

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 667 OF 2013

1. Sujit Haribhau Patil
aged 25 years, Occ: Agriculturist
2. Tukaram Rama Patil,
Aged about 50 years,
Occ: Agriculturist
3. Kashinath Rama Patil,
Aged about 48 years,
Occ: Agriculturist
4. Vilas Shravan Patil,
Aged about 32 years,
Occ: Agriculturist

All res. at Village Patnoli,
Taluka Panvel,
District Raigad
at present undergoing sentence
at Taloja Central Prison,
Taloja.

.. Appellants
(Org. Accd. Nos.1, 6, 8 and 10)

v/s.

The State of Maharashtra
(at the instance of Sr.Inspector of Police
Panvel Town Police Stn.,
vide C.R.No.I-275 of 2009).

..Respondents.

Mr.Shashank Manohar i/b. Mr.Nitin Sejpai & Mrs. Pooja Sejpai for
the Appellants
Mr.S.K.Shinde, PP for the State.

WITH

CRIMINAL APPEAL NO. 668 OF 2013

1. Ganesh @ Yogesh Kashinath Patil
Aged about 23 years,
Occ: Agriculturist

2. Haribhau Rama Patil
Aged about 40 years,
Occ: Agriculturist

3. Suhas Shravan patil,
Aged about 21 years,
Occ: Agriculturist,
All res. at Village Patnoli,
Taluka Panvel,
District Raigad
at present undergoing sentence
at Taloja Central Prison,
Taloja.

.. Appellants
(Org. Accd. Nos.2, 5 and 7

v/s.

The State of Maharashtra
(at the instance of Sr.Inspector of Police
Panvel Town Police Stn.,
vide C.R.No.I-275 of 2009).

..Respondents

Mr.Shirish Gupte, Sr. Advocate i/b. Mr.Nitin Sejpal &
Mrs. Pooja Sejpal for the Appellants.
Mr.S.K.Shinde, PP for the State.

**WITH
CRIMINAL APPEAL NO. 1330 OF 2013**

The State of Maharashtra
(At the instance of Panvel
Town Police Stn, C.R.1-275/09
District Raigad

.. Appellant

v/s.

1. Sujit s/o. Haribhau Patil
Age 25 years, Occ: Agriculture
2. Ganesh @ Yogesh s/o.Kashinath Patil
Age 23 years, Occ: Agriculture
3. Sandeep s/o. Kashinath Patil
Age 19 years, Occ: Agriculture
4. Sagar s/o. Tukaram Patil
Age 19 years, Occ: Agriculture
5. Haribhau s/o. Rama Patil,
Age 40 years, Occ: Agricluture
6. Tukaram s/o. Rama Patil
Age 50 years, Occ: Agriculture
7. Suhas s/o. Shravan Patil
Age 21 years, Occ: Agriculture
8. Kashinath s/o. Rama Patil
Age 48 years, Occ: Agriculture
9. Shravan s/o. Rama Patil
Age 52 years, Occ: Agriculture
10. Vilas s/o. Shravan Patil
Age 32 years, Occ: Agriculture
11. Alpesh s/o. Haribhau Patil
Age 19 years, Occ: Agriculture
12. Samadhan S/o. Tukaram Patil
Age 28 years, Occ: Service

All resident of Village Patnoli,
Taluka Panvel, Dist Raigad

..Respondents

**WITH
CRIMINAL APPEAL NO. 1141 OF 2013**

Deepak Parshuram Patil
Age 40 years, Occ: Service
Res. of Village Patnoli,
Taluka Panvel,
District Raigad

.. Appellant

v/s.

1. Sujit s/o. Haribhau Patil
Age 25 years, Occ: Agriculture
2. Ganesh @ Yogesh s/o.Kashinath Patil
Age 23 years, Occ: Agriculture
3. Sandeep s/o. Kashinath Patil
Age 19 years, Occ: Agriculture
4. Sagar s/o. Tukaram Patil
Age 19 years, Occ: Agriculture
5. Haribhau s/o. Rama Patil,
Age 40 years, Occ: Agriculuture
6. Tukaram s/o. Rama Patil
Age 50 years, Occ: Agriculture
7. Suhas s/o. Shravan Patil
Age 21 years, Occ: Agriculture
8. Kashinath s/o. Rama Patil
Age 48 years, Occ: Agriculture
9. Shravan s/o. Rama Patil
Age 52 years, Occ: Agriculture
10. Vilas s/o. Shravan Patil
Age 32 years, Occ: Agriculture

11. Alpesh s/o. Haribhau Patil
Age 19 years, Occ: Agriculture
12. Samadhan S/o. Tukaram Patil
Age 28 years, Occ: Service

All resident of Village Patnoli,
Taluka Panvel, Dist Raigad

..Respondents

**WITH
CRIMINAL APPEAL NO. 82 OF 2014**

The State of Maharashtra
(At the instance of Panvel
Town Police Stn, C.R.1-275/09
District Raigad

.. Appellant

v/s.

1. Sandeep s/o. Kashinath Patil
Age 19 years, Occ: Agriculture
2. Sagar s/o. Tukaram Patil
Age 19 years, Occ: Agriculture
3. Alpesh s/o. Haribhau Patil
Age 19 years, Occ: Agriculture
4. Samadhan S/o. Tukaram Patil
Age 28 years, Occ: Service

All resident of Village Patnoli,
Taluka Panvel, Dist Raigad

..Respondents

Mr. Sandeep Shinde, APP for the State- Appellant.
Mr.Nitn Sejpal & Mrs. Pooja Sejpal for the Respondents.

CORAM : SMT. V.K.TAHILRAMANI &

SMT. ANUJA PRABHUDESSAI, JJ.

RESERVED ON : APRIL 11, 2016

PRONOUNCED ON : JULY 25, 2016.

JUDGMENT (PER ANUJA PRABHUDESSAI, J.) :

1. These appeals arise from the judgment and order dated 10.5.2013 passed by the learned Addl. Sessions Judge-1, Raigad, District Alibag, in Sessions Case No.134 of 2009. The accused were tried for the offences under Sections 302, 307, 326, 325, 324, 504, 143, 144, 147, 148 and 149 of the IPC and under section 37(1), 135 of the Bombay Police Act and under sections 4 and 25 of the Indian Arms Act.

2. By the impugned judgment and order the learned trial Judge has held the accused nos.1, 2, 5, 6, 7, 8 and 10 guilty of offences under Sections 143, 144, 147, 148, 302 r/w. 149 of the Indian Penal Code. They have been sentenced to undergo imprisonment for six months in respect of offence under Section 143 IPC, imprisonment for one year each in respect of offence under Section 144, 147 and 148 of IPC and life imprisonment and fine of Rs.2000/- , i.d. one year imprisonment for offence under Section 302 r/w. 149 of IPC. The accused no.7 is also held guilty of offence under Section 307 r/w. 149 of IPC and has been sentenced to undergo life imprisonment.

3. The accused nos.1, 6, 8 and 10 have challenged their conviction and sentence in criminal appeal No.667 of 2013

whereas accused nos.2, 5 and 7 have challenged the conviction and sentence by filing criminal appeal no.668 of 2013.

4. The learned Judge has held accused nos.3, 4, 11 and 12 guilty of offence under Section 324 of the IPC and has released them on executing a bond of good behavior for a period of three years with surety of Rs.15,000/- each.

5. The State has filed an appeal being Appeal No.82 of 2014 for enhancement of sentence imposed against accused nos.3, 4, 11 and 12.

