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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 813 OF 2009

1. Vikas Mohanrao Zhade
Age 39 years, Occ: Business
Residing at Zhade Niwas,
Kishor Nagar, Kopari Road,
Opp. Gamdevi Mandir,
Thane (East) 3.

.. Appellant
(Org. Accd. No.1)

Versus

The State of Maharashtra

.. Respondent

WITH
CRIMINAL APPEAL NO. 803 OF 2009

1. Santosh Badriprasad Sing
Age 36 Years, Residing at
302, Shivsai Apartment, 3rd floor,
Mahatma Phule Nagar,
Opp. Thakur High School,
Vartaknagar, Thane.

2. Pankaj Omprakash Sing
Age 22 years, R/at Indiranagar,
Rupadevi Pada No.2,
Jayshree Galli, Wagle Estate,
Thane.

.. Appellants
(Org. Accd. Nos.2 & 3)

Versus

The State of Maharashtra

..Respondent

Mr. Harshad Bhadbhade a/w Mr. Harshawardhan Salgaonkar for the appellant in Criminal Appeal No. 813/09.

Mr. V. B. Singh and Mr. A. K. Singh for the appellants in Criminal Appeal No.803/09.

Mrs. S. D. Shinde, APP for the State.

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

JANUARY 06, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J] :

1. Criminal Appeal No. 813 of 2009 has been filed by the Original Accused No.1, while Criminal Appeal No. 803 of 2009 has been filed by Original Accused Nos.2 and 3. The appellants/Original Accused Nos.1 to 3, who stand convicted for offence punishable under Sections 120-B, 302 r/w Section 34 and 201 r/w 34 of the Indian Penal Code and sentenced to imprisonment for life and each accused to pay a fine of Rs.2000/-, in default of which to undergo further RI for six months, imprisonment for life and each accused to pay a fine of Rs.2000/-, in default of which to undergo further RI for six months and RI for five years and each accused to pay a fine of Rs.1000/-, in default of which to undergo further RI for six months, with a direction that the substantive sentences shall run concurrently, by the Additional Sessions Judge, Thane, by

judgment dated 15/06/2009, in Sessions Case No. 357 of 2006, by these appeals challenge their conviction and sentence. Since both the appeals arise from the same judgment of the trial court, these appeals are being decided by this common judgment.

2. Facts, as are necessary for the decision of these appeals, may briefly be stated thus :-

PW 33 – PSI Anil Gambhir, who, on 22/5/2006, was attached to the Wagale Estate Police Station and was on duty from 8 p.m. of 22/5/2006 till 8 a.m. of 23/5/2006, received information on 22/5/2006 at about 10.30 p.m. about some persons being attacked near the Teen-hath Naka. On receiving the said message on telephone, he immediately rushed to the scene of the incident and went near Priyadarshini tenements near Bus Stop No. 30. He was informed that one injured was lying between the tenements and accordingly noticed two persons lying with injuries. One person had already succumbed to his injuries, while the other was alive. He informed the said incident to his superiors and scribed the report of PW 1 – Anil Dhawan at Exh. 8. He forwarded the said report to the Wagale Estate Police Station for registration of the crime. He thereafter

prepared the inquest panchanama of the dead body in the presence of panchas at Exh. 12. The dead body was then referred for postmortem examination under requisition at Exh. 104.

PW 34 – Police Constable Shivaji Yadav, who was also attached to the Wagale Estate Police Station and had accompanied PW 33 – PSI Gambhir to the scene of the incident, was directed to take the dead body of deceased Shyamsundar Khanna for postmortem examination to the Civil Hospital, Thane. PW 34 – Police Constable Yadav had accordingly taken the dead body to the Civil Hospital for postmortem examination. Similarly, PW 34 – Police Constable Yadav was directed to take the dead body of deceased Pravin Khanna for postmortem examination to the Civil Hospital, Thane. Accordingly, PW 34 – Police Constable Yadav had taken the dead body of deceased Pravin Khanna to the Civil Hospital, Thane for postmortem examination. After the postmortem examination, the clothes of both the deceased were handed over to PW 34 – Police Constable Yadav, who deposited the same in the Police Station along with his report at Exh. 111.

PW 32 – API Mahesh Bagwe, who, on 22/5/2006, was

attached to the Naupada Police Station, received MLC from the Medical Officer attached to the Divine Brain Hospital and Trauma Centre intimating the admission of injured Pravin Khanna in the hospital. PW 32 – API Bagwe, after receipt of the MLC at Exh. 99, personally went to the hospital in order to record the statement of the injured. He requested the Medical Officer to ascertain if the injured was in a fit condition to give his statement. Said letter is at Exh. 100. The Medical Officer endorsed on the said letter at Exh. 100 that injured was serious and was not in a position to make a statement. PW 32 – API Bagwe handed over the MLC to the Wagale Estate Police Station as the offence had been committed within its jurisdiction. The forwarding letter is at Exh. 102.

PW 36 – Dr. Vinayak Joshi, who was running Divine Brain Hospital and Trauma Centre at Thane had issued MLC to the Naupada Police Station at Exh. 117 in respect of the injured Pravinkumar Khanna on 22/5/2006 pursuant to the admission of Pravinkumar Khanna in the hospital at 11.15 p.m. Injured Pravin had been brought to the hospital by 2 to 3 nearby persons from that locality. The provisional diagnosis was made that injured had sustained multiple lacerations and incised wounds with skull fracture in left occipital region. History of assault was disclosed.

One Pradeep Pariyani had admitted the injured in the hospital. On examination, the blood pressure was not record-able and the pupils were sluggishly reacting. The respirations had slowed and the pulse rate was 140 per minute. All the wounds were sutured and endo-tracheal tube was put and injured was connected to ventilator. He was given blood transfusion along with IV fluids and other life saving medicines. The condition of injured Pravin was deteriorating and he had cardiac arrest at 2 a.m. and was declared dead at 2.20 a.m. The dead body was referred for postmortem examination after necessary panchanama had been drawn. The medical case papers are at Exh. 119.

PW 38 – API Vijay Bhise, who, on 7/6/2006, was attached to the Crime Branch (Property Cell), Thane, assisted Sr. PI Praful Joshi in the investigation of Crime No. 172 of 2006 which was registered under Section 302 read with Section 34 of the IPC. On 7/6/2006, the accused, who had been arrested were in the custody and the accused were, accused no.1 – Vikash, accused no. 2 – Santosh and accused no. 3 – Pankaj. During custodial interrogation, accused no.1 – Vikas expressed his willingness to point out the place where the weapons had been concealed. A memorandum was accordingly drawn in the presence of panchas at Exh.

128. Accused No.1 – Vikas, along with the other two accused, led the police and the panchas to Panghar Kol and directed the vehicle to be taken towards the bridge of river Ulhas. The accused, panchas and the police then alighted from the vehicle and produced a chopper from the riverbed, which was seized. Article P2 is the said chopper. The accused then returned to the vehicle and directed the vehicle to be taken towards Murbad and thereafter towards Badlapur. The vehicle reached the Bharvi dam and the accused, panchas and the police alighted from the vehicle and reached the place where the water level was 3 ft. From the water of the dam, accused no.1 – Vikas produced one chopper and two knives, which were seized under panchanama at Exh. 129. The said articles are Articles P1, P3 and P4.

PW 39 – PI Bajirao Ghuge, who, on 22/5/2006, was attached to the Police Station Wagale Estate as a PI, was entrusted with the investigation of Crime No. 172 of 2006.

