

(1996) 07 BOM CK 0045
In the Bombay High Court
Case No : Criminal Appeal No. 493 of 1982

Ramesh Bhagwan Manjrekar and others	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 05-07-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 134
Penal Code, 1860 (IPC) — Section 114, 302, 324, 34

Citation : (1997) BomCR(Cri) 126 : (1997) CriLJ 796

Hon'ble Judges : Vishnu Sahai, J;S.S. Parkar, J

Bench : Division Bench

Advocate : Suresh Gholkar holding for S.G. Samant, for the Appellant; Mrs. Jyoti S. Pawar, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—By means of this appeal the appellants have challenged the judgment and order dated 31st May, 1982 passed in Sessions Case No. 6 of 1981, by the learned Additional Sessions Judge, Greater Bombay, whereby each of them have been convicted and sentenced in the manner stated hereinafter :

(i) u/s 302 read with 34, I.P.C. to suffer imprisonment for life and to pay a fine of Rs. 1500/- in default to undergo R.I. for one year : and

(ii) u/s 324 read with 34, I.P.C. to suffer R.I. for 18 months.

The substantive sentences of the appellants have been ordered to run concurrently.

2. Briefly stated the prosecution case runs as follows :

Appellant Ramesh Bhagwan Manjrekar and Vasudeo Bhagwan Manjrekar are real brothers. Appellant Ramdas Penter's wife and that of Ramesh Bhagwan Manjrekar are real sisters. Appellant Raju alias Don Shaikh Ibrahim is said to be an associate of the remaining appellants. Ms. Shakuntala Maruti Shelar P.W. 7 is the mother of the deceased Ramesh Shelar. Appellant Vasudeo and his brother

Shashikant Manjrekar resided in her neighbourhood.

On 10-10-1980 at about 9.30 a.m. while Shakuntala P.W. 7 was cleaning utensils outside her room Shashikant Manjrekar came along with appellant Vasudeo and asked Ramesh Shelar as to why he had threatened Vasu (appellant Vasudeo Bhagwan Manjrekar). Ramesh Shelar denied having extended any threat. On that Shashikant told him that if he did not know how to behave with his neighbours he should leave the place. Appellant Vasudeo is alleged to have told Ramesh Shelar that he will see him in the evening. Thereafter Shashikant and Vasudeo left.

(Note : This incident is spelled out in paragraph 3 of Shakuntala's statement. As it is described in the said para the same makes no sense. In our opinion Shakuntala's evidence in respect of it has not been correctly recorded by the learned trial judge. After reading it we tried to make out as to what actually Shakuntala stated and that is what we have detailed above).

The same day at about 8.30 p.m. Ramesh Shelar was sitting on a cot in the Dhobi Ghat area, near the hair-cutting saloon in Asalpha village, Sakinaka, Greater Bombay. Along with him Shaikh Jalaluddin P.W. 2 was also sitting on the same cot. There was electric light nearby. At that time the appellants came towards them from the eastern side. Appellants Ramesh, Vasudeo and Ramdas were carrying guppies and appellant Raju alias Don was carrying a knife. Ramdas stood in front of Ramesh Shelar and asked him why he had threatened Vasudeo. When Ramesh Shelar got up from the cot he slapped him. When Shaikh Jalaluddin got up appellant Ramesh pushed him by his left hand, resulting in his falling on the cot. Thereafter appellant Raju inflicted a knife blow on his right leg. As a consequence of the said injury Shaikh Jalaluddin's pant became stained with blood. Thereafter appellant Raju caught Ramesh Shelar by his collar and took him towards the door of Sai Haircutting Saloon. Then appellant Ramesh stabbed Ramesh Shelar on chest. Thereafter, appellants Vasudeo and Ramdas assaulted Ramesh Shelar with guppies on the back. After Vasudeo assaulted Ramesh Shelar Shaikh Jalaluddin ran away from the place of the incident. It is also alleged that this incident was seen by Adam Hussain Baig. P.W. 3. Anaji alias Eknath Shantaram Salunke Patil P.W. 6 and Bharat Dhaku Rane P.W. 5. Bharat P.W. 5 however, became hostile. After assaulting Ramesh Shelar the appellants are alleged to have run away.

