
(2013) 09 BOM CK 0007
In the Bombay High Court
Case No : Criminal Appeal No. 1186 of 2004

Rajnath Dudhnath Yadav

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Citation : (2013) 6 ABR 511

Hon'ble Judges : P.V. Hardas, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : Prakash Naik assisted with Ajit M. Savagave, for the Appellant; F.R. Shaikh, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

P.N. Deshmukh, J.—Both these appeals filed by original accused No. 1 Rajnath Yadav and original accused No. 4 Suraj Yadav take exceptions to the judgment and order passed by the learned Additional Sessions Judge, Thane, in Sessions Case No. 138 of 2003, dated 9th September, 2004 thereby convicting both the appellants for offence punishable u/s 302 of the Indian Penal Code and sentencing to suffer imprisonment for life and to pay fine of Rs. 5000/- in default to suffer rigorous imprisonment for six months. Both the appellants are, further convicted for the offence punishable u/s 148 of Indian Penal Code and are sentenced to suffer simple imprisonment for three years and to pay fine of Rs. 1000/- in default to suffer R.I. for three months. Original accused No. 2 Vishwanath Yadav and original accused No. 3 Prakash Kadu are acquitted of all the offences. The prosecution case, in brief, is as under:

That, there was a quarrel between accused No. 4 Suraj Yadav and deceased Dilip alias Julfikar Usmanali Janvekar about five to six months prior to the incident of which deceased Dilip had lodged a complaint against accused No. 4 with Kalwa Police Station and as such their relations were strained. On 22nd December, 2002, deceased Dilip with his servant PW-1 Mustakim Saimohammed Shaikh were proceeding by walk from his mutton shop situated in Waghoba Nagar, at

Kalwa to his another mutton shop situated in Bhaskar Nagar, Kalwa. PW-1 Mustakim was holding a bicycle in his hand on which he was carrying mutton. When they reached in front of Fair Price Shop of one Haji Saheb at about 8.30 a.m., 10 to 15 persons suddenly came from nearby lane. Accused No. 1 i.e. the appellant in Criminal Appeal No. 1186 of 2004 herein was holding a Gupti in his hand. Accused No. 4 Suraj Yadav i.e. the appellant in Criminal Appeal No. 1265 of 2004 was holding a Chopper in his hand. (Both these appellants are hereafter referred as A-1 and A-4 for brevity). Other absconding accused Lallu was also holding Chopper in his hand, while accused Soharab was holding an iron pipe. Out of the remaining accused, one was holding a sword and the others were holding iron pipes.

2. It is the case of prosecution that accused No. 4 Suraj Yadav in this incident gave blow of Chopper on the abdomen of the deceased. Thereafter accused No. 1 Rajnath Yadav delivered blows of Gupti. Other accused holding Chopper also assaulted the deceased. Due to this incident, PW-1 Mustakim started running towards firewood godown of deceased Dilip. He was shouting. The people heard the shouts and came to the spot. PW-2 Azad rushed to the spot when he heard PW-1 Mustakim shouting about the attack on deceased Dilip. He witnessed the incident of assault by accused No. 4 Suraj, accused No. 1 Rajnath, absconding accused Lallu and Soharab and other 10 to 12 unknown persons with Chopper, Gupti and iron pipes on Dilip, because of which Dilip fell on the ground. Accused No. 4 Suraj thereafter assaulted on his face with the help of chopper. PW-3 Nasim who was proceeding from his house at Waghoba Nagar, Kalwa, towards his tailoring shop in Bhaskar Nagar, Kalwa, at about 8.30 a.m., saw the incident of assault. PW-4 Riyaj, who was doing business of collecting goat skin, saw the incident of assault at about 8.30 a.m. Due to severe injuries deceased Dilip was lying on the spot. When persons gathered there, the accused persons ran away from the spot and threw the weapons there. Police arrived on the spot within 15 minutes from the time of incident of assault, thereafter PW-1 Mustakim went to the police station and informed the incident to the police and the complaint was recorded vide Exh. 35. As per the time mentioned on the complaint, it was lodged at 9.15 a.m. which was registered vide Crime No. I-228/2002 for the offences punishable under Sections 302, 147, 148, 149 of Indian Penal Code. Thereafter inquest panchanama was prepared vide Exh. 53 by PW-11 N.N. Shaikh, Senior Inspector of Police, attached to Kalwa Police Station between 9.45 a.m. and 10.45 a.m. in presence of panch witnesses PW-7 Hariram Sharma and Uday Maharav. The body of the deceased was sent for post-mortem and thereafter spot panchanama was drawn in presence of witnesses PW-2 Azad and one Shafi Ahmed Shaikh vide Exh. 37 between 10.55 a.m. and 12.10 p.m. by PW-11, the Investigating Officer.

