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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 261 OF 2011

1.Suhas Dattatray Panchal,

Age 46 Years, Occ: painter/Carpenter,
R/o Nagesh Patil Wadi, Khar Deo Nagar,
Near Karnataka High School,
Ghatala, Chembur,
Mumbai-400 071.

2.Sanjay Sakharam Mandavkar

Age 54 years, Occ: Painter,
R/o Khardev Nagar, Nagesh Patil Wadi,
Chembur, Mumbai-400 071.

..Appellants
(Orig.Accused Nos.1 & 2)

Vs.

State of Maharashtra

(through Chembur Police Station)

..Respondent.

WITH

CRIMINAL APPEAL NO. 269 OF 2011

Chandan @ Chandya Ramchandra

Lokhande, age 38 years, Occ: service,
Residing at : Nagesh Patil Wadi,
Khardev Nagar, Ghatala, Chembur,
Mumbai-400 071.

..Appellant
(Org.Accused No.3)

Vs.

State of Maharashtra

(through Chembur Police Station)

..Respondent.

**WITH
CRIMINAL APPEAL NO. 189 OF 2011**

Sunil @ Shendy Rajaram Mandavkar,

Aged about 42 years,
Occupation Electrician,
Residing at Nagesh Patil Wadi,
Khardeo Nagar, Ghatla Village,
Mumbai-400 071.

At present undergoing the sentence
imposed upon him at Yerwada Road
Central Prison, Pune.

**..Appellant.
(Org.Accused No.4)**

Vs.

The State of Maharashtra
(at the instance of Social Service Branch,
Chembur Police Station
vide C.R. No.37 of 1993.)

..Respondent.

Mr. S.R. Chitnis, Senior Advocate i/b Mr. Jayant Bardeskar for
Orig.Accused Nos.1 & 2 in Appeal No.261/2011.

Mr. S.R. Chitnis, Senior Advocate i/b Mr. Sudeep Pasbola & Rahul Arote
for Orig. Accused No.4 in Appeal No.189/2011.

Mr. S.R.Chitnis, Senior Advocate i/b Mr. Hrishikesh Mundargi for
Orig.Accused No.3 in Apeal No.269/2011.

Mr. H.J. Dedhia, APP for State.

**CORAM: Smt. V.K. Tahliramani, Acting C.J. &
A.S. Gadkari, J.**

Reserved On: 29th September 2015

Pronounced On: 27th October 2015.

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellants, have impugned the judgment and order dated

17th February 2011 passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No.826 of 1993 thereby convicting them for the offences punishable under Sections 143, 144, 147, 148, 149, 120-B, 427 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and with fine of Rs.300/- each and in default of payment of fine to undergo further rigorous imprisonment for 15 days. By the same judgment and order, the appellants have also been convicted under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and with fine of Rs.1000/- each and in default of payment of fine to undergo further R.I. for one month. The Trial Court has directed that the substantive sentences to run concurrently.

By the said judgment and order dated 17.02.2011, the Trial Court was pleased to acquit the appellants for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code and under Section 37 (A) read with Section 135 of the Bombay Police Act. The original accused no.5 Mohan Ramchandra Bane has been acquitted from all the charges framed against him.

Since the original accused nos.1 to 4 have filed three different appeals, for the sake of brevity hereinafter they will be referred to as

accused nos.1 to 4 as was referred before the Trial Court.

2 The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated thus:

(i) The date and time of the incident is 10.1.1993 between 10.00 p.m. to 11.00 p.m. Ms. Salima Gani Shaikh (PW-2) was residing at Khardev Nagar, Ghatla village, Chembur, Mumbai-71. Her family members consisted of herself, her parents, one elder sister and two younger brothers. Her father Mr. Gani Maula Shaikh was a driver on the car of one Mr. Kavle situated opposite Swastik Chambers. She was studying in 7th class in Ghatla Municipal School in Marathi medium. Her brothers Raju and Mohammed were studying in 4th and 5th standard respectively. The accused no.2 Sanjay Mandavkar was residing near the house of the complainant.

(ii) Prior to one month from the date of incident, the communal riots took place in the city of Mumbai. In the said riots, the brother of the accused no.2 was assaulted at Deonar and therefore the accused no.2 had beaten father of PW-2 namely Mr.Gani Maula Shaikh and had threatened her father to vacate the room. The mother of PW-2 namely Mrs. Rabiya Gani Shaikh had therefore lodged a complaint with the Chembur Police station.

(iii) That on 8.1.1993 the accused no.2 Sanjay Mandavkar had visited the complainant's house and had threatened her father to vacate the room till the evening failing which he will finish her father. That on 10.1.1993 in the night at about 10 p.m. PW-2 Salima, her parents and her siblings were sleeping in their house. At about 11.00 p.m., she heard the noise of pelting of stones on her house. She noticed that the accused were holding arms in their hands and there were other persons along with them. That the accused nos.1 and 2 namely Suhas Panchal and Sanjay Mandavkar tried to drag her father out of the house. At that time her mother intervened to save her father. However, when her mother did not leave her father, the accused nos.1 and 2 assaulted her mother with sword. Her mother died on the spot. Her mother had asked her (PW-2) and her siblings to conceal themselves beneath the cot (khat). After the mother of PW-2 died on the spot, the said persons dragged her father out of the house. Miss. Salima came out of the house. Her elder sister and one brother ran away in the lane. One of her younger brothers was beaten by accused no.2 Sanjay with sword. Her brother sustained injury on the leg. She came out of her house and saw that the accused namely accused no.2-Sanjay Mandavkar, accused no.1-Suhas Panchal, accused no.4-Sunil Mandavkar, Nishikant Vaishnav, accused no.3-Chandan Lokhande, Umakant assaulted her father and then

threw him in front of the house.