Adam Hussain P.W. 3 thereafter went to the residence of Ramesh Shelar and informed his mother Shakuntala about the incident. Thereafter along with Shakuntala he came to the place of the incident. Ramesh Shelar was lying in a gasping condition. Thereafter on a rickshaw he and Shakuntala removed Ramesh Shelar to Rajawadi Hospital.

3. Ramesh Shelar was medically examined at Rajawadi Hospital by Dr. Naresh Madanlal Khanna P.W. 9, the same day at 9.15 p.m. In the medical case papers Dr. Khanna has mentioned that Ramesh Shelar had sustained an incised wound

on the right lower chest 1" x 1/4" x ?. He also noted that the pulse was feeble, pupils were semi-dilated and the patient was smelling of alcohol. In the case papers it has also been mentioned that he was unconscious (the entry is worded as "H/O UC").

After Ramesh Shelar had been attended to by Dr. Khanna, police constable Mubarak Mohammed Mulla P.W. 4 who was on duty in Rajawadi Hospital and was in charge of EPR (emergency Police Register) counter, was informed through a ward boy that there was a case of stabbing. Consequently he went to the casualty ward. He noticed a person lying there. He gave his name as Ramesh Maruti Shelar. When he asked as to how he had sustained injuries he informed him that one Ramesh Manjrekar had stabbed him on his chest and back. He was also informed that the stabbing had taken place at about 8.30 p.m.

At about 9.30 p.m. Ramesh Shelar was medically examined by Dr. Govind Sadashiv Kubal P.W. 10. Dr. Kubal found that he had sustained a stab injury on the lower right chest 1" x 1/4" x query deep. He also found that at about 9.45 p.m. Ramesh Shelar was gasping and at about 9.45 p.m. there was no response from him.

It appears that Ramesh Shelar succumbed to his injuries at about 9.50 p.m. on 10-10-1983.

4. The FIR of the incident was lodged by Mubarak Mulla P.W. 4 the same day at about 9.50 p.m. It was recorded by Police Inspector, Gangadhar Parsu Naik P.W. 17. On the basis of the FIR a case under Sections 302/114, I.P.C. was registered.

5. Meanwhile Shaikh Jalaluddin P.W. 2 proceeded to Sion Hospital. At about 9.50 p.m. Dr. Aiylam Shivramkrishnan Vyenkatesh P.W. 11 medically examined him. He found that following injuries on his person :

"Incised wound 3/4" x 1/4" x query deep over the right leg. It was over the upper third medially. The injury was actively bleeding (plus+). The patient was thereafter referred to Orthopedic Registrar."

In his opinion, the said injury could have been caused by a sharp cutting weapon.

6. The post mortem examination of the dead body of Ramesh Shelar was conducted on 11-10-1980 between 5.45 p.m. and 7 p.m. by Dr. Chandrashekar Kantappa Kapse P.W. 13. On the dead body Dr. Kapse found the following ante mortem injuries :

1. Contused abrasion on face, right side beneath eye, 5.0 cm. x 1.0 cm.
2. Scratch on back of left forearm upper part middle 1.0 cm., above downwards :
3. Scratch on back of left arm, lower part outer above downwards, 2.2 cms.
4. Abrasion on right shoulder blade upper outer part, obliquely placed, 7.0 cm. x 1.0 cm.

5. Abrasion on back lumbar region middle part centrally 1.0 cm. x 0.5 cm.
6. Incised stab wound on back below right shoulder blade. 4 cm. from middle, obliquely placed 2.5 x 0.8 x 6.5 cms. outer lower angle and tailing. The direction was upwards and inwards.
7. Incised stab wound on chest right side, 2.5 cm. below nipple 1.8 x 0.8 cm. obliquely placed, both angles sharp."

On internal examination the doctor found beneath injury No. 7 the following internal damage :

- (A) Right 4th intercostal space perforated near breast bone, length 1.8 cm.
- (B) 5th costal cartilage nicked;
- (C) Pericardium perforated 1.5 cms.
- (D) Right lower chamber of the heart perforated 1.5 cms.

In the opinion of Dr. Kapse the deceased died on account of injury No. 7 which was necessarily fatal inasmuch as the heart had been perforated.

