
(2008) 12 BOM CK 0076

In the Bombay High Court

Case No : Criminal Appeal No. 150 of 1991

The State of Maharashtra

APPELLANT

Vs

Ashok Narayan Deshmukh and Others

RESPONDENT

Date of Decision : 04-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294, 313, 428
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2008) 12 BOM CK 0076

Hon'ble Judges : P.V. Hardas, J;P.R. Borkar, J

Bench : Division Bench

Advocate : R.R. Mane, APP assisted by H.F. Pawar, for the Appellant; K.G. Bhosale, for Respondent Nos. 1-5 and S.S. Jadhav, for the Respondent

Judgement

P.R. Borkar, J.—This appeal against acquittal brings to mind the celebrated words of Viscount Simon that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent..." the principle which has been quoted with approval by the Supreme Court in the case of Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, .

2. Here in this case it has been proved beyond doubt that one group of hooligans and vandals entered Court premises when the Court was working, killed one person, injured another with deadly weapons and knocked the chamber of the Judge demanding custody of third victim and ransacked the Court, with result of acquittal of all accused, though there was sufficient evidence at least against some of the accused persons. This case also raises several basic questions and is also a reflection on many of us. We find that so called independent persons from a noble profession, many of whom have witnessed the incident have chosen to shy away from the Court claiming total ignorance, and a few of them who came forward claimed that they were not knowing who were the culprits, though the incident had occurred and witnessed by them. Not a single person from local staff came forward even though the institution was attacked. Some of the

witnesses who spoke something against the accused in their examination-in-chief, gave some admission in cross-examinations, so as to nullify effect of the examinations-in-chief. Others who supported the prosecution case were stamped as interested, partisan persons without trying to know whether really they had personal interest in conviction of the accused. Thus ultimately all the accused were acquitted and muscle power of vandals triumphed over the cause of justice. We also find that instead of undertaking desirable though arduous process of verifying veracity of each witness and sifting truth from falsehood, with the help of few discrepancies and inconsistencies, the judgment of acquittal was recorded against all the accused.

3. This Court is aware of the limitations when an Appellate Court in an appeal against acquittal can interfere. The Hon'ble Supreme Court in the case of Ghurey Lal v. State of U.P. AIR 2008 SCW 6598, in para 73 after taking stock of entire case law right from Sheo Swarup v. R. Emperor AIR 1934 TC 227, till date, summarised the law as follows:

73. In light of the above, the High Court and other appellate Courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial Court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate Court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- i. The trial court's conclusion with regard to the facts is palpably wrong;
- ii. The trial court's decision was based on an erroneous view of law;
- iii. The trial court's judgment is likely to result in "grave miscarriage of justice".
- iv. The entire approach of the trial court in dealing with the evidence was patently illegal;
- v. The trial court's judgment was manifestly unjust and unreasonable;
- vi. The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.
- vii. This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate Courts must rule in favour of the accused.

4. Recently in the case of State of U.P. v. Awdhesh AIR 2008 SCW 6344, while considering the law regarding approach of Appellate Court in an appeal against acquittal in para 29 following observations from the case of Shivaji Bobade (supra) were reproduced:

6. Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to be rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs thro? the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breakdown and lose credibility with the community. The evil of acquitting a guilty person light-heartedly, as a learned author (Glanville Williams in Proof of Guilt) has saliently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted ?persons? and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent...." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibility as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents.

5. The Supreme Court has again and again repeated warning that a miscarriage of justice which may arise from acquittal of guilty is no less than from the conviction of the innocent. We find same principle repeated in the cases quoted in paras 33 and 35 of the case of State of U.P. v. Awdhesh (Supra). The said case also deals with what is reasonable doubt and makes it clear that reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.

6. Present appeal is filed by the State being aggrieved by order passed by the learned Additional Sessions Judge, Jalgaon, in Sessions Case No. 105 of 1990, decided on January, 31, 1991, whereby original accused Nos. 1 to 11 were acquitted of offence punishable under Sections 147, 148, 506, 323 and 427 of

the I.P.C.; accused Nos. 1, 3 and 7 were acquitted of the offence punishable u/s 302 of the I.P.C.; accused No. 1 and 7 were acquitted of the offence punishable u/s 307 of the I.P.C. and accused Nos. 2, 4, 5, 6, 8, 9, 10 and 11 were acquitted of the offence punishable under Sections 302 and 307 read with Section 149 of the I.P.C.

7. Briefly stated, deceased Dada Chindha Koli, P.W.12-Anna Chindha Koli and P.W.14-Tanaji Chindha Koli were brothers. On 19.01.1990, they had come to Chalisgaon Court for furnishing bail in a matter which was pending against deceased Dada and P.W.14-Tanaji and others, on the allegation that they had set the office of Shivsena at Chalisgaon on fire. At about 3.30 to 4.00 p.m. or so, these brothers had seen accused No. 1-Ashok and accused No. 5-Ramesh visiting Chalisgaon and they soon went away. At about 4.15 p.m. all the eleven accused persons armed with deadly weapons like swords, spear, iron bars, koyta, hockey stick entered the Court premises through the main gate. On seeing them deceased Dada started running towards main gate. Deceased Dada was assaulted by accused No. 1-Ashok, who was armed with sword; accused No. 3-Shrawan, who was armed with spear; and accused No. 7-Bharat, who was armed with koyta. They caused injuries to deceased Dada. It is prosecution case that P.W.14-Tanaji ran towards urinal and accused No. 1-Ashok, accused No. 3-Shrawan, accused No. 5-Ramesh, accused No. 7-Bhaskar went after him and inflicted injuries on him. P.W.12-Anna, on seeing the accused persons assaulting his brothers, ran to the chamber of Shri Subhash Gangakhedkar, Judicial Magistrate, First Class, Chalisgaon (P.W.1). It is said that along with Anna one more person entered the chamber and the door of the chamber was closed as accused persons including accused No. 1-Ashok came there and gave threats of killing P.W.12-Anna and demanded his custody. When it was said that he was not in the chamber, the accused ransacked by breaking glass panes of windows and doors of the Court. It is stated that they were also searching Advocate Nana Pawar (P.W.13), who is said to have represented deceased Dada Koli and his brothers. Police Constable - N.D. Patil (P.W.20), who was the Court duty constable attending the Public Prosecutor on seeing the accused and their acts, ran to nearby office of Shetkari Sangh and made telephone to Police and called for help. The message given by P.W.20-N.D. Patil, Police Constable was reduced into writing in the station diary and P.S.I. Pachpute along with his staff came to the spot. By that time, the culprits had run away. It is also said that when the accused entered the Court premises with arms, they were shouting and on seeing them all people started running here and there and started closing doors and windows. After P.I. Joshi (P.W.16) came, he recorded complaint of the J.M.F.C. Shri Gangakhedkar (P.W.1). He drew spot panchanama. The injured were taken first to the Municipal Hospital, Chalisgaon and then to the Civil Hospital at Dhule. Dada had died before he was taken to the Civil Hospital, Dhule. Statements of various witnesses were recorded and finally after usual investigation charge-sheet, was sent to the Court.

8. The prosecution in all examined 23 witnesses. After considering their evidence

the learned Trial Judge recorded finding of acquittal of all the accused. Mrs. Mane, A.P.P. vehemently attacked the judgment on the ground that there was no attempt to find out truth. Too much importance was given to minor inconsistencies in the evidence of witnesses such as whether Tanaji and Dada ran towards main gate or Tanaji after running for some distance towards main gate ran towards urinal or whether he was standing near Ota of the Court building until attack on Dada was over. She referred to the discussions in para 11 of the judgment, which are the reasons given for disbelieving P.W.12 and P.W.14. It is argued that when several persons were present and many persons armed with deadly weapons attacked different persons, there are bound to be some variances. The variance may be because of difference in the observation and difference in memory and difference in capacity to reproduce same. One person may note a particular thing, another may not remember it, third may not give attention to that thing. If same incident is seen by several persons in such melee, obviously there would be some difference in their evidence. But, the learned Additional Sessions Judge did not appreciate the evidence in a realistic manner but took hypertechnical view.