He had accordingly visited the scene of the incident and in the presence of panchas had drawn the scene of the incident panchanama of the place where deceased Shamsunder had been assaulted. From the scene

of the incident, he had drawn the sample of the blood which was found at the scene of the incident. He had also drawn sample of ordinary mud and blood mixed mud. The witnesses then pointed out the spot in respect of assault on deceased Pravin Khanna. From the said spot, PW 39 - PI Ghuge had obtained sample of blood as well as ordinary mud and blood mixed mud. From the scene of the incident, one bluish-blackish coloured Nokia mobile cell phone was found, which is Article 24. The said phone was seized. One key-chain with three keys was also found at the spot which was then handed over to the wife of deceased. A small plastic box, containing coins, was also found, which is Article 26. One plastic bag containing a silver plate on which religious incarnation was scribed, was also found. A chain of beads, Article 28, was also found. All these articles were seized and taken into custody. The panchanama is at Exh. 132.

On the same day, he recorded the statements of PW 7 – Balu, PW – 8 Parvez, PW 9 – Jaya and PW 10 – Pintu. Efforts were made to trace and arrest the accused. Since PW 39 – PI Ghuge had gone to U.P., in search of the accused, investigation had been entrusted to PI Gadkari. On his return, PW 39 – PI Ghuge forwarded the seized articles for examination to the Chemical Analyzer on 1/6/2006 under requisition at Exh. 139. The

investigation was then handed over to PI Praful Joshi, who was attached to the Crime Branch (Property Cell).

PW 40 – PSI Amarnath, who was also attached to the Wagale Estate Police Station seized the clothes of deceased on 23/5/2006 under panchanama at Exh. 118.

PW 41 – PI Praful Joshi, who was attached to the Property Cell of Crime Branch, was entrusted with the investigation on 1/6/2006. He had received information that the accused were to come to Prabhadevi Temple and, therefore, arranged for a trap for apprehending them. Accordingly, accused – Vikas, Santosh and Pankaj had been apprehended. On reaching the Property Cell of the Crime Branch, the accused were arrested under arrest panchanama at Exh. 46. A hand bag containing some clothes was also seized. Information about the arrest of the accused was conveyed to the Wagale Estate Police Station and the accused were referred for medical examination to the Civil Hospital at Thane.

On 2/6/2006, statement of PW 15 – Shaikh Muktar was

recorded. On the same day, statements of Harish Kumar Malhotra and Harish Kumar Gulpani were also recorded. On 3/6/2006 statements of PW 17 – S. K. Dudhani and PW 16 – Smt. Rafad Fakir were recorded. A letter at Exh. 95 was addressed to the City Engineer, Thane Municipal Corporation seeking information regarding the shop tenements and the beneficiaries of the shop tenements. On 4/6/2006, statement of PW 28 – Sanjay Yadav was recorded. Certain documents pertaining to the shop tenements were seized under seizure memo at Exh. 158.

On 6/6/2006, the vehicle alleged to be used in the commission of the crime was seized in the presence of two panchas. The documents pertaining to the ownership of the vehicle were also seized. Statement of Nova Daniel was accordingly recorded. On 7/6/2006 PW 38 – Shri Bhise was instructed to seize the weapons used by accused – Vikas and accordingly the seized weapons were produced. On 8/6/2006, the accused had pointed out the shop from where clothes had been purchased by them at Nagothane. One black coloured trouser kept for alteration was seized along with one receipt. The seizure panchanama is at Exh. 166. On 8/6/2006, statement of PW 25 – Suresh Jain was recorded. Section 120-B of IPC was added. A report was submitted before the court for addition of

Section 201 of IPC at Exh. 168. On 17/6/2006 supplementary statement of PW 12 – Asha was recorded. On 23/6/2006, the seized property was referred to the Chemical Analyzer under requisition at Exh. 169. Statements of witnesses under Section 164 of Cr.P.C. were recorded and further to the completion of investigation, a charge-sheet against the accused was submitted.

Postmortem on the dead body of deceased Shyamsunder was performed by PW 37 – Dr. Ravindra Utge. PW 37 – Dr. Utge, noticed the following external injuries:-

- (i) Cut injury deep around neck (front Side) with sharp instrument size was 30 cms. x 4 cms. trachea, oesophagus, blood vessels in the neck were cut.
- (ii) Multiple cut injuries of right ear from above downwards.
- (iii) Deep cut injuries of scalp above right ear, measuring i) 1.5 cms x 2 cms. x 3 cms., ii) 14 cm. x 2 cms x 3 cms., iii) 10 cms x 3 cm x 3 cm. over scalp (tempo parietal region), iv) 6 cms. x 3 cms. x 2 cms. v) 9 cm x 3 cm x 2 cm. Transverse cut, vi) 5 cms. x 2 cms. x 3 cms., vii) 8 cm x 2 cms x 3 cms.
- (iv) i) Crack fracture of right temporal bone, ii) Crack

fracture of right occipital bone.

- (v) Stab wound on left side of chest above nipple measuring 5 cms x 3 cms x 2 cms.
- (vi) Stab wound on left mid-axillary line measuring 3 cm x 2 cm x 3 cm.
- (vii) Cut injury of lip from mid-line to right side angle of mouth measuring 10 cm x 2 cm x 3 cm.
- (viii) Stab wound above iliac bone on left side in posterior axillary line size 3 x 2 x 2 cms.
- (ix) Contused lacerated wound (small) over left side of abdomen.
- (x) Cut injury over left forearm i) 10 cms x 3 cm x 2 cm at wrist ii) 10 cm x 3 cm x 2 cm below elbow joint.
- (xi) Depressed fracture of left parietal region.
- (xii) Cut injury over right forearm below elbow joint size 10 cm x 3 cm x 2 cm.
- (xiii) Stab injury over back of right shoulder size 8 cm x 4 cm x 2 cm.
- (xiv) Stab injury over right iliac fossa from which ileum (small intestine) was protruding size 6 cm x 3 cm x 2 cm.
- (xv) Cut injury of which was protruding from stab wound from which fecal matter was leaking.

He opined that all the injuries were antemortem injuries and during internal examination, he noticed the following injuries:

- (i) Injuries under the scalp – as specified in the list at serial nos. 3, 4 and 11.
- (ii) Skull – as specified in list of injuries at Sr. Nos.4 and 11.
- (iii) Brain – intra cerebral bleeding was present.
- (iv) Thorax – as mentioned in injury nos. 5 and 6.
- (v) Larynx, trachea and bronchi – larynx and trachea were completely cut.
- (vi) Abdomen – as specified in the list of injuries at Sr.No.9, 10 and 15.
- (vii) Desophagus – completely cut to neck.
- (viii) Stomach and its contents – contents semi-digested food particles around 200 ml.

He, therefore, opined that death was due to multiple stab injuries with shock. The postmortem report is at Exh. 124.

According to him, injuries 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14 and 15 were possible due to sharp edged weapons, either double edged

weapons or single edged weapon and were possible by Articles 3 and 4. Injuries 4 and 11 were possible by heavy and blunt object and were possible by weapons, Articles 1 and 2.