(iv) In the meantime, Mohammed (PW-3) the brother of PW-2 Salima rushed towards the road for police aid. At that time the police van came at the spot and removed her father to hospital. Her father was seriously injured. The accused destroyed the hut of Salima (PW-2).

(v) Ms.Salima (PW-2) thereafter lodged the first information report with Chembur Police Station on 11.1.1993 at about 00.10 a.m. The said first information report is at Exhibit 47. Shri Prahalad Sonawane (PW-11) started investigation. The father of the complainant namely Mr. Gani Maula Shaikh succumbed to injuries in the hospital. Dr. Pravin Bagul (PW-4) conducted the postmortem examination on the dead body. He submitted the postmortem reports of Mr. Gani Maula Shaikh and Mrs.Rabiya Gani Shaikh which are at Exhibits 50 and 55 respectively. The Investigating Officer recorded the statements of various witnesses during the course of investigation. The test identification parade was held by Smt. Bhushana Pathare, (PW-6) SEO. After receipt of Chemical Analyzer's report and other relevant documents, the Investigating Officer submitted chargesheet against the accused and original accused no.5 Mohan R. Bane in the Court of Additional Chief Metropolitan Magistrate, Kurla, Mumbai. The learned Additional Chief Metropolitan Magistrate committed the said case to the

Court of Sessions as contemplated under Section 209 of Cr. P.C. as the offence punishable under Section 302 was exclusively triable by the Court of Sessions.

(vi) The learned Trial Court framed charge below Exhibit 8 against the original accused nos.1 to 5 for the offence punishable under Sections 143, 144, 147, 148, 149, 302, 307, 427 read with Section 120(B) and 34 of the Indian Penal Code and under Section 37 read with Section 135 of Bombay Police Act. The contents of the said charge were read over and explained to the accused persons. The accused nos.1 to 5 pleaded not guilty and claimed to be tried. The prosecution in support of its case examined in all 11 witnesses. The learned Trial Court after recording the evidence of the witnesses and after hearing the parties to the said case was pleased to convict the accused by the impugned judgment and order dated 17.02.2011 as stated hereinabove. By the same judgment and order, the learned Trial Court acquitted the original accused no.5 Mohan R. Bane from all the charges framed against him. The original accused nos.1 to 4, the appellants herein, have impugned the said judgment and order dated 17.02.2011 thereby convicting them.

3 Heard at length, Mr. S.R. Chitnis, the learned Senior Counsel alongwith Mr. Jayant Bardeskar, Mr. Sudeep Pasbola, Mr. Rahul Arote, Mr.

Hrishikesh Mundargi for the accused persons/appellants and Mr. H.J. Dedhia, the learned APP for the State and with their assistance we have perused the entire record pertaining to the present case.

4 Mr. Chitnis, learned Senior Counsel for the appellants at the outset submitted that the appellants have been acquitted from charge which is at serial no.10 below Exhibit-8 under Section 37(A) read with 135 of Bombay Police Act meaning thereby that the possession of the arms with the appellants has not been proved by the prosecution and therefore there is presumption that the accused were not holding any arms and hence they are ex-facie entitled for acquittal from all the charges in the case. We are afraid to accept the said submission and are of the opinion that the said submission is to be recorded only for its rejection at its threshold as it is de hors of any merits. In the present case the 10th charge which is framed below Exhibit-8 by the Trial Court reads as under:

“That you accused no.1 to 5 alongwith wanted accused persons on the aforesaid date, time and place were possessing the prohibited weapons i.e. Sword, Gupti, Chopper, Kife, iron bars, sticks etc and committed the breach of prohibited orders issued by the Commissioner of Police, Mumbai U/s 37(A) r/w 135 of Bombay Police Act within my cognizance.”

5 The learned Trial Court in its judgment and order has taken the

said charge for its determination at point no.10 which reads as under:

“10. Whether the prosecution proved that in night of 10-1-1993 the accused were possessing weapons like swords, Gupti, Chopper, Knife, Iron rod, Sticks in contravention of prohibitory order issued by Commissioner of Police u/s 37(A) of Bombay Police Act and thereby committed an offence punishable u/s 135 of Bombay Police Act?”

6 The learned Trial Court while recording the finding on the said point no.10 has held that, to prove the said charge it was necessary on the part of the prosecution to prove that, the Commissioner of Police passed prohibitory orders under Section 37(A) of Bombay Police Act and the said order was promulgated in the vicinity where the offence was committed. It has been held that the prosecution has not led any evidence to show that on a particular date the Commissioner of Police, Mumbai passed prohibitory order under Section 37(A) of the Bombay Police Act and the same order was duly promulgated by affixing it at conspicuous places within the vicinity of Ghatla village near Karnataka High School. That the prosecution has placed a notification dated 7.1.1993 on record which speaks that the Commissioner of Police, Mumbai passed an order under Section 37 (A) of Bombay Police Act and prohibited to carry arms like,

swords, cudgel, spear, bludgeon, gun, knife, stick, lathi or any other article which is capable of being used for causing physical violence. That mere placing the copy of notification on record to show existence and operation of the prohibitory order does not automatically proves it without there being cogent evidence in that behalf. The Trial Court therefore held that the prosecution failed to prove the offence punishable under Section 135 of Bombay Police Act and recorded negative finding to the said point no.10.

