nitin Survey - accused No. 7 and 4 to 5 other persons. He has stated that Navnath and Prashant were killed while there was attempt on life of his brother Nilesh. He has further added that sword, chopper, bamboo stick, hockey stick

were used in that attack. He himself, Ganesh Kahar and Sachin Walhekar accompanying him were also threatened with sword and hockey stick.

47. Scrutiny of his deposition before trial court in the background of deposition of PW 2 - Ganesh Kahar and PW 3 - Sachin Walhekar, PW-4 Nilesh Wadkar and this report Ex. 108 is essential. After pointing out two earlier quarrels between accused No. 3 - Nilesh Shinde @ Nilesh S PW 2 - Ganesh Kahar and PW 3 - Sachin Walhekar, Salakhya and his brother Nilesh Wadkar, he points out that Jagan Mohite informed about murderous attack near the Datta Mandir and that accused No. 3 - Nilesh Shinde, accused No. 7 - Nitin Survey, accused No. 4 - Santosh Shigwan, accused No. 1 - Ganesh Surve and their companions were beating Navnath, Nilesh and Prashant. Jagan Mohite also told that accused were armed with swords, choppers, hockey sticks, iron rods. He & Darvesh ran towards spot. Their mother Rekha also followed. They pleaded accused not to beat brothers, but accused came to attack them. There was huge crowd and he went through the crowd. That time PW 2 - Ganesh Kahar and PW 3 - Sachin Walhekar were also there. Ganesh, Sachin and he tried to stop accused persons but accused persons came to attack them and hence they ran towards Jaibhavani Road. Then they hired rickshaw and came to Dattawadi Police Chowky. They carried Holkar saheb from police chowky to spot. On spot, they learnt from a labour of a brick factory that Navnath, Nilesh and Prashant were taken to Poona Hospital by his mother and one Vilas Dighe. He then went to Poona Hospital. Thus, his deposition and report lodged by him at Exh. 108 nowhere show that PW 2 Ganesh or PW 3 Sachin were assaulted during said episode on 31/5/2002 near Datta Mandir.

48. His further deposition shows that when he reached the Poona Hospital, police had already reached there. Police inquired with him. He narrated entire incidence to police. Navnath and Nilesh were in critical condition, while Prashant had already expired. Thereafter, Navnath also died. Hence, he again went to police and informed the incidence, police took down his complaint and read it over to him. He identified that complaint as Exh. 108. After giving complaint, he returned to Poona Hospital. PW 2 - Ganesh Kahar, PW 3 - Sachin were waiting there. He informed them that he had gone to police station and then made enquiry about health of Nilesh. He deposes that he had mentioned names of accused as accused No. 1 - Ganesh Surve, accused No. 7 - Nitin Surve, accused No. 4 - Santosh Shigwan and accused No. 3 - Nilesh Shinde in Exh. 108. He was in frightened state of mind and, therefore, omitted to mention remaining names of accused. After realizing it, he again went to police station and communicated names of other accused persons, namely, accused No. 6 - Rakesh Burte, accused No. 2 - Rahul Burte, juvenile accused - Baban Nalavade, accused No. 5 - Vilas Bhuvad and juvenile accused - Rajesh Shinde. Police thereafter recorded his statement.

49. At this juncture, we find it appropriate to refer to evidence of PW 16 - Smt. Joshi. At the relevant time, she was on duty at Dattawadi Police Chowky i.e. the

place where Santosh (PW 1) claimed that he went along with PWs 2 and 3 and narrated the incidence. He also states that he brought police officer Holkar with him to the spot. This lady officer has deposed that she received information of a murder at Janata Vasahat and hence went to spot. She gathered that two persons were murdered and one person was injured and admitted in Poona Hospital. She also learnt that all three were carried to Poona Hospital. She went to Poona Hospital along with staff. Relatives of deceased were present there. She recorded statement of PW 1 - Santosh at Exh. 108. She forwarded that complaint along with her report to Police Inspector, Swargate Police Station for registration of offence. Accordingly Crime No. 145 of 2002 was registered for offences under Sections 302 and 34 of IPC. She made inquest panchanama of dead bodies and forwarded those bodies for postmortem. Injured PW 4 - Nilesh was unconscious and, therefore, she could not record his statement on that day. Injured by name Ganesh Kahar (PW 2) and Sachin Walhekar (PW 4) were sent to Sassoon Hospital along with yadi vide Exhs. 130 and 132. Further investigation was then done by Police Inspector.

