

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.401 OF 2009

Sunil Kashinath Chandanshive,	]	
Age : 31 Yrs., Occ.: Nil,	]	
R/o. R. No.28, New Rahul Nagar,	]	
Mulund Colony, Mulund (West),	]	 Appellant /
Mumbai – 400 080.	]	(Org. Accused
R/at : Yerawale, Tal. Karad, Dist. Satara	]	No.1)

Versus

The State of Maharashtra	]	 Respondent
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WITH
CRIMINAL APPEAL NO.221 OF 2009

Latesh @ Dadu Baburao Karlekar,	]	
Aged : 36 Yrs.,	]	
R/at Amar Kunch, Room No.6,	]	 Appellant /
4 th Floor, Kisan Nagar No.3,	]	(Org. Accused
Wagle Estate, Thane (West)	]	No.3)

Versus

The State of Maharashtra,		
Through Mulund Police Station, Mumbai	]	 Respondent

WITH
CRIMINAL APPEAL NO.223 OF 2009

Vishnu Maruti Bule,	]	
Aged : 32 Yrs.,	]	
R/of Valkabai Chawl, Ghatipada No.2,	]	 Appellant /
Bal Rajeshwar Road,	]	(Org. Accused
Mulund (West), Mumbai – 400 080	]	No.5)

Versus

The State of Maharashtra	]	 Respondent
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WITH
CRIMINAL APPEAL NO.232 OF 2009

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| 1. Sandeep Barku Bhosale, |] | |
| Aged about 24 years, |] | |
| R/at Sainath Chowk, |] | |
| Hanuman Pada, Mulund Colony, |] | |
| Mulund (West), Mumbai – 400 082. |] | |
| |] | |
| 2. Anil Ankush Gadekar, |] | |
| Aged about 30 years, |] | |
| R/at 148/296, Powai Chowk, |] | Appellants / |
| Jai Shastri Nagar, Mulund Colony, |] | (Org. Accused |
| Mulund (West), Mumbai – 400 082. |] | Nos.4 and 6) |

Versus

The State of Maharashtra,		
Through Mulund Police Station, Mumbai	]	 Respondent

AND
CRIMINAL APPEAL NO.271 OF 2009

Vijay @ Vijay Istriwala Ramdulari Nirmal,	]	
Aged : 36 Yrs.,	]	
R/of New Rahul Nagar,	]	 Appellant /
Mulund Colony, Mulund (W),	]	(Org. Accused
Mumbai – 400 082	]	No.2)

Versus

The State of Maharashtra	]	 Respondent
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Mr. Shirish Gupte a/w. Mr. Kuldeep Patil for the Appellant/Original Accused No.1 in Cr. Appeal No.401 of 2009.

Ms. Naima Shaikh a/w. Mr. Khan Abdul Wahab for the Appellant/Original Accused No.3 in Cr. Appeal No.221 of 2009 and for the Appellant/Original Accused No.2 in Cr. Appeal no.271 of 2009.

Mr. Nitin Sejpal a/w. Mrs. Pooja Bhojne-Sejpal for the Appellant/Original Accused No.5 in Cr. Appeal No.223 of 2009 and for the Appellants/Original Accused Nos.4 and 6 in Cr. Appeal No.232 of 2009.

Mrs. Sangeeta Shinde, A.P.P., for the Respondent-State.

**CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

JUDGMENT RESERVED ON : 18TH MARCH, 2015.

JUDGMENT PRONOUNCED ON : 23RD MARCH, 2015.

JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. All these five Appeals are arising out of one and same Judgment dated 10th February, 2009 in Sessions Case No.260 of 2007 of the 6th Ad-Hoc Additional Sessions Judge, Sewree, Mumbai. Hence, they are being decided by this common Judgment. The Appellants are referred to, for the sake of convenience, by their original nomenclature.

2. By the impugned Judgment, Accused Nos.1 to 6 are convicted and sentenced as follows :

- Section 143 IPC - R.I. for 6 months and fine of Rs.200/-, in default to suffer R.I. for 1 month.
- Section 144 IPC - R.I. for 1 year and fine of Rs.300/-, in default to suffer R.I. for 1 month.

- Section 147 IPC - R.I. for 1 year and fine of Rs.300/-, in default to suffer R.I. for 1 month.
- Section 148 IPC - R.I. for 2 years and fine of Rs.500/-, in default to suffer R.I. for 2 months.
- Section 37(1)(a) r/w. 135 Bombay Police Act - R.I. for 6 months and fine of Rs.200/-, in default to suffer R.I. for 1 month.
- Section 4 r/w. 25 Arms Act - R.I. for 1 year and fine of Rs.200/-, in default to suffer R.I. for 1 month.

3. Accused Nos.1 to 3 are further convicted for the offence punishable under Section 302 r/w. 149 IPC and sentenced to suffer life imprisonment and fine of Rs.1,000/- each, in default to suffer R.I. for 6 months.

