
(2018) 12 BOM CK 0129
In the Bombay High Court
Case No : Criminal Appeal No. 433 Of 2005

State Of Maharashtra

APPELLANT

Vs

Suryabhan Govindrao Hulle & Ors

RESPONDENT

Date of Decision : 20-12-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 97, 98, 99, 100, 100(1), 147, 148, 149, 302, 307, 323, 324, 447
Evidence Act, 1872 — Section 3, 27, 114, 145
Code of Criminal Procedure, 1973 — Section 313

Citation : (2018) 12 BOM CK 0129

Hon'ble Judges : T. V. Nalawade, J; Vibha Kankanwadi, J

Bench : Division Bench

Advocate : M. M. Nerlikar, N. K. Kakade

Final Decision : Dismissed

Judgement

T. V. Nalawade, J

1. The appeal is filed by the State to challenge the judgment and order of Sessions Case No.112 of 2001 (Old Sessions Case No.130 of 2000), which was pending in the Court of learned Additional Sessions Judge, Udgir. All the Respondents are acquitted by the Trial Court of the offences punishable under Sections 302, 307, 324, 323 and 447 read with 149 of the Indian Penal Code and also for the offences punishable under Sections 147 and 148 of the Indian Penal Code.

2 Both the sides are heard.

3 In short, the facts leading to institution of appeal can be stated as follows:

The incident took place due to the dispute over the agricultural land bearing Survey No.124/2 situated at Dhangarwadi. This land was owned by one Anusayabai in the past and she was widow of the uncle of first informant (PW-14). Anusayabai had no son, but she has left behind a daughter by name

Kalubai. It is the contention of the prosecution that the property was given by Anusayabai to Namdeo (first informant) and Rajaram as she had no son and Namdeo had promised to give food grains for her maintenance. Due to this act of Anusayabai, Namdeo and his brother Rajaram had borne expenses of marriage of Kalubai. Kalubai is given in marriage to Gahinath (Accused No.2). After issues were born to Kalubai, she started demanding back the disputed land, but the first informant and Rajaram refused to return the land.

4 It is the case of the prosecution that Gahinath and his sons forcibly took possession of the disputed land about 10 years prior to the date of incident in question. Prior to that, a suit was filed by the two sons of Gahinath, who are also accused in the present matter, bearing R.C.S. No.355 of 1986 for relief of declaration that they are owners of the disputed property and they had also prayed for relief of permanent injunction against first informant and his brother. This suit came to be dismissed in the year 1996. Few days prior to the date of incident, the disputed land came to be mutated in the names of first informant and his brother Rajaram and then tension increased between the parties. The land of first informant and Rajaram, which is not in dispute, is situated adjacent to the disputed land and it is on northern side of the disputed land. The area of this land is more than 15 Acres. In the past, these two pieces of lands were part of same survey number, but subsequently, the survey was divided into two portions and Survey No.124/1 was mutated in the name of first informant and his brother Rajaram. The second portion, disputed portion was given number as 124/2 and aforesaid mutation was effected in respect of the disputed land in favour of first informant.

5 Though the aforesaid suit was dismissed, Gahinath and his two sons like Pandit and Mahindrakumar were cultivating the aforesaid disputed land. Accused No.1, Suryabhan is the real brother of Accused No.2, Gahinath. It is the case of prosecution that at the relevant time, first informant, his brother Rajaram and four sons of first informant viz. Ankush, Babruwan, Mahdukar and Ramdas were living together in a house constructed in Survey No.124/1.

6 Accused No.5 (Jeetendra), Accused No.8 (Giridhar @ Pintu) and Accused No.9 (Ranjit) are the sons of Accused No.1 (Suryabhan) and their place of residence is Deoni. Accused No.6 is a brother of Accused Nos.1 and 2 and Accused No.7 (Govind) and Accused No.10 (Sheshrao) are sons of Accused No.6. They were also not residents of Dhangarwadi, the place where the incident took place. The case was tried against these ten Accused persons. Accused No.11 (Bajrang Patil), Accused No.12 (Husain Bhambarge) and Accused No.13 (Pandhari Kamble) are shown as absconding Accused in the case.

7 In the charge-sheet, Accused No.2 (Gahinath) and his two sons i.e. Accused Nos.3 and 4 are shown as residents of Dhangarwadi, Tahsil Deoni, District Latur. Suryabhan and his sons are residents of Daithana, Tahsil Shirur Anantpal, District Latur. Accused No.6 (Rangrao) is also shown as resident of Daithana. Charge-sheet shows that at the relevant time, two sons of Rangrao were living at Sakol,

Tahsil Shirur Anantpal, District Latur.

8 It is the case of the prosecution that when Accused persons learnt about the aforesaid mutation, they started searching for opportunity to quarrel. On 24th June, 2000, first incident took place. One Raju Chinchole of village Bakli was present in the field of first informant (Survey No.124/1) with the first informant and his sons and other labours as plantation of sugarcane was going on. In the evening time, Accused, Mahindrakumar gave a taunt to Raju by calling him as a dog and he said that he had come unnecessarily there to help first informant. Raju retorted and then quarrel started between Raju and Mahindrakumar. Accused, Gahinath and his other son Pandit also came there and they started quarreling. First informant and his sons took Raju aside to stop the quarrel. While leaving, Gahinath and his sons gave threat to teach lesson to the first informant and his family on the next day. As there was long standing dispute and they used to quarrel, this threat was not taken seriously by the first informant and his family.

9 On 25th June, 2000, Madhukar, a son of first informant left Dhangarwadi for Shrimali. Aforesaid Raju also left for his village. From 08:00 am on that day, first informant, his wife Bhagabai, his sons Ankush, Babruwan, Ramdas, Balika wife of Babruwan, one Sopan Bodke of Dhangarwadi, his wife Savitabai and son Rajaram were doing agricultural operation, plantation of sugarcane in the land of first informant.

10 The area of Survey No.124/1 is more than 15 Acres and at 11:00 am, first informant took his cattle near the Bandh of his land for grazing. Others were busy in aforesaid agricultural operation. In some portion of Survey No.124/1, there were standing crop of Toor and Udad. At about 11:00 am, Accused No.1, Suryabhan came on motorcycle with one unknown man in the portion of first informant where there was Toor and Udad crop and he gave call to deceased, Babruwan to ask him to come there. Babruwan went towards that place and in the meantime, 10 to 12 persons came towards that spot and they had come in white jeep. Rangrao (Accused No.6), Gahinath (Accused No.2), Pandit (Accused No.3), Giridhar (Accused No.8), Ranjit (Accused No.9), Jeetendra (Accused No.5), Sheshrao (Accused No.10) and Govind (Accused No.7) were amongst the persons, who had come in the jeep. There were 3 to 4 other unknown person. Mahindrakumar was already present in the disputed land and he also rushed to the spot of offence. These persons had come with weapons like axe, sickle and sticks. The weapon, which each Accused was carrying, is described by the witnesses.

11 The incident in question took place in the portion of the field of first informant where there was standing crop of Toor and Udad. Suryabhan and Gahinath, all of a sudden started attacking Babruwan, who reached the spot by using axe and sickle. Suryabhan used axe and Gahinath used sickle. When first informant rushed to the spot to save Babruwan, he was pushed aside. Many blows were given on the person of Babruwan and when he collapsed, all the

Accused assaulted first informant and aforesaid persons, who were with first informant for agricultural operation. There was attempt on the life of Ramdas and Ankush and the weapons like axe and Katti were used against them. Witness Sopan and his wife were also not spared, who had come there to rescue. Lady members like Bhagabai and Balika were also assaulted and most of the persons from the side of first informant were injured in the incident.

12 Attempt was made to save life of Babruwan, but on the way to hospital, Babruwan died. On 25th June, 2000 itself, Namdeo gave FIR and crime at C.R. No.53 of 2000 came to be registered in Deoni Police Station, for the aforesaid offences.

13 On 26th June, 2000, Mahindrakumar, Accused No.3 gave FIR in respect of the same incident and crime at C.R. No.54 of 2000 came to be registered against Babruwan and two others and allegations were made that they had assaulted Suryabhan by using axe. It was for the offence punishable under Section 307 read with 34 of the Indian Penal Code.

