

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.685 OF 2009

- | | | |
|--|---|------------------|
| 1. Akhtar Hussein Mohiddin Ali Shaikh, |] | |
| Aged 41 Yrs., |] | |
| R/at Islamiya Chawl Committee, |] | |
| Pathanwadi, Powai, Mumbai-400 087. |] | |
| |] | |
| 2. Amin Momin Khan, |] | |
| Aged 26 Yrs., |] | |
| R/at Near Gupta Grocery Shop, |] |Appellants / |
| Morarji Nagar, Filterpada, |] | (Org. Accused |
| Aarey Road, Powai, Mumbai – 400087. |] | Nos.3 and 7) |

Versus

- | | | |
|------------------------------------|---|-----------------|
| The State of Maharashtra, |] | |
| Thru' Powai Police Station, Mumbai |] | Respondent |

WITH
CRIMINAL APPEAL NO.699 OF 2009

- | | | |
|--|---|-------------------|
| 1. Rauf @ Guddu @ Giddu Sher Bahadur Khan |] | |
| Aged 35 Yrs., Occu.: Security Service, |] | |
| R/o. Near Kedor Cable Company, Pathanwadi, |] | |
| Filterpada, Aarey Road, Powai, Mumbai – 400 087. |] | |
| |] | |
| 2. Khwaja Jamal Khan |] | |
| Aged 50 Yrs., Occu.: Cab Driver, |] | |
| R/o. Near Plastic Company, |] | Appellants / |
| Narendra Hardware Shop, |] | (Org. Accused |
| Filterpada, Aarey Road, Powai, Mumbai-400087. |] | Nos.8 and 9) |

Versus

- | | | |
|--------------------------|---|-----------------|
| The State of Maharashtra |] | Respondent |
|--------------------------|---|-----------------|

WITH
CRIMINAL APPEAL NO.700 OF 2009

1. Sherbahadur Akram Khan,	]	
Aged about 72 Yrs.,	]	
	]	
2. Yusuf Sherbahadur Khan,	]	
Aged about 44 Yrs.,	]	
	]	
Both residents of Pathanwadi, Filterpada,	]	
Near Kedor Cable Company, Aarey Road,	]	
Powai, Mumbai – 400 087.	]	
	]	 Appellants /
[Both presently detained at Nashik Road	]	(Org. Accused
Central Prison, Nashik]	]	Nos.1 and 4)

Versus

The State of Maharashtra,	]	
Thru' Powai Police Station, Mumbai.	]	 Respondent

WITH
CRIMINAL APPEAL NO.706 OF 2009

1. Yakub Akram Khan,	]	
Aged 55 Yrs.,	]	
	]	
2. Amroj @ Papa Momin Khan,	]	
Aged 27 Yrs.	]	
	]	
Both resident of Pathanwadi,	]	
Behind Hanuman Temple,	]	
BEST Nagar, Filterpada,	]	
Aarey Road, Powai, Mumbai-400 087.	]	 Appellants /
	]	(Org. Accused
Presently in Arthur Road Central Prison	]	Nos.5 and 6)

Versus

The State of Maharashtra	]	 Respondent
--------------------------	---	-----------------

WITH
CRIMINAL APPEAL NO.884 OF 2009

Arif Sherbahadur Khan,	]	
Age : 32 Yrs.,	]	 Appellant /
R/at Near Kedore Cable Company,	]	(Org. Accused
Pathanwadi, Powai, Mumbai – 400 087.	]	No.2)

Versus

State of Maharashtra,	]	
Thru' Powai Police Station, Mumbai	]	 Respondent

AND
CRIMINAL APPEAL NO.558 OF 2011

Akhtar Hussein Siddiqui,	]	
Aged about 47 Yrs.,	]	
R/at Near Gupta Grocery Shop,	]	 Appellant /
Morarji Nagar, Filterpada,	]	(Org. Accused
Aarey Road, Powai, Mumbai – 400 087.	]	No.10)

Versus

The State of Maharashtra,	]	
Thru' Powai Police Station, Mumbai.	]	 Respondent

Mr. Shailesh Kantharia for Appellant No.1 in
Cr. Appeal No.685 of 2009.

Mr. Sudeep Pasbola for Appellant No.2 in Cr.
Appeal No.685 of 2009.

Mr. Rahul Arote for Appellant No.1 in Cr. Appeal
No.699 of 2009.

Mr. A.G. Toraskar, appointed Advocate, for
Appellant No.2 in Cr. Appeal No.699 of 2009.

Mr. Prakash Shetty a/w. Mr. Shrikant Sonkawde
for the Appellants in Cr. Appeal No.700 of 2009.

Mr. Amin Solkar a/w. Mr. Shantanu Phanse for Appellant No.1 in Cr. Appeal No.706 of 2009.

Mr. Sudeep Pasbola for Appellant No.2 in Cr. Appeal No.706 of 2009.

Mr. Prakash Shetty for Appellant in Cr. Appeal No.884 of 2009.

Mr. Rahul Arote for the Appellant in Cr. Appeal No.558 of 2011.

Mrs. S.D. Shinde, A.P.P., for the Respondent-State.

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

JUDGMENT RESERVED ON : 20TH JANUARY, 2015.

JUDGMENT PRONOUNCED ON : 22ND JANUARY, 2015.

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

1. These Appeals are directed against the Judgment of conviction and sentence dated 4th May, 2009 recorded in Sessions Case No.80 of 2007 by the Court of 3rd Ad-Hoc Additional Sessions Judge at Sewree, Mumbai. By the said Judgment, the Appellants, who are Original Accused Nos.1 to 10, are held guilty for the offence punishable under Section 120-B of the IPC and sentenced to suffer imprisonment for life and fine of Rs.1,500/- each, in default to suffer R.I. for six months. They are further convicted for

the offence punishable under Section 302 r/w. section 149 of the IPC and sentenced to suffer imprisonment for life and fine of Rs.3,000/- each, in default to suffer R.I. for one year. Original Accused No.1-Sherbahadur Akram Khan is also convicted for the offence punishable under Section 302 r/w. Section 109 of the IPC and sentenced to suffer imprisonment for life and fine of Rs.1,000/-, in default to suffer R.I. for six months. They are further convicted for the offence punishable under Section 143 of the IPC and sentenced to suffer R.I. for six months and to pay fine of Rs.500/- each, in default to suffer R.I. for one and a half month. They are also convicted for the offence punishable under Section 144 of the IPC and sentenced to suffer R.I. for two years and fine of Rs.750/- each, in default to suffer R.I. for two months. Original Accused No.1-Sher Bahadur Akram Khan and Original Accused No.3-Akhtar Hussein Mohiddin Ali Shaikh and Original Accused No.9-Khaja Jamal Khan are also convicted for the offence punishable under Section 147 of the IPC and sentenced to suffer R.I. for two years and to pay fine of Rs.750/- each, in default to suffer R.I. for two months. Original Accused No.2-Arif Sherbahadur Khan, Original Accused No.4-Yusuf Sherbahadur Khan, Original Accused No.5-Yakub Akram Khan, Original Accused No.6-Amroj @ Papa Momin Khan, Original Accused No.7-Amin Momin Khan, Original Accused No.8-Rauf @ Guddu @ Giddu Sherbahadur Khan and Original Accused No.10-Akhtar Hussein

Siddiqui are further convicted for the offence punishable under Section 148 of the IPC and sentenced to suffer R.I. for three years and to pay fine of Rs.750/- each, in default to suffer R.I. for two months.

