
(2002) 01 BOM CK 0020

In the Bombay High Court

Case No : Criminal Appeal No. 142 of 1996

Shivaji Pandhari Deshmukh and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-01-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 464
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2002) 104 BOMLR 845

Hon'ble Judges : V.K. Barde, J;D.S. Zoting, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V.K. Barde, J.—The four accused, who are convicted and sentenced by the learned 4th Additional Sessions Judge, Jalgaon, in Sessions Case No. 111 of 1995 have filed this Criminal Appeal against their conviction and sentence.

2. The case of the prosecution is that Ramdas Bhagwan Farkande, being Doctor, wanted to start his dispensary at village Wakod, taluka Jamner, district Jalgaon. Therefore, an open plot belonging to Chandrabai was purchased. Adjacent to that plot, there is the house of accused Raidas. So, Atmaram, brother of Ramdas, requested Raidas that he should allow to pull down wall on one side of the house of Raidas for construction of new building for dispensary and Atmaram would reconstruct the wall of the house at his own costs. On the condition that Atmaram should reconstruct the wall at his own costs, Raidas gave permission to pull down the wall. Accordingly, the wall of the house was pulled down and construction was started.

3. On 7.1.1995, when the construction of the wall was not completed, there were heavy rains since evening. Raidas and his family, who were staying in the house, could not sleep at night because the rain water had come into the house. It is the prosecution case that on 8.1.1995, at about 6.30 a.m.. Atmaram went to the house of Raidas to find out the situation. At that time, an altercation took place

between Raidas and Atmaram and Raidas stabbed Atmaram on stomach with a knife. Atmaram then started to go away. He was bleeding from the injury. He covered a distance of about 50 to 80 ft. and then was lying on the ground near the tailoring shop of Ramesh. The information about the assault on Atmaram was received by others. So, Pralhad, the brother of Atmaram, also went to the house of Raidas, but the accused Uttam Patil and the accused Patilbuwa Patil caught Pralhad, and then the accused Shivaji and accused Raidas stabbed Pralhad on chest and stomach. Pralhad fell down. By that time, Sayaji, the paternal uncle of Atmaram, also reached there. But he was also caught by Uttam and Patilbuwa and again, there was similar attack on him by accused Raidas and Shivaji. He also received injuries on chest. He fell down. It is the prosecution case that family members from the family of Raidas and others also had gathered there and they were abusing Atmaram and others. Raidas and his brothers went to the place where Atmaram was lying. By that time, Baburao, son of Sayaji, had also reached there. Raidas wanted to stab Ramdas with knife, but Uttam, the brother of Ramdas, pushed aside Raidas and, therefore, Ramdas was saved. The family members of accused Raidas were pelting stones and some of the witnesses received injuries because of pelting of the stones. Baburao Farkande and others went towards the village. The accused also left that place.

4. However, Baburao and others returned back to the place of incident within 10 to 15 minutes and they found that both Pralhad and Sayaji were dead. Atmaram was removed to Jalgaon for medical treatment by the car of Mahesh Deshmukh. The Police also reached there. Thereafter, Baburao lodged F.I.R. at Police Station, Pahur. Crime No. 3 of 1995 for offences punishable under Sections 147, 148, 302, 307, 323, 324 and 504 all under the Indian Penal Code, was registered. A.P.I. Nawale took up the investigation.

5. The panchnama of the place of incident was prepared. After preparing inquest panchnamas on both the dead bodies, the dead bodies were sent for post-mortem examination to the Rural Hospital, Pahur. The Investigating Officer also referred the injured persons to the Medical Officer for examination and report. Amongst those injured persons, there were two accused Raidas and Shivaji. The statements of witnesses were recorded. The blood stained clothes attached during the course of investigation and other articles were sent to Chemical Analyser for examination and report. After completion of the investigation, charge-sheet was submitted against 8 accused in the Court of J.M.F.C., Jamner.

6. The learned J.M.F.C., Jamner, committed the case to the Court of Sessions, Jalgaon.

7. The learned Additional Sessions Judge framed charge against the 8 accused for offences punishable under Sections 302, 307, 324, 337, 352, 354 and 504 read with Sections 147 and 149 of the Indian Penal Code. He also framed charge against all the accused for offence punishable u/s 302 read with Sections 147 and 149 of the Indian Penal Code. All the accused pleaded not guilty.

8. The defence of the accused is that they are falsely implicated in the case. Raidas, accused No. 2, has taken a specific defence in his statement u/s 313 of the Code of Criminal Procedure, that on the previous evening and night, because of continuous rains, he, his wife and children could not sleep in the house and in that condition, Atmaram came to his house in the morning. He then asked Atmaram why the wall was not constructed and thereafter, altercation started between him and Atmaram. Atmaram took out a knife and caused injury on his hand. Pralhad and Sayaji also reached there. Then, they dragged him out from the house and started to beat him. His wife then called his brother Shivaji, but when Shivaji was coming there, some one from Atmaram, Sayaji and Pralhad hit Shivaji on head and Shivaji received bleeding injuries. The three of them started to beat Shivaji. Raidas has further contended that he became very angry, he snatched knife from Atmaram and started to brandish it blindly. As he was very much angry, because Shivaji was being beaten even after falling on the ground, he did not care whether any injuries were caused, but because of brandishing of the knife, Pralhad, Sayaji and Atmaram received injuries. He has stated that other accused were not present there. They did not take part in the incident. However, after deliberation, a false complaint was lodged by the prosecution witnesses.