On the same day, PW 37 – Dr. Utge also performed postmortem examination on the dead body of deceased Pravin Khanna and noticed the following external injuries :

- (i) Sutured wound from left eye (angle) to left ear about 12 cm (linear).
- (ii) C.L.W. on left chest admeasuring 10 x 2 x 2 cms.
- (iii) Sutured wound on left shoulder 5 cm in size.
- (iv) Left eye was black.
- (v) Sutured wound over left cubital fossa size 5 x 3 cms.
- (vi) Abrasion over left forearm.
- (vii) Abrasion over right arm and forearm.
- (viii) Abrasion over right arm and forearm.
- (ix) Abrasion over right hypochondric region.
- (x) Abrasion over right zygomatic region.
- (xi) Fracture of left tempo parietal region with depressed

fracture.

(xii) Hematoma around scalp region.

He opined that all the injuries were antemortem. During internal examination, he noticed the following internal injuries :-

- (i) Head – As specified in the list of injuries at Sr.Nos.1, 9, 10 and 11.
- (ii) Skull – As specified in the list at Sr.No.10.
- (iii) Brain – Intra cerebral hemorrhage was present.
- (iv) Nothing abnormal was detected regarding thorax except contused lacerated wound over left chest.
- (v) Abdomen – abrasion over right hypochondriac region.
- (vi) Stomach and contents – 200 ml semi digested food particles were found and nothing abnormal was detected regarding liver, pancreas, spleen, kidney, bladder and organs of waste.

He, therefore, opined that death was due to head injuries with hematoma with fracture of skull. The postmortem is at Exh. 125.

According to him, the injuries were possible by sharp as well as heavy and blunt weapons and were possible by Articles 1 to 4. Injury No.10 was possible by hard and blunt object like Articles 1 and 2.

3. On the case being committed to the Court of Sessions, Trial Court vide Exh. 2A framed charge against the accused for offence punishable under Section 120-B, 302 r/w 34 and 201 r/w 34 of the IPC. The accused by their statements at Exhs. 3, 4 and 5 denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 41 witnesses. The defence of the accused was of denial. The trial court upon appreciation of the evidence on record, convicted and sentenced the appellants as afore-stated.

4. We have heard Mr. Harshad Bhadbhade and Mr. V. B. Singh, learned counsel for appellants and the learned APP and in order to effectively deal with the submissions which have been advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined PW 1 – Anil Dhavan, who deposes that deceased Shamsunder was his brother-in-law, who was running a shop near Thane Railway Station in 1977. On account of demolition of the said shop, deceased Shamsunder was allotted four shops by the Thane Municipal Corporation at Teen Hat Naka. Deceased Shamsunder was running a STD/PCO Booth in one shop and a hotel in another shop and the other two shops remained to be unoccupied. Deceased Shamsunder had also started business of selling juice on an handcart and, therefore, there was a dispute between deceased and accused no.1 Vikas. About two months prior to the incident, one Shankar Dudhane had given his shop on rent to deceased for keeping the articles of deceased. Accused No.1 Vikas had abused the deceased and had threatened to kill him. According to PW 1 – Anil, threats had been given in his presence . About 15 days prior to the incident, there was a quarrel between deceased and accused no.1 – Vikas on account of the shop of Dudhane. Accused No.1 had again threatened deceased that the accused would not spare the deceased. Deceased Pravin Khanna, younger brother of deceased Shamsunder was having four shops at Teen Hat Naka.

On 22/5/2006, at about 10 to 10.30 p.m., PW 1 – Anil was

standing in front of his shop near the Thane Railway Station and had received a message on telephone from one Parvez that Shamsunder was assaulted by accused – Vikas. Said Parvez requested PW 1 – Anil to immediately rush to the scene of the incident along with an ambulance. Accordingly, PW 1 – Anil, along with Sunny Arora, Pintu Jaiswal, Santosh Kasotiya and driver Chunna rushed to the scene of the incident i.e. the Teen Hat Naka in a vehicle. On reaching the scene of the incident, they noticed deceased Shamsunder lying with injuries and also noticed the presence of the police as well as the dead body of deceased Pravin Khanna. Pravin Khanna was removed to the hospital as he had also sustained injuries. PW 1 – Anil, therefore, went to the hospital to see Pravin Khanna. Deceased Shamsunder had been removed to the City Hospital at Thane. PW 1 – Anil, therefore, went to the Wagale Estate Police Station and lodged his report at Exh. 8.

6. In cross-examination, he has admitted that he waited for half an hour at the scene of the incident and had gone to the Wagale Estate Police Station between 11.30 p.m. to 12 midnight. He has also admitted that he took about one and half to two hours for lodging a report at the police station. He has admitted that he was accompanied by Sunny, Pintu.

Omission has been elicited that he had not stated in his report that he had received a message on telephone from Parvez about the incident. He has admitted that he had not taken Parvez along with him to the police station, while lodging the report. He has admitted that he had stated the full name of accused – Vikas, but could not explain as to why the surname of accused no.1 – Vikas i.e. “Zhade” was not mentioned. He has admitted that he had not stated in his report about the previous dispute or quarrel between deceased and accused Vikas. Omission is also elicited that he had not stated in his report that Shankar Dudhane had given his shop on rent to deceased Shamsunder.

PW 1 – Anil Dhavan, admittedly, was present at the scene of the incident for nearly half an hour after the incident. Curiously, he claims that he had been informed by one Parvez about the incident. PW 1 – Anil has admitted that he had not taken Parvez along with him to the police station for lodging a report. It appears that Parvez was an eye witness to the incident, who was declared hostile by the prosecution. At the point of time when PW 1 – Anil had lodged the report, he had no information that it was the accused who had committed murder of the deceased. The report had been lodged by PW 1 – Anil only on the basis of suspicion.

7. Prosecution has examined PW 7 – Balu, who deposes that he was employed as a driver for driving the ambulance belonging to deceased Shamsunder Khanna. According to him, on 22/5/2006, he was present in his house and it was informed by a friend on telephone to come along with the ambulance at the Teen Hat Naka. He accordingly went to Teen Hat Naka by auto-rickshaw. Prior to that, he had gone to the Thane Railway Station, but could not see the police and therefore, from the Railway Station, went to Teen Hat Naka by auto-rickshaw. On going near Bus Stop No. 30, he noticed the dead body of deceased Shamsunder near a shop in a lane. He took the dead body of Shamsunder in the ambulance to the Civil Hospital, Thane. Brother of Shamsunder Khanna was taken to the Godbole Hospital at Thane. After taking the dead body of Shamsunder to the Civil Hospital, Thane, he had gone to the Godbole Hospital. He learnt that brother of Shamsunder i.e. Pravin Khanna had also succumbed to his injuries. According to him, there used to be quarrel between deceased Pravin Khanna and accused – Vikas on account of the shops. An omission has been elicited that he had not stated in his previous statement about the place where he was called by his friend. Omission is also elicited that he had not stated that he had first gone to the Thane Railway Station. He has

admitted that his statement was recorded on 23/5/2006 at night.

PW 7 – Balu is not an eye witness to the incident. PW 7 – Balu has only deposed about a dispute between deceased and accused no.1 – Vikas on account of the construction of the shops. The evidence of this witness, therefore, apart from deposing about the previous dispute between the deceased and the accused, does not assist the prosecution case in advancing it any further.

8. Prosecution has examined PW 8 – Parvez, the alleged eye witness to the incident. PW 8 – Parvez did not support the prosecution and was declared hostile. He was cross-examined on behalf of the prosecution and was confronted with portions marked “A” and “B” from his statement. Nothing of substance had been elicited in the cross-examination of PW 8 – Parvez which would assist the prosecution in its case.