2. Being aggrieved by this Judgment, Criminal Appeal No.685 of 2009 is filed by Original Accused No.3-Akhtar Hussein Mohiddin and Accused No.7-Amin; Criminal Appeal No.699 of 2009 by Original Accused No.8-Rauf and Accused No.9-Khaja; Criminal Appeal No.700 of 2009 by Original Accused No.1-Sherbahadur and Accused No.4-Yusuf; Criminal Appeal No.706 of 2009 by Original Accused No.5-Yakub and Accused No.6-Amroj and Criminal Appeal No.884 of 2009 by Original Accused No.2-Arif and, lastly, Criminal Appeal No.558 of 2011 by Original Accused No.10 Akhtar Hussein.

3. As all these Appeals arise from the same Judgment, they are decided by this common Judgment.

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

Informant Ramsagar Yadav, having resigned from the service due to heart ailment, was the active member of Vishva Hindu Parishad. Navinchandra Krishnakishor Dube, since deceased, was the Deputy

Secretary of the said Parishad. He was having sections (Galas) of plastic moldings at Filterpada, Powai and was residing at Khirani Road, Sakinaka. He used to visit his Galas at Filterpada daily. Hoslaprasad Upadhyay, since deceased, who was running a hotel and betel leaves kiosk at Filterpada, was Vice President of Hanuman Temple in the same locality and was Joint Secretary of Vishva Hindu Parishad. PW-12 Lalitkumar Dube is also the Member of Vishva Hindu Parishad. Initially, all of them were on visiting terms with Accused No.1-Sherbahadur, Accused No.2-Arif, Accused No.4-Yusuf and Accused No.6-Papa. However, in the year 2003, some dispute arose between them. As a result thereof, they stopped talking with each other. It is the Prosecution case that it was the practice of Informant Ramsagar, PW-12 Lalitkumar, deceased Navinchandra and Hoslaprasad to visit Hanuman Temple on every Saturday for prayers.

5. The incident giving rise to the present Prosecution case took place on 20th March, 2004. On that day, in the evening at about 7 p.m., Informant Ramsagar met PW-12 Lalitkumar, deceased Hoslaprasad and Navinchandra at Paras Tool Center, Filterpada. From there, they started proceeding towards Hanuman Temple. On the way Hoslaprasad expressed desire for chewing betel leaf and, therefore, all of them came to betel leaves kiosk near Anusaya Hotel. They placed the order for betel

leaf. At that time Accused No.3-Akhtar also came there and placed an order for betel leaf. However, without purchasing the same, he left giving push to Informant Ramsagar. Navinchandra told Informant Ramsagar to forget about it and then they started proceeding ahead towards Hanuman Temple.

6. It was about 7:45 p.m. After crossing some distance, when they came in front of Sugrabi Chawl, Informant Ramsagar heard the sound of loud talk from behind. So he turned round and saw Accused No.1 Sherbahadur and his son-in-law Accused No.3 Akhtar. He further saw that Accused No.1 Sherbahadur was exhorting to kill Navinchandra and Hoslaprasad. Immediately Accused No.2 Arif, Accused No.4 Yusuf, Accused No.6 Amroj, Accused No.8 Rauf, Accused No.10 Akhtar and others came with swords, choppers, knives, sickle and iron rods in their hands. Accused No.4 Yusuf assaulted Navinchandra with sword on his head and neck. Navinchandra fell down on the bicycle kept adjacent to the wall. At that time, Accused No.6 Amroj assaulted Navinchandra with knife in his hand. Accused No.2 Arif assaulted Hoslaprasad by chopper, whereas Accused No.3 Akhtar assaulted both Hoslaprasad and Navinchandra by iron rod. Accused No.7 Amin assaulted Hoslaprasad and Navinchandra by sickle in his hand, whereas Accused No.10 Akhtar Hussein assaulted both of them by chopper. Accused No.8 Rauf stabbed

Navinchandra with knife in his hand, whereas Accused No.5 Yakub was, throughout the incident, standing with iron rod in his hand in order to help the assailants.

7. As per further Prosecution case, due to this assault, the people started running helter-skelter. Adjoining owners closed the doors of their houses and shutters of their shops. Accused No.2 Arif shouted to kill Informant Ramsagar. Hearing this, Accused No.8 Rauf started chasing Ramsagar with knife in his hand. Both Ramsagar and PW-12 Lalitkumar then went in the lane running towards Tempo Naka. However, Accused No.9 Khaja and his wife Khurshid obstructed them by hands. Hence, Informant Ramsagar and PW-12 Lalitkumar ran through the lane of *Al Aman Rahivasi Sangh*. PW-12 Lalitkumar went to his house at Filterpada, whereas Informant Ramsagar rushed to Powai Police Station.

8. After 2 – 3 minutes, PW-12 Lalitkumar came to the Galas of Navinchandra and told the workers there about the incident of assault. Workers of the Galas came on the spot along with PW-12 Lalitkumar. By that time, Hoslaprasad's son Surendra had also come on the spot. He took his injured father Hoslaprasad to Rajawadi Hospital in an auto-rickshaw, whereas injured Navinchandra was taken to Cooper Hospital in the auto-rickshaw by PW-12 Lalitkumar and the workers of the Galas.

Medical Officer at Cooper Hospital declared Navinchandra as *"brought dead"*, whereas at Rajawadi Hospital, Hoslaprasad was also declared as *"brought dead"*.

9. Meanwhile, Informant Ramsagar went to Powai Police Station and gave information of the incident to PW-18 PSI Rajesh Kadav. He, along with the Informant Ramsagar and staff, came to the spot. He saw there the pool of blood and came to know from the nearby persons that both the injureds were taken to the hospitals. Hence, along with Informant Ramsagar and staff he went first to the Cooper Hospital. There Informant Ramsagar identified dead body of Navinchandra. PW-18 PSI Kadav obtained the Certificate of intimation of his death from the Medical Officer on duty. He recorded the statement of Informant Ramsagar in detail at Cooper Hospital itself and on telephone asked PSI Salve to register the offence.

10. Accordingly, on the complaint of Informant Ramsagar, C.R. No.77 of 2004 came to be registered at 9:50 p.m. at Powai Police Station against the Accused for the various offences punishable under Sections 143,144, 145, 147, 148, 149 and 302 r/w. 34 of the IPC and under Section 4 r/w. 25 of the Arms Act.

11. PW-18 PSI Kadav then made Inquest Panchanama (Exhibit-50) on the dead body of Navinchandra and seized the clothes on his person. Thereafter, along with the Informant Ramsagar, he went to the spot. There his superior officer PW-19 PI Eknath Shiralkar was present along with the staff. The Panchanama of Scene of Offence (Exhibit-50) was made at the spot and under the said Panchanama, various articles lying there like the sleepers, handle of weapon, blood stained mud were seized. PW-18 PSI Kadav then returned to the Police Station and filled up the printed form of F.I.R. (Exhibit-164). Then, along with the staff, he left in search of the Accused. Accused No.3 Akhtar was found in early morning in Sai Bungalow area. He was brought to Police Station and arrested under Panchanama (Exhibit-165).

