

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
AURANGABAD BENCH AT AURANGABAD

CRIMINAL APPEAL NO.211/2014
WITH
CRIMINAL APPEAL NO.205/2014
WITH
CRIMINAL APPEAL NO.228/2014
WITH
CRIMINAL APPLICATION NO.2702/2014
IN
CRIMINAL APPEAL NO.205/2014
WITH
CRIMINAL APPLICATION NO.2703/2014
IN
CRIMINAL APPEAL NO.211/2014

CRIMINAL APPEAL NO.211/2014

APPELLANT : Nagnath s/o Ankush Chate
Age : 35 Years, Occu. Agril.
R/o Kusalwadi, Tq. Ambajogai,
Distt. Beed.

(Ori. Accused No.2)

...Versus...

RESPONDENT : The State of Maharashtra,
(Copy to be served on Public Prosecutor,
High Court of Bombay, Bench at
Aurangabad).

Shri Rajendra S. Deshmukh, Advocate for appellant
Shri B.L. Dhas, APP for respondent

WITH

CRIMINAL APPEAL NO.205/2014

APPELLANT : Shri Mahadu s/o Namdeo Kendre
Age : 31 years, Occu. : Agriculture,
R/o Phawadewadi, Taluka Renapur,
District : Latur.
(Original Accused No.4)

...Versus...

RESPONDENT : The State of Maharashtra,
through the Police Station Officer,
Police Station, Parlivaijanath Rural,
Tq. Parlivaijanath, Distt. Beed.

S/Shri Mahesh S. Patil & D.S. Mali, Advocates for appellant
Shri B.L. Dhas, APP for respondent

WITH

CRIMINAL APPEAL NO.228/2014

APPELLANT : Patloba s/o Laxman Gutte
Age : 55 years, Occ. : Agri.
R/o Hallamb, Tq. Parali-Vaijinath,
Distt. Beed.
(Original Complainant)

...Versus...

RESPONDENTS : 1. The State of Maharashtra,
Through Police Station Officer,
Police Station, Parali-Vaijinath,
Tq. Parali, Distt. : Beed.

2. Jaganath s/o Narayan Gutte
Age : 44 years, Occ. : Agri.
R/o Hallamb, Tq. Parali Vaijinath,
Distt. Beed.

(Original Accused No.1)

Shri Sarang P. Joshi, Advocate for appellant
Shri B.L. Dhas, APP for respondent No.1

WITH

CRIMINAL APPLICATION NO.2702/2014

IN

CRIMINAL APPEAL NO.205/2014

APPLICANT : Patloba s/o Laxman Gutte
Age : 55 years, Occ. : Agri.
R/o Hallamb, Tq. Parali-Vaijinath,
Distt. Beed.

(Original Complainant)

...Versus...

RESPONDENTS : 1. The State of Maharashtra,
Through Police Station Officer,
Police Station, Parali-Vaijinath,
Tq. Parali, Distt. : Beed.

2. Mahadu s/o Namdev Kendre
Age : Major, Occ : Agri.

(Original Accused No.4)

Shri Sarang P. Joshi, Advocate for applicant/appellant
Shri B.L. Dhas, APP for respondent no.1

WITH

CRIMINAL APPLICATION NO.2703/2014

IN

CRIMINAL APPEAL NO.211/2014

APPLICANT : Patloba s/o Laxman Gutte
Age : 55 years, Occ. : Agri.
R/o Hallamb, Tq. Parali-Vaijinath,
Distt. Beed.

(Original Complainant)

...Versus...

RESPONDENTS : 1. The State of Maharashtra,
Through Police Station Officer,
Police Station, Parali-Vaijinath,
Tq. Parali, Distt. : Beed.

2. Nagnath s/o Ankush Chate
Age : 44 years, Occ : Agri,
R/o Hallamb, Tq. Parali
Vaijinath, Distt. Beed.

(Original Accused No.2)

Shri Sarang P. Joshi, Advocate for applicant/ appellant
Shri B.L. Dhas, APP for respondent No.1

CORAM : S.S. SHINDE AND
A.I.S. CHEEMA, JJ.