It is also the case of prosecution that, around 15 articles were seized from the scene of offence which included gupti, chopper, iron sword, iron knife and iron pipes. The postmortem report prepared by PW-6 Dr. Mangesh Ramchandra Ghadge, Associate Professor in Forensic Department, Rajiv Gandhi Medical

College, Kalwa, stated that there were 29 anti-mortem injuries on the dead body and as per the medical certificate the probable cause of death was haemorrhage and shock due to multiple stab injuries with head injury involving fracture of skull.

It is further case of prosecution that, thereafter the Investigating Officer made inquiry and recorded statements of witnesses. Accused No. 1 and accused No. 4 came to be arrested vide Exh. 55 and Exh. 59 respectively. The clothes on the person of the accused were seized on 22nd December, 2002 itself. Statements of witnesses were recorded on 22nd December, 2002, 23rd December, 2002 and 25th December, 2002.

On completion of investigation, charge-sheet came to be filed on 17th March, 2003 against four accused and one absconding accused-Janardan Eknath Nikam whose trial was separated. The learned Additional Sessions Judge framed charge against the accused and on recording evidence, had convicted accused No. 1 Rajnath Yadav and accused No. 4 Suraj Yadav, as aforesaid.

3. Learned advocates Shri Prakash Naik and Shri S.V. Marwadi, appearing for the respective appellants had submitted that the learned Trial Judge has based the conviction without considering the evidence in its proper perspective and submitted that though the name of appellant appears in the F.I.R. lodged and though it is mentioned that Accused No. 1 Rajnath was holding gupti in his hand, no specific role is assigned to him. It is further pointed out that, in spite of specific mention in the F.I.R. of the accused No. 4 Suraj holding chopper in his hand and had assaulted the deceased on his abdomen, there is no any specific mention with regard to the group of other accused persons who were with appellants and who, according to the complainant, were also armed with dangerous weapons like gupti, iron pipes in their hands. It is thus submitted that the evidence which has come on record is totally in variance and the witnesses have exaggerated and had transposed the prosecution case to falsely implicate the appellants.

It is further submitted that the Trial Judge ought to have held that the witnesses examined were only the interested witnesses whose evidence even otherwise was not trust worthy and, as such, were not worthy to be relied upon. The learned defence advocates have also pointed out various discrepancies in the evidence of prosecution witnesses and has contended that though, according to the evidence of prosecution, the alleged incident has taken place in the broad daylight at around 8.30 a.m. on the street having various shops and residential houses situated on both the sides, the prosecution has failed to examine any independent witnesses and had chose to examine only the interested witnesses like PW-1 Mustakim, the servant of deceased, PW-5 Chandbi, the wife of deceased and others having acquaintance with the deceased, without assigning any reason for non-examination of other witnesses. It is also pointed out that though the learned Trial Judge noted that there were discrepancies in the evidence of PW-1 Mustakim Shaikh the complainant and who in the strict sense can be termed as the sole eye-witness of the incident, the Trial Court erroneously

came to the conclusion that the discrepancies in his evidence are not sufficient to disbelieve his evidence. By making legal submissions which are duly referred to, during the course of the judgment while considering the evidence on record, both the learned defence counsel have summed up their submissions by submitting that the judgment of the learned Trial Court since is based only on inferences and surmises and not on the well established principles of law, the appeals of the respective appellants be allowed.

4. The learned A.P.P., Mr. M.R. Shaikh, however, had contended that the Trial Court's judgment does not require any interference as the same is based on sound reasoning.