12. On 21st March, 2004, in the afternoon, PW-19 PI Shiralkar arrested Accused No.4 Yusuf and Accused No.5 Yakub under Pachanama (Exhibit-90). On 21st March, 2004 itself, PW-19 PI Shiralkar recorded the statement of the eye witness PW-12 Lalitkumar.

13. During the course of investigation on 4th April, 2004, at the instance of Accused No.8 Rauf, two knives, one sword and one sickle were recovered under Memorandum Panchanama (Exhibit-51) and Seizure Panchanama (Exhibit-52). These weapons were having wiped out blood

stains. On the same day, at the instance of Accused No.7 Amin, the blood stained clothes of Accused No.6 Amroj and Accused No.8 Rauf were recovered from the house of his mother/Original Accused No.11-Gangubai under Memorandum Panchanama (Exhibit-83) and Seizure Panchanama (Exhibit-84). On 6th April, 2004, at the instance of Accused No.2 Arif, one chopper and blood stained clothes were recovered under Memorandum Panchanama (Exhibit-69) and Seizure Panchanama (Exhibit-70). On 18th April, 2004, at the instance of Accused No.10 Akhtar, his blood stained clothes and one chopper were recovered under Memorandum Panchanama (Exhibit-73) and Seizure Panchanama (Exhibit-74).

14. All these articles, seized under various Panchanamas, were sent to Chemical Analyzer on 5th May, 2004 vide requisition letters (Exhibits 167 to 173).

15. Further investigation was taken over by PW-20 ACP Prakash Mohanrao Wadkar. On 25th May, 2004, at the instance of Accused No.6 Amroj, he made Panchanama of the Gala, where the weapons were sharpened by the Accused. He recorded the statement of the owner of the Gala, Shri. Magdum Shah and labours Siraj and Javed. On 29th May, 2004, PW-20 ACP Wadkar made Memorandum Panchanama (Exhibit-88) of Accused No.1 Sherbahadur and Panchanama of the place (Exhibit-89),

where, according to the Accused, conspiracy was hatched. On 30th May, 2004, PW-20 ACP Wadkar made Panchanama of the place at the instance of Accused No.10 Akhtar, where the blood stained hands were washed. On the same day, he recorded the statements of some more witnesses.

16. Thereafter, on 2nd June, 2004, at the instance of Accused No.5 Yakub, two iron rods were recovered and seized under Memorandum Panchanama (Exhibit-184) and Seizure Panchanama (Exhibit-185). On 6th June, 2004, Accused No.8 Rauf showed them the house of Accused No.11 Gangubai. After recording the statements of some more witnesses, PW-20 ACP Wadkar concluded the investigation.

17. Since he invoked the offences under M.C.O.C. Act, Charge-Sheet was initially filed in the Special Court on 30th July, 2004. However, in December, 2006, it was held that the provisions of the M.C.O.C. Act were not applicable to the case. Accordingly, the case was transferred to the Court of Sessions and in due course it was assigned to 3rd Ad-Hoc Additional Sessions Judge, Sewree, Mumbai. He framed charge vide Exhibit-19 against Accused Nos.1 to 10 for the various offences punishable under Sections 120-B, 143, 144, 147, 148, 149 and 302 r/w. Section 120-B and r/w. Section 149, Section 176 r/w. Section 149 of the

IPC, Section 4 r/w. Section 25(1)(b), 27 and 35 of the Arms Act and under Section 135 of the Bombay Police Act. Accused No.1 Sherbahadur was further charged for the offence punishable under Section 302 r/w. Section 109 of the IPC. As against Accused No.11-Gangubai, the charge was framed under Section 212 r/w. Section 302 of the IPC. All the Accused abjured the guilt and claimed trial raising a defence of total denial and false implication out of rivalry.

18. To bring home the guilt of the Accused, Prosecution examined as many as 20 witnesses, majority of them being Panch Witnesses and Investigating Officers. PW-16 Dr. Mohan Shivsharan and PW-17 Dr. Shivaji Kachre are the Medical Officers, who conducted the post mortem on the dead bodies. The major plank of the Prosecution case was, however, on the evidence of sole eye witness PW-12 Lalitkumar.

19. Accused No.9 Khaja raised the plea of alibi and to substantiate it, he examined his brother Ayub Khan. Remaining Accused have not examined any other witness.

20. On appreciation of entire evidence on record, the Trial Court found the testimony of solitary eye witness PW-12 Lalitkumar to be wholly reliable, being corroborated fully with the evidence of recovery of weapons

of assault and blood stained clothes at the instance of various Accused, further supported with the C.A. Reports. Hence, Trial Court convicted and sentenced Accused Nos.1 to 10 as stated above and acquitted them of the remaining charges. Accused No.11-Gangubai was acquitted of all the charges levelled against her. The Respondent-State has not preferred any Appeal against this order of acquittal.

21. We have heard learned Counsels on behalf of the Appellants and the learned A.P.P. for the Respondent-State. In order to effectively deal with the various submissions advanced before us by them, it would be useful to refer first to the evidence on record. However, before advertng to the ocular evidence of the incident, in our considered opinion, it would be helpful to refer to the medical evidence to understand the magnitude of the incident, assault and ferocity of the cause of death of Navinchandra and Hoslaprasad.

22. PW-16 Dr. Shivsharan, who, at the relevant time, was attached to Cooper Hospital, has conducted the post mortem on the dead body of Navinchandra during 10 a.m. and 11 a.m. on the next day. On examination, he has found following external injuries, which he has mentioned in the Post Mortem Report (Exhibit-156) :-

“Injuries on head :

- (i) Incised wound on top portion of head at frontanalli measuring 10 cm. x 2 cm. and scalp deep.*
- (ii) Incised wound below it measuring 8 cm. x 2 cm. and scalp deep.*
- (iii) Incised wound behind left eyelid vertically placed measuring 11 cm. x 2 cm. and skin deep.*
- (iv) Incised wound in front of ear and behind ear measuring 10 cm. x 2 cm. and scalp deep.*
- (v) Incised wound at temporal region 10 cm. x 2 cm. and scalp deep.*
- (vi) Incised wound on temporal region horizontally placed measuring 11 cm. x 2 cm. and scalp deep.*
- (vii) Incised wound vertically placed and crossing the above injury measuring 11 cm. x 2 cm. and scalp deep with cutting of right ear pinna.*
- (viii) Injury behind head and neck portion measuring 20 cm. x 7 cm. and vertibral column deep.*

This incised wound was cutting almost back portion of the neck.

Injuries on neck portion :

- (i) Incised wound on right side of neck measuring 20 cm. x 5 cm. and deep into neck cutting thyroid gland and wind pipe extending from mid portion of neck right side to front mid portion of neck.*
- (ii) Incised injury below above injury measuring 11 cm. x 2 cm. and neck muscle deep.*

Injuries on right shoulder portion :

There were three incised wounds of size 5 cm. x 2 cm. and muscle deep, 4 cm. x 2 cm. and muscle deep and 4.5 cm. x 1 cm. and skin deep.

These injuries were placed on top portion of shoulder and front side of it, which were horizontally placed.

Injuries on left shoulder :

There were two incised wounds on back side of shoulder measuring 4 cm. x 1 cm. skin deep and 3 cm. x 1 cm. skin deep.

