

(2015) 11 BOM CK 0027

In the Bombay High Court

Case No : Criminal Appeal Nos. 1082, 1226, 1228 of 2005 and 797 of 2008

Sakharam Gunaji Chavan and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-11-2015

Acts Referred:

Arms Act, 1959 — Section 25
Bombay Police Act, 1951 — Section 135, 37(1)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 10, 27
Penal Code, 1860 (IPC) — Section 120(b), 120-B, 147, 148, 149

Citation : (2016) 1 BomCR(Cri) 117

Hon'ble Judges : V.K. Tahilramani, Actg. C.J. and Dr. Shalini Phansalkar Joshi, J.

Bench : Division Bench

Advocate : A.P. Mundargi i/by Ganesh Gole and Manoj Shinde, for the Appellant;
H.J. Dedia, A.P.P., for the Respondent

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.—These four Criminal Appeals preferred by Original Accused Nos. 1 to 23 are arising out of the Judgment and Order dated 27th October, 2005 in Sessions Case No. 79 of 2004 passed by the Additional Sessions Judge, Raigad-Alibag. Hence, they are being decided by this common Judgment. By the impugned Judgment, the Appellants/Original Accused Nos. 1 to 23 have been held guilty and convicted for the various offences punishable under Sections 147 , 148 , 302 , 325 and 427 r/w. 149 of the IPC and Section 37(1) and (3) punishable under Section 135 of the Bombay Police Act. Each of the Appellant is sentenced as follows :-

"* For commission of an offence under Section 147 of the IPC, to suffer R.I. for six months and to pay a fine of Rs. 200/-, in default to undergo further R.I. for fifteen days.

* For commission of an offence under Section 148 of the IPC, to suffer R.I. for

six months and to pay a fine of Rs. 200/-, in default to undergo further R.I. for three months.

* For commission of an offence under Section 302 r/w. 149 of the IPC, to suffer imprisonment for life and to pay a fine of Rs. 1,000/-, in default to undergo further R.I. for two years.

* For commission of an offence under Section 325 r/w. 149 of the IPC, to suffer R.I. for one year and to pay a fine of Rs. 500/-, in default to undergo further R.I. for two months.

* For commission of an offence under Section 427 r/w. 149 of the IPC, to suffer S.I. for seven days and to pay a fine of Rs. 50/-, in default to undergo further S.I. for seven days.

* For commission of an offence under Section 37(1) and (3) punishable under Section 135 of the Bombay Police Act, to suffer S.I. for one month and to pay a fine of Rs. 50/-, in default to undergo further S.I. for seven days."

2. By the impugned Judgment, all the Appellants/Original Accused are however, acquitted for the offences punishable under Sections 307 , 324 , 323 , 452 , 341 , 120-B , 504 and 506 r/w. 149 of the IPC and Section 25 of the Arms Act.

3. Being aggrieved by this Judgment, the Appellants/Original Accused have preferred these four Appeals, whereas, Respondent-State has not challenged their acquittal for the offences referred above.

4. For the sake of convenience, Appellants herein are referred to as Accused Nos. 1 to 23.

5. Factual matrix of the case can be depicted as follows :-

"This case is a fall out of intense political feud and communal rivalry between the two groups of a small Village Talaghar in District Raigad, which has resulted into murder of three persons, some persons being seriously injured and causing damage to the property in the riots committed by one group against the members of the rival group."

6. It is common ground that Village Talaghar is divided in two political factions, namely, the "National Congress Party" and the "Peasant & Workers Party", (hereinafter referred to as "NCP" and "PWP"). The persons from Maratha community of the village are the members of NCP, whereas the persons from Aagri Community are with PWP. All the injured and the deceased were from Maratha community, whereas the accused were the followers of PWP. The relations between the members of these two parties were strained on account of the political rivalry with a colour of community strife and caste enmity. Some of the members of Maratha community defected from their party and joined hands with the people from Aagri Community. This fact added fuel to the political rivalry. There was also the background of clashes between two groups during Ganapati festival in the year 2002. Some cases were launched in respect of the

said altercations in Sessions Court at Alibag.

7. The immediate cause for the incident, which gave rise to the present prosecution case, was the Kabaddi matches held at Village Nivi on 1st May 2004. The matches started in the evening on that day and went on till about 4 am in the morning on 2nd May 2004. The teams of the Maratha community lost the matches and returned to village after midnight, whereas, the teams of the Aagri Community reached upto the final, but lost, and returned to the village in the early morning at about 4 am. On that day, at about 6:30 to 6:45 am, a mob of about 20 to 25 persons, who are later identified as accused in the case, came to the house of PW-2 Pandurang Khaire shouting and giving abuses. Those persons were armed with various weapons like sticks, axes, knives, swords, iron pipes etc. PW-2 Pandurang saw those persons when he was standing in the door of his house and those persons were at the distance of about 50 to 100 ft. As those persons started breaking the bicycles and his motorcycles, he went inside the house and closed the entrance door. Therefore, those persons started breaking open the entrance door. Hence, after giving instructions to his children and family members to hide themselves on the mezzanine floor, PW-2 Pandurang escaped from the rear door of the house. He went towards southern side, where the agricultural lands are situate. On the way, Accused No. 1 Liladhar and Accused No. 2 Gajanan obstructed him. Accused No. 1 Liladhar was having an axe in his hand and Accused No. 2 Gajanan was having an iron rod in his hand. Accused No. 1 Liladhar gave blow of axe on the head of PW-2 Pandurang. PW-2 Pandurang tried to resist the same with his left hand. As a result, the axe blow struck to his left hand and also on his head. Accused No. 2 Gajanan gave blow with iron rod on his leg. By that time, some other accused also came there running. Out of them, Accused Nos. 3, 4 and 5, namely, Tukaram, Babu and Pandu, started giving stick blows to PW-2 Pandurang. The others also started beating him. Due to the assault, PW-2 Pandurang fell down. Then the accused persons scattered themselves. His relatives then took him to Government Hospital at Roha. While he was under treatment there, the other persons, who were also injured, were brought to the hospital. From them, PW-2 Pandurang came to know that due to the assault by the accused, Sahadeo has died on the spot, whereas, Shivram has also expired in the hospital at Roha. Injured Umaji was taken to the hospital at Mumbai, where he also succumbed to the injuries sustained in the assault.

8. Meanwhile, the information of the incident was received on telephone by Police Constable Anil Sanap, who was on PSO duty at Dhatav Outpost at about 6:45 am. He conveyed the said information to PW-27 API Pramod Nalavade at about 6:50 am. Hence, API Nalavade, along with staff, went to the spot and found two injured persons, namely, Umaji and Shivram, lying there. He brought them to Primary Health Center at Roha. There, he recorded the complaint of PW-2 Pandurang Khaire. On this complaint, he registered C.R. No. 51 of 2004. Further investigation of the case was taken over by PW-28 PI Bhalchandra Kulkarni. PI Kulkarni then recorded the statements of the injured and other eye-witnesses to

the incident. He drew the Scene of Offence Panchanama, arrested the accused, seized the blood stained clothes on their person, under various Panchanamas. In custodial interrogation of the accused, the weapons of assault were seized, under Section 27 of the Evidence Act. All the seized muddemal articles were sent to Chemical Analyzer. The Postmortem Notes of the three Deceased and the Injury Certificates of the witnesses were collected by him. Further to completion of due investigation, PW-28 PI Kulkarni filed Charge-Sheet in the Court against the accused on 30th June, 2004.

9. On committal of the case to the Sessions Court, the Trial Court framed charge against the accused vide Exhibit-6. All the accused pleaded not guilty and claimed trial, raising the defence of false implication on account of political rivalry and strained relations.

10. In support of its case, the prosecution examined, as many as, 28 witnesses and relied upon various documentary evidence like Postmortem Notes, Injury Certificates, Panchanamas and Station Diary Entries. On appreciation of their evidence, the Trial Court was pleased to hold the guilt of all the 23 accused to be proved beyond reasonable doubt for the offences of committing riot, being armed with weapons, committing the murder of three persons and causing injury to three witnesses.

