

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NOS. 630, 651, 678 & 692 OF 1993.

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CRIMINAL APPEAL No. 630/1993.

1. Mohamed Ali Taj Mohommad Shaikh.

2. Mohsinali Taj Mohommad Shaikh (Bablu)

Both residing at Plot no. 366, Jawahar
Nagar, Goregaon (W), Bombay 400 062.
(At present lodged at Nasik Central
Prison).

....**APPELLANTS.**

VERSUS

The State of Maharashtra,
(at the instance of Goregaon
Police Station.

....**RESPONDENT.**

Mr. H.E. Mooman with Mr. M.S. Mohite, Advocates for the Appellants.
Mr. H.J. Dedhia, A.P.P. for Respondent – State.

WITH

CRIMINAL APPEAL No. 651/1993.

Raju alias Rajumama Krishna Nadkar

residing at Jawahar Nagar, Goregaon
Bombay 400 051.

....APPELLANT.
(Ori. Accused No.4.)

VERSUS

The State of Maharashtra

....RESPONDENT.

WITH

CRIMINAL APPEAL No. 678/1993.

Shri Bala alias Narayan Arjun Gaonkar
aged about 30 years,
residing at Jawahar Nagar, Plot
No. 366, Road No.20. Goregaon
Bombay 400 051.
(At present lodged in Nashik Road
Central Jail)

....APPELLANT.
(Ori. Accused No.3.)

VERSUS

The State of Maharashtra
(at the instance of Goregaon
Police Station in CR No.362/88
and Sessions Case No.956/88).

....RESPONDENT.

WITH

CRIMINAL APPEAL No. 692/1993.

Chandu alias Chandrakant Govind Vaiti
(Now in Jail) .

....APPELLANT.
(Ori. Accused No.5.)

VERSUS

The State of Maharashtra
Goregaon P. Station.

...RESPONDENT.

Mr. Malhari J. Bandgar, Advocate for the Appellants in
Criminal Appeal Nos. 651, 678 and 692 of 1993.
Mr. H.J. Dedhia, A.P.P. for Respondent – State.

CORAM : **B. P. DHARMADHIKARI**
AND A. S. GADKARI, JJ.

Date of Reserving the Judgment : 13.08.2015.

Date of Pronouncement : 07.12.2015

JUDGMENT. (Per B.P. Dharmadhikari, J)

All five accused in Sessions Case no. 956 of 1988 convicted under S. 302 r/w S. 34 IPC and sentenced to suffer life imprisonment are before this Court in these Appeals under S. 374 Criminal Procedure Code. They have been acquitted of offences under S. 143 & 144 IPC, S.147 & 148 IPC & under S. 27 of the Indian Arms Act. Original accused No. 1 Mohamed Ali Taj Mohamed Shaikh and accused No. 2 Bablu @ Mousing Ali Taj Mohamed Shaikh are appellants in Cr. Appeal 630 of 1993 and they are on bail. Original accused No. 3 Bala @ Narayan Gaonkar, the appellant in Cr. Appeal 678 of 1993 is also on bail.

Original accused No. 4 Raju @ Rajumama Nader is appellant in Cr. Appeal 631 of 1993 while original accused No. 5 Chandu @ Chandrakant is appellant in Cr. Appeal 692 of 1993. Both of them are also on bail.

2. We have heard Shri H.E. Mooman, Shri M.S. Mohite, learned Counsel for the respective appellants/ accused in Criminal Appeal No. 630/1993 and Shri M.J. Bandgar, learned Counsel for the appellants/ original accused nos. 3, 4 and 5, who are appellants in other three Criminal Appeals. Shri H.J. Dedhia, learned A.P.P. has opposed the appeals on behalf of the State.

3. On 23.05.1988, Smt. Kamala Ramulingam (P.W.2) filed a complaint with police stating that when she was returning after answering nature's call in the morning at about 9.30 a.m., she saw accused persons namely Mohommad, his brother Bablu, Rajumama, Chandu s/o Machhiwali and one Balu sitting drinking tea, near dispensary of Dr. Banerjee. They were sitting there only when she went to public latrine and also when she returned. After her return, when she was cleaning utensils in front of her room, she heard shouts "*bachao bachao*", hence, through a lane she came to road and saw Mohommad

with sword, Bablu with knife like gupti, Rajumama with chopper and Balu with sword and they were assaulting and stabbing one Kisan Bait, who resided in the same hutment. Chandu s/o Machhiwali was standing there. Mohommad is accused no.1, Bablu is accused no.2, Bala @ Narayan is accused no.3, Raju @ Rajumama is accused no.4, while Chandu @ Chandrakant is accused no.5. Seeing the attack, she raised voice & shouted that somebody should save the victim (*"are koi usko chudavo"*). Kisan Bait fell down on road. Thereafter also Mohommad assaulted him on head, Bablu was assaulting in armpits, Rajumama and Balu were assaulting and stabbing Kisan on his person with weapons in their hands. After stabbing, these 5 persons ran towards the railway track from eastern side of the hutment from road no.20 with the weapons, which were blood stained.

4. Smt. Kamala, immediately came to police station to lodge report. While Kisan was being assaulted, persons residing in the vicinity had gathered there. There used to be quarrel between Kisan Bait and these 5 accused and there was enmity between them. Because of this, there was assault on Kisan Bait, with an intention to kill him. After registering the offence on the basis of that complaint, police had arrested accused nos. 1 to 5, and they came to be charge sheeted under

Sections 142, 144, 147, 148, 302 read with Section 149 of the Indian Penal Code and Section 27 of the Indian Arms Act.

5. Prosecution has examined total 16 witnesses. Site plan was drawn by P.W.1- Narendra Gurudas Dhembre. P.W.2- Smt. Kamala Lingam is complainant and an eye witness. P.W.3 – Smt. Gulabi Chaman Mahavir and P.W.4- Alexander Francis are the eye witnesses. P.W.5 – Lawrence D'souza was also examined as an eye witness. He has turned hostile. Other witnesses are panch on spot or then panch on recovery under Section 27 of the Evidence Act. P.W.11- Dr. Bhagwan Janraj, P.W.12 – Dr. Ramesh Narayan Dyawarkonde, P.W. 13 – Dr. Rajaram Narayan Marathe are the Doctors who had attended the deceased and performed post mortem. P.W.14 – Joseph Swamy Chhitiyar, P.W. 15- Sadanand Narayan Shette, P.W.16 – Bhimrao Krishnaji Sonawane are the officers who either have registered the FIR or had carried out the investigation. FIR is placed on record as Exh.15. Plan of scene of offence is at Exh.13, while spot panchnama is Exh.28. Post mortem report is at Exh.45. Panchnama dated 26.05.1988 about taking charge of clothes of accused is at Exh.50 and Chemical Analyzer report dated 16.09.1988, on articles sent to him is at Exh.61. Report of Chemical Analyzer dated 16.09.1988 regarding hair of accused nos. 1 to

5 are at Exh.65, collectively. Other Articles are sword-big in size bent at front at Article-1; Gupti with bent blade is Article-2. Small size sword is Article-3, Chopper is Article - 4 and knife with yellow tag is Article-6.

6. It is not in dispute that all 5 accused persons were arrested by the police on 26.05.1988.

7. Shri Mooman, learned Counsel submitted that conduct of P.W.1- Kamala is not natural. She had no occasion to see the accused persons and her visit at about 9.30 in the morning to public latrine has not been established by the prosecution. In any case, she did not see the accused with any weapon. He points out that her cross-examination reveals her inability to distinguish between various types of weapons like, sword, knife, chopper and gupti. Therefore, mention of weapon by her in the complaint to the police or putting a particular weapon in the hands of a named accused by her, cannot be accepted. He points out that her additional statement has been recorded after three days, when she was shown accused persons and weapons in the police station. She could not identify the weapons shown to her in the police station, as the one which were with the respective accused on 23.05.1988.

8. He submits that her cross-examination shows that there was enmity between the deceased on one hand and accused nos. 1 and 2 on the other. Another influential person residing in the area namely one Mahendra @ Bablu, had incurred expenditure of marriage of daughter of Smt. Kamala, and therefore, at his instance, she has given a wrong report. Shri Mooman, learned counsel also submits that these days when people are reluctant to go to police station, even if they are victim, conduct of Smt. Kamala of reporting police immediately [as alleged], shows that she is induced by some body. She had not seen Mahendra @ Bablu or another person by name Mohommad Machhiwala in the locality after 23.05.1988, as these persons who were real culprits, absconded. According to the learned counsel, names of accused given by Smt. Kamala are pet names and there are several persons in the locality with those pet names. Mahendra @ Bablu and Mohommad Machhiwale are instances of such person, prosecution, therefore, ought to have held identification parade as per law, to bring on record presence of accused persons at the spot. He contends that had such identification parade been conducted, Smt. Kamala would have failed to recognize these accused persons.