7. The investigation in the instant case was conducted by S.I. Vilas Rangnata Tupe P.W. 16 and Inspector Gangadhar Parsu Naik P.W. 17. After receiving information from S.I. Mali that Ramesh Shelar had been admitted in Rajawadi Hospital he (P.W. 17) rushed to the said Hospital : he recorded the F.I.R.; and found Ramesh Shelar to be dead. Adam Khan, P.W. 3 was present there. He prepared the panchanama of the place of the incident and thereafter returned to the police station. The same night he interrogated Shaikh Jalaluddin. P.W. 2. Shakuntala P.W. 7 Adam Hussain P.W. 3, Bharat Rane P.W. 5, and Anaji alias Eknath P.W. 6 at 2.15 a.m., 3.30 a.m., 4.10 a.m., 5 a.m., and 5.45 a.m. respectively. After some time he also recorded supplementary statements of Shaikh Jalaluddin, Adam Hussain and Bharat Rane. Since the appellants has been arrested prior to the interrogation of these witnesses they were confronted with them.

8. It is alleged that on 11-10-1980 on the pointing out of appellant Ramesh P.W. 16, P.S.I. Vilas Tupe, in the presence of public panch Baburao Ramchandra Gotawale P.W. 8, recovered a blood stained gupti under a panchanama. The said recovery was effected from a bush near the link road junction.

On 12-10-1980 on the pointing out of appellant Ramdas Penter, S. I. Vilas Tupe in the presence of public panch Anil Ramdhan Avkale P.W. 15, under a panchanama recovered two shirts and a jean having stains of blood. These clothes were said to be belonging to appellant Ramdas Penter and his brother-in-law appellant Ramesh.

On 13-10-80 on the pointing out of appellant Raju, under a panchanama, P.W. 16 P.S.I. Vilas Tupe, in the presence of public panch Tulsidas Gadekar P.W. 14, recovered a blood stained knife from a heap of stones near the junction of Link

Road and the small lane leading towards Ghatkopar.

It may be mentioned that from the place of the incident blood stained earth etc. was also seized during the course of investigation.

Finally after completing investigation P.W. 17 Inspector Naik submitted the charge-sheet.

9. The case was committed to the Court of Sessions in the usual manner. In the trial Court the appellants were charged on a dual count viz. u/s 302 read with 34 I.P.C. and 324 read with 34, I.P.C. The appellants pleaded not guilty and claimed to be tried. In the trial Court, apart from tendering voluminous documentary evidence the prosecution examined as many as 17 witnesses. In defence no witness was examined.

10. The learned trial Judge after considering the evidence on record and hearing submissions of learned counsel for the parties convicted and sentenced the appellants in the manner stated above.

Hence this appeal.

11. We have heard Mr. Suresh Gholkar for the appellants and Mrs. Jyoti S. Pawar APP for the State of Maharashtra. We have also gone through the material exhibits tendered by the prosecution; the deposition of the prosecution witnesses; the statements of the appellants recorded u/s 313, Cr.P.C. and the impugned judgment. After giving our anxious consideration to the matter we are constrained to observe that we do not find any merit in this appeal and the same in our view deserves to be dismissed.

12. The evidence adduced by the prosecution in the instant case can be classified under four heads - (a) the oral dying declaration of the deceased Ramesh Shelar recorded by notice constable Mubarak Mohammed Mulla, P.W. 4; (b) the ocular account furnished by Shaikh Jalaluddin P.W. 2, Adam Hussain P.W. 3, Bharat Rane P.W. 5 and Anaji alias Eknath P.W. 6, (c) motive; and (d) recovery evidence - recovery of blood-stained gupti on the pointing out of appellant Ramesh; blood stained clothes on the pointing out of appellant Ramdas Penter; and blood-stained knife on the pointing out of appellant Raju.

13. The crucial question in this appeal is whether the evidence adduced by the prosecution inspires confidence or not ?

14. We first propose examining the evidence of oral dying declaration deposed to by P.W. 4 Mubarak Mohammed Mulla. His duty was at the EPR counter of the Rajawadi Hospital on 10-10-80 from 6 p.m. to 9 a.m. the next day. At about 9.15 p.m. a ward boy came and informed him that a patient had been admitted in the casualty ward. He went there and when he asked the patient his name the latter told his name as Ramesh Shelar. When he asked him the history of assault, he stated that he had been assaulted by Ramesh Manjrekar with a knife on his chest and back.

