

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.253 OF 2008

- | | | |
|---|---|-------------------|
| 1. Kundan Harichandra Dhule, |] | |
| Age : about 24 years, |] | |
| R/o. Native Place – Village Wangni, |] | |
| Taluka Karjat, Dist. Raigad. |] | |
| At present R/o. Geeta Apartment, |] | |
| Room No.101, 1 st Floor, Pendse Nagar, |] | |
| Saraswati Colony, Dombivli (East), |] | |
| Dist. Thane. |] | |
| |] | |
| 2. Sachin Ajit Bhole, |] | |
| Age 23 Yrs., |] | |
| R/o. Trimurti Vasahat, |] | |
| Near Joshi High School, |] | |
| Dombivli (East), Dist. Thane |] | |
| Native Place – Chain, Tal. Murbad, |] | |
| Dist. Thane. |] | |
| |] | |
| 3. Deepak @ Babbu Kashiram Kalambe, |] | |
| Age 21 Yrs., |] | |
| R/o. Trimurti Vasahat, |] | |
| Near Joshi High School, Dombivli (E), |] | Appellants / |
| Native Place – Village Dharavali, |] | (Original Accused |
| Taluka Mahad, Dist. Thane. |] | Nos.1 to 3) |

Versus

The State of Maharashtra,	]	 Respondent /
Through Dombivli Police Station	]	(Org. Complainant)

ALONG WITH
CRIMINAL APPEAL NO.1045 OF 2008

The State of Maharashtra	]	 Appellant /
	]	(Org. Complainant)

Versus

- | | |
|------------------------------|---|
| 1. Kundan Harichandra Dhule, |] |
| Age : about 24 years, |] |

- R/o. Native Place – Village Wangni,
Taluka Karjat, Dist. Raigad.
At present R/o. Geeta Apartment,
Room No.101, 1st Floor, Pendse Nagar,
Saraswati Colony, Dombivli (East),
Dist. Thane.
2. Sachin Ajit Bhole,
Age 23 Yrs.,
R/o. Trimurti Vasahat,
Near Joshi High School,
Dombivli (East), Dist. Thane
Native Place – Chain, Tal. Murbad,
Dist. Thane.
3. Deepak @ Babbu Kashiram Kalambe,
Age 21 Yrs.,
R/o. Trimurti Vasahat,
Near Joshi High School, Dombivli (E),
Native Place – Village Dharavali,
Taluka Mahad, Dist. Thane.
4. Maruti Genu Gunjal,
Age 22 Yrs.,
R/o. Shanti Nagar, Bajrang Zopadpati,
Sai Baba Mandir, Nawale,
Dombivli (E), Dist. Thane.
5. Rakesh Mohan Shriyan,
Age 23 Yrs.,
R/o. Sunflower Society,
Building No.2, Room No.25,
Pendse Nagar, Dombivli (E),
Native Place – Kodiganj Sitaram
Dompound, Bangalore,
Karnataka State.
6. Pravin Arun Madkekar,
Age 29 Yrs.,
R/o. Namdeo Masne Chawl,
Room No.1, Village Shelu,
Tal. Karjat, Dist. Raigad.

- | | | |
|---|---|--------------------|
| 7. Govind Pandurang Choudhary, |] | |
| Age 56 Yrs., |] | |
| R/o. Geeta Bhavan, 1 st Floor, |] | |
| Room No.103, Near Joshi High |] | |
| School, Dombivli (E), Dist. Thane. |] | |
| |] | |
| 8. Keval Govind Choudhary, |] | |
| Age 31 Yrs., |] | |
| R/o. Geeta Bhavan, 1 st Floor, |] | |
| Room No.103, Near Joshi High |] | |
| School, Dombivli (E), Dist. Thane. |] | |
| |] | |
| 9. Ravindra @ Bhau Shankar Diwale, |] | |
| Age 25 Yrs., |] | |
| R/o. Bhanudas Shelar Chawl, |] | |
| Room No.2, Adjoining of Vidhya |] | |
| Vikas School, Wangni (W), |] | |
| Taluka Karjat, Dist. Raigad. |] | Respondents / |
| Native Place – Nandgaon, |] | (Org. Accused |
| Taluka Khed, Dist. Ratnagiri. |] | Nos.1 to 9) |

Mr. A.S. Shitole, A.P.P., for the Appellant/State in Criminal Appeal No.1045 of 2008.