Thus, it is clear that as the prosecution failed to prove the promulgation of the said order passed by the Commissioner of Police, Mumbai, the charge under Section 37(A) read with Section 135 of Bombay Police Act could not be proved. By advancing the aforesaid submission, Mr. Chitnis, learned Senior Counsel, inter alia, wants to impress upon this Court that because of the said technical lapse on the part of prosecution, the accused persons are entitled for clear acquittal from all the charges, despite the fact that there is direct evidence i.e. ocular evidence of witnesses in the present case. We, therefore, reject the aforesaid submission of Mr. Chitnis without further deliberating on it. However, we may also note here that if the said submission is accepted, then in many cases the Courts will have to disbelieve the testimony of eye-witnesses who lend undoubted assurance in leading a conviction in the matter. Mr. Chitnis, inter alia, tried to impress

upon this Court that if the accuse persons are acquitted from a charge under Section 37(A) read with Section 135 of Bombay Police Act or a charge under Indian Arms Act, for any reason whatsoever, it will ipso facto lead to clear acquittal of the accused persons from all other charges framed under the Indian Penal Code despite there being sufficient, substantial, and cogent evidence on record in the form of ocular evidence and other substantive corroborative pieces of evidence. The same cannot be accepted as it deserves rejection outrightly as stated earlier.

7 Mr. Chitnis, learned Senior Counsel apart from the aforesaid submission thereafter submitted that in the present case, the evidence of the eye-witnesses namely PW-2 Miss. Salima and PW-3 Mohammed (injured witness) does not inspire confidence as PW-2 Salima while recording the first information report did not mention the names of all the accused persons. He submitted that as the witnesses did not disclose the names of all the accused in the first information report or other statements immediately recorded after the incident, their testimony needs to be disbelieved. He submitted that the present case is an 'arson' case and on the fateful night i.e. on 10.1.1993 at about 10.00 p.m. to 10.30 p.m. when there was riotous situation prevailing in the city of Mumbai, the presence of the accused at the spot in the incident is doubtful. Mr. Chitnis submitted that

the evidence of PW-5 Gopinath D. Talwadekar, the Police Head Constable is not reliable as the said witness has failed to produce wireless record and the logbooks pertaining to the mobile van showing that he was on duty in the said night and therefore an adverse inference be drawn against the said witness. He further submitted that PW-9 Shivaji D. Phadtare has failed to produce E.P.R. Registers from the relevant hospital and therefore it creates doubt in the mind about the inception of incident. Mr. Chitnis then would contend that in the present case the prosecution has failed to prove the motive and the case of the prosecution is full of omissions and contradictions and therefore the entire evidence of the prosecution witnesses be discarded.

Mr. Chitnis lastly submitted that though PW-11 Shri P.B. Sonawane, the Investigating Officer in his evidence has stated about discloser statement of accused no.1 Suhas about the fact of concealment of the weapon used in the present case, the said witness in his memorandum statement has not stated so in precise words and therefore the discovery of the weapon at the instance of accused no.1 does not incriminate him in the present crime. In support of his contention, Mr. Chitnis placed reliance on the decision of the Supreme Court in the case of ***Prabhoo Vs. State of Uttar Pradesh reported in AIR 1963 SC 1113: 1963 2 Cr. L.J. 182.*** Mr.

Chitnis therefore urged before us that the present appeal may be allowed and the appellants may be acquitted from all the charges.

8 Mr. H.J. Dedhia, the learned APP for the State on the other hand submitted that PW-2 Salima while submitting her first information report has specifically stated about the motive behind the present crime i.e. the brother of the accused no.2 was assaulted a month prior to the date of incident in the riots at Deonar and therefore the accused no.2 and other co-accused were having grudge against the deceased. The learned APP further submitted that there was no enmity between the accused and the witnesses who have deposed against the accused. That the evidence of PW-3 Mohammed is corroborated by the evidence of PW-5 Gopinath Talwadekar. He further submitted that at the instance of the accused nos.1 and 3, the weapons used in the crime are discovered which were having blood stains on it and as per Chemical Analyzer's report the said blood stains were found to be of human origin of specific blood group and the accused have not given any explanation about the blood stains on the articles in their statements recorded under Section 313 of Cr. P.C. He lastly submitted that the evidence of accused nos.2 and 3 has been recorded after a period of 15 years and therefore there are certain minor discrepancies in their evidence. He further submitted that the testimony of PW Nos.2 and 3 need not be

discarded on the ground that the said witnesses are close relatives of the deceased. In support of his contention, he placed reliance on the decision of the Supreme Court in the case of ***Ramji Singh & Anr. Vs. State of Bihar reported in AIR 2001 SC 3853***. Mr. Dedhia submitted that the evidence on record is sufficient to sustain the conviction of the accused. He therefore prayed that the present appeals may be dismissed by maintaining the conviction and sentence of the accused/appellants.

9 With a view to appreciate the aforesaid submissions advanced by the learned Senior Counsel for the accused and the learned APP, it is necessary to advert in brief, the evidence of relevant prosecution witnesses.