9. The learned Additional Sessions Judge recorded evidence of the prosecution witnesses, statements of the accused u/s 313 of the Code of Criminal Procedure and after hearing arguments, came to the conclusion that accused No. 1 Shivaji, Accused No. 2 Raidas, Accused No. 3 Uttam and Accused No. 8 Patilbuwa, committed the offence punishable u/s 302 read with Section 34 of the Indian Penal Code, and he sentenced each of them to imprisonment for life and to pay fine of Rs. 1,000 in default to suffer further R.I. for one year. He further held that accused No. 2 Raidas committed the offence u/s 307 of the Indian Penal Code and he sentenced him to suffer R.I. for 5 years and to pay a fine of Rs. 500, in default to suffer further R.I. for 6 months. He, however, acquitted all the 8 accused of offences punishable under Sections 147, 148, 324, 337, 352 and 504, all read with Section 149 of the Indian Penal Code. Accused Nos. 4 to 7 were acquitted of all the offences. Hence, the present Criminal Appeal by the convicted accused.

10. Heard the learned Counsel for the Appellants and Shri Jadhav, the learned Additional Public Prosecutor, for the Respondent State.

11. Before proceeding with the evidence brought on record, we would like to point out that the charge framed by the learned Additional Sessions Judge is not properly framed. The first head of charge indicates that the accused have committed offences punishable under Sections 147 and 148 of the Indian Penal Code, because the unlawful assembly of the accused had the common object of committing offences punishable under Sections 302, 307, 324, 337, 352 and 504 of the Indian Penal Code. The learned Additional Sessions Judge has absolutely lost sight of the provisions under the Indian Penal Code that Sections 147 and

148 are independent offences. The ingredients of these two offences are quite different and, therefore, there ought to have been separate charge for offence u/s 147 and then a separate charge for offence punishable u/s 149, with respect to only those accused, who were armed with deadly weapons.

The second head of charge is that the accused committed offence punishable u/s 302, read with Sections 147 and 149 of the Indian Penal Code. How Section 147 of the Indian Penal Code, can be added is not understood. If it was an unlawful assembly with particular common object of committing murder of somebody, then the charge should have been only with respect to Section 302 read with Section 149 of the Indian Penal Code. The same mistake is committed with respect to third head of charge regarding offence u/s 307 read with Sections 147 and 149 of the Indian Penal Code, and the 4th head of charge for offence punishable u/s 302 read with Sections 147 and 149 of the Indian Penal Code.

The fifth head of charge is that the accused committed offences punishable u/s 337 read with Sections 147 and 149 of the Indian Penal Code. The offence u/s 337 of the Indian Penal Code is causing hurt or endangering life or personal safety of others by rash or negligent act. So, whenever it is alleged that offence u/s 337 is committed, then either rashness or negligence, is the main ingredient of that offence. When a person acts rashly, he thinks that if a certain act is done, it may turn into particular result, if it is done by some other person, but if he does so, it would not so happen. When the act is done negligently, there is complete absence of mind. So, under either of the circumstance, the active participation of the mind to commit the offence is not there. In such circumstances, it can only be said that offence u/s 337 or Section 338 cannot be committed by more than one person by common intention or by common object. If the intention or object itself is not there, how there can be common intention or common object. The learned Additional Sessions Judge did not apply his mind while framing the charge u/s 337 read with Sections 147 and 149 of the Indian Penal Code.

12. The allegations in the case by the prosecution are that these accused were deliberately pelting stones at the prosecution witnesses with an intention to cause them injuries. It was neither a rash nor a negligent act. So, framing of charge for offence u/s 327 of the Indian Penal Code on the basis of the material produced on record by the prosecution itself was wrong. If there were simple injuries caused by pelting of stones, then there should have been charge for offence punishable u/s 323 of the Indian Penal Code. So, this aspect of the case also was not taken into consideration by the learned Additional Sessions Judge.

13. The sixth and seventh heads of charge are again for offence u/s 352 read with Sections 147 and 149 of the Indian Penal Code and for offence u/s 504 read with Sections 147 and 149 of the Indian Penal Code. The same mistake is committed as it is committed with respect to first four heads of charge. Here, the charge should have been with particular offence, say, 504, 352, 302, 324 read with Section 149 of the Indian Penal Code. Section 147 could not have been

mentioned in the manner in which it is done by the learned Additional Sessions Judge. Section 147 has to be treated as an independent offence, because the offence of riot may be committed irrespective of any other offences under the Indian Penal Code.

14. No doubt, there are these defects in framing of the charge by the learned Additional Sessions Judge. However, on going through the entire record of the trial before the Court, we do not find that any prejudice is caused to the accused because of these defects in the framing of charge. They have fully understood that they were being tried for offences u/s 302 read with Section 149 and other offences. So, considering the provisions of Section 464 of the Code of Criminal Procedure, we do not think that this irregularity and error in framing of the charge would be a ground to set aside the conviction.

15. The prosecution has produced on record the inquest panchanamas on the dead bodies of Pralhad and Sayaji at Exhibits 26 and 27 respectively. The defence has admitted those panchanamas and from these two panchanamas, it is seen that stab injuries were noticed on the dead bodies of Pralhad and Sayaji. Further the prosecution has examined Dr. Jagtap, P.W. 8, who had performed post-mortem examination on the dead bodies of Pralhad and Sayaji. His deposition is at Exhibit 52, while the two postmortem examination reports are at Exhibits 53 and 54. The doctor has stated that he found on the dead body of Pralhad a stab wound over left side chest wall midline between 5th and 6th ribs, 5 cms. in depth reaching upto the heart, breadth 2 cms a stab wound on stomach epigastric area size 5 cms. reaching upto peritoneum, breadth 2 cms and incised wound over left forearm upper third part dorsal side, 3 ? 2 ? 2 cms. He also noticed fractures of 5th and 6th ribs. He also noticed injury of 5 ? 3 cms. on left atrium of the heart posteriorly and opening into heart cavity. There was accumulation of blood of 1 to 2 litres at that sight. He has stated that all these three injuries were ante mortem and the cause of death of Pralhad was cardio respiratory arrest due to stab injuries caused by sharp weapon to the left atrium of the heart.