Injuries on abdominal portion :

There were three incised wounds :

- (i) On right side of abdomen measuring 4 cm. x 2 cm. and abdominal deep.*
- (ii) On right flank measuring 2.5 cm. x 0.5 cm. and abdominal deep.*
- (iii) On right iliac fossa 2 cm. x 0.5 cm. and abdominal deep.*

There were superficial scratches over skin on lower chest, which were four in numbers and on abdomen on flank region, five in numbers.

Injuries on left side of abdomen :

- (i) *Incised wound at right edge of cage measuring 3 cm. x 1 cm. and abdomen deep.*

Injuries on lower side of chest :

Incised wound below nipple on 8th place obliquely placed measuring 3 cm. x 2 cm. and chest deep.

Injuries on back :

Incised wound at T-11 level measuring 10 cm. x 4 cm. and muscle deep.

Injury on left side near iliac crest in flank. There were five incised wounds - abdomen deep parallelly situated measuring 25 cm. to 27 cm. long and 3 cm. broad.

Injury on right hand :

Incised wound behind right elbow joint measuring 11 cm. x 3 cm. and muscle deep.

Injury on right palm :

Incised wound on right palm cutting base of thumb and total palm portion and first finger measuring 8 cm. x 2 cm. and there was separation of total palm portion.

Edges of all above injuries were clear. There was acute angle. Clotted blood was seen at places. All were ante-mortem in nature.

Internal Injuries :

- (i) Scalp (head skin) is cut upto skull bones under all above head incised wounds, which were mentioned in column No.17, with bilateral temporal muscle bleeding.*
- (ii) Injury on right temporal and parieto occipital bones were cut by incised wounds – muscle deep. There were multiple bones fracture at 10 – 12 places.*
- (iii) All membrane layer bleeding around brain. Brain matter was pale.*

Injury on chest portion :

8th space bleeding under incised wound perforating cage. Pleura was perforated. Larynx trachea and bronchi were cut on right side of thyroid gland, carotid artery along with wind pipe was cut.

On left side of lung, there was bleeding about 400cc. Pericardium lung coverings were perforated at apex of heart. Right side ventricle perforated. There was bleeding into heart sac.

Injuries on abdomen portion :

There was bleeding around all incised wounds on abdomen, which were mentioned in column No.17 and they have perforated abdominal wall. There was bleeding in abdominal

wall, which was semi-clotted about 900cc. In mouth cavity, chin bones were fractured, which loosening of posterior teeth. There was mesenteric bleeding throughout abdomen. There was rupture of right lobe of liver, which were placed at lower edges of liver at two places measuring 2.5 cm. and 2 cm. perforating liver. There was capsular bleeding around right kidney with cutting of kidney at lower side into two pieces.”

23. In his opinion, probable cause of death was “hemorrhage and shock due to multiple stab injuries over head, neck, chest and abdomen with cut throat neck injury”. He has opined that the external injuries mentioned in Column No.17 are co-related to internal injuries mentioned in Column No.19 of the Post Mortem Report (Exhibit-156) and all these injuries can be caused by the weapons like knife, chopper and sword. They were ante-mortem and sufficient in the ordinary course of nature to cause death.

24. Then there is evidence of PW-17 Dr. Shivaji Kachare attached to Rajawadi Hospital. He has conducted post mortem on the dead body of Hoslaprasad on the next day in between 9 a.m. to 10 a.m. On examination, he has found the following injuries, which he has noted in Column Nos.17 and 19 in the Post Mortem Report (Exhibit-158) :-

“(i) Incised wound at right frontotemporoparietal region, 23 cm x 2 cm – bone deep, reddish, margins were clean cut, underneath bone shows comminuted fracture.

- (ii) *Incised wound at right occipitoparietal region, 8 cm x 2 cm – bone deep, reddish, margins clean cut.*
- (iii) *Incised wound at left frontotemporoparietal region, extending to left ear pinna, 36 cm x 2 cm – bone deep with left ear pinna ruptured, reddish, margins clean cut, underneath skull bones communitied fracture.*
- (iv) *Incised wound at posterior of neck region, 11 cm x 3 cm x 5 cm, reddish, margins well defined, clean cut.*
- (v) *Incised stab wound at posterior of vertebral column at C7 approximately 8 cm x 3 cm x 12 cm, reddish, margins and angle clean cut.*
- (vi) *Incised stab wound at posterior of left lumber region, 2 cm x 1 cm x 8 cm deep, reddish, margins and angles clean cut.*
- (vii) *Incised stab wound at vertebral column at lumber region, 3 cm x 2 cm x 5 cm, reddish, angles clean cut.*
- (viii) *Incised stab wound at left axilla at 5 cm above left illiac crest 6 cm x 2 cm x 7 cm, reddish, margins clean cut.*
- (ix) *Multiple abrasions over left posterior of scapulae linear varying in sizes from 5 cm x 1 cm to 3 cm x 1 cm, reddish.*
- (x) *Multiple incised wound at phalanges of left palm with evidence of total rupture and fracture of left phalanges, metacarpals, sizes are varying from 5 cm x 2 cm muscle deep to 3 cm x 2 cm muscle deep, reddish.*
- (xi) *Total rupture and fracture of right thumb, forefingers, middle finger – reddish.*

Corresponding internal injuries were as follows :

- (i) Injuries under the scalp – haemorrhages all over scalp.*
- (ii) Skull -*
 - (1) Communitied fracture left fronto-temporoparietal bone.*
 - (2) Communitied fracture right temporoparietal bones.*
- (iii) Brain – subdural and subarachnoid haemorrhages.*
- (iv) Walls, ribs, cartilages – Fracture left 4th, 5th, 6th ribs in axillary region.*
- (v) Pleura – ruptured bilateral.*
- (vi) Larynx, Trachea and Bronchi – ruptured.*
- (vii) Right lung – ruptured at apical region, haemorrhages.*
- (viii) Left lung – ruptured at lower lobe.*
- (ix) Pericardium – ruptured.*
- (x) Heart – ruptured, empty.*
- (xi) Abdominal walls – upper part of left anterior abdominal wall – ruptured.*
- (xii) Peritoneum – ruptured at left side.*
- (xiii) Liver, pancreas, spleen, kidneys – pale -*
 - (1) Liver ruptured at inferior surface.*
 - (2) Pancreas, spleen – ruptured.*
 - (3) Pole of left kidney perforated.*
- (xiv) Evidence of fracture C-, vertebral column, spinal cord – rupture of vertebral column at lumber region.”*

25. In his opinion, cause of death was *“hemorrhage and shock due to multiple injuries (unnatural)”*. He has further opined that *“all these injuries were anti-mortem and are possible by any sharp edged cutting weapon”*. Injury Nos.1, 2 and 3 in Column No.17 are sufficient to cause death in ordinary course of nature, whereas Injury Nos.10 and 11 are defence type of wounds.

26. Both these Medical Officers are cross-examined by the various Defence Counsels, but nothing worthwhile is elicited in their cross-examination to disbelieve their evidence or the nature of injuries found on the dead bodies and the cause of death, as given by them, which was unnatural and homicidal in nature. In the course of arguments before us, the learned Counsel for the Appellants have also fairly conceded that they are not disputing either the cause of death, the nature of injuries or the homicidal nature of the deaths.