9. Prosecution has examined PW 9 – Jaya Shetty, who was running the hotel of deceased Shamsunder Khanna. In the examination-in-chief, PW 9 – Jaya has admitted that accused Vikas Zade was known to him. Accused – Vikas was managing the business of tours and travels near

the hotel i.e. the Ding Dong Dhaba of deceased Shamsundar Khanna. On 22/5/2006, according to PW 9 – Jaya, he started the hotel at 7 p.m. and at about 9.30 p.m. one Pravin Khanna came to his hotel. Pravin Khanna waited about 10 to 15 minutes and at about 10.30 he learnt about some incident which had taken place at Teen Hat Naka. According to PW 9 – Jaya, he had not witnessed the incident. Subsequently, he had seen injured Shamsunder and Pravin Khanna. This witness was also declared hostile by the prosecution and was cross-examined by confronting him with portions marked “A”, “B” and “C” from the previous statement. Again nothing of importance has been elicited in the cross-examination to assist the prosecution case.

Both, PW 8 – Parvez and PW 9 – Jaya Shetty did not support the prosecution and were declared hostile. Nothing of importance was elicited in their evidence which would assist the prosecution case.

10. Prosecution has examined PW 10 – Pintu Jaiswal, who deposes that he was knowing deceased Shamsunder Khanna. Deceased Shamsunder Khanna and deceased Pravin Khanna were owning about 11 shops at Teen Hat Naka in Thane. The shops belonging to deceased near

the Thane Railway State had been demolished in the road widening scheme. The shops at Teen Hat Naka belonging to the deceased had been constructed by accused – Vikas Zhade. According to Pintu, accused – Vikas was also owner of some shops at Teen Hat Naka.

According to Pintu, about two months prior to the incident, there was a quarrel between Vikas and Pravin on account of construction of the shops belonging to Shankar Dudhane. The dispute between them was settled by Shankar Dudhane in the presence of PW 10 – Pintu. About 15 days prior to the incident, deceased Shamsunder and deceased Pravin were constructing on the open land adjacent to the Ding Dong Dhaba at Teen Hat Naka. At the time of construction, PW 10 – Pintu, Shaikh, Iqbal, Yusuf were present. Accused – Vikas had come at the scene of the incident and had taken both the deceased at some distance. PW 10 – Pintu, therefore, followed them and overheard their discussion. Accused – Vikas started abusing the deceased and threatened them that if the deceased continued to behave in this manner, something will have to be done. Accused – Vikas thereafter went away.

On 22/5/2006, according to PW 10 – Pintu, he had gone to

Dadar for purchasing fruits and returned to Thane at about 2 p.m. and thereafter went to his shop. He received a telephone from Shamsunder Khanna, who enquired with him about his business and thereafter the phone was disconnected. At about 7.30 p.m. Shamsunder Khanna came to his shop on his motorcycle and met his brother-in-law, PW 1 – Anil, who was demanding Rs.10,000/- from Shamsunder. According to Pintu, he also went near Shamsunder and noticed Shamsunder paying Rs.10,000/- to PW 1 – Anil. After paying the amount, Shamsunder went away. Anil informed him that Shamsunder and Pravin had been assaulted and they were injured. PW 10 – Pintu, therefore, along with others took the ambulance to the Teen Hat Naka and noticed a crowd at the scene of the incident. He also noticed the presence of police at the scene of the incident and on enquiry, he learnt that Pravin had been sent to the hospital. Shamsunder Khanna was lying on the ground and since police were present, they did not permit to go near Shamsunder.

According to him, on 6/6/2006, he was called by the police to act as a panch and in his presence one Qualis Jeep bearing registration No.MH-05-G-1478 was seized from one Nova Daniel. A question was asked in the examination-in-chief as to what was informed by Nova Daniel

to the police. The answer has also been recorded, which, in our opinion, would be inadmissible in evidence as it would amount to a statement being made by a witness to the police. He has identified his signature on the seizure memo at Exh. 33.

11. In cross-examination, he has admitted that he was running a cloth business of deceased Shamsunder and was an employee of deceased Shamsunder. He had been an employee since two years prior to the incident. He has admitted that he was doing his business by the side of the Railway Station on the footpath. He has admitted that his statement was recorded by the police on 23/5/2006. He has admitted that Anil Dhavan had accompanied him and was present when his statement was recorded. Omission has been elicited that he had not stated that Shamsunder had paid Rs.10,000/- to PW 1 – Anil Dhavan. He has admitted that no one was allowed to go near the body of Shamsunder, who was lying at the scene of the incident. He has admitted that even Anil was not allowed to go near Shamsunder. He has admitted that the dead body of Shamsunder was shifted to the hospital within one to one and half hours after PW 10 – Pintu arrived at the scene of the incident.

In respect of PW 10 – Pintu Jaiswal, it is urged by the learned counsel for the appellants that PW 10 – Pintu deposes about the presence of PW 1 – Anil at the scene of the incident at about 7.30 p.m. demanding Rs.10,000/- from deceased Shamsunder. According to the learned counsel for the appellants PW 1 – Anil has not deposed about the same. He also deposes about being informed by PW 1 – Anil that the deceased had been assaulted and were injured. The learned counsel for the appellants have urged before us that PW 1 – Anil does not depose about the presence of PW 10 – Pintu at the scene of the incident. In our opinion, it is extremely doubtful if PW 10 – Pintu was present at the scene of the incident. In cross-examination, he has admitted that he was an employee of deceased Shamsunder. He has admitted that he was accompanied by PW 1 – Anil when his statement was recorded. It is, therefore, extremely doubtful if PW 10 – Pintu was present at the scene of the incident.

12. Prosecution has examined PW 11 – Manohar Patil, who was running the business under the name and style of “Shri Gurukrupa Travels” at Teen Hat Naka. According to him, on 22/5/2006, he had opened the shop at 9 a.m. At about 1.30 p.m. he had reached his shop and within 15 minutes deceased Pravin Khanna had come to his shop for demanding the

payment of the electricity bill. At about 10.30 p.m. he was at his residence and was informed on telephone by his employee about murder of someone and about people closing their shops. He, therefore, immediately proceeded to the scene of the incident and noticed Pravin Khanna lying in pool of blood. He, therefore, informed the police that the injured was alive and asked them to call for an ambulance. He took injured Pravin Khanna in his car to the Godbole Hospital at Naupada and again returned to the scene of the incident when he learnt that another person had been assaulted. On reaching the scene of the incident, he learnt that Shamsunder Khanna had succumbed to his injuries.

13. Prosecution has examined PW 12 – Asha Khanna, wife of deceased Shamsunder, who deposes about both the deceased being owners of the shops at Teen Hat Naka, Thane. According to her, on 14/5/2006, she had misplaced her Mangalsutra and was searching for the same and deceased Shamsunder had assured her with another Mangalsutra can be purchased. Shamsunder had received a call on his mobile phone and after answering the call, informed PW 12 – Asha that accused Vikas was persecuting him. Shamsunder appeared to be perturbed. Asha, who was to leave for Delhi on the next day, informed Shamsunder that she would

not go to Delhi. However, due to the persuasions of Shamsunder, she went to Delhi. On 17/5/2006, she had gone to the house of her mother-in-law and had enquired whether deceased Shamsunder had telephoned. Her mother-in-law had informed her that no call was received from Shamsunder and, therefore, her mother-in-law telephoned Shamsunder. Her mother-in-law informed her that Shamsunder appeared to be perturbed and had said that he would call her later. Thereafter there was no call from Shamsunder. Asha had also called Shamsunder and Shamsunder had informed her that he would telephone her later on as he was busy. On 20/5/2006, Tanmay, son of Asha and Shamsunder had given a missed call to Shamsunder and Shamsunder had informed Asha to look after the children and he would call her later on. According to Asha, whenever she used to go out of station, deceased Shamsunder used to regularly call her, but this time there was no telephone from Shamsunder.