6. The learned Judge has acquitted accused nos.9 of all the offences and the other accused are acquitted of the offences under Sections 325 and 326 r/w. 149 and 504 of IPC and 37(1)(3)(135) of the Bombay Police Act.

7. The State has filed Criminal Appeal No.1330 of 2013 and the first informant Deepak Patil has filed Criminal Appeal No.1141 of 2013 challenging the acquittal of the accused in respect of the offences other than those for which they have been acquitted.

8. The case of the prosecution in brief is that on 5.7.2009 at about 11.30 a.m the complainant Deepak Patil and his brothers Anil Patil and Manohar Patil were returning to village Patnoli from Panvel by their Safari Vehicle No.MH 43 V 1700. When they reached near the school ground at Patnoli, they saw Haribhau (A-5), Tukaram (A-6), Kashinath (A-8) and Shravan (A-9) sitting by the

side of the road. Their children and some other boys from the village were playing cricket on the ground. It is alleged that on seeing the complainant, Sujit (accused no.1) spat and abused him. The complainant got down from the vehicle and questioned the accused no.1, at which time the other accused who were sitting by the side of the road rushed towards the complainant and his brothers. They were also joined by others who had come to the spot armed with weapons such as sticks, iron rod, bat, hockey sticks, sword etc. On seeing this, the brothers of the complainant Prakash, Kishore, Deepak and Pravin- the brothers of the complainant Vilas also came to the place of the incident. It is alleged that the accused no.1 gave a blow of sword on the head of Anil (the deceased) while the other accused gave blows by hockey sticks, rod etc on his head. The accused also assaulted the complainant-Deepak and his brothers and thereafter fled away from the place of the incident. Mahadeo Patil took the injured to Gandhi hospital. They were examined by PW28 Dr. Bhushan Jain. The witnesses had sustained following injuries:

1. Deepak Parshuram Patil

- 1) Monteggia Fracture dislocation left forearm
- 2) Fracture distal phalnx right thumb
- 3) CLW over left frontal area of size 2 x 05. x 0.5 cm
- 4) CLW over left parietal area, having size 5 x 0.5 x 0.5 cms
- 5) CLW on mid parietal having size 5 x 1 x 1 cm
- 6) Contusion of right forearm having size 6 x 4 cm
- 7) Contusion on left thigh having size 7 x 4 cm

2. Prakash Parshuram Patil

- 1) Contusion over back of neck, size 5 x 2 cm
- 2) CLW on left supra orbital area, sized 3 x 1 x 1 cm
- 3) CLW over left infra orbital area, size 2 x 1 x 1 cm
- 4) Contusion over left middle finger 2 x 2 cm
- 5) Contusion over the dorsum of left hand 3 cm

3. Kishor Parshuram Patil.

- 1) Fracture proximal ulna on left forearm
- 2) Haematoma over occipital area , size 4 x 3 cm

4. Pratap Vithoba Patil

- 1) Abrasion over the left forearm area 3 x 2 cm
- 2) Contusion over left forearm size 5 x 3 cm
- 3) Abrasion on the dorsum of left wrist, sized 1 x 1 cm
- 4) Contusion over left frontal area size 4 x 3 cm
- 5) Contusion on the left hand of size 3 x 3 cm
- 6) Contusion over the left shoulder, size 6 x 4 cm

5. Dayanand Parshuram Patil

- 1) Fracture left ulna on the proximal 1/3rd area
- 2) CLW over the right tempora parietal area , size 6 x 1 x 1 cm
- 3) CLW over left occipital area size 4 x 1 x 1 cm

6. Praveen Parshuram Patil.

- 1) Nasal bleeding through both the nostrils
- 2) Left black eye

- 3) Contusion on left shoulder, size 8 x 6 cm
- 4) Contusion over upper dorsal area size 7 x 4 cm
- 5) Extra axial haemorrhage with pneumocephalus on the left frontal area
- 6) Fracture frontal bone, involving roof of the left orbit.
- 7) Haemosinous left maxillary and Ethmoidal.

7. Manohar Parshuram Patil

- 1) Extra axial hemorrhage on left parietal region with effacement of basal cistern and cortical sulci with cerebral edema with midline shift to right side.
- 2) Fracture right zygomatic arch and lateral wall of right orbit.
- 3) Right black eye
- 4) Haematoma on right parietal area size 4 x 4 cm.

9. PW29 PSI Prakash Patil, PSO attached to Panvel City Police Station learnt about the incident and visited the hospital. He recorded the FIR at Exh.59 lodged by Deepak Patil and registered Crime No.275 of 2009 under Sections 307, 143, 144, 147, 148 and 149 of the IPC r/w. section 37(1)135 of the Mumbai Police Act.

10. FIR No 275/2009 was initially investigated by PW29-PSI Prakash Patil. He conducted the scene of offence panchanama and arrested the accused and seized the clothes of the injured persons under panchanamas drawn in presence of Ravindra Ram Patil and Hausaram Shankar Patil. On 6.7.2009 PW30 Vijay Kadmane, PSI, took over further investigation of the said crime.

The injured, Anil expired on 08.07.2009. He conducted the inquest panchanama over the body of deceased Anil and referred the body for post-mortem.

11. PW28 Dr. Bhushan Jain conducted the post-mortem over the body of deceased Anil. The medical evidence reveals that the deceased had following external and internal injuries :

External injuries:

- 1) A sutured semi circular surgical wound seen over right franto parieto temporal region of length 33 cms (33 stitches) suture intact no oozing, no gaping. Free ends faceing anteriorly.
- 2) A sutured surgical wound seen over right of the abdomen lateral to umbilicus of length 13 cm (13 stitches) sutured intact, no oozing, no gaping.
- 3) Evidence of treatment, two punctured wounds, seen on right side of the neck, and one punctured wound seen on left side of the neck, lower part anteriorly reddish.

Internal injuries:-

- (a) Hemorrhage under scalp seen over right frontal, left temporal, bi-parietal region posteriorly and occipital region of size 6x2 cms, 7x5 cms, 15x6 cms and 8x7 cms respectively, dark reddish brownish.
- (b) Skull showed craniotomy on right franto parieto temporal bone of size 13x9 cms
- (c) Linear fracture of left occipito temporal bone,

upto middle cranial fossa of length 12 cms. In filtration staining of blood seen at the fractured margins. Thin extra dural Haematoma seen on left occipito temporal region, 8x6x1 cms dark reddish, brownish

PW28 opined that the injuries were antemortem and that the death of Anil was due to 'head injury'.

12. In view of death of Anil, PW30 -PSI kadmane added Section 302 IPC and arrested the accused. In the course of investigation he recovered the weapons of offence as per the disclosure statements made by the accused. He forwarded all the incriminating material to CSFL for examination and analysis. Upon completion of investigation, he filed the charge sheet against the aforesaid accused before the learned JMFC, Panvel. The case being sessions triable, the same was committed to the Court of Sessions at Raigad at Alibag, being Sessions Case No.134 of 2009.

13. Vilas Shrawan Patil (accused No.10) also lodged a report on 5.7.2009 alleging that on 5.7.2009, Sujit (accused No.1) and some other boys were playing cricket while Haribhau (A-5), Tukaram (A-6), Kashinath (A-8) and Shravan (A-9) were sitting by the side of the road and watching the match. While the match was in progress, one white colour Safari MH 43 V 1700 stopped on the road by the side of the ground. The complainant Deepak and his brother Anil got down from the vehicle and started abusing and threatening them. The complainant Deepak and his brother

thereafter, left the place, but by about 12.30 p.m. they returned to the ground armed with sticks and assaulted and caused serious injuries to them. Pursuant to the report lodged by accused No.10 lodged a report pursuant to which crime No.I-276/2009 came to be registered against PW1-Deepak Patil, Praveen Patil, PW10-Dayanand Patil, Kishore Patil, PW3-Prakash Patil, and Pradeep Patil.

