

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 586 OF 2012

1. Keshav s/o Babarao Bhure
Age 48 years, Occ. Agriculture
2. Yadav s/o Babarao Bhure
Age 45 years, Occ. Agriculture
3. Hemant s/o Vithal Bache
Age 19 years, Occ. Agriculture
4. Chaturabai w/o Vithal Bache
Age 40 years, Occ. Household,
5. Arun s/o Vithal Bache
Age 20 years, Occ. Agriculture
6. Nagorao s/o Ramrao Tudme
Age 35 years, Occ. Agriculture

All R/o. Kini Kaddu, Tq. Ahmedpur
District Latur

...Appellants

versus

The State of Maharashtra
(Copy to be served on Public
prosecutor, High Court of Judicature
at Bombay, Bench at Aurangabad)

...Respondent

.....
Shri. R.N. Dhorde, senior counsel i/b Mr. V.R. Dhorde, advocate for the
appellants
Mr. A.G. Magre, A.G.P. for respondent-State
.....

**CORAM : S. V. GANGAPURWALA AND
V. K. JADHAV, JJ.**

**Date of Reserving
the Judgment : 09.12.2015**

**Date of pronouncing
the Judgment : 23.12.2015**

JUDGMENT (PER V. K. JADHAV, J.) :-

1. In this appeal, challenge is to the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Ahmedpur, dated 07.09.2012 in Sessions case No. 5 of 2011 (new) : 40 of 2006 (old), thereby convicting the present appellants/accused, for the offence punishable under Section 147 of I.P.C. and sentencing them to suffer S.I. for one month and to pay fine of Rs.100/- each, i/d to suffer further S.I. for eight days, for the offence punishable under Section 148 of I.P.C. and sentencing to suffer further S.I. for one month and to pay fine of Rs.100 each, i/d to suffer S.I. for eight days and for the offence punishable under sections 302 r.w. 149 of I.P.C. and sentencing to suffer R.I. for life and to pay fine of Rs.1,000/- each, i/d to suffer R.I. for two months. The learned Additional Sessions Judge further directed that the substantive sentences shall run concurrently.

2. The prosecution version, as unfolded during trial, is as under:-

3. Deceased Sambhaji Bache is the husband of P.W.2 Mudrikabai. Deceased Sambhaji had three brothers. Out of them younger brother viz. Vithal Kondiba Bache died six years prior to the incident. Accused No.3 Hemant, accused No.5 Arun are the sons of

deceased Vithal. Sadashiv and Madhav are remaining two brothers of deceased Sambhaji. Partition of landed property took place among deceased Sambhaji and his brothers and there is no dispute between them on account of agriculture land. Deceased Sambhaji had two sons and one daughter from his second wife Sunanda, who died before three years. Accused No.4 Chaturabai is widow of deceased Vithal. After death of Vithal, his widow accused No.4 Chaturabai alleged to have developed intimacy with accused No.6 Nagorao. On account of that, relations between the families of informant P.W.2 Mudrikabai and deceased Vithal became strained. Accused Nos. 3 to 6 were also threatening the brother-in-law of informant P.W.2 Mudrikabai. In the summer season of last year of the incident, accused No.2 Yadav had assaulted informant's nephew. Even three years prior to the incident, accused No.1 Keshav, accused No.5 Arun and accused No.3 Hemant assaulted informant's brother-in-law Madhav. Three years prior to the incident the accused Nos. 2 and 3 assaulted informant's sister-in-law Bayanabai with stone which resulted into fracture of her leg. However, due to fear of the accused, no complaint was lodged in respect of said incident to the police.

4. The incident in question had taken place on 8.7.2006 at about 11.30 a.m. On that day, deceased Sambhaji was proceeding

towards village Warwanti to bring agricultural equipments. P.W.2 Mudrikabai also followed her deceased husband Sambhaji for giving tiffin to her son. On the way, near the field of one Nagnath Shembale, accused Nos. 1 to 6 chased deceased Sambhaji. They were holding stick, axe and Katti in their hands. Due to fear, deceased Sambhaji had taken shelter in the adjoining sugarcane crop, however, accused persons dragged Sambhaji out of sugarcane crop and brought him near Bandh and started beating him. At that time, son of P.W.2 Navnath, daughter Savita and sister-in-law Prayagbai were also present there. The accused persons assaulted and beat deceased Sambhaji. Deceased Sambhaji had sustained injuries on his head, knee, thigh and on other parts of the body. Accused persons had also chased informant's son Nagnath to kill him. However, due to beating extended to deceased Sambhaji, he died on the spot. It is alleged that deceased Sambhaji was opposing illicit relations of accused No.4 Chaturabai with accused No.6 and therefore, accused persons assaulted deceased Sambhaji and beat him with stick, katti and axe and committed his murder.

5. On the basis of complaint Exh.53, lodged by P.W.2 Mudrikabai, crime No. 99 of 2006 came to be registered for the offences punishable under Sections 302, 147, 148, 149 of I.P.C. at police station, Ahmedpur. P.W.9 - P.I. Sanjay Pujalwar took over the

investigation of the crime. He has carried out investigation by drawing inquest panchnama and spot panchnama and also recorded statements of witnesses. He has also effected arrest of accused persons and seized their clothes under panchnama. P.W.9 Pujalwar, pursuant to the statements made by accused No.5, recovered the axe at his instance. Similarly, weapon Katti came to be recovered at the instance of accused No.2 Yadav. On completion of investigation, since P.W.9 Pujalwar came to be transferred, P.I. Bhadre submitted charge sheet against accused persons in the court. Since offence under section 302 of I.P.C. is exclusively triable by the Sessions Court, the case was committed, in due course, for trial to the Sessions Court. Learned Additional Sessions Judge, Ahmedpur has framed charge against all accused persons. The prosecution has examined in-all nine witnesses to substantiate the charges levelled against accused. Defence of the accused is of total denial and according to them, they have been falsely implicated in the case. According to the defence of the accused, deceased Sambhaji was dealing with money lending business illegally at village Warwanti. Deceased Sambhaji used to give loan on compound interest and get executed the sale deeds of agricultural fields of the borrowers in the name of his wife, son etc. at low price. It is also a defence of the accused that deceased Sambhaji used to take certificate of cattle of the borrowers as a security for loan advanced and he used to