10 PW-2 is Salima Gani Shaikh, the daughter of the deceased Mr. Gani Maula Shaikh and Smt.Rabiya Gani Shaikh. PW-2 in her testimony has deposed that the incident occurred in the night of 9th /10th January 1993. At that time her family which was consisted of herself, her parents, one elder sister and two younger brothers were residing at Nagesh Patil Wadi, Khardeo Nagar, Ghatla, Chembur, Mumbai. Her father was a driver on the car of Mr. Kavle. She was studding in 7th class in Ghatla Municipal School in Marathi medium. That her brothers Raju and Mohammed were studding in 4th and 5th standard respectively. One Sanjay Mandavkar (accused no.2) was residing near her house. 15 to 20 days prior to the date of incident,

Sanjay Mandavkar (accused no.2) had came to her house at about 2.00 to 3.00 p.m. and threatened her father to vacate the said place else her father would be finished. When her mother was told about the said incident, her mother lodged the report with the Chembur Naka Police station. The police had advised Sanjay Mandavkar (accused no.2) and gave understanding to him. Thereafter, PW-2 alongwith her family members resided there peacefully for about 15 days. That on 9.1.1993 (10.1.1993) they were sleeping in their house which was made up of iron sheets. In the late night somebody pelted stones on her house and a group of about 10 to 15 persons entered in the house by breaking sheet-walls. Sunil Mandavkar (accused no.4), Sanjay Mandavkar (accused no.2), Suhas Panchal (accused no.1), Chandan Lokhande (accused no.3), Umakant, Nishikant Vaishnav were amongst them. Sanjay Mandavkar (accused no.2) was having sword, Suhas Panchal (accused no.1) was having gupti, Nishikant was having iron rod, Chandan Lokhande (accused no.3) was having stick. Sanjay Mandavkar (accused no.2) and Suhas Panchal (accused no.1) tried to drag her father out of the house. Her mother intervened to save her father by requesting them not to beat him. However, as her mother did not leave her father, Sanjay Mandavkar (accused no.2) and Suhas Panchal (accused no.1) assaulted her mother with sword. Her mother died on the spot. Her mother

had asked her (PW-2) and her younger brother to conceal themselves beneath the cot (khat). Her elder sister and other children were beneath the cot. After her mother died on the spot, the said persons dragged her father out of the house in the ground of the school. She came out of the house. Her elder sister and younger brother ran away in the lane of the house. One of her younger brothers was beaten by Sanjay Mandavkar (accused no.2) with sword. Her brother sustained injury on his leg and was lying unconscious in the house. Her mother was also lying in the house. She was standing out of the house. She saw Sanjay Mandavkar (accused no.2), Suhas Panchal (accused no.1), Sunil Mandavkar (accused no.4), Nishikant Vaishnav, Chandan Lokhande (accused no.3) and Umakant assaulted her father and threw him in front of the house. The said persons marched towards her. However, at the relevant time after hearing the sound of the siren of a police vehicle, the said persons ran away. Her brother and sister also came there from the said lane. Thereafter she herself and her brother and sister went to the police station in an auto rickshaw. Her unconscious brother gained consciousness in the meanwhile. The wireless police van came near her house. Her mother and brother were taken to Shatabdi Hospital and her father was taken to Rajawadi Hospital. As her brother was not seriously injured, after administering the first aid he was taken to the

police station. PW-2 narrated the entire incident to the police which was recorded. The said statement is at Exhibit 47. This witness has identified Sanjay Mandavkar (accused no.2) and Suhas Panchal (accused no.1). However, she committed error in identifying Sunil Mandavkar (accused no.4) to whom she called Chandan Lokhande (accused no.3). She also committed error in identifying accused Umakant (discharged accused) by pointing finger towards Mohan R. Bane (acquitted accused no.5). PW-2 further identified Sunil Mandavkar (accused no.4). It is to be noted here that this witness has voluntarily submitted before the Trial Court that there might be some mistake on her part in identifying the accused Chandan Lokhande (accused no.3) due to the lapse of time.

In her detailed cross-examination, PW-2 has admitted that the mob broken the walls of her house within two minutes and 4 to 5 persons entered into her house. That after coming out of the house, she saw 15 to 20 persons running. She has further admitted that after all the accused persons went out of the house, all the children came out underneath the cot. That no neighbourers or other residents in the vicinity came there. That she did not see who assaulted her brother Mohammed. A contradiction to the effect, 'that the police vehicle came to her house and took her father, mother and brother in her presence with reference to her statement

recorded under Section 154' has been brought on record. In her cross-examination, she denied the suggestion that as the accused Sanjay Mandavkar (accused no.2) had beaten her father therefore she implicated accused persons in false case. She has admitted, that her father was not on enimical terms with anybody. That at the relevant time there were communal riots in the Mumbai and she was knowing that Muslims were attacked by Hindus. She has further admitted that her brother Mohammed was injured and became unconscious. She has further categorically admitted that the assailants were in the room for about 5 to 10 minutes. They were opposed from carrying her father out of the room by her mother. An omission to the effect that, she did not state to the police that 'as her mother died, her father was dragged to the ground of a school' has been brought on record'. An other omission that 'the assailants were coming towards her, but after hearing the siren of police van, they ran away and her brother and sister were emerged from the lane' has also been brought on record. Some minor improvements have also been brought on record in her cross-examination.