14. The accused in the present crime were examined by DW1 **Dr. Bavraj Lohare**, at Rural Hospital Panvel. The accused had sustained following injuries :

1) Kashinath Rama Patil- Accused No.8

- i) Contused lacerated wound over right side of forehead
8cm x bone deep.

2) Vilas Shrawan Patil – Accused No.10.

- i) Contused lacerated wound over forehead 0.5 cm x bone deep.
- ii) Fracture left humerus lower end. Swelling plus tenderness, abnormal mobility plus

3) Sandeep Kashinath Patil – Accused No.3.

- i) Contused lacerated wound over left tempora-parietal region. Size 10 cm x bone deep.
- ii) Blunt trauma over right forearm, swelling.

4) Aplesh Haribhau Patil- Accused No.11.

- i) Blunt trauma over right knee joint + swelling + tenderness.

15. Crime No.I-276 of 2009, which was registered pursuant to the FIR lodged by the Vilas Patil (accused no.10), was investigated by PSI Keshav Patil, and upon completion of the investigation, chargesheet was filed against Deepak Patil and his brothers in Crime No. I-276 of 2009 for offences under sections 323, 504, 143, 147, 148, 307 r/w. 149 IPC and under Section 37(1), 135 of Bombay Police Act. This case was also committed to Sessions Court, Raigad at Alibag and registered as Sessions Case No.59 of 2010.

16. The prosecution adduced evidence in both these cases. By judgment dated 10th May, 2013 in Sessions Case no.134 of 2009 arising from Crime No.275 of 2009 which is the subject matter of the present appeals, the learned trial Judge convicted and sentenced the accused as stated above. By a separate judgment of the same date, the Ind. Judge acquitted the accused in Sessions Case No.59 of 2010 arising from C.R.No. 276 of 2009, which is the subject matter of Criminal appeal No.32 of 2014 filed by the State. The said appeal shall be dealt with separately for the sake of convenience.

17. Learned Senior Counsels Shri Shashank Manohar, who is representing the appellants in Criminal Appeal No.667 of 2013 and Shri Shirish Gupte representing the accused in Criminal Appeal No.668 of 2013 having taken us through the entire material relied upon by the prosecution as well as the accused, contended that the accused had not assembled on the play ground with a common object to commit murder of the deceased-Anil. On the contrary,

the evidence reveals that some of the accused persons were playing cricket whereas others were watching the match. They were not armed with weapons. They have submitted that the complainant and his brothers including Anil had come to the ground armed with weapons and assaulted the accused. The learned senior counsels have submitted that material on record amply proves that the prosecution witnesses were aggressors and that the accused had acted only in exercise of right of private defence. Relying upon the decision of the Apex Court in ***Darshan Singh v/s State of Punjab & ors (2010)2 SCC (Cri) 1037***, Lnd. Sr. Counsel Shri Gupte contends that the accused could not have been held guilty of offence punishable under section 302 IPC.

18. The learned senior counsel Shri. Shashank Manohar has submitted that in the case of free fight, Section 149 of the IPC has no application and that the liability of each of the accused has to be proved independently. This proposition has been settled by the Apex Court in i)***Subramani & Ors. V. State of T.N. (2002) 7 SCC 210***, ii) ***Ilam Singh & Ors. v. State of U.P. (1976) 4 SCC 355***, iii) ***Bachan Singh & Anr. v. State of Bihar (2008) 12 SCC 23***, iv) ***State of Haryana v. Chandvir (1996) 8 SCC 678***, v)***Bachan Singh & ors. V. State of Punjab 1993 Supp (2) SCC 490*** and vi) ***Ananta Kathod Pawar & Ors. v. State of Maharashtra (1997) 11 SCC 564***.

19. The learned senior counsels have submitted that the prosecution has failed to prove the individual role of each of the accused. They have further submitted that the accused had also

sustained injuries in the same incident, which fact clearly indicates that the complainant and the other prosecution witnesses were armed with weapons. It is submitted that non-explanation of the injuries sustained by the accused in the same incident is another manifest defect in the prosecution case, and the same clearly indicates that the prosecution has suppressed the true genesis of the incident. Reliance is placed on the decision of the Apex Court in **Lakshmi Singh v. State of Bihar AIR 1976 SCC 2263**.

20. The learned senior counsel Shri Gupte has further submitted that there is unexplained delay in recording the statements of the witnesses, which casts a cloud of doubt on the testimony of the prosecution witnesses. He has submitted that the injunction order is operating in favour of the accused and that the accused had no motive for committing the offence.

21. The learned Counsels for the accused have further submitted that though the prosecution witnesses have claimed that the accused no.1 had assaulted Anil with a sword, the medical reports reveal that Anil was admitted in the hospital with history of assault with a bat. It is further submitted that the witnesses have deposed that the other accused had inflicted several blows of sticks, stumps, rods etc on the head of Anil. Whereas the medical evidence reveals that the deceased had sustained only one CLW on the head. The Ind. Sr. Counsel therefore contends that the ocular evidence is in variance with the medical evidence and that this is a fundamental defect which discredits the entire case of the prosecution. He has placed reliance on i) **Kapildeo Mandal & Ors**

v., State of Bihar 2008 Cri.L.J. 730, ii) Gangabhavani v. Rayapati Venkat Reddy & Ors. (2013) 15 SCC 298, iii) Mahadeo Kundalik Vaidya & Ors. v. State of Maharashtra 2001 Cri.L.J. 4306 and iv) Rajpal & Anr. v. State of Haryana (2007) 13 SCC 554.

22. The learned senior counsels Shri Shashank Manohar and Shri Gupte have submitted that the deceased had sustained only one injury which was allegedly caused by the blunt side of the sword. They have submitted that the incident had occurred in a spur of the moment, and the injury was caused in exercise of right of self defence. They have submitted that the evidence read as a whole would clearly indicate that the accused had no intention to cause death of Anil and as such they cannot be held guilty of offence 302 of the IPC and the case would at the most be covered under section 304 part II of the IPC.

23. Per contra, Mr. Shinde, the learned PP has submitted that the case of the prosecution is based on the evidence of the injured witnesses. He has further submitted that the evidence of the prosecution witnesses proves beyond reasonable doubt that the accused herein were the aggressors and were involved in causing death of Anil and causing grievous injuries to PW1, PW2, PW3 and PW10, The learned APP has further submitted that the ocular evidence which is duly corroborated by the medical evidence proves beyond reasonable doubt that the accused herein had come armed with weapons and that they had assaulted Anil, Deepak, Pratap, Prakash and Dayanand and thereby caused

death of Anil and injuries to PW2 Pratap Patil, PW3 Prakash Patil and PW10 Dayanand Patil.

24. The learned APP therefore submits that non explanation of minor injuries suffered by the accused is not fatal to the case of the prosecution. He has further submitted that whether it was a case of a free fight or unlawful assembly has to be determined on the basis of attending circumstances. He has submitted that the injuries inflicted on Anil and the other injured prosecution witnesses were far more serious as compared to be injuries sustained by the accused. The nature and the number of injuries sustained by the deceased and the other prosecution witnesses clearly indicate that the accused were the aggressors. This being not a case of free fight, the accused have been rightly convicted with the aid of section 149 IPC. Learned PP Shri Shinde has submitted that the prosecution had proved the guilt of the accused beyond all reasonable doubt and that the sentence imposed on the accused Nos. 3, 4, 11 and 12 is not in consonance with the gravity of the offence. He has further submitted that the learned Magistrate has also erred in acquitting accused No.9-Shravan Patil.