Date of reserving the judgment : 04.08.2015

Date of pronouncing the judgment : 21.09.2015

JUDGMENT (PER : A.I.S. CHEEMA, J.)**Introduction**

1. Criminal Appeal No.211/2014 has been filed by Nagnath s/o Ankush Chate, original accused no.2 in Sessions Case No.10/2010, who has been convicted for the offence punishable under Section 302 of Indian Penal Code, 1860 and sentenced to undergo imprisonment for life and fine by the Additional Sessions Judge - 2, Ambajogai, District Beed. Criminal Appeal No.205/2014 has been filed by the original accused No.4 - Mahadu s/o Namdeo Kendre, who has been convicted in the same sessions case under Section 323 of Indian Penal Code and sentenced to undergo rigorous imprisonment for one year and fine. Criminal Appeal No.228/2014 has been preferred by Patloba s/o Laxman Gutte, original complainant, the father of Ashruba, the victim who was allegedly murdered. This appeal has been filed by the complainant to convict the original accused no.1 – Jaganath s/o Narayan Gutte, who was acquitted in the same sessions case and therefore, this appeal is filed seeking conviction of Jaganath for the Sections with which he was charged with other accused persons i.e. Sections 302,

201 r/w Section 34 of Indian Penal Code. Criminal Application Nos.2702/2014 and 2703/2014 have been filed by the original complainant Patloba for assisting the Additional Public Prosecutor in the appeals filed by the accused nos.2 ⁸ to 4.

2. The Case of the Prosecution In Brief is as follows :

A.D. of Accident

(A) On 19.10.2009 A.D. No.41/2009 came to be registered at Parli Rural Police Station at the instance of complainant Patloba vide Exh.51 informing that the dead body of his son was lying near the cement factory and it was necessary to ascertain as to how he had met death. P.W.9 - A.S.I. - Shivaji Rathod went to the spot and did inquest panchanama of the dead body and the body was taken to the civil hospital, Parli Vaijnath for post-mortem and seeking medical opinion regarding cause of death. In the next day morning of 20.10.2009, P.S.I. P.W.10 - Satish Bansode went to the spot and did spot panchanama (Exh.93). He received the inquest panchanama and other documents from A.S.I. Bansode, who had enquired in the earlier evening. On 21.10.2009 at about 23:20 hours complainant P.W.2 - Patloba registered F.I.R. at Crime No.175/2009.

F.I.R. of Murder

(B) In the F.I.R. the complainant informed police that his son Ashruba was working on the truck of his cousin brother A1 - Jaganath at Mumbai, where the truck had turned turtle. Subsequently, his son started working with one Shivshankar Munde at Tokwadi. A1 - Jaganath and A2 - Nagnath son of his cousin sister used to come to his house insisting with the victim Ashruba to pay for the damages of the truck turning turtle or to work without charges for one year on their truck and thus they were troubling Ashruba. On 19.10.2009 Ashruba went for his work. At about 7:30 p.m, one Mahadu Pandit Dhahiphale informed the complainant that A1 - Jaganath had informed on phone that Ashruba met with accident near cement factory and his dead body is lying there. F.I.R. mentions that the complainant went with others to the spot and found the dead body of his son lying on the edge of the road in injured condition. The complainant informed that he had reported to the police and police had done panchanama and post-mortem. F.I.R. states that at the concerned time many relatives gathered and his cousin son-in-law Govind Baburao Munde (P.W.3) had also come and Govind gave him information. F.I.R. refers to the

information given by Govind that he had met his son Ashruba at Parli at the bus stand and they had gone to Sapna Hotel and had consumed liquor and at that time A1 to A4 had come there (This includes Accused no.3 Pralhad Baburao Chate, accomplice, who has been acquitted). They came out from the Bar. Govind Munde asked Ashruba to come along with them to their village but A1 - Jaganath and A2 - Nagnath did not allow him to come and he had alone come back to Dharmapuri at about 5:00 p.m. Govind informed complainant that at about 7:30 p.m. he received information from one Mahadu Pandit Dhahiphale that Ashruba was lying at the edge of the road near the cement factory.

On the basis of such information, the complainant informed that A1 to A4 had murdered his son because of incident of truck of A1 - Jaganath turning turtle and non payment of damages.

A3 - Pralhad - Accomplice turned Approver

(C) On the offence being registered, P.W.10 - P.S.I. Satish Bansode investigated the offence. He recorded statements of the witnesses. The opinion of Doctor regarding the cause of death was taken. The confessional statement of A3 - Pralhad was got recorded. Procedure for grant of pardon to A3 - Pralhad was done

at the Court of J.M.F.C. on the condition that he will disclose true facts before the Court.