deceive the borrowers. Thus, there were so many enemies of deceased Sambhaji in that area. Therefore, nobody knows as to who has committed murder of deceased Sambhaji. According to the defence of accused, the informant intentionally involved accused in the crime. It is also stated that two brothers of accused No.6 Nagorao had executed a nominal sale deed in favour of deceased Sambhaji in the year 1979 and deceased Sambhaji got executed the said sale deed in the name of his wife Mudrikabai. So, accused No.6 is falsely involved in the case with an intention to grab the agricultural land owned by him and sons. It is also a defence of the accused that accused No.4 Chaturabai had taken certain amount as hand loan from accused No.6 and since she could not repay the loan amount, alongwith accused Nos. 1 and 2 sold the land to accused No.6. Deceased Sambhaji and P.W.2 Mudrikabai were intending to purchase the said land and opposed the said transaction. Accused Nos. 3 to 5 were not ready and willing to sell the said field to deceased Sambhaji. It is also a defence of the accused that the son of Sambhaji viz. Shivling has obtained employment by producing false caste certificate in the office of Panchayat Samiti, Vasmat. Accused No.2 Yadav and accused No.6 Nagorao made complaint before the Education Officer, Zilla Parishad, Hingoli. Consequently, enquiry was initiated and said Shivling was removed from service. It is therefore, contended that the informant and her sons, with

intention to take revenge, filed false case against the accused.

6. Learned Additional Sessions Judge, Ahmedpur, by impugned judgment and order dated 7.9.2012, passed in Sessions Case No. 5 of 2011, convicted and sentence all accused, as detailed above.

7. Mr. Dhorde, the learned senior counsel submits that so called eye witnesses are close relatives of deceased Sambhaji, most particularly, the family members of deceased Sambhaji and they are highly interested witnesses. Their evidence is not acceptable and credible. The evidence of so called eye witnesses is not consistent and clinching. Their evidence is not truthful and credible. There is no corroboration to their evidence from independent witnesses and therefore, the evidence of such close relatives and highly interested witnesses is required to be examined with great care and caution. The witnesses exaggerated the prosecution story and added the facts. P.W.2 Mudrikabai, P.W.4 Nagnath and P.W.7 Navnath cannot be said to be eye witnesses to the alleged incident. P.W.2 Mudrikabai has personal grudge against the accused persons. P.W.4 Nagnath is in inimical terms with aunt-accused No.4 Chaturabai, her two sons accused Nos. 3 and 5 and her brothers accused Nos. 1 and 2. P.W.7 was also having inimical terms with accused, like his mother P.W.2 Mudrikabai.

8. Learned senior counsel further submits that the alleged incident has occurred near Mogha road. Deceased Sambhaji was going to village Warwanti by the said road. The said Mogha road is on the western side of village Kini. There is another single road towards eastern side of village Kini. Sindagi road and Mogha road are the parallel roads passing by east and west sides of village Kini respectively. Distance between Mogha road and Sindagi road is about 300 ft. The field of deceased Sambhaji and P.W.4 Nagnath is situated towards east side of Sindagi road. Having regard to this location, it is impossible for P.W.2 Mudrikabai, who was proceeding towards her field to give tiffin to her son, and it was also impossible for P.W.4 Nagnath and P.W.7 Navnath, who were admittedly in their field which is situated towards eastern side of Sindagi road, to witness the incident which has taken place at a distance of 3000 ft. from their field, on the western side of Mogha road. While elaborating his arguments, learned senior counsel further submits that the field owned and possessed by deceased Sambhaji and the place of incident are in different directions from village site. The land of deceased Sambhaji is not situated towards the spot of incident. Having regard to the evidence of P.W.8 about location of the field, it is impossible that P.W.2, P.W.4 and P.W.7 have witnessed the incident.

9. Learned senior counsel further submits that the F.I.R. is concocted piece of evidence. As per the evidence of P.W.9 Investigating Officer, F.I.R. Is registered at 15.15 hours on the basis of written application in the police station, whereas P.W.2 Mudrikabai, who is informant, has deposed that she has lodged complaint orally with the police and it was reduced into writing. The information given on phone came to be suppressed and the fabricated piece of evidence in the form of F.I.R. is created deliberately. P.W.2 Mudrikabai has deposed that she contacted police on phone and her complaint was recorded by police in the village itself, however, other witnesses have deposed that P.W.2 Mudrikabai went to police station and lodged report in the police station. The original information, which is in the form that some unknown persons killed deceased Sambhaji, came to be suppressed and F.I.R. was concocted.

10. Learned senior counsel further submits that recovery of weapon Katti and axe is doubtful recovery. Weapons alleged to have been seized were not sealed. The C.A. report does not disclose that blood stains were found on the weapons. Even no blood stains were found on the clothes alleged to have been seized from the accused.

