

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.956 OF 2005

KASAM ALISHA SHAIKH	)
Age 31 years, Occ: Rickshaw Driver,	)
R/o.Hanuman Tekadi, Lonavala,	)
Taluka – Maval, District – Pune.	)
(At present detained at Yerwada Central	)
Prison, Pune)	)...APPELLANT
V/s.	
THE STATE OF MAHARASHTRA	)...RESPONDENT

WITH

CRIMINAL APPEAL NO.1069 OF 2005

GANESH KUMAR NAIDU	)
Age 25 years, Occ : Rickshaw Driver,	)
R/at. Hanuman Tekadi Lonavla,	)
Taluka – Maval, District – Pune.	)
Presently at Yerwada Central Prison, Pune	)...APPELLANT
V/s.	
THE STATE OF MAHARASHTRA	)...RESPONDENT

WITH

CRIMINAL APPEAL NO.1127 OF 2005

RAHIM YASIN SHEIKH	)
Age 26 years, Occ : Rickshaw Driver,	)
R/at. Hanuman Tekadi Lonavla,	)
Taluka – Maval, District – Pune.	)
Presently in Yerwada Central Jail, Pune	)...APPELLANT
V/s.	
THE STATE OF MAHARASHTRA	)...RESPONDENT

WITH

CRIMINAL APPEAL NO.624 OF 2006

DASHARATH SHIVAPPA MOLIMANI)
Age 22 years, Occupation : Service,)
R/at. Hanuman Tekadi Lonavla,)
Taluka – Maval, District – Pune.)
Presently in Yerwada Central Prison, Pune)...APPELLANT
V/s.
THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Rohini M. Dandekar, Advocate for the Appellant in Criminal Appeal No.956 of 2005.

Mr.Vipin Bidkar, Advocate for the Appellant in Criminal Appeal Nos.1069 of 2005 and 1127 of 2005.

Mr.H.J.Dedhia, APP for the Respondent - State.

**CORAM : V.K.TAHILRAMANI &
A. M. BADAR, JJ.**

DATE : 6th DECEMBER 2016.

JUDGMENT : (PER A.M.BADAR, J.)

1 By these appeals, appellants / original accused nos.1 to 4 are challenging the judgment and order dated 29th August 2005 passed by the learned Additional Sessions Judge, Pune, convicting them of offences punishable under Sections 302, 326, 324 read with Section 34 of the IPC and sentencing them each to

suffer imprisonment for life and to pay fine of Rs.1,000/-, in default, to suffer simple imprisonment for 3 months, for the offence punishable under Section 302 read with Section 34 of the IPC. For the offence punishable under Section 326 read with Section 34 of the IPC, appellants / accused were sentenced to suffer rigorous imprisonment for 5 years and to pay fine of Rs.1,000/-, in default, to suffer simple imprisonment for 3 months and for the offence punishable under Section 324 read with Section 34 of the IPC, they are sentenced to pay fine of Rs.500/- each, in default, to undergo simple imprisonment for 1 month. The substantive sentences are directed to run concurrently.

2 Briefly stated, according to the prosecution case, PW2 Anwar Nimbargi was running a video game parlour in the name and style of A1 Video Games Parlour at Lonavala. Firoz Nimbargi (since deceased) was brother of PW2 Anwar Nimbargi. On 10th August 2003, at about 8.30 p.m., appellant / accused no.1 Kasam Shaikh and appellant / accused no.3 Dasharath Molimani had been to the said video game parlour. Appellant / accused no.3

Dasharath received a slight dash of PW3 Tanvir Qureshi which led to slapping PW3 Tanvir Qureshi by appellant / accused no.3 Dasharath. This resulted in exchange of abuses. Ultimately, PW2 Anwar Nimbargi, his brother deceased Firoz Nimbargi and others drove out PW3 Tanvir Qureshi along with appellant / accused no.1 Kasam and appellant / accused no.3 Dasharath out of the video game parlour. However, the matter did not end there. Quarrel continued even outside the video game parlour.