A3 – Pralhad in his confessional statement informed the J.M.F.C. as to how he and A2 - Nagnath had met Ashruba. He referred to meeting of P.W.3 – Govind at Sapna Bar. He gave details as to how after the meeting at Sapna Bar, P.W.3 - Govind Munde left and thereafter they had gone to Dharmapuri point and A4 - Mahadu came there by truck; they had gone searching for liquor and ultimately, had liquor at Rajmahal Dhaba and quarrel took place between A2 – Nagnath and Ashruba; as to how they were proceeding in the truck; and how Ashruba was further beaten by A2 - Nagnath and A4 – Mahadu. He gave details as to how Ashruba was beaten and he fell out of the truck near the cement factory and A2 - Nagnath told that Ashruba had been dashed by auto-rikshaw and in the truck they followed the auto-rikshaw and the auto-rikshaw driver was beaten by A2 – Nagnath. In the confessional statement, A3 - Pralhad informed that thereafter A4 – Mahadu had left with his truck and A2 - Nagnath and A3 - Pralhad hid there out of fear that auto-rikshaw driver will beat them and they escaped from the spot later on.

(D) On 24.10.2009, P.W.10 - P.S.I. Satish was given discovery of truck by A4 - Mahadu at an isolated spot. P.S.I. later on handed over the investigation to P.I. Kale and the charge-sheet came to be filed. Offence being sessions triable, the matter was committed to the Court of Sessions.

3. A charge was framed under Sections 302, 201 r/w 34 of Indian Penal Code against all the accused persons. The accused pleaded not guilty. Their defence is total denial. A2 -Nagnath and A4 -Mahadu are sons-in-law of A1 - Jaganath. According to the accused nos.1, 2 and 4 there was a dispute of property between the complainant Patloba and A1 - Jaganath and because of this, the accident case was converted and shown as if murder has taken place.

4. The prosecution recorded evidence of ten witnesses. The judgment of the trial Court shows that the trial Court held that A3 - Pralhad had deposed against the accused persons and considering submissions of A.P.P. the trial Court after following the necessary procedure acquitted A3 - Pralhad. After considering the evidence brought on record A1- Jaganath has been acquitted, A2 - Nagnath has been convicted for the offence under Section 302

of Indian Penal Code. A4 – Mahadu has been convicted under Section 323 of Indian Penal Code. The accused persons have been acquitted of the other offences with which they were charged. Thus, these appeals.

5. It has been argued by their Counsel and A2 – Nagnath and A4 – Mahadu in their appeals claimed that the evidence has not been properly appreciated by the trial Court and the law is not properly applied. The offence charged against the accused is not proved and the accused should have been acquitted. In the appeal filed by the complainant, he is claiming that A1 - Jaganath has been wrongly acquitted. He should have been convicted. His Counsel argued that this accused should also have been convicted.

The learned Counsel for the accused persons relied on the rulings and provisions to submit that A3 - Pralhad was unreliable and his evidence should have been discarded. We are keeping in view grounds raised in appeals and arguments while proceeding to consider the evidence.

Victim last seen with Accused. But were A1 & A4 also there ?

6. We have gone through the material available on record and having heard the learned Counsel for both sides and the learned

Additional Public Prosecutor, this being the first appeal, we proceed to examine the evidence of the witnesses to see if the offence has been established. Accused No.3 – Pralhad Bhaurao Chate (A3/P.W.1) deposed that on 19.10.2009 he was at his village Kusalwadi and was told by A2 -Nagnath that they have to go to Parli. This was at 11:00 a.m. They went to Parli. After telephonic communication, they met P.W.3 – Govind at the commission agent shop. There was talk between A2 – Nagnath and P.W.3 – Govind and Govind left. A3 - Pralhad has deposed that he and A2 – Nagnath then went to the bus stand and went to Sapna Bar, where both of them had liquor. According to A3 – Pralhad at that time P.W.3 – Govind and victim Ashruba came there and when they were offered liquor, they said that they had already consumed liquor. According to P.W.1 – Pralhad (A3) he then proposed to A2 – Nagnath that his father will be coming so they had to go to village. Thereafter, he along with A2 – Nagnath and victim as well as P.W.3 – Govinda came out of the Bar and then P.W.3 – Govind proceeded to Dharmapuri point.