On 22/5/2006, an elder brother of Shamsunder, by name Trilok Khanna came to the house where Asha was staying and informed her that Shamsunder was serious and, therefore, they should go to Thane. Accordingly, Asha along with others returned to Thane and went to the Civil Hospital where she learnt that the accused had committed murder of

Shamsunder and Pravin. According to her, after 2 to 3 days of performing the last rites on the dead bodies of the deceased, she had opened the dickey of the motorcycle of Shamsunder and had found one letter, which is Article P-A. According to her, about 2 to 3 days prior to her departure to Delhi, she had found the said letter in the pocket of his trouser. She had inquired about said letter and Shamsunder had informed her not to worry and the letter was to be sent to higher authority. According to her, Shamsunder did not get the time for sending the letter and, therefore, the said incident had occurred.

14. She has admitted that her statement was recorded on 17/6/2006 and has admitted not to have informed the police about finding of the letter, Article P-A. She has volunteered that she had gone to the village in Delhi for some religious ceremony. She has admitted not to have informed her younger brother Annu regarding finding the letter, Article P-A. An omission is elicited that she had not stated that the accused had committed murder of her husband and her bother-in-law Pravin.

In respect of PW 12 – Asha, wife of deceased Shamsunder, it is urged by the learned counsel for the appellants that no reliance can be

placed on the recitals of the letter at Exh.P-A, which PW 12 – Asha had allegedly found in the dickey of the motorcycle of Shamsunder. Statement of this witness was recorded on 17/6/2006 and curiously this witness had admitted not to have informed the police about finding of the letter. This witness has also admitted that she had not informed her younger brother Annu regarding finding of the letter.

15. Prosecution has examined PW 15 – Shaikh Muktar, who deposes that on 22/5/2006, deceased Pravin Khanna had called him to the shop of Pravin for taking measurements of the tin-sheet. After taking measurements, PW 15 – Shaikh Muktar had returned to his shop. At about 9 to 9.30 p.m. he had gone to the shop of Pravin Khanna and at that time, he and deceased Pravin were talking near one toilet in that area. After about 5 to 10 minutes they heard some noise and deceased Pravin Khanna ran in that direction. According to PW 15 – Shaikh Muktar, he also followed Pravin Khanna, but stayed at the Bus Stop, while Pravin Khanna proceeded ahead. According to him, there was darkness at that place. He, however, did not wait there and returned. He claims not to have witnessed any incident. He was accordingly declared hostile and was cross-examined. Nothing of importance has been elicited in his cross-

examination.

PW 15 – Shaikh Muktar also did not support the prosecution and was declared hostile. This witness, in our opinion, cannot be relied upon as this witness does not show the presence of other eye witnesses at the scene of the incident.

16. Prosecution has examined PW 16 – Rafat Fakir, who claims to have seen the accused at the scene of the incident running with weapons in their hands. PW 16 – Rafat deposes that in June 2006, she was running a hotel which he had taken on rent and used to open her hotel in the morning at 7.30 a.m. and used to close the hotel at 9.30 or 10 p.m. She claims that she knew accused no.1 – Vikas. According to him, on 22/5/2006 she had opened her hotel as usual at 7.30 a.m. and was present in her hotel till 10 p.m. On that day, at about 9.45 p.m., the persons from the adjoining shops has come to his hotel and had informed him that there was a murder in the locality and she should close her hotel. Her servant, therefore, immediately closed the shutter and PW 16 – Rafat came out of the hotel. At that time she noticed people were running and had also noticed the three accused running with knives in their hands.

17. In cross-examination, on behalf of the accused, she has admitted that she had seen about 20 to 25 persons, who were running on the road. She has admitted that her statement was recorded by the police after 8 days of the incident. She has admitted that on her own she had not gone to the police, but was called by the police for recording her statement. She has admitted that some police used to visit her hotel. She has admitted that near her hotel, there was a traffic police chowky. She has admitted that she had not informed the incident to the police in the traffic police chowky. She has admitted not to have informed the incident to the police, who used to come to her hotel. She has admitted that the police chowky in Mahagiri lane is on her way to her house. She has admitted that she did not consider it necessary to inform the police at the chowky regarding the incident. She has admitted that before her evidence was recoded in the court, she had seen her statement, which was recorded during investigation. She has admitted that she has disclosed the incident to her husband and to her sons. She has admitted that she had not asked either her husband or her sons to accompany her to the police station. She has admitted that after the incident, she had noticed some policemen at the scene of the incident and was present at the scene of the incident for about half an hour after closing the hotel. She has admitted not to have disclosed the incident to the

policemen, who were present there. She has admitted not to have disclosed the incident to others, who were present there. She has admitted that she knows PW 1 – Anil, whome she has addressed as Annu. She has admitted to have informed him about the incident.

The learned counsel for the appellants have urged before us that no reliance can be placed on the testimony of PW 16 – Rafat who claims that she had seen the accused running, carrying weapons in their hands.

In cross-examination, this witness has admitted that she had seen about 20 to 25 persons, who were running on the road. Statement of this witness was recorded after 8 days of the incident. The conduct of this witness is extremely unnatural as she has admitted that she had not informed the police that she had seen the accused running with weapons in their hands. She has also admitted not to have informed the police in the Traffic Police Chowky. Curiously, this witness claims that she had seen the policemen at the scene of the incident after the incident was over, but yet did not inform or disclose to the police that she had seen the accused fleeing from the scene of the incident. This witness has also admitted that

she had not disclosed the incident to PW 1 – Anil, who admittedly, was present at the scene of the incident. In our opinion, therefore, no reliance can be placed on the testimony of PW 16 – Rafat that she had seen the accused fleeing from the scene of the incident.

18. Prosecution has examined PW 19 – Inishu Malhotra, who deposes that he knew the deceased. He used to sell ladies purses on the footpath out side the Railway Station at the time of the incident. According to him, on 22/5/2006, he was doing his business and at about noon, deceased Shamsunder had met him. Inishu had requested Shamsunder to provide one shop as Inishu was apprehending some action by the squad, which was entrusted with removal of encroachment. Shamsunder had accordingly asked him to see him at 9.30 p.m. and had assured him that he would provide one shop in the tenement. According to PW 19 – Inishu, he had gone to Teen Hat Naka at about 9 to 9.30 p.m. and had met deceased Shamsunder and deceased Pravin. One Harishkumar and one unknown person were also present there and he apprised him of the purpose of his visit. Deceased Shamsunder asked PW 19 – Inishu to wait. Shamsunder and his brother Pravin were talking about half an hour with each other and thereafter Shamsunder asked Inishu to accompany him and had assured

that he would provide one shop to him. Shamsunder went ahead and Inishu was following him. When they had taken a turn in the lane, they noticed three accused and one Jabbar standing in the lane. Accused – Vikas and person named Jabbar were armed with choppers, while accused – Santosh and accused – Pankaj were armed with knives. As soon as Shamsunder entered the lane, accused – Vikas and Jabbar started assaulting Shamsunder with chopper and accused Santosh and accused Pankaj assaulted him with knives. Shamsunder cried out for help. At that time, Pravin Khanna and two others rushed to the scene of the incident. Accused Vikas caught the collar of deceased Pravin and assaulted Pravin with chopper on his head. Shamsunder, on sustaining the injuries, fell on the ground and Pravin also fell on the ground. According to PW 19 – Inishu, on seeing the incident, he was frightened and, therefore, left the scene of the incident.