11 PW-3 is Mohammed Gani Shaikh, brother of PW-2 Salima and son of deceased Gani Shaikh and Smt.Rabiya Shaikh. PW-3 has deposed that in the year 1992 he was residing in Khardeo Nagar, behind Karnataka

High School at Chembur. At that time, he was residing with his brother, two sisters and parents. His brother's name was Raju. Raju was 13 years old at that time and Mohammed (PW-3) was 11 years old. PW-3 was taking education in 4th standard. That his father Gani Shaikh was a driver by profession and his mother was a house-wife. His house was situated behind the Karnataka High School in the locality. It was last house on the road. It was constructed of a single room. That the door side wall and right side wall of the said house were consisted of tin. The other walls were constructed in brick and cement mortar. He has further deposed that Suhas Panchal (accused no.1) used to reside in his locality. Suhas Panchal (accused no.1), Sanjay Mandavkar (accused no.2), Sunil Mandavkar (accused no.4) and Chandan Lokhande (accused no.3) used to reside about 10 houses away from their house. Since all the accused persons were residing in the same locality where he used to reside, he knew them. That a month prior to the incident, during the Holi period, Sanjay Mandavkar (accused no.2) had came to his house at about 2 to 2.30 p.m. and threatened his father that he would kill his father. Sanjay Mandavkar (accused no.2) asked his father to vacate the house. After two weeks thereafter somebody demolished their house. Therefore his mother had filed the complaint with the Chembur Police station. That because of the said incident, his father

kept him and his brother at Pune to his uncle's house. After about 10 days, his father came to Pune and took him (PW-3) and his brother back to his house at Mumbai. His father had temporarily repaired the house by erecting tins and they were residing there. On the date of incident, at about 11.00 p.m., in the night somebody hurled stones at his house. They woke up after hearing the sound. Thereafter four to five persons entered in their house and dragged his father to take him out of the house. His mother asked the children to hide below the wooden cot. His mother tried to rescue his father from the said persons. Suhas Panchal (accused no.1) was holding the gupti (sword stick) in his hand and gave a stroke on the neck of his mother. His mother thereafter fell on the ground and died. Those four to five persons took his father out of the house. Upon seeing the said act, all the four children came out of the cot. His three siblings attempted to run out of the house towards the police chowky, while PW-3 was trying to follow his father. Sanjay Mandavkar (accused no.2) gave a blow of gupti on his left leg. He tried to run away towards the opposite direction and on the way he found the police van going by the road. He stopped the van and told the police that his father and mother were assaulted. The police thereafter took him to his house. At that time, the assailants had already left from the spot. The police thereafter lifted his mother and father. The police

admitted his mother to Shatabdi hospital which was near his house. His father was admitted to Rajawadi hospital. He was treated at Rajawadi hospital. Stitches were applied to the injury which he had suffered on his leg. PW-3 has further deposed that when the accused persons entered his house, Sanjay Mandavkar (accused no.2) was holding sword and Suhas Panchal (accused no.1) was holding gupti in their hands. Chandan Lokhande (accused no.3) was holding a club in his hand. This witness has further deposed that when four to five persons entered in his house at that time about 18 to 20 persons were outside and they were demolishing the tin shed. That after his treatment in Rajawadi hospital, police left him at Chembur Naka Police outpost. His brother and two sisters were already there. The police were recording their statements at that time. His father died in the hospital in the afternoon on that day. His statement was recorded by the police on 11.1.1993. That after about one month he was called by the police for identification parade. On that day PW-3 and his sister i.e. PW-2 Salima were called by Chembur Naka Police. The identification parade was held at Deonar police chowky. This witness has subsequently clarified that the said identification parade was held at Chembur Police station.

It is to be noted here that PW-2 and PW-3 have deposed that the

test identification parade has been held in the police station and hence, the identification parade loses its significance and therefore we keep the said piece of evidence i.e. the test identification parade out from our consideration. PW-3 in his examination-in-chief has categorically stated that he did not identify Chandan Lokhande (accused no.3) who was sitting in the dock of court hall. He has further deposed that he did not identify the accused no.3 Chandan during identification parade since Chandan Lokhande was not present at that time.

In the detailed cross-examination, this witness has admitted that he was not able to say anything about the weapon which was shown to him during the examination-in-chief. He has further admitted that he did not state before the police while recording his statement that during Holi period Sanjay Mandavkar (accused no.2) threatened his father to kill him over the vacation of the house. He has admitted that at the time of recording of his second statement at Pune, he did not state to the police about the accused who had assaulted his mother. He has further admitted that about 2 to 3 policemen who were in the uniform were present in the room where the test identification parade was held. In the cross-examination, this witness has denied the suggestion that he did not at all witness the incident concerning the death of his parents. An omission to the effect that, this witness has not

mentioned in his statement to the police that, 'Suhas Panchal (accused no.1), Sunil Mandavkar (accused no.4) and Chandan Lokhande (accused no.3) used to reside 8 to 10 houses away from his house has been brought on record. In his cross-examination, some minor improvements have been brought on record which according to us are immaterial while considering the testimony of this witness.