9. He invites attention to records, to show that place of attack,

as alleged to be road no.19, is perpendicular to road no.20. Smt. Kamala has claimed that she resided on road no.19, but, at other place, she has shown that she had resided at road no.18. Attention is invited to evidence of PW.15, to urge that he brings on record other address of Smt. Kamala. Site plan drawn by PW.1 is pressed into service to show that it does not mention either the spot from which Smt. Kamala watched the attack or that it does not show her residence. No address like Jagruk Mahavir Chawl, is shown any where in the map, and hence, no such chawl in which Smt. Kamala claimed to occupy a room exists on road no.19 or road no.20. Site plan also does not show any lane through which she could have emerged and watched the alleged incidence. It is his contention that PW.2- Kamala has been put forth as an eye witness by rivals of accused nos. 1 and 2.

10. Evidence of other eye witness PW.3- Gulabi, is also challenged by pointing out that she was staying on road no.20 and from there the place of assault was not visible. It is also stated that, though she speaks of PW.2 – Kamala, as a person present on the spot, surprisingly she is not in a position to give names of others who are residing in the locality and had gathered on the spot. Accused persons were shown to her on 26.05.1988, and though her further statement

was not recorded, it is claimed that she identified the weapons used in the assault.

11. Again without holding test identification parade, P.W.3 could not have been permitted to observe accused persons. As Gulabi was sitting on the lane, she has not witnessed the incident at all. She resided by the side of Church, shown in the site plan and there is a lane near that Church and thereafter road no.18. She submits that she has wrongly mentioned as road no.19, and has admitted that error. She also accepted that she (Gulabi) and P.W.2 Kamala, were residing in the same place since 1988. Inviting attention to the site plan, Shri Mooman, learned Counsel submits that a person sitting on road no.19 in front of her room, could not have seen the dispensary of Dr. Banerjee.

12. The said witness Gulabi, has deposed as tutored by police, and therefore, there is omission to mention that she came out of the house and watched the incidence. As other independent witness who had not named the accused persons were available, police ought to have examined them. The attack on rear side of the head of Kisan by accused no.1 Mohommad, is an omission in the police statement. She did not see Smt. Kamala coming out of the lane. According to Shri

Mooman, learned counsel, presence of this witness on the spot is also not established.

13. P.W.4 – Alexander claims that he has cycle repairing shop and about 10 cycles, which he gave on rent. This shop is claimed to be on road no.19. However, P.W.1 has not shown any such shop in the map. This witness knew all the accused persons, but, he could not see Kisan coming from Bangdiwala Chawl to road no.19. Though this witness has put certain weapons in the hands of the accused, he has not put any weapon in the hand of accused no.5 Chandu. In cross, this witness has stated that his cycle shop was near Sunder Niwas, but, no such building is shown in the site plan. He had never seen gupti earlier and has accepted that there were several persons with names Mohommad, Bablu, Balu or Chandu in the area. Shri Mooman, learned counsel submits that this witness was accused in a case under Section 376 of Indian Penal Code. His conduct of closing shop after attack and going to his residence is objected by stating that he could have opened his cycle shop after some time or in the evening, but, he did not do so. Site plan is also shown to point out that on either side of the road no.19, there is a open gutter and hence, bicycle shop is not feasible. Accused persons were shown to this witness on 23.05.1988 itself.

14. Evidence of P.W.5 – Lawrence is on recovery of clothes of the deceased and on inquest panchnama. Shri Mooman, learned counsel states that in inquest panchnama at Exh.22, total 38 injuries are noticed on the deceased Kisan, while P.W.12 – Dr. Ramesh who first examined the deceased, found only 21 injuries. P.W.13 - Dr. Rajaram Marathe, who had carried out the post mortem, found total 33 injuries in the post mortem report at Exh.45. These injuries are found to be the cause of death. Shri Mooman, learned counsel contends that thus, the prosecution has not come with any definite number of injuries on deceased, and if Dr. Ramesh could find only 21 injuries, accused persons cannot be held responsible for 14 or 17 other injuries found by other Doctors. In this situation, according to him, accused persons are entitled to be acquitted.

15. Evidence of P.W.6 – Michael Mathew John, is also relied upon. He is witness on spot panchnama and spot is shown to be opposite Bangdiwala chawl. Accused no.1 had filed a case against him, and therefore, this witness has deposed against the accused persons. This witness has stated that P.W.2 – Smt. Kamala resided in a small lane behind Church and, therefore, not on road no.19. It is further pointed

out that shop of P.W.4 is shown on open gutter in Exh.28. As report of Chemical Analyzer at Exh.46 on blood group of deceased is inconclusive, finding of human blood on weapons allegedly recovered at the instance of the accused or on their clothes, cannot be viewed as an incriminating circumstance.

16. P.W.8 - Deepak Vishnu Sawant, examined by the prosecution to prove recovery of gupti (Article-6) from accused no.2, has turned hostile and prosecution did not examine another panch. Thus, recovery of Gupti has not been established at all. In so far as recovery of sword from accused no.1 is concerned, only police officer has been examined and no independent panch was summoned.

17. Our attention is drawn to evidence of P.W.11 – Dr. Bhagwan Shantaram Janraj, who claimed that he treated accused nos. 1 and 2. He stitched the wounds on their injured palms. Learned Counsel argues that as he could not identify the accused persons, his deposition cannot be used to their prejudice.

18. P.W.14 - Joseph Chhitiyar has been examined on seizure on clothes of accused persons. He has deposed about the clothes of

respective accused, its sealing and labeling etc. He also points out that there was a bandage on the palm of accused no.3 - Bala and accused no.5 - Chandu. Though in chief he speaks of recovery of clothes, he does not depose that those clothes had any blood stains. He could identify only accused no.1 and not others. His cross examination is pressed into service to show that he is regular panch used by the police and he claimed that he was sleeping from 11 p.m. to 6 a.m. at his residence. Exh.60 is report of Chemical Analyzer on weapons or on cloth piece found stuck on the sword, is assailed as useless in this background.

19. Evidence of Investigating Officer PW.16 – Bhimrao Krishnaji Sonawane, is also attacked on various grounds. It is pointed out that he was not in-charge of the police station and he was entrusted the job of supervision on 23.05.1988. As such, on that date, when PW.2 – Smt. Kamala came to police station, he should have permitted the officer in charge namely P.S.I. Patil, to record her statement. However, he went out of way and proceeded to record her statement. It is further pointed out that the investigation of the offence was not assigned to him by the Station House Officer, still unauthorizedly, he proceeded with the same. Shri Mooman, learned counsel submits that

as per practice, Officer who records FIR or initial statement of the complainant, is not entrusted with the job of investigation to ensure impartiality and fairness. P.W.16 recorded statement of one Rambhuvan Vasudeo Singh as an eye witness, but, this person was not produced before the court. P.W.2 Smt. Kamala and P.W.3 – Gulabi are related to each other, and resided close by. P.W.4 Alexander had no shop on street no.19. Thus their evidence was not convincing & doubtful. Therefore, P.W.16 wanted to record further statements. Clothes of accused were not shown to him in the court, and as such, there is no investigation thereon. There is no explanation, why he did not hold TIP. Though this witness speaks of recovery of sword from accused no.1, recovery of knife from accused no.2, recovery of sword from accused no.3, chopper from accused no.4 and sword from accused no.5 Chandu, these recoveries are not supported by any independent witness and in this situation, the same cannot be relied upon. Answer given by him in paragraph no.9 of cross examination are relied upon to show that he was not a station house duty officer at Goregaon police station on 23.05.1988. Charge of police station on that day was handed over to PI. Hajare, who was very much present at the police station. Inability of P.W.2 to give necessary details to him brought out in paragraph no.11 of his cross examination is also relied upon. His not

making any enquiry on spot from persons residing on street no.19, is also alleged to be a serious lacuna. It is pointed out that this officer did not examine Dr. Banerjee, in whose dispensary the accused persons were alleged to be sitting. He has deposed that he carried out a search of the hut, but, no search panchnama was drawn, when accused nos. 1 and 2 were arrested. Similarly, no panchnama of arrest was also prepared. He did not ask for necessary details of weapons used by the accused persons from P.W.2, and though he was aware of the questions needed to be put, he explained that as it did not occur to him then, those questions were not put. He also did not record affirmative answers given on the identification of accused persons by the eye witnesses, after they were shown to him by the P.W.2. He accepted that in copy of FIR filed in criminal proceedings, time and date was not mentioned under his signature. He stated that it was a cyclostyled copy. He accepted that time and date mentioned in the original needed to be mentioned even in cyclostyled copy. He also accepted that time has not been mentioned below his signature in copies of FIR supplied to the defence. He accepted that outward number is not mentioned on original FIR and there is no endorsement upon it, therefore, he could not state when police constable took the copy of FIR sent to the Court. He denied that copy was not dispatched to the court of Metropolitan

Magistrate on 25.05.1988. He also did not make any enquiry from persons present in Cooper Hospital, who had accompanied the deceased. He accepted that even after drawing the inquest panchnama at cooper hospital, he did not conduct any enquiry. He accepted that duties are assigned by senior police inspector to his subordinate officers and accordingly the same are entered in the register. Question – Why Dr. Banerjee was not examined; was not allowed to be answered by the trial Court. He denied that witness like Pramod Adulkar, Santosh Shewante and Rambhavan Singh were deliberately kept back as otherwise, they would have brought on record true and correct facts. He did not find any mattresses at the spot of offence, when he visited it. It is to be noted that P.W.3 – Gulabi, has deposed that she saw the accused no.1 Taj Mohommad bringing a mattress, and perhaps the weapons were carried in it to the spot. This witness also stated that he could not inadvertently inform to P.W.1 the various points with reference to which site plan needed to be drawn.