27. At this stage, it may be stated that the Informant Ramsagar, who was also the eye witness to the incident and, therefore, the crucial witness for Prosecution, has died on 1st June, 2005, during the pendency of the case in the Trial Court. Hence, he could not be examined as witness. The entire reliance of the Prosecution, therefore, is on the evidence of the

solitary eye witness PW-12 Lalitkumar and the evidence relating to recovery of the weapons and blood stained clothes at the instance of the various Accused.

28. To put it, as a matter of fact, the Prosecution case hinges on the sole testimony of the eye witness PW-12 Lalitkumar. The law relating to the appreciation of evidence of the sole eye witness and whether the conviction can be based on his testimony alone, is sufficiently crystallized in various pronouncements of this High Court and the Hon'ble Supreme Court. However, before adverting to the legal position, we would prefer to deal with his evidence on facts.

29. PW-12 Lalitkumar has deposed that he was knowing deceased Navinchandra and Hoslaprasad, as they were his friends. Navinchandra was running a factory and was also the Deputy Secretary of Vishva Hindu Parishad, whereas Hoslaprasad was Vice President of Hanuman Temple. As regards the incident, he has deposed that on 20th March, 2004, in the evening, he met Navinchandra, Hoslaprasad and Informant Ramsagar near Paras Tool Center. All of them came near betel leaves kiosk of Hoslaprasad, which was let out by him to Jayprakash Dubey on rent. At that time, Hoslaprasad placed an order for betel leaves. Accused No.3

Akhtar also came there and placed the similar order. However, without accepting the betel leaves, Accused No.3 Akhtar gave push to Informant Ramsagar and went away. When Informant Ramsagar made complaint about it to Navinchandra, Navinchandra told him to forget it. Then all the four of them started walking towards Hanuman Temple. Navinchandra and Hoslaprasad were walking ahead at a distance of 5 ft. to 7 ft. from Informant Ramsagar and PW-12 Lalitkumar. He heard some sound from back side. Hence, he turned around and saw Accused No.1 Sherbahadur and Accused No.3 Akhtar. Accused No.1 Sherbahadur was exhorting in loud voice to kill Navinchandra and Hoslaprasad. Then he saw Accused No.2 Arif, Accused No.4 Yusuf, Accused No.5 Yakub, Accused No.6 Amroj, Accused No.7-Amin, Accused No.8 Rauf and Accused No.10 Akhtar and others coming from front side. Accused No.4 Yusuf was carrying sword in his hand, whereas Accused No.6 Amroj and Accused No.7 Amin were having knives in their hands. Accused No.2 Arif and Accused No.10 Akhtar were carrying choppers, whereas Accused No.5 Yakub was carrying iron rod. Other persons with them also were carrying weapons in their hands.

30. As regards the actual assault, he has deposed that Accused No.4 Yusuf gave the blow of sword on the back side of Navinchandra's head,

whereas Accused No.2 Arif inflicted the chopper blow on the neck of Hoslaprasad. Navinchandra fell down on the bicycle, but Accused No.6 Amroj and Accused No.7 Amin continued to give blows of knives to both Navinchandra and Hoslaprasad. Accused No.5 Yakub was moving with iron rod in his hand and was threatening the persons. At that time, Accused No.2 Arif shouted loudly to kill Informant Ramsagar. Hence, Accused No.8 Rauf ran towards Informant Ramsagar with chopper in his hand. As per the evidence of this witness, he and Informant Ramsagar then started running. After they crossed some distance, Accused No.9 Khaja and his wife Khurshid tried to obstruct them. So he ran towards his house through the lane. Informant Ramsagar also ran away.

31. After he reached his house, he went to the factory (Galas) of Navinchandra and informed the workers present there. Then, along with the workers, he went to the spot. There he saw that Hoslaprasad was being taken in the auto-rickshaw by his son Surendra to the Hospital. He, along with workers of Navinchandra, took Navinchandra to the Cooper Hospital in auto-rickshaw. There Doctor declared Navinchandra dead. After some time, he came to know that Hoslaprasad was also declared dead at Rajawadi Hospital. As per his evidence, he was in the Cooper Hospital for about three hours.

32. In his evidence before the Court, he was shown seized weapons, namely, Article No.1 Sword, Articles Nos.2 and 3 Knives, Article No.4 Sickle, Article Nos.18, 21 and 34 Choppers and Article No.22 Iron Rod. He identified these weapons to be the same which were used by Accused in the assault.

33. In his cross-examination, PW-12 Lalitkumar has deposed that he saw the incident from the distance of 5 ft. to 10 ft. and he was present on the spot throughout the incident till Accused No.9 Khaja threatened to the Informant Ramsagar and then both of them started running in the lane. He has further admitted that as he was frightened due to attack on Navinchandra and Hoslaprasad, he was not in a position to take any decision and was thinking to run away from the spot as early as possible. He has further deposed that first Navinchandra was attacked. He has denied suggestion that as soon as Navinchandra was attacked, he tried to run away. He has affirmed that he remained on the spot and after the incident, he went towards the factory of deceased Navinchandra. He was there for 2 - 3 minutes and then went to his house and after two minutes again came to the spot. He has further deposed that due to funeral of Navinchandra and Hoslaprasad, he did not go to the Police Station for

recording his statement. He went there immediately after their funeral, which took place at about 3 p.m. to 4 p.m. He has admitted that there were no blood stains on his clothes and hence Police had not seized those clothes. As per his evidence, from the hospital he returned to the house at about 3 a.m. to 4 a.m. He saw the Police near his house, but he did not tell them that he knows about the incident. It is further brought out in his cross-examination that when he saw the weapons in the hands of the Accused, he thought that the Accused would definitely attack them. In his cross-examination, further details about the incident and the overt acts of the Accused are brought on record, which are consistent with his evidence in examination-in-chief.

34. This witness is cross-examined in extenso by the eight Defence Counsels on behalf of different Accused. However, none of the Defence Counsel had succeeded in eliciting anything of substance to disbelieve him. He has remained thoroughly consistent throughout his evidence and no major omissions or contradictions are brought out through his cross-examination. His testimony has, thus, remained unshattered constituting a solid bed rock for Prosecution case.

35. His evidence is challenged mainly on the ground that there is delay in recording of his statement by the Police. It is urged by the learned Counsels for the Appellants that as the case stands now on the evidence of only this witness, due to death of Informant Ramsagar, his evidence is required to be scrutinized very carefully. The fate of all the ten Accused hangs on his sole testimony and, therefore, it should pass an acid test. It is submitted that this witness had more than three occasions to disclose about the incident to the Police; firstly in the hospital to the constable on duty where he has taken deceased Navinchandra. Thereafter in the Cooper Hospital itself when PW-18 PSI Kadav arrived and recorded the complaint of Ramsagar and, thirdly, when he returned home and, as admitted by him, there was Police Bandobast in the area. It is urged that the conduct of this witness of not disclosing about the incident to anyone until the Police recorded his statement on the next day, is in itself sufficient to create suspicion about his credibility of being an eye witness to the incident.

36. It is also urged that this witness is not an independent witness. As admitted by him, he was active member of Vishva Hindu Parishad, of which Navinchandra was General Secretary and deceased Hoslaprasad was Joint Secretary. Admittedly, there were two factions between the

deceased, Informant and PW-12 on the one hand and Accused Nos.1 to 11 on the another hand, on account of the dispute, which had taken place earlier. Therefore, the evidence of such witness, who is not independent and whose statement is not recorded immediately after the incident by the Police, cannot be relied upon implicitly to prove the Prosecution case. According to the learned Counsel for the Appellants, there is serious doubt about the alleged presence of this witness at the time of incident.