14 Police Sub-Inspector, Gavde of Deoni Police Station, took over the investigation. On 25th June, 2000, he recorded statements of some witnesses and prepared in-quest Panchanama on the dead body of Babruwan. On 26th June, 2000, he prepared spot of offence Panchanama and the spot was situated in Survey No.124/1/1 of Dhangarwadi. On 26th June, 2000, Gavde arrested Accused, Mahindrakumar, Rangrao, Govind and Jeetendra. Other Accused came to be arrested subsequently. During investigation, weapons like axe, sickle (Katti) and sticks were recovered from some of the Accused on the basis of statements given under Section 27 of the Evidence Act. Clothes of most of the Accused persons having blood stains were also recovered and seized. Statements of remaining eye- witnesses were recorded. Statement of driver of jeep in which most of the Accused had come to the field of first informant came to be recorded. Postmortem report in respect of the dead body of Babruwan was collected. He died due to many incised wounds and some other injuries inflicted on him in the aforesaid incident. Accused, Suryabhan was also injured and he was in private hospital upto 15th July, 2000 and he came to be arrested on 16th July, 2000 after his discharge from the private hospital. Charge-sheet was filed against the present Accused and charge-sheet came to be filed in C.R. No.54 of 2000 also against Babruwan, Ramdas and Sopan, persons of the side of first informant.

15 Charge came to be framed for the aforesaid offences. All the Accused pleaded not guilty. Suryabhan (Accused No.1) took defence that he had gone there with a man to settle the dispute and to convince the side of first informant not to quarrel but he was assaulted in the incident. Copy of FIR given by Mahindrakumar (Accused No.3) is brought on record by defence.

16 The Trial Court has held that Babruwan died homicidal death. The defence also did not dispute this circumstance. The Trial Court has given acquittal to all

the Accused by giving following reasons:

- (i) FIR was belated and thumb impression of Namdeo appearing on FIR was not attested;
- (ii) Side of first informant was not in possession of the disputed land, but it was probably trying to take possession by using force and due to that the incident took place, possibility of exercise of right of private defence;
- (iii) Injuries found on the person of Accused No.1, Suryabhan are not explained by the prosecution.

17 The prosecution has given voluminous direct and circumstantial evidence in the present matter. Babruwan died homicidal death and many persons from the side of first informant were injured in the incident. Only one person, who was injured from the side of Accused was Accused No.1 (Suryabhan). In respect of the same incident, both the sides gave reports and the report from the side of Accused was given on 26th June, 2000, when the report from the side of first informant of the present matter was given on 25th June, 2000. As in the report given against present witnesses is brought on record, it can be said that the Accused were not disputing that in addition to Babruwan, Ramdas and Sopan were present on the spot at the time of incident. Babruwan, who was other person against whom allegations are made, died in the said incident. While appreciating the evidence given in the present matter, circumstance that all the eye-witnesses are residents of Dhangarwadi and most of the Accused are residents of other places need to be kept in mind. In view of this circumstance, it was necessary for the Accused persons to give plausible explanation as to why they were present on the spot, if their presence is established by the prosecution. On this background, this Court is considering various pieces of evidence one by one hereinafter.

MEDICAL EVIDENCE:

18 Dr. Mithare (PW-2) conducted postmortem examination on the dead body of Babruwan on 25th June, 2000 and report is proved at Exhibit-50. He found many injuries on the dead body. His evidence on description of injuries and his opinion regarding the cause of injuries is as under:

"3. I have mentioned ante-mortem injuries below column 17 of P.M. notes, which are as below:-

- (1) Incised wound over scalp, posterior aspect, size 15 cm X 2 cm. regular, running above downwards, underlying skull bone fracture, brain matter is seen through it.
- (2) Incised wound over scalp frontal bone size 7 cm X 2 c.m, regular, running above downwards, underlying bone is fractured. Brain matter is coming out of it.
- (3) Incised wound over frontal bone, above right eye size 10 cm x 20 cm, regular, running medial to lateral side. underlying bone is fractured.

- (4) Incised wound over scalp, temporal area size 10 cm. x 2 cm, underlying bone is fractured.
- (5) Incised wound over left forearm size 10 cm x 2 cm, regular, running above down wards.
- (6) Incised wound over left ring finger size 3 cm x 1 cm.
- (7) Incised wound over left thigh, posterior, aspect, size 10 cm x 2 cm.
- (8) Multiple irregular contusion over back.
- (9) Incised wound over right lower limb size 15 cm x 3 cm fracture of right tibia.
- (10) Incised wound over left thigh, size 15 cm x 3 cm fracture of femur.
- (11) Incised wound over lateral aspect of knee joint, underlying bone is fractured.

On internal examination, I have made observations below column 19 as follows:-

1. HEAD:- Multiple incised wound present over scalp. Multiple fracture of skull bone. bleeding present in the brain matter.

In my opinion, the cause of death was shock due to cerebral haemorrhage. Injuries no.1 to 4 below column 17 jointly and independently are sufficient to cause the death. All the injuries below column 17 are possible by sickle, axe as weapon."

Out of 11 injuries, 10 injuries on the dead body were incised wounds and the remaining injury was multiple abrasions on back. Four incised wounds were found on the head of Babruwan and those injuries had caused multiple fractures of skull and bleeding in the brain. The evidence on record shows that injury Nos.1 to 4 are independently sufficient to cause the death in ordinary course of nature. In view of this medical evidence, the Trial Court has given finding that Babruwan died homicidal death.

19 Dr. Mithare (PW-2) has given evidence that all the aforesaid incised wounds can be caused by weapons like axe and sickle (Katti). In the cross-examination, it was suggested to doctor that ordinarily a sickle would cause punctured wound. This suggestion is hypothetical in nature. It depends on the size of curved blade of weapon, which can be called as sickle (Katti) and also depends on the portion of blade, which comes into contact with the body.

20 The evidence of Dr. Mithare (PW-2) shows that on 25th June, 2000 itself at about 04:30 pm, he examined Namdeo (PW-14), first informant. He found following injuries on the person of Namdeo:

- "1. Multiple irregular abrasion over scalp.
2. Irregular swelling and tenderness over left elbow.

3. Irregular swelling and tenderness over right shoulder.
4. Irregular swelling and tenderness over right clavicle.
5. Irregular swelling and tenderness over both lumbar region."

21 Dr. Mithare (PW-2) has given evidence that the age of injuries, which were found on the person of Namdeo was within 24 hours and those injuries were caused by hard and blunt object like stick. He has given the evidence that Namdeo was referred him by police. The injury certificate in respect of Namdeo is proved at Exhibit-51.

22 Dr. Mithare (PW-2) has given evidence in respect of injuries sustained by Rajkumar. He was examined at about 04:30 pm and he was also referred by police. One CLW was found over scalp, having size 5 cm x 1 cm and age of the injury was given as 24 years. It was also caused by hard and blunt object and the injury certificate is proved at Exhibit-52. This Court has carefully gone through the cross- examination of Dr. Mithare made by the defence counsel. Nothing could be brought on record to create doubt about the aforesaid evidence including the opinion given by Dr. Mithare.

23 Dr. Jadhav (PW-15) examined five injured witnesses on 25th June, 2000 in Rural Hospital, Udgir. They were also referred by Police at 03:00 pm. His evidence shows that the injuries found on the persons of following witnesses were sustained within 6 hours prior to the time of examination. The evidence given by Dr. Jadhav in respect of injuries and opinion is as under:

Ramdas:

- "1. Contused lacerated wound on left parital area 15X8X bone jeep cm it was simple in nature, and might have been caused by hard and blunt object, within six hours.
2. CLW on fore head transversely, placed 8X2Xbone deep cm it was also simple and caused by hard and blunt object within 6 hrs.
3. CLW on bridge of nose of size of 6X3Xbone deep cm with crack of nosal bone and it was of grievous nature, caused by hard and blunt object, within six hours.
4. Incised wound on right upper arm transversely placed with cutting of underlying bicets muscle. Size 15X10X4 cm it was of grievous nature caused by sharp weapon and within 6 hrs.
5. Incised wound on right poplital area transversely placed, of size of 9X5X3 cm, with cutting of poplital muscle, bleeding positive and it was also grievous nature, by sharp weapon, and caused within 6 hrs.
6. Abrasion on left anterior superior illac spine- of 10 x 2 cm, vertically placed, bleeding positive. It was simple and caused by hard and blunt object within 6 hrs. After giving treatment, the patient was referred to civil hospital Latur accordingly. I had issued injury certificate which bears my signature. It is now

marked at exh96.