20. Learned Counsel for the accused has stated that P.W.2 and P.W.3 visited the accused persons in jail and had demanded money from them for not deposing in Court. Evidence of defence witness is relied upon for said purpose. Learned counsel submits that though the

documents were sought from jail authorities to bring on record these visits, those documents were not supplied to them and were not produced before the Court. The defence of accused in answer to question no. 501 during their Section 313 Cr.PC. examination is also pressed into service by him.

21. Shri Mohite and Shri Bandager, learned counsel have adopted the arguments of Shri Mooman, learned counsel. They point out that PW 9 – Pandurang Pange could not identify the weapon. Similarly PW.10 – Naresh Ambekar examined to show recovery of sword under Section 27 of the Evidence Act, from accused no.3, he could not identify the said accused before the Court and pointed out some other person.

22. Respective counsel conclude by stating that the eye witnesses have not seen the alleged episode/attack and murder of Kisan, and are being used to falsely implicate them by employing PW.2 – Smt. Kamala and PW.3 – Gulabi as also PW. 4 – Alexander.

23. Learned A.P.P. in reply submits that the alleged dispute about the address of PW.2 Smt. Kamala is, imaginary and she was not

asked relevant questions during her cross examination. Accused persons also do not examine anybody in defence to bring on record true and correct address of Smt. Kamala. These persons who resided in the vicinity or carried out their business are only witnesses and have given necessary details. He points out that though in earlier police complaint P.W.2 Smt. Kamala has given her address as staying at road no.18, plot number given by her was same and P.W.3 has deposed that they have been staying at same address since last several years. These witnesses and accused persons, as also deceased, who resided in the very same area, very well knew each other. Hence, when eye witnesses have employed their pet name, that does not mean that they had indicated some other person with same pet name. These eye witnesses are not connected with any group or party.

24. Shri Dedhia learned A.P.P. points out that P.W.2 – Smt. Kamala and other eye witnesses were threatened by the accused persons and hence, P.W.2 was also required to be given police protection. P.W. 2 and P.W.3 have deposed accordingly in the Court. Version of P.W.2 and P.W.3 is corroborated by P.W.4. He points out that though P.W.2 and 3 are relatives, they are not on talking terms. Accused persons attempted to demonstrate criminal background of husband of P.W.2 and

3, but, they could not produce certified copy of any charge sheet or judgment.

25. Knife and sword with accused nos. 2 and 3 were stained with blood of group "A", and 4 accused persons are having "O" blood group, while accused no.2 Bablu has blood of group "B". Accused have not explained how blood of group "A" was found on their weapons. Prosecution witness has pointed out bandage to palms of accused nos. 3 and 5, and hence, failure of PW.11 to recognize them is, not fatal. The recoveries of clothes and other weapons are proved by PW.16. Cognizance and investigation by P.W.16 is in accordance with law. He therefore, prays for dismissal of the appeals.

26. Shri Mohite, learned Counsel in brief reply submitted that if the accused persons were sitting in the dispensary of Dr. Banerjee, prosecution ought to have examined him. There is nothing on record to show that deceased Kisan was habituated to use road no.19, and therefore, to urge that accused persons were waiting for him in anticipation near the dispensary of Dr. Banerjee or outside. As residence of P.W.2 – Kamala on road no.19 is not established, very foundation of the prosecution story stands demolished. It is further submitted that

Smt. Kamala never deposed that accused persons forced her to pay visit to them in jail. He contends that thus, demand of money by P.W.2 and 3 from the accused persons has been sufficiently established.

27. It is at once clear that homicidal death of Kisan Bait is not an issue. Before appreciating the evidence of the eye witnesses, we find it proper to note that other evidence which may connect the accused with the crime is also produced by the prosecution here. Said evidence in present matter is in the shape of recovery under Section 27 of the Evidence Act; seizure from spot and report of Chemical Analyzer.

28. P.W.5 – Lawrence D'souza is a witness to inquest panchnama and also to panchnama of seizure of clothes of deceased. He points out that during inquest, he noticed total 38 injuries on both. On same line is evidence of the first Doctor who attended the deceased, immediately after he was brought to the hospital. However, that Doctor i.e. Ramesh (P.W.12) has found 21 injuries. All the injuries are in one attack & police carried the deceased from the spot. It is obvious that nothing much therefore turns on this aspect. The exhibition of inquest panchnama was objected to by the learned counsel for the accused on the ground that witness did not ask for permission to refresh

his memory, but that objection was overruled. Panchnama was then read over and witness accepted its contents to be correct and also accepted his signature. It was then marked Exh.22.

29. This witness thereafter points out production of clothes of deceased i.e. one 'T' shirt, blue in color, one white pant, one green underwear, one chain of yellow metal, one wallet containing attendance card as also one pair of shoe. He has pointed out that 'T' shirt has 8 to 10 cut marks. He stated that he did not notice anything else on said 'T' shirt. Pant also had cut marks at 5 or 6 places and underwear also had 2 to 4 cut marks. He points out seizure of aforesaid articles by the police, its sealing and then affixing thereto a label with their signatures. Panchnama was proved by him as Exh.23. He identified the clothes of the deceased, as also pair of shoes, gold chain with pendant, wrist watch and wallet. He also deposed that clothes of deceased were soaked with blood, and therefore, they were not packed at that time, but, were taken in khaki colour wrapper. In his cross-examination by the learned counsel for the accused, he could not explain why in panchnama at Exh.22, there was no reference to gold metal chain and wrist watch. He stated that Officer had informed him the day and date in the wrist watch on the day of the incidence, and it was 23rd and

Monday. He stated that panchnama was read over to him twice, and it was explained in Hindi. Co-panch to Exh.22 was sitting at a distance of about 7 to 8 feet from him. He has further stated that deceased Kisan was staying at road no.18. He further stated that on 23.05.1988, he was at Villeparle in the house of his brother-in-law, and he was to take him to the hospital. After coming to the hospital, he took out the case paper for his brother-in-law. He stated that he was unable to produce that case paper. He has also stated that co-panch was not with him when he went to the hospital. He reached emergency department within 15 to 20 minutes of taking out case papers and during that time, a person known to him contacted him. Said person talked with him for about 10 minutes, and he was unable to give name of that person. He noticed Sonwane (police officer) in the mean while, and he also noticed another officer PSI Kamble. Thus, his cross-examination does not bring on record any material which may help the prosecution in connecting the accused persons with the crime.

30. P.W.6- Michael Mathew John is the witness to spot. As a matter of curiosity, he went near the crowd and then saw police officer Sonawane, who requested him to act as a panch. The spot and the blood patches were pointed out by P.W.2 Smt. Kamala Lingam. He has

stated that the same were opposite to Bangdiwala Chawl on road no.20, which is a pucca road. On that road a piece of finger along with a nail and 3-4 hair with flesh were also noticed by him. He points out its seizure by the police. He has further deposed about the articles/material collected from the spot, its sealing, labeling. His cross-examination shows that if one stands in the middle of road no.20, its both sides are visible. He has stated that Mahendra chawl belongs to Babua who resided on southern side in that chawl. His further cross-examination shows that he was arrested by the Goregaon Police Station in connection with communal riots in January, 1993 and accused no.1 - Taj Mohommad was complainant in that case. He has further stated that P.W.2 Smt. Kamala used to stay behind church in a small lane. He could not explain why there was no mention of "flesh" in panchnama. He stated that he was not aware whether a person standing near a gutter, near Sharda Niwas could have seen the dispensary of Dr. Banerjee. He has proved spot panchnama Exh.28. Exh. 28 shows that cycle shop of P.W.4 is located on a gutter. This also shows that PW-4 inadvertently mentioned Sharda Niwas as Sunder Niwas.