5. In the background of above facts and submissions advanced by both the sides, we have scrutinized the evidence on record. PW-1 Mustakim Saheb Mohammed Shaikh, the complainant had stated that at the time of incident he was working in the mutton shop of deceased Dilip Muttonwala since about 5 to 6 months prior to the incident and that earlier to the incident there was a quarrel between deceased Dilip and Ac. No. 4 Suraj Yadav of which deceased Dilip had lodged a complaint with Kalwa Police Station and since then their relations were strained. On the point of incident he has stated that, on 22nd December, 2002 at about 8.00 a.m. he accompanied with deceased Dilip were proceeding from mutton shop of deceased situated at Waghoba Nagar to his another shop situated at Bhaskar Nagar on a bicycle carrying on it mutton. According to this witness, he was walking with the bicycle in his hand along with deceased, however, at around 8.30 a.m. when they were near the rationing shop lane of Hazisaheb, 10 to 15 persons armed with chopper, gupti, iron pipes, suddenly arrived and started assaulting Dilip. PW-1 has further stated that Ac. No. 4 Suraj was armed with chopper in his hand while Ac. No. 1 Rajnath was armed with gupti in his hand and that Ac. No. 4 Suraj assaulted with chopper in the stomach of Dilip, while Ac. No. 1 Rajnath assaulted Dilip by gupti, due to which Dilip died on the spot.

PW-1 Mustakim further stated that, amongst the mob of 10 to 15 persons, there was other assailant, namely, Soharab who was holding gupti and iron pipe in his hand and has assaulted with these weapons to Dilip and that rest of the assailants also committed assault.

6. PW-1 further stated that, immediately after the incident he started running towards the fire wood godown of deceased Dilip and on way met one Najibuddin to whom he told about incident of assault.

7. On the point of assault, another witness whose evidence needs consideration is PW-2 Azad Bhagwati Singh who is also claimed by the prosecution to be an eye-witness. On perusal of his evidence, he appears to have stated that he knew the accused and was knowing deceased Dilip and that on the day of incident at 8.30 a.m. he was standing in front of his house situated at Bhaskar Nagar, Kalwa, when he noted PW-1 Mustakim coming and shouting saying that persons are beating Dilip Seth. Accordingly he went to the spot of incident and saw both

the accused-Suraj and Rajnath along with 10-12 unknown persons and Lallu assaulting deceased Dilip with chopper, gupti and iron pipe due to which deceased fell down on the ground. He has further stated that he saw Ac. No. 4 Suraj assaulting Dilip with chopper by sitting on his chest, while Ac. No. 1 Rajnath was beating with gupti and that all the assailants left their weapons on the spot of incident and ran away.

8. Before considering evidence of other two witnesses, namely, PW-3 Nasim Asmi and PW-4 Riyaz Sattak Khan Bande, who, according to the prosecution, are also the eye-witnesses. When the evidence of these two witnesses i.e. PW-1 and PW-2 is considered, both these witnesses found to have not corroborating to each other on the material aspect of the case on the point of assault and thereby raises serious doubts on their evidence about their witnessing the incident of assault on the deceased by the said accused, inasmuch as, according to the evidence of PW-1 Mustakim, after the incident he started running towards the firewood godown of deceased and claims to have met one Najibuddin to whom he further claims to have narrated the incident and also claims that said Najibuddin had also seen the assailants assaulting the deceased, however, in the entire evidence PW-1 do not whisper a single word of his informing PW-2 Azad Singh of the incident. There is absolutely no link evidence led by prosecution on record on this material aspect of the case as to under what circumstances PW-2 Azad Singh arrived on the spot. What has come in the evidence of PW-2 is that, on the day of incident at 8.30 a.m. when he was standing in front of his house at Bhaskar Nagar, Kalwa, PW-1 came shouting and had told him that some persons are beating Dilip Seth. In view of PW-1 not uttering a single word about his informing PW-2 Azad Singh about the incident of assault, it is difficult to rely upon the evidence of PW-2 when he has stated to have learnt about the incident of PW-1, as such, very presence of PW-2 on the spot and his witnessing the assault becomes doubtful. Moreover, even if evidence of PW-2 is to be relied, he has stated that PW-1 had only informed him that some persons are beating Dilip Seth. As such, PW-1 had not named any of the assailants of deceased to this witness. Had PW-1 really witnessed the accused assaulting the deceased, he would have definitely stated their names as assailants of Dilip.