50. Cross-examination of this witness shows that she received intimation about murder at about 7 or 7.30 p.m. and she was not aware who gave that information. She did not take note of that person & this seems not normal. She reached hospital at about 8 to 8.15 p.m. and she recorded complaint of Santosh at about 10.30 to 11 p.m. She denied that she wrote complaint as per instructions of other persons and relatives. She accepted that deceased and injured as also complainant in the matter before the court were accused in other cases at her police station. Offences under Section 324 IPC or under Prohibition Act were registered against them. She denied that offences under Sections 326, 307 of IPC were also registered against those persons.

51. She accepted that information of cognizable offence is required to be entered in station diary and she did not make that entry. After visiting spot, as there was nobody, she immediately came to Poona Hospital. At that time one constable was with her. She denied, as there was nothing objectionable on spot, she did not wait at spot. PW 1 - Santosh Wadkar did not state before her that Navnath, his brother Nilesh, Prashant, Sachin etc. were waiting at the house of Navnath. He did not state before her that his mother reached the spot immediately after him or then when he reached the spot on second occasion worker from salt factory had told him that injured had been taken to hospital.

52. Thus, this witness, PW 16, falsifies contentions of PW 1 - Santosh Wadkar that he went to police station after death of Navnath and thereafter his statement was recorded. On the contrary, this lady officer states that she reached hospital between 8 p.m. to 8.15 p.m. and there she recorded complaint of PW 1 - Santosh between 10.30 to 11 p.m. PW 1 himself has stated that he recorded complaint after death of Navnath.

53. It is in this light that evidence of PW 1 - Santosh Wadkar needs consideration. In last paragraph of his examination-in-chief i.e. paragraph 6, he

has stated that after reaching spot, he saw accused - Nilesh Shinde beating his brother Nilesh Wadkar with hockey stick, accused - Santosh Shigwan was assaulting Navnath with sword while accused - Ganesh Surve and Nitin Surve were assaulting Prashant with sword and chopper. Rest of the accused were also beating Nilesh, Navnath and Prashant. He has further added that all the accused were armed with bamboo sticks and iron rods.

54. Cross-examination of PW 1 - Santosh Wadkar shows that he could not tell the time at which Jagan Mohite came to his house. Jagan Mohite took two minutes to narrate the incident and then he and family members ran towards spot. When he went to Dattawadi Police Chowky, it took him time of 10 minutes to relate the incidence to the police officer. He left police chowky with three policemen. Three policemen and he sat in auto-rickshaw and came to spot and they were at spot for two minutes only. After verification from Sachin Walhekar and Ganesh Kahar, he disclosed names of remaining accused to police in his supplementary statement. He accepted that out of accused persons, he was not knowing accused No. 5 - Vilas Bhuvad. He could not explain why statement that he came to Poona Hospital with police appeared in his complaint. He has further stated that at Poona Hospital, police wrote down his complaint and police constable Holkar wrote it down. He accepted that at that time Prashant Katurde and Navnath Wadkar were dead. He denied that accused No. 4 - Santosh Shigwan did not assault anybody with sword.

55. We will consider impact of his complaint and his deposition on material brought on record through evidence of PW 2- Ganesh, PW 3- Sachin and PW 4- Nilesh little later in this judgment. Roll of police in the matter deserve mention first.

56. Prosecution has examined PW 16 - Smt. Joshi to prove his complaint Exh. 108. PW 1 has accepted Exh. 108 as his complaint. Thus Exh. 108 nowhere shows that PWs 2 and 3 were injured on spot in the assault complained of. On the contrary, it appears that they were present on spot and then went to police station with PW 1 - Santosh Wadkar. It is seen that they did not come back to spot as PW 1 - Santosh alone came with three policemen in an auto-rickshaw. It is not understood why these two injured witnesses did not file any police report pointing out assault on them or any injury to them when they were at Dattawadi Police Chowky or then at Poona Hospital.