31. Evidence of eye witnesses have been assailed on the ground that their position or location from which they have witnessed the

incidence is not shown in the site map at Exh.13. This site map is drawn by Narendra Dhembre, who served as Draftsman at Presidency Division of P.W.D. He has been examined as P.W.1. He has mentioned that as per directions give by P.I. Sonawane (P.W.16), he has prepared the site plan in 1992. He visited the spot on 19.08.1992 and prepared a plan personally in his own hand and signed it. He identified that plan which came to be marked as Exh.13. Road no.20 on which the incidence occurred is shown running East-West in that plan. The East end of that road ends near Chawl and beyond that there is railway track. On Western side it goes to road no.3. He has also mentioned that on both the sides of road no.20, gutters have been shown and he has explained where dispensary of Dr. Banerjee is shown in that map. Road no.19 running North-South meeting road no.20 is also shown. On Southern side of road, there is Bangdiwala chawl on plot no.351, and also a Church on Western direction of road no.20. Sharda Niwas is on Northern side of road no.20. One Bicycle shop is shown in plot no.350 and Sharda Niwas is on this plot no.350. Then he has pointed out the blood patches on the spot as shown to him and distance of those blood patches from the place of offence to Electric pole is shown in the plan. He has mentioned that doors of rooms at Bangdiwala chawl open on road no.20. Door of Church also open on road no.20, and that door is at

40 feet from blood patch shown as point "A". The distance between point "A" and oata, is about 44 feet. He has explained that plan has been drawn as per the instructions from P.W.16 P.I. Sonawane. His cross-examination shows that he did not then feel it necessary to make any enquiry in respect of a cycle shop, and to find out whether it was in existence in the year 1988. P.I. Sonwane, did not point to him Jagruk Mahavir Chawl or Bhaiya Chawl, Narayan chawl, Krishna Pujari Chawl, Kachinbhai chawl. He did not notice any common toilet. He could not recollect whether any Hanuman temple was seen by him. He did not notice any tea stall near dispensary of Dr. Banerjee, on the date of visit. He did not measure the distance between railway track and point "A". He denied that bicycle shop was not in existence. He initially prepared a rough sketch map when he visited the spot along with P.I. Sonawane, took down rough notes and did not come across any shop in Sharda Niwas. The cycle shop was a temporary structure of bamboos, tarpaulin and he did not notice any tree around it. He did not notice road no.18 on that day.

32. P.W.2 – Kamala, P.W.3 – Gulabi and P.W.4 – Alexander are the eye witnesses examined by the prosecution. The evidence of P.W.2 Kamala is challenged basically on the ground that she does not reside on

road no.20, and prosecution has not brought on record any material to show that she resided on road no.20. She has given her address as Jagruk Mahavir chawl, Jawahar Nagar, road no.20, Goregaon, Bombay. She has stated that in May, 1988 she was staying at that address along with her daughter and her husband. On 23.05.1988, her husband had gone to work and she went to attend nature's call at about 9.30 a.m. To go to public toilet, she had to pass by the dispensary of Dr. Banerjee. While going, she noticed accused no.1 Mohommad, accused no.2 Bablu, accused no.4 Rajumama, accused no.5 Chandu and accused no.3 Balu drinking tea near dispensary of Dr. Banerjee. When she returned back, she again saw them. She went in her house, collected utensils in a lane outside it and was cleaning the same. That time she heard shouts "*bachao bachao*". She came on road no.20 and saw accused no.1 Mohommad with big sword, accused no.2 Bablu with knife with sharp edges on both the sides like gupti, accused no.4 Raju with chopper, accused no.3 Bablu with sword and accused no.5 Chandu also with sword. Accused no.5 was standing with sword in his hand. He was holding it with both the hands at his rear. She identified the accused persons. They were assaulting Kisan, who stayed in the same locality. Mohommad assaulted Kisan on his head by sword. Bablu assaulted below left side ribs, Rajumama and Balu were assaulting Kisan wherever

they could strike. Chandu was standing holding the sword at his rear with both hands. She did not see Chandu assaulting Kisan. None of the members from public came to the rescue of Kisan. She urged the public by saying "*koi bhi usko chhudao*", but nobody came forward. Even after Kisan fell down, accused persons were assaulting him. After assault accused persons ran away with weapons towards railway track. She came to Goregaon Police Station. P.W.16- P.I. Sonawane present there recorded her complaint at Exh.15. She also stated that she was in a position to identify the arms. The arms were then taken out one by one from a bundle, which was wrapped in the newspaper. After newspaper and thread was removed, it was containing some arms wrapped with khaki paper tied by string with seal. The same were cut and two swords, one chopper, one gupti which were sealed with labels were taken out. The seals and labels were on respective arms. She has then identified Article -1 as sword, which was used by accused no.1 Mohommad; Gupti – Article-2, used by accused no.2 Bablu. A small sword was used by accused no.3 Balu. Witness then stepped down from witness box and touched accused no.3 by hand and showed the small weapon lying on the table of the interpreter and said that it was in the hand of accused no.3. She also identified chopper Article-4, used by accused no.4 Rajumama. Thereafter one cardboard box having seal and

label was opened and one knife was taken out from it. It was having sharp cutting edge on both the sides. Witness stated that it was in the hands of accused no2. It was taken on record as Article-6. She has then stated that three days after the incidence, she was again called at Goregaon Police Station, where 5 accused persons were shown to her. Her further statement was recorded by the police. She was not knowing how many names each accused persons were having and she has given their names as per her knowledge.

33. Her cross-examination shows that she was not knowing name of father or surname of accused nos. 1 and 2. She was also not knowing real name of accused no.2. She stated that she was staying at Jawahar Nagar since her childhood and was not aware whether there were different road numbers and different lanes in that locality. She was not aware of plot numbers and therefore was not knowing number of plot on which accused nos. 1 and 2 were staying. She knew the person by name Mahendra @ Babua, who stayed in Jawahar Nagar. He was residing at a distance of 2-3 minutes at walk from her house. She knew deceased Kisan, but, was not knowing name of his father and surname. He was staying at a distance of 2-3 minutes after 2-3 lanes from her house. She was not knowing whether Kisan was arrested by

the police or then Kisan and Babua were friends. She was not knowing whether Kisan was wanted in 5 murder cases or then whether any warrant was pending against Babua in Goregaon police station, and he was needed in murder case. She had heard names of Lawrence Fernandes D'souza and Sanjay Shankar Dalvi, and was knowing them. She was not having any relation with accused nos. 1 and 2. She was not having cordial relations with Joseph, who resided behind dispensary of Dr. Banerjee. She did not know a person by name Jagan Thomas Shetty. She denied that she was staying on road no.19 and asserted that she was staying on road no.20. She further stated that after complaint lodged on 23.05.1988, she lodged another complaint at Goregaon Police Station, but, was not aware of the date on which it was lodged. On 30.07.1988, she sent a written complaint, but, was not knowing whether she affixed her thumb impression on it. She was also not aware whether it was lodged on 30.07.1988. She could not state whether in that complaint she has given her address of road no.19. She further stated that when her complaint was recorded on 23.05.1988, the Police officer did not ask her about age of assailants or their physical description or about their clothes. She had disclosed to police length of sword. She could not recollect whether she told police about said sword having a grip or not. She denied that she did not tell that such sword

was without grip. She asserted that sword was having grip. She could not explain why grip did not figure in her police statement. After 23.05.1988, she visited Goregaon police station only once i.e., after three days, when she identified the accused persons, and when her statement was recorded. She stated that then weapons were shown to her. She stated that the weapons Articles 1 to 4 and 6 were shown to her at police station. She further stated that when she visited Goregaon Police Station on second occasion, Vasant Bait, Gulabi Chaman, Santosh Shankar Adoskar, Pramod Nivruti Sawant, Peter Philips Alankar, Alexander Francis Pakyam, were also present at the police station, and those persons were shown weapons in her presence. She stated that Rambhuvan, was also there. Then her cross-examination is about distance between her house and toilet and about the spot. She could not state whether Mahendra was resident of Jawahar Nagar since 10-12 years prior to the date of incidence. His room was there even on the date of her deposition. She was not aware whether he was Congress Worker. Her relationship with residents of Jawahar Nagar were cordial. She had no occasion to talk with Mahendra and Vasant, and they also had no such occasion to talk with her. She was not aware whether Vasant Bait had lodged any private complaint against accused nos. 1 and 2. She was not aware whether Naresh Shetti was a victim of Pandurang