It is material to note that though, according to the evidence of PW-1, on running from the spot towards firewood godown of deceased, he met one Najibuddin to whom he told about the incident. His evidence is again silent about his narrating names of assailants or that of either of the accused as member of the unlawful assembly who were assaulting the deceased. More surprisingly, prosecution had not examined said Najibuddin who could have been the best witness as according to the evidence of PW-1 he was again first person in the point of time to whom he has disclosed the incident. Though prosecution appears to have recorded statement of Najibuddin during the course of investigation, no any reason is put-forth for non-examination of said witness. This fact, thus, also creates doubt in the evidence of PW-1.

9. Even otherwise, evidence of PW-1 does not stand for any reason, inasmuch as, he has deposed that he met Najibuddin while he was running towards firewood godown and had told him about the incident and has also deposed that said Najibuddin had also seen assailants beating Dilip.

In view of evidence of PW-1 as above, thus, had PW-2 really witnessed the incident of assault as claimed by PW-1. There was no any reason for PW-1 to tell him about the incident. On the contrary, PW-2 is silent on this aspect, as according to him, he learnt of the incident while he was standing in front of his house, from PW-1. Thus, there is no question of PW-2 being an eye-witness to the incident. Prosecution is again silent on this material discrepancy on record.

10. In view of the above material discrepancies in the evidence of these two witnesses, we, therefore, do not find it safe either to rely upon the evidence of PW-1 or PW-2 though the contents of F.I.R. (Exh. 35) lodged by PW-1 corroborates with the oral version as deposed by him. However, merely because the contents of F.I.R. which cannot said to be a substantive piece of evidence corroborate with the ocular testimony of complainant, that by itself can be no ground to rely on the complainant's evidence when his evidence is otherwise not found reliable and convincing to be acted upon as found in the instant case.

11. Prosecution had further heavily relied upon the evidence of PW-3 Nasim Azmi claiming to be an independent witness who has stated that, on the day of incident at about 8.30 a.m. he was coming from his house situated at Waghoba Nagar and was proceeding to his tailoring shop situated at Bhaskar Nagar, Kalwa. When deceased Dilip and PW-1 Mustakim were walking ahead of him at the distance of about 25 ft. when suddenly 10 to 12 persons armed with chopper, gupti and iron pipes in their hands arrived from the nearby lane and opened attack on Dilip. He has specifically deposed that, Ac. No. 4 Suraj was armed with chopper in his hand and Ac. No. 1 Rajnath was armed with gupti, and has deposed that all the accused assaulted Dilip by weapons and after dropping the weapons on the spot, ran away. Thus, it is pertinent to note that said eye-witness has not specifically attributed any assault by either of the Ac. No. 1 or by Ac. No. 4, but according to him, both the accused who were with 10 to 12 others, suddenly opened attack on deceased Dilip. Had this witness really witnessed the incident of assault, nothing would have prevented him from specifically deposing about the manner of assault committed by the accused on deceased Dilip, though he claims to have witnessed the incident of assault from short distance of 25 ft. Evidence of PW-3 Nasim Azmi about his witnessing the assault even otherwise is not convincing as PW-1 Mustakim, who according to prosecution, was accompanying the deceased at the time of incident do not name him at all, though according to PW-3 he was on visiting terms with deceased Dilip and was knowing him from 5 to 6 years and admittedly PW-1 was working as a servant of deceased Dilip about 5 to 6 months prior to the incident.

In the light of above discussed evidence of PW-1 about Ac. No. 4 Suraj assaulting deceased with chopper in his stomach and Ac. No. 1 Rajnath committing assault

on deceased by gupti, do not find any corroboration from any of the witnesses, on this most vital aspect of the case.

12. In fact, above piece of evidence of PW-1 is totally contradicted by PW-2 Azad, who, while claiming to be an eye-witness of the incident had deposed that the assailants 10 to 12 in number were armed with chopper, gupti, iron pipes and were assaulting Dilip due to which he fell down and in total contrast to the evidence of PW-1 has stated that Ac. No. 4 Suraj committed assault on Dilip by sitting on his chest by chopper. This piece of evidence of this witness cannot be acted upon at all as in his own evidence, it has come on record that he learnt about the incident from PW-1 Mustakim, who, after the incident came to him shouting and had informed that some persons were beating Dilip and, therefore, PW-2 went on the spot. Evidences of PW-1, PW-2 and PW-3 as such do not inspire confidence to be acted upon at all.