11. Learned senior counsel further submits that medical evidence

also does not support prosecution case. The cause of death is due to head injury and the said injury is caused by hard and blunt object and not by any sharp weapon. During post mortem examination, stomach of the deceased was found empty and according to doctor's opinion, the deceased died after 4/5 hours after taking last meal. Thus, there is no possibility of occurrence of alleged incident at the time as has been deposed by the witnesses. There are absolutely no allegations against accused No.4 Chaturabai and that she has been falsely implicated in the crime. Learned senior counsel thus submits that, in view of aforesaid facts, the accused are entitled for benefit of doubt. Learned senior counsel, in the alternative, submits that even if ocular evidence is believed, at the most, accused can be convicted for the offences punishable under sections 325 or 204, Part-II of I.P.C.

12. The learned Senior Counsel for the appellants, to substantiate his submissions, places reliance on the following judgments, on the point that only the interested witnesses (relatives) are examined by the prosecution.

- i. ***Deepak Kumar Vs. Ravi Virmani and another*** reported in ***(2002) 2 Supreme Court Cases 737.***
- ii. ***Jalpat Rao and others Vs. State of Haryana*** reported in ***(2011) 14 Supreme Court Cases 208.***

iii. ***Hem Raj and others Vs. State of Haryana*** reported in **AIR 2005 SUPREME COURT 2110.**

I) On the point of probable time of death, the learned Senior counsel places his reliance on the judgment in the case of ***Moti etc Vs State of U.P.*** reported in **AIR 2003 S.C. 1897.**

II) On the point of the conduct of the eye witness in not making any attempt to save the deceased, the learned senior counsel places reliance on the judgment in the case of ***State of Rajasthan Vs. Mani Ram*** reported in **2001 Cri. L.J.3283.**

III) On the point of non sealing of Muddemal property, learned counsel places reliance on the judgment in the following cases :-

i) ***Kailash Raghunath Ambekar and another Vs. State of Maharashtra*** reported in **2004 ALL M R (Cri) 3257.**

ii) ***Tulshiram Bhanudas Kambale and others Vs. State of Maharashtra*** reported in **2000 Cri. L.J. 1566.**

iii) ***State of Maharashtra Vs. Prabhu Barku Gade*** reported in **1995 Cri. L.J. 1432 (1).**

IV) On the point of inconsistency between the ocular and medical evidence, learned Senior Counsel places his reliance

on the judgment in the case of **Raj Pal and Another Vs. State of Haryana** reported in **2007 Cri. L.J. 2926**.

V) On the point of defective investigation, the learned Senior counsel places his reliance on the judgment in the case of **Sunil Kundu and another Vs. State of Jharkhand** reported in **(2013) 4 Supreme Court Cases 422**.

VI) On the point of false implication and benefit of doubt extended to the accused, the learned Senior Counsel has placed his reliance on the reported judgment in case of **Ramuthai Vs. State Rep. By Inspector of Police and anr.** reported in **2012 AIR SCW 3845**.

VII) On the point of common object wherein one of the accused causing injury by exceeding his individual act, learned senior counsel places reliance on the judgment in case of **Sarman and others Vs. State of M.P.** Reported in **1993 Supp (2) Supreme Court Cases 356**.

13. The learned APP submits that, the homicidal death of deceased Sambhaji is proved by the prosecution by tendering into evidence inquest panchnama Exh.152, postmortem report Exh.49

and also by examining P.W. 1 Dr. Vishnu Pandurang Padature Exh.48. P.W. 1 Dr. Vishnu Padature has conducted autopsy over the dead body of deceased Sambhaji on 8.7.2006 in between 07.30 p.m. to 08.40 p.m. and he noticed near about 14 injuries on the person of the deceased Sambhaji. The learned A.P.P. further submits that, out of said 14 injuries, seven (7) injuries are sharp injuries, (3) three are the contused lacerated wounds and remaining are the contusions on various parts of the body. All the injuries are ante-mortem in nature. On internal examination, P.W. 1 Dr. Vishnu Padature noticed blood clots on skull bone at vertex region and left temporal region. He has also noticed hemorrhage in cerebral area of brain and there was blood collection in base of skull about 20 ml. In his opinion, cause of death of deceased Sambhaji was due to intra cerebral hemorrhage with intra cranial of left temporal region. The learned A.P.P. further submits that, it was not even remotely suggested to P.W. 1 Dr. Vishnu Padature by the defence that deceased Sambhaji did not meet with homicidal death.

14. The learned A.P.P. further submits that there is a direct evidence of PW 2 Mudrikabai Sambhaji Bache, P.W. 4 Nagnath Sadashiv Bache and P.W. 7 Navnath Sambhaji Bache. Their evidence is trustworthy, reliable and consistent. The learned A.P.P. further submits that, there are corroborative circumstances of

discovery and recovery of muddemal i.e. Katti at the instance of accused No.2 Yadav Bhure and Muddemal i.e. axe at the instance of accused No.5 Arun Vitthal Bache in addition to that, the prosecution has seized blood stained clothes of the accused persons. The learned A.P.P. further submits that there is no proposition in law that relatives are to be treated as untruthfulness witnesses. There is no rule either of law or of prudence that family members of deceased in a murder case are incompetent witnesses. The learned A.P.P., thus, submits that the evidence of eye witnesses in this case found to be consistent, clinching and clearly implicating the accused persons and corroboration is not necessary for acceptance of such evidence. The learned A.P.P. further submits that, there is no conflict between ocular version and medical evidence. P.W. 2 Mudrikabai Bache, P.W. 4 Nagnath Bache and P.W. 7 Navnath Bache have consistently deposed that deceased Sambhaji was assaulted by the accused persons with the help of weapons like Axe, katti and sticks. Medical evidence fully corroborates the ocular evidence in this case. The learned A.P.P. further submits that the time taken normally for digesting the food would also depend upon quality and quantity of the food as well, besides others. The learned A.P.P. further submits that it has come in the evidence that, deceased left the house after taking the breakfast. Thus, only on the basis of postmortem notes wherein it is recorded that stomach and its contents found empty and

deceased died within 4 to 5 hours after meal, the direct testimony given by the eye witnesses cannot be discarded and it is not a safe modus adoptable in criminal cases. The learned A.P.P. further submits that even P.W. 1 Dr. Vishnu Padature is not confronted with said aspect and no any inference could be drawn in the absence of any expert evidence in this regard.