3 According to prosecution case, appellant / accused no.2 Rahim Shaikh armed with a chopper and appellant / accused no.4 Ganesh Naidu armed with a knife, joined that quarrel. Appellant / accused no.4 Ganesh assaulted PW3 Tanvir Qureshi by knife. Deceased Firoz Nimbargi, his brother PW2 Anwar Nimbargi, PW4 Noor Mohammed Mehboob Shaikh and others tried to intervene. Appellant / accused no.3 Dasharath gave a fist blow to Firoz Nimbargi. Thereafter, appellant / accused no.2 Rahim Shaikh assaulted PW2 Anwar Nimbargi by a sharp edged weapon. Appellant / accused no.1 Kasam Shaikh took a knife

from appellant / accused no.4 Ganesh and assaulted Firoz Nimbargi. Appellant / accused no.2 Rahim Shaikh is also stated to have assaulted deceased Firoz Nimbargi by means of a knife. Appellant / accused no.4 Ganesh is stated to have assaulted Sharan Nagore by taking knife from accused no.1 Kasam. In a similar way, by taking a knife from accused no.2 Rahim, appellant / accused no.3 Dasharath is stated to have assaulted Sharan Nagore. After sustaining injuries, deceased Firoz Nimbargi and his brother PW2 Anwar Nimbargi, rushed towards Parmar hospital in the vicinity. PW3 Tanvir Qureshi also left the spot. After the incident, PW1 Abhijit Nikude, who had witnessed the incident, lodged the First Information Report (FIR) (Exhibit 66) which has resulted in registration of Crime No.69 of 2003 against all appellants / accused for offences punishable under Section 302, 307, 324 read with Section 34 of the IPC. After investigation, appellants / accused were charge-sheeted. After due trial, ultimately, by the impugned judgment and order dated 29th August 2005, passed in Sessions Case No.407 of 2003, the learned Additional Sessions Judge, Pune, convicted and sentenced

appellants / accused as indicated in the opening paragraph of the judgment.

4 Heard the learned counsel appearing for appellant / accused no.1 Kasam. She argued that the entire case of prosecution is suffering from inconsistency in evidence. The deceased had suffered only one injury, whereas witnesses for prosecution are stating that deceased Firoz Nimbargi was assaulted by two persons by sharp edged weapon. Therefore, the evidence of the prosecution is unreliable. The learned counsel further argued that evidence of witnesses does not show that appellant / accused no.1 Kasam was holding any weapon nor it shows he had intended to commit murder of Firoz Nimbargi. The incident took place in a spur of moment.

5 We also heard the learned counsel appearing for appellants / accused nos.2 to 4 at sufficient length. By taking us through the evidence of all prosecution witnesses, the learned counsel for these appellants argued that the entire evidence of the

prosecution is doubtful and untrustworthy. He further argued that witnesses of prosecution are seen to be lying on material particulars, and therefore, their evidence needs to be discarded. The learned counsel for appellant nos.2 to 4 argued that dead body of Firoz Nimbargi was having only one injury on chest. However, the informant has stated that deceased Firoz Nimbargi was assaulted by knife and chopper by appellant / accused no.1 Kasam and appellant / accused no.2 Rahim and alleged assault by appellant no.1 Kasam was first in the point of time. Therefore, in submission of the learned counsel for appellant nos.2 to 4, appellant no.2 Rahim is falsely implicated in the crime in question. The learned counsel further argued that witnesses are attributing chopper to appellant no.2 Rahim and if injuries on deceased Firoz Nimbargi and PW2 Anwar Nimbargi are examined, then it is seen that they had not suffered any injury by chopper. The learned counsel by referring to photocopies of some pages of some book on medical jurisprudence argued that stab wounds are caused by weapons like pin, needle, knife, scissors, bayonet, spear, dagger, pickaxe and arrow. Therefore, in his submission, as the