11. This Judgment of the Trial Court is challenged in these Appeals by Shri.Yug Mohit Chaudhary, learned counsel for Accused Nos. 6 and 8 by, by Mr. Nitin Pradhan, learned counsel for Accused No. 13, and by Mr. Mundargi, learned counsel for rest of the Accused. The main substratum of their arguments is the inconsistency between the medical and ocular evidence in the light of the omnibus and general statements as to the assault made by various witnesses. According to them, when the incident has taken place at three different places, it was not possible for all the witnesses to be present at all the three incidents, especially, considering the topography of the scene of offence, as brought on record through the evidence of Circle Officer PW-1 Arun Gantandel through his map (Exhibit-36). It is urged that when the mob was consisting of about 20 to 25 persons and, as per prosecution case, the mob was making the assault on more than one persons, it was not possible for the witnesses to attribute specific role to each of the persons in the mob. That is what has exactly happened in the present case. Hence, the possibility of the accused persons being falsely implicated cannot be ruled out, especially, in the back-drop of the intense political rivalry and the strained relations between the parties. It is submitted that the prosecution witnesses and even prosecution itself is also not clear as to the spot of incident. Submission is also advanced that the First Information Report registered by PW-28 PI Kulkarni of PW-2 Pandurang Khaire is not the actual first information received of the incident, as, admittedly, information of the incident was received on telephone by PW-25 Police Constable Anil Sanap. A submission is also made to the effect that PW-2 Pandurang's knowledge about the assault on the Deceased and other injured was merely of a hear-say nature.

12. Thus, according to learned counsel for the accused, there is absolutely no convincing or reliable evidence brought on record by the prosecution to prove the charge against the accused. The entire emphasis is on Section 149 of the IPC, as the accused are convicted with the aid of the said section, but here mere presence of the accused, even if it is accepted to be proved, cannot implicate them with the offences charged, without any specific role or incriminating act attributed to them. In this respect, they have also placed reliance on the C.A. Report proving that, except for the sword, none of the weapons of assault were found to be having the blood stains. Hence, their use in the commission of the offence is also not proved. None of the injured or the Deceased have sustained any incised wound. All the injuries found on their person were in the nature of contusions, abrasions and CLWs. Hence, use of the weapons like axe, sword, knife is also not proved. Thus, in sum and substance, the submission of learned counsel for the accused is that, though it is an unfortunate case of triple murder and some persons being injured in the incident, the failure of the prosecution to prove the charge against the accused being writ large on the face of the record, the Judgment of the Trial Court convicting the accused cannot stand on legal scrutiny. To substantiate their submissions, learned counsel for Accused have placed reliance on the various decisions of the Apex Court, which will be considered in the course of Judgment.

13. Per contra, learned A.P.P. Mr. Dedia has submitted that the evidence in the case is of injured eye-witnesses, whose presence at the spot of the incident cannot be challenged or disputed. The evidence of these witnesses is definite and certain to prove the presence and involvement of these accused in the incident, which has resulted into the murder of three persons and injury to some persons, as a result of political feud and communal rivalry. According to him, when the charge is under Section 149 of the IPC, it implies vicarious liability. The prosecution, therefore, is not expected to prove the incriminating act of each and every accused. Their presence at the spot with the common object is sufficient to implicate them in the offence. In the present case, according to him, the prosecution has succeeded in proving the common object of this unlawful assembly and the riots committed by them with the weapons in their hands. According to him, there is no inconsistency in the evidence of eyewitnesses and medical evidence. Even if there is some inconsistency, the evidence of eye-witnesses will always prevail over the medical evidence, it being an opinion evidence. To substantiate his submissions, learned A.P.P. also relied on the latest pronouncements of the Apex Court, which will be discussed in detail at a relevant point.

14. In our considered opinion, for appreciating the rival submissions advanced by the learned counsels at bar, it would be useful to refer to the factual aspects of the case and also the evidence, as brought on record by the prosecution, to throw light on factual aspects.

15. As to the factual aspects, as stated above, undisputedly, the present case is

the outcome of the rivalry between two political parties. The injured and Deceased belonged to the Maratha community, which was owing allegiance to National Congress Party, whereas, the accused in the case belonged to Aagri Community, which was owing allegiance to Peasants and Workers Party. On account of defection of some members from the Maratha community to PWP during the last Panchayat elections, the relations had further strained between these two communities. Some cross criminal cases were also launched in the Sessions Court, Alibag, due to the clashes between the two communities in the Ganpati festival of 2002. It is submitted at bar, also by the learned counsels for accused, that Village Talaghar was, to that extent, equally divided between these two parties. The injured and the Deceased were not only of same political party and community, but also closely related by blood. Deceased Umaji was the father of injured PW-5 Arvind. PW-2 injured Pandurang Khaire was the father-in-law of PW-5 Arvind. Deceased Umaji, deceased Shivram and PW-8 Pandurang were brothers inter se and were the maternal uncles of Deceased Sahadeo. PW-15 injured Santosh Omale was the son of PW-8 Pandurang Omale. PW-7 Sarika Navashe is the wife of deceased Sahadeo. PW-6 Kashibai Omale is the wife of deceased Shivram. Thus, injured and Deceased belonged to, more or less, of the same extended family. Whereas, accused also are related inter se.

16. The incident, as can be seen from the map drawn by the Circle Officer PW-1 Arun Gantandel, had taken place at three different places; incident relating to deceased Sahadeo took place in the field of Narayan More, whereas, incident relating to deceased Shivram and Umaji took place in the field of Ramesh Salvi. The distance between the two fields is of 1,130 ft. The incident relating to injured Santosh took place in the field of Suresh Mundhe, which is at the distance of about 150 ft. from the field of Ramesh Salvi. The incident of rioting relating to PW-2 Pandurang Khaire took place again at some distance from the field of Ramesh Salvi. Naturally, there are different sets of witnesses to these three to four incidents. Some witnesses are common as the mob has proceeded from one place to another and coming to know of the earlier incident, the witnesses had rushed to subsequent incident also.

17. The first incident in this respect relates to the death of Sahadeo, husband of PW-7 Sarika. Before adverting to her evidence, it needs to be noted again that, one of the common ground between the parties was that Accused No. 23 Gopinath was on crossed terms with deceased Sahadeo and, as deposed by PW-7 Sarika, there was dispute between them in respect of the property matters. Otherwise also, both the parties, that of complainant and accused, were looking for an opportunity to pick-up the quarrel and altercations and just to take the revenge against each other. The immediate cause for the same was provided to the parties on account of the Kabaddi matches, that took place in Village Nivi on the evening of 1st May, 2004 and continued till the early hours of the next day morning. The said matches were attended by both the parties. In those matches, the teams from Maratha community lost and returned to the village by mid-night, whereas, the teams from the Aagri Community initially won the matches,

but lost in final. Hence, they also returned to village by early morning hours. PW-12 Vaijanti Kalambe, who is residing in the Khalachi Alley, deposed that, on the night intervening between 1st and 2nd May, 2004, at about 11:45 pm, she heard the noise of some people talking amongst themselves. Therefore, she opened back side door and found some persons, namely, Accused No. 6 Laxman, Accused No. 8 Ganpat, Accused No. 7 Devji, Accused No. 11 Gajanan and five to seven more persons, sitting near the house of Mr. Pawar. At 3:30 am also, at night, when she got up, those persons were sitting there. She saw them, when she came out of her house to answer the call of nature. Seeing her, all of them started going towards the temple of Lord Shankar through the lane adjacent to their house.

18. Further, there is also evidence of PW-13 Swati Kalambe, whose house is near the temple of Lord Shankar. As per her evidence also, she saw there Accused No. 8 Ganpat, Accused No. 6 Laxman, Accused No. 9 Vijay, Accused No. 12 Sachin, Accused No. 14 Harishchandra and Accused No. 3 Tukaram. She has deposed about hearing their conversation that they should take revenge of those who have joined Aagri Community by leaving Maratha community. Even if her evidence to that effect is required to be disbelieved as it may not be possible for her to hear the same from her bathroom, the evidence of these two witnesses prove that the accused persons were assembled together and were planning some incident on that night, after returning from the matches.

19. Now coming to the evidence of PW-7 Sarika, wife of deceased Sahadeo, she has deposed that, on that day, at about 6 am, her husband had gone to the field, as usual, to answer nature's call. While she was in the house, her husband's brother Gopinath, Accused No. 23, came to her house and told her that her husband Sahadeo has been assaulted by them and thrown in the field. He also told her that . When she asked Gopinath as to who has done it, he told her names as Accused No. 6 Laxman, Accused No. 7 Devji, Accused No. 10 Yashwant, Accused No. 13 Ramesh and other seventeen to eighteen persons, who had beat her husband. He also told her that Accused No. 8 Ganpat was also there in assaulting her husband. He further instigated her that she should go to her husband's maternal uncle and inform him about it. As per her evidence, then she went to the house of her husband's maternal uncles and informed them about it.

20. As per her further evidence, when she went to the house of her husband's maternal uncles, namely, deceased Umaji and deceased Shivram, and told them about the incident, both, deceased Umaji and Shivram, went to the field to see what has happened. PW-7 Sarika, who has sustained the paralysis attack and was not able to walk and do free movements, then went to the house of PW-3 Sadanand More and told him to come to the field. She herself walked slowly towards the agricultural land. At that time, she saw these accused persons coming from the said field. She became frightened and went to the field by another way. In the field, she did not find her husband. Hence, she went towards

the brooklet. There she saw her husband lying on the ground in unconscious condition with bleeding injury on his forehead. His hands and legs were broken. He was not responding to her calls. She sat near him crying. Slippers of her husband were lying there. Police came there after some time and took her husband to the Government Hospital at Roha, where he was declared dead. The slippers of her husband (Article No. 5) found at the spot by the Police at the time of drawing Scene of Offence Panchanama are identified by her in the Court. Except for eliciting the fact that her relations with the accused were strained, nothing worthwhile is brought out in her cross-examination.