3. The injuries no.4 to 5 could be caused by any sharp edged weapon like axe. Said injured Ramdas present before the Court is the same.

These injuries show that two incised wounds were caused and they can be caused by axe. Three injuries were inflicted on the face and head.

Ankush:

"1. CLW on right parital area, in antero-posterior direction 10x2xbone deep cms. It was simple caused by hard and blunt object within 6 hrs.

2. Incised wound on right penal area transversely placed 10x12 cm and opening to the abdomne. It was grievous by nature and might have been caused by sharp weapon, within 6 hrs. Accordingly, I had issued the certificate, which bears my signature, and it is correct, it is now marked at exh97. Said Ankush present before the court is the same.

This patient was also referred to Civil Hospital Latur. Injury no.2-could be caused by Katti. The injury no.2 - may cause death, if prompt treatment is not given to the patient."

There were two injuries and one injury found on abdomen can be caused by weapon like Katti (sickle). The Doctor has given evidence that in ordinarily course, such injuries can cause death, it was dangerous to life.

Balikabai:

"1. CLW on frontal bone, on frontal area in antero- posterior direction 8x3x1 cms. in direction, bleeding positive and it was simple in nature, caused by hard and blunt object within 6 hrs.

2. CLW on left partial area, in A.P. direction 8x 2x bone cm. bleeding positive of simple nature, by hard and blunt object and within 6 hrs."

The doctor has given evidence that these injuries can be caused by stick.

Bhagabai: Bhagabai is wife of first informant and in respect of her, evidence is given as follows:

"1. CLW on left parital area, transversely placed, 10 X 2 X bone deep Cms, bleeding positive, it was caused by hard and blunt object, within 6 hrs.

2. Complain of pain on back lower, no external injury seen, by hard and blunt-object, within 6 hrs. Patient was also referred to civil hospital, Latur. I had issued the injury certificate under my signature, and it is correct, which is now marked as Exh.99."

Bodke:

"1. CLW on left index finger, 4X2X1 Cms. dimension with generalise swelling of

left hand of simple nature by hard and blunt-object, within 6 hrs.

2. Compound fracture of left fore arm with-fracture of ulna, bleeding positive with CLW on same injury which is 4X2X1 cms. It is of grievous nature and might have been caused by hard and blunt object within 6 hrs.

3. Linear contusion on left upper arm-in lower 1/3rd part, 10X8XCms dimension. It was simple in nature and might have been caused by hard and blunt object, within six hours.

4. Contusion on left calf muscle of 15 X 8 Cm. of dimension, no bleeding, simple, by hard and blunt object, within 6 hrs.

5. Linear contusion on left scapular area, 15 X 3 Cms. direction, obliquely passed up wards and laterally simple nature, hard and blunt object, within 6 hrs.

6. Linear contusion lower left scapular area 10 Cms X 3 Cms. obliquely placed, upwards and laterally of simple nature, hard and blunt object, within 6 hrs. Accordingly I received the certificate Exh.100 which bears my signature and it is correct, said injured soproan present before the court is the same.

Such type of compound fracture could be caused by stick."

The evidence shows that there was compound fracture of left forearm, but the injury was caused by hard and blunt object.

24 The injury certificates in respect of aforesaid witnesses are duly proved. The medical officer was cross-examined at length by defence counsel to suggest that some injuries on which opinion is given cannot be caused by weapon like sickle, but the doctor remained firm about his opinion.

25 The aforesaid medical evidence shows that the deceased and other seven persons were attacked in the incident. Incised wounds were found on the dead body and on the two brothers of deceased, Babruwan. Thus, it can be said that in the attack, sharp weapons were used against Babruwan and his two brothers.

26 The defence has examined Dr. Dhage (DW-1), who was working in a private hospital, Vivekanand Hospital, Latur. He has given evidence that Suryabhan was brought to this hospital on 25th June, 2000 and he was admitted there. He was brought from Civil Hospital. He found the following injuries on the person of Suryabhan:

(i) Two sutured wounds over scalp;

(ii) CLW over scalp;

(iii) Penetrating injury over right scapula.

It appears that the record of treatment, which was produced in the counter case filed against the prosecution witnesses of present matter, was shown to the doctor, but copies of that record are not produced in the present matter. That

record is also not shown to be exhibited, proved in the present matter. The witness admitted that the case papers in respect of Suryabhan prepared by the hospital are not in his handwriting and they do not bear his signature. In the cross-examination, he has contended that Suryabhan appeared to be robust as per the record and due to that he survived. He has deposed that the patient was conscious and well oriented when he was brought to Vivekanand hospital from civil hospital. His evidence does not show that there was opportunity to see MLC, which must have been prepared by the civil hospital. There is no evidence that sharp weapon was used to inflict the injuries, which were found on the person of Suryabhan. Though he has tried to say that after sustaining such injuries, the person may not be in a position to assault other, such hypothetical evidence cannot be used in favour of Accused persons. Whether injuries were inflicted after assaulting Babruwan by Suryabhan, is a question that needs to be decided by the Court.

EVIDENCE ON SPOT PANCHANAMA:

27 In the evidence of Ramdas (PW-13), son of first informant, it is brought on record that a land Survey No.221 (old number) was owned by two brothers like Nagappa and Rudrappa. The total area of this land as per 7/12 extract (Exhibit-91) was 24 Acres. Till the year 1980-81, as per Exhibit-91, name of Anusayabai was shown as owner of 8 Aana portion of this land. The first informant and his brother Rajaram were shown as owners of remaining 8 Aana share of this land. In the year 1976, name of only first informant was shown as the person, who was cultivating the entire area of 24 Acres. The name of Anusayabai was entered in crop cultivation column after the year 1976, but the manner of cultivation was shown as rit-2, not personally cultivating. A copy of decision given by the Civil Court in R.C.S. No.355 of 1986 is produced. This record shows that Accused Mahindrakumar and Pandit had filed suit through their father. Copy of decision (Exhibit-90) shows that relief of declaration of ownership and permanent injunction was claimed by the Accused persons against the first informant and his brother. Though in the first paragraph of the decision, it is mentioned that suit was filed in respect of both Survey No.124/1 and 124/2 (new numbers) in subsequent portion of the judgment, there is mention that the Plaintiffs were admitting that Survey No.124/1 had gone to the share of Namdeo and Rajaram, complainant side. In the suit, it was contended by the Accused that they had purchased the suit land from Anusayabai. This suit was dismissed on 23rd October, 1996. Though such decision was there, Namdeo (PW-14) has admitted that possession of Survey No.124/2 was obtained by the Accused forcibly about 10 years prior to the date of incident. There is substantive evidence of prosecution witnesses like Ankush (PW-9) showing that possession of Survey No.124/2 was with the Accused persons.

28 The aforesaid evidence, which is not disputed, needs to be kept in mind while appreciating the circumstances mentioned in the spot Panchanama at Exhibit-76. Spot Panchanama is duly proved by the prosecution in the evidence of Ramkaran

More (PW-8). Spot Panchanama was prepared by police on 26th June, 2000 after funeral of the dead body of Babruwan was over. Substantive evidence is given by the Panch witnesses and contents of Panchanama show that the incident took place in the land belonging to first informant. In the record, there is a mention that spot of offence is situated in Survey No.124/1/1. On the spot of offence, articles like many stones, pieces of green bangles of ladies, pieces of sticks used as weapons were found and there was blood on all these articles. All these articles were taken over under spot Panchanama. The evidence of Panch witness and document at Exhibit-76 is sufficient to prove that the incident took place in the land, which was not in dispute and which was in possession and cultivation of the first informant and his brother.