deceased Firoz Nimbargi as well as injured PW2 Anwar Nimbargi were found to be having stab wounds, the entire case of prosecution is unbelievable. PW1 Abhijit is attributing knife to appellant no.2 Rahim and he is not explaining how it has come in hands of appellant no.2 Rahim. The learned counsel further argued that evidence of PW3 Tanvir Qureshi shows that three unknown assailants came on the spot by rickshaw, out of which two were having a chopper and a knife and they assaulted PW2 Anwar Nimbargi and deceased Firoz Nimbargi. The learned counsel further argued that PW6 Satyavan Jagtap, Police Constable, is not implicating appellant no.2 Rahim in the alleged crime, though he had witnessed the incident. PW4 Noor Mohd. and PW3 Tanvir Qureshi are not stating that appellant no.2 Rahim had assaulted deceased Firoz Nimbargi. Therefore, he cannot be held liable for commission of murder of Firoz Nimbargi. The learned counsel further argued that injuries on appellant / accused no.2 Rahim are not explained by the prosecution and therefore appellants deserve acquittal. The learned counsel submitted that according to prosecution witnesses, appellant /

accused no.4 Ganesh assaulted PW3 Tanvir Qureshi by knife on back, whereas this witness had not suffered any injury on his back. This creates doubt in prosecution case. Evidence of PW3 Tanvir Qureshi is inconsistent and he had omitted to state material particulars at the first opportunity. The learned counsel further submitted that there is doubt regarding arrest of appellants / accused nos.1 to 3. The arrest panchnama does not show that they were arrested with weapons.

6 The learned counsel for appellants / accused nos.2 to 4 placed reliance on unreported judgment of the Apex Court in **Criminal Appeal No.2028 of 2009 Ragbir Chand and Others vs. State of Punjab** to demonstrate that evidence of the prosecution does not show that the assault was in furtherance of common intention of all accused persons. Similarly, he relied on judgments of the Apex Court in **Sanjeev vs. State of Haryana** reported in **2015 ALL M R (Cri) 1251** and **Nankaunoo vs. State of Uttar Pradesh** reported in **2016 (1) Scale 344**. The learned counsel further relied on judgment of the Supreme Court in

Ganesh Datt vs. State of Uttarakhand reported in 2014 ALL SCR 2278 to demonstrate that inconsistent evidence of prosecution should result in acquittal of accused persons.

7 The learned APP supported the impugned judgment and order of conviction by contending that evidence of the prosecution is consistent and minor discrepancies in such evidence which does not go to the root of the prosecution case, are required to be ignored.

8 We have carefully considered the rival submissions and also perused the record and proceedings. We have gone through the oral as well as documentary evidence adduced by the prosecution. It is seen from the record that appellants / accused were charged for the offence of committing murder of Firoz Nimbargi, attempting to commit murder of PW2 Anwar Nimbargi and Sharon Nagore as well as for voluntarily causing hurt by deadly weapons to PW3 Tanvir Qureshi in furtherance of their common intention. After due trial, by the impugned judgment

and order, the learned trial court convicted all appellants / accused for committing offences punishable under Sections 302, 326 and 324 read with Section 34 of the IPC. It is held by the impugned judgment and order that appellants / accused had not intended to commit murder of prosecution witnesses but rather in furtherance of their common intention, they committed grievous hurt to PW2 Anwar Nimbargi. It is also seen that Sharan Nagore was not examined by the prosecution in order to prove assault on him.

9 At the outset, let us examine whether the prosecution has proved that Firoz Nimbargi died homicidal death on 10th August 2003. Report of postmortem examination of his dead body is at Exhibit 99. As this report of postmortem examination of Firoz Nimbargi is admitted by accused persons, it is exhibited at Exhibit 99 and therefore it seems that the prosecution has not examined the Autopsy Surgeon. This admitted document shows that dead body of Firoz Nimbargi was having stab injury caused by knife on left side of the chest and size of the said injury is

stated to be 1 ½ inches x 7 inches deep on upper side of lungs. The report of postmortem examination shows that lungs of the dead body were punctured and ribs no.7 and 8 were cut by the blow of knife. The Autopsy Surgeon opined that death of Firoz Nimbargi was due to cardiac respiratory failure caused by sharp knife injury on left side of his chest with laceration on left lung. The Autopsy Surgeon further opined that the death was due to shock and haemorrhage.