57. PW 16 - Smt. Joshi has recorded complaint of PW 1 - Santosh Wadkar between 10.30 to 11 p.m. i.e. more than three hours after the incidence. PW 1 has stated that his statement was recorded by police constable Holkar of Dattawadi Police Chowky. PW 16 was posted at same police chowky at the relevant time. His statement, if any, recorded by police constable Holkar has not been produced and similarly police constable Holkar has not been examined by prosecution. Why time of about three hours was required to record his statement is not explained by prosecution. Prashant died first at hospital and some time thereafter Navnath died. PW 4 - Nilesh Wadkar was unconscious. Police ought to

have recorded statement of PW 1 - Santosh Wadkar immediately or then if it had injured persons like PW 2- Ganesh and PW3 Sachin, it out to have recorded their statements. That has not been done. This raises a doubt whether PW 2 and PW 3 were at all present at the spot or they were injured in the assault. Certificates of injury issued to them vide Exhs. 175 and 176 are proved by PW 11 - Dr. Kishor Pedgaonkar. After describing one contusion on right forearm of PW 2 - Ganesh Kahar and two contusions i.e. one on left side of buttock and other on right side of buttock of PW 3 - Sachin Walhekar, this doctor has stated that injuries were sustained within six hours of his examination. In cross-examination, he accepted that contusions sustained by PWs 2 and 3 were possible because of a forceful fall on hard substance. He also accepted that patients were not brought by police, but they came with requisition i.e. police yadi. He accepted that in injury certificates he has not mentioned that they came along with any police yadi. Appellants have contended that the certificates are issued on 1/6/2002 in the afternoon i.e. more than 24 hours after the attack. The certificates expressly mention that assault had taken place at 7.30 p.m. on 31/5/2002 and patient was examined on 1/6/2002 early in the morning. The time of examination mentioned is 3.35 or 3.50 a.m., while, according to appellants it is 3.35 or 3.50 p.m. on 1/6/2002. We do not find any substance in this contention.

58. It is equally necessary to find out the other material on record produced by prosecution to connect accused persons with the crime. Recoveries from spot find mention in spot panchanama Exh. 153. It is drawn on 1/6/2002 between 00.30 a.m. to 1 a.m. i.e. in the night between 31/5/2002 to 1/6/2002. It is within five hours of the alleged assault. Prosecution has examined PW 6 - Ashok Khamkar to prove this spot panchanama and recoveries from spot. Apart from blood stained earth, police found two slippers having blue belt and white sole and one white slipper as also two leather chappals on spot. They also found holder of a sword and one sword without holder, one wooden ply, D-shape holder of sword and one sword cover. Ashok states that he can identify seized articles. Accordingly those articles were shown to him and he has identified those articles. His cross-examination shows that at spot only one tube light at a distance of 20 ft. away was on and he was not in a position to give name of police person who came to spot with him. He accepted that he had seen seized articles after their seizure panchanama for the first time in court. He denied that panchanama was prepared in police chowky and police obtained his signature there only. He also stated that sword shown to him was not the same. Perusal of spot panchanama shows that the same was conducted in the light of one mercury light and apart from seizure of blood stained soil or earth, earth without blood stains and slippers or chappals mentioned above, one cover of sword (known as "mayan") having faint blood stains, one iron blade of sword without handle with blood stains on it, one handle of sword made of iron pipe and tin-sheet and one wooden log was also seized.

59. Recovery under Section 27 of Indian Evidence Act is from accused No. 1, accused No. 3. PW 5 - Amol has proved memorandum of admission of accused

No. 1 - Ganesh Surve. He also identified Ganesh Surve in court. He also points out that after taking them near one bush and after digging earth, Ganesh took out one iron sword, one black iron pipe, cover of gupti and a sword blade without handle. His cross-examination shows an admission that police sealed all articles and obtained his signature on sealed cover. Perusal of panchanama of seizure at Exh. 142 shows that one iron sword, one bent gupti, one sword blade without handle were seized by police. One motorcycle pipe (guard) was also seized. Panchanama mentions that sword blade, iron pipe, gupti and blade of sword without handle, all had blood stains. PW 8 - Dattatray Pawar is witness to seizure allegedly from accused No. 6. However, his deposition shows that police obtained his signature on panchanama and he never inquired why panchanama was prepared. He also deposes that two accused were present when police called him. Accused took them to their house in police jeep. One of the accused took out two bamboos, one half pant, one full pant, banyan with blood stains. Police seized the same. He could not identify the accused. He also identified two bamboos i.e. articles 49 and 50. He also proved seizure panchanama at Exh. 159. He has at the end stated that after he went to police station, police told him that they wanted to prepare memorandum panchanama of Rakesh Burte. APP sought permission to cross-examine this witness and it was granted. He accepted that police noted down say of Rakesh Burte in his presence and then police obtained signature of panchas and thereafter Investigating Officer signed upon it. He thus proved panchanama Exh. 160. Then they went to house of Rakesh Burte and he took out articles which were kept beneath iron cot. He stated that he could not remember their names because of lapse of time. He accepted that police station is on upper floor of the building in which his seeds shop is located. He also stated that police called him whenever required for signing on such panchanama. He accepted that on 2/6/2002 police called him and he signed on panchanama and returned back as he cannot go around leaving the shop. He denied that he was deposing falsely.