12 PW-5 is Mr. Gopinath D. Talwadekar, Police Head Constable then attached to Chembur Police station. PW-5 has deposed that on 10.1.1993 he was on night duty starting from 8.00 p.m. and was posted on the wireless mobile van. That P.S.I. Bhalerao and two other constables were also in the van. While on patrolling duty, he alongwith the staff went to Ghatla area after receiving a wireless call. It was about 11.00 p.m. in the night. This witness has fairly stated that since the incident had occurred long back, he did not recollect the same precisely. He has further deposed that they received a message that there was arson in Ghatla village. They proceeded to Ghatla-Khardeo area. When they were near the gate of Karnataka High school at that time one boy came near their van. The said boy stopped the van (PW-3). He told that some people were beating his father and therefore he took them to his house. The said boy told PW-5 that the people were beating by steel, iron rods, knives etc. At the said spot the

police found a lady i.e. mother of the said body in an injured condition. The said lady had a injury on her neck. The police also saw her husband about five feet away from the said lady. The boy had also suffered minor injury. PW-5 and other police personnel took all the three persons by their van initially to Shatabdi hospital. That the name of the said lady was Rabiya and the name of the father of the said boy (PW-3) was Gani Maula Shaikh. The Medical Officer at Shatabdi hospital examined the lady and declared her as dead. As far as the other two injured persons are concerned, the Medical Officer told that the treatment in the said hospital was not possible and the said Medical Officer advised them to take the said two injured persons to Rajawadi Hospital. The police therefore took both injured persons to Rajawadi hospital. The boy (PW-3) was given treatment and thereafter handed over to the duty officer of the police station. PW-5 told the duty officer that the lady was already declared as dead, the man was admitted to Rajawadi hospital and the boy was handed over to him. PW-5 informed about the said fact to the control room and thereafter they returned back to their patrolling duty.

In his cross-examination, this witness has admitted that upon inspecting the said spot of occurrence, he felt that a serious incident had occurred. He has further admitted that he made wireless message regarding

the incident on the date of the incident itself. That at the spot of occurrence except those two injured persons, there was nobody. He has further admitted that there were houses surrounding the said house of the injured persons. That the surrounding houses were also ransacked. He has further admitted that at Shatabdi hospital, the entry was made in the Emergency Police Register (EPR). However, he did not recollect as to who was on EPR duty at that time. Apart from the aforesaid admissions, no other material which would be beneficial to the appellants have been brought on record.

The learned Counsel for the appellants submitted that the evidence of PW-5 Mr. Gopinath D. Talwadekar is not reliable as the said witness has failed to produce the wireless record and logbooks pertaining to the mobile van showing that he was on duty in the said night and he took the victims to Shatabdi Hospital and Rajawadi Hospital. He therefore submitted that an adverse inference may be drawn against the said witness and his evidence may be discarded from consideration.

We are of the considered opinion that the said submission cannot be accepted for the reason that non production of logbooks or wireless record will not create any doubt about truthfulness of the testimony of this witness. His evidence has remained unshaken in the

cross-examination by the appellants. According to us this witness, in view of the fact situation which was prevailing at the relevant time, had first taken the victims to the hospitals which according to us was of prime importance. This witness has also fairly stated in his testimony that since the incident in question had occurred long back, he did not recollect the same precisely and therefore non production of the aforesaid record according to us will not create any shadow of doubt about the truthfulness of the testimony of this witness. We find that the testimony of PW-5 is wholly reliable and trustworthy. PW-5 undoubtedly corroborates the version of PW- 2 and PW-3 in its totality.

13 PW-4 is Dr. Pravin S. Bagul. PW-4 was then attached to Additional Coroner's Court at Rajawadi Ghatkopar, Mumbai. On 12.1.1993, he received ADR No.10/93 from Chembur Police Station alongwith dead body of Gani Maula Shaikh. He conducted postmortem on the same day at 3.30 p.m. on the dead body of Gani Maula Shaikh. During external examination, he found the following injuries over the person of deceased: -

- “1.I/W (Rt) Side parietal region 4 cm x 1 cm bone deep
- 2.I/W (Rt) side eyebrow 4 cm x 0.2 cm intact.
- 3.I/W neck centre 2.5 cm x suture mark intact
- 4.I/W (Rt) Deltoid 2 cm x 0.5 cm

- 5.I/W (Rt) forearm lateral size 7 m x 0.8 cm
- 6.I/W (Rt) dorsal hand 4th space 5 cm x 0.2 cm
7. Contusion left elbow size 2 cm x 2.5 cm
- 8.I/W (Lt) palm 3 cm x 1 cm deep crush
9. I/W (Lt) side chest below nipple 2 cm x 4 cm suture
10. I/W (Lt) Deltoid to neck 13 cm x 0.5 cm suture
11. I/W (Lt) deltoid lateral 11 cm x 0.5 cm
12. I/W (trauma Rt) post scapula 5 cm x 0.5 cm muscle deep
13. I/W truma (Rt) scapula size 4cm with taparing effect 11cm muscle deep.
14. I/W post deltoid oblique 7 cm x 1 cm deep muscle
15. I/W (Lt) post scapula middle 6cm x 0.5 cm muscle deep
- 16.I/W (Lt) post scapula 12 cm x 0.5 cm deep
17. I/W (Rt) post buttock 6 cm x 0.2 cm suture
18. I/W (Lt) buttock 3 cm x 0.2 suture.”

Further externally, he found fracture to skull and ribs. In his opinion the external injuries were antemortem in nature.

During internal examination, he found injuries under the scalp corresponding to injury no.1. He further found crack fracture of skull. In the brain intracranial haemorrhage with blood clot was found.