10 Evidence of prosecution witnesses and particularly PW1 Abhijit Nikude, PW2 Anwar Nimbargi, PW3 Tanvir Qureshi and PW4 Noor Mohd. goes to show that after sustaining injuries in the assault, Firoz Nimbargi ran towards Parmar hospital of Lonavala. PW8 Dr.Rajendra Parmar is the Medical Officer working in that hospital run by Akshay Medical Foundation at Lonavala. His evidence shows that he examined Firoz Nimbargi on 10th August 2003 at about 9.15 p.m. and found him to have suffered stab injury on the left side of the chest which was bleeding profusely. This witness further deposed that Firoz Nimbargi was

bleeding from mouth also and he immediately collapsed and could not be revived. PW8 Dr.Rajendra Parmar has stated in his evidence that stab injuries to deceased Firoz Nimbargi were possible by muddemal Article 23 knife and injuries suffered by Firoz Nimbargi were sufficient in the ordinary course of nature to cause his death. In cross-examination of this witness, it is elicited by the defence that deceased Firoz Nimbargi was having only one injury and it was on the chest. This evidence as such establishes that Firoz Mainuddin Nimbargi died homicidal death on 10th August 2003.

11 As the appellants / accused, apart from the offence punishable under Section 302 read with Section 34 of the IPC are also convicted for the offences punishable under Section 326 read with Section 34 of the IPC for causing grievous hurt to PW2 Anwar Nimbargi and for the offence punishable under Section 324 read with Section 34 of the IPC for causing hurt by dangerous weapon to PW3 Tanvir Qureshi, it would be advantageous to put on record injuries suffered by these witnesses. Evidence of PW2

Anwar Nimbargi shows that after sustaining bleeding injuries in the assault, his brother Firoz Nimbargi ran towards Parmar hospital and he also followed his brother Firoz Nimbargi for going to that hospital. PW8 Dr.Rajendra Parmar had examined PW2 Anwar Nimbargi at the hospital run by Akshay Medical Foundation at Lonavala. It is in evidence of PW8 Dr.Rajendra Parma that on 10th August 2003 he saw PW2 Anwar Nimbargi lying on the floor of the hospital, sweating profusely due to hypothalamic shock. Evidence of PW8 Dr.Rajendra Parmar as well as contemporaneous document i.e. injury certificate Exhibit 80 issued by him shows that PW2 Anwar Nimbargi had suffered following injuries :

- i) stab injury over right second intercostal space
- ii) stab injury of size 2 cm x 1 cm in left third intercostal space
- iii)stab injury of size 1 cm x 1 cm on medial to mid clavicular line
- iv)stab injury to right hypochondrion region 3 cm x 1 cm right midclavicular line
- v) CLW 2.5 cm x 1 cm over left elbow
- vi) Perforating wound over stomach

Evidence of Dr.Rajendra Parma shows that injuries suffered by PW2 Anwar Nimbargi were bleeding and those were caused by sharp edged weapons. Muddemal Article no.22 which was described as chopper by witnesses was shown to this witness during his chief examination and he opined that injuries found on person of PW2 Anwar Nimbargi were possible by the said weapon. Perusal of evidence of PW8 Dr.Rajendra Parmar shows that even during his cross-examination, nothing could be brought on record to doubt his version regarding nature of injuries suffered by deceased Firoz Nimbargi as well as nature and number of injuries suffered by PW2 Anwar Nimbargi. Evidence of PW8 Dr.Rajendra Parmar to the effect that injuries suffered by PW2 Anwar Nimbargi can possibly be caused by muddemal Article 22 chopper has went unchallenged.

12 Injury certificate of PW3 Tanvir Qureshi, being admitted document is at Exhibit 86. This injury certificate shows that PW3 Tanvir has suffered CLW of size 2 cm x 0.5 cm on left side post aspect of chest at lower rib margin.

13 With this evidence regarding homicidal death of Firoz Nimbargi and sustaining of injuries by PW2 Anwar Nimbargi and PW3 Tanvir Qureshi, let us now examine whether prosecution has successfully proved that appellants / accused in furtherance of their common intention caused murder of Firoz Nimbargi, grievous hurt to PW2 Anwar Nimbargi and hurt by dangerous weapon to PW3 Tanvir Qureshi.