According to him, the contract for construction of the tenements at Teen Hat Naka had been given to accused Vikas. According to Inishu, prior to the incident, there was a dispute between deceased Shamsunder and Vikas in respect of the shop tenements. According to him he was knowing the accused since prior to the incident. He has admitted that in respect of the incident, he had gone to the police on 2/6/2006. He

has admitted that he alone had gone to the police at the Crime Branch Office. He has admitted that he did not consider it necessary to approach Wagale Estate Police Station at the relevant time. According to him, he was frightened. He has admitted that he had not approached the Crime Branch Office on 2/6/2006 at the instance of anyone. He has admitted that he was not called by the officers of the Crime Branch on that day. He has admitted that he had not discussed or deliberated with anyone prior to approaching the police. He has admitted that he was not frightened on the day on which he had approached the Crime Branch Office. He has admitted that he had gone to the Crime Branch Office for disclosing the facts regarding the incident. He has admitted that prior to 2/6/2006, he had never gone to the Crime Branch Office, but was knowing the location of the Crime Branch Office. He has admitted that on 22/5/2006, he was knowing the location of the Crime Branch Office as well as the office of the Police Commissioner. He has admitted that he could have gone to the office of the Police Commissioner. He has admitted that he was not knowing any officer or employee of the Crime Branch Office.

He has admitted that he was a Commerce Graduate of Kurukshetra University and had worked as a Supervisor in a private

garment factory at Panipat. He has admitted that the earlier shop tenement, where he was running a Chinese Food Centre was owned by deceased Shamsunder. He has admitted that from 22/5/2006 till 2/6/2006, he had not done his business of selling of ladies purses, but had resumed his business on 1/6/2006. He has admitted that he was possessing about 20,000 to 25,000 rupees for purchasing a shop at Teen Hat Naka. He has admitted that he had not talked with accused – Vikas regarding purchasing of any shop. He has admitted that he had worked with deceased Shamsunder for about 12 years.

He has admitted that he knew PW 1 – Anil and on 22/5/2006 had seen PW 1 – Anil. He has admitted that PW 1 – Anil is the brother-in-law of deceased Shamsunder and he had seen him at Teen Hat Naka at about 11 p.m. He has admitted to have met him at Teen Hat Naka. He has admitted that he had no talk with PW 1 – Anil at that time. He has admitted that he had attended the funeral of deceased Shamsunder and deceased Pravin at Kopri area. He has admitted that he knew the location of the Kopri Police Station. He has admitted that he had not disclosed the incident to anyone when he had attended the funeral. He has admitted that after the funeral, he had not gone to the residence of deceased Shamsunder

or deceased Pravin. He has admitted that from 22/5/2006 to 1/6/2006, he was at Dombivali, but used to go out of Dombivali during the said period. He has admitted that even at Dombivali, he had not disclosed the incident to anyone.

Omission has been elicited that he had not stated in his previous statement that deceased Shamsunder had come to see him on 22/5/2006. Omission has been elicited that he had not stated in his previous statement that he had expressed his need for purchasing a shop to Shamsunder Khanna and he had a talk in that regard with deceased Shamsunder. Omission has been elicited that he had not stated in his previous statement that deceased Shamsunder had called him in the evening at Teen Hat Naka and had assured to provide one shop to PW 19 – Inishu. Omission has been elicited that he had not stated in his previous statement that accordingly he had gone to Teen Hat Naka in the evening to see deceased Shamsunder and since deceased Shamsunder was talking with someone else, he had asked him to wait for half an hour and accordingly he was waiting there. Omission has been elicited that deceased Shamsunder had assured that he would show the tenement and had asked PW 19 – Inishu to accompany him. Omission has been elicited that he had not

stated in his previous statement that deceased Shamsunder proceeded ahead and PW 19 – Inishu followed him. Omission has been elicited that he had not stated that on taking turn in the lane, he had noticed the accused and one Jabbar in the said lane. Omission has been elicited that he had not stated that accused – Vikas and Jabbar were armed with chopper, while accused – Panjak and Santosh were armed with knives. Omission has also been elicited that he had not stated in his previous statement that accused – Vikas and Jabbar attacked Shamsunder with chopper, while accused Santosh and accused Pankaj attacked him with knives. Omission has also been elicited that he had not stated in his previous statement that deceased Shamsunder had raised an alarm and had cried out in the name of his brother Pravin and, therefore, deceased Pravin accompanied by two others had rushed in the lane.

He has admitted that there was no darkness in the lane. He has admitted that there was no street light in the said lane and he was present at the scene of the incident till about 11.40 p.m.

In further cross-examination, he has admitted that deceased Shamsunder had informed him that the deposit would be Rs.25,000/- and

and the rent would be Rs.3000/- per month. He has admitted as correct that even now he was doing the business at the Railway Station. He has admitted as correct that he had not obtained any shop on rent at Teen Hat Naka. He has admitted as correct that he was running the business illegally at the Railway Station. He has also admitted as correct that he was to maintain good relations with the police and the railway personnel. According to him, all the accused had arrived at the lane suddenly. As soon as they arrived, they started attacking deceased. He has admitted that he had made no attempts to save deceased Shamsunder. He has admitted that he had made no attempts to save deceased Pravin. He has admitted that he had not cried for help, but was simply witnessing the incident. He has admitted that he was waiting at the scene of the incident till 11.30 p.m. and was standing at a distance of 10 to 15 ft. from the scene of the incident. He has admitted that the police had arrived when he was present at the scene of the incident. According to him, he only stood at the scene of the incident. He has admitted that PW 1 – Anil had arrived at the scene of the incident within 45 minutes. He has admitted not to have disclosed the incident to PW 1 – Anil. According to him, the police, after their arrival, were interrogating persons if they had seen the incident. He has admitted that he had not disclosed anything to the police at that time regarding

having witnessed the incident.

In respect of PW 19 – Inishu, learned counsel for the appellants have urged before us that the statement of this witness, who claims to be an eye witness, was recorded on 2/6/2006. This witness claims that he was present at the scene of the incident and had seen PW 1 – Anil at the scene of the incident and yet had not disclosed the incident to him.

PW 19 – Inishu claims to be an eye witness to the incident. There is no explanation as to why PW 19 – Inishu did not disclose the incident to the police immediately after the incident or soon thereafter. He claims that he was frightened and had left the scene of the incident, but in cross-examination, he has admitted that he had seen PW 1 – Anil at the scene of the incident at about 11 p.m. He has also admitted that he had met PW 1 – Anil at the Teen Hat Naka. This witness has also admitted that he had attended the funeral of deceased. Despite this, till 2/6/2006, he made no attempts at disclosing the incident either to the relatives of the deceased or to the police. In our opinion, therefore, no reliance can be placed on the testimony of this witness and he appears to have been a got up witness for supporting the prosecution case. Apart from this, several omissions on the

core of his testimony have been elicited and on that account also no reliance can be placed on the testimony of this witness. At the close of the cross-examination, this witness has emerged as a witness on whom implicit reliance cannot be placed.