25. We have perused the records and considered the submissions advanced by the learned senior counsels for the accused and the learned APP for the State.

26. It is not in dispute that the complainant -(PW-1) Deepak Patil, the deceased-Anil, the injured witnesses viz. PW2-Pratap Patil, PW3-Prakash Patil, PW10-Dayanand Patil and the accused are

closely related to each other and are the residents of JNPT Colony, Uran. The relations between both these groups are strained in view of the pendency of the civil litigation. The animosity between both groups led to the incident of 5.7.2009, in which Anil, the brother of PW1 lost his life. The prosecution case is that the accused formed an unlawful assembly, armed with weapons and in prosecution of the common object caused death of Anil. The case of the prosecution rests mainly on the ocular evidence of PW1- Deepak Patil, PW2- Pratap Patil, PW3- Prakash Patil, PW10- Dayanand Patil, PW25-Praveen Patil and PW- 26 Janabai Katkari, besides other circumstantial evidence.

27. The testimony of PW1 Deepak Patil indicates that on 5.7.2009 at about 9.15 am, he along with his brothers Manohar and Anil had been to Panvel by their Safari Vehicle bearing No.. MH 43 V 1700. They returned to their village Patnoli at about 11.30 a.m. When they reached near the cricket ground, they saw some boys playing cricket. Shravan Rama Patil (accused No.9), Haribhau Rama Patil (accused No.5), Tukaram Rama Patil (accused No.6) and Kashinath (accused No.8) were sitting by the side of the road which is near the ground. He has deposed that he slowed down the vehicle, as he had to negotiate a turn on a narrow road leading to the village. On seeing him, Sujit (A1), who was on the cricket ground, spat and started abusing him. He therefore stopped his vehicle and went near Sujit (A1) and questioned him about spitting and abusing. The accused no.1 continued abusing him. In the meantime, the accused nos.5 Haribhau, Accused no.6 Tukaram, accused no.8 Kashinath and accused no.9 Shravan

came towards them armed with weapons. He stated that the accused Shravan was armed with a gun, Tukaram with an iron rod, Haribau with a stick and Kashinath with a bat. Ganesh (A2), Sandeep (A3), Sagar (A4), Suhas (A7), Vilas (A10), Alpesh (A 11) and Samadhan (A12) also came from the village, armed with hockey sticks, stumps, sticks, sword and lathi. All of them started assaulting him and his brothers.

28. PW1-Deepak Patil has further stated that on hearing their cries his brothers Prakash (PW3), Kishor, Dayanand (PW10) and Praveen (PW25), came to the place of the incident. He has stated that Alpesh (A11) had come armed with a sword. He handed over the sword to Sujit (A1) and Sujit gave a blow of sword on the head of Anil, Tukaram (A6) gave a blow of rod, Vilas(A10) gave a blow of hockey stick and Haribhau (A5) gave a blow of stick on the head of Anil. PW1-Deepak Patil deposed that when he rushed towards Anil, accused No.10-Vilas gave a blow of hockey stick on his head. He has further narrated that Suhas and Ganesh gave blows of stump on the head of Anil. Anil fell on the ground and thereafter Kashinath Patil sat on his chest and pressed his neck. At that time Kashinath, Tukaram and Vilas were shouting to Kill Anil.

29. PW1-Deepak Patil has stated that (A3)-Sandeep Patil gave a blow of stump on his head and hands, (A10) Vilas Patil gave a blow of hockey stick on his leg, and Sagar Patil gave him blow with lathi on his right hand. As a result he suffered injuries on his head, hands and legs. He has deposed that the accused also assaulted his brothers Manohar, Prakash, Dayanand, Kishor and Praveen

and they suffered severe injuries. In the meantime his Uncle Mahadeo and cousin Mohandas came to the spot, and on seeing them, the accused ran away towards the village.

30. Mahadeo and Pratap took Anil Patil to Purohit hospital. Since the doctor was not available, they were taken to Gandhi hospital. Anil as well as the other injured persons were admitted in the said hospital. The police came to the hospital and recorded the complaint at Exh.59. He has stated that he later learnt from his relatives that Anil was shifted to MGM Hospital at Vashi. Anil expired on 8.7.2009 while undergoing treatment at MGM Hospital at Vashi.

31. PW1 has admitted in his cross examination that the incident took place on the ground which is at a distance of about 35 feet away from the road. He has denied the suggestion that while some of the accused were playing cricket, he and his brothers came on the ground and threatened Vilas Patil (A10). He has further denied that he and his brothers had assaulted the accused with hockey sticks, wooden dandas etc. He has admitted that Kashinath and Vilas had sustained injuries. He has denied the suggestion that while they were assaulting Vilas Patil, the accused who were playing cricket removed the stumps from the ground and assaulted them with bat and stumps in exercise of their right of self defence.

32. PW1-Deepak Patil has admitted in his cross examination that he had not stated in the FIR dated 5.7.2009 that Shravan Patil had

come with a gun. He has also admitted that he had not stated in the FIR that after Anil fell on the ground, Kashinath sat on his chest and pressed his neck, and further that Kashinath and Tukaram had said "Kill Anya: Kill Anil".

33. He has further admitted that he had not stated in the FIR that Kashinath (A8), Tukaram (A6) and Vilas (A10) had implored others to kill Anil. He has also admitted that he had not stated in the FIR that Ganesh @ Yogesh (A2) and Suhas (A7) had struck stumps on the head of Anil. Though Deepak Patil-PW1 claimed that he had narrated in the FIR that Tukaram (A6) had given a blow of rod and Kashinath (A8) had given a blow of bat on the head of Anil, no such statement is recorded in the FIR and these material omissions have been elucidated in the cross-examination.

34. PW2 Pratap Patil, was the driver of the deceased-Anil. The testimony of this witness indicates that on 5.7.2009 at about 9.15 a.m., he had taken Anil, Deepak and Manohar to Panvel. PW1 Deepak Patil drove the vehicle on the return journey. They reached near the school ground at Patnoli at about 11.30 a.m. Sujit (A1) and his father Haribhau and uncles Shravan, Tukaram and Kashinath were standing on the road, while some boys were playing cricket on the ground. Sujit (A1) spat and abused on seeing them. On hearing the abusive words, Deepak (PW1), Anil and Manohar got down from the vehicle to question Sujit. He has deposed that Shravan (A9), Tukaram (A6), Haribhau (A5) and Kashinath (A8) and Sujit (A1) came towards them. Sharvan was armed with a gun, Tukaram was armed with an iron rod, Haribhau

was armed with a stick and Kashinath was holding a bat. In the meanwhile Alpesh (A11), Vilas (A10), Suhas (A7), Yogesh (A2), Sandeep (A3), Sagar (A4) and Samadhan (A12) also came to the place of incident armed with sticks, lathi, sword, hockey stick and stumps. He has deposed that Alpesh (A11) handed over the sword to Sujit (A1) and thereafter Sujit (A1) gave a blow of a sword on the head of Anil, as a result Anil sustained bleeding head injury.