In the thorax left side 6th and 7th ribs were found fractured. Pleura was contused. Froth with congestion was seen in larynx, trachea and bronchi. The right as well as left lungs were found pale with haemorrhagic

patches.

On the walls of the abdomen superficial multiple stab over the post back were found. Cavity contained blood stained fluid. In the stomach he found watery fluid. All other organs were pale. The intestines were inflated with gases.

After examination, according to PW-4 probable cause of death was shock due to multiple injuries with internal haemorrhage with fracture of skull. And the death was unnatural death. The injuries might have been caused because of some assault.

PW-4 thereafter opined that all the incised wounds found over the person of deceased can be caused by sharp edged weapons like sword, gupti, chopper etc. Injury no.7 can occur by any hard and blunt object like rod or any hilt of a weapon Incise wounds as found by him over the person of deceased were possible by a gupti 'Article X'. PW-4 has proved the postmortem notes which are at Exhibit 50.

It is to be noted here that the postmortem report of the deceased Smit. Rabiya Gani Shaikh which is at Exhibit 55 has been admitted by the defence and therefore no further examination-in-chief of this witness was conducted.

14 PW-1 is Shankar Vishram Bhogale, the panch-witness to the

spot panchanama. This witness is formal witness and has proved the spot panchanama which is at Exhibit 43. PW-7 is Smt. Laxmi S. Waghmare, the panch-witness to the inquest panchanama of the dead body of Smt. Rabiya Gani Shaikh. According to us the testimony of this witness is also formal in nature and therefore requires no consideration.

15 PW-6 is Mrs. Bhushana C. Pathare. As stated earlier, PW No.2 and PW-3 in their testimony have admitted that Test Identification Parade was conducted at Chembur Police station and/or at police station where the police personnel were present in uniform in the room where the test identification parade was held, therefore we keep the alleged test identification parade conducted by PW-6 out of our consideration. After keeping the test identification parade out of consideration, we will hereinafter consider the ocular evidence of by PW.2 and PW-3 coupled with the corroborative evidence in that behalf.

16 PW-8 is Shri Vijay G. Kule, the panch-witness to the discovery of weapons at the instance of Suhas Panchal (accused no.1) and Chandan Lokhande (accused no.3). This witness did not support the prosecution case and therefore was declared hostile. The learned APP after taking permission from the Trial Court cross-examined this witness at length. However, no material which is useful to the prosecution has been brought

on record from this witness.

17 PW-9 is Shri Shivaji D. Phadtare. He was then working as Police Sub Inspector and was attached to Chembur Police station. PW-9 has deposed that on 10.1.1993 at about 11.30 p.m., Salima Gani Shaikh (PW-2) had come to the police station and lodged her oral report which PW-9 reduced into writing. The said report is at Exhibit 47. On the basis of the said report, the offence bearing C.R. No.37 of 1993 under Section 302, 307, 147 and other Sections of the Indian Penal Code was registered. He along with the Investigating Officer Mr. Shinde (API) went to Shatabdi Hospital. Mr. Shinde prepared inquest panchanama of the dead body of Rabiya Gani Shaikh. PW-9 has identified the signature of Mr. Shinde which is on the inquest panchanama. That Mr. Shinde is now dead. The further investigation was carried out by P.I. Shri Prahalad B. Sonawane (PW-11).

In the cross-examination of this witness, no material which is beneficial to the appellants has been elicited.

18 PW-10 is Mr. K.R. Bopere, Police Inspector then attached to the Chembur Police Station. PW-10 has deposed that he assisted API Mr. Shinde and PI Mr. Prahalad B. Sonawane (PW-11) during investigation in crime no.37/93. That he accompanied PI Mr. Sonawane (PW-11) while

arresting the accused persons. This witness has identified the accused persons who were sitting in the dock. He has further deposed that on 16.2.1993 he recorded further statement of injured witness Master Mohammed Gani Shaikh (PW-3) and the complainant Ms. Salima Gani Shiakh (PW-2). It appears to us that this witness has deposed about the facts pertaining to the steps taken by him while assisting PW-11 Mr. Sonawane during the course of investigation. In the cross-examination of this witness, no material which is useful to the appellants has been brought on record.

19 PW-11 is Prahalad B. Sonawane, Police Inspector who was then attached to Chembur Police Station. PW-11 has deposed that the investigation of C.R. No.37 of 1993 was transferred to him on 2.2.1993. This witness has deposed that he arrested accused no.2 Sanjay Mandavkar on 2.2.1993. That he had arrested other accused persons during the course of investigation. That on 3.2.1993 the accused no.1 Suhas Panchal expressed his willingness to make voluntarily statement thereby leading to the discovery of the fact of concealment of Chopper and the clothes which were worn by him during the incident. The said memorandum statement is at Exhibit 80. The discovery panchanama under which the chopper and the clothes of the accused no.1 Suhas Panchal were recovered is at Exhibit 81.

That on 3.2.1993 the accused no.3 Chandan Lokhande expressed his willingness to show the place where he had concealed the weapon used in the commission of crime. His memorandum statement is at Exhibit 82. In pursuance of the said memorandum statement, the accused no.3 Chandan Lokhande led the police to discovery of a knife and the clothes which were worn by him on the day of incident. The said discovery panchanama at the instance of accused no.3 Chandan Lokhande is at Exhibit 83. This witness has further deposed about various steps taken by him during the course of investigation upto the stage of filing of chargesheet in the Court of the Additional Chief Metropolitan Magistrate, Kurla, Mumbai. In the detailed cross-examination of this witness, no material which is beneficial to the appellants have been elicited.