21. Her evidence about Accused No. 23 Gopinath boasting before her that her husband has been assaulted by them and thrown in the field is in the nature of extra judicial confession made by Accused No. 23 Gopinath. The submission of learned counsel for the accused is that this part of her evidence that Accused No. 23 Gopinath told her about assault on Sahadeo, suffers from improbability as it belies the human nature. In our considered opinion, however, human nature is such that no generalized statement can be made as to how a human being will react or act in a particular situation. To cast human behaviour in some uniform iron jacket is against the reality of the situation. It may depend on person to person and situation to situation how a human being will act or react. Moreover, there is nothing unnatural, in the present case, of Accused No. 23 Gopinath going to the house of PW-7 Sarika, his sister-in-law, and boasting before her about the assault of her husband, when looked at in the light of the crossed terms between them over the property disputes. There is also nothing unlikely in PW-7 Sarika asking him about the names of assailants and then going to the house of the maternal uncles of her husband and informing them about such assault. There is also nothing unnatural in her conduct of going to the field and finding her injured husband near the brooklet.

22. Moreover, her evidence to that effect gets complete support and corroboration from the evidence of PW-8 Pandurang Omale, brother of deceased Umaji and deceased Shivram. According to the evidence of PW-8 Pandurang, at about 6:30 am, his brothers Umaji and Shivram went to see Sahadeo when they came to know that deceased Sahadeo has been assaulted. He also followed them with his son PW-15 Santosh and brother PW-5 Arvind. According to him, when they were following deceased Shivram and Umaji, they found the accused persons gathered in the field of Ramesh Salvi. The accused were armed with the weapons and seeing him, Arvind and Santosh, accused persons rushed on them. They caught hold of his son PW-15 Santosh and assaulted him with iron bars, sticks and axes. When he proceeded ahead to rescue his son Santosh, accused persons started beating him also. Accused No. 14 Harishchandra gave him a blow of axe on his right leg below knee, whereas, Accused No. 9 Vijay gave him the blow of iron rod on his right hand, twisted his right leg and caused fracture to it. Accused No. 2 Gajanan gave him a blow with wooden stick. Accused No. 12 Sachin also assaulted him with stick on his hands and legs. Therefore, he fell down with the injuries. After the assailants went towards the village, Police came

there and he was shifted to the Government Hospital at Roha and from there to Mumbai. As in the said assault, deceased Umaji, PW-15 Santosh and PW-2 Pandurang were also injured, they were also shifted to the hospital in Mumbai. He was admitted in the hospital for about seven days. Police has recorded his statement in the hospital itself in between 8 to 9 am.

23. The evidence of PW-8 Pandurang gets full support and corroboration from the evidence of PW-5 Arvind and PW-15 Santosh. Evidence of PW-5 Arvind goes to prove that, on that day, PW-7 Sarika, wife of deceased Sahadeo, told them that Sahadeo is being assaulted in his field. Hence, he got up and came out of the house. Then his father deceased Umaji, uncle deceased Shivram and PW-8 Pandurang and PW-15 Santosh started proceeding towards the said field to see what has happened. He also followed them after some time. When he came near the field of Ramesh Salvi, he found that accused persons were already present there with various weapons in their hands like swords, knives, axes, sticks. He also found there PW-3 Sadanand More and PW-4 Thamaji Kambale present. Accused gave threatening to them not to come forward as they want to smash the houses of Omale, Khaire and Shirke as well as to kill them. Due to those threats, PW-3 Sadanand and PW-4 Thamaji retracted by five to six spaces. This witness, however, remained there and saw that Accused No. 6 Laxman gave a blow of chopper in his hand on the head of deceased Shivram, whereas, Accused No. 8 Ganpat gave a blow of sword in his hand on the head of deceased Umaji. The other accused were assaulting with weapons in their hands to both deceased Umaji and Shivram. After assault on them, the accused rushed on him, PW-8 Pandurang and PW-15 Santosh. He managed to immediately run away from the spot. From there, he went in six seater rickshaw to Roha Police Station. The Police Officer, who was present there, came along with him. By then, PW-5 Arvind has also given information to Dhatav Outpost. However, by that time, Police had already received the information and had gone to the Village. Therefore, he returned to the Village and came to know that deceased Sahadeo, Shivram and Umaji, injured PW-8 Pandurang and PW-15 Santosh were already shifted to the Government Hospital at Roha. Hence, he also came to the Government Hospital at Roha. There he came to know about the death of Shivram, Sahadeo and shifting of Umaji, PW-8 Pandurang and PW-15 Santosh to the hospital at Mumbai.

24. Further corroboration to the evidence of these two witnesses is also coming from the evidence of PW-15 Santosh, son of PW-8 Pandurang. According to him, he has also accompanied his father PW-8 Pandurang and deceased Shivram and Umaji, when he came to know about the assault on Sahadeo. On the way at the field of Ramesh Salvi, they were obstructed by the accused with weapons in their hands. He witnessed the assault on deceased Umaji by Accused No. 8 Ganpat with sword in his hand on the head of deceased Umaji and he also saw the other accused assaulting deceased Umaji and Shivram. According to his evidence, Accused No. 12 Sachin came across him and gave him the blow of stick on his face below the ears. Accused No. 9 Vijay also assaulted him with iron rod on his head. Then Accused No. 12 Sachin again gave him the stick blow on his right leg.

His father PW-8 Pandurang came there to rescue him. At that time, Accused No. 14 Harishchandra, Accused No. 12 Sachin, Accused No. 9 Vijay, Accused No. 11 Gajanan and Accused No. 7 Devji started beating him. Accused No. 14 Harishchandra gave him the axe blow by rear side on his right leg and also on the right leg of his father PW-8 Pandurang. Due to the assault, his father PW-8 Pandurang fell down. After the assault, PW-15 Santosh saw all the accused going towards the village. Due to the said assault, he was also admitted in the hospital for eight days by the Police.

25. As to the incident of this assault on the deceased and injured, the prosecution has also relied on the evidence of PW-3 Sadanand and PW-4 Thamaji. According to PW-3 Sadanand, at about 6:30 am, PW-7 Sarika knocked on the door of his house. He opened the door and found that she was in a very frightened condition. She told him that the people from Khalachi Alley have assaulted her husband in the field. She requested him to accompany her to bring her injured husband to the house. Hence, he came out of the house and went to the house of PW-4 Thamaji. He was sleeping. He narrated him the incident as told to him by PW-7 Sarika and then both of them started proceeding towards the agricultural field. On the way, they saw accused persons in the agricultural land of Ramesh Salvi. Those accused persons encircled both of them. Accused were armed with the weapons like sticks, swords, knives, choppers etc. and threatened them not to proceed ahead, otherwise they will be also killed.

26. As per evidence of PW-3 Sadanand and PW-4 Thamaji, both of them became frightened and turned back. At that time, they saw deceased Shivram, deceased Umaji, PW-15 Santosh, PW-8 Pandurang and PW-5 Arvind coming there one after another and proceeding ahead crossing them. They further saw that Accused No. 6 Laxman gave a blow of knife on the head of deceased Shivram, whereas, Accused No. 8 Ganpat inflicted sword blow on the head of deceased Umaji. The remaining accused were assaulting deceased Shivram and Umaji with other weapons in their hands. At that time, PW-15 Santosh and PW-8 Pandurang went to their help, to rescue Umaji and Shivram. Accused persons assaulted PW-15 Santosh and PW-8 Pandurang also with weapons in their hands. As per evidence of both these witnesses, after witnessing such incident, they got more frightened and started running to their house. The accused persons also followed them. Then accused entered into the house of deceased Umaji. They started breaking the articles in the house and causing damage to the motor-cycle and bicycles. Accused persons were also beating female members and children in the house. Thereafter accused went to the house of PW-10 Namdeo Omale. There also, they caused damage and assaulted the family members. Thereafter, the accused left towards their houses in Khalachi Alley. After some time, the Police came there and took injured to the hospital. PW-3 Sadanand More has acted as Panch to the Inquest Panchanama of deceased Shivram, Sahadeo and Umaji.

27. Thus, as regards the actual incident of assault on the two deceased, namely, Shivram and Umaji, there is consistent and certain evidence of PW-3 Sadanand,

PW-4 Thamaji, PW-8 Pandurang, PW-15 Santosh and PW-5 Arvind. They have attributed specific acts of assault to the accused, on them and also on the injured and deceased. No inconsistency or discrepancy is brought out from their evidence to discredit them in any way. Their presence at the spot is also natural one. Being related inter se, after coming to know about the assault on Sahadeo from his wife PW-7 Sarika, it is but natural for them to rush to the spot where Sahadeo was assaulted.