4. Whereas, Accused Nos.4 to 6 are further convicted for the offence punishable under Section 307 r/w. 149 IPC and sentenced to suffer R.I. for 10 years and fine of Rs.1,000/-, in default to suffer R.I. for 6 months.

5. All the substantive sentences of imprisonment were to run concurrently.

6. Facts, as are necessary, for the decision of these Appeals may briefly be stated thus :

On 10th December, 2006, at about 10:20 pm to 10:30 pm, after attending the office of Uttam Gite, the worker of Congress (I) Party, at Mulund, injured PW-2 Vitthal Hingane and his brother deceased Jagdish were returning towards their house. When they reached near Sant Pyas Lane, the Accused Nos.1 to 6 came from opposite side. They were armed with various weapons, like choppers, swords, sickle, and with those weapons, on account of some old enmity, they assaulted deceased Jagdish and injured PW-2 Vitthal. Hearing the shouts of the injured and the deceased, PW-11 Police Naik Dyaneshwar Ladse, who was patrolling in the said area, along with Police Naik Ghyansham Pawar, rushed to their help. They tried to chase the Accused persons. However, they could caught hold of Accused No.1-Sunil alone with blood stained chopper in his hand and other Accused succeeded in fleeing from the spot.

7. PW-16 Kishor Potdar, who was passing on the said road, after hearing the shouts, came to the help of PW-11 P.N. Ladse and with his help P.N. Pawar took both the injured in an auto-rickshaw to Mulund General Hospital. PW-11 P.N. Ladse took Accused No.1-Sunil also in one Maruti Car behind the said rickshaw to the same hospital. On the way, they met PW-15 Jagdish Shetty, who was knowing the injured persons and he identified them. He also accompanied the P.N. to Mulund General Hospital.

8. On arrival at the hospital, PW-11 P.N. Ladse handed over the custody of Accused No.1-Sunil, along with his blood stained chopper, to P.N. Pawar for taking him to the Mulund Police Station. PW-11 P.N. Ladse stayed in the hospital with the injured. He made enquiry with injured Jagdish and injured Jagdish told him the names of the assailants, who have assaulted him and his brother PW-2 Vitthal.

9. Meanwhile, PW-24 PSI Madhusudan Joshi and PW-25 PI Ananta Mane, who were attached to Mulund Police Station, on receipt of the information of the incident from PW-11 P.N. Ladse and P.N. Pawar rushed to Mulund General Hospital. There they came to know that Jagdish has succumbed to the injuries, whereas, another injured PW-2 Vitthal was being taken to Sion Hospital. PW-24 PSI Joshi then took PW-2 Vitthal to Sion Hospital. There he obtained permission of PW-23 Dr. Aniruddh Gokhale for recording the statement of injured PW-2 Vitthal and also verified from him whether injured PW-2 Vitthal was in a position to give the statement. Accordingly, he recorded the statement of injured PW-2 Vitthal, with the endorsement of PW-23 Dr. Gokhale thereon about consciousness and fitness of injured PW-2 Vitthal to give such statement. This statement came to be recorded at about 12:15 am. and treating it as an F.I.R., PW-24 PSI Joshi registered thereon offence bearing C.R. No.595 of 2006 against all the Accused on the same night at about 1:25 am.

10. At Mulund General Hospital as injured Jagdish has, by that time, at about 11:15 pm, succumbed to the injuries and was declared dead, API Lahigude made the Inquest Panchanama (Exhibit-25) of his dead body in the presence of Panchas. His dead body was then referred for postmortem examination. PW-18 Dr. Sunil Javale conducted postmortem and found 27 injuries on his body. He issued Postmortem Report (Exhibit-61) accordingly.

11. PW-24 PSI Joshi has, meanwhile, seized the blood stained clothes of the injured PW-2 Vitthal under Panchanama (Exhibit-27). Then he went to the spot along with PW-25 PI Mane and PW-11 P.N. Ladse. The spot of incident was shown by PW-11 P.N. Ladse. The Spot Panchanama (Exhibit-29) was accordingly prepared in the presence of the Panch PW-4 Deepak Jadhav. From the spot, the blood stained and the ordinary mud was seized. The photographs of the scene of offence were also taken vide Article-22 (colly.).

12. PW-24 PSI Joshi then returned to the Police Station, made Station Diary Entry and deposited muddemal in Malkhana. On the same night, at about 1 am, PW-22 PSI Shrikant Ramdas seized the chopper and blood stained clothes of Accused No.1-Sunil under Panchanama (Exhibit-46) in the presence of the Panch PW-10 Raju Jadhav. Accused No.2-Vijay and

Accused No.3-Latesh were arrested on the night of the incident. Their clothes were seized by PW-24 PSI Joshi under Panchanama (Exhibit-34) in the presence of the Panch PW-7 Pradeep Shirodkar.