60. Admissible part thereof has been exhibited as Exh. 160. Perusal of memorandum panchanama dated 8/6/2002 at Exh. 159 shows that it is at the instance of Rakesh Burte. The clothes recovered from Rakesh i.e. Banyan, half pant, clothes of accused Nitin Surve, recovery of two bamboo sticks are shown in Exh. 159. This memorandum shows that only half pant seized from Rakesh Burte had faint blood stains. PW 10 - Dnyaneshwar Ubhay has been examined to bring on record recovery from accused No. 2. Memorandum panchanama of accused No. 2 is at Exh. 169. Accused No. 2 has produced one wooden rod (log) which was concealed beneath the stone. He has identified that wooden rod as article 43. This witness has not pointed out what accused No. 2 Rahul Burte disclosed in police station leading to recording of memorandum panchanama Exh. 169. He also does not speak about Exh. 169.

61. PW 12 - Sunil is witness to recovery of hockey stick from accused No. 3 - Nilesh @ Salakhya Shinde. That accused is not before the court. It is also not necessary to comment separately on it in this matter. PW 7 - Rohidas Kale is a

common witness on seizure of clothes of all seven accused. All these accused persons were arrested on 1/6/2002. In examination-in-chief, he states that seven accused were present in police station and police seized clothes in his presence, sealed the same and then obtained his signature on it. He proved seizure panchanama at Exh. 157. He further stated that accused persons present in court are the same persons. He was not remembering their names. He stated that he was in a position to identify seized clothes. He identified the clothes as article Nos. 23 to 36. His cross-examination shows that police did not show him clothes which were already seized and then obtained his signature. He was not in a position to remember the number of clothes seized. He accepted that he was not in a position to point out accused whose clothes were seized. All clothes were tied up and kept in one bundle and his signature was obtained on it. Though panchanama was recorded, he was not in a position to remember its contents. He accepted that accused persons were not present before him when panchanama was prepared. It is to be noted here that though accused - Rajesh Shinde (juvenile) and accused No. 7 - Nitin Surve were not present before the trial court, this witness has stated that all seven accused persons were present before the court.

62. Perusal of panchanama Exh. 157 shows that it is drawn on 2/6/2002 and all seven accused persons are shown there in first paragraph. It is mentioned that accused persons were taken in custody at 21 O'clock in night on 1/6/2002 and clothes worn by them were to be seized. It is also recorded that accused persons disclosed their names and then they put on other pair of clothes and handed over the clothes worn by them to police. Clothes handed over by accused Nos. 1 to 7 are then separately mentioned in this panchanama. It is also recorded therein that all clothes were put in separate-sheet of paper and on it a seal under signature of pancha witness and a wax seal was put. Perusal of panchanama shows that in second paragraph, it is recorded that accused No. 2 - Rahul Burte changed his clothes and handed over clothes earlier put on by him which were taken in custody. There is no such mention separately in relation to accused No. 1, accused No. 3 to accused No. 7. This panchanama is also not signed by accused persons. Thus, this pancha witness is not able to associate any shirt or pant with a particular accused. Accused were not present before him when the panchanama was drawn. He could not have therefore, even otherwise, connected any given piece of clothing allegedly seized by police with any accused. We are therefore not in position to conclude that any specific piece of clothing with a particular blood group on it is of a particular accused. This adversely affects & diminishes the evidentiary value of the exercise undertaken by the chemical analyzer.

63. This brings us to consideration of report of Chemical Analyzer. In the light of absence of material on record to fix any bloodstained cloth with a specific individual, the CA report loses its clinching property. Advocate Mr. Khamkar has submitted that contents of Chemical Analyzer's report are not put to accused persons while recorded their statements under Section 313 of Cr. P. C. and

accused persons have in that examination specifically raised defence of false implication. It appears that general question about report of C.A. has been put to accused persons and it is nowhere stated that seized articles were blood stained. It is the defence of accused persons that they were falsely implicated. Answer given to Question Nos. 40, 41, 60 and 64 by accused No. 1 and answer given by accused No. 2 to Question Nos. 49 and 50 support this objection of Advocate Mr. Khamkar.