28. As to the third incident relating to rioting committed by the accused in the house of the witnesses, first and foremost, there is evidence of PW-2 Pandurang Khaire, who was related to deceased Umaji, as his son-in-law. According to his evidence, on that day, at about 6:30 to 6:45 am, accused came to his house giving abuses and shouting, with various weapons in their hands like sticks, axes, big knives and swords. He saw them when they were at the distance of 50 to 100 ft. from the house. Hence, he closed the doors. However, accused started breaking the bicycles and motor-cycle. Thereafter, they started breaking open the entrance door. Hence, after instructing his family members to hide themselves on mezzanine floor, he escaped from the rear side door. He went towards the agricultural land. On the way, Accused No. 1 Liladhar and Accused No. 2 Gajanan obstructed him. Accused No. 1 Liladhar gave the axe blow on his head, whereas, Accused No. 2 Gajanan assaulted him with iron rod. Accused No. 4 Babu, Accused No. 3 Tukaram and Accused No. 5 Pandu also came there running with sticks in their hands and started beating him. Due to the assault, he fell down and sustained the injuries. After accused persons scattered themselves, his relatives came there and took him to the hospital, where his complaint (Exhibit-38) came to be recorded. There, other injured, namely, PW-8 Pandurang Omale and PW-15 Santosh were also present and from them he came to know about the murderous assault on deceased Shivram and Umaji.

29. In respect of this incident, there is also the evidence of PW-9 Priti Omale, the niece of deceased Shivram and Umaji. According to her evidence, at about 7 am on that day, when she came out of the house on the road, she came to know that deceased Sahadeo and her uncle are being assaulted in the field. She also saw her father running towards the house from the field and accused persons chasing her father. They were about 20 to 23 and armed with weapons. She found Accused No. 6 Laxman having knife in his hand, whereas Accused No. 7 Devji and Accused No. 8 Ganpat were armed with sword. Other accused were having sticks, iron bars and stumps in their hands. Her father PW-10 Namdeo entered into the house. Then she and her mother closed the door of the house. The accused broke open the door of the house. Accused No. 6 Laxman gave her slap across the face. Accused No. 12 Sachin pushed her away, Accused No. 14 Harishchandra gave a blow of stump to her mother Kashibai. Then those accused persons caused damage to the Show-Case, T.V. Fridge and Gas Stove. Since they did not find her father in the house, they went away from the back door. After some time, she came to know that her uncles were severely injured in the field. Hence, she herself and her mother Kashibai went towards the field. There she

saw her uncles PW-8 Pandurang, deceased Shivram and deceased Umaji lying in the field with injuries on their person. Her mother Kashibai gave water to deceased Shivram. She went to her house and brought some leaves of plant to stop the bleeding of Shivram. Thereafter, Police came and shifted the injured to the hospital.

30. Her evidence is corroborated by the evidence of PW-6 Kashibai Omale, her mother, who has also deposed about PW-7 Sarika coming to their house and informing of the assault on Sahadeo by the accused and then her husband Shivram and brother-in-law Umaji rushing towards the field. Thereafter, she woke up her son, PW-8 Pandurang. He also followed them. As per her evidence, while she was in the house, accused came there and caused damage to the articles in the house. They also told her that they have already killed her husband and her son had escaped from their clutches. Hearing the assault on her husband, she took water in the pot and went towards the field to see her husband. Her evidence proves that her husband was lying in the field in injured condition and suffering with pain. She gave him some water and started crying. He asked her where was their son Babu and whether he was injured. He further told her that he will not live and she should call Babu to inform Police about him. When she asked him who has assaulted him, he gave her the names of four accused persons with some difficulty, namely, Accused No. 8 Ganpat, Accused No. 6 Laxman, Accused No. 10 Yashwant and Accused No. 7 Devji. She sat there with him. After some time Police came and took Shivram to the hospital.

31. The prosecution is also relying on the evidence of this oral Dying Declaration of deceased Shivram made before PW-6 Kashibai as regards the murderous assault committed on him. We find it to be completely reliable and deserves to be accepted without any hesitation. Her going to the field to give water to the husband and asking him about the names of the assailants, is nothing but natural. Her evidence is, therefore, rightly relied upon by the prosecution not only to prove the riots committed by the accused persons in the village, but also to prove the oral Dying Declaration of deceased Shivram as to the incident of actual assault on the deceased and the injured.

32. The prosecution has also examined PW-10 Namdeo, the brother of deceased Umaji and Shivram, who has also deposed about PW-7 Sarika coming to their house to inform about the assault on Sahadeo and thereafter Shivram and Umaji going towards the field. He followed them. He saw the accused coming from opposite direction, armed with weapons. Since they rushed on him, he ran back to his house. As he was under impression that they may assault him, he hid himself on the mezzanine floor of the house. The accused persons came to his house, caused damage to the household articles and went away from rear door. Then he got down from the mezzanine floor and came to know about the injured being taken to the hospital.

33. The evidence of PW-11 Jitendra Shirke proves that accused persons had come to his house also and caused damage to the electric meter and mangalore

tiles of the roof. Accused No. 12 Sachin gave him the blow of stick on his head. Accused No. 11 Gajanan assaulted him with iron bar and other accused gave kicks and fists blows. Accused No. 11 Gajanan pushed his grand-mother. She was also admitted in the hospital for one day.

34. PW-14 Savita Khaire, wife of PW-2 Pandurang Khaire, is again an eye-witness to the incident of rioting, that had taken place in the house. PW-16 Chandrakant Omale has deposed about accused entering into the house of deceased Umaji and then coming to his house. He got frightened and ran away towards the house of Aagri Community. After Police came to the village, he returned to the house and found that Show-Case, T.V., Wall-Clock and Motor-Cycle in his house were damaged.

35. Thus, in this case, the evidence of the eye-witnesses can be categorized into three groups; first group is of the witnesses who are injured in the incident of assault that took place in the field, namely, PW-5 Arvind, PW-8 Pandurang and PW-15 Santosh. The second category of the eye-witnesses is of the injured but not in the incident of assault in the field but in the riot that took place in the village, namely, PW-2 Pandurang, PW-9 Priti, PW-11 Jitendra and PW-16 Chandrakant. Third category is of the eye-witnesses, who have witnessed both the incident of assault in the field and also of the riots in the village, namely, PW-3 Sadanand, PW-4 Thamaji and PW-10 Namdeo. The evidence of all these three categories of eye-witnesses is thoroughly consistent inter se. Their presence at the spot of incident is also natural one. Nothing is brought out in their cross-examination, except for some minor omissions or inconsistencies, which are bound to occur in the evidence of any truthful witness, especially, when the witness himself is injured in the incident in which several persons were assaulted by number of accused persons. The evidence of these witnesses have a colour of consistency, a sense of straightforwardness and a ring of truthfulness, as a result of which, it inspires confidence in the judicial mind. Their evidence not only proves the presence of each of the accused in the incident alleged against them, but also their involvement and the particular role played by them.

36. In addition to this set of eye-witnesses, there is evidence of oral Dying Declaration of deceased Umaji, proved through evidence of PW-6 Kashibai, attributing the cause of his death to the accused, and extra-judicial confession of Accused No. 23 Gopinath before PW-7 Sarika, attributing the cause of Sahdeo's death to himself and other co-accused. This set of evidence also cannot be brushed aside as its source is proved to be natural.

37. This ocular account of the incident further gets corroboration from the medical evidence on record. PW-23 Dr. Shital Joshi, who, at the relevant time, was working as Medical Officer at Rural Hospital at Roha, where the injured were taken immediately after the incident, has examined them at about 8:15 am and onwards. On examination of PW-2 Pandurang Khaire, who was brought to the hospital in injured condition, she found, as many as, 17 injuries on various parts of his body, out of which, there were 9 CLWs, 6 contusions and 2 abrasions.

According to her, these injuries were on the forearm, shoulder, upper arm and lower legs. They were fresh and caused by hard and blunt object. She has transferred the patient to the Sion Hospital, Mumbai for x-ray and further treatment. The injury certificate of PW-2 Pandurang Khaire is at Exhibit-97.

38. At the same time, she has also examined PW-15 Santosh Omale and on his person also, she found 4 CLWs and 2 abrasions on the forearms and legs. He was also referred to the Sion Hospital, Mumbai for x-ray and further treatment. His injury certificate is at Exhibit-98.

39. On examination of deceased Umaji, who was aged about 56 years old, she found following injuries :-

"(i) CLW - 7 x 2 x 3 cm over left lower leg.