14 PW1 Abhijit and PW4 Noor Mohd. are eye witnesses to the incident where as PW2 Anwar Nimbargi and PW3 Tanvir Qureshi are witnesses who have been injured in the incident in question. They being injured witnesses are stamped witnesses whose presence on the spot admits no doubt. It will also have to be kept in mind that these injured witnesses will not leave the real assailants and substitute them with innocent persons. Evidence of all these witnesses, shows that PW2 Anwar Nimbargi is owner of a Video Game Parlour at Lonavala by name "A1 Video Game Parlour." All these witnesses have stated in unison that they all as well as Firoz Nimbargi (deceased), Sharan Nagore etc. were present at that Video Game Parlour, at about 8.30 p.m. on 10th

August 2003. Evidence also shows that Firoz Nimbargi (deceased) is brother of PW2 Anwar Nimbargi. Congruous evidence of all these witnesses goes to show that at about 8.30 p.m., appellant / accused no.1 Kasam and appellant / accused no.3 Dasharath came in that Video Game Parlour. Then, it is seen that appellant / accused no.3 Dasharath gave a slap on ear of PW3 Tanvir Qureshi which resulted in exchange of abuses and scuffle. Clear and consistent evidence of these witnesses goes to show that then appellant / accused no.3 Dasharath, appellant / accused no.1 Kasam and PW3 Tanvir Qureshi were ousted from the Video Game Parlour by PW2 Anwar Nimbargi, deceased Firoz Nimbargi and other persons present in the said parlour. These witnesses further testified that even outside the Video Game Parlour, assault on PW3 Tanvir Qureshi continued. This part of testimony of these witnesses is not seriously challenged in the cross-examination and as such, the prosecution has established the fact that quarrel was started by appellant / accused no.3 Dasharath by hitting PW3 Tanvir Qureshi in the Video Game Parlour of PW2 Anwar Nimbargi.

15 Evidence of PW2 Anwar Nimbargi shows that probable reason behind picking up this quarrel was the incident which took place outside his Video Game Parlour at about 12 noon of the same date i.e. 10th August 2003. Even if improvements made by PW2 Anwar Nimbargi on this aspect are ignored from consideration, his evidence do shows that there was some quarrel at that afternoon time outside his Video Game Parlour during which a person named Rajesh Pimpale dared to rush upon person of accused no.4 Ganesh in presence of accused no.1 Kasam and accused no.2 Rahim.

16 What happened outside the Video Game Parlour after ousting PW3 Tanvir Qureshi, appellant / accused no.3 Dasharath and appellant / accused no.1 Kasam is also stated by these witnesses namely, PW1 Abhijit Nikude, PW2 Anwar Nimbargi, PW3 Tanvir Qureshi and PW4 Noor Mohd. They have accounted for the incident which took place outside the Video Game Parlour in detail, but with some variation and therefore it needs to be kept in mind that while appreciating their evidence, one will have to

keep in mind the fact that none of these witnesses or even deceased Firoz Nimbargi had anticipated the occurrence of such nature and magnitude, which in all probability must have caused an element of shock and surprise in their minds. Therefore, it will have to be kept in mind that mental faculties of all these witnesses may not be attuned to absorb minute details of such incident.

17 Evidence of injured witnesses and eye witnesses is consistent to the effect that they all along with deceased Firoz Nimbargi came out of the Video Game Parlour because of continuation of quarrel and consequent assault on PW3 Tanvir Qureshi. On this backdrop, it is in evidence of PW1 Abhijit Nikude – the informant, that outside the Video Game Parlour accused no.1 Kasam and accused no.3 Dasharath were beating PW3 Tanvir Qureshi and at that time, armed with knife and chopper respectively, appellant / accused no.4 Ganesh and appellant / accused no.2 Rahim came there. PW1 Abhijit Nikude further deposed that appellant / accused no.4 Ganesh assaulted PW3 Tanvir Qureshi by knife on his back. When there was an attempt