19. Prosecution has examined PW 20 – Ramjanam, an auto-rickshaw driver, who deposes that he used to ply his auto-rickshaw in Thane City and used to park his auto-rickshaw at the Teen Hat Naka. He has admitted that deceased Shamsunder was managing some shops at the Railway Station and after demolition of the said shops, he was owning shops at Teen Hat Naka area. He has further admitted that the said shops at Teen Hat Naka had been constructed by accused no.1 - Vikas. He has further deposed that accused no.1 – Vikas was managing Krishna Travels. On 22/5/2006, as usual, he was plying his auto-rickshaw since 7 a.m. and came at Teen Hat Naka at 8.30 p.m. At about 8.30 to 8.45 p.m. deceased Shamsunder had come towards Karishma Travels and accused no.1 – Vikas had asked deceased Shamsunder to come at 10 p.m. Deceased Shamsunder had informed accused no.1 that he would not be able to come at 10 p.m. and would send his brother Pravin. According to PW 20 – Ramjanam at about 9.30 to 9.45 p.m. he had noticed deceased Shamsunder along with one

person at the Teen Hat Naka going towards the shops which were unoccupied. He further deposes that near the Chinese Centre, accused no. 2 – Santosh, accused no. 3 – Pankaj and one Jabbar were present. These accused were taking their dinner and were consuming liquor. Accused No.1 – Vikas came to that place, carrying one bag and handed over the said bag to accused – Santosh. At that time, one Qualis vehicle was noticed parked near the Karishma Travels. Accused – Santosh kept the said bag in the vehicle. PW 20 – Ramjanam has identified the said bag, as article 10. Accused No. 1 – Vikas then went to the rear of the shop, where a meeting was going on. According to Ramjanam, he was initially sitting in the auto-rickshaw, but later on sat at the rear side of the auto-rickshaw and had noticed deceased Shamsunder coming from the said meeting, keeping his hand on his abdomen and shouting as “run run”. Deceased Pravin instead of fleeing from the scene of the incident, fell on the person of Shamsunder. Jabbar who was armed with knife and accused – Santosh who was armed with chopper and accused – Pankaj who was also armed with a chopper attacked deceased Shamsunder and deceased Pravin by the said weapons. Accused No.1 – Vikas also came near the scene of the incident. Ramjanam immediately started his auto-rickshaw and fled from the scene of the incident. He returned to the scene of the incident after about 3 to 4

minutes and had seen the accused fleeing from the scene of the incident. According to Ramjanam for two days he was present at Thane and thereafter had gone to his native place. According to him, he had fled from Thane as he was apprehending danger to his life.

20. In cross-examination, he has admitted that his statement was recorded after one month i.e. on 23/6/2006. According to him, after 15 days of the incident, he had returned to Thane from his native place. He has admitted that he alone had gone to his native place. He has admitted that he had made attempts to see the Policemen and also had made attempts to see the Commissioner of Police. He has admitted that he had personally not gone to see the Senior Inspector of Wagale Police Station. He has also admitted that he had not seen either Assistant Commissioner of Police or Deputy Commissioner of Police. According to him, he was driven out by the policemen. He has admitted that he had gone to see the Police Commissioner, but was not allowed to see him. He has admitted that an entry of his name had been taken in the register and a pass had been issued to him, but he was not allowed to see the Commissioner.

Omission has been elicited that he had not stated in his

previous statement that deceased Pravin Kahnna also used to visit the Mataji Temple where Ramjanam was regularly visiting. He has admitted that on his own accord, he had gone to see Police Officer Shri Joshi. He has admitted that he had learnt on 22/5/2006 that the investigation had been handed over to Shri Joshi. He has admitted that Shri Joshi was personally recording his statement. He has then admitted that during the period from his return from his native place till recording of his statement by the police, he was plying his auto-rickshaw in Thane City. He has admitted that he was parking his auto-rickshaw at the Teen Hat Naka compound in Wagale Estate. He has admitted that even prior to 22/5/2006, he used to park his auto-rickshaw at the same place. He has admitted that after his return from his native place, he used to park his auto-rickshaw during working hours at the Teen Hat Naka. He has admitted that he had not complained regarding the refusal of the police officers to meet him to other auto-rickshaw pullers or anybody else. He has admitted that he was apprehending danger even during the period when he was parking his auto-rickshaw at the Teen Hat Naka. He has admitted that he was knowing the family members of deceased Shamsunder and deceased Pravin. He has admitted that he had made no attempts to see them and to have a dialog. He has admitted that he had made no efforts at contacting the persons, who had employed by

Shamsunder at his work place.

Omission has been elicited that he had not stated in his previous statement that on the day of the incident, deceased Shamsunder had come towards the Karishma Travels at about 8.30 to 8.45 p.m. Omission is also elicited that he had not stated that accused no.1 – Vikas had asked Shamsunder to come at 10 p.m. Omission is also elicited that he had not stated in his previous statement that deceased Shamsunder expressed his inability to come at 10 p.m. and had stated that he would send his brother Pravin. Omission is also elicited that he had not stated that at about 9.30 p.m. he had noticed Shamsunder Khanna going to Karishma Travels along with one person. Omission is elicited that he had not stated that he had seen Shamsunder and one person going towards the unoccupied shops. Omission is elicited that he had not stated in his previous statement that he had seen Shamsunder going to the unoccupied shops by the side of the shop, where a meeting was going on. Omission is elicited that he had not stated in his previous statement that accused no.1 – Vikas had gone to the vacant shops to the rear side of the Karishma Travels for attending the meeting. Omission is also elicited that he had not stated in his previous statement that he had seen persons attacking deceased Shamsunder.

Omission is elicited that he had not stated in his previous statement that initially he was sitting in the driver seat and later on sat in the rear seat from where he had witnessed deceased Shamsunder coming from the side where the meeting was held and had placed his hand on his abdomen. Omission is elicited that he had not stated in his previous statement that deceased Shamsunder had shouted as “run run”. Omission is elicited that he had not stated that deceased Pravin instead of running away, fell on the person of Shamsunder. Omission is also elicited that he had not stated that accused – Santosh, accused – Pankaj and Jabbar had attacked Pravin Khanna by chopper and knives. Omission is also elicited that he had not stated in his previous statement that accused no.1 – Vikas also rushed to the said place. He was confronted with portion marked “A” from his previous statement that while he was present at the scene of the incident, the police had arrived at the spot. He was confronted with portion from his previous statement that he had seen deceased Shamsunder and deceased Pravin lying in one lane.

In respect of PW 20 – Ramjanam, the learned counsel for the appellants have urged before us that the conduct of this witness is wholly unnatural as the statement of this witness was recorded belatedly after

about a month of the incident. Though this witness claims to be an eye witness to the incident, the conduct of this witness is wholly unnatural and, therefore, no reliance can be placed on the testimony of this witness.