37. However, we find it difficult to accept these submissions as, in our considered opinion, we get full proof guarantee of the presence of this witness at the spot of incident from the F.I.R. (Exhibit-163) itself, which is lodged immediately within one or two hours after the incident by Informant Ramsagar. It is significant to note that the incident has taken place around 7:40 p.m. and F.I.R. is registered at the Police Station at 9:30 p.m. It was recorded in the hospital itself by PW-18 PSI Kadav. He has obtained the C.R. number on telephone. It is lodged by another eye witness to the incident, namely, Ramsagar, who was very much with PW-12 Lalitkumar, as deposed by this witness. In this F.I.R. (Exhibit-163), Ramsagar has clearly mentioned that he along with PW-12 Lalitkumar, Navinchandra and Hoslaprasad was proceeding towards Hanuman Temple when incident of assault took place. In the F.I.R. it is further stated that after assault on

Navinchandra and Hoslaprasad, when Accused No.8 Rauf ran towards him to assault him with knife, he and PW-12 Lalitkumar ran in the nearby lane.

38. Thus, F.I.R. (Exhibit-163), proved through the evidence of PW-18 PSI Kadav, who has recorded it, is a clinching proof of the presence of PW-12 Lalitkumar on the spot at the time of incident, leaving no spec of doubt about his presence at the spot and demolishing totally the contention of Defence Counsel that he is a got up witness.

39. We are aware that F.I.R. is not a substantive piece of evidence and it can only be used for the purpose of corroboration or contradiction. We are further aware that in this case Informant Ramsagar was no more available to give evidence due to his death during pendency of the trial. However, we also cannot ignore the fact that F.I.R. is properly proved through the evidence of PW-18 PSI Kadav, who has recorded it as per the say of the Informant Ramsagar. He has deposed that it was read over to the Informant Ramsagar in Hindi and signed by Ramsagar. It is, thus, an exhibited document. Hence, for the limited purpose of ascertaining the presence of PW-12 Lalitkumar at the spot, we are making reference to it.

40. Once the presence of PW-12 Lalitkumar at the time of incident is proved, the alleged delay in recording of his statement becomes totally immaterial. As per the settled legal position also, mere delay in recording of statement of eye witness can not be said to be a ground to discard his evidence. Only when the delay is unwarranted and remains unexplained, it may create suspicion about the credibility of the evidence of the witness.

41. In our opinion, in the present case, there is no delay as such in recording of the statement of PW-12 Lalitkumar. The incident has taken place around 7:40 p.m. on 20th March, 2004 and the statement of this witness is recorded immediately on the next day in the evening. Though the contention is raised to the effect that this witness had opportunity to disclose the incident to the Police on three occasions; first two occasions, when he was in Cooper Hospital and the third when he saw Police nearby his house after he returned from the hospital, in our considered opinion, this contention is of no avail, if one has regard to the magnitude and gravity of the assault. It was a sudden incident of double murder. About 10 Accused persons had made simultaneous indiscriminate assault on Navinchandra and Hoslaprasad in the presence of this witness. Both the deceased were very much known to this witness. He has to run from the

spot due to the threat of the assault. As deposed by him, he was totally paralyzed during the course of incident due to the fear of the Accused, who were fully armed with deadly and dangerous weapons. Only when Accused No.8 Rauf rushed towards him and Informant Ramsagar with knife in his hand, he could gather his wits to run away. Immediately after the assault, he had informed the workers of Navinchandra and then, along with their help, he has taken Navinchandra to the hospital, where he was declared dead. There, to his knowledge, the complaint of Ramsagar was recorded. Then there was another death of Hoslaprasad in Rajawadi Hospital. One can imagine his mental condition in this entire episode. It was but natural for him that, only after the rituals of funeral were performed, he could make himself available to record his statement at the Police Station. As brought out in his cross-examination, funerals took place by 3 p.m. to 4 p.m.. Then he went to the Police Station and his statement came to be recorded. Therefore, it can hardly be called that there was any delay in recording of his statement, having regard to the entire conspectus of the fact situation.

42. Moreover, it is not the case that he was the solitary eye witness and unless he has disclosed about the incident, Police would not have come to know about it. Informant Ramsagar has rushed to Powai Police Station

and the Police had come immediately on the spot. The investigation was set in motion. The complaint of Ramsagar was recorded in the hospital itself. Police were also busy in carrying out Spot Panchanama, the Inquest Panchanama and search and arrest of the Accused. In such situation, if at all there is any delay in recording of his statement, which appears to be clearly on the part of the Police, then it cannot be said that the delay was unwarranted or unexplained. It appears that, as Police came to know the names of assailants from the complaint of Ramsagar itself and they were busy in carrying other part of investigation and search of Accused, Police did not hastily recorded statement of this witness on the same night. Therefore, the alleged delay in recording of his statement, in no way can affect his evidence, which is found to be thoroughly credible and consistent throughout and whose presence at the spot is proved otherwise also from the F.I.R.

43. The second ground on which the Defence Counsels had assailed his evidence is that, as admitted by him, his clothes were not blood stained and they were not seized by the Police. According to the learned Counsel for the Appellants, this fact falsifies his evidence that he has taken Navinchandra to the hospital in rickshaw. In our considered opinion, merely because he was along with the workers of the Navinchandra,

when they took him in auto-rickshaw, it cannot be said that he has literally carried Navinchandra in his hands, so as to get his clothes blood stained.

44. The learned Counsels for the Appellants have then drawn our attention to the alleged contradiction in his evidence that in examination-in-chief, he has stated that after the incident, first he reached his house, then went to the factory of Navinchandra and informed the workers there, whereas, in the cross-examination, he has stated that first he went to the factory of Navinchandra and then went to his house. In our considered opinion, this alleged contradiction is quite insignificant and pertains to subsequent incident. It is not relating to the core of his testimony as regards the actual incident of assault. It has no potential to discredit his otherwise reliable evidence.

45. The learned Counsel for the Appellants has also drawn our attention to the omission as he has not deposed about the roles played by certain Accused in respect of the overt acts attributed to them. Again this contention can be of least avail to the Appellants. This witness has clearly spoken of the presence of Accused Nos.1 to 10 at the spot and has deposed about the overt acts committed by these Accused in his evidence-in-chief. Now, if at all anything remained to be said or deposed

on his part, either in his statement before Police or in evidence before the Court, this Court has to bear in mind two aspects; first, that all of a sudden the incident of assault has taken place. The assault, as stated above, was indiscriminate. Ten Accused came there, fully armed with the deadly weapons and started assaulting two persons Navinchandra and Hoslaprasad simultaneously. Therefore, in such a melee of incident, if the eye witness could not specifically attribute role to each of the Accused, detailing the overt acts played by them, no fault can be found with his testimony. Conversely, inference has to be drawn that he is the most truthful and honest witness, who has not exceeded his version just to please the Prosecution. It also rules out the attack on him that he is an interested witness or bent upon to implicate the Accused falsely.

46. Second aspect is that the incidence has taken place in the year 2004 and this witness has deposed about the said incidence in the year 2008 – 2009. Naturally, the memory at times plays mischief and, therefore, if the witness is not a tutored one, then in his evidence, such omissions are bound to occur. Instead of demolishing his evidence, they give an in-built guarantee of his truthfulness.