15. The learned A.P.P. further submits that, at the time of incident, deceased Sambhaji was proceeding towards village Warwati and the incident has taken place near the field of one Nagnath Shembale. P.W. 2 Mudrikabai was following the deceased as she was proceeding towards her field. There is no evidence that agricultural land owned by deceased Sambhaji is not situated towards the field of Nagnath Shembale. The learned A.P.P. has further pointed out that it is nowhere suggested to P.W. 2 Mudrikabai that in order to go to her field she need not be proceeded by Mogha Road following her deceased husband. The learned A.P.P. further submits that the limits of village Sindagi is towards north of village Kinhhi and therefore, it is for the villagers to choose their way in order to reach their respective fields. The learned A.P.P. further submits that only on the basis of location of the field, no inference could be drawn that it is impossible for the eye witnesses to witness the incident.

16. The learned A.P.P. further submits that within a short time, after the incident, complaint came to be lodged. On the basis of the complaint lodged by P.W. 2 Mudrikabai, crime bearing No.99/2006 came to be registered at 1515 hours on 8.7.2006 itself. On the same day, in between 1600 to 1645 hours inquest panchnama Exh.152 was drawn and the spot panchnama Exh.153 was drawn in between 1650 to 1730 hours. In both the panchnama, crime No.99/2006 is mentioned. It is, thus, clear that after registration of the Crime at 1515 hours, these two panchnamas came to be drawn by the police during the course of investigation. The learned A.P.P. submits that, furthermore, on the same day, copy of the F.I.R. was sent to the Judicial Magistrate, First Class, Ahmedpur through police constable and there is endorsement to that effect on the F.I.R.. Thus, copy of the F.I.R. must have been sent before 05.30 p.m i.e. between the working hours of the Court. The learned A.P.P. further submits that P.W. 2 Mudrikabai has orally narrated the incident to the police and it was reduced into writing as per her narration. Accordingly, in the F.I.R. the type of information is recorded as written. The learned A.P.P. further submits that in view of this, there is no possibility of preparing false and fabricated first information report.

17. The learned A.P.P. thus lastly submits that, the learned Additional Sessions Judge, Ahmedpur has rightly convicted all the

accused persons for the offences punishable under Sections 147, 148 and 302 read with 149 of the Indian Penal Code. There is no merit in the appeal and the appeal is liable to be dismissed.

18. So far as homicidal death is concerned, it is proved by the prosecution by tendering into evidence; inquest panchnama Exh.152, P.M. notes Exh. 49 and also by examining Dr. Vishnu Padature as P.W.1 at Exh.48. P.W.1 doctor Vishnu Padature, on external examination, noticed following injuries on the person of deceased Sambhaji:-

- i) CLW over vertex region of scalp, horizontal, 4x2x2 inch.
- ii) Sharp injury on right elbow, 2 in number, size 2x1x2 inch.
- iii) Sharp injury on left elbow joint, 2x1x2 inch.
- iv) Sharp injury at below left elbow size 2x1x2 inch.
- v) CLW on left knee joint, 3x2x1 inch.
- vi) CLW on right knee joint, 4x2x1 inch, with fracture patella.
- vii) Sharp injury to left leg frontal side, vertical, 3x2x1 inch.
- viii) Sharp injury to left leg frontal side, vertical, 2x2x1 inch, below above injury.
- ix) Sharp injury to right leg, vertical, 3x2x1 inch, frontal side.

- x) Sharp injury to right leg, vertical, 2x1x1 inch, above injury.
- xi) Contusion on left cheek, 2x2 inch.
- xii) Contusion on right shoulder, 1x1 inch.
- xiii) Contusion on left shoulder, 3 in no., 4x2 inch.
- xiv) Contusion on right infra scapular region, 3 in No., 4x2 inch.

In the opinion of P.W.1 doctor Vishnu Padature, all injuries are antemortem in nature. On internal examination, he noticed the blood clots on skull bone at vertex region and left temporal region. He also noticed hemorrhage in cerebral area of brain and there was blood collection in base of skull about 20 ML.. In his considered opinion, all the above injuries are possible by axe, katti and stick. According to him the cause of death of deceased Sambhaji was due to intra cerebral haemorrhage with intra cranial of left temporal region. It appears from the evidence that the defence has not disputed the homicidal death of deceased Sambhaji.

19. P.W.2 Mudrikabai, P.W.4 Nagnath and P.W.7 Navnath are the eye witnesses to the incident. According to P.W.2 Mudrikabai, at about 10.00 a.m. her husband took breakfast and left the house for going to village Warwanti for bringing agricultural implements. She had also followed him along with tiffin of lunch of her son. She has

further deposed that when deceased Sambhaji reached near the land of Nagnath Shembale, accused came there from sugarcane crop standing in the land of Nagnath Shembale. They were armed with sticks, axe and Kattis. She has further deposed that the accused assaulted deceased Sambhaji with the said weapons in consequence of which deceased Sambhaji fell on the ground. On hearing hue and cry raised by her, P.W.4 Nagnath and P.W.7 Navnath and her sister in law Prayagabai came there. Her husband was demanding water. She has further stated that the accused persons went on the persons of her son and nephew and due to fear they ran away from the spot. She gave some water to her husband, however, after some time deceased Sambhaji succumbed to the injuries. She has further deposed that her husband deceased Sambhaji sustained multiple injuries on both the hands, both legs, head. She has further made it clear that deceased Sambhaji was assaulted on his head with axe and Kattis. She has further deposed that the accused committed murder of her husband due to reason that accused No.4 and 6 were having illicit relations and deceased Sambhaji was opposing it.