64. Report of Chemical Analyzer shows that blood group of accused No. 7 - Nitin Surve was found to be "B", while sample of accused No. 1 - Ganesh Surve, accused No. 2 - Rahul Burte, accused No. 3 - Nilesh Shinde, accused No. 5 - Vilas Bhuvad was found unsuitable for determining blood group. Blood group of accused No. 4 - Santosh Shigwan and accused No. 6 - Rakesh Burte also could not be determined as sample was unsuitable. Thus except for blood group of accused No. 7 - Nitin Surve, blood group of other accused persons could not be determined.

65. In so far as report of C.A. on recoveries from accused persons is concerned, said report is at Exh. 209. Item Nos. 42 to 45 therein are weapons seized from accused No. 1 and it is shown that human blood is found on all these items/exhibits. In so far as blood on Exh. 43 - iron pipe is concerned, blood group thereon was found to be inconclusive and could not be determined. On other three articles, "A" and "B" antigens have been found. Exh. 48 is a wooden stick recovered from accused No. 2 and blood on it was found to be human, but blood group examination remained inconclusive. Exh. 49 is hockey stick seized from accused No. 3 and blood of "A" group has been found on it. Exh. 54 is bamboo stick seized from accused No. 6 and on it "A" and "B" antigens have been found. Exh. 55 is another bamboo stick seized from juvenile accused - Rajesh and though human blood was found on it, blood group test remained inconclusive.

66. The report of C.A. on clothes of accused persons is also available at Exh. 209 only. Exhs. 28 and 29 are full open shirt and track pant of accused No. 1 - Ganesh Surve and on it blood of "A" group has been found. Exhs. 30 and 31 are full open shirt and track suit of accused No. 2. No blood is found on shirt, while "A" group blood is found on track suit. Exhs. 32 and 33 are full shirt and full pant of accused No. 3 and on it blood of "A" group and "A" and "B" antigens have been found. Exhs. 34 and 35 are half T-shirt and full pant of accused No. 4 - Santosh Shigwan and no blood has been found on it. Exhs. 36 and 37 are full open shirt and full pant seized from person of accused No. 5 Vilas Bhuvad and group of human blood on Exh. 36 could not be determined as test remained inconclusive. In so far as Exh. 37 is concerned, "A" "B" antigens have been found on it. Exhs. 38 and 39 are half T-shirt and jean pant seized from Rajesh (juvenile accused). Blood of "A" group has been found on it. Exhs. 40 and 41 are half T-shirt and full pant seized from another juvenile accused - Baban and no blood was found on Exh. 40, while group of human blood on Exh. 41 could not be determined. Exhs. 50 and 51 are banyan and half pant seized from accused No.

6 - Rakesh Burte. On it, blood of "A" group and "A" "B" antigens have found respectively. Exhs. 52 and 53 are full T-shirt and jean pant seized from accused No. 7 - Nitin Surve. On it, human blood of "A" group and "A" "B" antigens have been found. However, as noted supra the prosecution has failed to associate these clothes with an identified individual, we can not use this report against any accused.

67. Determination of blood group of deceased Prashant and Navnath shows inconclusive result. Blood group of injured PW 4 - Nilesh Wadkar is found to be "A". Test of scalp hair of Prashant and Navnath is found inconclusive. Exh. 6 contains cloth piece, while Exh. 18 is wooden piece recovered from spot. No blood has been found on these exhibits. Exh. 7 is another cloth piece, Exh. 8 is another sample of earth. Blood group "A" is found on Exhs. 7 and 8. Determination of blood group of sample of earth and tar from spot at Exh. 10 remained inconclusive. Exhs. 12 to 18 are other recoveries from spot like slippers, chappals, sword case, sword blade, iron handle of sword, wooden piece. Though human blood is found on it, group determination has remained inconclusive. Exhs. 19 to 22 are clothes of deceased Prashant. On all clothes human blood is found but blood group "A" is found on full open shirt and his jean pant. Exhs. 23 to 25 are clothes of deceased Navnath and blood of "A" and "AB" group is found on it. Exhs. 26 and 27 are clothes of PW 4 - Nilesh Wadkar. Human blood of "A" group is found on it. Exhs. 56 to 60 are about juveniles and test on human blood on Exh. 56 (hair) is inconclusive, while group of blood "B" is found in Exh. 57 i.e. blood sample of juvenile accused - Baban. No blood is found on Exh. 58 i.e. scalp hair of juvenile accused - Baban and Exh. 60 i.e. scalp hair of Rajesh Shinde. Exh. 59 blood sample of r juvenile accused Rajesh is found unsuitable for analysis.