29 To show that More (PW-8) is interested witness, he was cross-examined at length by defence counsel. He has admitted that on that day, he had gone to Dhangarwadi to attend funeral of dead body of Babruwan as one Jyotiram Hazare of his village, who is a neighbour of this witness, had requested him to come with him. Said Jyotiram is a relative of the family of Namdeo. In the statement given under Section 313 of the Code of Criminal Procedure, Suryabhan (Accused No.1) has admitted that incident took place in the land of first informant. In view of this admission and aforesaid record, there is no need to discuss more the case of prosecution that the incident took place in the land, which was not in dispute and which was in possession of the first informant. In Exhibit-76, there is a hand sketch map showing that on south side of the land of first informant, there is disputed land. In the land where the incident took place, there was standing crop of Udad and Toor and this crop was taken by the complainant side as per the substantive evidence. In this land, there was house of family of first informant and there was one shed. On one side of Toor and Udad crop, there was sugarcane crop. The map shows that there was a Bandh between the land of first informant and the disputed land. Thus, there is voluminous record and there is admission of Accused that incident took place in the land belonging to the first informant and that land was in possession of first informant, but the Trial Court has held that the evidence on record shows that the incident took place in disputed land. After making such observations, the Trial Court has further held that probably the side of complainant tried to take possession of the disputed land by using force and incident took place due to that attempt of the side of complainant. Though in spot Panchanama at Exhibit-76, there is a mention that Bandh, which was there between the land of first informant and the disputed land, was damaged to much extent, only on the basis of that circumstance, inference is not possible that this was the act of complainant side and they had tried to take possession of the disputed land forcibly. On the contrary, the document at Exhibit-76 shows that plantation of sugarcane was going on in the land of the first informant. Right from beginning, from the FIR, the first informant and the prosecution witnesses had admitted that the possession of the disputed land was with Accused Nos.2 to 4. Thus, the inference drawn by the Trial Court that the incident took place in the disputed land and the family of the

first informant was trying to take possession of that land forcefully, is erroneous. This circumstance needs to be kept in mind while considering the direct evidence also. This evidence and direct evidence establishes motive also for the crime.

DIRECT EVIDENCE:

30 Namdeo (PW-14), first informant and other witnesses have given evidence on the incidents dated 24th June, 2000 and 25th

June, 2000. In respect of first incident, Namdeo has given evidence that on 24th June, 2000, Mahindrakumar had come to them and had picked up quarrel with Raju Chinchole, who was in the field of first informant to help the first informant in plantation of sugarcane crop.

He has given evidence that when Raju retorted, Gahinath and Pandit came there and they started quarreling with Raju. He has given evidence that his son Ramdas intervened and took Raju aside. He has given evidence that Gahinath and his two sons viz. Mahindrakumar and Pandit left the place but after giving threat that they would teach lesson to the first informant and his family on the next day. The incident of quarrel dated 24th June, 2000 is not disputed by Accused No.1 also. He has taken specific defence that due to that incident, he had gone to the land of first informant to convince the family of first informant not to quarrel. Thus, there is evidence on motive and there was additional reason of the incident of 24th June, 2000 behind the incident dated 25th June, 2000. The circumstance that Bandh between the two lands was damaged needs to be kept in mind and it shows that tension had increased between two sides.

31 Namdeo (PW-14) has given evidence on the incident dated 25th June, 2000 by saying that incident started due to arrival of Accused No.1, Suryabhan, who came to their field with one unknown person on motorcycle. He has given evidence that they came upto Udad and Toor crop of the complainant side, which is described as land adjoining to the portion where plantation was going on. It needs to be kept in mind that Survey No.124/1 was further divided into Survey No.124/1/1 and 124/1/2. He has given evidence that within no time, in one jeep 10 to 12 persons from the side of Accused came there and with them, Accused, Gahinath came there. It is already mentioned that FIR, which was given by Accused, Mahindrakumar for counter case is brought on record by defence and this document also shows that Suryabhan had gone to the field of Accused with one unknown person. Thus, two persons from other village first came to the field of first informant. Though Suryabhan is a real brother of Accused No.2, Gahinath, the circumstance that persons were brought from other village needs to be kept in mind.

32 Namdeo (PW-14) has described the weapons with which each Accused had come there. The description is as under:

- (i) Suryabhan (Accused No.1) : Axe.
- (ii) Gahinath (Accused No.2) : Katti (sickle of big size).

- (iii) Pandit (Accused No.3) : Axe.
- (iv) Mahindrakumar (Accused No.4) : Axe.
- (v) Jeetendra (Accused No.5) : Stick.
- (vi) Rangrao (Accused No.6) : Stick.
- (vii) Govind (Accused No.7) : Stick.
- (viii) Giridhar @ Pintu (Accused No.8) : Stick.
- (ix) Ranjit (Accused No.9) : Not specifically mentioned in substantive evidence by Namdeo but evidence is on use of stick.
- (x) Sheshrao (Accused No.10) : Stick.

33 Namdeo (PW-14) has given evidence specifically against Accused No.1 to describe the role played by him in the incident. He has given evidence that first Accused No.1 gave call to Babruwan and called Babruwan towards Toor and Udad crop where Suryabhan had reached. He has deposed that when Babruwan was proceeding towards the spot of offence, all the Accused rushed towards Babruwan. He has deposed that as he felt some danger he went ahead, but he was pushed aside by Suryabhan and then Suryabhan gave two blows of axe on the head of deceased, Babruwan. Though it can be said that sequence in which the incident took place is not the same, which was mentioned in the FIR, but broadly, evidence given by Namdeo is as per the allegations made by him in the FIR against Suryabhan.

34 Namdeo (PW-14) has given evidence that Ankush, Ramdas (his two sons) and other witnesses like Balika and Bhagabai rushed towards the spot, but all of them were assaulted by all the Accused and beating was given to them by using weapons like axe and sticks. Namdeo has given specific evidence as against Accused No.8 (Giridhar @ Pintu) that he gave two blows of sick on his back. Thus, initial evidence was not given to describe the weapon, but the assault made by Accused No.8 is described at other place by Namdeo.

35 Ankush (PW-9), son of Namdeo (PW-14) was injured in the incident. Description of weapons which each Accused was carrying, given by Ankush is similar to the description given by PW-14. Ankush has deposed that Suryabhan gave two blows of axe on the head of deceased Babruwan and after that Gahinath gave blows of Katti to Babruwan and then Babruwan was assaulted by all the Accused by using weapons like axe and sticks. Specific evidence is given by Ankush against Gahinath that Gahinath gave blow of Katti to him. He has given specific evidence against Mahindrakumar that Mahindrakumar gave blows of axe on his head. The evidence is given against all the Accused that they gave beating to all the prosecution witnesses like Balika, Ramdas, Sopan, Savitabai etc. He has deposed that he became unconscious due to beating given to him and so he gave statement after two days of the incident to police.

36 Sopan Bodke (PW-10) has given evidence that on 25th June, 2000, he, his wife Savitrabai and son Rajkumar had gone to the field of first informant for doing labour work. In the FIR given by Accused, Mahindrakumar, in the cross case, Sopan is named as an accused person. His evidence about weapons, which were used by the Accused in the incident is similar to the evidence of aforesaid two eye-witnesses. Sequence of arrival of Accused on the scene of offence given by this witness is also similar. His evidence is to the effect that only Accused Mahindrakumar was present in the land of Gahinath and after arrival of other Accused, he came to the scene of offence.

37 Sopan (PW-10) has deposed that Accused No.1 instigated other Accused to assault by saying that "Hana Mara" and then he started the incident by giving two blows of axe on the head of Babruwan. He has deposed that then simultaneously other Accused assaulted the prosecution witnesses including Ankush and Ramdas. He has given evidence that when he went ahead to request the Accused not to assault, Accused, Pintu gave blows of stick on his hand and other parts of his body. He has deposed that he sustained fracture injury to his hand due to the blow. His evidence shows that he knew all the ten Accused from prior to the date of incident.

38 Rajkumar (PW-11) is a son of Sopan (PW-10). Rajkumar has given evidence against Suryabhan that he gave two blows of axe on the head of deceased and Accused No.2, Gahinath gave blows by Katti on the head of deceased. He has given evidence that Accused, Pandit, Mahindrakumar and Ranga also assaulted the deceased. He has deposed that other Accused also assaulted deceased by using sticks. Evidence given by this witness on different weapons used by different Accused is similar to the evidence of aforesaid witnesses and the sequence of incident given by him is also similar. He has given evidence that when he tried to intervene in the incident, Accused Pandit gave blow of axe on his head. He has given evidence that all the Accused tried to kill him and his parents.