20. P.W.4 Nagnath has also deposed on the same lines. According to him, he himself and P.W.7 Navnath had been to their field at about 9.00 a.m. At about 11.00 to 11.30 a.m. his cousin sister Savita came

to the field. He has further explained that deceased Sambhaji was following Savita and P.W.2 Mudrikabai was following her husband Sambhaji at that time. He has further deposed that near the sugarcane field of one Nagnath all accused persons armed with weapons like sticks, axe, Katti and assaulted deceased Sambhaji. Accordingly, he himself, P.W.7 Navnath, said Savita and Prayagabai reached towards them. According to him, deceased Sambhaji tried to take shelter in the sugarcane crop, however, the accused persons dragged Sambhaji outside the crop. He has further deposed about individual act of assault by the accused persons. He has further explained that the accused assaulted Sambhaji on his head, hands, elbow and on legs. Thus, deceased Sambhaji fell on the ground. He has further deposed that accused persons chased him and P.W.7 Navnath and therefore, they ran away from the spot. After some time when they returned to the spot, they found, deceased Sambhaji in dead condition in pool of blood.

21. P.W.7 Navnath also deposed in the similar lines. He has deposed about the incident in detail and assault and beating extended to deceased Sambhaji by the accused persons with the help of weapons axe, Katti and sticks. He has also deposed that because of beating extended to deceased Sambhaji he fell down on the ground. Thereafter, accused persons chased him and P.W.4

Nagnath. After some time, they returned to the spot of incident, deceased Sambhaji sustained bleeding injuries and found in dead condition. He has further explained that there were injuries on head, elbow, legs and knee of his father.

22. Learned senior counsel for the appellants has assailed the evidence of eye witnesses on the ground that P.W.2 Mudrikabai, P.W.4 Nagnath and P.W.7 Navnath are close relatives of deceased Sambhaji and they are highly interested witnesses. There is no proposition in law that relatives are to be treated as untruthful witnesses. It is true that if it is shown that there is enmity and witnesses are near relatives, the court has duty to scrutinize their evidence with great care, caution and circumspection and be very careful too in weighing such evidence. In such case, if the presence of these witnesses at the time of occurrence is proved or considered to be natural and the evidence tendered by such witnesses is found, in the light of surrounding circumstances and probabilities of the case, to be true, it can provide good and sound basis for conviction of the accused. We would say that the close relatives of the deceased are normally most reluctant to spare the real assailant and falsely implicate the other persons. If the plea of false implication is made, foundation has to be laid for the same and reason has to be shown that the witnesses had reason to shield actual culprit and

falsely implicate the accused persons. It is to be borne in mind that two eye witnesses cannot give identical evidence. The eye witnesses may perceive the incident in different manner, most particularly when assault is made by many persons. They may commit mistakes while describing individual acts. It is not expected from them to narrate the incident like parrot version. In the result, some inconsistencies and discrepancies are bound to come on record. The witnesses may tend to exaggerate the incident, however, exaggeration by itself is not sufficient to label them as untrustworthy and unreliable witnesses. However, care is required to be taken that such exaggeration does not affect the evidence with regard to the main incident.

23. The Supreme Court in the case of ***Sucha Singh and another vs. State of Punjab (2003) 7 SCC page 643*** while dealing with credibility of related witnesses, observed that the relationship is not a factor which would affect the credibility of the witnesses because it is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. All that the court had to do is to adopt a careful approach and analyze the evidence to find out whether it is cogent and credible. The Supreme Court, in the above case, has further observed as under:-

"It is the duty of the court to separate the grain from the

chaff. Where chaff can be separate dfrom grain, it would be open to the court to convict an acused notwtihstanding the factthat evidence has been found to be deficient to prove the guilt of other accused pesons. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an abolutely new case has to be reconstructed by divorcing the essential details presented by the prosecuiotn completely form the context and the background against which they are made, the only available course to eb made is to discard the evidence in toto."

24. In the light of above observations, evidence of P.W.2 Mudrikabai, P.W.4 Nagnath and P.W.7 Navnath is required to be considered. In our considered opinion, the inconsistencies do not affect the core of evidence of these witnesses. The evidence of aforesaid eye witnesses is fully corroborated by medical evidence. There are seven sharp injuries on various parts of body of deceased Sambhaji, as noted in the postmortem report Exh.49. Furthermore, there is one CLW over vertex region of scalp and two CLWs on the left knee joint and right knee joint, respectively. There are also four contusions on both the shoulders, scapular region and left cheek. Thus, the medical evidence corroborates ocular version that deceased Sambhaji was assaulted and beaten by the accused with

the help of weapons axe, Katti and sticks. The medical evidence also corroborates the evidence of eye witnesses that the accused persons with the help of said weapons assaulted and beaten deceased Sambhaji and inflicted the injuries on his both the hands, legs, head etc. The complaint Exh.53 also corroborates the evidence of P.W.2 Mudrikabai.