and Mahendra. She accepted that Chaman is her brother and Gulabi is her sister-in-law. She has stated that they were not on talking terms because of dispute between them. She stated that her brother may have been arrested in a theft case. She stated that she was not knowing Advocate Bhanusali, but, she had given instructions to him in the matter after her complaint was recorded. She did not recollect whether she had given date of offence as 27.06.1988 at 21.30 hours. She stated that she filed a complaint as accused persons used to visit her home and threaten her for not going to court. She therefore, lodged a police complaint. Threats were given to her 2 to 4 months after murder of Kisan, and she was not in a position to give date thereof. As she was afraid of her life, she filed a complaint in the court. She accepted that in spite of threats, her relations with accused nos. 1 and 2 were good. Whenever they harassed her, she used to lodge complaint. She was not aware whether in Jawahar Nagar there were many people by name Mohommad. She was not aware of names of her neighbours and there was only one Muslim, who resided in her neighbour-hood. She was not aware as to how many Muslims were staying on road no.19. She had stated before police that she would be able to identify the assailants and could not explain why said fact was not recorded. She also accepted that she had told police that she would be in a position to identify the

weapons, but, could not explain why said fact did not figure in her police statement. She denied that on 06.01.1992, she had gone to Thane Central Prison and demanded money from accused nos. 1 and 2. She accepted that constable who brought her to court in the morning, leaves her at station in the evening and during recess, she remained outside the court hall with the said constable. She has also deposed that 2 to 3 constables were put on watch near her residence & few were deputed near crime scene.

34. She (PW-2) was not aware whether Kisan had quarreled with people residing at Jawahar Nagar and whether he was on inimical terms with them. There used to be quarrel between accused nos. 1 and 2, as also Kisan prior to 23.05.1988, but, thereafter they again used to talk with each other. She was not aware whether there was any enmity between them. She was not aware on which date there was quarrel between them prior to 23.05.1988, but, quarrel used to take place on road. She did not go out on road to see the quarrel, and used to hear the noise thereof at her house. If she heard noise, she used to go out. She stated that she may have gone out twice or thrice after hearing such noise prior to 23.05.1988. Quarrel used to take place in the evening, but, she was not able to give its dates. She could not state whether

police enquired with her about inimical relations of deceased with the accused nos. 1 and 2. She stated that she was not arrested by Kandivali police station for receiving stolen goods. She denied that she was arrested by Villeparle Police Station in that connection. About incident dated 23.05.1988, she stated that people had gathered after hearing shouts, she could not give their number, but then Gulabi, Alexander and his servant were there. Police did not ask her whether she was knowing every person who had collected at the spot. She was not knowing every person who had gathered at the spot personally. She did not ask Alex to attend police station and she went there on her own. She was not remembering name of servant of Alex. She stated that before going to police she had not seen Vasanta any where. She denied that marriage expenses of her daughter were borne by Mahendra @ Babua @ Bablu. But, she accepted that Mohammed Machhiwala resided at Jawahar Nagar, but, not near her house. She further stated that she had seen weapon – Article 6 – Knife in hand of accused no.2, while assaulting Kisan. She stated that she would call it a knife only. She had seen only Article 6 – knife in hand of accused no.2. She further stated that Article 2, weapon appeared to be a long knife. She could not state whether it can be called as a sword. She further stated that she cannot call Article 2 as Gupti. She had not seen it in the hands of

accused no.2. She has immediately stated that by mistake she had stated that Article 2, was in the hands of accused no.2. After her attention was drawn to Article 2, she realized her error. She further stated that because of their white color as she had seen both the articles, she after seeing articles 6 and 2, realized her error. She stated that article 2, was in the hand of accused no.5 Chandu.

35. Her cross examination in paragraph no.41 shows that she was not knowing which weapon is exactly called as Gupti. She was not asked description of weapons in hands of accused no.1 and 2. Officer recording her complaint enquired from her whether weapon which accused no.2 was carrying was having grip or not, and she stated that accused no.2 was carrying a knife with grip. She could not explain why fact whether said weapon was having handle or not, was not recorded in her statement. She was not aware whether gupti is thin or longer in size than knife. She had not seen sword, knife, gupti, chopper, sickle prior to 23.05.1988. At the time of recording of her complaint, she stated that accused no.1 was having sword and she also stated that there was a small knife with grip. Other weapons were also shown by her to the officer. At that time, officer did not tell her that this particular weapon is called as gupti or sword or knife. She stated that

the investigating officer did not write of his own that particular accused persons were armed with a certain type of weapon. She was not in a position to state whether proforma of FIR (exh.15) was filled in first or then after recording of her complaint. Taking into account the background in which she has grown up & fact that she identified the weapons in trial court, we can not believe her deposition in cross-examination that she never saw such type of or these weapons prior to 23.05.1988.

36. She stated that she had not seen Mahendra in the locality after recording of her complaint. She could not recollect when she had seen him after 23.05.1988. She could not recollect whether she had seen Mohommad Macchiwala in the area, after she lodged complaint. She denied that on 23.05.1988, accused nos. 1 and 2 did not assault Kisan. She was not aware whether accused no.1 is called as Mohammedali Tajmohammed, and she knew him by name Mohammed. She was not aware whether accused no.2 is known as Moshid Ali and she knew him by name Bablu. She denied that she did not see accused nos. 1 and 2 at police station on 26.05.1988. She denied that she did not witness incidence on 23.05.1988. She denied that she did not see accused nos. 1 and 2 near dispensary of Dr. Banerjee on 23.05.1988.

She was not aware, whether deceased Kisan was a gunda and had enmity with Mohommad Macchiwala and Mahendra @ Babua @ Bablu. She denied that she was bribed by Mahendra and Mohommad Macchiwala because she is the eye witness. She denied that she went along with one Chaman and Gulabi to Thane Central prison and demanded money from accused nos. 1 and 2. She has stated that whole incident lasted for about 5 to 10 minutes and deceased was surrounded by all accused persons. She saw accused no.4 for the first time when he was facing her. Back of Kisan was towards accused no.4. When she saw accused no.5 Chandu, she was standing with both his hands on his hips on the rear side. She had stated before police in her complaint that Chandu was holding sword in both the hands at the rear side, by keeping both his hands on his hips. She could not explain why said fact did not figure in her complaint. She further stated that Article No.2 (weapon) shown to her was in same condition as seen by her at the time of incidence, as she did not state in her statement to police that article no.2 had any dents. When she reached the offence spot, she saw that Kisan was being assaulted by accused persons. After assault, assailants ran away.

37. Thus, her evidence shows that she came out on road no.20 and witnessed the incident. She also attempted to persuade others to

save Kisan and then went to police station. Fact that she reached police station immediately and lodged report is not in dispute. Though she claims that she had not seen the weapons before 23.05.1988, her answer does not mean that she had not seen the weapons at all and therefore, she was not in a position to identify the same. She has stated that whatever was reported by her has been recorded by the investigating officer, and that the investigating officer did not add anything on his own. Though accused made roving efforts to show involvement of Mahendra & Machhiwala in the crime, no other material to corroborate such a stance could be brought on record by them. On the contrary, the tenure of cross-examination of witnesses or in chief of defence witnesses, militates with this line of arguments.

38. Another eye witness i.e. PW.3 – Gulabi, has stated that at 10 a.m. on 23.05.1988, she was sitting on road no.20 along with her two children. She was feeding chiwda to them. Dispensary of Dr. Banerjee was at a distance of about 25 to 30 feet. Near that dispensary, there was a red color fuse box, made of tin and accused no.1 Mohommad was sitting on it. Inside dispensary, accused no.2 Bablu, accused no.3 Bala, accused no.4 Rajumama and accused no.5 Chandu were sitting on a bench. She identified each accused. She has stated

that accused nos. 1 to 5 are not related with each other. After some time, accused no.1 jumped down from the fuse board and ran towards road no.20. He brought a mat which was in folded condition. At that time deceased Kisan Bait, known to her, was coming via road no.19 and taking turn towards road no.20. Kisan reached near wooden hen cage of Rambhuvan. Accused no.1 Mohommad came from back of Kisan and assaulted him by sword on the rear side of his head. Mohommad was shouting "*maro maro*". Other accused persons came there and started assaulting Kisan. Accused no.2 Bablu was armed with knife like Gupti. Accused no.3 was armed with a sword. Accused no.4 with chopper, while accused no.5 had a sword small in size. They assaulted the deceased whenever they got opportunity. Kisan was shouting "*bachao bachao*". Kisan fell down on the ground. Accused nos. 1 to 5 continued to assault him. On hearing the shouts of deceased, Kamala came from a lane and urged that somebody should save him, but, nobody came to his rescue. Apart from Kamala, she was not knowing anybody amongst the people who gathered at the spot. All assailants ran away towards railway track via road no.20, with their blood smeared weapons. Then police arrived and Kisan was kept in police jeep. Brother of Kisan by name Vasant went along with police. Vasant arrived at the spot after police came.