39 Balika (PW-12), widow of deceased Babruwan has given evidence that after giving of blows on the head of Babruwan by Suryabhan, other Accused like Pandit and Mahindrakumar also assaulted the deceased by using axe. She has given evidence that Accused Gahinath and Ranga also assaulted Babruwan by using Katti and the remaining Accused assaulted Babruwan by using sticks. She has given evidence that when Ankush and Ramdas reached the spot, they were also assaulted by all the Accused. She has given evidence that Accused Mahindrakumar gave blow of axe on her head and the remaining witnesses were also assaulted by all the Accused.

40 Ramdas (PW-13), a brother of deceased has given evidence that on 24th June, 2000, Accused, Mahindrakumar had caused damage to common Bandh and then there was quarrel between Mahindrakumar and Raju Chinchole. His evidence shows that Raju is his maternal uncle. The evidence does not show that Raju was involved in the incident dated 25th June, 2000 and so, cross-

examination of this witness made in respect of Raju need not be considered. Ramdas has given evidence against Accused Nos.1 and 2 that they assaulted Babruwan with axe and Katti respectively. He has given evidence that other Accused also assaulted Babruwan by using weapons like axe, Katti and stick. He has given evidence that when other witnesses tried to intervene, all the Accused assaulted the witnesses. He has given evidence that Accused Mahindrakumar gave blow of axe on his head and Accused, Pandit gave blow of axe on his forehead. He has given evidence that Accused, Gahinath gave two blows of Katti on his nose and hand.

41 In respect of aforesaid evidence of eye-witnesses, there are some omissions in relation to their previous statements given before police and there are some inconsistencies in the versions given by some witnesses. It needs to be ascertained as to whether those omissions and inconsistencies have affected their evidence to such extent that due to which the evidence needs to be discarded. At the time of consideration of the evidence of these witnesses, it needs to be kept in mind that there was a motive for the crime and the injuries discussed also need to be kept in mind. The evidence on the nature of dispute is already discussed. The evidence on spot Panchanama, scene of offence is discussed and it is proved by the prosecution that the incident took place in the land belonging to and in possession of the complainant side and not in the disputed land. All the injured witnesses sustained injuries in the incident and that also needs to be kept in mind at the time of appreciation of the evidence. Though the witnesses have not admitted that Gahinath and his sons were living in the disputed field, such suggestions are given by their counsel to all their witnesses. The suggestion is also given to the effect that Gahinath was living separate from Suryabhan and Ranga. The evidence shows that only the family of Gahinath was resident of Dhangarwadi and other Accused were residing at other places. In addition to that, the incident took place in the land of first informant and so if there is convincing evidence against the Accused, who had come from outside, it was their responsibility to explain as to why they had come there, if they had no intention of commission of aforesaid crime. Similarly, the burden of proof of prosecution to prove the presence of Gahinath and his two sons like Mahindrakumar and Pandit on the spot was not that heavy due to nature of defence taken by them and due to circumstance that Mahindrakumar had given report of counter case showing that he himself was witness to the incident. In the said report, Accused No.1, Suryabhan was shown as injured witness and it was also mentioned that Suryabhan had brought with him one person on the motorcycle. Thus, the evidence on the record about presence of Accused Nos.1, 2, 3 and 4 is sufficient to establish their involvement in the incident. In respect of other Accused, it needs to be ascertained as to whether there is circumstantial evidence to check the direct evidence and it corroborates the case of prosecution about involvement of other Accused persons. Though Accused No.5 (Jeetendra), Accused No.8 (Giridhar @ Pintu) and Accused No.9 (Ranjit) are sons of Accused No.1 (Suryabhan), due to nature of aforesaid evidence, it needs to be

ascertained whether due to inconsistencies, omissions in the evidence of eye-witnesses, whether reasonable doubt is created about the involvement of these sons of Accused No.1 and same approach needs to be adopted in respect of Accused No.6, brother of Accused Nos.1 and 2 and Accused Nos.7 and 10, who are sons of Accused No.6. Let us see first the so-called omissions and contradictions, which are pointed out to the witnesses by defence counsel in the cross-examination of the witnesses and which were brought to the notice of investigating officer also for proof of those previous versions.

42 In the cross-examination of Namdeo (PW-14), it is pointed out to him that in FIR, he had not specifically mentioned that two blows of axe were given by Accused No.1 on the head of Babruwan. Though such omission is recorded as suggested by defence counsel, it is only in respect of number of blows given and in FIR it was mentioned that Accused No.1 had given blows of axe on the head of Babruwan. It was pointed out to PW-14 that in FIR he had not specifically mentioned that Accused, Giridhar @ Pintu had given two blows of stick on his back. It appears that in the Court PW-14 could not identify Giridhar @ Pintu and Jeetendra. However, it needs to be kept in mind that evidence was recorded after three years of the incident and on that day, this witness was aged about 80 years. The evidence on record and the nature of suggestions show that PW-14 knew Accused Nos.1, 2 and families of Accused Nos.1 and 2. There is his evidence that all the Accused had participated in the incident and so it can be said that the FIR has given general corroboration to the substantive evidence of PW-14. When there is evidence on formation of unlawful assembly, there is no need to prove particular role played by each member of the unlawful assembly.

43 Ankush (PW-9) was confronted in cross-examination with his previous police statement. In the previous statement he had described the weapon, which was in the hand of Accused No.1 as Jambia, axe. The word "Jambia" is marked as portion 'A' in the previous statement and this portion is proved in the evidence of the investigating officer (PW-21). As both the weapons were mentioned, not much can be made out from this circumstance, inconsistency for the reason already given. Ankush (PW-9) has admitted some omissions in his evidence and that portion of his evidence is as follows:

"Likewise I have not stated before the police that said suryabhan uttered the words to my brother Babruwan that "Lai Majlas K Gunan Khau watat nahi ka, etc." and at that time only the jeep came there. Likewise I have not stated before the police that at that time only accused Mahendrakumar came running there alongwith axe. Likewise I have not stated before the police that my father Namdeo followed Babruwan to that village. Likewise I have not stated before the police that all of a sudden accused suryabhan gave to blows of axe on hand of Babruwan. Likewise I have not stated that accused Gahininath gave the blow of Katti on his head. Likewise, I have not stated specifically that then all accused persons started beating to Babruwan by axes, sticks etc. Likewise I have not stated before the police that we were lying on the ground here and there in

injured condition. And the, all accused thought that we are dead and hence they went away.

It is true that in my police statement I have not stated as to who had actually beaten Babruwan. I cannot assign any reason for this omission."

44 If the police statement of PW-9 is seen carefully, it can be said that the aforesaid so-called omissions are not properly and correctly recorded by the Trial Court as per Section 145 of Evidence Act. In previous version also PW-9 had stated that Suryabhan was holding axe. He had stated that Accused No.1, Suryabhan had assaulted on the head of Babruwan and also on legs of Babruwan. He had stated that all the Accused had assaulted the prosecution witnesses by using weapons like axe and Katti. Thus, the aforesaid so-called omissions recorded by the Trial Court cannot be called as omissions in legal sense. When many Accused are involved and there are many persons on both the sides, some discrepancies are bound to be there and further use of Section 149 of the Indian Penal Code takes away the adverse effect of such inconsistencies.

45 In the cross-examination of Sopan (PW-10) one inconsistency was brought to his notice with relation to his police statement. He has stated that Accused No.1 had brought one unknown person on motorcycle to the scene of offence, meaning there by that Suryabhan was riding motorcycle and unknown person was pillion rider. In substantive evidence, PW-10 has stated that Accused No.1 was pillion rider on motorcycle. That inconsistency cannot be used for any purpose in the present matter in view of the circumstance that in the cross case, which is brought on record, information was given that Accused No.1 had come to the spot with unknown person on motorcycle. However, other omissions like before police PW-10 had not stated that Accused No.1 instigated others by using some words like "Hana Mara" can be considered as this would create a case that Accused No.1 was leading the persons on his side. PW-10 had not stated before police specifically that Pintu had given blow of stick on his hand, which caused fracture injury and he has denied some portion of police statement, which was to the effect that all the Accused had assaulted him. It can be said that PW-10 has made material improvement to assign specific role to Pintu and to that extent, his evidence is affected.