13. Another witness whose evidence has been relied upon by prosecution is PW-4 Riyaz Khan who has stated that he was knowing deceased Dilip since he was purchasing goat skin from him for selling it in a bazaar, and according to his evidence, on the day of incident at 8.30 a.m., he was coming from Kalwa railway station to proceed to collect goat skin and on his reaching near the shop of Hajisab, he saw deceased lying on the ground and Ac. No. 4 Suraj assaulting deceased with chopper by sitting on his chest and Ac. No. 1 Rajnath assaulting with gupti in the stomach of deceased Dilip. Above piece of evidence of PW-4 is contrary to the evidence of PW-1 and thus doubts his evidence when PW-1 has stated about Ac. No. 4 Suraj assaulting with chopper in the stomach of deceased and Ac. No. 1 Rajnath assaulting with gupti, when it is no case of prosecution that both the accused Nos. 1 and 4 had assaulted the deceased in his stomach. The evidence as above certainly cannot be said to be minor variations in the evidence of eye-witnesses. In fact, above material discrepancies in the evidence of all these witnesses creates doubt to rely upon them as eyewitnesses to the incident as claimed by prosecution.

Moreover, evidence of PW-3 even otherwise is not reliable to be acted upon, inasmuch as, in the cross-examination he has admitted that at the time of actual assault upon Dilip, nobody else was present there and further admits that like him other persons, namely, Joturam, Riyaz and Makhi Hasan were present, however, none of them are examined by the prosecution for the reasons best known to it. Similarly, evidence of PW-3 do not inspire confidence in view of the fact that, admittedly, he was present on the spot for about one and half hours, while police arrived on the spot within half an hour, however, said witness did not narrate anything about the incident to the police. The normal conduct of any person who had witnessed such a fatal assault, would be to immediately disclose the facts of incident either by visiting the police or at least when the police arrived on the spot on their own immediately when the police is available. However, no recourse of this sort has been adopted by PW-3 Nasim Azmi, which again creates doubt of his witnessing the incident. On the contrary, he has

admitted that there was no discussion between him and the police on the spot nor he found it necessary to tell the police about the incident when they were present on the spot.

14. As stated earlier, PW-1, PW-2 as well as PW-3 were all knowing the deceased, while PW-4 Riyaz was also acquainted with him with reference to his business of selling goat skin which he used to collect from the deceased and, as such, appears to be acquainted. In the light of above contradictory evidence thus, we find much substance when it is suggested to these witnesses that having been acquainted with the deceased Dilip, they are deposing false, though these suggestions are denied by the prosecution witnesses.

15. Another star witness as per prosecution is PW-5 Chandbi Zulfikar Janvekar, wife of deceased Dilip, who has stated that, on the day of incident her husband left the house at around 8.30 a.m. for going to his shop, while she was present in the house. She further stated that, at 9.45 a.m. their servant Najibuddin Khan came and told her of the incident of assault by Ac. No. 4 Suraj and others by chopper and sword and that Dilip was lying in injured condition. Accordingly she went to the spot with him and saw that deceased was lying in the pool of blood having injuries on the face, chest and weapons were lying on the spot. Evidence of Chandbi when considered, it appears that she was not informed about the assault committed by Ac. No. 4 Suraj in stomach as is the case of prosecution nor she was informed of any assault by Ac. No. 1 Rajnath. Evidence of this witness even otherwise does not inspire confidence for non-examination of Najibuddin Khan, as already stated earlier, though his statement is recorded during the course of investigation and according to evidence of Chandbi, she learnt about the incident for the first time from said Najibuddin. In view of her further evidence, evidence of PW-1 Mustakim, PW-3 Nasim, tailor, even otherwise does not appears to be truthful, inasmuch as, PW-5 Chandbi has admitted that on the day of incident she had no discussion with any of these witnesses anywhere or at her house. Similarly, the conduct of all these eye-witnesses also creates doubt of their witnessing the incident, in view of evidence of PW-5 Chandbi about not discussing anything about the incident with the wife of deceased though they claims themselves as the eye-witnesses to the incident, and more particularly, when they were on visiting terms to the house of deceased since much days prior to the incident.

16. Record reveals that PW-6 Dr. Mangesh Ghatge had performed autopsy on the body of the deceased and had noted following external injuries:--

- (1) CLW over scalp top of skull in midline oblique size 6 cm & 0.5 cm bone deep.
- (2) CLW over frontal bone midline 4.0 cm x 0.2 cm.
- (3) CLW over frontal bone in midline oblique above nasim size 7 cm x 1.5 cm bone deep.
- (4) CLW over left chick triangular size 2.0 cm x 1.5 cm bone deep.