16. So far as Sayaji is concerned, the Doctor has stated that he noticed stab injury over left side chest wall between 4th and 5th ribs, intercostal space cartilages of ribs were injured and the size of the injury was 5 cms. deep reaching upto heart ? 2 cms. There was incised injury over right side web of thumb 3 ? 2 ? 2 cms. and contused lacerated wound on scalp left parietal region 1 ? ? ? ? cm. The doctor has stated that injury No. 1 caused rupture of left ventricle of the heart of the size of 6 ? 3 cms. and the heart chamber was opened. There was accumulation of 2 to 3 litres of blood in the cavity. All the three injuries were ante mortem and the cause of death was cardio respiratory arrest due to stab injury caused by sharp weapon on left ventricle of the heart.

17. The doctor is cross-examined by the learned Counsel for the defence, but there is nothing in the cross-examination to dislodge the opinion given by the Medical Officer. So, on going through all this evidence, we hold that the

prosecution has established that Pralhad and Sayaji died due to stab injuries caused on their chest and the deaths were homicidal deaths.

18. Either as per the prosecution story or as per the defence story, Atmaram had gone to the house of Raidas early in the morning on 8.1.1995. So, it is necessary to consider the prosecution story first by taking into consideration the evidence of Atmaram. He is P.W. No. 7 and his deposition is at Exhibit 50.

19. P.W. No. 7 Atmaram has stated that on 8.1.1995, it was Sunday. Ramrao Shamrao Mahale had come to him in the morning and along with him, he went to the place of construction, i.e., at the house of Raidas. When he was inspecting the construction work, accused Raidas came there. He then asked Raidas why the wall was demolished and Raidas said that he would do whatever he wanted. The witness has further stated that then Raidas took out a knife from his pocket and gave him a blow of knife. He received injury on stomach. Witness has stated that by that time Shivaji, brother of Raidas, his mother, his sister Pamabai, wife of Shivaji, wife of Raidas, Uttam Zipru and Patilbuwa came there. At the same time, his brother, Pralhad and paternal uncle, Sayaji, came there. Atmaram has further stated that accused Uttam and accused Patilbuwa caught his brother Pralhad and accused Raidas and accused Shivaji inflicted injuries on the chest of Pralhad with knife. He has stated that he saw this incident while lying on one side at some distance. Because of the injuries on chest, Pralhad was bleeding and he fell down at a distance of 10 to 15 ft. from the place of construction. He has stated that thereafter the accused Uttam and accused Patilbuwa caught his uncle Sayaji and accused Shivaji and accused Raidas inflicted knife injuries on the stomach and chest of Sayaji, Sayaji also fell down.

20. Witness Atmaram has further stated that then all the accused Nos. 1 to 8 rushed to him where he was lying down. Accused Raidas assaulted his brother Ramdas with knife, but Uttam son of Sayaji pushed aside Raidas. Raidas fell down. Then his brother Ramdas, Uttam, Bhimrao, Baburao, Vithal ran towards the village and accused Nos. 1 to 8 also went to their house. About 10 minutes thereafter, his brother Ramrao, Sampat Dabhade, Mahesh Deshmukh brought ambassador car of Mahesh Deshmukh and took him to the Civil Hospital at Jalgaon.

21. The witness is cross-examined at great length with respect to the place of the incident, how the incident started and what part was played by him and his brother and cousin brothers in the incident. However, there is nothing in the cross-examination to dislodge his deposition in the examination-in-chief with respect to how the incident took place. There are minor contradictions here and there, but those do not materially, affect the prosecution story.

22. No doubt, it is brought in the cross-examination of Atmaram that he had not stated before the Police that Patilbuwa and Uttam had caught Sayaji before Shivaji and Raidas gave him blows with knife. But the witness has explained that his statement was recorded by the Police on 9th January, 1995, the next day of

the incident in the hospital, and he was not in position to give all the details at that time. The medical evidence on record with respect to injuries on Atmaram does indicate that he had received serious injury on stomach and his intestines had come out. So, in the given circumstances, if the witness did not give all the details regarding how the incident took place in his statement before the Police, the omissions here and there will not be so material to discredit his evidence.

23. In the background of this evidence of Atmaram, the evidence of other prosecution witnesses is to be considered. P.W. No. 1 is Bhagwat Rupla Sonwane. His deposition is at Exhibit 36 and he has stated that on 8.1.1995, at about 6 or 6.30 a.m., he was going to his field and then he found that there was altercation between Atmaram and Raidas. They were quarreling about the construction of the plot of land. Raidas was abusing Atmaram and Atmaram was trying to pacify him. Raidas then took out knife and then gave blow of knife on the stomach of Atmaram. Atmaram received bleeding injury and he ran towards water tank. He collapsed near the shop of tailor. The witness has further stated that at that time, Pralhad reached there. Shivaji, Raidas, Patilbuwa Patil, Uttam and 4 ladies were present there. The ladies were abusing Pralhad. Shivaji asked to catch hold of Pralhad, accused Uttam and accused Patilbuwa caught Pralhad and accused Shivaji and accused Raidas then gave knife blows on Pralhad on his stomach and chest. Pralhad received bleeding injuries and he fell down.

24. The witness has further stated that within two to three minutes, Sayaji reached there and accused Shivaji asked to catch Sayaji. Again, Patilbuwa and Uttam caught Sayaji and then accused Shivaji and Raidas inflicted knife blows on chest of Sayaji. Sayaji also received bleeding injuries and he also fell down.

25. The witness has stated that then Bhagwan Farkande came there. When he was near the tailor's shop, Raidas gave him blow with knife on his hand. Dr. Ramdas, Uttam Sayaji and Bhagwan Farkande all were near Atmaram. Accused Raidas, Patilbuwa, Uttam and Shivaji, along with accused Nos. 4 to 7 went towards Atmaram. Accused Nos. 4 to 7 were abusing and were pelting stones on Atmaram and Ramdas. Raidas assaulted Ramdas with knife, but Uttam intervened. Uttam pushed Raidas aside and Raidas fell down and he has also stated that some other persons by that time had gathered there. But the brothers of Atmaram left that place, as well as accused left that place. He has stated that about 10 to 15 minutes thereafter, Mahesh Deshmukh took Atmaram to Civil Hospital. Sayaji and Pralhad were dead.