46 In the cross-examination of Rajkumar (PW-11), son of Sopan, some omissions are brought on record and they are quoted as follows:

"18. My statement was recorded by the police on 29/6/2000. I have not stated before police in that statement that the accused suryabhan gave to blows of axe on the head of Babruwan and then accused Gahininath gave blow of Katti on the leg of Babruwan. I cannot assign any reason for this omission. I have not stated before the police that thereafter, accused panditkumar, Mahindrakumar and Ranga also started beating to Babruwan. I have not specifically stated before the police that accused panditkumar gave the blow of axe on my head. I cannot

assign any reason for this omission also."

47 The suggestions given to Rajkumar (PW-11) in cross-examination show that his presence on the spot is not disputed by the defence. Thus, the aforesaid omission is only from the angle that specific role was not attributed to each Accused by this witness before the police. However, he had specifically described the weapons used by each Accused before the police and it was contended that all the Accused persons had used the weapons in the incident. When there is unlawful assembly, such evidence can be used to prove membership of the unlawful assembly.

48 In the cross-examination of Balika (PW-12), widow of deceased, attempt is made to prove some omissions. If her previous statement is considered, it can be said that the entire portion of paragraph 18 of her evidence recorded as omissions ought not to have been recorded as omissions as that kind of version was given even before the police. It can be said that specific role to each Accused was not attributed in the previous version to some extent. Her evidence shows that initial assault was made on deceased, Babruwan by Accused Nos.1 and 2 by using weapons like axe and Katti and then Accused Nos.1 to 4 and Accused No.6 assaulted the deceased. If the evidence of Ramdas (PW-13) is considered, it can be said that similar type of omission is attempted to be brought on record by the defence.

49 In the evidence of PW-21, investigating officer, the aforesaid portions, which were confronted with the witnesses of previous statements and so-called omissions are shown as proved.

OTHER CIRCUMSTANTIAL EVIDENCE:

50 Accused No.4, Mahindrakumar gave report about cross case against the prosecution witnesses on 26th June, 2000 to police. The record of arrest is not disputed and it shows that on 26th June, 2000, he came to be arrested. The prosecution has examined Pratap (PW-4), a Panch witness to prove the discovery of blood stained clothes of Accused No.4, Mahindrakumar and an axe having blood stains on the basis of statement given under Section 27 of the Evidence Act by Mahindrakumar. His evidence shows that statement was given by Accused No.4 on 27th June, 2000 and the memorandum of statement is proved at Exhibit-59. The evidence of Panch witness shows that Mahindrakumar took police and Panchas to the house situated in Dhangarwadi village near a temple and from there he produced a shirt and Lungi having blood stains and one axe having blood stains. These articles were seized and seizure Panchanama is proved at Exhibit-60. Evidence is given that the articles were found to be kept in wooden box. In the cross-examination, Pratap (PW-4) has admitted that his maternal aunt is the wife of Namdeo (PW-14) and other Panch witness is his cousin. His village is situated at a distance of 12 kilometers from Dhangarwadi. Thus, he appears to be an interested witness. In any case, Mahindrakumar has not disputed his presence on the spot at the relevant time and in view of the other

circumstances mentioned already, the evidence of Panch witness on the seizure of weapon and clothes of Mahindrakumar can be safely used for corroboration purpose. The discovery was immediate. The prosecution has examined carrier constable to prove that the articles discovered and seized in the present matter were sent to C.A. office and the covering letter Exhibit-120 is proved in the evidence of constable, Patil (PW-20). C.A. reports in respect of articles are at Exhibits 124 to 142. The C.A. reports show that on the clothes of Mahindrakumar, blood of 'O' group was found, on axe blood was found, but its origin could not be detected. Blood sample of Mahindrakumar was sent to C.A. office, but his blood group could not be determined. Blood of group 'O' was found on the spot of offence and also on the clothes of deceased. The blood group of Babruwan could not be determined. In any case, Mahindrakumar had not sustained any injury in the incident and so there was no question of presence of own blood on his clothes. No explanation at all is given by Mahindrakumar in respect of this incriminating circumstance. There is evidence of investigating officer (PW-21) on the aforesaid circumstantial evidence and this Court holds that this circumstantial evidence can be used against Mahindrakumar. Even if this circumstantial evidence is ignored, there is more than sufficient evidence against Mahindrakumar to prove his involvement.

51 Shivaji Malkunde (PW-6) is examined by prosecution to prove the discovery of clothes of Gahinath (Accused No.2) on the basis of statement given by Gahinath under Section 27 of the Evidence Act. As per the record of arrest, Gahinath came to be arrested on 16th July, 2000 (Exhibit-38). He gave statement to police in the presence of Panch witnesses on 20th July, 2000 that he had kept the clothes and Katti in his house situated in the village. His evidence shows that on 20th July, 2000, the house of Gahinath was found in locked condition and after opening it, Gahinath produced his shirt having blood stains and Katti having blood stains, which were kept under cot. Memorandum of statement of Gahinath is proved at Exhibit-65 and seizure Panchanama is proved at Exhibit-66. The evidence of Shivaji (PW-6) shows that daughter of first informant, Namdeo is given in marriage to elder brother of this witness and he is from other village like Bakni. There is one more circumstance that on 27th June, 2000, the clothes of Accused No.4, Mahindrakumar and one weapon like axe were recovered from the house situated in Dhangarwadi and it must be the same house from where clothes of Accused Gahinath are shown to be recovered. This circumstance creates suspicion about the evidence given on recovery of clothes and weapon on the basis of statement given by Gahinath. That recovery was also belated. Though Gahinath was not available till 16th July, 2000, it does not look probable that till that day, no search of the house of Gahinath was taken by police. C.A. report shows that blood of group 'O' was detected on the clothes and weapon produced by Gahinath. His blood group could not be determined. Due to aforesaid circumstances, even if the evidence of discovery of these articles from Gahinath is ignored, there is other voluminous direct evidence and there are other circumstances against Gahinath to hold that he was present on the spot at

the relevant time and he was involved in the incident.

52 In the evidence of Shivaji (PW-6), memorandum of statement given by Pandit (Accused No.3) on 20th July, 2000 is proved. Pandit came to be arrested on 16th July, 2000 (Exhibit-39). He took police and Panchas to a shed situated in the agricultural land and from there, he produced a shirt, pant and one axe. Blood of group 'O' was found on these articles as per C.A. report. Blood group of Pandit could not be determined as per C.A. report. Memorandum of statement and seizure Panchanama are proved at Exhibits 67 and 68. For the circumstance that Panch witness was a close relative of first informant, the evidence of discovery of these articles can be ignored. The discovery was also belated. However, due to absence of this circumstantial evidence, no benefit can come to Accused, Pandit. The arrest of Pandit (Accused No.3) and Gahinath (Accused No.2) was made on 16th July, 2000 and the evidence of investigating officer (PW-21) shows that they were not available to police, they were absconding and this circumstance can be used against Gahinath and Pandit. Mahindrakumar was arrested on 26th June, 2000 itself and he had given report in respect of counter case. Further, as per the defence version, Suryabhan was seriously injured, but Accused Nos.2 and 3 were not available till 16th July, 2000.