68. In Chemical Analyzer's report though human blood has been found, in certain cases as blood group could not be determined a finding that "A" and "B" an antigen exists has been recorded. Antigen is a substance, generally a protein which causes formation of an antibody and reacts specifically with that antibody. Its part of process of immune system in which immunoglobulin coated B cells recognize an intruder or antigen and stimulate antibody production to protect the human body against infection.

69. At this stage various precedents cited by Advocate Khamkar and APP Dedhia may be looked into. In [Masalti Vs. State of U.P., AIR 1965 SC 202 : (1964) 8 SCR 133], the Hon"ble Apex Court in such a crime where the provisions of Sections 141 to 149 of Indian Penal Code are pressed into service has pointed out Rule of prudence that Rule is a conviction can be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In Narayan Kanu Datavale and others Vs. State of Maharashtra, (1997) BomCR(Cri) 138 : (1997) CriLJ 1788], Division Bench of this Court has observed that mere presence of a witness and a circumstance of witnesses being injured is not enough to accept their evidence. In [(2004) ALL MR (Cri) 2573

(S.C.) (Narayan Kanu Datavale and Ors. v. State of Maharashtra)], Hon''ble Apex Court has observed that merely because witnesses are related or friendly with the deceased that is not a ground to discard their evidence. It is further observed in paragraph 21 of said Judgment that plea that accused persons did not commit any overt act would really be of no consequence. Hon''ble Apex Court has found that those accused persons were not merely sightseers and they did not take any steps to dissuade the persons from committing criminal act or to withdraw at any point of time during the course of the incident. This inaction or omission by itself is seen as a step in furtherance of an ultimate offence. In [Akbar Sheikh and Others Vs. State of West Bengal, (2009) 6 JT 315 : (2009) 6 SCALE 745 : (2009) 7 SCC 415 : (2009) 7 SCR 518 : (2009) 6 UJ 2610], Hon''ble Apex Court has again placed reliance on earlier Judgment in Munna Chanda Vs. State of Assam, AIR 2006 SC 3555 : (2006) CriLJ 1632 : (2006) 3 JT 366 : (2006) 2 SCALE 476 : (2006) 3 SCC 752 : (2006) AIRSCW 1058 : (2006) 2 Supreme 420 and Hon''ble Apex Court has found that doing of some overt act in prosecution of the common object of the unlawful assembly must be established. In Mummidi Hemadri and Others Vs. State of Andhra Pradesh, AIR 2007 SC 2528 : (2007) 4 JT 356 : (2007) 4 SCALE 431 : (2007) 13 SCC 496 : (2007) 4 SCR 30 : (2007) 1 UJ 398 : (2007) AIRSCW 4507 : (2007) 2 Supreme 978], again in paragraphs 11,12 and 15, Hon''ble Apex Court has pointed out a meaning of proving common object of unlawful assembly, It has also observed common object may be formed by express agreement after mutual consultation or it may be formed at any stage by all or few members of the assembly and other members may just join and adopt it. Members of such assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge possessed. In paragraph 15, Hon''ble Apex Court found that accused 2,3 and 4 had caught hold the deceased and therefore, applied Section 149 of Indian Penal Code. In Sarwan Singh and Others Vs. State of Punjab, AIR 1978 SC 1525 : (1978) CriLJ 1598 : (1978) 4 SCC 111 : (1978) SCC(Cri) 549 : (1979) 1 SCR 383], Hon''ble Apex Court has in paragraph 7 stated that it was necessary for prosecution to establish that common object of unlawful assembly was to commit an offence under Section 302 or the members of the assembly knew it to be likely that such an offence would be committed. In [Ramkishan and others Vs. State of Rajasthan, AIR 1997 SC 3997 : (1998) CriLJ 54 : (1997) 7 JT 722 : (1997) 6 SCALE 6 : (1997) 7 SCC 518 : (1997) 3 SCR 700 Supp], the Hon''ble Apex Court has considered absence of intention to cause death and also absence of sufficient evidence of involvement of all accused persons in causing death and found that complicity of all of them in inflicting fatal blows was proved thereby attracting Section 149 of Indian penal Code. In [Munivel Vs. State of Tamil Nadu, AIR 2006 SC 1761 : (2006) CriLJ 2133 : (2006) 4 JT 356 : (2006) 4 SCALE 134 : (2006) 9 SCC 394 : (2006) 1 UJ 493 : (2006) AIRSCW 1949 : (2006) 3 Supreme 377], Hon''ble Apex Court has considered even a passive act to be sufficient and again reiterated that if such common object of unlawful assembly is proved, it would not be necessary to record a definite or specific finding as to which particular accused out of members of unlawful assembly

caused the fatal injury.