47. The last submission made by learned Counsel for the Appellants is that the conduct of this witness is unnatural, as he neither intervened to save deceased Navinchandra and Hoslaprasad from the assault, nor he ran away from the spot as the incident started. In our opinion, the explanation to this conduct is found in the incident itself. When ten Accused are fully armed with deadly weapons and assaulting simultaneously two persons with those weapons, how can one expect PW-12 Lalitkumar to gather the courage to intervene in the assault? Self preservation is the most predominant human tendency. He is bound to save himself first. No normal person will dare to intervene in such incident so as to invite the assault and injuries on himself. As regards running away from the spot, in cross-examination itself, the explanation is brought on record that he was so frightened due to attack that he was not in a position to take any decision. A person being paralyzed in such gruesome incident of assault cannot be called as unnatural.

48. The last, but not the least, submission made by the learned Counsel for the Appellants is that, as this witness belongs to the faction of the deceased who were office bearers of Hindu Vishva Parishad and as the Accused belong to another faction and as there were enemical relations between these two factions, implicit reliance cannot be placed on his sole

testimony, especially when large number of persons were available who must have witnessed the incident, as it has taken place in the open space on the road with shops and houses nearby.

49. Needless to state that, if the evidence of the eye-witness is found to be convincing and wholly reliable, there is no reason to discard his evidence merely because he belongs to the faction to which the deceased belong. At the most his evidence may require careful scrutiny, which we have already done. As on the touch stone of the cross-examination also, he has withstood successfully, we find no reason to disbelieve him. It is common knowledge that when the incident of such a magnitude and gravity of assault between two factions has taken place, independent witnesses, even if available, will rarely come forward to depose due to fear of their life. The evidence on record also goes to prove that the shop owners had closed the shutters and the doors of the houses were also closed the moment the incident had started. If this was the terror created, then naturally the evidence of independent witnesses cannot be expected in such fact situation.

50. Moreover, the law does not require the Court to count the witnesses. As per the settled position, the evidence is to be weighed and

not counted. It is the quality of the evidence which is of significance and not the quantity. That is why Section 134 of Indian Evidence Act clearly lays down that no particular number of witnesses shall in any case be required for the proof of any fact. Hence, the testimony of solitary witness can also be a basis for conviction, if the Court comes to the conclusion that his testimony is true and correct version of the incident. The Hon'ble Supreme Court has, in the case of ***Lallu Manjhi V/s. State of Jharkhand, AIR 2003 SC 854***, in categorical words, laid down that *“the Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court as to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness.”* In this case, on careful analysis and appreciation of evidence of PW-12 Lalitkumar, we found his testimony to be wholly reliable, hence acceptable with no need of looking for corroboration to it.

51. In the case of ***Kunju V/s. State of Tamil Nadu, AIR 2008 SC 1381***, also the Hon'ble Supreme Court has laid down that *“a conviction can be based on the testimony of the sole eye witness, the test is whether his evidence has a ring of truth and it is cogent, credible, worthwhile or otherwise. Corroboration would be required only if the witness is neither wholly reliable, nor wholly unreliable”*.

52. In this case, on re-appreciation of evidence of PW-12 Lalitkumar, we are convinced that the evidence of this witness has a ring of truth, a colour of consistency and a sense of straight-forwardness. His evidence inspires confidence in the judicial mind being bereft of any improvements, contradictions or inconsistencies. His presence at the time of incident is also sufficiently proved on record. As observed by the Hon'ble Supreme Court in ***Vithal Pundalik Zendge V/s. State of Maharashtra, 2009 ALL MR (Cri.) SC 245***, *“one credible witness outweighs the testimony of a number of other witnesses of indifferent character and unless corroboration is insisted upon by the Statute, Courts should not insist on corroboration”*. It always depends on the facts and circumstances of each case to determine whether corroboration to the testimony of single witness is necessary or not. In our opinion, the Trial Court, which has the advantage of observing the demeanor of this witness PW-12 Lalitkumar

while undergoing the incisive cross-examination, found that his testimony needs to be relied upon. Nothing is pointed out before us, for this Court also to take any other view of the matter.

53. Moreover, if at all any further corroboration is necessary for his testimony, it is also coming from the medical evidence discussed above, which proves that both the deceased were having more than 15 to 20 incised wounds on the vital parts of the body, corresponding with internal injuries clearly establishing that they were subjected to indiscriminate assault by deadly weapons by several assailants simultaneously. There is also corroborating evidence of the recovery of the various weapons at the instance of the Accused. As discussed in detail by the Trial Court, the said recovery is under Section 27 of the Evidence Act.

54. In addition to the recovery of the weapons of assault, which, as deposed by PW-12 Lalitkumar, were used in commission of the assault like swords, knives, iron rods, choppers, Prosecution has also relied upon the recovery of blood stained clothes of the Accused. All these articles were sent to the Chemical Analyzer and the C.A. Reports are produced on record showing the blood stains of the blood group of the deceased Navinchandra on the clothes of the Accused No.4 Yusuf, Accused No.6

Amroj, Accused No.7 Amin and Accused No.8 Rauf. Learned Counsel for the Appellants have, however, brought to our notice that the Trial Court has not put up the contents and findings of C.A. Reports to the Accused in their statements recorded under Section 313 of the Cr.P.C. In view thereof, we are not relying upon the C.A. Reports and their contents as an incriminating circumstance against the Accused. In our opinion, however, the recovery of the weapons of assault at the instance of the Accused, which are identified by PW-12 Lalitkumar as being used in the commission of the offence, is definitely a corroborating circumstance, if at all any corroboration is necessary for the ocular account of PW-12 Lalitkumar.

55. The Spot Panchanama proved through the evidence of the Panchas and the Investigating Officer, proving the factum of assault and seizure of various articles from the spot also gives further corroboration. The prompt lodging of F.I.R. containing all the details of the incident, the names of the Accused and the presence of the eye witnesses at the time of incident add further corroboration.

56. This brings us to the last contention raised by the learned Counsel for the Appellants that, in the F.I.R. no overt act is being attributed to some of the Accused like Accused No.8 Rauf and Accused No.5 Yakub. As

regards Accused No.1 Sherbahadur, it is submitted that he has merely exhorted and not assaulted anyone. Similarly, as regards Accused No.9 Khaja, it is submitted that he was just present, but no specific role of inflicting blow is attributed to him. Reliance is also placed by the learned Counsel for Accused No.9 Khaja on the Defence Witness to state that Accused No.9 Khaja was not present at the time of incident. However, the plea of alibi, which is tried to be proved through the evidence of the Defence Witness Ayub, who is the brother of Accused No.9 Khaja, is not proved sufficiently. This witness has stated that on that night, Accused No.9 Khaja went with his taxi for fare. However, he has not stated where Accused No.9 Khaja had gone on that night. He did not depose name of passenger. In absence of evidence proving that, at the relevant time, Accused No.9 Khaja was at a particular place, which is far away from the spot of incident and it was impossible for him to remain present at the spot of incident at the time of incident, the plea of alibi cannot be said to be proved.