15. Mr. Gholkar vehemently assailed the evidence of this oral dying declaration, primarily on the ground that Ramesh Shelar was not in a fit medical condition to have made the dying declaration. In this connection he invited our attention to the medical case papers of Ramesh Shelar, prepared by Dr. Khanna, P.W. 9, at about 9.15 p.m. in Rajawadi Hospital, wherein he has mentioned history of unconsciousness, pulse feeble and pupils semi dilated .He also invited our attention to the evidence of Dr. Kubal who examined Ramesh Shelar. In paragraph 3 of his statement Dr. Kubal stated that at about 9.35 p.m. he found the patient to be gasping and at 9.45 p.m. there was no response from him. Mr. Gholkar urged that in view of this medical evidence it would be extremely hazardous and unsafe for us to believe that Ramesh Shelar was in a conscious condition at 9.15 p.m. to make the oral dying declaration. We find ample merit in this connection of Mr. Gholkar.

Apart from the fact that it is extremely improbable that Ramesh Shelar was in a condition to speak at 9.15 p.m. we find that the evidence of Mubarak Mulla to whom the deceased is said to have made the oral dying declaration to be highly discrepant. Mubarak Mulla has tried to make improvements in his statement in the trial Court regarding the oral dying declaration; whereas in paragraph 5 of his statement in the trial Court he stated that Ramesh Shelar told him that the appellant Ramesh Manjrekar alone had assaulted him, in the FIR he has mentioned that Ramesh Shelar informed him that Ramesh Manjrekar and two other had attacked him.

For the aforesaid reasons, in our view it would not be safe to accept the evidence of the oral dying declaration.

16. We next take up the ocular account furnished by the prosecution.

As mentioned earlier there are four eye-witnesses of the incident, viz. Shaikh Jalaluddin, P.W. 2 Adam Hussain P.W. 3, Bharat Rane P.W. 5, and Anaji alias Eknath P.W. 6. Bharat Rane P.W. 5, as stated above, turned hostile and did not support the prosecution case. In his cross examination; when confronted with portions of his statement recorded u/s 161, Cr.P.C. he disowned having made them. Hence his evidence is of no benefit to the prosecution.

The question is whether the evidence of the remaining three eye-witnesses inspires confidence or not. Our answer for the reasons stated hereinafter is in the affirmative.

17. The star witness of the prosecution in the instant case is the injured witness Shaikh Jalaluddin. We now propose taking up his evidence. He stated that on the date of the incident when at about 8.30 p.m. he was sitting on a cot and talking with the deceased, near the hair cutting saloon, the four appellants, out of whom Ramesh, Vasudeo and Ramdas were armed with guppies and Raju with a knife came. Thereafter Ramdas asked Ramesh Shelar as to why he had threatened Vasu and slapped him. He stated that when he tried to get up Ramesh pushed him, resulting in his falling down on the cot. Then Raju inflicted a knife blow on

his right leg resulting in his pant becoming blood-stained. Then Raju took Ramesh Shelar towards the door of the hair cutting saloon. There Ramesh assaulted Ramesh Shelar with a gupti on his chest. Thereafter Vasu assaulted Ramesh Shelar with a gupti on his back and then Ramdas Penter lifted the hand in which he was carrying a gupti and at that time he (Jalaluddin) ran away towards Dhobi Ghat area and stood at a place from where he could not see as to what was happening.

18. We have gone through the statement of Shaikh Jalaluddin and we find the same to be implicitly reliable. The biggest guarantee of the fact that he saw the incident is his injuries and the circumstance that they were examined within one hour and twenty minutes of the incident taking place. As mentioned earlier he was medically examined at 9.50 p.m. at Sion Hospital by Dr. Vyenkatesh P.W. 11 Dr. Vyenkatesh found that he had sustained an incised wound 3/4" x 1/4" (depth not probed) over his right leg. Dr. Vyenkatesh also stated that the said injury could be caused by a sharp cutting weapon. The nature of injuries sustained by this witness corroborates the manner of assault deposed to by him. Even the statement of this witness pertaining to the assault on the deceased stands corroborated by the medical evidence inasmuch as the post mortem report of the deceased shows that he sustained a incised stab wound on his chest (attributable to the blow of Ramesh) and one incised stab wound on back (attributable to the blow of Vasudeo). There was no difficulty for this witness to have identified the appellants for not only did he know them from before the incident but also because the evidence is that there was electric light very near the place of incident.