70. [Santosh Jaywant Takawane Vs. The State of Maharashtra, (2013) 3 ABR 1068 : (2013) ALLMR(Cri) 2882 : (2013) ALLMR(Cri) 2875 : (2014) 2 BomCR(Cri) 789] is the Division Bench Judgment of this court where the High Court has held that lapses on part of prosecution cannot confer any benefit on accused. The Judgment has been cited by learned APP to urge that though weapons seized from spot or then from accused persons under Section 27 have not been shown to concerned witnesses, i.e. not a fatal lacunae. Advocate Khamkar has submitted that in said matter there was single accused. A chart pointing out prosecution version ie name of accused, weapon allegedly recovered from him & report of CA on human blood on it, is submitted jointly by the Counsel for convenience. We do not find it necessary to go into said aspect here as no witness has identified the weapons discovered in his presence by any accused. Why the weapons were not put to these witnesses & they were not asked to identify it, is not very clear. Though blood of group "A" is found on all weapons & blood group "A" is of PW-4 Nilesh Wadkar, in this situation, we find it unsafe to rely upon it. Learned APP has relied upon [Hem Raj Vs. State of Haryana, (2014) 2 JT 399 : (2014) 1 SCALE 48 : (2014) 2 SCC 395 to urge that when clinching material is available on record, lapses on part of prosecution need to be condoned. Here, why the prosecution avoided essential exercise & why weapons were not put to the pancha witnesses & were not allowed to be identified, is not explained. If there was fight between two groups or then, there were any unknown unidentified assailants, such a lacuna can not be countenanced. Various serious lapses in the investigation can not be overlooked in this case.

71. Advocate Khamkar has also invited our attention to [Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853 : (1991) CriLJ 2653 : (1991) 3 Crimes 82 : (1991) 3 JT 151 : (1991) 2 SCALE 80 : (1991) 3 SCC 627 : (1991) 3 SCR 1 , particularly paragraph 10 thereof to state that the circumstances must form a chain leading to an irresistible conclusion of guilt of accused and ruling out possibility of involvement of any third person. The circumstances and chain must lead to conclusion which is unpalatable with the presumption of innocence of accused. In paragraph 10, Hon''ble Apex Court has found that Appellant before it did not explain presence of human blood on Dhoti and shirt recovered from his possession. Hon''ble Apex Court has ultimately dismissed his Appeal.

72. In present matter, PW 1 Santosh Wadkar is the reporter & an eye witness. Injured PW-4 Nilesh Wadkar is his brother. He was 26 years old when he deposed & his father was murdered about 8 to 10 years back in a similar incidence. He was in remand home during childhood. A criminal case was pending against the victim killed in the offence viz. Navnath though he was not aware of details thereof. He claimed ignorance whether any criminal case was pending against his brother PW-4 Nilesh Wadkar, Sachin Walvekar, Jagan Mohite & the other

murdered victim of the offence Prashant Katurde. Cases under S. 110 Cr.P.C. are pending against him, his brother Darvesh, Nilesh & Navnath. He had executed bond thereby undertaking not to commit any offence for one year. He was not aware whether PW-2 Ganesh Kahar was externed out of Pune. He accepted that one month after the incidence regarding which his deposition was being recorded, he himself, his brothers Darvesh, Anil Buvad, Rahul Sarode, Ganesh Kahar & Sachin Walvekar were charge-sheeted under S. 302 r/w S. 324 IPC. He accepted that all witnesses were his friends & he was not aware whether criminal cases were pending against them. He denied that his entire family had criminal background. His stepbrother Sachin was in jail in S. 110 matter. He accepted that he told police that a fight was going on between his brother & other boys near Datta Mandir & did not give any details at that time.