13. On the next morning, PW-25 PI Mane recorded the statements of P.N. PW-11 Ladse and P.N. Pawar. On 12th December, 2006, he recorded the statements of PW-9 Uttam Gite, PW-15 Jagdish Shetty and PW-16 Kishor Potdar. During the course of investigation on 13th December, 2006, the blood stained clothes of Accused No.4-Sandeep came to be seized under Panchanama (Exhibit-35) in the presence of the Panch PW-6 Gopal Naidu, after his arrest. On 14th December, 2006, Accused No.5-Vishnu and Accused No.6-Anil came to be arrested and their blood stained clothes came to be seized under Panchanama (Exhibit-32) in the presence of Panch PW-6 Gopal Naidu.

14. During police custody on 16th December, 2006, Accused No.5-Vishnu gave a disclosure statement showing his readiness to produce the weapon of assault, the scythe, concealed by him in the bushes near Nahur Bridge. His statement was reduced to Memorandum Panchanama (Exhibit-37) in the presence of the Panch PW-8 Sanjay Shishupal. Thereafter, Accused No.5-Vishnu guided the Panch and PW-25 PI Mane to the spot and produced the scythe, which came to be seized under

Panchanama (Exhibit-38). On the same day, Accused No.6-Anil gave a voluntary statement showing his willingness to produce the weapon of assault, the sword. His statement was reduced to Memorandum Panchanama (Exhibit-39). Thereafter, he guided Panch PW-8 Panch Sanjay Shishupal and PW-25 PI Mane to the bus stop at Airoli and produced the blood stained sword, which came to be seized under Panchanama (Exhibit-40).

15. On 19th December, 2006, PW-25 PI Mane recorded supplementary statement of injured PW-2 Vitthal in Sion Hospital, after ascertaining that he was in a position to give the statement. On 14th and 20th December, 2006, the seized articles were sent to Chemical Analyzer at the hands of PW-12 P.N. Pradip Kadam vide requisition letter (Exhibit-51) and PW-14 Police Constable Minakshi Salve vide requisition letter (Exhibit-55). The C.A. Reports are produced in the case at Exhibits “63” and “101” to “110”. Further to completion of investigation, Charge-Sheet came to be filed in the Court against all the Accused for the various offences.

16. On the case being committed to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-3. The Accused denied the guilt and claimed trial. Their defence is of denial. In support of its case, the Prosecution examined in all 25 witnesses. On appreciation of their

evidence, the Trial Court convicted and sentenced the Accused, as aforesaid.

17. We have heard learned Counsels for the Appellants and learned A.P.P. for the Respondent-State. In our considered opinion, before adverting to their submissions, it would be useful to refer to the evidence on record.

18. The entire case of the Prosecution revolves around the evidence of injured eye witness PW-2 Vitthal and another independent eye witness PW-11 P.N. Ladse with corroborating evidence, like, the Postmortem Report of deceased Jagdish (Exhibit-61), Injury Certificate of PW-2 Vitthal (Exhibit-20), Complaint (Exhibit-23) lodged immediately after the incident and various Recovery Panchanamas of Muddemal Articles and blood stained clothes of the Accused.

19. Coming first to the homicidal death of Jagdish, the Prosecution has relied upon the Inquest Panchanama (Exhibit-25), which is admitted in evidence by the Defence Counsel under Section 294 of the Code of Criminal Procedure, and the evidence of PW-18 Dr. Sunil Javale, who has conducted the postmortem examination. At the relevant time, he was attached to Rajawadi Hospital Postmortem Center. Dead body of Jagdish

was brought there by API Lahigude on 11th December, 2006 at about 6:15 am, along with Inquest Panchanama (Exhibit-25). On examination, he found following external injuries on the dead body of Jagdish Narayan Hingne :-

- (1) *Sutured wound left parietal, horizontal on opening of sutures clean cut margins 9 x 1 x bone deep.*
- (2) *Two incised wounds meet each other on vertex, 2 form 'V' shape, pointed posterior, each limb, 7 x 1 x bone deep.*
- (3) *Incised wound crossing injury No.2, 4 x 1 x bone deep.*
- (4) *Incised wound horizontal near injury No.3, 8 x 1 x bone deep.*
- (5) *Incised wound over posterior vertex to left parietal, 9 x 1 x bone deep.*
- (6) *Abrasion contusion linear, left infra scapula, 12 x ½.*
- (7) *Abrasion contusion linear, left forearm, outer aspect, vertical 11 x ½.*
- (8) *Incised wound left forearm, posterior medial aspect, vertical, 8 x 2 x 2.*
- (9) *Incised wound left forearm, horizontal, posterior medial, 3 x 2 x 2.*
- (10) *Incised wound medial parallel wrist band, left side, 3 x 2 x 2.*
- (11) *Incised wound posterior wrist left to middle finger 13 x 4 x bone deep.*