19. Assurance is lent to the claim of Shaikh Jalaluddin of having seen the incident by two other circumstances also :- (a) that his statement u/s 161, Cr.P.C. was recorded within 6 hours of the incident taking place by Inspector Naik. P.W. 17, Inspector Naik in paragraph 6 stated that he recorded his statement at 2.15 a.m. on 11-10-1980; and (b) Article 9, the pant which he was putting on at the time of incident and which according to him became stained with blood, as a result of the assault made by appellant Raju was seized during investigation and sent along with his blood (Jalaluddin's) to the Chemical Analyst and the latter found blood of "A" group on pant and also opined that the sample of blood sent to him (Jalaluddin's blood) was also of "A" group.

20. It may also be mentioned that Shaikh Jalaluddin P.W. 2 is a wholly independent witness and had no enmity or bias against the appellants. In the absence of the same we are not prepared to hold that he would have falsely implicated them.

21. It is well settled that the evidence of an injured witness can be the sole basis; in fact the best basis, for either recording or sustaining a conviction. This is because injuries ensure the presence of a witness. And once that is ensured the limited question which remains is that of his credibility and truthfulness. After going through the evidence of Shaikh Jalaluddin we not only find it to be truthful

but also in consonance with probabilities and medical evidence.

22. The time honoured principle is that evidence has to be weighed and not counted. On this principle are based the provisions contained in Section 134 of the Indian Evidence Act which provides that :-

"134. No particular number of witness shall in any case be required for the proof of any fact."

After weighing the evidence of Shaikh Jalaluddin we find it implicitly reliable and even sufficient as the sole basis for sustaining the conviction of the appellants.

23. Fortunately plurality of ocular account is forthcoming in the instant case. Corroboration is lent to the statement of Shaikh Jalaluddin by those of Adam Hussain Baig, P.W. 3, and Anaji alias Eknath P.W. 6. Both of these witnesses in material particulars have corroborated the manner of assault as deposed to by Shaikh Jalaluddin. In addition both these witnesses have stated that appellant Ramdas Penter also inflicted a gupti blow on the back of the deceased. These witnesses have also given plausible reasons for their presence on the place of the incident. Adam Hussain P.W. 3 has stated that at the time of the incident he stopped at the place of the incident to have a betel leaf from a betel shop which was situated there. Anaji alias Eknath P.W. 6 stated that on the date of the incident he had his meals at about 7.30 p.m. and thereafter he proceeded to pipeline in Asalpha village to meet a friend. At about 8.30 p.m. he happened to pass along Dhobi Ghat area (the place of the incident), and noticed Ramesh Shelar and Jalaluddin Shaikh were sitting on a cot. After he had proceeded about 4 to 5 paces ahead he saw the four appellants coming with weapons and thereafter saw the assault.

The evidence of Adam Hussain P.W. 3 and Anaji alias Eknath P.W. 6 is also corroborated by the medical evidence.

Again both these witnesses are wholly independent witnesses and had no axe to grind against the appellants. Had the appellants not been the real culprits, for no rhyme or reason they would not have falsely implicated them.

Assurance is also lent to their claim of having seen the incident by the circumstance that they were promptly interrogated u/s 161, Cr.P.C. by P.W. 17 Inspector Naik. Inspector Naik in paragraph 6 of his statement has stated that he interrogated both these witnesses on 11-10-1980; Adam Hussain in P.W. 3 at about 4.10 a.m. and Anaji alias Eknath at about 5.45 a.m. In our view the evidence of these two witnesses also is implicitly reliable and sufficient for sustaining the conviction of the appellants.

24. We now take up the evidence pertaining to motive. The motive alleged by the prosecution is that on the date of the incident at about 9.30 a.m. Shashikant, the real brother of appellants Ramesh and Vasudeo along with Vasudeo came to the house of Shakuntala P.W. 7, the mother of the deceased Ramesh Shelar and asked the deceased as to why he had threatened Vasudeo and told him that

either he should live peacefully or leave the area. It is also alleged that Vasudeo threatened Ramesh Shelar that he would see him that evening.

(Note : This incident is spelled out in paragraph 3 of Shakuntala's statement. As it is described in the said para the same makes no sense. In our opinion Shakuntala's evidence in respect of it has not been correctly recorded by the learned trial Judge. After reading it we tried to make out as to what actually Shakuntala stated and that is what we have detailed above).

25. It would be significant to point out that the appellants are closely connected with appellant Vasudeo, (appellant Ramesh is his real brother, appellant Ramdas is his brother in law, inasmuch as Ramdas's wife and Ramesh's wife are real sisters). Appellant Raju is the associate of Vasudeo and others. That being so all the appellants had a very very strong motive to commit the murder of the deceased.