to intervene for settling the quarrel, appellant / accused no.3 Dasharath gave a fist blow on the face of deceased Firoz Nimbargi. Then, as per version of PW1 Abhijit Nikude, PW2 Anwar Nimbargi intervened and at that time, appellant / accused no.2 Rahim gave blows of knife on his stomach. This caused deceased Firoz Nimbargi to intervene between them and at that time, appellant / accused no.1 Kasam took knife from the hand of appellant / accused no.4 Ganesh and assaulted deceased Firoz Nimbargi. PW1 Abhijit Nikude further deposed that appellant / accused no.2 Rahim also assaulted deceased Firoz Nimbargi with knife. This is the eye witness account given by PW1 Abhijit Nikude regarding assault on the deceased Firoz Nimbargi as well as PW2 Anwar Nimbargi and PW3 Tanvir Qureshi. In addition, he has stated about assaulting Sharan Nagore by appellants / accused persons. Evidence of PW1 Abhijit Nikude shows that because of injuries sustained, deceased Firoz Nimbargi, PW2 Anwar Nimbargi and PW3 Tanvir Qureshi left the spot. This witness identified the weapons used in the assault.

18 Cross-examination of PW1 Abhijit Nikude and particularly paragraphs 6 and 7 thereof establishes presence of PW1 Abhijit Nikude, PW2 Anwar Nimbargi and PW3 Tanvir Qureshi inside as well as outside the Video Game Parlour during the course of incident. In his cross-examination, the defence has accepted the fact that PW4 Noor Mohd. has also witnessed the incident which took place inside as well as outside the Video Game Parlour. Cross-examination of PW1 Abhijit Nikude also brings on record the fact that the incident outside the Video Game Parlour lasted for about 5 minutes in which Firoz Nimbargi (deceased), Tanvir Qureshi (PW3) and Sharon Nagore were assaulted. It was suggested to this witness and it was accepted by the witness that deceased Firoz Nimbargi had received 2 – 3 blows on his stomach by different assailants. By suggesting that PW3 Tanvir Qureshi abused appellant / accused no.3 Dasharath, presence of appellant / accused no.3 Dasharath on the spot of the incident is also accepted by the defence. PW1 Abhijit Nikude admitted that about 30 – 40 persons gathered on the spot and that assailants were not assaulted by anybody during the course of the

assault or thereafter. Thus, from cross-examination of this witness, the defence has attempted to demonstrate that independent witness is not examined by the prosecution, injuries suffered on accused persons are not explained, and that, this witness is stating about multiple injuries on deceased Firoz Nimbargi, when infact, deceased Firoz Nimbargi had suffered only one injury, which proved to be a fatal injury. By this it is being suggested that PW1 Abhijit Nikude is not a reliable witness. All these aspects can be dealt with subsequently after noting what other witnesses are stating about the incident.

19 Exhibit 66 is the FIR lodged by PW1 Abhijit Nikude instantaneously on 10th August 2003 itself and his evidence is consistent with the FIR lodged by him.

20 PW2 Anwar Nimbargi – an injured witness has stated in his evidence that outside the Video Game Parlour, appellant / accused no.3 Dasharath began to hit PW3 Tanvir Qureshi. At that time, appellant / accused no.4 Ganesh and appellant / accused

no.2 Rahim also came there armed with knife and chopper respectively. PW2 Anwar Nimbargi stated that then appellant / accused no.4 Ganesh assaulted PW3 Tanvir Qureshi by knife. PW2 Anwar Nimbargi further testified that then appellant / accused no.2 Rahim assaulted him on both sides of chest as well as abdomen by chopper. He further stated that thereafter his brother deceased Firoz Nimbargi came for rescuing him and at that time, appellant / accused no.1 Kasam took knife from appellant / accused no.4 Ganesh and thrust it in stomach of deceased Firoz Nimbargi causing bleeding from mouth of Firoz Nimbargi. As per version of PW2 Anwar Nimbargi, his brother Firoz Nimbargi ran towards Parmar Hospital. PW2 Anwar Nimbargi further disclosed assault by appellants / accused on Sharon Nagore. He then stated that as he felt giddy, he also ran towards Parmar hospital and from Parmar hospital he was admitted to YCM hospital after about 15 days. This witness identified his full pant as well as muddemal article chopper and knife. While in dock, he also identified all accused persons.