Mrs. G.P. Mulekar, A.P.P., for the Respondent/State in Criminal Appeal No.253 of 2008.

Mr. Shyam Kalyankar, i/by Mr. Aabad H. Ponda, for the Appellants in Criminal Appeal No.253 of 2008 and for the Respondents in Criminal Appeal No.1045 of 2008.

CORAM : SMT. V.K. TAHILRAMANI & DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 6TH JULY, 2015

PRONOUNCED ON : 13TH JULY, 2015

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

1. Original Accused Nos.1 to 3 are convicted by the Additional Sessions Judge, Kalyan vide Judgment dated 28th February, 2008 in Sessions Case No.110 of 2005 for the offence punishable under Section 302 r/w. 34 of the IPC and sentenced to suffer R.I. for life and to pay fine of Rs.1,000/- each, in default to suffer further R.I. for six months. Hence, being aggrieved by the same, they have preferred Criminal Appeal No.253 of 2008.

2. As by the said Judgment, Original Accused Nos.4 to 9 are acquitted for the various offences punishable under Sections 120-B, 302 and 201 of the IPC, State has preferred Criminal Appeal No.1045 of 2008 challenging their acquittal.

3. As both these Criminal Appeals are arising out of one and same Judgment of the Trial Court, they are being decided by this common Judgment.

4. For the sake of convenience, the parties are referred to by their original nomenclature as "*Accused Nos.1 to 9*".

5. Facts, as are necessary, for deciding these Appeals may be stated as follows :-

6. Deceased Gopichand Mhatre was the maternal uncle of PW-14 Chandan Bhagat. He was serving as a Peon in the State Bank and also doing the business of providing cable connections in partnership with 8 to 9 persons, including Original Accused No.7 Govind. Accused No.7 Govind was also the President of Shiv Sena Party of Dombivli Branch. Accused No.8 Keval was Govind's son. Accused No.1 Kundan was Govind's sister's son. Accused No.2 Sachin and Accused No.3 Deepak @ Babbu were friends of Accused No.1 Kundan, whereas Accused No.5 Rakesh was friend of Accused No.2 Sachin.

7. Five to six days prior to the incident, PW-14 Chandan found his maternal uncle Gopichand under tension and on enquiries, Gopichand disclosed to him that Accused No.7 Govind and Accused No.8 Keval had threatened him not to contest the election for Membership of Municipal Council. Gopichand, however, told them that as he was having public support, he was keen to contest the same. Accused No.7 Govind and Accused No.8 Keval hence threatened Gopichand that they would not allow him to survive to contest the election, as they would kill him.

8. In this back-drop, the incident giving rise to this case took place on 9th February, 2005. On that day, at about 9 to 9:30 pm, while PW-14 Chandan was proceeding towards the house of his maternal uncle Gopichand by auto-rickshaw, he found some persons gathered near Sarvottam Store at Dediya Niwas. Hence, he got down from the rickshaw and saw Accused Nos.1 to 5 and others running from the said gathering towards the Railway Station side. He also found Accused No.8 Keval standing in the chowk and talking on phone. PW-14 Chandan, therefore, went in rickshaw to the direction in which Accused No.5 Rakesh and others had ran away. On the way, he saw that PW-1 Jairam Pathare was proceeding on the road lifting Gopichand in his hands. Gopichand was in injured condition with a large size injury on the right side of his neck. At that time, Rohan Mhatre, maternal brother of PW-14 Chandan, was proceeding in a vehicle from the spot. Hence, PW-14 Chandan stopped him and Rohan and PW-14 Chandan took Gopichand in his Indigo Car to Shirodkar Hospital. PW-1 Jairam also accompanied them.