(ii) Contusion - 15 x 2 cm over right lower leg.

(iii) Contusion - 2 x 1 cm over left forearm.

(iv) CLW - 5 x 2 x 0.5 cm over left elbow.

(v) CLW - 7 x 2 x 1 cm over left parietal region.

(vi) CLW - 3 x 0.5 x 0.5 cm over left.

(vii) Contusion - 10 x 3 cm over left upper arm."

40. The injuries, according to her, were fresh in nature and caused by hard and blunt object. Injury No. (v), being the head injury, was grievous and serious, for which she transferred the patient to the Sion Hospital, Mumbai. She also found Injury No. (ii) of grievous and serious nature. She has issued the Injury Certificate (Exhibit-99) accordingly.

41. On the same day, she has examined, PW-11 Jitendra Shirke, the injured, and found one CLW on his eyebrow and one Contusion each on upper arm and lower leg.

42. On the very day, she carried out autopsy on the dead body of Shivram, who has succumbed to the injuries sustained in the assault and was brought dead to the hospital. She noticed following injuries on his person.:-

"(i) CLW over forehead in middle 7 cm x 2 cm x bone deep, fracture of frontal bone.

(ii) CLW over right side forehead - 2 x 0.5 cm x 0.5 cm.

(iii) CLW over occipital region - 5 x 1 x 0.5 cm.

(iv) Contusion over right shoulder - 6 x 2 cm.

(v) CLW over right little finger, encircling the distal phalynx.

(vi) Contusion over right elbow - 5 x 3 cm.

- (vii) Contusion below right axilla - 5 x 3 cm.
- (viii) Contusion over right side of back - 3 in numbers, 15 x 2 cm, 13 x 2 cm, 14 x 2 cm oblique and parallel to each other.
- (ix) Contusion over right side back lumbar region - 3 x ___ cm.
- (x) Contusion over right upper arm - 6 x 2 cm posterior.
- (xi) Contusion over right upper arm - 4 x 1 cm anteriorly.
- (xii) Contusion over right elbow 2 x 1 cm posteriorly.
- (xiii) Contusion over right thigh lower 1/3rd 13 x 5 cm - fracture of femur lower 1/3rd.
- (xiv) Contusion over right lower leg upper 1/3rd 7 x 3 cm, fracture of right tibia, fibula upper 1/3rd.
- (xv) Contusion over left thigh lower 1/3rd 10 x 3 cm fracture of left femur lower 1/3rd.
- (xvi) Contusion over left lower leg upper 1/3rd 5 x 2 cm, fracture of left tibia fibula upper 1/3rd."

43. According to her, all these injuries were ante mortem. Injury Nos. (i), (ii) and (iii) were on the head with corresponding internal injuries like bruising of scalp over frontal region. She also found fracture of frontal bone in midline and subdural hematoma in frontal region with injury to both frontal lobe of brain anteriorly. On internal examination, she further found the injury on the right side over lower lobe pale with hematoma on lower lobe of right lung. According to her, internal injuries, as noted in Column No. 20 of the Postmortem Report (Exhibit-103), were corresponding to the external injuries and the cause of the death was on account of "hemorrhagic shock due to multiple injuries and injury to brain matter". She has further opined that these injuries were sufficient in the ordinary course of nature to cause death and even the instant death is possible.

44. On that day, she has also carried out postmortem on the dead body of Sahadeo and found 13 external injuries in the nature of contusions and CLWs with compound fractures, as noted in the Postmortem Report (Exhibit-104). She has opined that all these injuries were ante mortem and they had resulted into the bruising of scalp over right side parietal temporal region, fracture of right temporal bone with subdural hematoma on the right side temporal region. The cause of his death was also found to be "hemorrhagic shock due to multiple injuries with subdural hematoma".

45. As regards deceased Umaji, he has succumbed to the injuries in Sion Hospital, Mumbai. His postmortem was conducted by PW-24 Dr. Raghvendra Vishwakarma, who has found 7 CLWs on the various parts of his body, the fracture of left radius and ulna, fracture of lower end of left humerus and fracture of left tibia and fibula. He also noticed scalp hematoma over right fronto parietal

region and brain odema subarachnoid heamorrhage over right fronto parietal region. According to him, the cause of death was "shock following multiple injuries in a case of assault (unnatural)". The Postmortem Notes issued by him are at Exhibit-117.

46. The main attack of the Defence Counsels is on this medical evidence itself, as, according to them, it is not going hand-in-hand with the ocular account of the evidence, as given by the alleged eye-witnesses. By pointing out to the injuries, as noted by PW-23 Dr. Shital Joshi and PW-24 Dr. Vishwakarma, it is submitted that all these injuries, either found on the dead body of Umaji, Sahadeo or Shivram or on the persons of injured like PW-2 Pandurang and PW-8 Pandurang or other witnesses, they were in the nature of contusions or CLWs, at the most, abrasions. However, not a single injury in the nature of incised wounds or rupture was found on the dead body of either Umaji, Shivram or Sahadeo or even on the person of any of the injured persons. According to learned counsels for the accused, the medical evidence, thus, totally falsifies and demolishes the ocular account of the incident as given by the eye-witnesses, because, according to the eye-witnesses, the assault was made by sharp edged weapons like axe, knife, sword, chopper etc. Especially, as regards the assault on deceased Umaji and Sahadeo, it is submitted by them that all the witnesses are consistent and categorical that Accused No. 6 Laxman has assaulted deceased Shivram on his head with the knife, whereas, Accused No. 8 Ganpat has assaulted deceased Umaji with sword on his head. It is also brought out through cross-examination of these eyewitnesses that assault was made by sharp side of these weapons. According to learned counsels for the Accused, if the evidence of the eyewitnesses to the effect that assault was made by sharp edged weapons like axe and choppers is to be accepted as true, then the medical evidence is required to be discarded, as it does not show any injury; even the fatal injury on the head of the deceased to be caused by sharp edged weapon like chopper or sword alleged to be used by Accused No. 6 Laxman and Accused No. 8 Ganpat. According to them, therefore, medical evidence, in the instant case, belies the prosecution version.

47. Hence, Mr. Nitin Pradhan, learned counsel for Accused No. 13, has placed reliance on Ram Narain Singh Vs. State of Punjab, , especially to para No. 14 of the said Judgment, to advance his submission that, "where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case, and unless reasonably explained, it is sufficient to discredit the entire case".

48. In this case, the Apex Court has placed reliance on the observations in Mohinder Singh Vs. The State, , to the effect that, "in a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which

and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle".

49. The learned counsel for the accused has submitted that, in the present case, when the direct evidence is not supported by the expert evidence of the Doctor, then, as held in the above said authority, the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence.

50. Mr. Nitin Pradhan, the learned counsel for Accused No. 13, has also relied upon the observations made by the Apex Court in *Kartarey and Others Vs. The State of Uttar Pradesh*, , especially in para 26 of the said Judgment, to advance his submission that, it was necessary for the prosecution to elicit the opinion of medical witness, who had examined the injuries of the victim, to know whether all or any of the injuries could be caused with the weapons alleged to be used. In the present case, Mr. Nitin Pradhan has urged that prosecution has not done so and hence there is aberration in the course of justice.

51. Shri.Yug Mohit Chaudhary, learned counsel for Accused Nos. 6 and 8, has also relied upon the authority of *Bhola Singh Vs. State of Punjab*, , to submit that, the normal presumption is that when the sharp edged weapons are used in the commission of assault, they are used only from the sharp edge side and not from blunt edge side. Here in the case, it is submitted that the eye-witnesses were specifically asked in the cross-examination and they have deposed that the assault was made by sharp edge side of the weapons like axe, chopper, sword. Therefore, in addition to the presumption available to the Defence, there is also admission of the witnesses proving that the assault was made by sharp edge side and not by blunt side. In such circumstances, according to him, the absence of any incised wounds on the body of the deceased or on the injured persons makes it questionable as to whether the eye-witnesses had really witnessed the occurrence, as had taken place.

52. Per contra, the learned A.P.P. has relied upon recent decision of Supreme Court in *Kuria and Another Vs. State of Rajasthan*, , to advance his submission that, medical evidence cannot override the ocular account of the incident, as given by the eye-witnesses. Witnesses being the eyes and ears of justice, the importance and primacy has to be given to the ocular account, whereas, the medical evidence, being an opinion evidence, cannot take precedence. According to him, unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy. In the instant case, he has urged that the medical evidence is not of irreconcilable nature so as to give primacy to the same.

53. The question whether primacy is to be given to ocular account of the incident, as given by the eye-witnesses, or, to the opinion evidence of Medical Officer, is really a vexed and complex question. It has engaged the attention of

the Courts over a long period on innumerable occasions. Ultimately, it was held that no hard and fast rule can be laid down therefore.