53 The evidence on record shows that on the clothes of Suryabhan (Accused No.1), blood of group 'O' was found. The presence of Suryabhan on the spot is not disputed and the evidence in this regard is already discussed. Thus, the evidence on record is sufficient to infer that Accused Nos.1 to 4 were involved in the incident alongwith some other Accused. For these reasons, the provisions of Section 149 of the Indian Penal Code can be used against these four persons. They had gone to the field of first informant and after calling Babruwan to the spot, assault was made on Babruwan. This Court has already mentioned the injuries, which were noted by Vivekanand Hospital, Latur on the person of Suryabhan (Accused No.1) and it is also observed that it was necessary to produce record of MLC, which must have been prepared by the civil hospital. That kind of attempt was not made by defence even when one doctor from private hospital was examined by the defence. Case papers in respect of treatment given to Suryabhan were also not produced and proved in the present matter. The Trial Court has given undue weight to the circumstance that injuries, which were found on the person of Suryabhan are not explained by the prosecution. The evidence on record shows that many persons were there from the side of deceased, Babruwan and there is clear probability that after starting of incident, they had rushed there and they must have used force against Suryabhan. Considering the number of injuries mentioned by defence witness and other circumstances, it is not possible to infer that the incident was started by the complainant side. On the contrary, considering the number of injuries sustained by the prosecution witnesses and number of injuries, which were inflicted on the deceased and his two brothers like Ankush and Ramdas, it cannot be said that the incident was started by the persons of complainant side. The evidence is sufficient to safely infer that the incident was started by Suryabhan

and Suryabhan was brought there by Gahinath and they had also brought some outsiders to help them in the incident.

54 The question now arises about involvement of other brother of Gahinath viz. Rangrao and sons of both Suryabhan and Rangrao in the incident. The evidence discussed already shows that main allegations are as against Suryabhan and Gahinath that they assaulted Babruwan with dangerous weapons. The weapons like axes were used by two sons of Gahinath and incised wounds were found on the persons of Ankush and Ramdas, two sons of first informant. Most of the injuries found on the dead body were incised wounds. Though allegations are made that Rangrao, other brother of Gahinath had used Katti, the aforesaid oral evidence given against Rangrao about use of Katti by him is not that convincing. Evidence is given against the sons of Ranga and sons of Suryabhan that they had used sticks in the incident. Some abrasions were found on the dead body of Babruwan and some injuries, which can be caused by hard and blunt object, were found on the person of other prosecution witnesses. Those injuries are already quoted. The substantive evidence given by ladies is also quoted and that shows that no specific and consistent evidence is there as against Ranga and sons of both Ranga and Suryabhan. Such vagueness in the evidence as against these persons need to be kept in mind while appreciating the circumstantial evidence given against them. They are from different places and so it was necessary to give some independent evidence to show that they were seen in the village Dhangarwadi. The driver, who was expected to give evidence to the effect that he had brought them in a jeep to the field of first informant, has turned hostile. The nature of evidence of Sopan and his family members also shows that they actually participated in the incident and so that way their versions cannot be treated as entirely of independent nature. Nature of injuries inflicted in the incident does not make clear the role of other Accused, Accused Nos.5 to 10.

55 Navnath Kale (PW-3), a Panch witness is examined by prosecution to prove the recovery of clothes of Accused, Govind. Govind was arrested on 26th June, 2000 and seizure is shown to be made on 30th June, 2000. The Panch witness has given evidence that Govind, son of Rangrao gave evidence that clothes were kept in his house from Daithana in a wooden box. Memorandum of statement is proved at Exhibit-54. The evidence is given that Govind produced a pant and shirt having blood stains and the seizure Panchanama is proved at Exhibit-55. This witness has given evidence as against Accused, Jeetendra, who is son of Accused No.1. Jeetendra was arrested on 26th June, 2000. Evidence is given that Jeetendra gave statement to police that he had kept shirt and pant in the house. The house is situated at some distance from the house of Rangrao from where recovery was made of the clothes of Govind. Blood of group 'O' was found on the clothes of Govind and blood of similar group was found on the clothes of Jeetendra as per the C.A. report. However, the evidence of Panch witness, Navnath (PW-3) shows that his sister was given in marriage to Ankush, son of the first informant about 15 years prior to the date of incident. The place of resident of this witness is situated at a distance of more than 30 kilometers from

village Daithana. There is no explanation as to why Panch witness from Daithana was not used. Thus, the version of witness is interested one and in view of other circumstances of present matter, this Court holds that the evidence of Navnath cannot be used as against Govind and Jeetendra.

56 Limbaji Kale (PW-5) has given evidence on discovery of clothes of Rangrao and weapon on the basis of statement given by Rangrao (Accused No.6). Rangrao was arrested on 26th June, 2000 and discovery is shown to be made on 1st July, 2000. Memorandum of the statement is proved at Exhibit-62 and seizure Panchanama is proved at Exhibit-63. A Katti and clothes are shown to be recovered.

Blood of group 'O' was found on the clothes and Katti. Though discovery was almost immediate, the Panch witness has admitted in the cross-examination that deceased, Babruwan was brother-in-law of the brother of this witness. He was related to both Babruwan and Ankush in different ways. Further, recovery of clothes of Govind, which was shown to be made on 30th June, 2000 is from same house from where clothes of Rangrao and weapon are shown to be recovered on 1st July, 2000. Due to all these circumstances and other circumstances already mentioned, this Court holds that it will not be safe to place reliance on this circumstantial evidence given against Rangrao.

57 Sanjay Bajurge (PW-7) is examined by prosecution to prove the recovery of weapon and clothes on the basis of statement made by Giridhar @ Pintu. Memorandum of this statement is proved at Exhibit-74 and seizure Panchanama is given Exhibit-73. Giridhar came to be arrested on 1st August, 2000 and recovery of articles is shown to be made on 4th August, 2000. Recovery shown to be made from a house from Daithana. Blood of group 'O' was found on the pant, shirt and axe. One stick was also shown to be recovered, but no blood was found on the stick. The evidence of this witness shows that he is not relative, but one Jyotiram Hazare is his neighbour in his village. Jyotiram Hazare is relative of the first informant as a daughter of Jyotiram was given in marriage to Madhukar, other son of first informant. Such evidence is brought on record through the evidence of Ramkaran (PW-8). Thus, discovery of these articles from the house of Accused No.1 is shown to be made, but it was very late and the witnesses used, are interested. Due to other circumstances already mentioned, this Court holds that it will not be safe to use the evidence on recovery of weapons and blood stains clothes on the basis of statement given by Giridhar under Section 27 of the Evidence Act.

58 Satyawar Gore (PW-16) is examined to give evidence on recovery of clothes of Accused, Ranjit, but he has turned hostile. Recovery is shown to be made on 24th July, 2000. Similarly, evidence is given of Baban Waghmare (PW-18) to prove the recovery of clothes of Accused, Sheshrao, but he also turned hostile. The investigating officer (PW-21) has given evidence to prove the memorandums of statements of Ranjit and Sheshrao and recovery of their clothes and one stick. This Court is avoiding to discuss that evidence as it was belated recovery and

there is no convincing evidence to show the active participation of Accused, Ranjit and Sheshrao in the incident.

59 It appears that undue weight was given to one circumstance by the Trial Court. The thumb impression of first informant (PW-14) appearing on the FIR was not attested by anybody. It appears that the typed FIR was given on which the first informant had put his thumb impression. When the witness is an illiterate person, he gets some help of others to put his contention into writing. FIR was given on the same day within few hours. Babruwan was dead and two sons of first informant were seriously injured due to incised wounds. Accused No.1 had contested election to Parliament in the past and that circumstance is brought on record by defence itself. In view of these circumstances, it is possible that the first informant wanted to put his contentions in black and white in the police station. When he is admitting that FIR was given by him and he has put his thumb impression, not much can be made out due to the circumstance that thumb impression was not attested. In such a case, it needs to be presumed that before registering the crime, police must have verified that the first informant wanted to make allegations, which were appearing in the FIR. Surprisingly, the Trial Court has used this circumstance for giving the decision of acquittal and for holding that there is a possibility of concoction. There may be some exaggeration, but the person who had lost one son and whose two sons were seriously injured, would not have spared the real assailants. Surprisingly, suggestions were given to prosecution witnesses that the investigating officer (PW-21) was relative of first informant. This suggestion is denied by everybody. If PW-21 was really a relative of first informant, he would have taken care to see that proper FIR was given. Contents of FIR, which are already quoted, show that it was not prepared by any expert. Thus, appreciation of evidence was not properly done by the Trial Court and the circumstance that the first informant is an illiterate person and he had no help at that time, was not considered by the Trial Court.