9. At Shirodkar Hospital, PW-16 Dr. Hemlata Mate examined Gopichand and declared him to be dead at about 9:50 pm. PW-1 Jairam, therefore, went to Dombivli Police Station and lodged

complaint against the Accused vide Exhibit-97. On his complaint, PW-15 Head Constable Baban Bhor, who was on duty as Station House Officer, registered C.R. No.37 of 2005 for the offences punishable under Sections 302, 143, 147, 148, 149, 323, 201 and 120-B of the IPC and Section 4 r/w. Section 25 of the Arms Act. As in the said incident itself, PW-1 Jairam, who has tried to obstruct the blow on deceased Gopichand, had also sustained some injury on his face, he was referred to Kalyan-Dombivli Municipal Corporation Hospital. There PW-3 Dr. Chandrashekhar Savtare examined him and took the entry thereof in Medico Legal Register vide Exhibit-106.

10. Further investigation of the case was taken over by PW-19 PI Dilip Jagtap. He immediately proceeded to the spot and found there pool of blood. PW-14 Chandan showed him the various places at which deceased was assaulted. Accordingly, the Scene of Offence Panchanama (Exhibit-108) was drawn in the presence of the Panch PW-4 Bhalchandra Mane. From those spots, the blood stains were collected and the various articles, like, footwear and the weapons of assault, the sickle and the gupti, were seized. The search of the Accused was taken. However, on that night, they were not found.

11. On the next day, i.e. on 10th February, 2005, PW-1 Jairam produced his own clothes, which were having blood stains. They were seized by PW-19 PI Jagtap under Panchanama (Exhibit-101) in the presence of the Panch PW-2 Varendar Gupta. On 12th February, 2005, PW-19 PI Jagtap recorded the statements of two eye witnesses, namely, PW-6 Rashmi Shukla and PW-7 Ratansi Dediya. On that day, PW-6 Rashmi produced her maxi, on which the blood stains were spread at the time of incident. It was seized by PW-19 PI Jagtap under Panchanama (Exhibit-142) in the presence of the Panch PW-10 Dnyaneshwar Patil.

12. During the course of further investigation, Accused No.1 Kundan was found on the road of Village Sagarli and he came to be arrested under Panchanama (Exhibit-143). His clothes were also seized under the said Panchanama. In due course, the remaining Accused were arrested. On 13th February, 2005, PW-19 PI Jagtap recorded the statement of PW-14 Chandan and seized his blood stained clothes under Panchanama (Exhibit-144). On the same day, Accused No.2 Sachin expressed his willingness to produce his blood stained shirt, which he has burnt. His statement was reduced to Memorandum Panchanama (Exhibit-152). Thereafter, he guided the Police and Panchas to

the back side of the room of one Pravin Madkekar and produced the burnt pieces of the shirt, which came to be seized under Panchanama (Exhibit-153). On 14th February, 2005, Accused No.7 Govind and Accused No.8 Keval came to be arrested. All the seized muddemal articles were sent to Chemical Analyzer vide requisitions dated 23rd February, 2005 (Exhibit-186), 10th March, 2005 (Exhibit-187) and 6th May, 2005 (Exhibit-188). The C.A. Reports are produced in the case at Exhibits "189" to "192".

13. On 12th April, 2005, Nayab Tahasildar PW-13 Arun Kanoje conducted Test Identification Parade of six Accused, including Accused Nos.1 to 3, in which the witnesses identified these Accused. Nayab Tahasildar PW-13 Arun Kanoje prepared Memorandum of Test Identification Parade accordingly vide Exhibit-165.

14. Further to completion of investigation of the case, PW-19 PI Jagtap filed Charge-Sheet in the Court against the Accused.