20 It is to be noted here that the learned Senior Counsel for the appellants during the course of arguments submitted that the original accused persons namely Umakant and Nishikant Vaishnav were discharged by the Trial Court and therefore they were not arraigned as accused persons in the array of accused persons in the judgment of the Trial Court.

21 Before we proceed to analyze the evidence of the prosecution witnesses, a useful reference can be made to the celebrated judgment of the Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai Vs. State of*

Gujrat, reported in AIR 1983 SC 753 and in particular paragraph-5 thereof.

The Supreme Court while taking into consideration the conduct and/or behaviour of the witness, in paragraph-5 has held as under:

“5-Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:-

1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore can not be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human

tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and piercing cross-examination made by the counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence

witnessed by him- perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.”

22 After taking into consideration the entire evidence available on record, it is to be noted here that the date of incident is 10.1.1993 and the approximate time of the incident was between 10 to 10.30 p.m. PW-2 and PW-3 the eye-witnesses have deposed in the Court after gap of about approximately 15 years. It is to noted that the ghastly incident took place in their house which they witnessed, has imprint on their minds even after period of 15 years. As has been observed by the Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai (supra)*, overmuch importance cannot be attached to minor discrepancies and therefore human error at the instance of PW-2 while identifying one accused person further certifies that the said witness is deposing the truth and truth alone.

23 It is clear that PW-2 and PW-3 have categorically stated about the act of commission done by the appellants in concert with each other. They have specifically and categorically assigned the roles and acts to the accused nos.1 to 4. PW-2 has specifically stated that when her mother intervened to save her father, Sanjay Mandavkar (accused no.2) and Suhas Panchal (accused no.1) assaulted her mother with sword. PW-2 also stated about the active part taken by the accused nos.3 and 4 in the said entire

incident. PW-2 has specifically and categorically stated that she had seen the accused nos.1 to 4 assaulted her father and then threw him in front of the house. PW-3 the injured witness has also specifically and categorically assigned role to each and every accused person in commission of the murder of his mother Smt. Rabiya Gani Shaikh and father Mr. Gani Maula Shaikh. Though PW-2 has committed error in identifying Chandan Lokhande (accused no.3), as stated earlier according to us, in view of the ratio led down by the Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai (supra)* over much importance cannot be attached to such minor discrepancies and as the witness was deposing in the Court after lapse of about 15 years, we accept it as a human error.

It is further to be noted that the substantive evidence of PW-2 and PW-3 has not at all been shaken in the cross-examination by the appellants and we find that the evidence of PW-2 and PW-3 is wholly reliable and the said witnesses as trustworthy.

24 The learned Counsel for the appellants submitted that PW-2 in her testimony has attributed role to the accused no.3 Chandan Lokhande as was having stick in his hands while committing the crime, however, during investigation a knife has been discovered at his instance by effecting discovery panchanama at Exhibit-83. We are of the considered opinion that

the appellants in pursuance of conspiracy have acted in concert and while exhibiting the common intention they committed the crime in question. The knife which was discovered at the instance of accused no.3 Chandan Lokhande was having blood stains on it and the accused no.3 has not offered any explanation for the same in his statement recorded under Section 313 of Cr. P.C. Therefore, we do not find any substance in the submission of the learned Counsel for the appellants.

25 We may also note here that the weapon i.e. choper which was discovered at the instance of accused no.1 was found to be stained with blood of human origin and accused no.1 has not given any explanation about the said blood stains on the said article. As stated earlier, apart from the ocular evidence of PW-2 and PW-3, there is recovery of a choper at the instance of accused no.1 Suhas Panchal and a knife at the instance of accused no.3 Chandan Lokhande. The said discovery panchanamas are at Exhibits 81 and 83 respectively. The Chemical Analyzer's report discloses that the item-choper which was recovered at the instance of accused no.1 Suhas Panchal and the knife recovered at the instance of accused no.3 Chandan Lokhande were having blood stains of human origin. The knife which was recovered at the instance of accused no.3 Chandan Lokhande was having blood stains of blood group "B". The Chemical Analyzer's

report further discloses that item nos.1 to 4 in the said report which were belonging to Smt. Rabiya Shaikh and were clothes of the deceased Smt. Rabiya stained with blood group "B". The accused nos.1 and 3 have not offered any explanation about the blood stains on the said weapons which were recovered at their instance. Though PW-2 in her testimony has attributed role to the accused no.3 Chandan Lokhande with stick in his hand, however choper has been discovered at his instance during the investigation is of no significance. According to us finding of different weapon than what has been alleged against the appellants will not make any difference as the prosecution has charged the present accused persons with Section 120-B of the Indian Penal Code and according to us all the four accused have committed the crime in furtherance of their conspiracy and by sharing common intention. We are of the considered opinion that the appellants are the perpetrators of the said crime and are guilty of the offence for which they are charged with.

26 In view of the above, we find that there are no merits in the aforesaid appeals preferred by the accused nos.1 to 4 and the same are accordingly dismissed.

(A.S. GADKARI,J.)

(ACTING CHIEF JUSTICE)