9. On the other hand Shri K.G. Bhosale and Mrs. S.S. Jadhav supported the judgment saying that the view taken by the learned Additional Sessions Judge is reasonable and probable view and as such there cannot be interference in this appeal against acquittal.

10. At the outset we may state that the appeal was admitted only against respondent Nos. 1 to 5, 7, 8 & 10. At the stage of admission, the appeal was dismissed against respondent Nos. 6, 9 and 11. Respondent No. 10-Dilip Baudha died pending the appeal. Order was passed on 21.10.2008 holding that the appeal is abated against respondent No. 10. As such this appeal is now to be considered only against respondent Nos. 1 to 5, 7 and 8.

11. P.W.2-Ishwar Thakur, P.W.3-Vishwanath Tandudkar, P.W.4-Shaikh Yousuf and P.W.5-Balkrushna Suryawanshi are panch witnesses and all of them have turned hostile and did not support the prosecution case. Accused admitted inquest panchanama (Exh.21) u/s 294 of the Cr.P.C. Dead body of Dada Chindha Koli was identified by his brother Shivraj. There were injuries which were bandaged. Said panchanama is at Exh.21. At Exh.22 there is panchanama of attachment of clothes of accused No. 1, which shows that there were bloodstains on shirt, Payjama and underpart of accused No. 1-Ashok. Panchanama at Exh.23 is panchanama of attachment of clothes of deceased Dada after the post mortem examination. Exh.24 is panchanama of attachment of clothes of P.W.14-Tanaji. Exh.24 is medical certificate of accused No. 1-Ashok, which shows that he had following four injuries:

- 1) Horizontal incised cut wound over left first lumbar region of 4 1/2 x 1 1/2 x 1 cms., fresh bleeding seen.
- 2) Vertical incised cut wound over left delotie of 3 1/2 cms x 1 1/2 cms x 1 cm.,

fresh blood seen.

3) Horizontal scratch over right side back i.e. near lower end scapula of 4 cms. skin deep.

4) Incised cut wound on the first phylangial joint at right index finger over palmer prospect of 1 cm. skin deep.

The injuries were caused with sharp edged weapon within 12 hours.

12. At this stage we may also refer to written statement filed by accused No. 1, so that we may consider if the defence is probable and made out by evidence. Said written statement is at Exh.84 and it is stated by accused No. 1-Ashok that he was worker of Shivsena; whereas deceased Dada and others were of Indira Congress. There were cross complaints between them and therefore there was enmity between them. It is further said that on the day of incident in the evening he had gone to Chalisgaon Court for furnishing bail in a case against him. One Rajendra More was his surety. On 4.00 p.m. P.W.12-Anna Chindha, deceased Dada Chindha and other persons came with weapons in the car of P.W.12-Anna. P.W.14-Tana was already present in the Court. On seeing them accused No. 1-Ashok attempted to run away from the Court, but he was stopped near the main gate and Kailas Mahajan had pressed his neck with hand. Deceased Dada threw soil in his eyes. P.W.12-Anna Chindha, P.W.14-Tana Chindha and Kailas Mahajan had injured him. P.W.12-Anna injured him with knife. Kailas injured him with Gupti and others were instigating them. He raised shouts. Many people from the Court came outside and tried to stop Anna and others and there were quarrel between the persons who came from outside and Anna's party. He became unconscious. He could not see what had actually happened. Thereafter, police came and took him, Dada and Anna first to Police Station and then to the Hospital. He asked police to record his complaint, but police refused. Accused No. 1 further said that he did not cause any injury to anybody. He was not armed with weapons. He had not produced any weapon. He had not done anything wrong and so he may be acquitted.

13. It may be noted that after prosecution evidence was over, at the time of statements of the accused u/s 313 of the Cr.P.C. accused No. 1-Ashok has filed above-said written statement. To the pointed out query by this Court, learned advocate Shri K.G. Bhosale has stated that to his knowledge and from the record, it does not appear that accused No. 1 had lodged any private criminal complaint or complaint to superior officers regarding the incident. We have to find out whether this defence is made probable by evidence on record.

14. Spot panchanama is at Exh.52. The spot was shown by Magistrate Shri Gangakhedkar (P.W.1). Though panch witnesses have turned hostile, P.I. - Joshi (P.W.16) so also Magistrate Shri Gangakhedkar (P.W.1) have proved the same. Said panchanama Exh.52 shows the Civil and Criminal Court premises at Chalisgaon to be spot of incident. On the spot police found one broken piece of sword 12 inches in length, 2 iron bars, a pair of sleeper. All these articles were

lying within space of 5 to 10 feet, on Western side at a distance of 33 feet from the Court hall. It is found that glass pieces were lying near and in the chamber. Outside it on a wooden frame forceful stroke of sword was seen. There were also sword marks on the door of the chamber. At a distance of 30 feet from main gate, a pool of blood was seen of about 6 inches x 6 inches size and there were also one moccasin shoe pair and one rubber sleeper. Near gate of the Court on the road, there was a car belonging to P.W.12-Anna Koli, which was damaged. Its tyres were deflated and damaged with sword and iron bars. The damage was said to be of Rs. 7000/-. Glass pieces were also found at the entrance of C.O.C. office. Wooden frame of door was damaged. This panchanama was made between 4.45 p.m. to 7.00 p.m. Absolutely, there is no reason to disbelieve this description of damage.

15. At Exh.70 Dr. K.R. Gindodia (P.W.22), who performed post mortem on deceased Dada, is examined. Dr. Gindodia was Medical Officer at Civil Hospital, Dhule and he said that he performed post mortem on the dead body of Dada Chindha Koli on 20.01.1990 between 1 p.m.to 2 p.m. and found following external injuries.

- 1) Contused lacerated wound on right temporal region, sutured already, about 3" long.
- 2) Contusions all over the back and right lateral side of the chest wall.
- 3) Injuries to the back of right leg and contusions on both the thighs.
- 4) Fracture of the right 7, 8 and 9th ribs.

He also found hematoma of about 100 ml blood in the right temporal region. There was a fracture to right temporal bone. The right temporal lobe of the brain was contused and lacerated. The Doctor said that such injury was possible if blow with blunt side of koyta was given on temporal region of head. The Doctor also said that injury No. 2 was possible with blunt side of spear. The Doctor further found fracture of 7th, 8th and 9th ribs and contusion and laceration of the right lower lobe of the lung. About 400 ml of blood was present in the pleural cavity. The Doctor found 700 ml blood in the abdominal cavity. There were abrasions and tears on right lateral and superior surface of the liver. The Doctor proved post mortem notes at Exh.71. Absolutely, there is no reason to disbelieve the Doctor. The Doctor admitted that the injuries mentioned on right temporal region cannot extend to right parietal region, though those are adjacent to each other. There were two injuries on the back of right leg. He did not find any incised wound over right back side of deceased or fracture of tibia or fibula of any leg.

16. Dr. D.P. Pawar (P.W.21) examined at Exh.68 is another Medical Officer at the Civil Hospital, Dhule, who had examined P.W.14-Tanaji Koli on 19.01.1990 at 7.50 p.m. He found following injuries:

- 1) Contusion over right thigh in the middle, anterior.

- 2) Sutured wound, posterior aspect of right thigh of the size 7 cms x 1/2 cm.
- 3) Contused lacerated wound, right buttock 2 cms, lateral to anus, 3 cms x 2 cms x 1 cm.
- 4) Sutured wound right forearm, ventrally in lower third of the size 5 cms x 1/2 cm.
- 5) Contused lacerated wound right side of forehead, lateral to eye, 1 cm x 1/2 cm x 1/2 cm. This injury was arrow shaped.