15. On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-28. The Accused pleaded not guilty and claimed trial.

16. In support of its case, the Prosecution examined in all nineteen witnesses and on appreciation of their evidence, the Trial Court held the guilt of Accused Nos.1 to 3 to be proved beyond reasonable doubt for the offence punishable under Section 302 r/w. 34 of the IPC and convicted and sentenced them, as aforesaid. The remaining Accused Nos.4 to 9 were acquitted of all the charges levelled against them. Hence, the instant Appeals have been preferred by Accused Nos.1 to 3 and the State respectively.

17. In these Appeals, we have heard learned Counsel for the Appellants/Accused and learned A.P.P. for the Respondent/State. In our considered opinion, in order to effectively deal with the submissions advanced by them, it would be useful to refer to the evidence of prosecution witnesses.

18. To prove the homicidal death of Gopichand, Prosecution has examined two witnesses, namely, PW-16 Dr. Hemlata Mate, who has examined the deceased immediately on his admission at Shirodkar Hospital, and PW-8 Dr. Ashok Bhide, who has conducted the postmortem. The evidence of PW-16 Dr. Hemlata Mate goes to show that Gopichand was brought to the hospital in

gasping condition. On his examination, she found multiple stab injuries on his body. 14. According to her, all those injuries were probable due to the assault by sharp and cutting weapon. Her evidence further reveals that Gopichand succumbed to those injuries at about 9:50 pm on that day. She handed over the Injury Certificate of Gopichand (Exhibit-177) and his dead body to his nephew and then it was taken for postmortem.

19. PW-8 Dr. Ashok Bhide has conducted postmortem on the dead body of Gopichand on the next day, at about 8 am, and he has also noticed totally twenty external and internal injuries, as follows :-

External Injuries :

- (i) Incised wound over right side of face and neck irregularly defined 5" x 2 1/2" x 1 1/2", extending obliquely from right ear to neck, right ear completely cut from middle, ramus of mandible cut, neck muscle cut, carotid and jugular vessels cut.*

- (ii) *Incised wound over face from angle of mouth right upto symphysis menti 3 1/2" x 1 cm. cut through and through with underlined mandibular bone cut.*
- (iii) *Incised wound over face zygoma 3/4" x 1/4" x bone deep.*
- (iv) *Incised wound over right forehead temporal region 1" superficial.*
- (v) *Stab wound above thyroid 1 cm x 1/4 cm x superficial neck muscle deep.*
- (vi) *Stab wound below thyroid cartilage 1 cm x 1/2 cm x 1 1/2 cm.*
- (vii) *Incised wound over left forehead frontal to left end of eye 2 1/2" x 1/2" x bone deep crack fracture.*
- (viii) *Incised wound left parietal region 1 & 1/4" 1/4" cm. Crack fracture, spindle shape horizontal.*

- (ix) *Incised wound over right shoulder 4" x 2" fracture head of humerus and clavicle lateral end.*
- (x) *Below and posterior to previous injury, incised wound 2" x 1" x muscle deep vertical.*
- (xi) *Contusion shoulder anteriorly 2" x 1/4" x skin.*
- (xii) *Scratch mark upper 1/3rd arm 2 1/2" x superficial.*
- (xiii) *Incised wound right wrist 1 1/2" x 1/2".*
- (ixv) *Incised wound right wrist 2 1/2" x 1/2" fracture joint.*
- (xv) *Amputation of right right finger middle phalanx attached with some skin tag.*
- (xvi) *Incised wound thenar eminence right palm 2" x 1/4" x muscle deep.*

- (xvii) *Stab wound over abdomen right side laterally to umbelicus 1" x 1/4" cavity deep.*
- (xviii) *Incised wound left wrist 4" x 1 & 1/2" partial amputation of wrist.*
- (ixx) *Incised wound above previous injury 1" x 1/4" x skin.*
- (xx) *Incised wound below left elbow 3/4" superficial.*

Internal Injuries :-

- (i) *Over head crack fracture left parietal bone.*
- (ii) *Fracture left frontal bone.*
- (iii) *In the abdomen omentum stab intestine stab on external surface.*

20. According to him, all the injuries were antemortem in nature and probably caused by sharp edged weapon, like, sword and sickle. External injuries were corresponding to internal

injuries and the cause of the death was *“haemorrhagic shock due to multiple injuries”*. He has further opined that those injuries were sufficient in the ordinary course of nature to cause the death. The Postmortem Report is produced on record at Exhibit-133.