26. This witness is also cross-examined at considerable length. However, there is nothing in his cross-examination to dislodge his deposition in examination-in-chief. He has fully corroborated the evidence of Atmaram.

27. Baburao Sayaji Farkande is P.W. No. 3 and his deposition is at Exhibit 39. He lodged the F.I.R. and the same is at Exhibit 40. He has stated that on the morning of the incident, when he was at his home, his brother Vithal told him that at about 6.30 a.m., at the place of construction, Raidas had stabbed

Atmaram. He thereafter immediately went to the place of construction. He saw Atmaram lying injured near the tailor's shop at a distance of 30 to 35 ft. from the place of construction. Dr. Ramdas, brother of Atmaram, was also there. He has stated that the accused Uttam and Patilbuwa caught Pralhad near the site of construction and accused Shivaji and Raidas each inflicted knife injuries on the stomach and chest of Pralhad. Pralhad received bleeding injuries and fell down. Accused Nos. 4 to 7 were abusing Atmaram and others. He has stated that at that time his father Sayaji came there. Accused Patilbuwa and Uttam caught hands of Sayaji and accused Raidas and Shivaji inflicted injuries by knife on stomach, chest and hand of Sayaji. Sayaji received bleeding injuries and he fell down. He has also stated that when Bhagwan was going towards his father, the accused Raidas caused injury on head of Bhagwan with knife. Accused Shivaji and Raidas were having knives in their hands and they came towards him at the place where Atmaram was lying. Uttam and Patilbuwa were also with them. Accused Nos. 4 to 7 were abusing and were pelting stones. Raidas assaulted Ramdas with knife, but Uttam, brother of witness Bhagwan, pulled aside Raidas and Raidas fell down. He has stated that he himself and others then went towards the village and returned to the place after 10 or 15 minutes and then Atmaram was taken to Civil Hospital by the car of Mahesh Deshmukh. The witness has further stated that at that time, the Police came to the place. He has also stated that he lodged the report at the Police Station, the F.I.R. is at Exhibit 40. Nothing material by way of contradictions is brought on record in the cross-examination of this witness. The F.I.R. fully corroborates the deposition of this witness.

28. P.W. No. 4 is Aba Pandit Kumawat and his deposition is at Exhibit 40. He has stated that on 8.1.1995 at about 6.30 a.m., when he was proceeding towards his field, he saw crowd near the house of Raidas and Atmaram was lying near the tailor's shop. He had injury on his stomach. He asked Atmaram as to what had happened and Atmaram told him that Raidas inflicted knife injury to him. The witness has stated that he then went to the house of Atmaram and Raidas, that means the place of construction. The accused Raidas and Shivaji were having knives. Accused Uttam and Patilbuwa and accused Nos. 4 to 7 were also there. He has stated that Pralhad came there, accused Uttam and Patilbuwa caught hold of Pralhad and accused Raidas and Shivaji inflicted knife injuries on chest of Pralhad. Pralhad received bleeding injuries and he fell down. The witness has further stated that then Sayaji reached there. He was also caught by Uttam and Patilbuwa and accused Raidas and Shivaji inflicted knife injuries on his chest. Sayaji received bleeding injuries and he fell down. He has stated that Bhagwan was at a distance from the place of incident, but Raidas inflicted knife injury on Bhagwan. He has further stated that Rambhau, Uttam, Vithal were standing near Atmaram. Accused Shivaji, Raidas and Accused Nos. 4 to 7 were going towards them. Accused Uttam and Patilbuwa were also with them. Accused Raidas lifted his hand to give stab injury to Dr. Ramdas, but Uttam obstructed and pulled Raidas. Raidas fell down. Accused Nos. 4 to 7 were pelting stones at Atmaram

and his brothers. He has stated that then Uttam son of Sayaji, Vithal and Ramdas all ran towards their house. They returned thereafter in 10 to 15 minutes and then Atmaram was taken to Civil Hospital at Jalgaon by car.

29. This witness is also cross-examined, but there is nothing material in the cross-examination to dislodge his deposition in the examination-in-chief. So, he has also fully corroborated the evidence of Atmaram.

30. The next eye witness is Sampat Pandu Dabhade, P.W. No. 5 and his deposition is at Exhibit 43. He is giving the narration regarding the incident as given by the other witnesses in his examination-in-chief. However, in the last portion of his cross-examination, he states that he heard the noise of quarrel while going by Wakod - Tondapur road. He saw the persons running. The persons, who were running, were saying that there was beating to Atmaram and they were also saying that Pralhad and Sayaji were beaten. So, these statements in the cross-examination completely wipe out his evidence. He is not at all a reliable witness. Whatever he states in examination-in-chief with respect to incident claiming that he had seen the incident cannot be believed. The prosecution cannot rely upon this witness.

31. Besides, these witnesses, the prosecution has examined Vithal Ganpat Sonwane, P.W. 2. His deposition is at Exhibit 37 and he is the witness with respect to panchanama of the place of incident. Panchnama is at Exhibit 38. There is not much dispute about the place of the incident and therefore, the prosecution has properly brought on record this formal evidence.

32. P.W. No. 6 Prakash Deshrnukh and P.W. No. 9 Prakash Bhagwan Shelke are the two panch witnesses examined by the prosecution to bring on record that the accused Shivaji and accused Raidas stated before them that they would produce the knives kept in the house by them. The memorandum of their statement was prepared and then the two accused took the panchas to their house and took out the knives. The memorandum of statement of the accused and the panchanama are at Exhibit 49.