35. Manohar and Deepak-PW1 rushed towards Anil, at which time Vilas (A10) gave a blow of hockey stick on the head of Deepak-PW1. Sandeep Patil (A3) gave a blow of stump on the left hand of Deepak-PW1, whereas Sagar gave a blow of lathi on the right hand of Deepak-PW1. Ganesh @Yogesh (A2) and Suhas (A7) also beat Manohar Patil by a stump. Vilas Patil (A10) gave a blow by hockey stick on the head of Anil Patil. Tukaram Patil (A6) gave a blow of rod, Ganesh @Yogesh (A2) gave a blow of stump and Kashinath (A8) gave a blow of bat on the head of Anil. As a result Anil collapsed and Kashinath (A8) sat on the chest of Anil and pressed his neck. Kashinath (A8), Tukaram (A6) and Vilas (A10) were shouting to kill Anil. Pratap Patil-PW2 further stated that when he tried to intervene and save Anil, Alpesh (A11), Ganesh @Yogesh (A2), Suhas (A7) and Sandeep (A3) assaulted him with stumps. As a result he sustained injuries on his head, shoulder, hand and palm. He has stated that Prakash (PW3), Dayanand (PW10) and Kishore had also sustained injuries in the said incident. He has stated that after the incident all the accused ran away towards the village along with the weapons.

36. Though PW2-Pratap Patil has claimed that he had stated to the police that Kashinath (A8), Tukaram (A6), Haribhau (A5) and Shravan (A9) had come to the place of the incident armed with rod, stick, and gun no such statement is recorded in the statement under section 161 of Cr.P.C. This material omission has been brought on record in his cross-examination. Similarly, the fact that Alpesh (A11), Vilas (A10), Suhas (A7), Sandeep (A3), Ganesh @ Yogesh (A2), Sagar (A4) and Samadhan (A12) had come to the place of the incident armed with weapons such as sword, hockey stick, stumps, sticks, lathi, etc. was not stated in the statement under section 161 of Cr.P.C. and this omission is elicited in the cross examination.

37. PW2 has denied the suggestion that PW1 Deepak and Anil got down from the vehicle and started abusing Vilas(A10) and threatened him. He has denied that thereafter they went to the village and returned with weapons such as hockey sticks, lathis, etc and assaulted the accused. He has also denied the suggestion that the accused had assaulted them in their self-defence.

38. PW3 Prakash Patil and PW10 Dayanand Patil are the brother's of deceased Anil. They have deposed that on 5.7.2009 at about 10.45 am they were at the house of one Govardhan Katkar at Adivasiwadi. At about 11.30 am they heard some noise near the school ground. They saw their safari vehicle parked on the road. They rushed towards the place of the incident and saw all the accused armed with swords, stumps, hockey sticks, bats, sticks etc. Their brothers Manohar, Deepak-PW1 and Anil and his driver

Pratap-PW2 were also present at the place of the incident. Both these witnesses have stated that the accused no.1 Sujit wielded a blow of sword on the head of Anil.

39. PW3-Prakash Patil has narrated that Vilas (A10) gave a blow of hockey stick, Haribhau (A5) gave a blows with stick, and Tukaram (A6) gave a blow of rod whereas Kashinath (A8) gave a blow of bat on the head of Anil. Ganesh @ Yogesh (A2) and Suhas (A7) also assaulted Manohar with sumps on his head and eye. PW3-Prakash Patil has further stated that Vilas (A10) gave a blow of hockey stick on the head of PW1-Deepak Patil, Sandeep (A3) hit PW-1 Deepak Patil with a stump on his left hand, and Sagar (A4) gave a blow of lathi on the person of PW1-Deepak Patil. He has deposed that he requested the accused not to assault him. However, Tukaram (A6) gave a blow of rod on his forehead, Ganesh @ Yogesh (A2) hit him with stump on his left hand and neck, and Sandeep (A3) hit him with a stump on his head, shoulders and hand. He has deposed that his brother Kishore came to the place of the incident and that Yogesh @ Ganesh (A2) and Suhas (A7) assaulted him with stumps, and Samadahan (A12) gave him a blow of stick.

40. PW3-Prakash Patil has deposed that he and his brothers Manohar Patil, Anil Patil, PW1-Deepak Patil, Kishor Patil, PW-10 Dayanand Patil, PW-25 Pravin Patil as well as his driver PW2-Pratap Patil were seriously injured in the said incident. Mahadeo Patil (PW24) and Mohan Patil came to the place of the incident and the accused fled away from the place of incident. Mahadev

Patil and Mohan Patil shifted the injured to the hospital. This witness had not stated in his statement under section 161 of Cr.P.C. that Shravan (A9), Tukaram (A6), Haribhau (A5), Kashinath (A8), Samadhan (A-12) and Sagar (A4) had come to the place of the incident armed with sword, gun, hockey sticks, but stumps rods sticks, lathi, etc. This omission has been brought on record in the cross-examination and proved through the Investigating Officer.

41. PW10-Dayanand Patil has deposed that Suhas (A7) gave a blow of stump on the head of Manohar, Vilas Patil gave a blow of hockey stick on the head of Deepak. He has deposed that he and his brothers PW-3 Prakash and Kishor tried to intervene, at this time, Tukaram (A6) gave a blow of iron rod on the head of PW3-Prakash. Suhas (A7) gave a blow of stump and Haribhau (A5) gave a blow of stick on his head. Whereas Sandip Patil (A3) gave a blow of stump on his head and leg. He has deposed that he had sustained bleeding head injury. He has further deposed that when Pratap (PW2) tried to lift Anil, Alpesh (A11) gave a blow of sword on the head of Pratap (PW2). Ganesh @Yogesh (A2) and Suhas (A7) also assaulted (PW2)-Pratap on his head with stumps.

42. PW10 has deposed that accused Shravan (A9) who was armed with a gun had pointed out the gun at them. He has deposed that he and his brothers Manohar, Anil, PW3-Prakash, Kishor, PW1-Deepak and PW-25-Praveen as well as their driver PW2-Pratap had sustained injuries in the said incident. In the meanwhile, PW24- Mahadeo and Mohan came to the place of the incident, and on seeing them the accused ran away from the place

of the incident. Mahadeo shifted them to the hospital. He has deposed that his brother Anil expired as a result of the injury sustained in the said incident.

43. PW24-Mahadeo Patil has deposed that on the relevant date at about 11.30 am while he was at his resident, some villagers told him that Anil and his brothers were being assaulted. He rushed to the school ground and saw that Anil was lying on the ground and Manohar, PW3-Prakash, PW1-Deepak, PW10-Dayanand, Kishore and PW25-Praveen were present at the place of the incident. He has deposed that the accused were assaulting Anil and his brothers. He has further stated that his nephew Mohandas also came at the place of the incident, and thereafter all the accused ran away towards the village with their weapons in their hands. He has deposed that Anil had sustained head injury. He was unconscious. Manohar was also lying at the place of the incident. He shifted Anil and the other injured persons to Gandhi Hospital. He has stated that Anil was later shifted to MGM Hospital. Anil died on 08.07.2009 as a result of the injuries sustained in the said incident.

44. PW25 Pravin Patil is also one of the brothers of the deceased. This witness has stated that on 5.7.2009 at about 11.30 am some of the villagers had informed him that the accused Anil, Manohar and PW1-Deepak were being assaulted near the school ground. He immediately rushed to the school ground and saw the accused assaulting his brothers. He has deposed that Kashinath (A-8) gave a blow of bat on the head of Anil, after which Anil fell

down. Kashinath (A-8) sat on his chest and pressed his neck. Kashinath (A-8) and Tukaram (A-6) were shouting to kill Anil. He has stated that when his brothers PW3-Prakash, Kishore, PW1-Deepak and Manohar tried to intervene and save Anil, the accused assaulted them by hockey stick, stumps, etc. He has stated that he was also assaulted by Yogesh, Sandip and Haribhau. He has stated that he was unconscious and he regained consciousness at Gandhi hospital after two days. Subsequently, he learnt that his brother Anil had expired as a result of the injuries sustained in the said incident.