21. The evidence of both these Medical Officers, thus, go to prove the death of Gopichand as homicidal in nature.

22. To prove involvement of the Accused in the homicidal death of Gopichand, Prosecution has placed reliance on the evidence of three eye witnesses, namely, PW-1 Jairam, PW-6 Rashmi and PW-7 Ratansi. As regards the evidence of PW-6 Rashmi and PW-7 Ratansi, they have admitted that the assailants of Gopichand were unknown to them. Only PW-1 Jairam was knowing some of the assailants, whom he has identified as Accused Nos.1 to 3. As per his evidence, deceased Gopichand was his childhood friend. He was knowing Accused Nos.1 to 3, the Appellants herein, because they were residing near his residence. On 9th February, 2005, at about 7:45 pm, Gopichand asked him to come to have a round at Naka. Hence, they went to Chheda Road at Dediya Building in Blue Star Salon and sat there. Thereafter they went to

Khandagale's shop and again returned back. On the way, there was shop of PW-7 Ratansi. While PW-1 Jairam was talking with PW-7 Ratansi, Gopichand was standing behind him at the distance of 10 ft. PW-7 Ratansi alerted PW-1 Jairam that Gopichand is being assaulted. Hence, PW-1 Jairam turned back and saw that Accused Nos.1 and 2 were assaulting Gopichand with choppers in their hands, whereas Accused No.3 was assaulting Gopichand by fist blows and kicks. PW-1 Jairam moved forward to save Gopichand from the assault. As the Accused were armed with weapons, he picked-up the stool from the shop of PW-7 Ratansi and assaulted the assailants. The stool hit Accused Nos.1 and 2. At that time, Accused No.3 gave him fist blows on his face and Accused No.1 threatened to kill him also. Therefore, he got scared and went to one side. As per his further evidence, to escape from assault, Gopichand was moving in the back side passage of the building DediYa Niwas. At that time, all the six Accused chased him with weapons and inflicted several blows of the weapons on him. Thereafter they fled from the back side. PW-1 Jairam brought injured Gopichand from that spot to the road. PW-14 Chandan was passing on the road. He informed about the incident to PW-14 Chandan and then he himself, PW-

14 Chandan and Rohan Mhatre took the injured to Shirodkar hospital, where he was declared dead. As per evidence of PW-1 Jairam, he then went to the Police Station and lodged the report (Exhibit-97).

23. In his evidence before the Court, he has identified Accused Nos.1 to 3 and remaining three Accused, namely, Accused No.4 Maruti Gunjal, Accused No.5 Rakesh Shriyan and Accused No.9 Ravindra Diwale. He has further stated that Accused No.4 Maruti was holding axe, Accused No.5 Rakesh was holding sickle and Accused No.9 Ravindra was holding gupti. He has identified Muddemal Article No.3 Sickle, Muddemal Article No.13 Axe and Muddemal Article No.39 Gupti as the same weapons. Further he has deposed that Accused No.3 Babbu has hit him on his face by fist blows. He suffered from pain. Hence, he has taken treatment in this regard in Municipal Hospital at Dombivli. Thereafter, on 12th April, 2005, he has identified the above said 6 Accused in Test Identification Parade.

24. In his cross-examination, it is brought on record that assault on Gopichand was going on for about 4 to 5 minutes. When initially Gopichand was attacked, he was not facing Gopichand.