33. The learned Additional Sessions Judge has rightly discarded this evidence. Here, the Investigating Officer has prepared memorandum of statement of accused Raidas and Shivaji together in one memorandum and in the next part, it is being indicated that Shivaji went into the house and took out a knife and then Raidas went in to the house and took out a knife. It is in most suspicious circumstances this panchanama is prepared. There is no signature of either of the accused on the panchanama. The depositions of the two panch witnesses did not also tally. The Investigating Officer is also not stating properly about the recovery of knives. So, the prosecution has utterly failed to prove that knives were recovered at the instance of the accused. So, any further evidence of finding blood stains on knives and identification of the knives by the prosecution witnesses as used by these two accused for causing the injuries is meaningless.

34. To prove the lodging of the F.I.R., the prosecution has examined Head

Constable Bhaskar Fakira Mistari, P.W. No. 10, at Exhibit 63. He has stated that on 8.1.1995, he was Police Station Officer at Pahur Police Station from 8 a.m. to 2 p.m.. At about 8.30 a.m., Baburao Sayaji Farkande informed about the beating incident at Wakod and that his brother was injured by knife. He has stated that then he gave this information to P.S.I., who immediately rushed to the place of the incident, and thereafter, he recorded the F.I.R. as narrated by Baburao, which is at Exhibit 40. In the cross-examination the witness has denied that anybody else had given information at about 8 a.m. regarding this incident.

35. From the F.I.R., Exhibit 40, it is seen that the Police had arrived at the place of the incident even before the lodging of the F.I.R., because in the F.I.R., it is mentioned that thereafter the Police of Pahur and Saheb had come to Wakod at the place of the incident. It means that Baburao was at the place of the incident when the Police reached there.

36. A.P.I. Nawale, in his deposition at Exhibit 64, has stated that at about 8.30 a.m., the Police Patil of Wakod informed about the quarrel which had taken place at Wakod. So, this statement of A.P.I. Nawale does not corroborate the deposition of the Head Constable. To ascertain the correct situation, the learned A.P.P., was directed to produce before us the Police Station Dairy and accordingly, the Station Diary is produced. From the Police Station Dairy, it is noticed that on 8.1.1995, at about 9.05 a.m., entry was taken that the Police Patil Wakod, informed that at Wakod, Farkande and others were assaulting each other with knives and so, A.P.I. was informed immediately to proceed to the place of the incident. This clearly means that the information about the incident was given by the Police Patil as stated by the A.P.I. Shri Nawale and Baburao had gone to the Police Station thereafter and then his detailed statement was recorded.

37. Though at 9.05 a.m., the information was received at the Police Station about the incident, whatever entry is taken in the Station Diary does not disclose any details. There is only information that there was assault with knife on each other. So, that was by itself not sufficient to register a cognizable offence. So, this information by the Police Patil can be considered as an intimation for the Police to make aware about the incident. Because of this information, A.P.I. Nawale reached to the spot and it appears that after Police had reached to the spot, Baburao went to the Police Station, Pahur and lodged the report. The distance between Police Station, Pahur, and Wakod is 9 to 10 kms. So, he could have very well reached there before 10 a.m. and then his statement was recorded, which disclosed the details of the incident and a cognizable offence and, therefore, the F.I.R. was registered. So, in the given circumstances, though there is some contradictory statement in the deposition of Head Constable and A.P.I., that is not fatal to the prosecution. Exhibit 40 can be treated as F.I.R., because it is for the first time disclosing the details regarding cognizable offence.

38. The learned Counsel for the Appellants has argued that the incident took place at about 6 to 6.30 a.m. as being stated by the witnesses and the F.I.R., was lodged at 10 a.m., nearly four hours after the incident, when the Police

Station was hardly at a distance of 10 kms. from the place of the incident. There is delay in lodging the F.I.R. and that must be considered as a vital circumstance against the prosecution.

39. No doubt, the F.I.R. is expected to be lodged immediately after the incident. But what would amount immediate lodging of F.I.R. will vary from case to case. Here, in the present case, the two persons from the same family had lost lives and one had received a serious injury on stomach and he was bleeding. Naturally, it was the duty of the persons there first to attend the injured person. Some time must have been spent in obtaining the car and sending the injured person to hospital. By that time, the Police had reached there and thereafter Baburao proceeded to the Police Station. So, he might have taken at least one hour to reach Police Station. The F.I.R. is in details and more than 45 minutes must have been spent to record this F.I.R. It is running into six typewritten pages. So, after completion of recording of F.I.R., time 10 a.m. is mentioned. In these circumstances, we do not think that there is inordinate delay in lodging the F.I.R.

40. It is also argued by the learned Counsel for the Appellants that after deliberations, this F.I.R. is filed. We have to see how the incident took place. There was an assault, then these persons ran away from the place, they returned back after 10 or 15 minutes to help the injured, then they were engaged in helping the injured, the Police by that time reached there and then Baburao was sent to the Police Station to lodge F.I.R. Was there any opportunity for deliberation and with whom they were going to deliberate? It is alleged that at the Instance of Mahesh Deshmukh, the F.I.R. is lodged. But Mahesh Deshmukh had taken Atmaram by his car to Jalgaon. So, we do not think that there is any circumstance to indicate that the F.I.R. is lodged after deliberation with other witnesses and that it is, therefore, not reliable.

41. The learned Counsel for the Appellants has argued that though all the witnesses were available at the place of the incident on 8.1.1995, the Investigation Officer, A.P.I. Nawale did not record their statements immediately on that day. Statements of some witnesses were recorded on next day and of some witnesses were recorded even two days after the incident.

42. However, it has to be noted that A.P.I. Nawale in his deposition at Exhibit 64 has stated that on 8.1.1995, he recorded the statement of Ramdas and others. So, it is not that he did not record statement of any witness on 8.1.1995. He had to first complete formalities, such as, inquest panchanama, sending bodies for post-mortem examination, drawing panchanama of the scene of incident, etc. So, it was not possible for him to record statements of all the witnesses on 8.1.1995. So, as it is, statements of some of the witnesses were recorded on 9.1.1985 and statements of some other witnesses were recorded thereafter.