- (5) CLW below nose horizontal 4 cm x 1 cm bone deep.
- (6) CLW over chin 9 cm to 4 cm involving lower lips bone deep E/O fracture of teeth.
- (7) Incised chop wound over left submandibular region horizontal size 8.0 cm x 2 cm bone deep.
- (8) Incised stab wound over front of neck, above thyroid cartilage midline cavity deep 1 cm x 0.2 cm.
- (9) I.S.W. over neck 0.5 cm above injury No. 8 2 cm x 0.2 cm cavity deep.
- (10) ISE over back 0.2 cm obliquely below injury No. 8 on RT side 1.0 cm x 0.5 cm v cavity deep.
- (11) ISW below chin in midline submandibular region 4.0 cm above injury No. 9 1.5 cm x 0.5 cm cavity deep.
- (12) ISW over neck Rt side 1.0 cm obliquely below injury No. 11 2.0 cm x 0.6 cm cavity deep.
- (13) ISW over neck on Rt side 1.0 cm above medical end of Rt clavicle cavity deep 1.5 cm x 0.5 cm.
- (14) Abrasion over neck lower aspect Rt side oblique 6.0 cm x 1.5 cm.
- (15) Abrasion over neck 1.0 cm to left of midline lower aspect size 2.0 cm x 2.0 cm.
- (16) Abrasion over Rt side chest 0.5 cm obliquely below injury No. 13 size 1.5 cm x 1.0 cm.
- (17) ISW over Rt side chest (lower part) x 2.0" cm to Rt of midline in the level of phisternum size 4.0 cm x 1.0 cm on deep horizontal:
- (18) ISW 0.2 cm below injury No. 17 horizontal size 3.0 cm x 1 cm. cavity deep.
- (19) ISW on Rt side abdomen horizontal 0.1 cm to the Rt of midline 1 cm below xi-phisternum size 6.05 cm x 2 cavity deep coils of Intestine protruding out.
- (20) ISW over left side chest 1.0 cm to left of midline at the level of xiphisternum, horizontal side 4.0 cm x 1.0 cm cavity deep.
- (21) ISW over Lt side chest, horizontal, 5.0 cm to the left midline, 10 1.0 cm obliquely below injury No. 20 size 3.5 cm x 1 cm cavity deep.
- (22) ISW over it side abdomen 2.0 cm below injury No. 20, horizontal, coils of intestine protrudine size 5.0 cm x 1.5 cm cavity deep.
- (23) ISW over Lt side abdomen 4.0 cm to the left of midline, 2.0 cm obliquely below injury No. 22.
- (24) ISW over abdomen in midline horizontal 4.0 cm below xiphisternum, 5.0 cm

x 1.0 cavity deep.

(25) ISW over abdomen in midline, horizontal 2.0 cm below injury No. 24, size 4.0 cm x 0.5 cm.

(26) ISW over front of abdomen midline horizontal 2.0 cm below injury No. 25 size 4.0 cm x 0.5 cm.

(27) ISW over front of abdomen midline horizontal 1.0 cm below injury No. 26, size 3.0 cm x 0.5 cm.

(28) ISW over Lt side back 2.0 cm below angle of scapula size 3.0 cm x 1.05 cavity deep.

(29) Abrasion over Lt shoulder top size 4.0 cm x 1.5 cm. All these injuries were anti-mortem.

PW-6 Dr. Mangesh Ghatge had noted following internal injuries:

Contusion and haematoma seen under the scalp over cipito paratal region and it pariatal temporal region fracture of frontal bone fracture by lateral or by orbiten plates, fracture multiple facial bones, fracture mandible brain: All over the brain lacerated and contused over by lateral frontal lobes. Lunja was collapsed. Blood collected in chest cavity 800 cc. Blood and blood cloty in abdomen cavity found more than 1500 cc. There was injury to tongue stomach perporated 5 cm small intestine perporated at 4 places, mysentry perporated at 5 places. Large intestine intact.

According to said Medical Officer, the probable cause of death was due to haemorrhage shock due to multiple stab injuries with head injury involving fracture of skull and had accordingly issued the post-mortem report Exh. 49.