25. Learned senior counsel vehemently submitted that having regard to the location of the spot of incident, it was impossible for the so called eye witnesses to witness the incident. The learned senior counsel has relied upon certain admissions given by P.W. 8 Rajeshwar in his cross-examination. It appears from the evidence that the residential house of deceased Sambhaji is situated by the side of main road of the village towards its northern side. Village road is east-west in direction. The main part of the village Kini Kaddu is located towards north and the remaining part is towards south of the said main road of the village. Mogha road is situated towards western side of village Kini Kaddu and Mogha road is south-north in direction. In order to reach village Warwanti, one has to use the said Mogha road. Adjoining to Mogha road, towards its eastern side, the land of Nagnath Shembale is situated. The spot of incident is at a distance of 100 paces towards eastern side of the said Mogha road. There is Shindgi road towards the eastern side of the village Kini

Kaddu. Shindgi road is also south-north in direction. It is not disputed that the Shindgi road towards the eastern side of the village and Mogha road towards the western side of the village are two parallel roads passing in north direction. According to P.W.8 Rajeshwar, the east-west length of village Kini Kaddu is near about 2,500 feet. The agricultural field of one Raosaheb Tudme is towards the east of the said Shindgi road. Thereafter, the agricultural field of one Rajaram is situated towards the east side of the land of said Raosaheb Tudme. Thereafter, the field of one Madhav Bache is situated towards the eastern side and towards the eastern side of the land of Madhav Bache, the land of deceased Sambhaji is situated.

26. The learned senior counsel, on the basis of these admissions, has tried his best to convince us that if the land of deceased Sambhaji is situated towards the far eastern side of Shindgi Road and if P.W. 4 Nagnath and P.W.7 Navnath were in the said field at the time of alleged incident and P.W.2 Mudrikabai was carrying lunch tiffin for giving it to her son P.W.7 Navnath in the field, then it was impossible for the eye witnesses to witness the actual incident which allegedly took place near the field of Nagnath Shembale which is situated towards eastern side of the said Mogha road.

27. We have considered the submissions of the learned senior

counsel and have carefully examined the evidence of eye witnesses P.W.2, P.W.4 and P.W.7 respectively and also P.W.8 Rajeshwar. Even though the above stated witnesses are subjected to cross-examination at length on this point, it is nowhere suggested to any of them that the land of deceased Sambhaji is not situated near the field of Nagnath Shembale, nor it is suggested to P.W.2 Mudrikabai that in order to reach their agricultural land, she need not proceed by Mogha road. It appears that by avoiding direct questions to the witnesses on this point, only location of the said two parallel roads i.e. Mogha road and Shindgi road is brought on record. In the light of evidence of P.Ws. 2, 4, 7 and 8, it appears that village Kini Kaddu is divided by main village road and almost entire village is situated towards north side. It thus appears that towards northern side the village Kini Kaddu is spread and developed. So far as the western side of village Kini Kaddu is concerned, there is Mogha medium project adjacent to Mogha road. Thus, therefore, beyond Mogha road there could not be any development of village Kini Kaddu. Similarly, Sindgi road which is parallel to Mogha road is towards eastern side of the village and further development of village Kini Kaddu beyond Pandan which is towards extreme east side of village Kinni Kaddu could not take place. It has also come in the evidence that land of said Nagnath Shembale is divided into three parts and the incident took place in the middle piece of said three pieces of lands. The said land of

Nagnath Shembale is towards eastern side of Mogha road and lands of other villagers including land of deceased Sambhaji is also situated towards eastern side. The distance between said piece of land belonging to Nagnath Shembale and the land of deceased Sambhaji has not come on record. Merely on the basis that the length of village is 2500 ft. east-west direction, no inference could be drawn that the land of Nagnath Shembale, where the incident has taken place is situated far away from the land of deceased Sambhaji. P.W.2 Mudrikabai has categorically deposed that she was following her husband by Mogha road and her husband deceased Sambhaji was proceeding towards village Warwanti by using the said Mogha road. It also appears from the evidence that the land of Nagnath Shembale is situated towards northern side of the village, as well, the land of deceased Sambhaji is also situated towards the north side of the village.

28. On careful perusal of the contents of spot panchnama (Exh.153), it appears that the spot is situated in the field of said Nagnath Shembale and at the time of drawing of spot panchnama, there were standing crop of sugarcane. It is specifically noted in the spot panchnama that the place measuring 10 feet south-north and 15 feet east-west of the said field is found in trampled condition. It is also specifically noted in the spot panchnama that, blood stains are

found on the said spot and also on the sugarcane plants. The pair of shoes belonging to deceased Sambhaji, having blood stains over it, is also found there. Furthermore, one stick having blood stains over it, is also found there. In addition to this, some other articles are also found lying there. The samples of plain earth and the blood mixed earth are also seized from the spot of incident. As per the C.A. report (Exh.166), human blood was detected in the sample of blood mixed earth. So far as the stick seized from the spot of incident is concerned, the blood detected on it is of blood group "O". Blood group of deceased Sambhaji is "O" as per the C. A. report (Exh.175). P.W.2 Mudrikabai has deposed that she ran towards her husband and offered him water on his demand and thereafter, he passed urine and succumbed to the injuries on the spot itself. We are not inclined to discard the ocular evidence merely on the basis of location of the spot and that of the location of the land of deceased Sambhaji.