43. Statement of Atmaram was recorded on 9.1.1995 and it is contended that his statement was recorded with great delay. It has to be noted that Atmaram had

received serious injury. He was admitted in the hospital. He was under treatment. So, his statement could not have been recorded on 8.1.1995 itself, but his statement was recorded on 9.1.1995 itself and we do not think that there is any inordinate delay in recording the statement of Atmaram.

44. The learned Counsel for the Appellants has drawn our attention to the entries in post-mortem examination reports. In both the reports, it is mentioned that there was semi-digested food in stomach and intestines. The doctor has, therefore, stated in his deposition that death could have taken place 4 to 6 hours after the last meal. The learned Counsel for the defence, therefore, argued that the incident could not have taken place at 6 a.m.. Generally, the villagers take their meals at about 8 or 9 p.m.. One can even imagine that on the given date, they had taken meals at 10 p.m. then the incident ought to have taken place at 3 or 4 a.m.. The timing given regarding the incident by all these witnesses is, therefore, not believable.

45. It is true that from the medical evidence, it appears that the deaths took place 4 to 6 hours after the last meal. But there is no specific evidence before the Court when these two deceased took the last meal. Merely because there is the general practice of taking night meals at about 8 or 9 p.m. in this particular case we cannot jump to the conclusion that, that must have been the time of taking the meals with respect to these two deceased and, therefore, the time of incident given by the witnesses cannot be correct. It will be dwelling on hypothesis and that is not permissible. These two deceased might have taken meals late in night. No such specific question was asked to any of the prosecution witness in the cross-examination to bring out this particular circumstances on record and, therefore, this medical evidence by itself is not sufficient to discard the evidence of the eye witnesses who state that the incident took place at about 6.30 a.m..

46. The learned Counsel for the Appellants has also argued that many witnesses were injured. Their statements were recorded by the police, but except Atmaram, no other injured witness is examined by the prosecution and, therefore, the important witnesses are kept back. As against this argument, the learned A.P.P. has argued that the injured Atmaram being most important witness, he is examined and to corroborate his evidence, the other independent witnesses are examined. The injured witnesses are close relatives of Atmaram. So, if they had been examined, it would have been argued that they being close relatives, they are not independent witnesses. To avoid any such contention, the other villagers, who were present there, are examined as witnesses and, therefore, there is no infirmity in the prosecution case.

47. We find much substance in the argument of the learned A.P.P. Injured Atmaram is examined and other witnesses who were present and who had seen the incident are also examined. Merely because other injured witnesses are not examined, the evidence of the witnesses, who are examined, cannot be discarded if that evidence by itself is reliable and cogent. Non-examination of

other injured witnesses, therefore, cannot be a ground to disbelieve the witnesses, who are examined by the prosecution.

48. The learned Counsel for the Appellants has strongly relied on the circumstance that accused Shivaji and accused Raidas had received injuries and the prosecution has not explained how they received the injuries and, therefore, the prosecution evidence should not be believed.

49. Dr. Jagtap, P.W. No. 8 in his cross-examination has stated that he examined Shivaji and Raidas on 8.1.1995 as they were referred to him by the police station, Pahur, and he found the following injuries on the person of Shivaji.

1. C.L.W. size 2 ? 2 ? 2 cms. over left little finger nail is crushed.
2. C.L.W. size 1 ? ? ? ? cm. to the right thumb side.
3. C.L.W. size 1 ? ? ? ? cm. on the occipital region of the scalp.
4. Contusion 5 ? 2 cms. size on the back.
5. Contusion 5 ? 2 cms. on back.
6. Contusion 2 ? 2 cms. on right knee.
7. Contused lacerated wound 1 ? ? ? ? cm. on right arm upper middle side.

Similarly, he described the following injuries as seen on the person of Raidas.

1. Incised injury size 3 ? 2 ? 2 cms. on left forearm middle third anterior side, caused by sharp object.
2. C.L.W. size 1 ? ? ? 1 cm. frontal area forehead left side.
3. C.L.W. size 3 ? ? ? ? cm. on the occipital area of head.
4. Contusion size 3 ? 3 cms. on right forearm upper 3rd dorsal.
5. Contusion size 2 ? 2 cms. on the right wrist joint.

50. It is true that the prosecution witnesses have not explained how accused Shivaji and accused Raidas suffered the injuries. But some of them have admitted in the cross-examination that they had seen injuries on the person of Shivaji. There is also explanation that when Raidas was to assault Rambhau, Uttam pushed Raidas aside and Raidas fell down on the ground. There is also statement that Raidas and Shivaji fell down when they were effecting attack on Sayaji. So, it is not the case that the prosecution witnesses are saying that there was no occasion for these two accused to receive those injuries. The injuries could have been caused because of the fall.

51. The injuries on the person of Shivaji were contused lacerated wounds of very minor size and it cannot be said that those witnesses, who were away from the place of the incident, say at about 50 ft. distance, could have seen how those injuries were received by Shivaji. The injuries Nos. 4 to 7 on the person of

Shivaji are all contusions on the back and knee and contused lacerated wound on the right arm, upper, middle portion. If the person was wearing shirt, when the incident took place, how was it possible to the witnesses to know that he had received the injuries on the back and to explain that he received injuries in particular manner. So, considering the nature of the injuries, the size of the injuries and the place where the injuries were caused, the deposition given by the prosecution witnesses that the accused had fallen down, then, as argued by the learned A.P.P., that they must have received those injuries because of the fall, appears probable. One more circumstances has to be taken into consideration that all these witnesses have stated that accused Nos. 4 to 7 were pelting stones. No doubt, Accused Nos. 4 to 7 are acquitted, but if those two accused had received injuries because of the stones pelted by the other accused, the prosecution witnesses were not expected to explain those injuries. The facts of each case must be taken into consideration.