PW 20 – Ramjanam claims that he was sitting in the auto-rickshaw and while sitting in the auto-rickshaw, he had noticed the incident of assault by the accused on the two deceased. Statement of this witness was recorded on 23/6/2006. He has admitted that he had returned from his native place about 15 days prior to recording of his statement. This witness made no attempts at informing the police that he had witnessed the incident. This witness also did not contact the relatives of the deceased for giving information about the incident. Though this witness claims that he had gone to his native place as he was frightened, there is nothing on record which would substantiate that this witness, after seeing the incident, had fled to his native place. The accused had not threatened this witness and, therefore, there was no cause for this witness to be alarmed. It is extremely curious that on 23/6/2006 all of a sudden this witness decided to inform the police that he had seen the incident. Several omissions have been elicited in his statement which affects the very core of testimony of this witness in respect of the incident. In our opinion, therefore, no

reliance can be placed on the testimony of this witness.

21. Prosecution has also examined PW 21 – Harishkumar, who deposes that he knew deceased Pravin and deceased Shamsunder. On 22/5/2006 at about 9 p.m. he was attending to his business outside the railway station at Thane. Deceased Shamsunder came there and requested him to accompany him for attending one marriage. PW 21 – Harishkumar accordingly closed his business and proceeded on the motorcycle at about 9.15 to 9.30 p.m. They had gone to Teen Hat Naka and had noticed deceased Pravin talking with two or three other persons. PW 21 – Harishkumar, thereafter had gone to the pan stall and in the meantime deceased Shamsunder had entered one lane. All of a sudden, PW 21 – Harishkumar heard the cries and also noticed deceased Pravin Khanna and one Muktar Shaikh rushing towards the said lane. He had also noticed accused no.1 – Vikas, accused – Santosh, accused – Pankaj and one Jabbar attacking deceased Shamsunder. Two of the accused were armed with choppers, while the other two were armed with knives. Accused thereafter pulled deceased Pravin by the collar of his shirt and assaulted deceased Pravin. PW 21 – Harishkumar claims that on seeing the incident, he was frightened and fled from the scene of the incident.

22. In cross-examination, he has admitted that he was residing near Premnagar in the Parsi Colony in Kopri area. He was confronted with his previous statement dated 2/6/2006 and he has admitted that his residential address at Parsi Colony was not stated by him. He has admitted that he does not know PW 19 – Inishu Malhotra, but has admitted that he knew complainant PW 1 – Anil Dhawan. He has admitted that on 22/5/2006, he had not met PW 1 – Anil. He has admitted that he had met PW 1 – Anil during 22/5/2006 to 2/6/2006. He has admitted that he had met PW 1 – Anil after 4 to 5 days of the incident at the railway station between 4 to 5 p.m. PW 21 – Harishkumar has admitted that he had not talked with Anil at that time. He has admitted that he had not informed anyone regarding the incident. He claims that he was ailing from 22/5/2006 till 5/6/2006 and had taken treatment at Premnagar. He has admitted that during the relevant period, he was residing with his friend. He has admitted that deceased used to help him in his business as he does not have a license to run a shop. He has admitted that deceased Shamsunder used to give him financial aid. He has admitted that he did not know the place where the marriage was to be solemnized when he was asked to come by deceased Shamsunder. He has admitted that he had not

questioned deceased Shamsunder as to why they were proceeding towards Teen Hat Naka instead of going for attending the marriage.

He has admitted that prior to recording of the statement he had not gone and given information at the police station. He has admitted that he learnt about arrest of the accused and thereafter on his own had gone for recording his statement. He has admitted that he had seen the Investigating Officer Shri Joshi during 22/5/2006 to 2/6/2006. He, however, claims that he was frightened. An omission has been elicited that he had not stated in his previous statement that since he was frightened, he had not gone for recording his statement. An omission has been elicited that he had not stated in his previous statement that two accused were armed with choppers, while two were armed with knives. Omission is elicited that he had not stated in his previous statement that the accused had pulled deceased Pravin by the collar of his shirt. In further cross-examination, he has admitted that in case of any dispute with the police, deceased Shamsunder and deceased Pravin used to help him. He has admitted that he could not state the source of light at the scene of the incident. He admits that he stood at a distance of 5 to 7 ft. from the place where the deceased were attacked. He has admitted that he had not cried for help. He has

admitted that he had fled from the scene of the incident when deceased Pravin was assaulted. He has then admitted that during 22/5/2006 to 5/6/2006 he was ailing for some period and was alright after the rest. He has admitted that he does not know the medical practitioner who had treated him. He has admitted that he had gone to the railway station after 2 to 3 days of the incident for seeking financial help for his medical treatment. He has admitted that he had not disclosed the incident to his friend Sunny or to his other friends. He has admitted that he had not informed the incident by approaching the Kopri Police Station. He has admitted as correct that the deceased and PW 1 – Anil hail from his native place.

In respect of PW 21 – Harishkumar, it is urged by the learned counsel for the appellants that no reliance can be placed on the testimony of this witness as this witness does not show the presence of PW 19 – Inishu as well as the fact that this witness had not disclosed the incident to PW 1 – Anil.

Though PW 19 – Inishu claims that PW 21 – Harishkumar was present, PW 21 – Harishkumar does not refer to the presence of PW 19 –

Inishu. This witness has admitted that he had met PW 1 – Anil during 22/5/2006 to 2/6/2006, but has also admitted not to have disclosed the incident to PW 1 – Anil. There is no explanation forthcoming from the prosecution regarding the enormous delay in recording the statement of this witness on 2/6/2006. This witness has admitted that the deceased used to financially help him whenever he was in difficulty. In our opinion, on account of the unnatural conduct as well as delay in recording of his statement, no reliance can be placed on the testimony of this witness.

23. In respect of the seizure of the weapons, the learned counsel for the appellants have urged before us that no reliance can be placed on the seizure of the weapons as there is no evidence about weapons being sealed and more over PW 41 - Joshi has admitted that when he had seen the weapons, they were not sealed.

24. The panch witnesses to the memorandum regarding the discovery of the weapons did not support the prosecution and were declared hostile. The report of the C.A. at Exh. 171 also does not assist the prosecution as the origin of the blood as well as grouping was not possible. Mere recovery of the weapons by itself, without a relevancy of the

weapons being established to the commission of the offence, cannot assist the prosecution case further. There is no reliable evidence in respect of the sealing of the weapons.

25. PW 41 - Prafulla Joshi, in his cross-examination, has admitted that he had seen the weapons and at the time of production of the said weapons before him, the weapons only bore the labels bearing signature of the panchas and they were “open”. Since the report of the C.A. does not conclusively establish the user of the weapons in the commission of the offence, coupled with the fact that there is no evidence of sealing of the weapons immediately on their seizure, no reliance can be placed on mere discovery of the weapons at the behest of the appellants.

26. Thus, the prosecution, in our opinion, has only been able to establish a dispute between the deceased and the appellant/accused no.1 – Vikas. At the most, it can, therefore, be said that accused no.1 – Vikas had a motive for commission of the crime. Mere motive by itself, in the absence of evidence to establish that it was, in fact, accused no.1 – Vikas, who had committed the crime, motive as a circumstance, cannot be held sufficient to prove the offence against the accused beyond reasonable

doubt. We, therefore, find that there is no evidence on the basis of which the prosecution can claim that it has proved the offence against the accused beyond reasonable doubt. The accused, in our opinion, therefore, are entitled to be given the benefit of doubt.

27. Accordingly, Criminal Appeals are allowed and the conviction and sentence of the Appellants/Original Accused Nos. 1, 2 and 3 is hereby quashed and set aside and the accused are acquitted of the offence with which they were charged and convicted. Fine if paid by the accused be refunded to them. Since the Appellants/Accused are in Jail, they be released forthwith if not required in any other case.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)