29. On the basis of complaint lodged by P.W.2 Mudrikabai, crime No. 99/2006 came to be registered on 1515 hours on 08.07.2006 itself i.e. on the day of incident. According to P.W. 2 Mudrikabai, she has orally narrated the incident to police and it was reduced into writing by the police. The complaint is marked as Exh. 53. At one place, she has deposed that she herself with her son Navnath went to police station, Ahmedpur and she lodged complaint with the police

and it was reduced into writing as per her narration. However, she has also deposed that the police came to village Kini Kaddu and recorded her complaint there only. She has also stated that from village Kini Kaddu itself, she contacted police on phone. In the F.I.R., in the format in column of 'type of information', it is mentioned as "complaint in writing". On the basis to these admissions, the learned senior counsel has submitted that the F.I.R. was not lodged at 3.30 p.m. and the information given on phone was suppressed and a fabricated piece of evidence is created. The learned senior counsel thus, submits that the said F.I.R. is a concocted piece of evidence. The learned senior counsel has tried to canvass that in fact, the original information, as received by the police, was to the effect that some unknown persons killed deceased Sambhaji. P.W.2 Mudrikabai is the wife of deceased Sambhaji. She is bound to suffer an emotional trauma on account of such tragic death of her husband. However, we cannot ignore that on the same day, in between 1600 to 1645 hours, inquest panchnama (Exh. 152) was drawn and the spot panchnama (Exh.153) was drawn in between 1650 to 1730 hours. In both the panchnamas, crime No. 99/2006 is mentioned. It is, thus, clear that after registration of crime at 1515 hours, these two panchnamas came to be drawn by police during the course of investigation. On the same day, the copy of F.I.R. was sent to Judicial Magistrate First Class, Ahmedpur through police constable

and there is an endorsement to that effect on the F.I.R. Thus, the copy of F.I.R. must have been sent before 5.30 p.m. to the court i.e. between working hours of the court. It appears from the prosecution evidence that the incident was reported to police within 2½ to 3 hours of the happening of incident and thereafter, the police machinery was set in motion and accordingly, within 40 to 45 minutes, the inquest panchnama was drawn mentioning therein the crime number registered on the basis of the complaint lodged by P.W.2 Mudrikabai. We do not think that there is a possibility of preparing a false and fabricated First Information Report in this case. P.W.2 Mudrikabai has orally narrated the incident to the police and it was reduced into writing as per her narration. Accordingly, in the printed form of F.I.R., the 'type of information' is recorded as "written". Merely on this basis, it cannot be inferred that P.W.2 has lodged written complaint in police station and that came to be suppressed and a concocted F.I.R. was prepared subsequently. We find no substance in the submission that F.I.R. in this case is concocted piece of evidence.

30. Learned senior counsel has further assailed the prosecution evidence with regard to the time of death. He submits that the medical evidence most particularly, p.m. report at Exh. 49 shows that the stomach was empty and deceased died after 4/5 hours after the

last meals. He further submits that as per evidence of P.W.2 Mudrikabai the deceased Sambhaji had taken breakfast at around 10.00 a.m. and alleged incident had taken place around 11.30 a.m.. Learned senior counsel further submitted that death of Sambhaji occurred because of head injuries. There was no fracture of skull bone. Considering the nature of injuries to brain, time of one and half hour is required for collection of blood at the place of skull. In this backdrop the learned senior counsel submitted that P.W.2 Mudrikabai is not eye witness to the incident and it also falsify the story put forth by P.W.2 Mudrikabai in her evidence that she gave water to her husband and after some time he succumbed to injuries.

31. Medical science is not yet so perfect as to determine the exact time of death nor can the same is determined in mathematical fashion. Furthermore, the time required for digestion may depend upon the nature of food and time varies according to digestion capacity. The process of digestion is not uniform. It varies from individual to individual. In the case in hand, the deceased Sambhaji had not taken full meals and he had only taken breakfast. There is no cross examination as to what deceased Sambhaji ate at the time of breakfast. It has also come in the evidence that previous day of the incident was of *Ashadi Ekdashi*, the festival which the people in rural area usually observe as fasting day. P.W.1 Dr. Vishnu Padature is

also not subjected to any cross examination on this point. There is no substance in the submissions that death of deceased Sambhaji might have taken place in between 8.00 to 8.30 a.m. and therefore, the stomach was found empty at the time of postmortem examination. Further, there is also no substance in the submission that in this backdrop it falsifies the evidence of P.W.2 Mudrikabai, who has deposed that she followed her husband at 11.00 to 11.30 a.m. and actually witnessed the incident. In the case of ***Moti etc. vs. State of U.P. (supra)*** relied upon by the learned senior counsel, the deceased had taken his dinner alongwith his father-in-law and while sitting on cot outside the house after finishing the dinner, assault had taken place. In this backdrop the Apex Court given due weightage to the findings recorded in the postmortem report about empty stomach of deceased and in light of the facts of the said case, held that the prosecution case appears to be doubtful. In the case in hand, the facts are altogether different and the above cited case cannot be applied to the facts and circumstances of the present case.

32. So far as the hemorrhage occurring in brain in the present case is concerned, even small quantity of hemorrhage in the brain may prove rapidly fatal by disturbing functioning of brain or heart from mechanical pressure on them. Nothing can be inferred only on the basis that one and half hours is required for collection of blood at

the place of skull.

33. As far as the recovery of weapons at the instance of some of the accused persons is concerned, the accused came to be arrested in between 9.7.2006 to 15.7.2006 as per the arrest panchnama Exh. 155 to 160. On the date of incident, none of the accused came to be arrested by the police. Furthermore, weapon axe came to be recovered at the instance of accused No.5 on 16.7.2006, weapon Katti was recovered at the instance of accused No.2 on 11.7.2006 and on 16.7.2006 accused Nos. 1 and 6 had produced two sticks. On 9.7.2006 clothes of accused Yadav, Chaturabai and Hemant came to be seized under panchnama whereas clothes of accused Keshav came to be seized on 14.7.2006 and clothes of accused No.5 Arun and accused No.6 Nagorao came to be seized on 16.7.2006. P.W.9 Investigating Officer, Sanjay Pujalwar has not deposed that he has seized the said weapons and clothes under respective panchanamas. There are also certain discrepancies in the memorandum as well as the recovery panchanama. Apart from this, we do not think that by such belated recovery of weapons and clothes of the accused, certain purpose would be served. No blood stains were found on the clothes seized from the accused as well as on the weapons, however, it is to be borne in mind that it is very unlikely that in belated recovery, blood stains would appear on the

clothes and weapons. We do not find any substance in the submission that since there was no sealing of the said articles, the recovery loses its significance. We must observe here that, had there been any tampering, even in such belated recovery, blood stains would have been appeared on the weapons and clothes.