52. So far as the injuries on the person of Raidas are concerned, there is incised injury 3 cms. ? 2 ? 2 cms. on left forearm and others are contusions and lacerated wounds. All these injuries are very minor injuries.

53. It is worth noting that though in his statement u/s 313 of the Cr.P.C. accused Raidas has stated that Atmaram inflicted injury on his arm with knife, nowhere such suggestion was given to Atmaram in his cross-examination. For the first time in his statement u/s 313 of the Cr.P.C., the story is given by Raidas. Furthermore, it is already pointed out that the witnesses have stated that Raidas was to assault Ramdas with knife and then Uttam pushed him aside and Raidas fell down. So, during the said scuffle also, Raidas could have received injuries on his right arm by the knife, which he was holding in his hand. This incident as a whole has to be considered. Merely because the prosecution witnesses are not deposing that particular accused received a particular injury because of particular act, they cannot be disbelieved.

54. The learned Counsel for the Appellants has relied on the ruling of the Apex Court in the matter of Lakshmi Singh and Others Vs. State of Bihar, , and has emphasised that the non-explanation of the injuries sustained by the accused will amount to drawing of three conclusions (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version, (2) that the witnesses, who have denied the presence of the injuries on the person of the accused, are lying on most material point and, therefore, their evidence is unreliable, and (3) that, in case, there is defence version, which explains the injuries on the person of the accused, it is rendered probable, so as to throw doubt on the prosecution case. So far as the first two conclusions which the Court may draw in the given circumstances are concerned, it is already explained that the injuries were very minor. It is not that the witnesses have totally denied that there were injuries on the person of the accused and in such circumstances, it cannot be said that the prosecution has suppressed the genesis and origin of the occurrence or that the witnesses are lying on most material

point. In each case, the circumstances will have to be weighed before drawing these conclusions. In the present case, the facts do not indicate that such conclusions should be drawn only because there is no full explanation about the injuries on the person of the accused.

55. So far as the third conclusion mentioned in the judgment of the Apex Court cited *supra* is concerned, we will discuss it while considering the defence story.

56. It is also argued by the learned Counsel for the Appellants that the accused were not the aggressors. Accused were at their home. Atmaram had gone there and Atmaram picked up the quarrel. So, they cannot be blamed. The story as given by the prosecution witnesses is that Atmaram went to the place of construction. The place of construction is adjacent to the house of Raidas. There is one common wall in between the newly constructed house and the house of Raidas. But it appears that Atmaram had gone there to see the situation at the place of the construction. As it turned out that, because of the rains in the previous evening and night, accused Raidas and his family could not sleep in his house. So, Raidas was really annoyed person. When he saw Atmaram, he must have got angry, because the wall had not been completely constructed, the rain water came in his house. Atmaram had no reason to get angry with Raidas. Atmaram had also no reason to go to that place with knife in that early hour of the morning. So, when the altercation started between Atmaram and Raidas, naturally Raidas, who was annoyed very much, must have assaulted Atmaram. The knife was from his house and he had not to go anywhere to fetch the knife. It may be a sudden reaction on the part of Raidas. He gave one stab blow to Atmaram. Atmaram immediately left that place and went upto certain distance of 40 to 50 ft. but then he fell down and was lying there.

57. The incident could have ended there and then because it does not appear that Raidas or anybody else followed Atmaram to inflict more injuries on him. However, then Pralhad reached there. He had seen Atmaram and he must have raised quarrel with Raidas. However, the other accused had also reached by that time and the further incident of stabbing Pralhad and Sayaji took place. The point who was the aggressor is not to be decided from the circumstances as to who had gone to the house of the accused. But it has to be decided on the basis of how the incident took place, what evidence is brought by the prosecution and what explanation is given by the defence. If all these things are taken together, it cannot be said that the prosecution witnesses were aggressors and Raidas and other accused were only acting in self defence.

58. Here, at this stage, even for the sake of arguments, it is accepted that injuries on the person of Raidas and Shivaji were caused by the prosecution witnesses, those injuries were not that serious for Raidas and Shivaji to stab two persons with deadly weapons. So, the theory as to who was the aggressor being brought before the Court by the defence is not such helpful to the defence.

59. The learned Counsel for the Appellants has strongly relied upon the written

statement of Raidas u/s 313 of the Cr.P.C. We have already referred to that written statement given by Raidas. The defence is that Raidas states that his brother was assaulted, therefore, Raidas became angry, he snatched knife from Atmaram and wielded it and caused injury to the three persons. The other accused did not participate in the incident and it was an act in self defence by Raidas.

60. The learned Counsel for the Appellants has referred to the ruling of the Apex Court in the matter of *Seriyal Udayar Vs. State of Tamil Nadu*, and has contended that even if the accused has not established fully the right of private defence, if the cross-examination and circumstances indicate that the incident might have taken place in the manner as described by the accused, then the benefit must be given to the accused.

61. There cannot be two opinions about this principle. Atmaram is the main witness. He is cross-examined at considerable length. But nowhere it is suggested to him that he caused injury to Raidas with the knife, which he was having. Nowhere it is suggested to him that Raidas snatched that knife from Atmaram when Pralhad and Sayaji were assaulting Shivaji. So, no basis is created in the cross-examination when there was full opportunity to the accused to make out such a right of private defence. Only at the eleventh hour, at the time of recording statement u/s 313 of the Cr.P.C., Raidas has come out with this story.

62. With reference to other witnesses also, no suggestions are given that Atmaram first wielded knife, Atmaram caused injury to Raidas and then Raidas snatched knife from Atmaram and Raidas was brandishing the knife in self defence. Only suggestion given is that there was assault on Shivaji and others, but those are vague suggestions and not as specific as is being made out in the statement of Raidas. Hence, the cross-examination of the prosecution witnesses is not sufficient to draw the conclusion that the accused was acting in exercise of right of private defence.