The Doctor further stated that Tanaji was conscious when he examined him and Tanaji gave him history of being beaten with different articles in the Court by a mob. According to the Doctor, injury Nos. 3 and 5 were possible with sharp and cutting weapons. Other injuries were sutured, therefore he could not give opinion. According to the Doctor all injuries were simple in nature. The Doctor did not find any cut injury on the person of Tanaji, particularly on left wrist or on right temporal region. However, he answered in cross-examination that forehead lateral to eye and right temporal region indicate the same part of body.

17. Dr. Kotwal examined at Exh.59 was the Medical Officer at the Municipal Hospital at Chalisgaon and he stated that he examined Dada Chindha Koli on 19.01.1990 at 5.10 p.m. Dada Chindha Koli was unconscious when brought to him and he found following injuries:

- 1) Horizontal contused lacerated wound over right parietal region of 10 cms x 2 cms x skull deep clinically fractured parietal bone, fresh bleeding present.
- 2) 15 cms x 4 cms x 2 cms tapering at both ends incised wound over right thigh, middle back, fresh bleeding present.
- 3) Contused lacerated wound of 2 cms x 1 cm over both legs lower third, clinically fractured tibia fibula, lower end, fresh bleeding present.
- 4) Contused lacerated wound near right knee outer side 2 1/2 cms x 1 cm x 1 cm. fresh bleeding present.

The Doctor proved certificate - Exh.60. According to him the injury on head could have been possible with koyta which is used for cutting sugar cane. Injury No. 1 was possible with blunt side of koyta. Injury No. 2 was possible with sharp side of sword. Injury Nos. 3 and 4 were possible with hard and blunt object. Injury No. 1 was sufficient to cause death in the ordinary course of nature. Injury No. 2 was possible with sword article No. 22.

18. Dr. Kotwal further stated that on 19.01.1990 he examined P.W.14-Tanaji at about 5.45 p.m. and Tanaji had following three injuries.

- 1) Vertical incised cut wound over right thigh back of 15 cms x 4 cms x 2 cms, tapering at both ends, bleeding present.
- 2) Two incised cut wounds over left wrist anterior, lower third each of 4 cms x 1

cm x 1/2 cm.

3) Incised cut wound over right temporal region of 2 1/2 cms x 1 cm x 1/2 cm.

The Doctor proved injury certificate at Exh.61 and said that injury Nos. 2 and 3 were possible with sharp weapon. He gave primary aid to Tanaji and referred him to the Civil Hospital.

19. Dr. Kotwal (P.W.17) also stated in the cross-examination that on 19.01.1990 at 6.10 p.m. he examined accused No. 1-Ashok and found injuries as mentioned in Medical Certificate Exh.25. Accused No. 1-Ashok was under his observation for 24 hours to see if any complication would be developed. It is stated that injury No. 1 mentioned in certificate Exh.25 could have endangered life, if kidney had been damaged, but fact remains that kidney was not damaged. We have noted the injuries observed by Medical Officer at Civil Hospital, Dhule on the person of deceased Dada and P.W.14-Tanaji earlier.

20. Dr. Kotwal (P.W.17) stated in his examination-in-chief that on 21.01.1990 at 8.10 p.m. he examined P.W.7-Hiralal Chavan, Advocate, who had horizontal ecchymosis over right thigh, upper third outer side of 8 cms x 3 1/2 cms. The injury was caused within 48 hours by hard and blunt object. He proved certificate Exh.62. In cross-examination the Doctor said that Hiralal might have sustained injury at 8.00 p.m. on 19.01.1990 or thereafter. It is now well known that such age of injuries given by Doctor is always approximate and there could be error of judgment. It is prosecution case that P.W.7-Hiralal Chavan who is practising advocate had witnessed part of the incident and had intervened to stop it. If we consider the injuries stated by Dr. Kotwal on the person of Dada and Tanaji and compare them with injuries found on said persons by the Medical Officer at Civil Hospital, Dhule, there appears reason to take word of Dr. Kotwal with a pinch of salt.

21. P.W.7-Hiralal Chavan examined at Exh.41 is an independent witness. He is the officer of Court. He has no reason to take side of either of the parties. He was practising at Chalisgaon for 37 years. It is not suggested that he was favouring either side and so his evidence can be considered to know what must be the truth, though this witness has said that he had not identified either assailants or injured. P.W.7-Hiralal Chavan stated that on 19.01.1990 he was present in the Court premises at Chalisgaon at 4 to 4.15 p.m. while he was in the room adjacent to the Court hall of Magistrate Shri Gangakhedkar, suddenly some persons entered the room running. He also heard some noise from outside. The persons who entered the room started closing door. So, he made enquiry with those persons. He was told that some beating incident had started outside. So, he went out of the office room and saw one person being assaulted by 3-4 persons near compound wall at the entrance gate of the Court premises. The person who was being assaulted had fallen down on the ground by the time he reached him. The persons, who were assaulting, were armed with sword, spear and iron bars. He went to the spot and tried to prevent from assaulting that

person who had fallen down. He asked the assailants why they were assaulting the person who had fallen down. One or two blows were given to the fallen person in his presence. When he was going towards main gate, Gajabhau Purnapatre, Advocate, asked him why he was going there, but he had neglected the call and went ahead. Then the assailants ran towards bar room and he followed them. Nobody prevented him when he started following assailants. At that time two persons stood in his way and gave him 1 or 2 blows with something like iron bar on his thigh. He felt giddiness and therefore went inside bar room. He had not seen the assailants prior to the day of incident. He was not knowing accused No. 1-Ashok or Anna Koli. 3-4 days after the incident Police Officer sent him for medical examination. He also found that miscreants while running away had damaged a car near the main gate. In the cross-examination, he said that he did not give attention to the incident that took place in the Court hall. He denied that he saw some persons running with sword, iron bars when he was going towards the main gate. He also heard noise coming from other side of the premises, but he did not see any incident. Absolutely, there is no reason to disbelieve this witness.

22. Evidence of P.W.7-Hiralal falsified the defence case. It was case of accused No. 1 that he was injured with knife, gupti near main gate. The defence could have very well asked if the person fallen down was accused No. 1-Ashok, but no such attempt was made. Statement of Hiralal Chavan is more consistent with the prosecution case that it was deceased Dada, who was injured near the gate with sword, spear etc. and while going away miscreants had damaged the car near the main gate.

23. It must be said that so far as incident near the chamber is concerned, absolutely there is no evidence as to which persons have taken part in it. P.W.1-Shri Gangakhedkar, J.M.F.C. was an independent witness. He stated at Exh.28 that on 19.01.1990 at about 4.15 p.m. he was doing remand work in his chamber and 8-9 persons were present in the chamber. The persons present were one female accused, one lady constable, one Head Constable, two male constables, A.P.P. Shri Pathak, Advocates S/Shri S.Z. Pawar, S.F. Patil and Jadhav. Jr. Clerk Sangale and two peons were also present in the chamber. When he was doing his work he heard noise from outside the chamber and saw some persons running here and there. He saw them through window of his chamber. One of the persons running was armed with naked sword in his hand and going towards bar room. That person had appeared before him in the past. P.W.1-Shri Gangakhedkar said that he was unable to identify that person, but then stretched his memory and said that, that person was accused No. 7-Bharat Chindha Bhoi. P.W.1-Shri Gangakhedkar further said that said Bhoi was saying that "Where was Nanya Pawar". The person seen by the Magistrate was also saying that "Ashok you see on that side and I will see on this side". The accused were searching advocate Shri N.J. Pawar. Thereafter, constables and peons present closed door of chamber. At that time Anna Koli and one more person entered the chamber. They were saying that they should be saved. They were frightened and therefore

he asked one of those persons to hid under his table and asked another person to hid behind the row of the accused who were present in the chamber. At that time one brick was hurled at the door between the chamber and the Court hall and a glass pane of that door was broken. Two or three persons armed with swords were seen near the door of the court near door. They were accused No. 3-Shrawan, accused No. 7-Bharat and one more. The Magistrate said that these two persons Bharat and Shrawan had appeared before him in about 25 cases, but then added that he was unable to identify them. It is further said that the persons who had come near the door gave kicks on the door and broke frame of the door and glass panes. Those persons were asking where was Anna Koli. They demanded his custody. The Head Constable, who was present in Chamber told those persons that Anna Koli was not present in the Chamber and thereafter culprits went away. Thus, we find hesitancy in identifying the culprits. In one breath it is said that the Judge knew the culprits and told their names and then he said that he could not identify them. Be that as it may.