39. She (Gulabi) was not knowing the reason of assault. Police were making enquiry in the vicinity and she told police that she had witnessed the incident. Police then recorded her statement. Three days thereafter, she was called at Goregaon police station, where accused nos. 1 to 5 were shown to her. She told police that accused persons were known to her. Police did not record her further statement. She stated that she would be in a position to identify the weapons if the same were shown to her. She identified the sword – Article No.1 which was with accused no.1; Knife – Article no.6, which was with accused no.2; Small size sword – Article No.3 which was in the hands of accused no.3. She also identified Article No.4 Chopper which was in the hands of accused no.4 and Article 2- Gupti, which was in the hands of accused no.5.

40. Her cross-examination reveals that there is only one lane to come on road no.20 which leads from her house. She further stated that people resided on either side of road no.20. She also stated that same was the position of road no.19. She has been cross-examined thereafter to find out whether persons standing at letter “D” on road no.19 can be seen from road no.20. She was not aware of the plot number of which

Sharda Niwas was situated. She stated that she was residing on the address disclosed by her since 6 years prior to 23.05.1988. She was residing in a hut. Next to small lane by the side of Church, there was road no.18. She stated that if one stands near Church and looks towards road no.19, only crossing of road no.19 and 20 is visible. She accepted that she did not state in her statement to police that she was residing on road no.19. She asserted that it was falsely written. She and Kamala were residing on the same road in the year 1988. Kamala was residing in a lane. She accepted that she informed police that on 23.05.1988, she was sitting in front of her house at 10 a.m. feeding chiwda to her children. She accepted that she had used words “outside the house” (घराबाहेर). She could not explain why that expression “घराबाहेर” did not figure in her police statement.

41. Gulabi's further cross-examination reveals that the police arrived after 10 to 15 minutes. P.I. Sonawane (PW.16) also came there. She went to police chowki at about 5 to 6 p.m. There she did not notice any person known to her. Police had made enquiries in the locality for near about 10 minutes. She had talked with police for about 10 minutes. At that time, there was only one police constable and not police officers. She was knowing difference between police constable

and police officer. Police did not record her statement at the scene of offence when enquiry was made. P.W.2 Kamala is her sister-in-law, but she was not on visiting terms. She was not aware of the location of Congress Party Office at Jawahar Nagar. She accepted that she came to the court along with a constable and she was not aware of the date. She further stated that *"It is not correct to say that Padmakar Shankar Pavashe, Buckle No.9502 has not tutored me"*. The accused claim that she deposed as tutored by Pavashe. She denied that Pavashe told her to depose in the manner in which he instructed her. In recording there appears to be some error, but, it cannot be said that P.W.3 – Gulabi accepted that she was tutored by Pavashe. She was not knowing surname and father's name of accused no.1, when she went to the police station for giving of her statement. She had told the police that she was knowing accused no.1 since last many years. Police did not ask her the room or plot in which the accused no.1 resided and she was not aware of the same. She was also not aware of these details even in relation to Bablu. Police did not ask her about description of accused no.1 Mohommad or description of Bablu. She voluntarily did not give any description. The question – whether she signed a complaint lodged in the police station was put to her, and the trial Court has disallowed it. She stated that she did not tell the distance of dispensary of Dr. Banerjee

to be 25 to 30 feet, she had stated approximate distance. She could not explain why distance approximately was not there in her police statement. She stated that accused no.1 Mohommad had never come to her place, nor she visited his place. She had no occasion to talk with him. She also stated that neither she nor the accused no.2 visited each others house. Her husband Chaman also did not have any talk with accused nos. 1 and 2. Before 23.05.1988, accused no.1 or accused no.2 did not tell her that they were Mohommad and Bablu respectively. She was never asked about length, breadth, thickness or thinness or color of the weapon. She was not having T.V. set and visited her neighbours house to watch programmes on T.V. She was visiting house of Rambhuvan for said purpose. Rambhuvan also did not tell her the names and description of various type of weapons. She has explained that whenever she saw a movie in theater, the spectators coming outside used to speak about weapons, therefore, she was knowing the same. She being illiterate, she was not in a position to give name of such movie/ picture. She accepted that some people, call the weapon with which vegetables are cut as 'knife', while some call it as "chura". She stated that Article-2, was a sword. She stated that some swords come with handles, while others are without handles. She did not tell the officer about swords having handles or number of swords without

handles. She had seen swords, but, not the handles. Police did not enquire about the length of sword, and she had given its length, as also its breadth. She has stated that sword was dented. She volunteered that it got dented during assault on Kisan. She could not assign any reason as to why this fact was not written in her police statement, though she had informed the police accordingly.

42. She denied that her husband Chaman was arrested for theft. She was not aware whether she stole property which was disposed of by her sister-in-law Kamala or that Kamala was arrested by Villeparle Police station. She could not explain why fact of accused persons running away towards railway track did not figure in her statement.

43. When she (Gulabi) was inside her house with kids, public were using the public road i.e. road no.20. She was not aware of the occupants of Sharda Niwas. She also stated that she was not aware whether name Mohommad was common in Mohammedan locality. She was not aware whether Mohommad Macchiwala stayed in the vicinity. She knew name of Babu Adoskar's brother as Santosh. She was not aware whether Babu Adoskar was involved in murder matters. She

denied that on 06.01.1992, she herself, her husband Chaman and sister-in-law Kamala had gone to Thane Central prison for demanding money from accused nos. 1 and 2. She was not aware whether accused nos. 1 and 2 were detained in Thane Central prison. She denied that she had been to Borivali Court for demanding money from accused no.4. She was not aware whether Mahendra @ Babua contested elections from her locality in 1982-83 on Lokdal Ticket. She was not aware whether his other name is Bablu. She denied that her relations with Babua were good and they were on visiting terms, or that Kamala and Babua used to visit each other. She denied that she was aware about Mahendra @ Babua @ Bablu committing murder in Jawahar nagar locality or that he was terrorist in that locality. She was not aware that deceased Kisan was a known gunda and was on inimical terms with others in the locality. She was not aware whether, prior to 23.05.1988, there was quarrel between Mahendra and Kisan. She was not aware whether Mohommad and Mahendra @ Babua were close friends. She was not aware whether Mahendra paid money to her sister-in-law for her daughter's marriage. She was aware that her sister-in-law (PW.2) Kamala had constructed a pucca house. She denied that her husband Chaman was under thumb of Mahendra. She accepted that whenever police detained her husband, Mahendra helped him to secure bail. She

denied that in 1988 she was residing on road no.19.

44. She deposed that as per her knowledge, name of accused no.1 was Mohommad and she was not aware whether his name is Mohommad Ali. She denied that she was tutored by police as well as Advocate Bhanushali for giving evidence in a particular manner. She stated before police that one of her kids was a milk -sucking child and that she was feeding chiwda to other child. She could not assign any reason as to how fact that she was feeding chiwda to both kids came to be recorded in her police statement. She could not explain why word 'rear' pointed out by her while stating that accused no.1 gave blow on rear side of head of Kisan, did not figure in her police statement. She accepted that she had not seen Kamala, while coming out of lane. She stated that no talk took place between her and any other person after receipt of summons and before entering the witness box. When assault was going on, she did not pay attention to find out what was the position (as recorded) of accused nos. 4 and 5. But it can not be ignored that she just prior to this sentence, has deposed that deceased was surrounded by all these 5 assailants.

45. Her deposition therefore, shows that she was in a position

to identify the weapons and she has also identified the accused persons. Our comments supra on deposition of PW-2 Kamala also hold good here.

46. PW.4- Alexander runs a cycle shop just opposite to the spot of incidence. He was conducting his business in a tarpaulin shed on road no.20. This position is affirmed by PW.1 draftsman. His shop is adjacent to Sharda Niwas building and in 1988 one person by name Peter was his servant. On 23.05.1988, he opened his shop between 7.30 to 8 a.m. He has stated that dispensary of Dr. Banerjee was about 30 to 40 feet from his shop. He saw accused no.1 Mohommad near the electric pole and Bablu, Rajumama, Balu and Chandu sitting on a bench in the dispensary of Dr. Banerjee. He knew all accused persons, as he was residing in the very same area since his childhood. He identified them in the court. Opposite his cycle shop Bangdiwala chawl is situated. Kisan was coming towards road no.20 from Bangdiwala chawl, when he came on road no.20 he was at a distance of about 20 – 30 feet from his shop. Accused no.1 came running from behind and assaulted him on head with sword. He was shouting “maro maro”. Other accused persons also came running. Accused no.2 Bablu was armed with Gupti like knife, accused no.3 with chopper, accused no.4 with sword, small in size. Accused no.5 Chandu was standing there and

this witness did not notice what was in his hand. Assault took place on Kisan at a distance of 10 to 15 feet from his shop. Assault took place near wooden hen cage of Rambhuvan. Kisan was raising cries to save him. P.W.2 - Kamala came running towards the scene of offence. P.W.3 Gulabi was sitting in front of church feeding kids. Kisan fell down on the ground. He was standing by cycle shop, he further stated that after attack, assailants ran towards railway line. In the evening he was called by the police when his statement was recorded. He stated that weapons at Article 1 was in the hands of accused no.1, Article no.6 was in the hand of accused no.2, Article no.4 was in the hands of accused no.3, Article no.3 was with accused no.4. He stated that accused no.5 - Chandu was not holding any weapon. 2 – 3 days after 23.05.1988, he was again called in the police station, where he was shown accused nos. 1 to 5 and he identified them.