34. So far as the motive in this case is concerned, since the prosecution case entirely rests upon direct evidence, motive plays a very limited role. There are three eye witnesses to the incident and as we have observed that their evidence is trustworthy, reliable and consistent, there is no reason to discard their evidence only for the reason that they are highly interested witnesses. On the contrary, in such case, if the eye witnesses are close relatives, it is unlikely on their part to set free the real culprit and falsely implicate the other person out of enmity. For false implication, necessary foundation is required to be laid by the defence. Here in this case, no such foundation shown to have been existed so as to draw inference that the accused have been falsely implicated in this case and real culprits are set free. In the case in hand, deceased Sambhaji was not happy with the illicit sexual relations between accused No.4 and accused No.6. As it appears from the prosecution evidence, the accused have taken it otherwise. It is to be mentioned herein that the accused Chaturabai was widow of real brother of deceased

Sambhaji. In that way, the accused persons got annoyed on the count that accused Chaturabai came to be defamed in the village. In our considered opinion, the motive is well established in this case.

35. So far as accused No.4 Chaturabai is concerned, there is absolutely no evidence against her. She was not carrying any weapon nor any overt act is attributed to her. It is also doubtful that she was the member of an unlawful assembly. Therefore, in our considered opinion, accused No.4 Chaturabai is entitled for benefit of doubt.

36. It appears from evidence P.W.2 Mudrikabai, P.W.4 Nagnath and P.W.7 Navnath that all accused persons have formed an unlawful assembly and they had common object to kill deceased Sambhaji. There is no sudden action of one of the member of unlawful assembly to constitute act of murder. It appears that accused persons were determined to kill deceased Sambhaji and in order to achieve the common object of their unlawful assembly, took a calculated move. Deceased Sambhaji died due to head injuries. It is true that there is no injury over head of deceased Sambhaji by sharp weapon. In this background the alternate submission of learned senior counsel that conviction under Section 302 of I.P.C. cannot be sustained and at the most conviction under Section 326 or

Section 304 (Part II) of I.P.C. can be recorded. In our considered opinion, formation of unlawful assembly by the accused persons is established by the prosecution in this case. Once membership of unlawful assembly is established, it is not incumbent upon the prosecution to establish whether any specific overt act has been assigned to the accused. The manner in which deceased Sambhaji was assaulted and beaten with the help of sharp weapons and sticks, as deposed by the eye witnesses, we do not think that common unlawful assembly formed by the accused was either to cause grievous hurt to deceased Sambhaji or culpable homicide not amounting to murder.

37. In the result, we partly allow the appeal by setting aside the judgment and order of conviction dated 7.9.2012, passed by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No. 5 of 2011 in respect of accused No.4 Chaturabai Vithal Bache. However, we confirm the said judgment and order of conviction and sentence in respect of remaining accused persons i.e. accused No. 1 to 3, 5 and 6. Hence, we pass the following order:-

O R D E R

- I. Criminal Appeal is partly allowed.

- II. The judgment and order of conviction dated 7.9.2012 passed by the Additional Sessions Judge, Ahmedpur in Sessions Case No.5 of 2011, thereby convicting accused No.4 Chaturabai Vithal Bache for the offence punishable under Section 147 of I.P.C. and sentencing her to suffer S.I. for one month and to pay fine of Rs.100/- i/d to suffer further S.I. for eight days, for the offence punishable under Section 148 of I.P.C. and sentencing to suffer further S.I. for one month and to pay fine of Rs.100, i/d to suffer S.I. for eight days and for the offence punishable under sections 302 r.w. 149 of I.P.C. and sentencing to suffer R.I. for life and to pay fine of Rs.1,000/-, i/d to suffer R.I. for two months, is quashed and set aside.

Accused No.4 (appellant No.4) Chaturabai Vithal Bache is hereby acquitted of the offences punishable under Sections 147, 148, 302 r.w. 149 of I.P.C. Accused No.4 Chaturabai Vithal Bache be set at liberty forthwith, if not required in any other offence. The fine amount, if paid, by accused No.4 Chaturabai Vithal Bache, be refunded to her.

- III. The judgment and order of conviction dated 7.9.2012 passed by the Additional Sessions Judge, Ahmedpur in Sessions Case No.5 of 2011, thereby convicting the original accused Nos. 1 to 3, 5 and 6 i.e. Keshav s/o Babarao Bhure, Yadav s/o Babarao Bhure, Hemant s/o Vithal Bache, Arun s/o Vithal Bache and Nagorao s/o Ramrao Tudme, respectively, who are appellant Nos. 1 to 3, 5 and 6 herein, for the offence punishable under Section 147 of I.P.C. and sentencing them to suffer S.I. for one month and to pay fine of Rs.100/- each, i/d to suffer further

S.I. for eight days, for the offence punishable under Section 148 of I.P.C. and sentencing to suffer further S.I. for one month and to pay fine of Rs.100 each, i/d to suffer S.I. for eight days and for the offence punishable under sections 302 r.w. 149 of I.P.C. and sentencing to suffer R.I. for life and to pay fine of Rs.1,000/- each, i/d to suffer R.I. for two months, is confirmed.

IV. Criminal appeal is disposed of in the above terms.

(V. K. JADHAV, J.)

(S. V. GANGAPURWALA, J.)

rlj/