24. It is further said by P.W.1-Shri Gangakhedkar that he found glass panes of the doors of annex building broken. He saw bloodstains and marks of sword on the door of property room. Shri Joshi who was employee of Civil Court, Chalisgaon, had received injury. Said Joshi is not examined. P.W.1-Shri Gangakhedkar also saw one Ambassador car standing outside Court premises, which was damaged. In para 2 he said that he was knowing accused No. 1-Ashok and he had seen accused No. 1-Ashok. Shri Gangakhedkar (P.W.1) proved the report lodged by him at Exh.19. The learned A.P.P. sought permission to confront P.W.1-Shri Gangakhedkar with his complaint. Shri Gangakhedkar admitted portions marked "A" and "B". Thereafter, in cross-examination it is brought on record that there was extensive damage to glass panes. In cross-examination P.W.1-Shri Gangakhedkar also admitted that he had not seen any person assaulting any person. His chamber was crowded to the capacity. Thus, the evidence of P.W.1-Shri Gangakhedkar cannot be said to be sufficient to base conviction of any of the accused. Ordinarily, we could have relied upon sole word of a Judicial Officer.

25. P.W.6-Sakharam Pawar, who had been practising advocate when the incident took place and who later on joined judiciary, stated that when he was present in the Chamber of Shri Gangakhedkar (P.W.1) in connection with remand work, the incident as described by Shri Gangakhedkar (P.W.1) had taken place. He said that he was not knowing who were culprits, but he admitted that Anna and one boy had entered the chamber in frightened condition and prayed for saving them and they were hidden. He also said that there was damage to the door of the chamber. Thus, complicity of the accused so far as incident near chamber is concerned, it is not proved.

26. P.W.8-Babu Phulane is a petition writer. Though he said that Anna Koli and Dada Koli were his clients, he is a petition writer who serves anyone who approaches him for service of petition writing and cannot be said that he is in

anyway interested in deposing against the accused or in favour of deceased Dada Koli and others. In our opinion, he can be considered as an independent witness. He said that on 19.01.1990, he was doing work in Court premises. Dada Koli, P.W.12-Anna Koli, P.W.14-Tanaji Koli were present in the Court premises on that day. 10-15 persons had accompanied them in connection with bail matter. He was also knowing accused No. 1-Ashok and accused No. 7-Bharat. P.W.8-Bapu Phulane said that accused No. 1-Ashok and Accused No. 7-Bharat had came with 6-7 persons in auto rickshaws, went near the spot where Anna Koli and others were sitting. There was exchange of words between Anna's side and side of Accused No. 1-Ashok. Witness said that he was knowing accused No. 1-Ashok and accused No. 7-Bharat by name and face and could identify in the Court. He further stated that after exchange of abuses, there was commotion and bedlam. Persons started running here and there. He also ran towards the bar room and peeped from the window of Bar room and saw that accused No. 1-Ashok and accused No. 7-Bharat were chasing Dada. Accused No. 7-Bharat had koyta in his hand and accused No. 1-Ashok had sword in his hand. The witness said that he did not see actual assault. Then he was declared hostile and permission was granted to put question in the nature of cross-examination. Then he admitted that he saw accused No. 1-Ashok assaulting Dada with sword and accused No. 7-Bharat assaulting Dada with Koyta. Other persons were also assaulting Dada with hockey stock and iron bar. One motor car was also damaged. Later on he saw Dada in injured and bleeding condition. Witness further said that he did not see arms in the hands of any of the accused when there was exchange of abuses. Weapons can be concealed. The witness also said that advocates M/s. I.M. Sanklecha, S.B. Patil and S.S. Shendurnikar who were present in the bar room had seen the incident. The witness said that he was not knowing in what direction Anna and Tana had run away. He denied that place where Dada had fallen at the main gate cannot be seen from the door or window of Bar room. The witness also said that he had closed door of Bar room, after Dada fell down. According to this witness exchange of abuses was going on for about one and half minutes.

27. It is stated that no other witness had said about exchange of abuses, but when two warring parties come near and see each other, there is bound to be some exchange of words and there is nothing unusual in it. Witness further stated that he did not see any injury on the person of Ashok, though he found clothes of Ashok bloodstained. Possibility of Ashok being injured by Anna, Dada or Tana sometime before 4 to 4.30 p.m. outside Court premises cannot be ruled out. In-fact, such incident of beating to accused No. 1 outside Court premises must have motivated accused No. 1-Ashok and others to come to the Court premises in search Dada, Anna and Tana and to injure them. The way in which they were seen coming and the manner in which they went to the Chamber of Judge and demanded custody of Anna show how they were enraged and this could only be because of some immediate previous incident. It is difficult to believe that accused No. 1-Ashok was injured during incident which took place at

4.00 4.30 p.m. Even if we are to accept such case in that case, since accused No. 1-Ashok and others were aggressors, who had come armed with weapons into Court premises for causing hurt to Dada, Anna and Tana, it cannot be said that they were exercising right of defence or were in any way justified in causing injuries to Dada and Tana.

28. P.W.9-Nandlal Wani was one of the accused persons arrested in connection with setting fire to Shivsena office. He had come to the Court for furnishing bail on 19.01.1990. He stated that he, his sureties, Dada Chindha, Kishor More, Tana Koli were present in the Court premises. At about 4.00 p.m. accused No. 1-Ashok and accused No. 5-Ramesh came and saw them and went away. At about 4.15 p.m. accused No. 1-Ashok, accused No. 5-Ramesh again came. He was knowing only accused No. 1-Ashok, accused No. 5-Ramesh, accused No. 7-Bharat by their name and face and was not knowing others. They entered the Court premises shouting. Then this witness was declared hostile and was confronted with portions marked "A" and "B" from his statement. In cross-examination by the accused he was confronted with portions marked "C" and "D" from his statement. Thus, this witness has not supported the case.

29. P.W.10-Pandurang Choudhari has, however, supported the prosecution case. He stated that on the day of incident he had come to the Court as he was to stand as surety for Anna Koli. At about 12.00 to 12.30 noon, their bail papers were prepared and handed over to the concerned clerk and they were asked to wait. At about 4.00 p.m. Dada Koli, Tana Koli, Kishor More, Nandu Wani were sitting in the Court premises. Anna and Raju driver also went there. At that time witness Pandurang was sitting on Ota near Neem tree, near office of Government Pleader. At about 4.15 p.m. some 10-12 persons belonging to Shivsena entered the Court premises through the main gate. Accused No. 1 was armed with sword, accused No. 3-Shravan was armed with spear, accused No. 7-Bharat was armed with Koyta, accused No. 6-Mangesh had iron bar and accused No. 10-Dilip had hockey stick. The witness identified all these accused persons in the Court. They went to the spot where Dada and others were sitting. They were shouting. Persons present started running here and there. Dada Koli started running towards main gate. At that time the accused were coming from opposite direction. Accused No. 7-Bharat Bhoi came from behind Dada Koli and gave blow on head of Dada with Koyta. Accused No. 3-Shrawan gave blow to Dada with blunt side of spear. Dada fell down. Thereafter, accused No. 1-Ashok gave sword blow on the leg of Dada. Accused No. 10-Deelip also beat Dada with hockey stick. Advocate Hiralal Chavan (P.W.7) tried to intervene in the incident, but someone gave blow on his leg. When Dada Chindha was unconscious, the accused went towards the Chamber of Judge to search out Anna Koli. Tana Koli went towards urinals and accused who assaulted Dada ran after Tana Koli. This witness did not see who actually assaulted Tana Koli. The accused and broke glass panes of Court building. The incident lasted for 10-12 minutes. The car of Anna Koli was damaged.