45. PW26 Janabai Katkari is one of the villagers residing near the place of the incident. She has deposed that on the relevant date PW3-Prakash had been to her house to assist her in the engagement ceremony of her daughter Manisha. She has stated that they heard some noise near the ground. PW-3 Prakash and his brothers Kishor and PW10-Dayanand, as well as she and Ganesh Balu Pawar rushed towards the place of the incident. She has stated that she had seen the Sujit (A-1) wielding a blow of sword on the head of Anil. Vilas (A-10) gave a blow of stick on the head of PW1-Deepak. She has stated that Anil, Manohar, PW10-Dayanand, PW3-Prakash and Kishor sustained injuries in the said incident. The accused assaulted them with stumps, rod, bat, sticks, and lathi etc. She has further deposed that PW24-Mahadeo came to the place of the incident and shifted the injured to the hospital. She has admitted in the cross examination that the accused as well as PW1-Deepak Patil and his brothers were assaulting each other. She has stated that it was not possible to

specify as to who was assaulting whom.

46. Based on the aforesaid evidence the accused have been held guilty of offence under section 302 with the aid of section 149 of the IPC. Suffice it to say that in order to bring home the charge under section 149 IPC, essential ingredients of section 141 of the IPC must be established. While considering the applicability of necessary ingredients of Section 149 of the IPC, the Apex Court in **Kuldip Yadav & Ors. vs. State of Bihar, JT 2011 (4) SC** has held as under:

"26) The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 149 IPC must be established."

47. It is thus clear that the accused can be held guilty of principal section with aid of Section 149 IPC only if it is established that he was a member of an unlawful assembly. The members of the unlawful assembly can be held liable under section 149 of the IPC if it is shown that they knew that the offence actually committed

was likely to be committed in prosecution of the common object. It is equally true that the common object does not require prior consent and a common meeting of mind before the attack. It can develop even on spot but sharing of such an object by all the accused must be shown to be in existence at any time before the actual occurrence.

48. In the instant case, the evidence of the aforesaid witnesses as well as the evidence of PW4 Hausaram Patil vis-à-vis the scene of offence panchanama at Exh.80 vis-a-vis the testimony of PW30 Viday Kadmane indicates that the incident occurred on the cricket ground, which is at a distance of about 35 mtrs away from the road. The evidence of these witnesses indicates that Sujit (A1) and some other boys were playing cricket on the ground while Haribhau Patil (A5), Tukaram Patil (A6), Kashinath Patil (A8) and Shravan Patil (A9) were sitting by the road watching the match. They were neither armed with weapons nor were they waiting for PW1-Deepak Patil and his brothers to arrive at the place of the incident. In fact, it is not the case of the prosecution that the accused were aware that the complainant PW1-Deepak Patil and his brothers would arrive at the place at the stated time and that they had assemble to assault the complainant and his brother or to commit murder of Anil.

49. It is thus evident that the prosecution has not proved that the accused had assembled with a common object of causing hurt to the complainant and his brother. The evidence on the contrary, reveals that the incident occurred with Sujit (A1) spitting and

hurling abuses at PW1-Deepak Patil and his brother, who had returned from Panvel. This incident led to PW1-Deepak and his brothers Anil (deceased) and Manohar going to the play ground. The altercation between Sujit (A1) and PW1-Deepak Patil led to a sudden quarrel in which the two sides jostled with each other and assaulted each other. The other family members of each group, who arrived at the place of the incident assaulted each other with weapons they were armed with as well as with other handy objects like bats and stumps lying on the spot. The evidence on record reveals that it was a case of free fight wherein members of both the groups had sustained injuries.

50. PW1-Deepak Patil, PW2-Pratap Patil and PW3-Prakash Patil have stated that Kashinath (A8) and Tukaram (A6) called upon other accused to kill Anil. However, this is a material improvement which does not find place in the FIR and statements under section 161 of the Cr.P.C. These material omissions could not have been cursorily brushed aside as suppression of these material fact cast a doubt on the prosecution version that the accused had reflected their intention to commit murder of Anil and thus negates the theory of such common object having been developed on the spot.

51. The incident had occurred on the spur of the moment without there being premeditated plan. The evidence reveals that both groups had indulged in free fight resulting in death of Anil and injuries to the members of both the groups. The suddenness of quarrel militates against the common object being entertained by the members of the assembly. As held by the Apex court in **Puran**

Vs. State of Rajasthan, AIR 1976 (SC) 912,

"in case of sudden mutual fight between the two parties, there can be no question of invoking the aid of Section 149 for the purpose of imposing constructive criminal liability on accused. The accused in such a case can be convicted only for the injuries caused by him by his individual acts."

47. In ***Ishwar Singh (supra)*** the Apex Court has held that if the accused were not the aggressors no case either under section 147 or 148 of the IPC can be maintained against them and it is for the prosecution to prove the individual assault. In ***Bachan Singh & Ors. Vs. State of Punjab (supra)*** and ***Ananta Kathod Pawar & Ors. Vs. State of Maharashtra*** the Apex Court has reinstated that in a sudden and free fight each accused will be liable for the individual act attributed to the particular accused and there is no scope for convicting members of one of the groups under sections 147 and 148 of the IPC and for that matter for substantive offences with the aid of section 149 of the IPC.

48. It is also pertinent to note that in the case of ***Dwarkaprasad Vs. State of UP, 1993 SUPP (3) SSC 141*** it has been held that:

"A free fight is that when both sides mean to fight a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival party. In such cases of mutual fights, both sides can be convicted for their individual acts. This position has been settled by this Court in the cases of Gajanand v. State of Uttar Pradesh, AIR 1954 SC 695; Kanbi Nanji Virji v. State of Gujarat AIR 1970 SC 219; Puran v. State of Rajasthan, AIR 1976 SC 912 and Vishvas Aba Kurane v. State of Maharashtra, AIR 1978 SC

414. As such once it is established by the prosecution that the occurrence in question is result of a free fight then normally no right of private defence is available to either party and they will be guilty of their respective acts."

49. In the facts and circumstances of the case we are of the opinion that the prosecution has not succeeded in proving existence of common object amongst the accused persons to attract the provisions of Section 149 of the IPC. The incident in question being a case of a sudden and free fight no right of private defence is available to the accused. Hence the decision in Darshan Singh (supra) has no application. This being a case of mutual fight where both groups have sustained injuries, no constructive liability can be imposed and the accused can only be held responsible for their individual acts.

50. Now coming to the role played by each of the accused, a cumulative reading and apposite appreciation of the evidence of PW1 Deepak, PW2 Pratap, PW3 Prakash and PW10 Dayanand proves beyond reasonable doubt that Sujit (A1) had taken a sword from the hands of Alpesh (A11) and inflicted a blow of sword on the head of Anil. Anil had sustained head injuries and he was taken to Gandhi hospital and later shifted to MGM Hospital, Vashi. He expired on 08.07.2009. The evidence of PW28 Dr. Bhushan Jain vis-a-vis the post mortem report indicates that the death of deceased Anil was due to head injury, which was sufficient to cause death in ordinary course of nature. The medical evidence leaves no doubt that the death of Anil was homicidal.