Now, the above evidence of A3 - Pralhad (P.W.1) needs to be read with what P.W.3 – Govind has deposed. P.W.3 – Govind

firstly referred to the incident of truck turning turtle at Mumbai at the hands of Ashruba for which A1 - Jaganath and A2 - Nagnath were asking for compensation or insisting that Ashruba should work without salary for A1 - Jaganath. Then P.W.3 - Govind has deposed that on 19.10.2009 he went to Parli at about 11:00 a.m. to sell his 'Bajri' and had received the phone call of A2 - Nagnath at about 11:00 to 11:30 a.m. They had met at about 12:00 noon near the shop of commission agent at which time A2 - Nagnath was accompanied by A3 - Pralhad, who was unknown to P.W.3 - Govind till then. After their talk, A2 - Nagnath went away. P.W.3 - Govind deposed that he sold his crop and went to jeep point near bus stand, where he met victim and both of them proceeded to Sapna Hotel and consumed liquor there. When they were talking, on back side table, according to P.W.3 - Govind, A1 to A4 were there and they offered liquor to them, which they declined. At this time, A2 - Nagnath introduced A3 - Pralhad as his friend. Then all of them had come out of the hotel. Time was about 3:00 to 3:15 p.m. According to P.W.3 - Govind, he told these people that they should return to village. A1 - Jaganath and A2 - Nagnath did not agree. P.W.3 - Govind said that he held hand of Ashruba to come to the

village but the accused persons did not allow him. Consequently, P.W.3 - Govind deposed that he went to his village by jeep at 5 :00 p.m.

Thus, if the evidence of A3 - Pralhad (P.W.1) is juxtaposed with the evidence of P.W.3 - Govind, it is glaringly apparent that while Pralhad does not refer at all to the presence of A1 - Jaganath and A4 - Mahadu at Sapna Bar, P.W.3 - Govind is categorically recording the presence of those accused also. Details of what happened in the Sapna Bar are similar between the two witnesses except for the presence or absence of A1 - Jaganath and A4 - Mahadu, which is a material contradiction. One set of evidence does not fit into the other set of evidence.

Drinks and quarrel at Rajmahal Dhaba

7. Coming back to the evidence of P.W.1 - Pralhad, his evidence shows that it was only after P.W.3 - Govind left from Sapna Bar, that A2 - Nagnath rang up A4 - Mahadu and after their conversation, they decided to meet at Dharmapuri point. As per P.W.1 - Pralhad, A2 - Nagnath and victim went to Dharmapuri point, where after some time, A4 - Mahadu came with his truck. According to P.W.1 - Pralhad, after A4 - Mahadu came there,

A2 – Nagnath and A4 – Mahadu wanted to consume liquor and so all of them (including victim – Ashruba) sat in the truck and went near cement factory Dhaba, where they could not get liquor and so they came back to Rajmahal Dhaba. There, they sat under the tree and the evidence is that A2 – Nagnath, A4 – Mahadu and victim Ashruba drank two quarters liquor at that place. P.W.1 - Pralhad has deposed that at this Dhaba, A2 – Nagnath had scolded and abused Ashruba and had shown 'Chappal' to him and Ashruba was weeping. A2 – Nagnath asked Ashruba to pay bill but he said that he did not have the money and thus Nagnath gave Rs.389/- to P.W.1 – Pralhad, who paid the money.

The above is the incident stated to have taken place at Rajmahal Dhaba. Although it is stated that a quarrel had taken place there, no witness from the said Dhaba has been brought forth by the prosecution.

The Incident

8. As per the further evidence of P.W.1 – Pralhad (A3), from Rajmahal Dhaba after consuming the liquor, the victim Ashruba, A2 – Nagnath, A4 – Mahadu and this P.W.1 – Pralhad sat in the truck. A4 – Mahadu started the truck. They started

proceeding towards Dharmapuri. Before Dharmapuri there is a railway gate and brick kiln. When they were proceeding in the truck, there was great quarrel between victim Ashruba and A2 – Nagnath. According to this witness, in the running truck, A2 – Nagnath gave kicks to victim Ashruba on his face, chest and private part. A4 – Mahadu also gave 4 to 5 slaps to Ashruba and abused and said “Bhandane Karu Naka” (i.e. you people, do not quarrel). P.W.1 – Pralhad deposed that the truck was moving and the quarrel was going on and thus, he asked that the truck should be stopped. P.W.1 – Pralhad deposed that the truck was stopped after cement factory. At that time A2 – Nagnath gave 4-5 kicks to Ashruba on his face, chest and private part and A4 – Mahadu kicked Ashruba 2-3 times. According to P.W.1 – Pralhad, at that time, he was sitting at the cleaner side seat. He deposed that he moved back to avoid kick and at that time victim Ashruba sat in that seat. At that time, A2 – Nagnath gave two kicks to Ashruba, who fell down on the road. His evidence is that he and A4 – Mahadu got down from the truck and saw Ashruba. They saw that Ashruba was bleeding from nose and mouth. At that time A2 – Nagnath and A4 – Mahadu said that Ashruba had been dashed by auto-rikshaw. Then