Only after PW-7 Ratansi told him, he saw Gopichand. By that time, Gopichand was already bleeding. When he turned back, he saw that Gopichand was further assaulted 4 to 5 times on his hands and also on the head. An omission is elicited to the effect that he has not stated before Police that assailants had weapons, like, sickle, gupti and axe. As per his evidence, he saw the axe and sickle lying on the spot while lifting Gopichand. A further omission is elicited from his cross-examination that in his statement recorded by the Police, there is no mention that he has assaulted the assailants by stool and it hit to Accused No.1 Kundan and Accused No.2 Sachin. An admission is also elicited from his cross-examination that he does not know what was the motive or cause for the assault on Gopichand and Accused were shown to him by Police on the next day of the incident. Further, it is also admitted by him that the passage in which the assault was made on Gopichand was not visible from the road, where he was standing.

25. The evidence of PW-7 Ratansi is to the effect that while PW-1 Jairam was talking with him and Gopichand was standing at the distance of 15 to 20 ft. from him, he saw 5 to 6 boys of the age group of 20 to 25 years assaulting Gopichand with chopper and

sickle. Hence, he shouted and told PW-1 Jairam that Gopichand was being assaulted. In order to save himself, Gopichand rushed in the building, whereas PW-1 Jairam took the stool from his shop and threw it towards those boys. The said stool hit to one of the boys, who had given fist blow to PW-1 Jairam, that is Accused No.3 Babbu.

26. In evidence before the Court, he has identified 5 Accused. Those identified Accused are Accused Nos.1 to 3, the present Appellants, and Accused No.4 Maruti and Accused No.5 Rakesh, the acquitted Accused. As per his further evidence, on 13th February, 2005, he was called at the Police Station and shown 7 Accused. Out of them, the 5 Accused, as identified by him, were present there.

27. In his cross-examination it is brought on record that out of 5 to 6 assailants, only 2 or 3 were armed with chopper and sickle. Further he has stated that he understands the difference between the weapons like axe, sword, sickle and chopper.

28. Then there is evidence of PW-6 Rashmi, who was residing in Block Nos.3 and 4 in "C" Wing at Dediya Niwas along with her husband and in-laws. As per her evidence, on the date of

incident, i.e. on 9th February, 2005, at about 9:30 pm, when they were watching T.V., one person, who was full of blood, entered into the house. 5 to 6 persons of the age group of 25 to 30 years were following him. Those persons assaulted that injured person with large knife, namely, sura and an axe. When her father-in-law told all of them to go out of the house, those persons dragged the injured and again assaulted him, after he was dragged out of the house. In the said incident, some blood stains were spread on her maxi, which she has produced before the Police.

29. In evidence before the Court, she has identified all the six Accused, including the present Appellants. However, she has also admitted that on 13th February, 2005, Police has shown her 8 to 10 persons. Out of them, she has identified 5 Accused, whom she has identified in the Court also. In her cross-examination, it is brought on record that on seeing the said incident, she and her family members were frightened and went to the next room. She has further admitted that neither Police asked her to give description of those boys, who had assaulted Gopichand, nor she had given the said description. Further she has stated that she has never seen those assailants before the incident in her area, nor she was called in the Jail for Test

Identification Parade of these assailants.

30. Thus, certain facts, which emerge from the evidence of these three eye witnesses, are to the effect that in all 5 to 6 persons simultaneously made attack on the deceased Gopichand. Some of them were armed with the weapons like Axe, Sickle and Gupti. Out of the three eye witnesses, except for PW-1 Jairam, two other eye witnesses, namely, PW-6 Rashmi and PW-7 Ratansi, were not knowing any of the assailants, as admitted by them. They were seeing those assailants for the first time. They have also not given the description of those boys to the Police. Moreover, as per categorical admissions given by them, those assailants were shown to them by the Police in the Police Station on 13th February, 2005. As a result, whatever evidence of Test Identification Parade, as led by the Prosecution through the testimony of Nayab Tahasildar PW-13 Arun Kanoje loses all its significance and relevance. If the witnesses were shown the Accused in the Police Station itself, then the Test Identification Parade of the Accused by Tahasildar, that too, two months after the incident, on 12th April, 2005, is of no evidential value at all. That is the reason why Trial Court has also disbelieved the evidence relating to identification of the Accused

in the Test Identification Parade and we are also of the same opinion, considering the admissions given by these witnesses in their cross-examination.