51. The entry in the medical records at Exh.173 indicates that Anil was brought to the hospital with history of 'beaten by bat'. It is pertinent to note that the said history was not given by Anil as the medical papers indicate that Anil was brought to the hospital in an unconscious state. Furthermore, there is nothing to suggest that the said entry was based on the statement of any of the eyewitnesses. The medical papers do not reveal as to who had given the said history, nonetheless, the fact that PW24-Mahadeo had taken Anil to the hospital gives an indication that the said history was given by this witness. It is pertinent to note that PW24 had gone to the place of the incident after the villagers informed him that his brother Anil was being assaulted. He had not seen the accused No.1 assaulting Anil. It is therefore evident that the history of assault as recorded in the medical case papers was not based on the personal knowledge of this witness. As against this, the FIR, which was lodged by the eye-witness- PW1 immediately after the incident, refers to the assault by a sword. In the light of above the history of assault, as recorded in the medical case papers pales into insignificance.

52. PW28 has deposed that the indoor medical case papers refer to a single external injury (CLW). PW28 has opined that a contused lacerated wound cannot be caused by a sharp weapon but can be caused by a hard and blunt weapon. In the light of the said statement it is sought to be contended that the medical opinion is inconsistent with the ocular evidence. At this stage it would be advantageous to refer to the decision of the Apex Court in **Thaman**

Kumar Vs. State of U.T. of Chadigarh, A 2003 SC 3975, wherein it has been held as under:-

" The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

53. In **Kapildeo Mandal Vs. State of Bihar and Gangabhavani Vs. Rayapati Venkat Reddy (supra)** the Apex Court has reiterated the well settled principle that the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence. However, the medical evidence which is totally inconsistent with

the eye witness version renders the ocular version doubtful.

54. In the instant case, the prosecution witnesses have specifically stated that Sujit (A1) had inflicted a blow by sword. Though PW28-Dr. Bhushan Jain has stated that the injury i.e. CLW could not be caused by a sharp weapon, he has stated that the said injury could be caused by the blunt edge of the sword. It is true that the witnesses have not specified whether the accused No.1 had struck the blow by the sharp or blunt edge of the sword. The witnesses cannot be branded as untruthful merely because they had not specified that the sword was struck from the blunt side. In the mele surrounding the incident it would not be possible for the witnesses to identify which side of the sword was used to cause the injury. Furthermore, unlike an axe or Farsi, where it is possible to observe which side of the weapon has been used, the sword by its very nature would make such identifications difficult. The evidence of the witnesses is not inconsistent or contrary to the medical evidence. Hence the decisions in ***Rajpal & Anr. Vs. State of Haryana*** and ***Mahadeo Vaidya & Ors. Vs. State of Maharashtra (supra)*** would not be applicable to the facts of this case.

55. It is also pertinent to note that evidence of the eye witnesses indicate that apart from the blow of the sword inflicted by the accused No.1, the other accused had also wielded blows of sticks, stumps, etc. on the head of Anil. Though the indoor medical papers makes reference to only one external head injury, the testimony of PW28-Dr. Bhushan Jain indicates that there were

multiple impacts on the head of the deceased. The medical evidence is therefore, not inconsistent but in fact corroborates the ocular evidence.

56. At this stage, it is relevant to note that the witnesses have specifically stated that the skull of Anil was cracked with severe blow of sword given by the accused no.1 Sujit. The testimony of these witnesses indicate that though the other accused had also inflicted head injury, the fatal injury was in fact inflicted by the accused no.1 Sujit. The testimony of PW28-Dr. Bhushan Jain also reveals that the death of Anil was due to the head injury, which was stated to have been caused by sword. The evidence of PW28 further indicates that the said injury was sufficient to cause death. The medical evidence fortifies the fact that fatal injury was caused by the blow of sword inflicted by accused no.1. Thus the ocular evidence which is duly corroborated by medical evidence proves that the death of Anil was due to head injury inflicted by accused no.1 Sujit.

56. The evidence of PW16-Sanjay Patil vis-à-vis the memorandum and seizure panchanama at exhs. 116 and 117 as well as the testimony of the Investigating Officer reveals that while the Sujit (A1) was in custody he had volunteered to show the sword (Art. 14) which was kept in his house. The said disclosure statement was recorded in presence of PW16-Sanjay. Sujit (A1) took them to his house. The accused no.1 removed a sword, which was on loft of the kitchen and handed over the same to the

police. The testimony of PW16 indicates that the sword was stained with blood. The said sword was sealed and seized under panchanama at Exh.117 drawn in presence of PW16. The sword was sent to CFSL, Kalina, Mumbai for examination. The CA report at Exhibit 216 reveals that the sword (Art.20) was stained with human blood, the results of blood group were inconclusive. Suffice it to say that the fact that the results of the blood group were inconclusive would not dent the prosecution case.

57. It would be advantageous to refer to the observations of the Apex Court in ***John Pandian Vs. State Rep. by State of Tamilnadu, 2010 (14) SSC 129:***

"The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."

58. In the instant case the accused has not offered any explanation as to how the sword, which was recovered at his instance was stained with human blood. This being the case there is no reason to discard this relevant circumstance viz the recovery of the weapon used in the crime. The ocular evidence as well as the other supporting evidence proves beyond reasonable doubt

that the accused No.1 had inflicted blow of sword on the head of Anil. Thus, the evidence adduced by the prosecution, proves the complicity of the accused No.1 in causing the death of Anil.

59. The moot question which arises for our consideration is whether the offence committed by Sujit (A1) constitutes an offence punishable under section 302 IPC or whether the offence committed by the accused can attract exception 4 of section 300 of the IPC and further whether conviction can be converted from section 302 to section 304 par I or part II of the IPC. Before reverting to the facts, it would be advantageous to refer to section 300 IPC which reads as under:

"Section 300:Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

Secondly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused or--

Thirdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

Fourthly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any

excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.--When culpable homicide is not murder.--
Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:--

First.--That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.--That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.--That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 2.--Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of

defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Exception 3.--Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.--Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.-

60. Dealing with the Exception 4 to section IPC, the Hon'ble Apex Court in ***Ghapoo Yadav and ors. Vs. State of M.P., (2003) 3 SCC 528*** has held as under:-

“...The help of Exception 4 can be invoked if death is caused

(a) without premeditation, (b) in a sudden fight: (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 Indian Penal Code is not defined in the Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4 It is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'. xxx xxx xxx ...

61. In the case of **A. Maharaja Vs. State of Tamilnadu, 2009 Cr.L.J. 315**, the Hon'ble Apex court held:

8. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to do

deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to [Section 300 IPC](#) is not defined in the [IPC](#). It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must

necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

62. In ***Sukhbir Singh vs State Of Haryana 2002 (3) SCC 327***, the apex court has held that:-

"To avail the benefit of Exception 4, the defence is required to probabalise that the offence was committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of pre-meditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by courts that a fight is not per se palliating circumstance and only un-pre-meditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception."

63. It will also be useful to refer to the judgment of the Apex Court in the case of ***Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh., (2006) 11 SCC 444***, wherein the Court

has observed that:-

18. ... the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt

a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

65. We have examined the issue keeping in mind the above legal principles. The evidence reveals that the incident was preceded by an altercation between the accused No.1 and PW1-Deepak Patil, which led to a scuffle. The family members of accused No.1 as well as PW1-Deepak Patil came to the place of the incident armed with weapons and joined them. The trivial altercation led to the ensuing incident of assault in which the members of both groups sustained injuries. There is no clear evidence as to which of the groups was the aggressor. Nonetheless, the evidence reveals that accused No.1 had inflicted a blow of the sword on the head of Anil, which culminated in his death. The incident was not premeditated but had occurred on the spur of the moment, in a sudden fight, without there being any common object to commit murder of Anil. The evidence further reveals that after Anil fell down with a single blow of the sword, the accused No.1 did not inflict any other injury upon his person when he was lying on the ground in a helpless position. The accused No.1 therefore did not act in a cruel or unusual manner. Thus, taking cumulative view of the facts of the case and the legal position discussed in foregoing paragraphs, we are of the considered view that the case is covered by Exception 4 to section 300 of the IPC.