P.W.1 – Pralhad, A2 – Nagnath and A4 – Mahadu sat in the truck. A4 - Mahadu started the truck and overtook one auto-rikshaw and stopped the same. A2 – Nagnath got down from the truck and he and the auto-rikshaw driver caught hold of the collars of each other. As per P.W.1 – Pralhad, he also came down from the truck and asked them not to quarrel. At that time, A4 – Mahadu took away the truck and told them not to quarrel. P.W.1 (A3) further deposed that apprehending that auto-rikshaw person will beat them he and A2 – Nagnath hid at the side of the road till auto-rikshaw went away. This witness has given details at which different places they went and how at village they met A1 – Jaganath, who asked as to why and how the incident happened.

9. Above is the evidence of P.W.1 – Pralhad (A-3), who has become approver to give evidence of the actual incident. Question is if the evidence, as stated by P.W.1 – Pralhad, inspires confidence. The first thing that becomes clear from the narration of the incident given by this P.W.1 – Pralhad and accused is that in the whole incident he does not give any evidence which is self implicating in any manner. The trial Court, of course, has observed that the act of A2 – Nagnath hiding himself indicated his implication

in the offence but we are not convinced. The said act of hiding related to the incident of allegedly beating to the auto-rickshaw driver by A2 – Nagnath.

Spot makes story of A3 doubtful

10. It would be material to keep in view the spot panchanama to appreciate the evidence of P.W.1 - Pralhad. To prove the spot panchanama, there is evidence of P.W.6 – Parasram, who turned hostile. There is evidence of P.W.8 – Pandharinath. He also turned hostile but in the cross-examination, he gave details of the spot, which evidence can be looked into. There is evidence regarding the spot also of P.W.10 – Satish Bansode, P.S.I. In the cross-examination of P.W.8 - Pandharinath by A.P.P., it has come on record that the spot of offence was Parli Dharmapuri road. The exact spot was the edge of the road. The road was about 20 ft. broad and 5 ft. "Katcha" portion on both sides. The dead body was lying on the western side of the road, which goes north-south. The evidence of P.W.6 – Parasram, P.W.8 – Pandharinath and P.W.10 – Satish read with spot panchanama makes it clear that this road proceeds from Parli towards Dharmapuri. Parli is to the north and Dharmapuri is to the south. On the western side, there is India

Cement Factory. On the eastern side of the spot, there is yard of India Cement Factory and trucks in waiting are parked there. The evidence shows that at a short distance of the spot where the dead body was found at the western edge of the road nearby there are gates of India Cement Factory, where all the time watchmen are there. The evidence of P.W.1 – Pralhad is that they were proceeding from Parli towards Dharmapuri. When the quarrel started in the truck, he asked the truck to be stopped. If the truck was going from Parli towards Dharmapuri i.e. from north towards south and was to be stopped, in ordinary course, it would stop to its left, which would have on the eastern side. It is not the evidence of P.W.1 – Pralhad that the truck was stopped on wrong side. If the truck was to stop on its left on road going north to south cleaner side of the truck would be towards the east. If the incident as stated by P.W.1 – Pralhad was to take place in such a situation and the victim was to be kicked and was to fall out of the truck from cleaner side, he should have fallen on the eastern side of the road. The sketch of spot panchanama and the evidence however is that the dead body was lying on the edge of the road between tar and “Katcha” portion on the western side. This itself makes the evidence of

P.W.1 – Pralhad doubtful as to how exactly the incident took place. The trial Court has not considered this aspect in its judgment although the accused pointed out this fact. In the cross-examination of P.W.8 – Pandharinath (in paragraph no.4), the question was put in this regard, but the trial Court did not allow the question and observed that the Court can itself read the document (Exh.93) and opinion of the pancha was not necessary. The trial Court, however, did not read the evidence of P.W.1 – Pralhad vis-a-vis the spot panchanama and the map, which exercise if would have been done itself would have revealed that the evidence of P.W.1 – Pralhad cannot be simply accepted if the same is read with the hard facts appearing from the spot panchanama. Thus, the story given by A3 – Pralhad is doubtful.