47. Cross-examination of P.W.4 shows that he closed his shop after 1 or 1 ½ hours of the incident. Police recorded his statement after 30 or 45 minutes, after they removed body of the deceased. Police left the scene of offence at about 11 or 11.15 a.m. He accepted that police van came there, put Kisan in van and went away. He was asked whether he would call the weapon at Article no.2 a Gupti, sword or

knife-cum-gupti or a knife. Trial Court did not allow this question to be put. He stated that he had given length of sword i.e. Article no.1 and it was long. It was shining. He could not remember whether he had given description of its handle, or whether sword was with or without handle. He stated that it was smeared with blood. He understood the measurement in feet, and he had not stated length of sword in foot or feet. He did not pay any attention whether it was straight or dented, and had not stated width of sword. He stated that since he was frightened, he did not ask the police officer as to why length of sword is missing from his statement. He did not tell police that as he was frightened his statement should be recorded later on. After 23.05.1988, he did not feel it necessary to go to police station and tell them about length of sword. Police did not ask him whether he would be in a position to identify the weapons and he also did not tell police accordingly. He could not explain why he did not tell the police that he was in a position to identify the weapons. He informed the police that accused nos. 1 and 2 were residents of his locality, but, he was aware of the plot number or hutment in which they resided. He was not having license for conducting bicycle shop and it was not registered with the Municipal Corporation. On 23.05.1988, he was called by the police constable from his house. Police came to him between 6 to 7 p.m. He

had closed his shop after 10 a.m. Within 5 to 10 minutes after Hawaldar came to call him, he went to police station. He was knowing Kisan since two years prior to the incident, but, he was not knowing Vasant, brother of the deceased. One boy informed him that Vasant is brother of the deceased, told him that Vasant occupied seat in the police jeep and since then he came to know Vasant. He was not knowing name of that boy. He did not see Vasant in the area after the incident. But, he was meeting Vasant since last 2-3 years. He was not knowing whether Vasant was staying in Jawahar Nagar since 1970. Though he was not knowing names of all persons residing at Jawahar Nagar, from faces he was in a position to identify them. Vasant was his customer and therefore, his relations with Vasant were cordial. As he was residing in the very same locality and since childhood, his relations with Kamli (Kamala) and Gulabi were cordial. He was not knowing Mahendra Chawl in Jawahar Nagar. He denied that any such chawl was situated on plot no.350. Since last 14 to 15 years, there was a police chowki at road no.12, and he was not knowing name of chawl situated by its side. He knew one Mahendra @ Babua. He stated that Kisan was staying in corner between road no. 18 and 19. He was not aware of road number and chawl number. He was not knowing the person by name Pramod, but, explained that if he sees him, he may be able to identify him.

Rambhuvan resided opposite the dispensary of Dr. Banerjee. No flour mill was located in the year 1988 by the side of dispensary. That room was occupied by a person whose name he could not recollect. He could not explain why fact that assailants ran towards railway tracks, did not figure in his police statement. He stated that the distance between accused no.1 and deceased might have been 15 to 20 feet, when he saw accused no.1 for the first time. He also stated that people were coming and going by the said road. He did not see PW.2 Kamala coming out from a lane, when deceased was shouting. He denied that in the year 1988, his shop was adjacent to wall of Sunder Niwas. He could not explain why fact that his shop was adjacent to compound wall of Sunder Niwas appeared in his police statement. We find that word "Sunder" appears to have been inadvertently used in place of "Sharda" in his statement. He had stated that Gulabi was sitting opposite the church, but he could not explain why it was not so recorded in his police statement. He had not seen Gupti, but, read the word gupti in newspaper. He had seen dagger, sword, knife. He had also seen folding knife. He had not seen a button knife. He explained that folding knife is having edge on one side. He stated that Article no.6 was a knife. The trial Court has recorded that witness has earlier called it as a gupti like knife and also stated that it was a dagger. He was not aware whether

Gupti is to be kept in scabbard. He had seen a naked gupti in movie. Since his friend was using the word 'gupti' while viewing movie, he uttered that the particular weapon was gupti. He stated that he did not get opportunity to observe gupti closely. He was not aware whether he did observe gupti in movie for about 2-3 minutes. Police officer did not ask him about length of the weapon in the hand of the accused no.2, and did not enquire whether it was gupti. He was not recollecting whether public had gathered at the site of the assault. He stated that he did not have any enemy in the area. He was not aware whether there was any enmity between Mahendra @ Bablu @ Babua, Mohommad Macchiwale and their associates. He was not aware whether Mahendra was terrorist in the locality and whether he was arrested by Goregaon police. He was not aware whether deceased Kisan has also committed murder and stabbings in the locality. He accepted that name of accused no.1 is Mohommad and name of accused no.2 is Moshid Ali. He, however, added that he was not knowing whether accused no.2 was known as Moshid Ali. He denied that Kisan was assaulted by Mahendra, Mohommad Macchiwale and their associates. He accepted that there were several people with name as Mohommad in Muslim community residing in the locality. Many also had their name as Bablu. He was not aware whether Mahendra was having nick name as

Bablu. He was knowing exact position of accused no.4 at the time of assault.

48. This PW-4 has answered that entire incidence of assault lasted for about 4 to 5 minutes, and he was not aware whether people had started running here and there. Though he was afraid, he did not run away. He denied that accused nos. 3 and 4 or 5 were not present during assault. It appears that he was permitted to be re-examined, and in answer to question put by the Special PP, he has stated that he was guilty of charge under Section 376 of Indian Penal Code. This permission to re-examine was granted in absence of one of the advocates representing accused, and hence, said counsel was given opportunity to cross examine. Alexander, stated that he was not aware of the names of victim or then number of crime in which he was acquitted.

49. Alleged recovery of bloodstained clothes & swords from the accused needs to be examined now to ascertain whether it has potential to connect the accused with the crime. We find the submission of respective learned Counsel for the accused that as blood group of the deceased could not be determined as reported at Ex. 46, these recoveries

or then report of the chemical analyzer Ex.60 loses significance without any merit as human blood is found on all articles and in some cases, it is of group "A" while none of the accused has that group.

50. Only police officer PW 16 (IO) Bhimrao Sonawane has deposed about recovery of sword from accused No. 1. Said panchanama is at Ex. 30. In Ex. 60, this sword is Ex. 1 and is found stained with human blood though its group could not be determined. No panch witness has been examined by the prosecution in support of this discovery.

51. PW-8 Deepak has been examined to prove the recovery of a gupti (a sword stick) from accused No. 2. This witness has accepted his signatures on memorandum as also recovery panchanama but deposed that all those signatures were made in police station only and he did not see any accused there. He also did not go with the accused anywhere on that day. His cross-examination by the learned APP also could not yield anything positive. Second witness on these recoveries has not been examined. Ex. 32 mentions discovery of a weapon with bloodstains. This weapon is described as sword-stick cum knife. Chemical analyzer in report at Ex. 60 reports human blood of "A" group on this article referred to as small dagger therein at Ex.2. In the light of this result as

“A” is not the blood group of any accused and deposition of eye witnesses, we find that this accused is sufficiently connected with the offence.

52. PW-10 Naresh Ambekar has been examined to prove discovery of a sword under S. 27 of the Evidence Act from accused No. 3. Though he has stuck to the position as emerging from the recorded panchanama Ex. 41 and nothing useful could be extracted by any accused in his cross-examination, he could not identify said accused in Court and instead indicated some third person who was accused in some other criminal case scheduled on that date only. But that by itself is not a factor in favour of accused as the eye witnesses have found this weapon in hands of accused No. 3. Chemical analyzer in report at Ex. 60 reports human blood of “A” group on it. In that report, this weapon is stated to be a sword.