60 The aforesaid discussion of the evidence made from different angles show that the Trial Court has committed serious error in holding that probably the complainant side was aggressive party and the incident in question took place in the disputed land. The Trial Court has committed error in giving over much importance to the circumstance that the prosecution did not explain the injuries sustained by Suryabhan. When Suryabhan had entered the land of complainant side and he admits that he was there for some purpose, for settling the dispute, it was necessary for Suryabhan to say something about the incident, in which the deceased sustained around 10 incised wounds and his brothers sustained incised wounds. In such a case, the Court is required to go with the presumption that the persons, who had entered the field of complainant, were trespassers and they were involved in the incident, in which the persons from complainant side sustained injuries. Suryabhan and the persons from outside had come to Dhangarwadi and this circumstance ought to have been given due weight by the Trial Court. The provision of Section 114 of the Evidence Act ought to have been

used by the Trial Court. When there is direct evidence against such persons and it has corroboration of circumstances mentioned above, the Court is not expected to lightly brush aside the direct evidence. In such a case, the defence of right of private defence cannot be inferred as provided in Section 100 of the Indian Penal Code. In the present case, there is evidence on motive. Civil case was already decided in favour of the complainant side and relief of injunction was refused by the Civil Court in favour of Accused side in respect of disputed land, Survey No.124/2. Thus, there was a reason for Accused side to create fear in the mind of complainant side. Complainant side had no reason to use criminal force as they had already decision in their favour of Civil Court. This motive was strong for Gahinath and his two sons viz Mahindrakumar and Pandit. If Suryabhan had come with his men to help Gahinath, in ordinary course, Gahinath and his two sons must have remained present and they must have participated in the incident. Such inference is possible. In view of the direct evidence and the provisions of Section 114 of the Evidence Act, the Court ought to have believed the evidence given against Gahinath and Pandit. Mahindrakumar had already admitted his presence on the spot by giving report for registration of counter case.

61 Considering the medical evidence, which says that four injuries, which were found on the head of dead body of Babruwan were independently sufficient to cause death, this Court holds that Accused Nos.1 to 4 are guilty for the offence of murder of Babruwan punishable under Section 302 read with 149 of the Indian Penal Code. It needs to be kept in mind that many persons had participated and some had come from outside. In view of these circumstances, acquittal of other Accused in this case will not create difficulty in using the provisions of Section 149 of the Indian Penal Code as against Accused Nos.1 to 4.

62 Considering the nature of injuries found on the persons of Ramdas and Ankush and the nature of weapons used against them, this Court holds that the Accused are also liable to be convicted for the offence of attempt of murder punishable under Section 307 read with 149 of the Indian Penal Code. By using dangerous weapons, they caused injuries to other witnesses and so they are liable to be convicted for the offence punishable under Section 324 read with 149 of the Indian Penal Code. They committed criminal trespass into the land of first informant and his brother and thereby each of them committed the offence punishable under Section 447 of the Indian Penal Code. They used dangerous weapons and so each of Accused Nos.1 to 4 is liable to be convicted for the offence punishable under Section 148 of the Indian Penal Code.

63 The learned counsel for Respondents, Accused placed reliance on the observations made by the Madhya Pradesh High Court in the case reported as 2005 CRI. L. J. 73, (Sheikh Bashir and another Vs. State of M.P.). In view of the facts of that case, it was held that when there is danger to life and property of Accused, Accused are justified in exercising the right of their private defence by inflicting injuries to the members of complainant party. It was held that such

accused person is covered by clause (1) of Section 100 of the Indian Penal Code and so conviction could not be proper. The facts and circumstances of each and every case are always different. In the present matter, the Accused persons were trespassers and evidence is sufficient to infer that they had come there with intention to finish Babruwan due to the incident dated 24th June, 2000 and they wanted to create fear in the mind of complainant side by using criminal force. Thus, the observations made by the Madhya Pradesh High Court are of no use to the Accused in the present matter.

64 Reliance was placed on the observations made by the Apex Court in the case reported as AIR 1975 Supreme Court 1674, (Puran Singh and others Vs. The State of Punjab). In this case, the Apex Court has discussed the provisions of Sections 97 to 100 of the Indian Penal Code and limitations on exercise of right of private defence. In the present matter, the incident in question took place in the property of complainant and for that reason as already observed, it was not possible for the Court to infer that Accused persons were exercising the right of private defence of person or property. Accused persons were trespassers, aggressors.

65 Reliance was placed by the learned counsel for Respondents, Accused on some observations made by this Court in the case reported as 1994 CRI. L. J. 3602, (Deoraj Deju Suvarna and etc. Vs. State of Maharashtra). In this case, it was observed that when charge under Section 302 read with 149 of the Indian Penal Code is framed convicting the Accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code may not be possible. With due respect, this Court may not agree with this proposition. Both the provisions viz. Sections 149 and 34 of the Indian Penal Code lay down the principle of liability when more than one Accused persons are involved. In the given case, the Court may come to the conclusion that there was common intention of few of the Accused. In that case, the Court may also come to the conclusion that absence of charge by using Section 34 of the Indian Penal Code has not caused prejudice to the Accused persons. There are some observations with regard to appreciation of evidence given under Section 27 of the Evidence Act with reference to Section 3 of the Evidence Act. The effect of circumstance like the witness was interested is also discussed. Each and every case needs to be decided by the Court on the basis of evidence given in that case and there cannot be ratio as such for discarding or accepting the evidence of interested witness. Only caution is required to be observed by the Court when witness is interested and if there are other circumstances which give credence to the evidence of interested witness, the Court can use the evidence of even interested witness.

66 Reliance was placed on the observations made by the Apex Court in the case reported as AIR 1976 Supreme Court 2263, (Lakshmi Singh and others etc. Vs. State of Bihar). In this case, effect of non-explanation of injuries sustained by accused and inference, which can be drawn due to these circumstances are discussed by the Apex Court. The observations are as follows:

"In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

- (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 a most material point and therefore their evidence is unreliable;
- (3) that in case there is a 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."

While appreciating the evidence of prosecution witnesses in the present matter, the aforesaid observations made by the Apex Court were in the mind of this Court and from that angle the evidence is discussed. Even after considering these observations as tests, this Court has come to the conclusion that the injured prosecution witnesses need to be believed and the incident has taken place in the manner as described by them.

67 In view of the above discussion, the following order is passed:

I. The Appeal of the State filed as against Respondent Nos.1 to 4 is allowed. The decision of the Trial Court acquitting Respondent Nos.1 to 4 of the offences punishable under Sections 302, 307, 324 read with 149 and Section 148 of the Indian Penal Code, is hereby set aside.

II. Accused Nos.1 to 4 stand convicted for the offence punishable under Section 302 read with 149 of the Indian Penal Code for the offence of murder of Babruwan and each of them is sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/-. In default of payment of fine, each Accused is to further undergo rigorous imprisonment for one month.

III. Accused Nos.1 to 4 stand convicted for the offence of attempt of murder of Ankush and Ramdas punishable under Section 307 read with 149 of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.2,000/-. In default of payment of fine, each Accused is to further undergo rigorous imprisonment for fifteen days. No separate sentence is given for two attempts of murder.

IV. Accused Nos.1 to 4 stands convicted for the offence punishable under Section 324 read with 149 of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.1,000/-. In default of payment of fine, each Accused is to further undergo rigorous imprisonment for seven days. No separate sentence is given for causing injuries to all the witnesses.

V. Each of Accused Nos.1 to 4 is convicted for the offence punishable under

Section 148 of the Indian Penal Code and each of them is sentenced to suffer rigorous imprisonment for one month and to pay fine of Rs.500/-. In default of payment of fine, each Accused is to further undergo rigorous imprisonment for one week.

VI. Substantive sentences to run concurrently.

VII. The appeal filed by the State as against the remaining Accused stands dismissed.

VIII. Record and property is to be preserved for trial of the absconding Accused persons.

IX. A copy of judgment is to be supplied to each convicted Accused free of cost.

X. Accused Nos.1 to 4 to surrender to their bail bonds for undergoing the sentence.

XI. Accused Nos.1 to 4 will be entitled to set off in respect of the period for which they were behind bars as under trial prisoners.

. At this stage, the learned counsel for Respondents requested for giving time to surrender. It is refused. They are to surrender to the bail bonds.