Story not matching with Medical Evidence also.

11. The evidence of P.W.1 – Pralhad will have to be discarded for yet another reason. The evidence is built on the premise that when the accused persons as well as P.W.3 – Govind had met liquor was offered to P.W.3 – Govind and victim Ashruba at Sapna Bar, they had declined saying that they had already consumed liquor. The evidence of P.W.3 - Govind is that Ashruba

had consumed liquor with him at Sapna Bar. There is further evidence of P.W.1 – Pralhad that after P.W.3 – Govind left, he along with victim, A2 – Nagnath and A4 – Mahadu had gone to Rajmahal Dhaba and they consumed liquor. The victim along with accused persons had left Rajmahal Dhaba and while proceeding towards Dharmapuri, there was a quarrel in which victim allegedly fell down from the truck and died. But then it is surprising that the evidence of P.W.7 – Dr. Anant, who carried out the post-mortem, shows that the deceased had not consumed alcohol. Even this evidence was not considered by the trial Court. The evidence of Doctor that the deceased had not taken alcohol puts a question mark to the evidence of P.W.1 – Pralhad that the victim along with the accused had consumed the alcohol at Rajmahal Dhaba and when they were proceeding towards the cement factory, the incident took place in which the victim died. The evidence regarding incident does not match with medical evidence.

Delayed F.I.R.

12. The evidence of complainant P.W.2 – Patloba Gutte discloses that in the evening of 19.10.2009 at about 7:00 p.m. one Mahadu Pandit Dhahiphale informed him that A1 – Jaganath had

informed that victim met to the accident near cement factory. Complainant has deposed that he along with others went to the spot and saw the dead body of his son lying on the road near cement factory. The complainant referred to the injuries of the victim. He says that he informed the police who took his thumb impression on blank paper to send the dead body for post-mortem. His evidence is that they went to the hospital and at that time cousin father-in-law of his son Ashruba, namely, P.W.3 – Govind met him. According to the complainant, at that time, Govind gave him the details as to how he had met the accused persons at Parli bus stand at Sapna Hotel. The cross-examination of the complainant is that he got knowledge of murder of his son first time when he went to the road near cement factory. According to the cross-examination, he was intimated by Mahadu about the incident on 19.10.2009 at about 7:30 p.m. If the evidence of P.W.9 – A.S.I. - Shivaji Rathod is perused, he has deposed that he was on duty at Parli Rural Police Station on 19.10.2009. He received information from Station Officer that there was murder of a person and dead body was lying at cement factory at Parli Vajinath. In fact, this P.W.9 – Shivaji went to the spot and did inquest panchanama (Exh.65). He stated that he

has mentioned the fact in the inquest panchanama that the death had occurred "due to accident". The same thing was mentioned in Exh.99. In the enquiry report submitted by the police the words "Apaghat Zalya Mule" (i.e. due to accident) are mentioned. Thus, in these documents the words earlier used were that the incident had occurred "due to accident". These words appear to have then been scored out. These words were in contradiction with the evidence of P.W.9 – Shivaji Rathod that on 19.10.2009 he was informed that murder had taken place.

13. The F.I.R. was lodged by P.W.2 – Patloba on 21.10.2009 at about 23:20 hours. Even if it was understandable from the manner in which the dead body was found to initially think that accident must have taken place still, if the P.W.2 – Patloba had been informed in the evening of 19.10.2009 itself by P.W.3 – Govind as to what happened at the Sapna Bar, P.W.2 – Patloba did not go forward to lodge F.I.R. immediately. The evidence shows that he had support of many other persons when he had gone to the spot. The delay is not explained. The trial Court did not consider the aspect of delay in lodging of F.I.R. and its effect also. The delay becomes material looking to the cross-examination

of P.W.2 - complainant Patloba, where although he went on denying that there was dispute of property with A1 - Jaganath he had to admit at one stage that after filing of a case A1 - Jaganath had sold his land to one Mudrikabai Kendre and that Mudrikabai had filed Regular Civil Suit No.64/2010 against complainant before the Civil Judge Senior Division. The case had been filed against the complainant, his brother, wife, son and sister-in-law and injunction had been passed against them. It is surprising that in the face of evidence of P.W.1 - Pralhad attributing no role to A1 - Jaganath, A1 - Jaganath was arrayed as an accused and till today P.W.2 - Patloba is pursuing the appeal against A1 - Jaganath, seeking his conviction.