67. The evidence reveals that the Sujit (A1) had not come armed

with a sword but in a heat of passion, taken the sword from the hands of Alpesh (A11) and inflicted a single blow with blunt edge of the sword, which had unfortunately turned to be fatal. In the facts and circumstances, the accused No.1 cannot be imputed with the intention to cause death of the deceased Anil or with the intention to cause that particular fatal injury. In the absence of any positive proof that the accused no.1 caused the death of the deceased with the intention of causing death or intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, neither Clause I nor Clause III of Section 300 of the IPC will be attracted. From the factual matrix, Sujit (A1) could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death. The offence committed by the appellant is the one punishable under Section 304 Part-II IPC and not under Section 302 IPC. Hence, the finding of the trial court below, holding the aforesaid appellant guilty of offence of murder punishable under Section 302 r/w 149 IPC, is not sustainable

68. As regards the involvement of the other accused, the evidence of PW1, PW2 and PW3 indicates that the accused nos.2, 5, 6, 7 and 10 had inflicted blows of stumps, sticks, rod and hockey sticks on the head of Anil. It is pertinent to note that in the FIR at Exh.59, PW1-Deepak Patil had not stated that the accused No.8 had inflicted a blow of iron rod, accused No.5 Haribhau had inflicted a blow of stick, accused No.2 and 7 had inflicted blows of stumps on the head of Anil. These material omissions have also been brought on record and proved through the investigating

officer. Similarly, PW2 and PW3 had not stated in their statements that the accused Nos.2, 5, 6, 8 and 10 were armed with hockey sticks, stumps sticks, lathi, etc. and that these accused had given blows by the said weapons on the head of Anil. These material omissions have been brought on record and proved through the investigating officer. It is thus, evident that PW1, PW2 and PW3 had not attributed any specific role to the other accused except the accused No.1. Such role had been attributed for the first time in their deposition before the Court. This is nothing but an improvement, which makes their testimony doubtful. There being no cogent and conclusive evidence to prove the specific role played by these accused they cannot be held guilty of the offence under section 302 or 304 part I of the IPC.

69. The learned trial Judge has held the accused No.7 Suhas guilty of attempting to commit murder of Manohar Patil and has thus convicted and sentenced Suhas Patil (A7) for the offence under section 307 r/w. 149 of the IPC. It is pertinent to note that the learned Judge having acquitted all the other accused of the offence under section 307 of the IPC and could not have convicted the sole accused No.7 with aid of section 149 of the IPC. Be that as it may, the evidence of PW27 indicates that Manohar was brought to Gandhi Hospital on 5.7.09. Said Manohar had suffered extra axial haemorrhage on left temporo parietal region with effacement of basal cistern cortical sulci with cerebral edema with mid line shift to right side. The age of the injuries was within 24 hours duration. The injuries Nos.1 and 2 were grievous nature and

were caused with hard and blunt object. PW28 has deposed that the head injury (intracranial injury) sustained by Manohar Patil could have resulted into his death.

70. The medical evidence indicates that Manohar had sustained serious head injuries which could have been fatal. The question is whether these injuries were inflicted by accused No.7. It is to be noted that the prosecution has not examined the injured Manohar. It was sought to be explained that Manohar Patil had sustained brain injuries and that he is unable to speak coherently. This explanation cannot be accepted in view of the statement of PW1 in his cross-examination that earlier Manohar was working as a train operator and presently he is working in a workshop in a Government department. The aforesaid statement falsifies the prosecution version that Manohar was unable to depose because of the injury sustained in the said incident or that he is not a competent witness.

71. Be that as it may, though PW1-Deepak has stated that Manohar had sustained severe brain injury, he has not specified as to which of the accused had inflicted the said injury. The testimony of PW2-Pratap Patil and PW3- Prakash Patil reveals that accused No.2 as well as accused No.7-Suhas, had inflicted injuries on the head of Manohar by cricket stumps. It is to be noted that PW3 had not stated in a statement under section 161 of Cr.P.C. that the accused Nos.2 and 7 had inflicted injuries on the head of Manohar.

74. The testimony of PW10-Dayanand Patil does not indicate that the Ganesh @ Yogesh Patil (A2) had inflicted any injury on

Manohar. He has attributed role only to the accused No.7-Suhas whereas PW25-Pravin has deposed that the Tukaram (A6), Haribhau (A5), Vilas (A10), Sandip (A3) and Ganesh @Yogesh (A2) had assaulted his brothers Manohar, Kishore, PW3-Prakash and PW1-Deepak, by hockey sticks, stump, iron rod and sticks. The testimony of this witness does not indicate that accused no.7 had inflicted any injury on Manohar. The evidence as regards the assault on Manohar is inconsistent and does not cogently and conclusively established that the accused No.7 had inflicted the injuries on Manohar. Under the circumstances, the conviction of Suhas Patil (A7). for offence under section 307 cannot be sustained.

72. The appeal No.1330 of 2013 and 1141 of 2013 are directed against the judgment of acquittal. In ***Ghurey Lal Vs. State of U.P. 2008 (2) UJ SC 0991***, the Apex Court after considering the previous decisions, crystallized the legal position as regards the scope of the powers of the Appellate Court in dealing with the appeal against acquittal as under:

“73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

73. We have scrutinized the evidence and analysed the reasoning and the conclusion arrived at by the learned Judge, keeping in view the above well settled principles laid down by the Apex Court. In the instant case the learned Judge has held that the offence under section 143, 144, 147, 148, 302 r/w. 149 were proved only against accused Nos. 1,2,5,6,7,8 and 10 whereas the

offence under section 307 was proved only against Suhas (A7). The learned Judge therefore acquitted the other accused in respect of the said offences. As stated earlier the incident occurred in a free fight and provisions of section 143, 144, 147, 148 and 149 are not attracted. There is no evidence on record to indicate that the accused who have been acquitted had played any specific role in causing the death of Anil or in inflicting the injuries on Manohar and the other injured witnesses. This being the case the view taken by the trial court is probable. Consequently, these accused cannot be held guilty of the said offences. We therefore, find no reason to interfere with the order of acquittal.

74. In criminal appeal no.82 of 2014 the State has sought enhancement of sentence imposed on accused Nos.3, 4, 11 and 12. Having considered the evidence against the said accused, we are of the considered view that there are no justifiable reasons to enhance the sentence. Hence, the order does not warrant any interference.

75. Under the circumstances, and in view of discussion supra appeal 667 of 2013 is partly allowed.

- i) The accused Nos.6,8 and 10 are acquitted of all the offences.
- ii) The accused No.1 is held guilty of offence 304 Part II of IPC and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.5000/-. In default of payment of fine, he shall undergo further Rigorous Imprisonment for one

year. The period undergone be set off in terms of section 428 of the Cr.P.C.

76. The appeal No.668 of 2013 is allowed.

i) The accused Nos.2, 5 and 7 are acquitted of all the offences.

77. The appeal Nos.1330 of 2013, 1141 of 2013 and 82 of 2014 are dismissed.

(ANUJA PRABHUDESSAI, J.)

(SMT. V.K.TAHILRAMANI, J.)