30. Witness Pandurang admitted in the cross-examination that previously he was in Government service. For committing theft of a golden chain of a woman, he was convicted and therefore he was removed from the Government service. He was knowing Dada Koli and his brothers from childhood as they resided in same ward. It is suggested that accused No. 1-Ashok has filed a criminal complaint against him. It is said that this witness and others had assaulted accused No. 1 Ashok Deshmukh on 19.01.1990 at 4.00 p.m. The witness said that he was knowing accused Ashok from 4-5 years. He was Shivsena worker and indulged in Goondaism. Anna Koli is another Goonda from Chalisgaon. This witness does not conceal that Anna Koli and Suresh Taire were also Goondas from Chalisgaon. He stated that he was knowing accused No. 3-Shrawan from childhood. Accused No. 3 was running gambling den, which he had visited once. He was also knowing accused No. 7-Bharat Bhoi since prior to the incident. Bharat Bhoi had a hotel at S.T.Stand, Chalisgaon and he had visited to the hotel. He stated that he had no dispute with Bharat Bhoi at any time. It was Bharat who had given name of accused Mangesh to him.

31. The witness said that he was standing near neem tree when the incident occurred and he did not feel afraid as he had no enmity with the accused. Though this witness cannot be said to be totally independent witness, his evidence can be accepted so far as it is consistent with evidence of P.W.7-Hiralal Chavan and P.W.8-Bapu Phulane. This witness said that one group of accused assaulted Dada and one group chased Tana and other group went towards chamber. However, he also stated in cross-examination that accused No. 8-Tukaram Koli and accused No. 11-Tukaram Gavali were standing near canteen. It is argued before us that the evidence of witness Pandurang Choudhari shows that accused No. 8-Tukaram was a by-stander, standing near canteen and not involved in the incident. This witness also saw accused Nos. 2, 4, 5 & 9 going towards chamber, but does not say what they had done. He further said that he was at a distance of 25 feet from the place where Dada was assaulted.

32. P.W.11-Himmat Koli examined at Exh.46 did not support the prosecution case. He was declared hostile and was confronted with his statement before Police, but without any use.

33. Then, there remains evidence of P.W.12-Anna and P.W.14-Tanaji. So far as P.W.12-Anna is concerned, he stated that on 19.01.1990 he had gone to Chalisgaon for furnishing bail of his brother who was suspected in case of setting Shivsena office on fire. At about 3.00 p.m. his brother Dada came in a car to the Court. The witness, Dada, P.W.14-Tanaji and two sureties were sitting in the Court verandah. At that time accused No. 1 and 5 came, saw them and went away. Five minutes thereafter all the eleven accused came armed with sword, iron bars, hockey sticks, spears, koyta in two auto-rickshaws. They entered Court premises shouting and hurling abuses. After accused entered the Court premises, atmosphere became tense and everybody started running here and there out of fear. When accused came into the Court premises, Dada and Tana

who were sitting in the Court verandah started running towards main gate. At that time accused No. 7-Bharat gave blow to Dada with koyta. Accused No. 3-Shrawan gave blow to Dada with blunt side of spear. He saw accused No. 1 giving blows on the right thigh of Dada with sword. Anna had injury on his leg and hand. Therefore, he ran from the spot and entered the Court hall. Some police men present in the Court hall pulled him in the room where Magistrate and others were present. At that time accused No. 1-Ashok was saying that Anna should be taken out. Accused No. 1-Ashok and three more persons had come near the chamber to kill him. He requested Magistrate to save his life. So, he hid behind accused persons. Kishor More who was with him was concealed under table of the Magistrate. The accused were told by the Magistrate that Anna was not in the chamber. Then they went elsewhere. It is brought in the cross-examination that what this witness has stated was not consistent with evidence of P.W.14-Tanaji.

34. P.W.14-Tanaji has stated that Dada started running towards main gate and he started running towards other side i.e. urinal. Therefore, witness Anna must not be telling truth. In cross-examination omission was also brought on record that this witness has not stated in his statement before police that accused No. 3-Shrawan had given blow with blunt side of spear to Dada and that accused No. 1 gave blow with sword on the thigh of Dada. Admissions were brought in para 9 of deposition of Anna to show that he is criminal against whom several cases were pending for various reasons. However, if we consider other evidence, evidence of Anna cannot be disbelieved so far as his statement that he saw accused armed with weapons coming into the Court premises and they were shouting. It cannot be denied considering evidence of P.W.1-Shri Gangakhedkar and P.W.6-Sakharam Pawar, Advocate that Anna ran into chamber of the Magistrate to save his life. So, one thing is clear that this witness had opportunity to see accused with weapons and so he was afraid and ran to the chamber to save his life. It is argued that this witness may not have seen the entire incident of causing injuries on Dada by accused Nos. 1, 3 and 7.

35. P.W.14-Tanaji Koli is examined at Exh.53. He stated that on the day of incident he was sitting with his brothers in the verandah of Court premises. Accused No. 1 and 5 had come to the premises and saw them. P.W.14-Tanaji Koli thought that accused Nos. 1 and 5 might have come for their case. Thereafter, accused Nos. 1 and 5 went away. After sometime accused No. 1-Ashok and accused No. 5 returned with 10-12 persons shouting that Anna Koli should be killed and none should be left (alive) out of them. Those persons were having Koyta, swords, iron bars, hockey sticks. The witness identified accused persons. On hearing shouts, Dada started running towards the main gate. P.W.14-Tanaji started running towards urinal. Dada was assaulted by accused No. 7. Accused No. 7 gave blow on the back side of Dada with koyta. Accused No. 3 Shrawan gave blow with blunt side of spear. Dada after receiving blows fell down. Thereafter, accused Ashok gave blow on him with sword. After Dada fell down he was further assaulted. P.W.14-Tanaji started running towards urinal out of fear.

Accused No. 1-Ashok, accused No. 5-Ramesh and accused No. 7-Bharat came to him. Accused No. 7 Bharat hit him with koyta on right hand near wrist. Accused No. 1-Ashok on his right thigh on the back side with sword. P.W.14-Tana fell down. Accused continued to assault him and then he became unconscious. He regained consciousness in the Hospital at Dhule. He was taken to the Municipal Hospital, Chalisgaon, but he was not conscious, so he was taken to hospital at Dhule. He was in the hospital for about 7-8 days. It is further stated by this witness that he regained consciousness on next day i.e. 20.01.1990. He had seen P.W.12-Anna in the hospital and had talked with him. He learnt about death of Dada after 8-10 days. Tana was not knowing if Police of Chalisgaon Police Station had come to the Hospital on 20.01.1990 and 21.01.1990. He also said that he was arrested by police on 13.12.1990 in the case in which he was to give bail on 19.01.1990. It is suggested that he was absconding till 13.12.1990.

36. The evidence of Investigating Officer P.I. Khan at Exh.72 shows that as per his information, Tanaji was not in a condition to give statement as per report of police constable at Dhule. He did not personally to Dhule on 20th and 21st January, 1990. He specifically stated that he had recorded statement of Tana on 22.01.1990. In the circumstances, no adverse inference can be drawn merely because statement of Tana who was admitted in the Civil Hospital, Dhule was not recorded on 20.01.1990 or 21.01.1990. The witness said that after 5-6 days, the Medical Officer of Dhule Hospital drove him out. We are not concerned whether witness Tana was discharged from the hospital against his wishes or whether the witness was absconding in another case. The fact remains that his statement was recorded within next 2-3 days and proper explanation is given.