Unfair Investigation/Torture of A3

14. In this matter, it is necessary to comment on the investigation done. The evidence of P.S.I. Satish Bansode (P.W. 10) shows that the spot of incident was near the gate of cement factory. The main door of cement factory was near the spot of offence as per the evidence of this witness. P.S.I. Satish admits that near the two gates which are 30 ft. apart there were security guards for 24 hours. Still this P.S.I. admits that he did not make any enquiry with these

security guards near the gate. He stated that he did not feel it necessary to make enquiry with the security guards. P.S.I. admits that on both sides of the road at cement factory vehicles are parked and there is traffic of vehicles. Still he admits that he did not make any enquiries with the drivers or cleaners at that place. He admits that his investigation showed that the accused had caught hold of auto-rikshaw driver and there was quarrel between the accused and auto-rikshaw driver. Still he does not appear to have traced out the said auto-rikshaw driver. He did not record statement of commission agent of Parli Vajjnath also where the deceased Ashruba, A2 – Nagnath and A3 – Pralhad are supposed to have met. P.S.I. does not appear to have made any effort to get any witness from Rajmahal Dhaba where initially it is stated that there was quarrel between A2 – Nagnath and the victim. There is evidence of P.W.1 – Pralhad (A3) admitting in cross-examination that after the accused persons were arrested, they had been beaten by the police. P.W.1 – Pralhad admitted that police had beaten them separately. He admitted in cross-examination that he was taken in the middle room and was beaten by police. He deposed that he was beaten by stick twice. He admitted that after second meeting when he was

taken to Parli Court, he agreed to the statement before the Magistrate and thereafter he was not beaten by police. Of course, P.W.1 – Pralhad did not admit that because of the beating and pressure of the police, he gave imaginary statement to the J.M.F.C. However, this cross-examination makes the evidence of P.W.1 – Pralhad doubtful and it shows that the police instead of making proper investigation resorted to such illegal methods to procure evidence of A3 - Pralhad by making him accomplice. The evidence of P.W.1 – Pralhad read as a whole does not show any self implication in the crime. There was no reason to array him as an accused when he could have been offered as a witness in case what he was telling was truth. Thus, we find that the investigation done in the present matter was not proper.

Injuries possible in Accident

15. Cross-examination of P.W.10 – P.S.I. Satish Bansode shows that on 21.10.2009 he had given letter to the Medical Officer to enquire whether injuries of the victim were possible by accident or what. There is report of Doctor at Exh.117 concluding that the injuries of the victim were possible in accident. There is evidence of P.W.7 – Dr. Anant who did the post-mortem of the victim. In the

examination-in-chief he deposed that injury nos.4, 10 and 13 mentioned by him in the post-mortem report were possible if person forcibly falls from truck on hard surface and that other injuries were possible by beating by fists and kicks with shoes. However, Doctor admitted in the cross-examination that the injuries mentioned by him are possible due to accident also. Thus, the medical opinion in the matter shows that the injuries of the victim were possible due to accident also.

Evidence of Accomplice – Needs to be discarded

16. The learned Counsel for the accused relied on the decision in the case of State of Maharashtra & ors...Versus...Yuvraj Kashinath Sable and anr., reported in 2015 (1) Bom.C.R. (Cri.) 371 to submit that the evidence of the accomplice is required to be corroborated by independent witness. Reliance was placed in this regard also on the decision in the case of Chandan...Versus...State of Rajasthan, reported in 1988 (1) SCC 696. The learned Counsel for the accused has further relied on the decision in the case of Adambhai Sulemanbhai Ajmeri & Ors....Versus...State of Gujarat, reported in 2014 ALL MR (Cri) 2627 (S.C.). The Hon'ble Supreme Court in paragraph No.93 of the

judgment observed as follows :

“93. Before examining the evidence of the accomplices on merit, we need to satisfy ourselves that the evidence of the accomplices is acceptable. The twin test on this point has been laid down by this Court in the three judge bench decision of this Court in Ravinder Singh v. State of Haryana (1975) 3 SCC 742 which was reiterated in the case of Mrinal Das & Ors. v. State of Tripura (2011) 9 SCC 479 : [2011 ALL MR (Cri) 3256 (S.C.)], wherein this Court in the Ravinder Singh case (supra) held as under:

“12. An approver is a most unworthy friend, if at all, and he, having bargained for his immunity, must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be a natural and probable catalogue of events that had taken place. The story if given, of minute details according with reality is likely to save it from being rejected brevi manu. Secondly, once that hurdle is crossed, the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt

beyond reasonable doubt. In a rare case taking into consideration all the factors, circumstances and situations governing a particular case, conviction based on the uncorroborated evidence of an approver confidently held to be true and reliable by the court may be permissible. Ordinarily, however, an approver's statement has to be corroborated in material particulars bridging closely the distance between the crime and the criminal. Certain clinching features of involvement disclosed by an approver appertaining directly to an accused, if reliable, by the touchstone of other independent credible evidence, would give the needed assurance for acceptance of his testimony on which a conviction may be based."