- (12) *Incised wound bevelled degloving left little finger/partial amputation 3 x ½ x ¼.*
- (13) *Incised wound ring finger posterior on ring finger to medial 4 x ½ x ¼ left side.*
- (14) *Stab wound left side of chest 8 cm below nipple / 4 x 1.5 x cavity deep.*
- (15) *Linear abraded contusion at right shoulder 8 x ½ superior aspect.*
- (16) *Linear abraded contusion right shoulder outer aspect 7 x ½.*
- (17) *Linear abraded contusion right elbow 6 x ½.*
- (18) *Incised wound posterior forearm right side near elbow horizontal telling laterling 6 x 3 x 2.*
- (19) *Incised wound in middle of right forearm posterior, horizontal, 5 x 2 x 2.*
- (20) *Incised wound posterior near breast 4 x 2 x 2 horizontal, right side.*
- (21) *Incised wound medial right wrist, 4 x 1 x 1.*
- (22) *Incised wound posterior on right palm 7 x 4 x 1 beveling horizontal telling medial.*
- (23) *Incised wound posterior palm at the base of little finger and ring finger, horizontal, 6 x 3 x bone deep.*
- (24) *Chop wound at right base of thumb joint cut, skin at lateral ends intact shows bones muscles cut sharp margins, 9 x 4.*
- (25) *Stab wound 2 cm above right nipple / 4 x 1.5 x cavity deep.*
- (26) *Incised wound just above right knee 2 x 1 x 1.*

(27) *Stab wound left infra scapula 2 x 1 x cavity deep / track traced goes upto lower part of pericardial through lungs left side, all injuries reddish oedematous.*

20. Further, PW-18 Dr. Sunil Javale found corresponding internal injuries and, on the basis of his examination, he opined that the cause of the death was “*shock due to head injury in the form of fracture skull bones with intra cranial haemorrhage with stab wounds with multiple incised wounds (unnatural)*”. Accordingly, he has issued Postmortem Report (Exhibit-61). He has further deposed that injury Nos.1 to 5, 14, 20 and 27 were on the vital parts of the body and were sufficient in the ordinary course of nature to cause the death. In evidence before the Court, he has stated that all the injuries, which were found on the dead body, are possible by Muddemal Article Nos.5 to 7, i.e. scythe, sword and chopper, recovered from the Accused.

21. As regards injured PW-2 Vitthal, his Injury Certificate (Exhibit-20) is proved on record through the evidence of PW-1 Dr. Ajit Kale. He was attached to Mulund General Hospital. According to his evidence, at about 10:50 pm on 10th December, 2006, injured PW-2 Vitthal was brought to the hospital by his friends. He gave the history of assault by sharp object by known persons before 20 to 30 minutes. On his examination, he found following injuries :-

- (1) *Incised wound right side of forehead 3 cm x bone deep. There was crack felt on outer table of skull.*
- (2) *Incised wound on right forearm extensor aspect, his finger movements restricted.*
- (3) *Incised wound right hypocondrium, omentum seen protruding out. Depth not confirmed, peristalsis present, chest air entry both sides equal, breath sounds normal.*

22. He has, accordingly, issued Injury Certificate (Exhibit-20) and the certified copy of the MLC Register (Exhibit-19). As injured PW-2 Vitthal needed emergency exploration in view of wound on abdomen, he was then shifted to the Sion Hospital.

23. Learned Counsels for the Accused are also not disputing the factum of homicidal death of Jagdish and the injuries found on the person of PW-2 Vitthal.

24. To prove the fact that the authors of the injuries found on the person of PW-2 Vitthal and on the dead body of Jagdish, Prosecution has relied upon the evidence of two eye witnesses. Out of them, the star witness for Prosecution is injured PW-2 Vitthal. His evidence goes to reveal that on 10th December, 2006, at about 10:20 pm to 10:30 pm, he was returning, along with his brother deceased Jagdish, from the office of PW-9 Uttam Gite, the worker of Congress (I) Party. They were walking on the road.

When they reached near Sant Pyas Lane, these 6 Accused came from opposite direction. Accused No.1-Sunil was holding chopper, Accused No.6-Anil was holding sword and Accused No.5-Vishnu was holding sickle. All these 6 Accused assaulted him and his brother Jagdish with weapons in their hands on account of the old enmity. He was assaulted by Accused No.5-Vishnu, Accused No.6-Anil and Accused No.4-Sandeep on his right wrist, near his eye and on the abdomen, whereas, Accused Nos.1-Sunil, Accused No.2-Vijay and Accused No.3-Latesh assaulted his brother Jagdish on his head, hands and other parts of the body. During incident, he shouted "*bachao...bachao...*" and listening his shouts, two Police Officers rushed near them. One of the Police Officers caught hold of Accused No.1-Sunil with weapon in his hand on the spot. The other Police Officer tried to chase the remaining Accused, but those Accused succeeded in fleeing away from the spot. Those two Police Officers then, with the help of one more person, took him and his brother Jagdish in auto-rickshaw to Mulund General Hospital. Subsequently, he came to know the name of the said unknown person with whose help he was brought to the hospital as Kishor Potdar, who is examined in the case as PW-16.