53. PW 9 Pandurang Pange is examined to establish discovery of a chopper from accused No. 4 Rajumama. He could not remember the face of accused. He could not recollect whether weapon discovered was large or small one and could not identify it. He stated that panchanama was read over and explained to them and it was correctly recorded. He

could not state whether Art. 4 was that weapon. Ex. 34 is that panchanama and it records seizure of a chopper under S. 27 of the Evidence Act at the instance of accused No. 4. The dimensions of said weapon are also given therein. As such failure of the PW-9 Pandurang to either identify the accused or weapon does not, by itself, benefit accused at all and arguments of his advocate Bandgar hold no merit. Chemical analyzer has, in report at Ex. 60 described it at Ex. 6. C.A. finds human blood on it of which group could not be determined.

54. PW- 7 Yeshwant Indulkar is on discovery of a sword from accused No. 5. He has turned hostile and stated that his signatures were taken in police station only. No accused was then present. Said panchanama is at Ex. 30 and records recovery of a sword. This weapon is at Ex. 5 in report of CA at Ex. 60. Though human blood is detected on said sword, tests to determine its group remained inconclusive. Demeanor of all these witnesses show that they were reluctant to state the truth in Court.

55. PW-14 Joseph is examined to bring on record the seizure of bloodstained clothes from the person of the accused 1 to 5 and to prove

panchanama dated 26.5.1988 for that purpose. The incidence is dated 23.5.1988 and the prosecution alleges that all 5 accused were arrested with blood stained clothes. Said panchanama mentions that its recording commenced at 3.30 on 26.5.1988 and was over at 4.35. Joseph deposes that in that night at about 3.30 AM, he was returning from Ram aur Sham theater when he was called at police station to act as panch. He then points out how one by one the clothes from the five accused persons were seized, He has identified those clothes also. However, he does not mention any blood stains on said clothes though in panchanama Ex. 50. The blood stains are noted on full pant of accused No. 1, on shirt and full pant of accused No. 2, on full pant of accused No. 3, on shirt of accused No. 4 and on shirt and full pant of accused 5. He also deposes that accused No. 5 Chandu and accused No. 3 Bala were having bandage to their hands. Cross-examination of this witness shows that he resides in a hut just near police station and his assertion that in past he did not act as a pancha witness for police was falsified by inviting his attention to records of earlier Sessions Case Nos. 1076/1987 & 256 of 1988. Thereafter, he has accepted that wife of his brother was arrested by police and that at 10.30 PM he was cleaning utensils near Bharat Talkies. Thereafter, he was asleep between 11.00 PM to 6.00 AM. He accepted that he was regular panch witness of

Goregaon police station. PW-16 Bhimrao has stated that upon intimation, he raided a hut in Dindoshi area and took accused in custody at about 2.15 AM. If this person was sleeping at his house, it is obvious that he could not have witnessed the seizure of clothes of the accused. It is apparent that this witness is giving incorrect answers to help the accused in cross-examination.

56. Exhibits 15 to 24 mentioned in report of CA at Ex. 60 are the clothes of accused sought to be brought on record through PW-14 Joseph. Report shows that human blood is found on all these clothes. Ex. 60 needs to be read with forwarding letter Ex. 59 where the articles are described. Article G-6 is fullpant of accused No. 3 Bala alias Narayan Arjun Gaonkar which becomes Ex. 20 in CA's report. This Ex. 20 is found to contain blood of "A" group while the tests to determine the group of human blood found on other clothes remained inconclusive.

57. Thus, human blood is found on all the clothes and weapons. CA could also find "A" group blood on the weapon discovered from accused Nos. 2 & 3 as also on full pant of accused No. 3. Fact that none of the accused has blood group "A" is not in dispute. Accused have avoided to explain the blood on their clothes. It follows that this blood

corroborates the version of the eye witnesses and brings on record presence of accused on the spot. PW-2 to 4 are the eye witnesses and their deposition does not appear to be artificial and their presence at spot is also natural and inspires confidence.

58. PW-2 - Kamala saw accused No.1 Mohommad with big sword, PW-3 Gulabi saw Accused No.1 Mohommad assaulting by sword, PW-4 Alexander also states assault with sword by accused No. 1. Said sword is article 1 on record and at Ex. 1 in Ex. 60. Thus, all eye witnesses put same weapon with accused No. 1.

59. PW-2 - Kamala saw accused No.2 Bablu with knife with sharp edges on both the sides like gupti, PW-3 Gulabi saw Accused No.2 Bablu was armed with knife like Gupti. PW-4-Alexander saw Accused no.2 Bablu armed with Gupti like knife. Said gupti is article 2 on record. In cross-examination, PW-2 Kamala states that Article No.6 is a knife which was in the hand of accused No.2. According to her, weapon art. 2 was with accused no. 5. PW-3 Gulabi states that art. 2 is a sword and it got dent when Kisan was assaulted. She also states that art. 2 is white in colour while art. 4 was not white. She did not state

before the police that sword was white in colour. PW-3 Alexander also states that art. 6 was with accused No. 2. Thus, two eye witnesses out of three put art. 6 in hands of accused No. 2.

60. PW-2 - Kamala saw accused No.3 Bablu with sword, PW-3 Gulabi saw Accused no.3 was armed with a sword. PW-4 Alexander saw accused No.3 with chopper, Article No.3 is a small sword was in the hands of accused No.3, PW-4 Alexander saw Article no.4 chopper with accused no.3. Thus, two eye witnesses out of three put art. 3 in the hands of accused No. 3.

61. PW-2 - Kamala saw accused No.4 - Raju with chopper, PW-3 Gulabi saw Accused no.4 with chopper, Article no.4 chopper was with accused No.4. PW-4 Alexander saw accused no.4 with sword at art. 3. Thus, two eye witnesses out of three put art. 4 in the hands of accused No.4.

62. PW-2 - Kamala saw accused No.5 Chandu also with sword. She in cross-examination states that art. 2 is that weapon. PW-3 Gulabi saw accused No.5 had a sword small in size. PW-4 Alexander states that Accused No.5 Chandu was standing there and this witness did not notice

what was in his hand. PW-2 - Kamala has deposed that he was holding sword on the backside of his body and, therefore, PW-4 may not have seen it.

63. The assault was fierce and lasted for few minutes. The witnesses may not have then minutely grasped all details visualizing that they would be required to depose in court of law. Even otherwise, witnesses, normally, may not see or remember all such details. This difference in ascribing a specific weapon to a particular accused by itself is not fatal and adds to the bonafide effort of these eye witnesses to tell the truth. It rules out the alleged conspiracy to falsely implicate the accused persons. Human blood is found on all articles and in some cases, it is of group "A" while none of the accused has that blood group. Report of Chemical Analyzer at Exh.46 that blood group of deceased could not be determined and test was inconclusive does not dilute the rigour of finding of human blood on weapons. Fact that P.W.14 - Joseph Chhitiyar examined on seizure on clothes of accused persons could identify only accused No.1 and not others., therefore, does not help the accused persons at all. Fact that brother of PW No. - 2 Kamala may have been arrested by police and have some criminal antecedents also is not clinching in this background. The depositions of eye

witnesses do not seem to be inspired by any enmity or gang war.

64. Investigation officer P.W.16 - Bhimrao Krishnaji Sonawane recorded statement of one Rambhuvan Vasudeo Singh as an eye witness but then said witness was not examined by the prosecution. It is for the prosecution to omit any of the witnesses and accused cannot take any objection to the same. Investigation by him is questioned on various grounds but then alleged bias on his part is not brought on record and impact of alleged bias is also not demonstrated. He was on supervisory duty over the Station House Officer and as such, under S. 154 Cr.PC. competent to take up the matter. Entire material on record reveals that investigation was free and fair. Defence that discovery of weapons or recovery of clothes from the accused persons is fabricated, therefore, does not hold any water. Accused also tried to urge that Mohd. Machhiwala and Mahendra @ Babua were real culprits but then except for giving some vague suggestions no serious effort to bring on record the alleged enmity between the alleged groups has been made. Defence of accused that P.W.2 and P.W.3 allegedly visited the accused persons in jail and had demanded money from them for not deposing in Court, itself militates with this story. If group rivalry or struggle for power was at the root and P.W.2, P.W.3 or P.W.4 were propelled by such

consideration, they would not have gone to jail to demand money and remained loyal to their alleged godfathers viz. Mohommad Machhiwala or Mahendra. In that event, their evidence would have been almost on same lines and reiteration. Hence, the failure of prosecution to tender jail visit register in trial court or then the evidence of defence witnesses examined by the accused, all pale into insignificance.

65. Thus, we find no merit in these appeals. The same are dismissed. Appellants / Accused to surrender to their bail bonds within three weeks.

(A.S. GADKARI, J.)

(B.P. DHARMADHIKARI, J.)

Rgd.