54. In the case of Baso Prasad and Others Vs. State of Bihar, , it was held that, in some cases, medical evidence may corroborate the prosecution witnesses; in some, it may not. The Court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case.

55. In the above referred authority of Kuria & Anr. (supra) relied upon by the A.P.P., the Supreme Court has taken the review of its earlier decisions on this issue and by placing reliance on Krishnan and Another Vs. State Rep. by Inspector of Police, , held that, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witness account, which had to be tested independently and not treated as the variable, keeping the medical evidence as constant".

56. It was further held that, "it is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. Eye-witnesses account would require a careful independent assessment and evaluation of its credibility, which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touch-stone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with undisputed facts, the credit of the witnesses; their performance in the witness box; their power of observation etc. Then, the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation".

57. In this authority, the Apex Court has also held that, the position of law in cases where there is contradiction between medical evidence and ocular evidence can be crystallized to the effect that unless oral evidence is totally irreconcilable with the medical evidence, it has primacy. The facts of this authority of Kuria & Anr. (supra) were, to some extent, similar to the facts of the present case. In this reported authority also, the weapons alleged to be used in commission of the offence were sharp edged like axe or kash. The injuries, however, found on the deceased were stated to be caused by the blunt weapon. It was held that, "such medical evidence would not ex-facie bely the ocular account of the incident". It was further held that, "even an axe or kash could be used from the other side, that is not a sharp edge to cause such injury. Even if they are not used, it would not, in any way, cause a dent in the case of the prosecution. All the witnesses have truthfully spoken about the occurrence, as in the present case", and hence it was held that mere presence of injuries caused by blunt edged weapon cannot be sufficient to disbelieve the evidence of an eye-witness, who has deposed about the use of sharp edged weapon like axe in commission of the offence.

58. In the present case, therefore, one has to see whether the medical evidence really is irreconcilable with the ocular account of the occurrence, as given by the witnesses. As per the evidence of the witnesses, Accused No. 6 Laxman has assaulted deceased Umaji with knife on his head, whereas, Accused No. 8 Ganpat has assaulted deceased Shivram with sword on his head. It is brought out from their evidence that the weapons were used from the sharp edge side. Investigating Officer has made specific query to PW-23 Dr. Joshi as to whether the injuries found on the deceased are possible by the weapons of assault seized at the instance of these accused, namely, the sword and chopper, and she has opined that those injuries are possible, if hard and blunt objects are used by force. Whereas, the weapons shown to her like Article Nos. 34, 35 and 42, were sharp edged weapons. According to her evidence, the injuries found on Umaji, when she examined him, were caused by hard and blunt objects.

59. Postmortem on the dead body of Umaji was conducted by PW-24 Dr. Vishwakarma. He has not given any opinion as to the nature of the weapon possibly used in inflicting the injury on the head of deceased Umaji and it was so, because almost all the injuries were sutured. Hence, it was not possible for him to determine exactly the nature of injury as it was before suturing. Unless the injuries are clearly and carefully examined, the weapon of offence used is difficult to be determined.

60. Hence, it is the evidence of PW-23 Dr. Joshi which is of importance. According to her, all these injuries were Contused Lacerated Wounds. She has made it clear that till the recording of her evidence, she has not given any opinion as to the weapon used and not answered the questions she was called upon to answer. But the fact remains that in the certificate issued by her and in evidence before the Court, she has stated that these injuries are possible with the hard and blunt object, if used with force.

61. In this respect, while assessing the medical evidence, which is merely of a opinion evidence, the Court has to consider all the facts and circumstances on record in order to decide what, in all probabilities, is possible and form its own opinion, which may be even contrary to the one formed by Medical Officer. Court has to also bear in mind that the evidence of eye-witnesses is the first hand evidence with respect to the nature of the weapon used and the injuries inflicted therewith. The Court has also to read the medical evidence in the light of the other evidence like the Inquest Panchanamas, which take note of the injuries found on the dead body.

62. Here in the case, the Inquest Panchanamas of Shivram, Sahadeo and Umaji are produced on record at Exhibits 42, 43 and 44 respectively. In case of injuries found on the dead body of Shivram, it is stated that he had a couple of deep injuries in the head. Both the legs were broken in the shin and the cause of the death was the infliction of injuries by means of pointed sharp object. Similarly, in the case of Sahadeo, it is stated in the Inquest Panchanama that there were bleeding injuries on the right side of the head, about one inch deep. There was

stab wound on the elbow and right leg was broken in the thigh. As to the Inquest Panchanama of Umaji (Exhibit-44) also, there is clear mention about the presence of bleeding injury in the head on left side and the left leg was found twisted. The description of these injuries in the Inquest Panchanamas, even if made by the lay persons, cannot be ignored and have to be read for the purpose of appreciating the opinion evidence of the Medical Doctor.

63. The evidence of all the eye-witnesses and other witnesses, who are injured in the same assault, also is consistent, uniform, certain and categorical that the axe and chopper were used not only in the assault on the deceased but also in assault on them. In our considered view, their evidence cannot be brushed aside easily, especially, in the light of the description of injuries in the Inquest Panchanamas. Also in the light of the fact that in case of injuries, inflicted by sharp edged weapon, like, knife and chopper, the injuries suffered in the head would be lacerations. If they were bleeding at the time of Inquest Panchanama, then it necessarily follows that they were incised and caused by the sharp edged weapon. May be because for want of sufficient thickness of the skin on the head, lacerations may some times resemble, an incised wound or vise-e-versa. That appears to be the reason of inconsistency between medical and oral evidence of the witnesses.

64. It is pertinent to note that PW-23 Dr. Joshi has, at a time, examined more than 5 to 6 injured including two deceased, namely, Shivram and Sahadeo. The possibility, therefore, of her misreading the nature of injuries and opining about the probable weapon used in causing the injuries, cannot be ruled out. Moreover, though in the course of evidence before the Court, the witnesses may have, to fortify their evidence in cross-examination, deposed that the sharp side of the weapon was used to commit the assault, the possibility of the assault been made with blunt side cannot be ruled out totally as such. After all, several persons were being assaulted by about 23 accused. Even the witnesses were also injured in the same assault. In such a melee of the incident, there is possibility of witnesses not having actually seen whether the assault was made from blunt side or sharp edge side. However, the fact remains that they have seen the actual assault by these weapons and their evidence to that effect is not at all shattered. It has remained consistent, certain and definite. Their cross-examination also does not suggest anything otherwise. Here in the case, therefore, it cannot be said that the medical evidence is totally irreconcilable with the ocular account or discrepancy in the two is such that it can become fatal to the prosecution case. It also does not completely improbablize the ocular account.

65. An argument is then advanced to the effect that the incident might have occurred at or about 3 to 4 am in the morning and somebody else might have committed the assault on deceased and accused have been implicated falsely on account of the enmity. To support this argument, Shri Chaudhary, learned counsel for Accused Nos. 6 and 8, has taken recourse to the Postmortem Notes (Exhibits "103" and "104") pertaining to Shivram and Sahadeo. It is submitted

that, on internal examination, the stomach contents of Shivram and Sahadeo were found to be having some undigested food and in small intestine, semi digested food, some particles were found, as noted in Column No. 24 of the Postmortem Notes. It is submitted that the process of digestion begins within 3 to 4 hours of the intake of the food and the digestion is complete within 3 to 4 hours thereafter. He has pointed out that normally the villagers eat their food little after sunset. Therefore, since undigested and semi-digested food particles were found in the digestive track of deceased Shivram and Sahadeo, then, according to Shri Chaudhary, in all probabilities, death must have occurred within a few hours of the last meal.

66. However, we are not impressed with this submission for the simple reason that digestion of the food depends on several factors and not only on intake of food. Those factors are the nature of the food particles, the amount of food consumed, the eating habits etc. In the present case, there is absolutely no evidence to show what was the food taken by the deceased Shivram and Sahadeo. There is also no evidence to show exactly when the said food was consumed by the deceased. If one considers the fact that, as per evidence on record, there were Kabaddi matches in the village going on till late night, the possibility of food being consumed in the wee hours of the day of occurrence, cannot be ruled out as the villagers returned from the Kabaddi matches late in the night at about 3 to 4 am.

67. The submission that villagers take their food early in the morning before leaving for the field, also cannot be accepted in the instant case, because the evidence on record proves that the incident has occurred near around 6 to 6:30 am. As a matter of fact, as per evidence of PW-7 Sarika, her husband deceased Sahadeo had gone to the field to answer the nature's call. Similarly, the witnesses like PW-8 Pandurang and PW-15 Santosh were woken up from their sleep by PW-7 Sarika. Therefore, there is no question of incident occurring at about 3 or 4 am.