We have gone through the statement of Shakuntala P.W. 7 and we find that nothing has been elicited from her cross-examination which could erode her credibility.

26. We finally come to the recovery evidence.

The prosecution case is that under a panchanama on 11-10-1980, in the presence of P.W. 16 Sub-Inspector Tupe and public panch Baburao Gotawale P.W. 8, on the pointing out of appellant Ramesh Bhagwan Manjrekar a blood stained gupti was recovered from inside a bush at the junction of Asalpha Pipeline and Link Road. We have gone through the evidence of Baburao Gotawale and we find the same to be implicitly reliable. He appears to be wholly independent witness who had no bias or animus against the appellants. It may be mentioned that the chemical analyst found blood of "B" group on the said gupti. It is pertinent to point out that the Chemical Analyst found the blood of appellant Ramesh Manjrekar to be of "A" group. Hence we are of the view that the said recovery constitutes a strong incriminating circumstance against Ramesh Manjrekar.

27. We now take up the evidence of recovery of blood stained clothes at the pointing out of the appellant Ramdas Penter in the presence of P.W. 16 S.I. Vilas Tupe and Anil R. Avkale, P.W. 15. The evidence shows that the said recovery was effected on 12-10-1980 at the pointing out of appellant Ramdas from a heap of stones near a patra (hut). The recovered clothes were two shirts and one jean. These clothes are said to be belonging to both appellant Ramdas Penter and appellant Ramesh Manjrekar. The evidence is that out of these clothes article 10 (shirt) belonged to Ramesh Penter. On the said shirt the chemical analyst found blood of "B" group, namely, the blood group of the deceased. It may be mentioned that the Chemical Analyst found the blood of appellant Ramdas Penter to be of "A" group. Hence this is a very strong circumstance which goes against him. The other two clothes viz. a shirt and jeans belonged to Ramesh Manjrekar (Articles 11 and 12). The Chemical Analyst found blood of group "B" on Art. 12 (jeans). This also is incriminating evidence because as mentioned in paragraph

26 the blood-group of appellant Ramesh Manjrekar was "A".

We have gone through the evidence of Anil Avkale and we find the same to be implicitly reliable. He is a wholly independent witness and had no axe to grind against appellant Ramesh Penter. We find no reason as to why he would wrongly attribute the recovery on the pointing out of Ramesh Penter.

28. We now take up the evidence of recovery of blood-stained knife on the pointing out of appellant Raju. As mentioned in paragraph 8 it was made from beneath a heap of stones on 13-10-1980, under a panchanama. We have gone through the evidence of the recovery witnesses and find it reliable. P.W. 14 Tulsidas Gadekar, the public panch is a wholly independent witness and in our view would not have falsely attributed this recovery to appellant Raju. The Chemical Analyst found human blood on knife.

29. To sum up, the evidence of the three eye witnesses viz. Jalaluddin P.W. 2, Adam H. Baig P.W. 3 and Anaji @ Eknath P.W. 6 inspires implicit confidence and leaves absolutely no iota of doubt in our mind that the appellants murdered the deceased on the time, date and place alleged by the prosecution. The evidence of recovery and the existence of a strong motive provide a very strong corroboration to their evidence.

We are squarely satisfied that the learned trial judge acted correctly in convicting and sentencing the appellants on both the counts, namely, under S. 302 read with 34, I.P.C. and S. 324 read with 34, I.P.C.

30. Mr. Gholkar, learned counsel for the appellants made a number of submissions before us.

We have already considered this first submission in respect of the oral dying declaration and not placed reliance on that piece of evidence.

Mr. Gholkar secondly contended that the prosecution case that both Vasudeo and Ramdas Penter assaulted the deceased with guppies on his back is belied by medical evidence, inasmuch as, the doctor who conducted autopsy found only one injury attributable to gupti on the back of the deceased. We regret that we are not able to accept his contention. It is common knowledge that when a person is being assaulted he does not remain stationery. He keeps on moving in order to save himself for the instinct of life is a paramount instinct. It may be that one of the two blows may have missed the deceased while he was trying to rescue himself. It may also be, as urged by Mrs. Jyoti S. Pawar, learned APP that instead of the sharp point of the gupti striking the deceased the blunt side may have struck. Mrs. Pawar urged that this is probable in view of the fact that the post mortem report in the deceased shows that he had sustained an abrasion on his lumbar region which was 1 c.m. x 0.5 c.m. She urged that this may have been the result of one of the two gupti blows of which instead of the pointed part of gupti the blunt side may have struck.