25. PW-2 Vitthal has further deposed that while proceeding to the hospital, on the way, he saw PW-15 Jagdish Shetty. He signaled him to

come to the hospital. The other Police Officer also, after some time, came to the hospital with Accused No.1-Sunil. He and his brother were examined and given the treatment. Subsequently, he was referred to the Sion Hospital for better treatment along with Police Officer PW-24 PSI Joshi. At Sion Hospital, in the presence of Medical Officer on duty, his complaint came to be recorded by PW-24 PSI Joshi vide Exhibit-23. He was in the hospital till 21st December, 2006. During his stay in the hospital, on 19th December, 2006, PW-25 PI Mane has recorded his supplementary statement. In evidence before the Court, he has identified the blood stained clothes, which he and his brother Jagdish were wearing at the time of incident. He has also identified the weapons of assault recovered from the Accused.

26. In his cross-examination, further details of the incident are brought on record. It is deposed by him that Accused persons had assaulted him and his brother Jagdish simultaneously. It is also brought on record that he was knowing Accused No.2-Vijay and Accused No.3-Latesh since his childhood. They were close friends of one Yogesh Rathod. Yogesh Rathod was belonging to the political party of Rashtravadi Congress, of which Accused were also the members, whereas, he himself and his brother Jagdish were from Congress (I) Party. PW-9 Uttam Gite and PW-15 Jagdish Shetty were also members of the Congress (I) Party. It is brought

out from his cross-examination that at the time of lodging the complaint (Exhibit-23), he was not aware of the fact of the death of his brother Jagdish. He has further stated that he was fully conscious at the time of lodging complaint (Exhibit-23) and was also aware of the injuries caused to him. The distance between the Mulund General Hospital and the spot of incident was seven minutes by auto-rickshaw. Thus, his evidence has remained completely unshattered on record.

27. The only ground on which his evidence is assailed by the Defence Counsel is that in the complaint (Exhibit-23), he has not given the details as to which Accused was holding which weapon and which Accused has assaulted him. He has also not attributed specific overt act to each of the Accused, which he has done in his evidence before the Court. It is submitted that this part of his evidence is in the nature of omissions, hence need to be disbelieved. By drawing our attention to the complaint (Exhibit-23), it is urged that it is a very short statement, making general allegations against the Accused of assaulting him and his brother Jagdish with the various weapons, like, chopper, knife, sickle, sword etc., without attributing any specific overt act to any of the Accused.

28. In our considered opinion, this fact can be easily explained, because his evidence supported with the evidence of PW-1 Dr. Ajit Kale,

who has immediately examined him in the hospital, goes to reveal that he himself has sustained serious and grievous injuries in the same incident, whereas, his brother Jagdish has sustained as many as 27 injuries. All the six Accused were making simultaneous assault on him and his brother Jagdish with various weapons in their hands. In such situation, when he was bound to be in a traumatic condition, even at the time of recording of his complaint, it was just not possible for him to state in detail the specific overt act of each of the Accused. Conversely, if he has done so, it would have created suspicion about the truthfulness of the complaint. In his supplementary statement and in his evidence before the Court, he has given these details. It must be remembered that the complaint was recorded by PW-24 PSI Joshi immediately after the incident, within two hours, at about 12:15 am, while he was undergoing the treatment for the serious injuries sustained by him in the assault. Therefore, it is but natural that the complaint will not be in detail and elaborate. Whatever essential particulars were required to be mentioned in the complaint are finding recitals therein. Names of all the six Accused are found mentioned therein along with weapons with which the Accused had assaulted him and deceased Jagdish. Therefore, we do not find any fault in the complaint (Exhibit-23). Conversely, it is the spontaneous, truthful document and completely corroborates and fortifies his evidence. As a

matter of fact, this prompt lodging of F.I.R. and registration of the offence within two hours after the incident gives an in-built guarantee of the credibility of the Prosecution case and its veracity.

29. His evidence gets further support and corroboration from the evidence of PW-11 P.N. Ladse, who is also an eye witness to the incident. As deposed by him, on that night he was on patrolling duty along with P.N. Pawar from 7:15 pm onwards. He and Pawar were patrolling on their motor cycle. At about 10:20 pm, when they were passing from near the spot, they heard the shouts of “*bachao...bachao....*”. Hence, they rushed there and found that two persons were being assaulted by six persons with chopper, sword and knife. Hence, they got down from the motor cycle. However, seeing them, those assailants started running away. PW-11 P.N. Ladse succeeded in catching hold of Accused No.1-Sunil with blood stained chopper in his hand. The other Accused persons, however, succeeded in running away from the spot. Then, with the help of PW-16 Kishor Potdar, who had also reached there after hearing the shouts for help, he and P.N. Pawar took injured persons in auto-rickshaw to the Mulund General Hospital. He also took Accused No.1-Sunil in Maruti Car to the said hospital. On the way, they met PW-15 Jagdish Shetty, who identified both the injured. After reaching at Mulund General Hospital, he informed his senior PW-24 PSI Joshi and handed over the custody of

Accused No.1-Sunil, with blood stained chopper, to P.N. Pawar for being taken to Police Station.