17. The medical officer has also opined the possibility of injuries sustained by deceased by Art. 1 Gupti and Art. 2 chopper. However, in the absence of cogent and reliable evidence on the point of assault on deceased by Ac. No. 1 or Ac. No. 4, such opinion becomes irrelevant as there is no dispute of possibility of injuries sustained by deceased Dilip by weapons as above, however, what we are concerned is to get satisfied if from the available evidence on record the injuries sustained by the deceased are caused by either of the Ac. Nos. 1 and 4 or by both of them along with 10-12 other assailants as is the case of prosecution. However, from the above discussed evidence, we do not find that prosecution has in any way established beyond reasonable doubt that the above said accused are authors of the injuries sustained by the deceased.

Another aspect which reveals from the evidence of PW-6 Dr. Mangesh Ghatge is of his admitting that as per the contents of Col. No. 21 of post-mortem report Exh. 49, the stomach was found empty and that the time required for digestion of food is about 4-6 hours. In this context it has come in the evidence of PW-5 Chandbi that deceased Dilip had left house at about 8.30 a.m. after taking bath and breakfast. In that view of the matter and on considering the evidence of

PW-6 Dr. Mangesh Ghatge as above, it appears that the incident of assault on deceased might have occurred much prior to 8.30 a.m. as the contents of his stomach were found to be empty. No any explanation is given by prosecution on this aspect.

Similarly, another aspect which needs to be considered is that, according to the evidences of PW-1, PW-2, PW-3 and PW-4, it has come on record that the assailants after committing the assault ran away from the spot by dropping the weapons on the spot itself, which according to the evidence of PW-11 the Investigating Officer as well as PW-2 Azad who also acted as a spot panch when the spot panchnama Exh. 37 came to be drawn, are seized from the spot, however, the material fact which is noted is that, there is absolutely no mention of any bicycle or mutton found lying on the spot. There is no mention in the spot panchnama of any of these articles to be found or seized from the spot though it is the specific case of prosecution that all of a sudden assault was committed on deceased Dilip while he was proceeding with PW-1 having mutton carried by them on a bicycle from one of the mutton shop of Dilip, situated at " Waghoba Nagar to his another mutton shop situated at Bhaskar Nagar. No any explanation is put forth by prosecution on this aspect of the case also.

18. Prosecution though had examined PW-7 Hariram Verma, panch witness, in whose presence inquest panchnama Exh. 53 is drawn and PW-8 Shriram Ekhankar, PW-9 Kailash Sathe, who had proved arrest panchnamas of Ac. No. 1 Rajnath and Ac. No. 4 Suraj at Exhs. 55 and 59, evidence of these witnesses is too short to establish the involvement of said accused.

19. On considering the evidence of PW-11 Investigating Officer Nazruddin Shaikh, his (evidence further doubts the case of prosecution, when he has stated that on 22nd December, 2002 when he was posted as Senior Police Inspector, Kalwa Police Station, message was received on phone at said police station by P.S.O. about murder which has taken place in Bhaskar Nagar locality which was informed to said Investigating Officer and on the basis of same complaint was reduced into writing by PSI Kamble and offence was registered vide C.R. No. I-228/2002 for the offence punishable under Sections 147, 149, 302 of Indian Penal Code and was investigated by him. PW-1 the Investigating Officer, has admitted that abovesaid information was received by Police Station Officer, Kalwa, after 5.30 a.m. and according to the information received from Control Room, one person was informed to be murdered at Bhaskar Nagar. The information so received is not placed on record. Admittedly, there was no name of assailant in the information received by police nor name of informant was given nor such name transpired during the course of the investigation. The Investigating Officer has also not placed on record any station diary entry of information received by P.S.O., Kalwa and though stated that on the date of incident he was patrolling within the limits of Kalwa police station, he did not remember at what time he received the information from Police Station Officer on his mobile according to which he visited the spot.

20. In view of the above evidence of Investigating Officer, thus, we find much substance when it is argued for the accused that the incident had occurred much prior to 8.30 a.m. which fact is otherwise found substantiated from the evidence of medical officer PW-6, who at the time of post-mortem had found the stomach of deceased to be empty, though according to evidence of PW-5 Chandbi, on the day of evidence, deceased at about 8.30 a.m. had left the house after having his breakfast while the incident of assault according to the prosecution has taken place at about 8.30 a.m. in that view of the matter also prosecution case fails.