It is significant to point out that the eye-witnesses are wholly independent and

had no axe to grind against appellants Vasudev and Ramdas. In our view unless these appellants participated in the incident they would not have deposed about their presence. Hence we are not inclined to accept the submission of Mr. Gholkar.

Mr. Gholkar thirdly urged that the evidence of recovery, both of knife and of blood stained clothes, does not merit our acceptance because the said recoveries were effected from an open place. We have gone through the relevant evidence and we regret that we cannot accede to this contention of Mr. Gholkar.

Fourthly Mr. Gholkar urged that the conduct of the eye-witness in not disclosing the names of the assailants militates against their claim of having seen the incident. He urged that Adam Hussain P.W. 3 should have disclosed the names of assailants to those who had accompanied him in taking Ramesh Shelar to Rajawadi Hospital and Shaikh Jalaluddin P.W. 2 should have made a similar disclosure to two of his workers who took him on a taxi to Sion Hospital. We regret that we are not able to accede to this contention of his. It appears that there is every likelihood that having seen the murder of the deceased who was done to death in a most ghastly and merciless manner, these witnesses may have been terrified and hence dared not to disclose their names to anyone or due to P.W. 3 being engrossed in rushing Ramesh Shelar to hospital and P.W. 2 in getting his injuries examined. We should also bear in mind that all these witnesses were examined under S. 161, Cr.P.C., within 10 hours of the incident taking place. The time of recording of their statements under S. 161, Cr.P.C. has been mentioned in paragraph 7. The Apex Court has repeatedly emphasised the value of prompt interrogation under S. 161, Cr.P.C. because the same substantially eliminates chances of an adulterated account creeping in, in the testimony of the witnesses. The promptness with which these witnesses have been interrogated under S. 161, Cr.P.C. is a guarantee of the fact that they saw this incident. Hence we reject this contention of Mr. Gholkar.

Fifthly Mr. Gholkar urged that the evidence is that along with P.W. 3 Adam Baig and P.W. 7 Shakuntala two other persons accompanied Ramesh Shelar to Rajawadi hospital and their non-examination has prejudiced the appellants. We find absolutely no substance in this submission. In our view it was only and wholly proper after the prosecution having examined Adam Baig and Shakuntala not to have multiplied evidence in respect of this fact by examining those persons. For a similar reason we are not inclined to accept Mr. Gholkar's submission that the two persons who had accompanied Shaikh Jalaluddin P.W. 2 to Sion hospital were material witnesses and should have been examined.

Finally Mr. Gholkar urged that there must have been an entry in the EPR register of Sion Hospital pertaining to the manner in which Jalaluddin P.W. 2 sustained injury and the said EPR entry was an essential piece of evidence and should have been proved by the prosecution. Again we do not find any merit in this contention.

That Shaikh Jalaluddin went to Sion Hospital immediately after the incident and

got his injuries examined the same evening at 9.50 p.m. is established by the evidence of Dr. Aiylam Vyenkatesh P.W. 11 who had medically examined him and made an entry in the Casualty Register at Serial No. 20073. During trial he proved the said entry as Exhibit 28. Regarding the manner he sustained the injury has come in his statement under S. 161, Cr.P.C. which was recorded within 6 hours of the incident taking place. In case the defence felt that the said EPR Entry was of value for it, it could have got the same summoned and proved.

In our view the failure of the prosecution to have adduced evidence to prove the EPR entry would not falsify or wash out the credit to be attached to the ocular testimony of Jalaluddin.

31. No other point was canvassed by Mr. Gholkar.

32. Pursuant to the above discussion we find no merit in this appeal which is accordingly dismissed. We confirm the convictions and sentences of the appellants recorded vide the impugned judgment. The appellants are on bail. They shall be taken into custody forthwith to serve out their sentences.

We would be failing in our fairness if we do not mention that Mr. Gholkar left no stone unturned to persuade us to allow this appeal. That we have not done so is the result of a deeper reflection by us and also because of the persuasive and tenacious advocacy of Mrs. J. S. Pawar, the learned APP.

Certified copy expedited.

Appeal dismissed.