73. His deposition shows the first quarrel in morning due to dash of leg of PW-4 Nilesh Wadkar to accused 3 Nilesh Shinde. Similar quarrel in the afternoon in marriage ceremony of a mutual friend Sandip More & its resolution due to intervention of said Sandip. After marriage he was resting at his home while deceased Navnath, deceased Prashant, PW-2 Ganesha, PW-3 Sachin, PW-4 Nilesh (all injured in the offence) & others were waiting near house of Navnath. One Jagan Mohite came to him and informed that a fierce quarrel was on near Datta Mandir. Accused 1 Ganesh, accused 3 Nilesh Shinde, accused 4 Santosh Shegawn, accused 7 Nitin with their companions were beating Navnath, Nilesh Wadkar & Prashant. They were armed with swords, choppers, hockey-sticks, iron rods.

74. We may mention here that presence of PW-2 Ganesh Kahar & PW-3 Sachin Walhekar at the time of main incident in evening is itself in doubt. Their criminal antecedents & hostile relations or background, necessitates a cautious approach while appreciating the oral evidence of these 4 witnesses. Mother Rekha or Dighe who allegedly carry the victims to Poona Hospital are not examined as witnesses. Even the driver of the auto-rickshaw in which PW-1 Santosh Wadkar claims to have traveled to the Dattawadi Police outpost from spot & returned with three constables, has not been examined. None of these three police constables are tendered as witnesses & how the information about crime was received by PW-12 Smt. Joshi (PSI) has not been explained. Records are to the contrary & reveal that one Ravindra Ghule brought injured PW-4 Nilesh Wadkar to the hospital. It does not show that either Rekha or Dighe admitted him. This person Ravindra Ghule is also not examined. If a fight was going on between members of two groups, the genesis thereof presented by the prosecution is rendered incorrect. Thus a serious doubt is cast on status of PW-1 Santosh Wadkar as a witness to the incident.

75. Thus deposition of Ganesh Kahar shows attack by 4 to 5 unknown persons with accused 1 on deceased Prashant. Police has not accounted for two pairs of slippers & two leather chappals found on spot. Obviously the prosecution could not connect it with either the victims or the accused. His statement that he did

not intervene & did not attempt to rescue shows that he was not attacked at all. Chief of PW-3 Sachin shows that he sustains injury by a bamboo while attempting a rescue & he was not a target. Thus as per PW-2 & 3 both accused - Nilesh Shinde was on platform with them when PW-4 & deceased Prashant started for their respective homes. It also appears that accused Rahul Burte was not on spot. Hence, these witnesses create a serious doubt about correctness of the prosecution story. If deposition of PW-4 Nilesh Wadkar is evaluated in this light, it is apparent that either he or then these witnesses, are correct. PW-4 - Nilesh is not speaking about presence of accused Nilesh @ Salakhya Shinde with him on same platform just prior to the incidence. Though all deny knowledge of fact whether Santosh Shigwan was a BJP worker or not, except for his presence on spot there is no cogent evidence of any overt act on his part. Therefore, true & correct events are not being brought on record by the prosecution. Benefit of this failure must definitely go to accused persons.

76. Hence deposition of PW-1 Santosh Wadkar, PW-2 Ganesh Kahar & PW-3 Sachin Walhekar need to be discarded. However, the evidence of PW-4 Nilesh Wadkar has been independently considered by us. This victim was admitted in hospital in unconscious condition & regained conscious only on 9.6.2002 & was discharged on 17.6.2002. His statement is recorded by the police on 13.6.2002. It is admitted position that his brother PW-1 Santosh had met him earlier. Possibility of his statement being influenced by instructions from PW-1 Santosh Wadkar also must be borne in mind. This situation therefore called for finding of corroboration in support of his assertions from the record. Recovery of weapons & report of the C.A. would have constituted such material. But then as held above, the prosecution has failed even in this respect. PW 4 - Nilesh Wadkar accepted that he himself and his brother was working for Congress-I party. He has also accepted that in Janta Vasahat there were 4 to 5 criminal gangs. Story given by him does not explain presence of accused 3 Nilesh with him on same platform or any fight. We therefore, find it unsafe to base conviction on his sole testimony. He is proved to be a biased & interested witness not giving true version of the episode.

77. Hence we pass the following order :--

"(A) The appeals are allowed & conviction of the appellants as per Judgment and Order dated 11/4/2008 delivered by Sessions Judge - 5, Pune in Sessions Case No. 366 of 2002 is quashed & set aside.

(B) Appellants are given the benefit of doubt & are acquitted of the offences with which they were charged and convicted. They be set free, if their custody is not required in any other case.

(C) Muddemal Properties be dealt with as directed by the Trial Court after expiry of period of Appeal."