57. About the submission that no overt act is attributed to some of the Accused and their mere presence at the time of incident cannot be sufficient to attribute to them the guilt for the offence punishable under Section 302 r/w, 149 of the IPC, this submission is misconceived and

cannot be accepted in law. The very basis of bringing on Statute Book Section 149 of the IPC is *“to provide for vicarious liability. This section clearly provides that, if the offence is committed by any member of an unlawful assembly in prosecution of a common object thereof or such as the members of that unlawful assembly knew that the offence was likely to be committed in prosecution of that object, every person who at the time of committing that offence was member is guilty of the offence committed”*. Hence, once formation of unlawful assembly is proved, every member thereof is liable for any offence committed by any member of that assembly in prosecution of the common object of that assembly, whether he has committed any specific overt act or not. Only two conditions are required to fasten him with vicarious liability. First that he was the member of an unlawful assembly and the second, offence was committed by such unlawful assembly in prosecution of the common object of that assembly. The law is also well settled that the words *“in prosecution of the common object”* do not mean *“during the prosecution of the common object of the assembly”*. It means that the offence committed was immediately connected with the common object of the assembly or the act is one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the assembly.

58. The common object of the unlawful assembly may be formed by an express agreement, after mutual consultation, but that is by no means necessary. It may be formed at any stage, by all or a few members of the assembly and other members may just join and adopt. As held by the Hon'ble Supreme Court in the case of ***Gangadhar Behera V/s. State of Orissa, 2003 SCC (Cri.) 32***, though no hard and fast rule can be laid down under the circumstances from which common object can be culled out, it may necessarily be collected from the nature of the assembly, arms it carries and behaviour at, before or after the scene of incident. As observed by the Apex Court in this authority, when a group of members come together, armed with dangerous weapons and inflict several injuries resulting into death of two persons, as in the present case, the common object of murder has to be inferred and all of them are required to be held guilty of murder even if some of them did not actually participate or some of them did not use the arms. It would not absolve them of the offence of murder with the aid of Section 149 of the IPC.

59. The law is crystallized on this aspect in the case of ***Lalji V/s. State of U.P., AIR 1989 SC 754***, wherein it is held that, *“everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary in all cases*

that all the persons forming an unlawful assembly must do some overt act. Where the Accused had assembled together, armed with weapons, and were parties to the assault, Prosecution is not obliged to prove which specific overt act was done by the particular Accused. Once it is held that there was an unlawful assembly, then each and every member of that unlawful assembly, who acts in prosecution of its common object, is equally liable irrespective of whether some of them have not been assigned any role of actually committing that particular offence”.

60. Therefore, the submission of the learned Counsel for the Appellants that PW-12 Lalitkumar has not attributed specific overt act to some of the Accused will be of no avail to absolve them from the offences with which they are charged on the basis of vicarious liability under Section 149 of the IPC. It is also not the case of any of those accused persons that they were mere by-standers. Conversely, the evidence on record proves that all these Accused had come together to the spot. They were armed with weapons and on the exhortation of Accused No.1 Sherbahadur, they assaulted both the deceased with weapons in their hands. Then all of them also left together. We are, therefore, of the opinion that the finding of the Trial Court of holding the Accused guilty for the offences punishable under Sections 143, 144, 148 and 302 r/w. Section 149 of the IPC has to

be confirmed, being arrived at after proper appreciation of entire evidence on record.

61. However, the same cannot be said, so far as finding of the Trial Court regarding the conviction of Accused Nos.1 to 10 for the offence punishable under Section 120-B of the IPC. The offence of criminal conspiracy, as defined under Section 120-B of the IPC, essentially contemplates an agreement to do an illegal act. This agreement is the gist of the offence; meeting of minds is essential for arriving at agreement. Mere knowledge or information is not sufficient. It is true that there may not be any direct evidence of such agreement, as conspiracy is always hatched in secrecy. However, there must be some evidence or the circumstances for inferring the conspiracy. The circumstances must be such as giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. The law further contemplates that the existence of meeting of minds of two or more persons, which is *sine qua non*, must be established from the chain of circumstances from which a conclusion about the guilt of Accused could be drawn.

62. In the present case, there is absolutely no evidence proving the meeting of minds or of agreement amongst the Accused. Though the Trial Court has relied upon the evidence relating to the Accused sharpening their weapons and coming together at the spot to infer the criminal conspiracy, these two pieces of evidence are too feeble to draw the inference of criminal conspiracy. They are also not sufficient to form the chain of circumstances from which the only and only irresistible inference that can be drawn is about the meeting of minds. This finding of the Trial Court, therefore, of holding the Accused Nos.1 to 10 guilty for the offence punishable under Section 120-B of the IPC is required to be quashed and set aside.

63. Further finding of the Trial Court of holding Accused No.1 Sherbahadur guilty and convicting him for the offence punishable under Section 302 r/w. Section 109 of the IPC also cannot survive as Accused No.1 Sherbahadur is already held guilty and convicted for the offence punishable under Section 302 r/w. Section 149 of the IPC, being the member of the unlawful assembly, the common object of which was commission of the offence.

64. Consequently, we allow these Appeals partly. The Judgment of the Trial Court of convicting and sentencing Accused No.1 Sherbahadur, Accused No.2 Arif, Accused No.3 Akhtar Hussein Mohiddin Ali Shaikh, Accused No.4 Yusuf, Accused No.5 Yakub, Accused No.6 Amroj, Accused No.7 Amin, Accused No.8 Rauf, Accused No.9 Khaja and Accused No.10 Akhtar Hussein Siddiqui for the offence punishable under Section 120-B of the IPC and further convicting Accused No.1 Sherbahadur for the offence punishable under Section 302 r/w. Section 109 of the IPC is hereby quashed and set aside. Accused Nos.1 to 10, as stated above, are acquitted for the offence punishable under Section 120-B of the IPC. Similarly, Accused No.1 Sherbahadur is further acquitted for the offence punishable under Section 302 r/w. Section 109 of the IPC. Fine amount, if any, paid by the Accused Nos.1 to 10, for these offences be refunded to them.

65. As regards the conviction and sentence of the Accused Nos.1 to 10 for the offences with which they were charged and tried, namely, Accused No.1 Sherbahadur, Accused No.2 Arif, Accused No.3 Akhtar, Accused No.4 Yusuf, Accused No.5 Yakub, Accused No.6 Amroj, Accused No.7 Amin, Accused No.8 Rauf, Accused No.9 Khaja and Accused No.10 Akhtar, for the offences punishable under Sections 302 r/w. Sections 149

and 143 of the IPC; Accused No.2 Arif, Accused No.4 Yusuf, Accused No.5 Yakub, Accused No.6 Amroj, Accused No.7 Amin, Accused No.8 Rauf and Accused No.10 Akhtar for the offence punishable under Section 148 of the IPC; Accused No.1 Sherbahadur, Accused No.3 Akhtar and Accused No.9 Khaja for the offence punishable under Section 147 of the IPC and Accused No.2 Arif, Accused No.3 Akhtar, Accused No.4 Yusuf, Accused No.5 Yakub, Accused No.6 Amroj, Accused No.7 Amin, Accused No.8 Rauf and Accused No.10 Akhtar for the offence punishable under Section 148 of the IPC, is hereby confirmed and maintained.

66. Appeals are, thus, partly allowed as indicated above.

67. Fees payable to the Mr. Toraskar, the learned counsel appointed on behalf of Appellant No.2 in Criminal Appeal No.699 of 2009 is quantified at Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]