37. The reason given for disbelieving P.W.14-Tana is that in his examination he said that on seeing accused first Dada and Tana ran towards gate, then Tana ran towards urinal; whereas in cross-examination in para 4 he said that when Dada was assaulted, he stood near Ota of the verandah and did not run away till Dada fell down. He further said that he ran towards urinal with a thought that he would jump over the compound wall, which was near urinal. He denied that on seeing assailants, Dada started running towards main gate and he started running towards urinal. It may be noted that the whole incident had taken place in a fraction of minute. Distance between verandah and the main gate was hardly 50 feet and Dada might have fallen down within few seconds. So, whether Tana was standing near Ota till Dada fell down or he started running away with Dada has no much value, so as to discard evidence of Tana. Absolutely, there is no reason why Tana should not be believed, at least regarding his statement that he was injured by accused Nos. 1, 5 and 7 near urinal. The injuries on him clearly support this thing. It is a fact that Police had taken away Tana and Dada in injured state from Court premises. There is no reason to disbelieve Tana, when he said that he could see and identify the persons who assaulted and injured him. It was day broad light. Very fact that he fled to urinal shows that he had seen accused with arms and apprehending danger, he ran away. So, there is no reason why evidence of Tana should not be believed so far as accused Nos. 1,5

and 7 are concerned, even if we hold that Tana was not standing near Ota of the verandah and was not watching the assault on Dada till Dada fell down.

38. There is one more evidence which is reliable and the earliest information. It statement of P.W.20-N.D. Patil, Police Constable examined at Exh.65. P.W.20-N.D. Patil was the Court Constable attached to the office of Assistant Public Prosecutor. He said that he was posted as the Court Constable for two prior to his deposition on 15.01.1991. The incident had taken place on 19.01.1990. He was present at the time of incident. It took place on 4.00 to 4.15 p.m. on 19.01.1990 when remand work was going on. He had gone to the room of the bench clerk and he heard some noise outside. He saw that windows and doors of the chamber were being closed. So he came out to see what had happened. At that time accused Nos. 1, 3, 4, 5, 6, 7 and 10 were assaulting Tana, Dada Chindha Koli. Those persons were armed with sword, iron bar, hockey stick. He saw some persons running towards chamber. He could not say who were they. However, he informed that Anna had entered the chamber through the Court hall. Some persons broke glass panes of chamber door and chamber window with the weapons in their hand. So, he proceeded to inform the police station regarding the incident. Pathak, A.P.P. told him through broken door to go to police station. He went to the office of Shetkari Sangh and made telephone call to the police station. He was knowing the accused with their names as they were attending Court in connection with their criminal cases pending against them. He also saw damage to the car of Anna Koli, while leaving the spot of incident. He said that he was not knowing other accused persons. He informed police station on phone that accused No. 1-Ashok and his associates have assaulted Dada Koli and Tana Koli with sword and they created atmosphere of terror. P.S.I. Pachpute came to the Court. Spot panchanama was prepared in his presence. In the cross-examination this witness said that Shetkari Sangh was at a distance of 90 to 100 feet from the compound wall of Court premises. He saw assault made on Dada and Tana on the spot shown by green colour in the map. It is argued that this is the one and same spot and this shows that this witness must not have seen the assault. However, he on seeing that some armed persons have entered the Court premises and are likely to cause some untoward incident, ran to inform the police station. This witness said that since there was crowd near main gate, he jumped over the compound wall and went to Shetkari Sangh office. He also said that since there was crowd near main gate and it was not possible to see who was assaulting whom. The beating incident was seen by him for 1 to 1 1/2 minutes near green colour spot. So, possibly this person may not have seen the actual assault on Tana Koli or may not have seen who had caused injuries to Dada Koli. He however, said that at green spot shown by him in the map, there were bloodstains. He further said that one broken piece of sword and 2-3 iron bars were lying on the spot.

39. Though this witness may not have seen who had caused injuries to whom, still the information given by him on telephone to police station was reduced into writing and xerox copy of the station diary entry is produced and proved at

Exh.82. It shows that it was 4.55 p.m. on 19.01.1990 and it says that Court duty constable Narayan Patil made telephone and informed that in the Court premises Ashok Narayan Deshmukh -accused No. 1, Shrawan Kalu Panchal - accused No. 3 and other 10-12 persons of Shivsena armed with sword, iron bars have caused injuries to Anna Koli, his brothers Dada and Tanaji, who are in the Court premises and the atmosphere of terror is created in the Court and so immediately send police help. Immediately at 5.00 p.m. P.S.I. Pachpute went to Court. This entry made in the station diary at 4.55 p.m. shows that accused No. 1 and 3 and others had come to the Court armed with weapons and were about to cause injuries to Anna Koli and others. Perhaps, statement that Anna was also injured may be just inference as assailants had given shouts that Anna should be killed and others should not be left alive.

40. There is also evidence of P.C. Pathak (P.W.18), who was inside the chamber. He said that he was giving names (of accused persons) as told to him by A.S.I. Patil and was not knowing the accused.

41. In the case of Daulatram Sadram Teli v. State of Chhattisgarh AIR 2008 SCW 6273. The Supreme Court observed that ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism. In this case Tana was not likely to screen the actual offenders who had caused him injuries. It may be noted that he has named only three persons and his deposition is consistent with injuries caused on his person.

42. In the case of Masalti Vs. State of U.P., following observations are made:

14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

43. In the case of Gunnana Pentayya @ Pentadu and Ors. v. State of A.P. AIR 2008 SCW 6132, Their Lordships considered Section 149 of the I.P.C., what is "common object" and what is distinction between Ist part and IInd part of Section 149. Their Lordships also considered the law relating to non-explanation of injuries sustained by accused. In this case it can be held that the accused persons whose involvement and identity is established beyond reasonable doubt with other unknown persons, have entered the Court premises armed with deadly weapons with an object to cause injury to Anna Koli and his brothers. That was clear from their utterances. So therefore irrespective of who had

caused injuries, since causing of the injuries to these persons was the common object of the unlawful assembly and since they knew that some persons would be injured, Section 149 of the I.P.C. is applicable and the accused will be liable for the offence punishable u/s 326 read with Section 149 of the I.P.C. When deadly weapons are to be used for causing injuries, knowledge can be attributed to all members of the family that some injured would receive injuries which were likely to cause death. This is so, even assuming for a moment that they were not knowing that murder would be committed and even if there was no common object to commit murder.

44. In para 15 of *Gunnana* (Supra) Their Lordships considered the principle of "falsus in uno falsus in omnibus" and observed as follows:

15. The next plea as noted above related to the acquittal of number of persons. Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by PW1 to a large extent to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient, or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witness or witnesses cannot be branded as liar(s). The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". See *Nisar Ali Vs. The State of Uttar Pradesh*, . In a given case, it is always open to the Court to differentiate accused who had been acquitted from those who were convicted where there are a number of accused persons. See *Gurcharan Singh and Another Vs. State of Punjab*, . The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respect as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across

a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment.

It is further observed that normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. It is only material discrepancy which corrode the credibility of witness. In para 16 it is also laid down that where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries, non-explanation of injuries will not affect prosecution case.

45. In this case if we have overall view and see the probabilities, it appears that the injuries caused to accused No. 1 might have been caused sometime prior to 4 p.m., may be by Anna and his brothers, outside the Court premises. Evidence of independent witness like P.W.7-Hiralal Chavan, P.W.8-Bapu Phulane makes it clear that injuries to accused No. 1 were not caused during the incident. Even assuming for a moment that they were caused during the incident as described by the prosecution witnesses, injuries to accused No. 1 must be held to have been caused in self-defence by Dada. We are of the opinion that accused No. 1 had not sustained injuries in the Court premises and there is no basis for drawing such conclusion. No witness has supported such case.