(emphasis laid by this Court)

A perusal of the evidence of all the three accomplices in the present case shows that all of them intended to absolve themselves of the liability for the conspiracy with respect to the attack on Akshardham, going as far to mention that they were not involved in the incident and only the accused persons knew about the intricate details of the chain of events that ultimately led to the execution

of their plan of 'carnage'. Even then, if, we were to presume that the accomplices have implicated themselves by mentioning that they were aware about some incident which was about to happen and thus, were part of the criminal conspiracy, the evidence of the accomplices fail the second test, in that it fails to prove the guilt of the accused persons beyond reasonable doubt. All the three accomplices mentioned about the plan of 'carnage' which the accused persons had planned together. However, no link can be established between the accused persons and the attack on Akshardham since the evidence of the accomplices is far too vague and they fail to provide any form of substantive evidence against the accused persons. ..."

17. If the above observations of the Hon'ble Supreme Court are kept in view, it can be seen that in the present matter also P.W.1 – Pralhad (A3) absolves himself of any liability in the incident. We have already discussed the evidence which shows that he was beaten by police before giving confessional statement before the J.M.F.C. and has subsequently stood by the same during the course of trial. Reading his evidence of story of the incident with spot panchanama, we find his story not probable. In view of the facts of

the present matter, we find that the witness is unreliable. Under Section 133 of the Evidence Act, 1872, even if P.W.1 - Pralhad (A3) may be a competent witness but he is unreliable. Under Section 114 (b) the Court can presume such accomplice to be unworthy of credit unless he is corroborated in material particulars. We have already discussed that corroboration offered to this witness by the prosecution from the evidence of P.W.3 - Govind is not material. Rather it creates doubt as to whether P.W.1 - Pralhad is speaking the truth or P.W.3 - Govind is speaking the truth regarding the presence or absence of A1 - Jaganath and A4 - Mahadu at the Sapna Bar. This is material as P.W.2 - Patloba and P.W.3 - Govind are implicating A1 - Jaganath and A4 - Mahadu on the basis of last seen together. In view of contradictions the evidence needs to be discarded.

Impugned Judgment not maintainable

18. On re-appreciation of the evidence, we are convinced that A1 - Jaganath was rightly acquitted by the trial Court and the conviction of A2 - Nagnath and A4 - Mahadu is not maintainable. In fact, the trial Court did not take note of material evidence relating to conflict of medical opinion; and the incident alleged. The

trial Court in paragraph no.68 of its judgment concluded that “the prosecution have proved their case from probability to possibility and possibility to more than 50% certainty in that circumstance A2 – Nagnath and A4 – Mahadu are not entitled for the benefit of doubt”. Looking to these observations, we are convinced that the trial Court itself did not come to the conclusion that the offence was proved beyond reasonable doubts. The trial Court was thus ignorant of this basic principle of Criminal law and the conviction is perverse based on improper reasonings ignoring material evidence and that the same is not maintainable.

In view of the above reasons, we pass the following order.

ORDER

(i) Criminal Appeal No.211/2014 is allowed. The conviction and sentence imposed by the trial Court on the appellant – original accused no.2 – Nagnath is quashed and set aside. Fine, if paid, be refunded to him. This accused be released forthwith, if not required in any other offence.

(ii) Criminal Appeal No.205/2014 is allowed. The conviction and sentence imposed on the accused no.4 – Mahadu by

the trial Court is quashed and set aside. Fine, if paid to ^{be refunded} refund to him.

His bail bonds stand cancelled.

(iii) Criminal Appeal No.228/2014 filed by the original complainant is dismissed.

(iv) Criminal Application Nos.2702/2014 and 2703/2014 filed by the original complainant stand disposed of.

No order as to costs.

(A.I.S, CHEEMA, J.)

(S.S. SHINDE, J.)

Wadkar