30. PW-11 P.N. Ladse remained in the hospital along with PW-15 Jagdish Shetty and PW-16 Kishor Potdar. He made enquiries with injured Jagdish in the hospital and from him he came to know the names of the assailants i.e. Accused No.1-Sunil, Accused No.4-Sandeep, Accused No.5-Vishnu and Accused No.6-Anil. He noted their names in his diary. While treatment of both the injured was going on, PW-22 PSI Ramdas, PW-24 PSI Joshi and PW-25 PI Mane came there. Injured PW-2 Vitthal was then taken to Sion Hospital by PW-24 PSI Joshi, whereas, injured Jagdish succumbed to injuries at 11:20 pm.

31. During his cross-examination, it is brought on record that Mulund General Hospital was hardly at the distance of 7 to 10 minutes from the spot of incident. During transit, he did not get time to use wacky-talky, which was with him. It is further brought out that in the EPR Register, no entry about the incident was made. Except for this fact, no other discrepancies are brought out in his cross-examination to challenge his evidence in any way. He is totally an independent eye witness, who was on official duty, and while doing so, he came across this incident of assault on two persons by six assailants with various weapons in their hands.

Hence, he has discharged his duties properly by going to the help of injured and in succeeding to arrest one Accused at the spot with the weapon of assault. From the mere fact that in the EPR Register, the entry was not made that too, when he had already informed the Police Station and Police Officers had also rushed there, no infirmity can be found in his evidence.

32. There is further corroboration to the evidence of injured PW-2 Vitthal and PW-11 P.N. Ladse from the testimony of PW-15 Jagdish Shetty. On the date of incident, he had also gone to the office of PW-9 Uttam Gite. He was there upto 10 pm, during which time, injured PW-2 Vitthal and his brother deceased Jagdish had also came there. At 10 pm, he left the office. At about 10:30 pm, he received phone call of injured PW-2 Vitthal that someone has assaulted him and his brother Jagdish at Sant Pyas Road. Hence, he went there and met deceased Jagdish and injured PW-2 Vitthal. While they were proceeding in auto-rickshaw to the hospital, he followed them in his car. Though he has not supported the Prosecution case as regards oral Dying Declaration made by deceased Jagdish before P.N. PW-11 Ladse, whatever he has deposed supports the evidence of injured PW-2 Vitthal that he and his brother Jagdish had gone to the office of PW-9 Uttam Gite and while returning, this assault took place on him

and his brother and on the way, they met this witness and he also came to the hospital.

33. There is also supporting evidence of PW-16 Kishor Potdar, again a totally independent witness, who has accompanied injured in the auto-rickshaw to the Mulund General Hospital. As per his evidence, he saw both these injured lying on the spot. Hence, he assisted PW-11 P.N. Ladse in taking the injured to the hospital. Of-course, he has also not supported the Prosecution case as regards the oral Dying Declaration made by Jagdish before P.N. PW-11 Ladse. His evidence about taking the injured to the hospital, however, supports the testimony of injured PW-2 Vitthal and P.N. PW-11 Ladse.

34. There is further corroborating evidence of PW-9 Uttam Gite, who has also deposed about injured and deceased Jagdish coming to his office on that night, when PW-15 Jagdish Shetty was sitting there. According to his evidence also, at about 10:30 pm to 10:45 pm, he received the phone call of PW-15 Jagdish Shetty informing that PW-2 Vitthal and his brother Jagdish were attacked and both were taken to Mulund General Hospital. Then he also went there.

35. If at all any further corroboration is required, then, it is also coming

from the medical evidence on record. As discussed above, PW-1 Dr. Ajit Kale has found three incised wounds caused by sharp edged weapons on the body of PW-2 Vitthal, whereas, evidence of PW-18 Dr. Sunil Javale, who has conducted the postmortem examination on the dead body of Jagdish, proves the fact that there were as many as 27 injuries found on the vital parts of the body of the deceased, again caused by sharp edged weapons. Thus, in this case, the ocular account of the incident goes hand in hand with medical evidence and together they go to prove the case of Prosecution beyond reasonable doubt.

36. There is corroborating evidence of PW-23 Dr. Gokhale, who was attached to Sion Hospital and in whose presence the complaint of injured PW-2 Vitthal was recorded by PW-24 PSI Joshi vide Exhibit-23. At that time, he has examined PW-2 Vitthal and found him to be conscious and mentally fit to give the statement. His endorsement (Exhibit-80) accordingly is appearing on the said complaint.

37. There is also evidence of PW-24 PSI Joshi and PW-25 PI Mane, who have rushed, initially, to the Mulund General Hospital and from there PW-24 PSI Joshi had taken injured PW-2 Vitthal to the Sion Hospital and recorded his complaint on the very night registering the offence. The evidence of PW-22 PSI Ramdas also goes to prove that on that night

itself, he has arrested Accused No.1-Sunil, when he was brought to Police Station by P.N. Pawar. PW-11 P.N. Ladse has produced blood stained chopper seized from Accused No.1-Sunil. The said chopper and the blood stained clothes of Accused No.1-Sunil were seized on that night at about 00:50 hours under Panchanama (Exhibit-46).