46. In the case of Masalti (Supra) it is observed that where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. While appreciating evidence, in this case, we will have to bear in mind that several persons were present in the Court premises. The assailants were 10-12 in number. Victims were atleast three. Everybody cannot be expected to see everything happening and reproduce the same in same words. Everybody has different faculty of observation, memory and different capacity of expression. This is not a case where separation of truth from falsehood is impossible, though it is difficult and requires application of mind and close scrutiny of the evidence. In our opinion the Trial Court ought to have attempted to find out truth.

47. Various authorities were cited before this Court. In the case of State of U.P. Vs. M.K. Anthony, , it is observed that even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer.

48. In the case of *Jai Shree Yadav v. State of U.P.* AIR 2004 S.C. 4443, it is observed in para 20 that when a witness is subjected to such lengthy arduous cross-examination over a lengthy period of time there is always a possibility of the witnesses committing mistakes which can be termed as omissions, improvements and contradictions therefore those infirmities will have to be appreciated in the background of ground realities which makes the witness confused because of the filibustering tactics of the cross-examining Counsel.

49. Case of *Lakshmi Singh and Others Vs. State of Bihar*, is referred to regarding non-explanation of injuries sustained by the accused. We have already referred to case-law on the point.

50. In the case of *Suraj Singh v. State of U.P.* AIR 2008 SCW 5578, general principals regarding powers of Appellate Court while dealing with an appeal against an order of acquittal are discussed in para 34. We have referred to the law on the said point earlier. In same case it is observed that where eye-witness account is found to be credible and trustworthy, medical opinion pointing to alternative possibilities are not to be accepted as conclusive.

51. In the case of *Bhagwan Tana Patil Vs. The State of Maharashtra*, following observations are made:

15. ...The mere fact that the evidence of the prosecution witnesses was not firm and safe enough to be relied upon with regard to the part assigned to the acquitted accused in the occurrence, was no ground to reject it mechanically against the appellant also. The maxim *falsus in uno falsus in omnibus* is not to be blindly invoked in appraising evidence adduced in our Courts where witnesses seldom tell the whole truth, but often resort to exaggerations, embellishments and "padding-up" to support a story however true in the main. It is the function of the Court to disengage the truth from falsehood and to accept what it finds to be true, and reject the rest. It is only where truth and falsehood are inextricably mixed up, polluting beyond refinement, down to the core, the entire fabric of the narration given by a witness, that the Court might be justified in rejecting his evidence in toto....

52. In the case of *Shajahan and Others Vs. State of Kerala and Another*, , it is stated that where minor and superficial injuries are sustained by the accused, their non-explanation would not affect prosecution case.

53. Several other cases are also cited mainly on law discussed earlier. Thus case of *State of Maharashtra v. Prabhakar Sampat Songire and Ors.* 2004 All MR (Cri.) 1517, deals with non-explanation of injuries on the accused persons. The same principles are laid down and the case is decided on its own fact.

54. In the case of *Vijaybhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel and Ors.* 2004 All MR (Cri) 2822 (S.C.), there was delay of two days in recording statement of widow and son of deceased, who were eye witnesses also found to be tainted with certain embellishments. In the facts of the particular case

considering totality of the circumstances, the accused were given benefit of doubt. Most of the other cases cited are decided mainly on the facts of the individual case.

55. In this case so far as accused No. 1-Ashok is concerned, there is evidence of P.W.8-Bapu Phulane, P.W.10-Pandurang Choudhari, P.W.12-Anna Koli, P.W.14-Tanaji Koli, P.W.18-P.R. Pathak (Police Constable) and P.W.20-N.D. Patil (Police Constable). Out of them P.W.8-Bapu Phulane, P.W.10-Pandurang Choudhari have seen accused No. 1-Ashok with sword. P.W.8-Bapu Phulane stated that he saw accused No. 1 chasing deceased Dada with sword. P.W.10-Pandurang Choudhari saw accused No. 1 giving sword blow on the leg of deceased Dada. P.W.12-Anna has seen accused No. 1 with sword. Even if, we disbelieve other part of evidence of this witness in view of omissions, but the fact remains that P.W.12-Anna had seen accused No. 1-Ashok coming into the Court premises with sword. P.W.14-Tanaji was injured witness, who said that accused No. 1-Ashok had injured him with sword. There is no reason to disbelieve P.W.18-Police Constable P.R. Pathak and P.W.20-Police Constable N.D. Patil. They said that they had seen accused No. 1-Ashok with sword. Particularly P.W.20-Police Constable N.D. Patil has given name of accused No. 1 as one of the armed person in his earliest information given on telephone to the police station, which was reduced into writing and entered in the station diary and proved at Exh.82.

56. So far as accused No. 3-Shrawan is concerned, he is named by P.W.1-Magistrate Shri Subhash Gangakhedkar, who saw him near his chamber. P.W.10-Pandurang Choudhari saw him giving blow with spear to Dada. P.W.12-Anna identified him as the person who came with accused No. 1-Ashok. P.W.14-Tanaji has also seen him armed with weapon. P.W.18 and P.W.20 have also stated about presence of accused No. 3-Shrawan. His name is also appearing in the earliest report to police station which is entered in the police station diary (Exh.82).

57. So far as accused No. 5-Ramesh Patil is concerned, there is evidence of P.W.12-Anna Koli. P.W.14-Tanaji Koli identified him as one of the assailants, who caused him injuries.

58. So far as accused No. 7-Bharat is concerned, his name is referred by P.W.1-Magistrate Shri Subhash Gangakhedkar, though later on he changed his version. P.W.8-Bapu Phulane and P.W.10-Pandurang Choudhari had seen accused No. 7 giving blow with koyta to deceased Dada. P.W.12-Anna had also seen him with koyta and also saw him giving blow to Dada with koyta. It may be noted that there is no omission about this. P.W.14-Tanaji also said that accused No. 7-Bharat also injured him. There is also corroboration from P.W.18 and 20. So, in our opinion accused Nos. 1, 3, 5 and 7 are the persons whose presence as members of unlawful assembly and participation in the crime is proved beyond doubt. So far as accused Nos. 2, 4, 8 and 11 are concerned, they should be given benefit of doubt as their presence and participation is not established beyond reasonable doubt.

59. So far as the offences which are proved to have been committed by accused Nos. 1, 3, 5 and 7 are concerned, as we have stated earlier all these accused persons were members of the unlawful assembly; and force and violence has been used by said unlawful assembly and by its members. The unlawful assembly was formed by said respondents and other unknown persons against whom case is not proved beyond reasonable doubt. But every member is guilty of offence of rioting and therefore each of the four respondent Nos. 1, 3, 5 and 7 are guilty of offence punishable u/s 147 of the I.P.C. Similarly, common object of the unlawful assembly was to cause hurt with deadly weapons. It has come in the evidence that above-said four respondents and other persons with them were armed with deadly weapons like sword, spear, koyta and iron bars. Accused No. 1 was armed with sword, accused No. 7 was armed with koyta and accused No. 3 was armed with spear. So respondent Nos. 1, 3 and 7 have committed offence punishable u/s 148 of the I.P.C. However, it is not clear with what weapon respondent No. 5 was armed, though he was one of the assailants, who injured P.W.14-Tanaji. So, we give benefit of doubt to respondent No. 5 so far as offence punishable u/s 148 of the I.P.C. is concerned.

60. Section 149 of the I.P.C. deals with liability for constructive criminality i.e., liability, for an offence not committed by the person charged. Section 149 of the I.P.C. is as follows:

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

It consists of two parts. As per one part where there is commission of an offence by any member of an unlawful assembly and such offence is committed in prosecution of the common object of the assembly then every member of the unlawful assembly would be guilty of said offence. As per second part whenever commission of an offence by any member of an unlawful assembly is such that members of the unlawful assembly knew the said offence is likely to be committed in prosecution of the common object of the assembly, each member of the unlawful assembly would be guilty of such offence. Object of Section 149 of the I.P.C. is to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not, with his own hand, commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. However, Section 149 of the I.P.C. is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. In this case when members of the unlawful assembly were armed with deadly weapons like sword, koyta, spear and iron bars, knowledge can be attributed to them that there is likelihood of

causing of hurt which endangers life of any person within the meaning of clause eighthly of Section 320 of the I.P.C. In this view of the matter, the members of the unlawful assembly in the present case would be guilty of an offence punishable u/s 326 read with Section 149 of the I.P.C. We have already referred to case of Gunnana (Supra).