21. In the backdrop of above discussed contradictory and unreliable evidence, we find much force in the case of the defence that there is an attempt by the prosecution in this case to create evidence by way of recording statements of witnesses. Accordingly, we also find much substance in the legal submissions advanced by the learned defence counsel by referring to the case of Suraj Mal Vs. State (Delhi Administration), wherein the Apex Court while considering the credibility of the evidence of witness who had given two inconsistent statements at one stage or two stages, had observed in paragraph 2 of the judgment, as under:

Where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses.

The defence has further relied upon the case of Jagdish Prasad and others Vs. State of Madhya Pradesh, wherein the Apex Court by referring to its decision in the case of Vadivelu Thevar Vs. The State of Madras, has observed thus--

As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated provided the testimony, of that single witness is found out entirely reliable. In that case, there will be no legal impediment for recording a conviction. But if the evidence is open to doubt or suspicion, the court will require sufficient corroboration. In this connection, reference may be made to a decision of this Court in Vadivelu Thevar Vs. The State of Madras, wherein this court has classified the testimony of a witness into three categories viz. (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable or wholly unreliable and observed that though in the first two categories of classification, there may not be any difficulty in coming to a conclusion either accepting or rejecting the testimony but it is in the third category of cases that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony either direct or circumstantial.

In the case of Vadivelu Thevar Vs. The State of Madras, referred supra, in paragraph 11 of the judgment, the Apex Court has further observed:--

(11) In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act

has categorically laid it down that no particular number of witnesses shall in any case be required for the proof of any fact. The legislature determined, as long ago as 1872, presumably after due consideration, of the pros and cons, that it shall not be necessary for proof or disproof of a fact to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of Statutes as set out in Sarkar's I Law of Evidence-9th Edition, at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in S. 134 quoted above. The section enshrines the well recognized maxim that Evidence has to be weighed and not counted. Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. ".....

22. In the case in hand, on considering the evidence as discussed above and for the reasons, though PW-1 Mustakim can be considered as the sole eye-witness to the incident, who according to the prosecution's case was accompanying deceased Dilip when he was subjected to assault, his evidence is not at all convincing nor of the witnesses who claim to have knowledge of assault from PW-1 Mustakim. The Apex Court while considering the credibility of a single witness time and again has noted that, whether a corroboration to such evidence is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in the matter like this as much depends upon the judicial discretion of the Judge before whom the case goes.

23. In the light of these facts, the observations of the Apex Court in the case of Vadivelu Thevar Vs. The State of Madras, are of much relevance where in paragraphs 11 and 12 of its judgment, the Apex Court has observed thus:-- (11).....Hence, in our opinion, it is a sound and well established rule of law that court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories namely: (1) wholly reliable, (2) wholly unreliable (3) neither wholly reliable nor wholly unreliable.

(12) In the first category of proof, the court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.....

There can be no dispute that, even when there is only a sole eye-witness of the crime, a conviction may be recorded against the accused concerned provided the Court consider the evidence of such witness to be truthful, however, by way of prudent caution it is always considered that such evidence is corroborated from other prosecution evidence and more particularly when the evidence of such

witness is that of a closely related witness to the deceased and to whom some motive or ill-will is suggested. In the case in hand, PW-1 admittedly, since prior to the incident, was working with the deceased and, as such, was on visiting terms to his house and was knowing him as well as his wife PW-5 Chandbi. As such, before relying upon evidence of this witness, we found it of utmost necessity to have corroborative evidence before acting upon the evidence of PW-1 which even otherwise did not inspire confidence at all. However, even on scrutinizing the evidence of other witnesses i.e. PW-2 to PW-5, prosecution cannot said to have established its case beyond reasonable doubt that the accused had committed murder of deceased Dilip. In that view of the matter, we are of the considered opinion that the appeals are liable to be allowed as the conviction of accused u/s 302 of Indian Penal Code, is not sustainable. Thus, we pass the following order:--

ORDER

(1) Criminal Appeal No. 1186 of 2004 is allowed and conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid, by the appellant be refunded to him.

The bail bond of the appellant stands cancelled.

(2) Criminal Appeal No. 1265 of 2004 is allowed and conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid, by the appellant be refunded to him.

Since the appellant is in jail, he be released forthwith, if not required in any other case.