38. As per the evidence of PW-24 PSI Joshi and PW-25 PI Mane, during the course of investigation, the remaining Accused came to be arrested and, at their instance, the weapons of assault and their blood stained clothes came to be seized under various Panchanamas. The learned A.P.P. has relied upon these Panchanamas and the C.A. Reports to submit that the C.A. Reports show that blood stains on the chopper were matching with the blood group of the deceased, and, even on the other weapons and the clothes of the Accused, human blood stains were found, which further corroborates the case of Prosecution.

39. The learned Counsels for the Accused, however, pointed out to us that the contents of the C.A. Reports were not put up to the Accused in their statement recorded under Section 313 of the Code of Criminal Procedure; hence, as no opportunity was given to the Accused to explain the same, this recovery evidence cannot be relied upon. In our considered opinion, even if this submission is accepted and in order to avoid any

semblance of prejudice likely to be caused to the Accused, the evidence relating to the recovery of the weapons and of the presence of blood stains thereon is left out of consideration, it will not affect the Prosecution case in any way, as there is strong and clinching evidence of the injured and the eye witness PW-2 Vitthal, which is fully supported and corroborated by the evidence of another independent eye witness PW-11 P.N. Ladse and medical evidence on record. The Prosecution case, therefore, in our considered opinion, stands proved beyond any shadow of doubt.

40. Coming to some other submissions advanced by learned Counsels for Accused, it is submitted by the learned Counsel for Accused No.1-Sunil, Shri. Gupte that PW-10 Panch Raju Jadhav, in his evidence before the Court, has stated that the knife was seized. However, the Panchanama (Exhibit-46) goes to prove that what was seized from Accused No.1-Sunil was the chopper and not the knife. In our opinion, it is too insignificant a discrepancy to be paid attention to it. In view of the description in the Panchanama, it was a chopper. Merely because PW-9 Uttam Gite has called the said weapon as knife, it does not become knife.

41. Secondly, learned Counsel for Accused No.1-Sunil has submitted that PW-1 Dr. Ajit Kale has deposed that the injured PW-2 Vitthal was

brought to the Mulund General Hospital by his friends. It is urged that who are the friends of PW-2 Vitthal is not explained by the Prosecution. In our considered opinion, this is again quite an irrelevant fact as to who has brought injured to the hospital. It appears that as PW-16 Kishor Potdar has brought the injured to the hospital, it might have been written accordingly. However, as deposed by PW-1 Dr. Ajit Kale, the history has been given before him by injured PW-2 Vitthal himself and he has categorically stated that the history was of assault by sharp object by known persons before 20 to 30 minutes.

42. Learned Counsel Naima Shaikh for Accused No.2-Vijay and Accused No.3-Latesh, has submitted that the names of Accused No.2-Vijay and Accused No.3-Latesh are involved subsequently as an after-thought. According to her, in the alleged oral Dying Declaration before P.N. PW-11 Ladse, deceased Jagdish had not taken the names of Accused Nos.2 and 3. Accordingly, in the Station Diary also the names of Accused Nos.2 and 3 are not appearing as the assailants of deceased Jagdish. Even PW-2 Vitthal has not deposed that Accused Nos.2 and 3 were holding or carrying any weapons in their hands. Whatever overt act he has attributed to them in evidence before the Court is in the nature of omissions, as he has admitted that he has not stated it in his statement. No recovery of weapons is also made at the instance of Accused Nos.2

and 3; therefore, according to her, they cannot be implicated for the offences charged.

43. In our considered opinion, this submission cannot be accepted in the face of overwhelming evidence on record that of the testimony of PW-2 Vitthal, who has categorically deposed about all these Accused assaulting him and his brother with the weapons in their hands. Their names are also finding mention in the complaint (Exhibit-23) lodged immediately. The evidence on record also proves that all the Accused have come together at the spot and started assault on, both, PW-2 Vitthal and his brother Jagdish simultaneously. Therefore, merely because in the traumatic and serious condition in which deceased Jagdish was, when he made that oral Dying Declaration to PW-11 P.N. Ladse, he has not stated about the specific overt act committed by these two Accused, their case cannot be differentiated so as to give them benefit of doubt. Their presence at the spot and their complicity in the assault is required to be held as proved.

44. Thus, the evidence on record proves the fact that Accused Nos.1 to 6 came at the spot together, being armed with deadly weapons, and mercilessly assaulted, both, deceased Jagdish and PW-2 Vitthal with the weapons in their hands. This fact is sufficient to prove that the assault was

made with premeditation with a common object to commit the murder of both Jagdish and PW-2 Vitthal. Hence, all the 6 Accused are required to be held guilty for both the offences punishable under Sections 302 and 307 r/w. 149 of the IPC. In paragraph No.62 of the Judgment, the Trial Court has also arrived at the same conclusion categorically observing that,

“the facts and evidence brought on record reveals that all the Accused persons with their common object to commit the murder of Jagdish and Vitthal formed an unlawful assembly and at the relevant date and time attacked on them with deadly weapons causing them severe bodily injuries, which resulted into the death of Jagdish Narayan Hingane”.