68. Much capital is made by learned counsel for accused on the ground that the spot of incident is changed at the last stages of the trial. It is submitted that the entire prosecution case proceeded on the premise that incident has occurred in the Gavthan land situate at southern side of the village. Only after the entire evidence was closed, charge is altered vide Exhibit I-66 to state that the incident has taken place on the northern side of the village. According to Shri. Chaudhary, learned counsel for Accused Nos. 6 and 8, though the Defence was given opportunity to cross-examine the prosecution witnesses, again after the alteration of charge, the fact remains that prosecution itself was not clear about the spot of incident. He has submitted that some witnesses, like PW-2 Pandurang Khaire, PW-3 Sadanand More and PW-14 Savita Khaire, have stated that the incident took place on southern side, whereas, Investigating Officer PW-26 Sadashiv Mali and PW-27 API Pramod Nalavade have stated that it took place on northern side of village. PW-26 Sadashiv Mali has even denied that it occurred in

southern part of the village. Hence, according to the learned counsel Shri. Chaudhary, this fact makes the prosecution case itself suspect.

69. In our considered opinion, however, there is not much substance in this submission as the incident had taken place in three parts, as can be seen from the map (Exhibit-36). It has taken place in the field of Ramesh Salvi, also in the field of Kamalakar More and at the same time in the houses of witnesses also, where the riots have been committed. Thus, this was the incident which has taken place in stages and scattered over the whole village, including northern and southern part. Hence, hardly any significance can be given to the fact whether it was described as on northern side or southern side of the village. The evidence of PW-2 Pandurang, who has lodged the First Information Report, is certain to the effect that assailants came to his house, he escaped from the back-door, ran towards southern side of village, where these assailants followed.

70. A submission is also advanced to the effect that the First Information Report (Exhibit-38) lodged is not the first in point of time. It is submitted by Shri. Chaudhary, learned counsel for Accused Nos. 6 and 8, that three witnesses are deposing about the fact that they have given information about the incident to the Police. As per evidence of Police Head Constable PW-25 Anil Sanap, he has received the telephonic message about the incident and immediately thereafter he has made Station Diary Entry vide Exhibit-122 and proceeded for investigation. He has received the telephonic message at 6:45 am, which, according to him, was the basis for the launch of investigation. Further, according to learned counsel for accused Shri. Chaudhary, there is also one N.C. Complaint alleged to be lodged by Nayana, paternal aunt of PW-5 Arvind and the mother of PW-9 Priti Omale. It is urged that the names of the accused shown in the said Station Diary Entry (Exhibit-126), as admitted by Police Head Constable PW-25 Anil Sanap, are different from the accused in this case. It is urged that this Nayana was also an injured in the incident. She is examined by PW-23 Dr. Joshi, along with other injured. Her injury certificate is also produced on record at Exhibit-101. Two abrasions were found on her forearm and chest respectively. However, this N.C. Complaint is not produced on record by the prosecution, nor prosecution has examined this witness Nayana. Shri. Chaudhary, the learned counsel for Accused Nos. 6 and 8, has further pointed to the evidence of PW-28 PI Kulkarni that one Vithal More has made this telephonic call to the Police Station at about 6:45 am and he has recorded the statement of Vithal More. He has further admitted that he has submitted the charge-sheet after completing the investigation on the basis of receiving telephonic message at 6:45 am from Vithal More. PW-3 Sadanand More has also deposed that Vithal More conveyed to him that he had informed the Police on phone about the incident. Thus, according to learned counsel for Accused Nos. 6 and 8 Shri. Chaudhary, the complaint (Exhibit-38) lodged by PW-2 Pandurang cannot, in effect, be treated as the First Information Report. The real First Information Report was either the telephonic message from Vithal More or the N.C. Complaint lodged by Nayana.

71. In our considered opinion, in the absence of the N.C. Complaint produced on record, it cannot be said that the said complaint is in respect of this incident. So far as information on telephonic message is concerned, as, admittedly, the names of the assailants, the victims or the other details of the incident were not given in the said information, it cannot be called as the First Information Report. The law is fairly well settled to the effect that cryptic information given on telephone, without giving details of the incident, the names of the assailants, the victims, the place where the incident is alleged to have taken place, it cannot constitute or be treated as a First Information Report. The First Information Report, in the instant case, can be only, therefore, the statement of PW-2 Pandurang (Exhibit-38), which was recorded first in time and contains all the details of the incident.

72. As to the grievance that the knowledge of PW-2 Pandurang, who has lodged the First Information Report, as to the assault on the deceased was of a hear-say nature, it does not make any difference. It is not necessary that the person who lodges the First Information Report should have first hand information of the incident or he should be the eye-witness to the incident. It is sufficient if he has given the details of the occurrence. Moreover, as can be seen from the entire sequence of events, the assault on the deceased and the injured in the field of Ramesh Salvi, was a part of the incident of rioting that took place in the village, to which PW-2 Pandurang Khaire was not only the witness, but a direct victim.

73. A submission is also advanced to the effect that though PW-3 Sadanand More claims to be the eye-witness to the incident, in the Inquest Panchnamas of the three deceased in the case, to which he was a Panch, he has not mentioned this fact. On this aspect also, it has to be stated that Inquest Panchanama is confined to ascertainment of apparent cause of death and it need not mention the other details like who assaulted the deceased and who were witnesses to the assault. They are foreign to the ambit and scope of the Inquest Panchanama. Neither in practice nor in law it is necessary for the person holding the inquest to mention all these details. Hence, non-mention of this fact by PW-3 Sadanand More in the Inquest Panchnamas is totally inconsequential, especially, in the light of the fact that his statement was recorded by Police on the very same day of the incident and his presence at the spot is corroborated by other witnesses, namely, PW-4 Thamaji Kambale, who was accompanying him, PW-5 Arvind, PW-8 Pandurang and PW-15 Santosh.

74. As to the submission of learned counsel for the accused that there is delay in recording statements of some of the witnesses, like the statements of PW-5 injured Arvind, PW-7 Sarika, PW-9 Priti, PW-14 Savita and PW-16 Chandrakant were recorded on third day of the incident, whereas, the statement of PW-12 Vaijanti Kalambe was recorded on fourth day and PW-6 Kashibai Omale was recorded on the sixth day of the incident. We are again not ready to accept that there was any delay, much less, the fatal delay in recording of their statements. The magnitude of the occurrence has to be kept in mind. There were three

deaths in the family of these persons and several persons were injured in the incident. PW-5 Arvind and PW-9 Priti were injured in the same incident. The Police were also occupied with completing all the formalities of inquest, shifting the injured to the hospital in Mumbai, arresting the accused, conducting the Panchnamas etc. Therefore, the delay of one or two days in recording the statements of these witnesses cannot be called as fatal one, especially, when the statements of major witnesses were recorded on the same day or on the next day.

75. Though prosecution is also relying on the evidence relating to recovery of the weapons of assault at the instance of the accused and in pursuance of the statements made by them, except for the sword, which was in the hand of Accused No. 6 Laxman, none of the weapon was found to be having the blood stains thereon and the results of the analysis of blood stains found on the sword were also inconclusive as to the blood group of the deceased. Therefore, even if the evidence relating to the recovery of the weapons, which is merely of a corroborating nature, is excluded from consideration, it does not make much difference to the prosecution case. Though prosecution is also relying upon the evidence relating to recovery of the clothes of the accused, as no blood stains were found thereon and as the C.A. Report came to be filed on record after the entire evidence was over and statements of accused under Section 313 of the Cr.P.C. were recorded, we are not placing reliance thereon.

76. The last, but not the least, submission advanced by the learned counsels for accused is about individual role of each of the accused. It is urged that without specifying the same, the prosecution has roped in all the persons, who were on inimical terms with the deceased and injured. Even the witnesses, in the course of their evidence, have also made general statements that all the accused persons have assaulted them, without specifying or attributing particular act to each of the accused. In the light of animosity between the parties, it is submitted that such statements of partisan witnesses have to be accepted with a pinch of salt. According to learned counsel for accused Mr. Mundargi, when the entire village is divided into two political factions and both the factions are absolutely inimical to each other, the possibility of false implication of even the innocent bystanders cannot be denied. According to him, when the incident of such a magnitude has taken place, entire village must have been present at the spot of occurrence. Therefore, merely on the basis of the presence, it would be hazardous to convict these large number of accused persons. According to him, the alleged weapons recovered at their instance are also not found to be having blood stains thereon. The articles like iron bars and sticks are of the common use of peasants. The time of incident, i.e. early morning at 6 am, was also such that these persons may be going to their respective fields with their agricultural equipments. According to him, it is also difficult to say that when incident was scattered at three spots, the common object of the assembly was to kill three persons. Also no reason is specified as to why these three deceased were signaled out for committing murderous assault.