61. However, respondent Nos. 1, 3, 5 and 7 cannot be convicted u/s 302 and 307 both read with Section 149 of the I.P.C. as there is no evidence to show that common object of the unlawful assembly was to cause death of Anna Koli and his brothers.

62. In our opinion, since there was no evidence to show common object to cause damage to property, the accused/respondents cannot be convicted u/s 427 read with Section 149 of the I.P.C. There is no evidence to show that there was common object to enter Court building and commit crime, though some did enter in search of Anna and in the process caused damage to property of the Court and committed offence of criminal intimidation, but their identity is not proved.

63. In our opinion, respondent Nos. 1, 3 and 7 are liable to be convicted of offences punishable under Sections 147, 148 and 326 read with Section 149 of the I.P.C. and respondent Nos. 5 is liable to be convicted of offence punishable under Sections 147, 326 read with Section 149 of the I.P.C. Thus, in our opinion the appeal will have to be allowed partially. At this stage, we propose to hear respondent Nos. 1, 3, 5 and 7 on the question of sentence, if they so desire and are available.

[P.R. Borkar, J.]

[P.V. Hardas, J.]

Dated: 02.12.2008

64. Last time we had orally instructed Adv. Shri K.G. Bhosale to keep respondent Nos. 1 to 5, & 7 present in the Court today. We asked Adv. Mrs. S.S. Jadhav to keep respondent No. 8 present today. Only accused Nos. 1, 4 & 8 are present today in the Court. Adv. Shri Bhosale fairly stated that accused Nos. 3 and 5 had come to the Court, but have gone away and accused No. 7 is not present.

65. In the circumstances accused No. 1-Ashok is heard on sentence. He said that he is 57 years of age and doing dairy business; he is head of his family; he has two sons and two daughters; his elder son and elder daughter are married and younger son and younger daughter are taking education and there was no previous conviction. Accused No. 1 also said that he was in jail from the date of incident till the date of judgment of the Trial Court i.e. from 19.01.1990 till 31.01.1991 and he requested that leniency should be shown to him. Since accused Nos. 3, 5 and 7 are not present, they could not be heard on sentence.

66. Adv. Shri K.G. Bhosale for the accused/respondents submitted that age of accused No. 1-Ashok may be considered; he had been in jail for more than one

year and he is only earning member of his family. Adv. Shri Bhosale further stated that similarly age of other accused persons may be considered, there is no previous criminal background and in the circumstances leniency should be shown to them.

67. Mrs. Mane, A.P.P. for the appellant/State has submitted that necessary orders as per law may be passed.

68. At this stage Adv. Shri Bhosale requests that matter may be adjourned till day after tomorrow, so that other three accused persons may also remain present and they may also be heard on sentence.

69. At the request of Adv. Shri Bhosale, the matter is adjourned to 04.12.2008.

[P.R. Borkar, J.]

[P.V. Hardas, J.]

Dated: 04.12.2008

70. Today respondent Nos. 1, 3, 5 & 7 are present in the Court. We have already heard respondent No. 1-Ashok regarding sentence.

71. Respondent No. 3-Shrawan when asked about sentence, stated that he is a blacksmith by profession; his age is 50-51 years; he is only earning member in the family; he has five sons and one daughter; three of the children including daughter are taking education and other are doing labour work.

72. Respondent No. 5-Ramesh when asked about sentence, stated that he has old parents; he has three sons who are taking education; he is 41 years of age; he is an agriculturist and Municipal Councillor. He submits that he has not committed any offence, but he was involved due to political rivalry.

73. Respondent No. 7-Bharat when asked about sentence, submitted that he is 47 years of age; he is a Bhoi (trader of Chirmure, Phutana etc.); he has two sons and four daughters; all daughters are unmarried; four of the children are taking education and two are yet to enter school. Respondent No. 7-Bharat further stated that he sustained injuries to his leg and he is unable to walk.

74. Shri K.G. Bhosale, Advocate for the respondent Nos. 1, 3, 5 & 7 submitted that there is no previous conviction to any of the accused. The incident has occurred 19 years ago. All the four respondents were in jail for certain period and as such are entitled to set off. He further stated that all the four respondents are above 40 years of age. They have family responsibilities. Their intention was only to cause injuries and not death. Respondent No. 1-Ashok has also sustained injuries in the incident. So, leniency may be shown.

75. A.P.P. Mrs. Mane has stated that severity of the offence may be taken into consideration. The respondents and others have entered the Court premises with deadly weapons and a life is also lost. So, severe punishment may be awarded.

76. In our opinion, we do take into consideration the submissions of all the respondents regarding showing leniency, but at the same time we cannot lose sight of the fact that all the four respondents along with some more persons formed unlawful assembly with common object to cause injuries with deadly weapons to Anna Koli and his brothers. In the attack which they made, not only Dada Koli lost his life and P.W.14-Tanaji Koli sustained injuries, but the culprits had dared to go to the chamber of the Judge and demand custody of Anna Koli; and when they were told that Anna Koli was not in the Chamber, they damaged the Court property. Eventhough the incident had taken place 18 years ago and the respondents were in jail for about one year or so, still totality of the circumstances needs to be considered. Deterrence would play vital role in such cases. The very acts of entering the Court premises when the Court is functioning, and of attacking persons in the Court premises and even demanding custody of a person to the Magistrate is something which has to be dealt with severely. However, at the same time we are aware that the incident has taken place in the year 1990 and about 18 years and over. The accused have family responsibilities. All of them are above 40 years of age. It also appears that two of the respondents are not financially well. So, we feel that rigorous imprisonment for four years for the main offence with fine of Rs. 1000/- would meet ends of justice.

77. In the result we pass the following order:

(1) Respondent No. 1-Ashok Narayan Deshmukh, respondent No. 3-Shrawan Kalu Panchal and respondent No. 7-Bharat Chindha Bhoi are convicted of offence punishable under Sections 147, 148, 326 read with 149 of the I.P.C.

(2) Respondent Nos. 5-Ramesh Vikram Patil is convicted of offence punishable under Sections 147, 326 read with 149 of the I.P.C.

(3) For the offence punishable under Sections 326 read with 149 of the I.P.C. each of the accused/respondent Nos. 1, 3, 5 & 7 is sentenced to suffer rigorous imprisonment for four years and to pay fine of Rs. 1000/- (Rupees One Thousand), in default, to undergo rigorous imprisonment for one month.

(4) For the offence punishable u/s 147 of the I.P.C. each of the accused/respondent Nos. 1, 3, 5 & 7 is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 1000/- (Rupees One Thousand), in default, to undergo rigorous imprisonment for one month.

(5) For the offence punishable u/s 148 of the I.P.C. each of the accused/respondent Nos. 1, 3 & 7 is sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 1000/- (Rupees One Thousand), in default, to undergo rigorous imprisonment for one month.

(6) All substantive sentences shall run concurrently.

(7) The accused are entitled to set off u/s 428 of the Cr.P.C. for the period they were already under detention.

(8) The order of acquittal of accused Nos. 1, 3, 5 & 7 for rest of the offences with which they are charged is confirmed.

(9) The appeal is dismissed against respondent Nos. 2, 4, 6 and 8. Their bail bonds stand cancelled.

(10) Accused Nos. 1, 3, 5 & 7 are directed to surrender to their bail within four weeks from today before the Sessions Judge, Jalgaon and to undergo remaining punishment.

(11) Thus, the appeal is partly allowed.