63. Though it is alleged that Atmaram was having the knife. It is not alleged that any other witness was having any other weapon. So, what was there for Raidas to get very much angry on seeing that Shivaji was being beaten. It was not that type of assault, which would require Raidas to take the knife and stab three persons at a time.

64. The stand taken by Raidas is that Atmaram, Pralhad and Sayaji caught him and then to save himself, he was brandishing the knife and thus they got injured. If that had been the position, then the injuries would have been on any part of the body, but, here, on going through the medical evidence, it is very clear that the injuries were stab injuries on chest and stomach. Those were caused by standing in front of the injured. Those were not caused at random because of brandishing of the knife. The knife had penetrated deep in heart in case of Pralhad and Sayaji and deep in stomach in case of Atmaram. From point blank

distance, the stab injuries were caused and they do not appear to have been caused at random, because of brandishing of knife. They were caused because the injured was caught by two persons. The explanation given by Raidas does not appeal to reason. It is not sufficient and satisfactory. It cannot be treated as an act in exercise of right of private defence as being made out by the learned Counsel for the Appellants. Deliberately, point blank and from close distance injuries were caused on vital part, i.e., heart and stomach.

65. So, considering all these circumstances, the third point which is mentioned in the above referred judgment of the Supreme Court (Lakshmi Singh's case) also cannot be made applicable in the present case. No probable explanation is rendered by the accused. The injuries on the person of the accused being of a very minor character, as stated above, we do not think that the evidence of the prosecution should be discarded on applying the third point also.

66. One more aspect of the case is also argued by the learned Counsel for the Appellants. He has pointed out that the Medical Officer has stated that there was only one stab injury on the chest of Sayaji, but the prosecution witnesses, especially Atmaram and others, are saying that repeated blows were given by both the accused Raidas and Shivaji with knives to Sayaji on chest and stomach. This evidence of the witnesses does not tally with the medical evidence.

67. Atmaram was at a distance of 50 ft. from the place of the incident. He was lying on the ground and he must have seen assault on Sayaji. However, it was not possible for him to see exactly where the blows landed. Therefore, he is saying that blows were given on chest and stomach. Same is the position with other witnesses. It is stated by the doctor that there was stab injury on the left side of the chest and incised injury on right side web of thumb. There was contused lacerated wound on the scalp. It was very small and it could have been caused due to fall after the assault. But the first two injuries were caused by sharp weapon. The witnesses must have seen that the repeated blows were given. Only thing is that one blow penetrated the heart and the other blows did not cause any injury on the vital organ. So, only because of this small discrepancy in the medical evidence and the ocular evidence, the ocular evidence cannot be discarded. In fact, there is no discrepancy as such. The witnesses had seen that the blows were being given, but actually the blows did not land on the body of Sayaji, except one.

68. So, considering all this prosecution evidence, we are of the opinion that the learned Additional Sessions Judge has rightly come to the conclusion that the Appellants committed the offences punishable under Sections 302 and 307 of the Indian Penal Code. Here, the charge was framed for offences punishable with offence u/s 149 of the Indian Penal Code. The learned Additional Sessions Judge has come to the conclusion that Accused Nos. 4 to 7 were not part of the unlawful assembly and the evidence on record does not indicate that they were having the common object of causing injury to any of the three injured with weapon like knife. They might be present as the accused were their relatives.

They might have abused the prosecution witnesses, but so far as the offences under Sections 302 and 307 of the Indian Penal Code are concerned, they cannot be held responsible as observed by the learned Additional Sessions Judge.

69. In such circumstances, as the prosecution failed to prove that there was unlawful assembly of 5 or more persons, the question arises as to how the accused can be convicted for this offence and the learned Additional Sessions Judge has, therefore, rightly roped in the four accused by resorting to the provisions of Section 34 of the Indian Penal Code. If the description of the incident given by the prosecution witnesses is looked into, common intention can be inferred. First, Atmaram was assaulted with knife. Shivaji, Uttam and Patilbuwa were knowing that Raidas was having a knife. Shivaji himself was armed with knife. Uttam and Patilbuwa caught Pralhad and Sayaji, so that Shivaji and Raidas could assault them. So, even if Uttam and Patilbuwa were not having particular weapon or they had not caused any injury on the person of Pralhad and Sayaji, their participation in the incident clearly indicates that they were having the full knowledge that the knife would be used if these two persons were caught by them, and to make possible the assault with knife, they had caught Pralhad and Sayaji. The conviction of the four appellants for offences u/s 302 read with Section 34 of the Indian Penal Code is proper in the given circumstances.

70. So far as the conviction of accused Raidas for offence u/s 307 of the Indian Penal Code is concerned, the incident as narrated clearly indicates that when the assault on Atmaram took place, the other accused were not there. It may be that Raidas was very much angry and annoyed and, therefore, he assaulted Atmaram. But was it necessary for him to use knife. Was it necessary for him to stab the knife on stomach, the vital part. The prosecution has examined Dr. Bhole, P.W. 12. His deposition is at Exhibit 73. He had given treatment to Atmaram and he has described the injury as caused on left umbilical region horizontal 3 ? 4". So far as depth is concerned, he has not mentioned the depth. The doctor said that the depth could have been ascertained only at the time of operation. Further evidence of the doctor indicates that on surgery on Atmaram, it was noticed that momentum out, which means, the injury was sufficiently deep. It may be because of luck that Atmaram survived. But the nature of injury, the place where the injury is caused and the weapon used for the injury, clearly show that there was intention to commit murder and, therefore, the conviction of Raidas for offence u/s 307 of the Indian Penal Code is also proper in the given circumstances.

71. In the result, this Criminal Appeal is dismissed. The order of conviction and sentence passed against the Appellants by the learned 4th Additional Sessions Judge, Jalgaon, in Sessions Case No. 111 of 1995 on 22.3.1996 is hereby confirmed. Appellant Nos. 3 and 4 are on bail. They shall surrender to their bail forthwith.