77. The learned counsel for Accused No. 13, Mr. Niteen Pradhan, has also strenuously urged that as regards Accused No. 13 Ramesh, six witnesses, namely, PW-2 Pandurang, PW-9 Priti, PW-11 Jitendra, PW-13 Swati, PW-14 Savita and PW-15 Santosh, have not been spoken about his presence. Though seven witnesses, namely, PW-3 Sadanand, PW-4 Thamaji, PW-7 Sarika, PW-8 Pandurang, PW-10 Namdeo, PW-12 Vaijanti and PW-16 Chandrakant, have spoken about his presence, they have not attributed any role to him. His mere presence cannot be sufficient for making him member of an unlawful assembly unless it is proved that he has either instigated the assault or extended tacit support by his actions or conduct. According to him, only PW-5 Arvind has attributed some overt act to Accused No. 13 Ramesh, that of obstructing PW-3 Sadanand and PW-4 Thamaji. However, PW-3 Sadanand and PW-4 Thamaji are not stating so. PW-6 Kashibai is also not naming him in the evidence relating to oral Dying Declaration of deceased Shivram. Though alleged chopper (Article No. 21) is said to be recovered from him, no blood stains were found thereon, as per C.A. Report. The recovery was after ten days of the incident, i.e. on 12th May, 2004, and none of the witnesses have stated about use of the said chopper by Accused No. 13 Ramesh. Further, he has urged that as accused are acquitted for the charge of conspiracy under Section 120(b) of IPC, Accused No. 13 Ramesh cannot be held guilty with the aid of Section 10 of the Evidence Act. Hence, evidence of PW-12 Vaijanti and PW-13 Swati is also not of help to the prosecution to implicate Accused No. 13 Ramesh.

78. To substantiate his submission, learned counsel for Accused No. 13, Nagarjit Ahir etc. Vs. State of Bihar, , to submit that, "when the evidence on record establishes the fact that a large number of persons were present, it may be safe to convict only those persons against whom overt act is alleged with the aid of Section 149 IPC, lest some innocent spectators may get involved".

79. As regards Accused No. 23 Gopinath, similar submissions are advanced by learned counsel Mr. Mundargi. It is submitted that no overt act is attributed to him, except for the alleged information given by him to PW-7 Sarika that Sahadeo was assaulted by them and thrown in the field. He has also relied on Eknath Ganpat Aher and Others Vs. State of Maharashtra and Others, , wherein it was held that, "unless there is cogent and specific evidence attributing a specific role in the incident to the accused persons, who have themselves been injured and there being no explanation forthcoming as to such injuries, it would be unsafe to pass an order recording conviction and sentence against the appellants, more so when the prosecution has produced, in support of its case, witnesses, who are inimical to the accused persons".

80. It was further held in this authority that, "in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. In such situations, the Courts are called upon to be very cautious and sift the evidence with care. Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the Court with regard

to the participation of any of those who have been roped in, the Court would be obliged to give benefit of doubt to them".

81. All said and done by the Defence Counsels, in our opinion, the law laid down by the Apex Court in its latest decision in Nand Kumar Vs. State of Chhattisgarh, , relied upon by learned A.P.P. becomes more applicable to the facts of the present case. In this authority, the Apex Court has considered the applicability of Section 149 IPC and as to under what circumstances, a member of an unlawful assembly can be said to have committed an offence in pursuance of the common object of such assembly of which he is a member.

82. While doing so, the Apex Court has relied upon the law, as crystallized in the case of Masalti Vs. State of U.P., , which has distinguished the observations made in Baladin and Others Vs. State of Uttar Pradesh, , and held that "it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object and that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the relevant time of committing of that offence, is a member of the same assembly is guilty of that offence, and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

83. If these legal principles are kept in mind, which categorically brings out the principle that punishment prescribed by Section 149 IPC is, in a sense, vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly, then all the arguments advanced by learned counsels for the accused need to be brushed aside. In the first place, names of all these accused are mentioned in the FIR (Exhibit-38). Secondly, their names are also mentioned in the statements of witnesses recorded under Section 161 of the Cr.P.C. and also in their evidence before the Court. As regards some accused, a specific evidence is given about the overt act committed by them. Thus, as regards their presence and involvement in the incident, there remains no iota of doubt.

84. Now as to the question whether they were members of an unlawful assembly, it has to be found out from the various circumstances, including the common object, which can be culled out from the nature of the assembly, the arms they carried, their behaviour at, before or after the scene of incident and their relations inter se. Here in the case, all the accused persons belong to the rival party of the injured and deceased. They had come together, being fully armed with various weapons. After committing the assault on Sahadeo, they assaulted Umaji and Shivram together. Thereafter, all of them went towards the

village to commit riot, cause damage and cause injury. They had assaulted several persons simultaneously.

85. It is a mere matter of co-incidence that some of the injured like PW-8 Pandurang, PW-16 Chandrakant, PW-15 Santosh and PW-5 Arvind survived the assault, whereas, some of the injured like Umaji, Sahdeo and Shivram succumbed to the assault either on the spot or in the hospital. There was no question of singling out particular persons for committing their murder, but it was merely a matter of co-incidence or the matter of fortune or misfortune.

86. The fact that assault was committed indiscriminately on whosoever was coming there to obstruct the accused persons while committing riots, spells out the common object of the assembly, especially when the assault was committed on the deceased and the injured, who were totally unarmed or unprepared for the same, and the fact that assault made on vital parts of the bodies of the deceased inflicting several blows of weapons in their hands by the accused, leaves no manner of doubt about the common object on their part to commit the murders of the persons from rival party.

87. As to the submission that the witnesses are from rival party or there are some discrepancies in their evidence, in a faction-ridden society, there is no possibility of any independent witness. Especially, when there is political feud and communal rivalry, the witnesses are bound to be on one or other side. There is no proposition of law that the evidence of such witnesses is to be disbelieved. On the contrary, they are the last persons to spare the real culprit and falsely implicate an innocent one. Their presence at the spot of such incident is just natural one. Some discrepancies on trivial matters are bound to occur in their testimony, as they have been the victims of such assault and the witness of incident of a grave nature. There is no valid reason to disbelieve them for that matter.

88. In our considered view, when not less than 23 persons participated in commission of offence with deadly weapons and attacked more than 4 to 5 persons with an intention to kill them, then the witnesses, who are closely related to the victims and who are also themselves the subject of assault, cannot be expected to describe the incident in graphic detail and with such precision as to which member and in what manner he participated in the commission of offence.

89. As held in the above-said authority of Nand Kumar (supra), relied upon by learned A.P.P., their evidence is required to be appreciated in its totality; otherwise, it will be a travesty of justice. When a simultaneous attack is made on several persons by several assailants, in that melee if the witnesses try to specify the role of each of the accused, then it would be called as unrealistic. Here in the case, the witnesses, who are injured, have specified the roles of the accused as to who had assaulted them and with which weapon. Even as regards the assault on the deceased, they are very specific about Accused No. 6 Laxman inflicting

the blow of knife and Accused No. 8 Ganpat of inflicting the sword on deceased Shivram and Umaji respectively. Therefore, there is nothing unnatural in the conduct of the witnesses, nor there is any unreal in the case of prosecution. It categorically proves the common object on the part of the accused persons. The presence of the accused and their involvement, including that of Accused No. 13 Ramesh and Accused No. 23 Gopinath, is categorically proved on record. They are also proved to be the members of an unlawful assembly, which was formed with the common object of committing riots and murders of the members of the rival parties. They have not offered any explanation for their presence at the spot. No specific plea is raised to that effect.

90. In our considered opinion, therefore, the Trial Court has rightly held the guilt of all the accused to be proved beyond reasonable doubt and convicted and sentenced them, as aforesaid. The Appeals, therefore, hold no merit and hence stand dismissed.

91. Bail Bonds of Accused No. 1 Liladhar Mahadeo Shirke, Accused No. 2 Gajanan Hiru Khaire, Accused No. 3 Tukaram Anant Jailkar, Accused No. 4 Babu @ Shashikant Tukaram Kalambe, Accused No. 5 Pandu Malu Mondhe, Accused No. 7 Devji Hari Shinde, Accused No. 9 Vijay Mahadu Mane, Accused No. 10 Yashwant Maruti Kalambe, Accused No. 11 Gajanan Hari Gudekar, Accused No. 12 Sachin Mahadeo Barje, Accused No. 14 Harishchandra Krishna Barje, Accused No. 15 Ramesh Hiru Jailkar, Accused No. 16 Sakharam Gunaji Chavan, Accused No. 17 Balu Umaji Mane, Accused No. 18 Sudam Balu Shelke, Accused No. 19 Ganpat Bhagoji Shirke, Accused No. 20 Narayan Yashwant Mundhe, Accused No. 21 Sakharam Hari Shinde, Accused No. 22 Ganesh Sudam Mane and Accused No. 23 Gopinath Pandurang Navashe, who are on bail, stand cancelled and they are directed to surrender before the Trial Court within twelve weeks from today.