45. However, thereafter Trial Court has distinguished the overt acts attributed to the various Accused on the basis of the evidence given by PW-2 Vitthal and held them guilty for different offences. The Trial Court has held that,

“as per evidence of Vitthal Hingane, Accused Sunil Chandanshive, Latesh Karlekar and Vijay Nirmal @

Istriwala assaulted Jagdish Hingne and therefore they are the author of his death. Similarly, accused Sandip Bhosale, Vishnu Bule and Anil Gadekar assaulted Vitthal hingne causing stab wounds and severe bodily injuries on vital part of his body and thus I have no hesitation to hold that, the prosecution has proved the case U/s. 143, 144, 147, 148, 302 r/w. 149 of I.P.C. against accused No.1 to 3 and Sec. 143, 144, 147, 148, 307 r/w. 149 of IPC against accused No.4 to 6 beyond all reasonable doubts”.

46. In our considered opinion, the Trial Court has completely erred in adopting this approach. Once the formation of unlawful assembly, that too, with the common object of committing the murder of both Jagdish and PW-2 Vitthal is proved, then all the Accused have to be held guilty for both the offences punishable under Sections 302 and 307 r/w. 149 of the IPC. There cannot be two different objects of the members of unlawful assembly one of committing murder of one and another of attempting to commit murder of another. Then it will no more remain the 'common' object. At-least in the facts of the present case, from the manner in which all the Accused have participated in assault on both Jagdish and PW-2 Vitthal simultaneously with the weapons in their hands, no separate

common object on the part of Accused Nos.1 to 3 on one hand and Accused Nos.4 to 6 on another hand can be distinguished. Curiously enough, though there can be common object of committing murder, there cannot be common object of “an attempt to commit murder”. Merely because in the said incident, PW-2 Vitthal was fortunate enough to survive on account of the timely help, it cannot be legally permissible to hold that Accused Nos.4 to 6 had the common object of only committing 'attempt of his murder'. Hence, the Trial Court should have convicted all the Accused for both the offences punishable under Sections 302 and 307 of IPC with the aid of Section 149 of the IPC, especially, as the Trial Court has already held even the charge of Sections 143, 144, 147 and 148 proved against all the Accused.

47. In our considered opinion, the Trial Court has, thus, committed an error in acquitting Accused Nos.4 to 6 for the offence punishable under Section 302 r/w. 149 of the IPC. It was, therefore, a fit case where Prosecution should have preferred an Appeal challenging the acquittal of Accused Nos.4 to 6 for the offence punishable under Section 302 r/w. 149 of the IPC. As the Prosecution has not done so, we are precluded from interfering in the said order of acquittal and are constrained to maintain it. However, as in such situation, charge of forming unlawful assembly with the common object and committing riot in prosecution of the said common

object cannot be sustained, we have to set aside the conviction of all the Accused for the offences punishable under Sections 143, 144, 147 and 148 of the IPC.

48. As a result, we have to convert the conviction of Accused Nos.1 to 3 for the offence punishable under Section 302 of the IPC read with Section 34, whereas, conviction of Accused Nos.4 to 6 for the offence punishable under Section 307 r/w. 34 of the IPC.

49. Similarly, as regards the offence punishable under Section 4 r/w. 25 of the Arms Act and Section 37(1)(a) r/w. 135 of the Bombay Police Act, in the absence of the original prohibitory order being produced on record, the conviction for the said offence cannot be maintained and hence to this limited extent, we have to interfere in the order of the Trial Court.

50. We are also unable to accept the alternate submission made by learned Counsel for Accused Nos.4 to 6 Shri. Sejpal to reduce the punishment of Accused Nos.4 to 6 to the period of imprisonment already undergone by them, having regard to the gravity of the offence proved against them and considering the fact that Trial Court has already committed an error in acquitting them for the offence punishable under Section 302 r/w. 149 IPC.

51. Consequently, all these Criminal Appeals are partly allowed. Conviction and sentence of the Appellants/Accused for the offences punishable under Sections 143, 144, 147 and 148 of the IPC, Section 4 r/w. 25 of the Arms Act and Section 37(1)(a) r/w. 135 of the Bombay Police Act is hereby quashed and set aside. The conviction of Appellant Nos.1 to 3 for the offence punishable under Section 302 r/w. 149 of the IPC is modified to Section 302 r/w. 34 IPC. The sentence awarded by the Trial Court is maintained. Similarly, the conviction of Accused Nos.4 to 6 for the offence punishable under Section 307 r/w. 149 IPC is modified to Section 307 r/w. 34 IPC. The sentence awarded by the Trial Court is maintained.

52. Bail Bonds of Accused Nos.2 to 6 stand cancelled. Eight weeks time is given to them to surrender to their Bail Bonds.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]