31. There remains now the substantive evidence of only one eye witness i.e. PW-1 Jairam. As deposed by him, he was knowing only Accused Nos.1 to 3, as they were residing in the same area. He was not knowing other Accused. He was also shown all these 6 Accused in the Police Station on 13th February, 2005 by the Police. Like the Trial Court, we also find that the evidence relating to Test Identification Parade is not admissible as the Accused were shown to the witnesses by the Police and as the Test Identification Parade was held two months after the incident and several lacunae were found therein. Hence, as regards the other assailants, including Accused No.4 Maruti, Accused No.5 Rakesh and Accused No.9 Ravindra, whom PW-1 Jairam has identified in Court, the Trial Court has given them benefit of doubt. Only as regards these Accused Nos.1 to 3, whom he has identified as knowing them because they were residing in the same area, the Trial Court has held the offence proved against them beyond reasonable doubt.

32. The question for consideration is '*whether these Accused Nos.1 to 3 were really residing in the same area in which PW-1 Jairam and PW-6 Rashmi and PW-7 Ratansi were residing?*'. The answer thereto will have to be in the negative. Because, both, PW-6 Rashmi and PW-7 Ratansi have deposed that they were not knowing any of the assailants, including the present Accused Nos.1 to 3. As PW-6 Rashmi and PW-7 Ratansi were also residing in the same area, it follows that if PW-6 Rashmi and PW-7 Ratansi were not knowing them, PW-1 Jairam also cannot know them.

33. Secondly, the evidence of PW-1 Jairam that he has actually seen the assault, is also not free from suspicion. According to him, Gopichand was already assaulted by the assailants. When he turned, after PW-7 Ratansi shouted, he saw that Gopichand was bleeding with injuries. So he has seen only some part of the assault and not the entire incident. As per his further evidence, Gopichand ran towards the passage behind the building and that passage was not visible from the road where he was standing. Admittedly, he has not followed Gopichand as he was frightened. Therefore, whatever assault on Gopichand took place in the house of PW-6 Rashmi or in the passage, he has not witnessed. The evidence of PW-6 Rashmi and PW-7 Ratansi though proves

the assault, it does not prove the identity of the assailants, as held above.

34. Now coming to the evidence of PW-1 Jairam as to the part of the assault, which he has seen, according to him, he saw Accused Nos.1 and 2 assaulting Gopichand with chopper and Accused No.3 assaulting Gopichand with fist blows and kicks. Admittedly, the chopper is not at all recovered from the spot of incident or at the instance of any of the Accused. Whatever weapons of assault which were found either at the spot or recovered at the instance of the other Accused, were Gupti, Sickle and Axe.

35. Though Prosecution has lead the evidence of PW-9 Panch Rajendra Shirshwal to prove the Memorandum Panchanama of Accused No.3 to the effect that at his instance, Gupti was recovered, that too on 5th May, 2005, i.e. after three months of the incident, the evidence of PW-1 Jairam reveals that Gupti was not in the hands of Accused No.3. The only role attributed by him to Accused No.3 is of giving fist blows and kicks to deceased Gopichand. Therefore, the recovery of Gupti at the instance of Accused No.3 again loses its significance.

36. It is also pertinent to note that none of the injuries found on the dead body of the deceased by PW-16 Dr. Hemlata Mate or even by PW-8 Dr. Ashok Bhide show that it can be caused by the chopper. Those injuries, as deposed by these two Medical Officers also, are possible by sickle, axe and gupti, which weapons were shown to them at the time of recording their evidence.

37. As regards the other two witnesses, namely, PW-6 Rashmi and PW-7 Ratansi, they have not attributed any specific role to those 5 to 6 persons; not even stated which of them was holding which weapon. Here is, therefore, a case where in all 5 to 6 persons have assaulted the deceased and out of them only 3 are picked-up by the Trial Court, relying solely on the evidence of PW-1 Jairam. It is not, however, established beyond reasonable doubt that the fatal assault on the deceased, which resulted into his death, was made by these 3 Accused and not by the other acquitted Accused.

38. As stated above, the injuries found on the body of the deceased are more likely to be caused by the weapons in the hands of the other Accused, whose identity is not established.

Therefore, in our considered opinion, it is not safe to rely on the sole testimony of the single eye witness PW-1 Jairam to convict these 3 Accused only, out of the 6 assailants. If Prosecution case is to be believed, then the Charge-Sheet is filed against in all 9 witnesses. No evidence is brought on record to show what was the role of other co-accused and how they are involved in the case and whether they were also the assailants. If it was so, then to pick and choose 3 out of 9 assailants and that too on the basis of the evidence of a single eye witness, who had no opportunity to see the entire incident, becomes quite unsafe.

39. It is also pertinent to note that though PW-1 Jairam says that he picked-up the stool and threw it towards the assailants and it hit Accused No.1 Kundan and Accused No.2 Sachin, there is no evidence to prove that either Accused No.1 Kundan or Accused No.2 Sachin had sustained any injuries because of it. Moreover, though PW-1 Jairam says that in the said incident, Accused No.3 hit him on his face by fist blow and, therefore, he took treatment at Municipal Corporation Hospital at Dombivli, evidence of PW-3 Dr. Chandrashekhar Savtare reveals that he did not notice any visible or any other injury, though, according to him, the injury on the face caused by fist blow would remain for

about 6 to 8 hours.

40. Further, the evidence of PW-14 Chandan reveals that his maternal uncle Gopichand had partnership business with Accused No.7 Govind and it was Accused No.7 Govind and Accused No.8 Keval, who had threatened his maternal uncle Gopichand not to contest the election, otherwise to face the consequences. Therefore, the motive is alleged against the acquitted Accused No.7 Govind and Accused No.8 Keval. As regards Accused No.1 Kundan, he was Govind's sister's son and Accused No.2 Sachin and Accused No.3 Babbu were friends of Accused No.1 Kundan. No motive is alleged or proved against them. Trial Court has held that even as against Accused No.7 Govind and Accused No.8 Keval, motive not proved as there is no evidence beyond reasonable doubt of Accused Govind and Keval conspiring with rest of the Accused to commit murder of the deceased.

41. As regards recovery of the alleged blood stained clothes of Accused Nos.1 and 2, there is no evidence that on the seizure of the clothes, they were wax sealed and were in the same sealed condition at the time of examination by the Chemical Analyzer.

Moreover, it is merely a corroborating evidence. The substantive evidence in criminal trial is always that of an eye witness when the case stands on the ocular account of the incident.

42. In the instant case, therefore, though the occurrence of the incident stands proved, the specific involvement of the present Appellants, i.e. Accused Nos.1 to 3, in the said incident, which has resulted into the death of Gopichand, is not proved by the Prosecution beyond reasonable doubt. Hence, in our considered opinion, the conviction of the Appellants/Accused Nos.1 to 3 for the offence punishable under Section 302 r/w. 34 of the IPC cannot be sustained. The Appeal preferred by them, therefore, deserves to be allowed.

43. So far as Appeal preferred by the State against acquittal of the remaining Accused is concerned, there being no iota of evidence brought on record by the Prosecution against those Accused also, it has to be held that Trial Court has rightly acquitted them.

44. Consequently, Criminal Appeal No.253 of 2008 is allowed. The conviction and sentence of Appellant Nos.1 to 3 for the offence punishable under Section 302 r/w. 34 of the IPC is

quashed and set aside. They are acquitted of the offence punishable under Section 302 r/w. 34 of the IPC. Their Bail Bonds stand cancelled. Fine amount, if any, paid by Appellant Nos.1 to 3 be refunded to them.

45. Criminal Appeal No.1045 of 2008 preferred by the State stands dismissed, confirming acquittal of the remaining Accused also.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]