21 In cross-examination of PW2 Anwar Nimbargi, the defence has accepted presence of appellant / accused no.3 Dasharath on the spot by bringing on record that when Dasharath slapped, PW3 Tanvir Qureshi became angry. By eliciting the fact that appellant / accused no.4 Ganesh and appellant / accused no.2 Rahim came on the spot after starting the fight between appellant / accused no.3 Dasharath and PW3 Tanvir Qureshi, presence of these two appellants / accused on the spot is also accepted by the defence. Statement of PW2 Anwar Nimbargi was recorded on 22nd August 2003 as well as on 27th August 2003. Cross-examination of PW2 Anwar Nimbargi reveals that he gained consciousness on 22nd August 2003 and in the statement recorded on that date, he has not stated to police about appellant / accused no.1 Kasam assaulting deceased Firoz Nimbargi. However, cross-examination of PW2 Anwar Nimbargi does not show that such omission was there in his statement recorded on 27th August 2003. This witness had suffered extensive injuries on vital parts of his body as seen from the medical evidence and had regained consciousness after the incident on 22nd August 2003 itself.

Therefore, such omission is inconsequential. Cross-examination of PW2 Anwar Nimbargi further brings on record presence of appellant / accused no.2 Rahim on the spot due to suggestion given to him that he assaulted appellant / accused no.2 Rahim from behind.

22 Now comes another injured witness PW3 Tanvir Qureshi. His evidence shows that after he and appellant / accused no.3 Dasharath were ousted from the Video Game Parlour, they came on the road near the Video Game Parlour. This witness spoke about presence of appellant / accused no.4 Ganesh with knife and that of appellant / accused no.2 Rahim with chopper on the spot and stated that appellant / accused no.4 Ganesh stabbed him with knife on his back. He stated that when others came to rescue him, appellant / accused no.3 Dasharath gave a fist blow on the face of deceased Firoz Nimbargi requiring PW2 Anwar Nimbargi to intervene. Thereupon, as stated by this witness, appellant / accused no.2 Rahim assaulted PW2 Anwar Nimbargi with chopper on chest and stomach. Then deceased Firoz

Nimbargi came for rescuing PW2 Anwar Nimbargi and at that time, appellant / accused no.1 Kasam took a knife from appellant / accused no.4 Ganesh and assaulted deceased Firoz Nimbargi on stomach causing bleeding from mouth and stomach of Firoz Nimbargi. He stated that Firoz Nimbargi then ran towards Parmar Hospital. PW2 Anwar Nimbargi also ran behind his brother Firoz Nimbargi. PW3 Tanvir Qureshi further deposed that his clothes were then seized by police. He identified his clothes, as well as weapons and accused.

23 In cross-examination of PW3 Tanvir Qureshi, it was admitted that his evidence regarding presence of appellant / accused no.4 Ganesh and appellant / accused no.2 Rahim outside the Video Game Parlour when he was ousted from the Video Game Parlour, has come by way of omission. However, even if this fact of presence of appellant / accused no.4 Ganesh and appellant / accused no.2 Rahim outside the Video Game Parlour at that point of time is ignored, then also, subsequent presence of appellant / accused no.4 Ganesh and appellant / accused no.2 Rahim on the

spot with weapons is established by evidence of this witness. Even otherwise, it is not the defence of these accused persons that they were not present on the spot at all. Further tone and tenor of cross-examination of this witness goes to show that appellant / accused no.4 Ganesh and appellant / accused no.2 Rahim came on the spot by rickshaw immediately when PW3 Tanvir Qureshi came out of the Video Game Parlour. Therefore, half hearted attempt to show that these two appellants were not present on the spot is of no consequence to doubt the prosecution case. From cross-examination of this witness it is brought on record that act of appellant / accused no.3 Dasharath in slapping him and abusing him was not liked by this witness. It is further brought on record that due to assault on him, he was frightened and went back to his home instead of going to the police station. This is a natural conduct of a normal human being.

24 PW4 Noor Mohd. is an eye witness to the incident in question, whose presence on the spot is accepted by the defence. It is in his evidence that outside the Video Game Parlour, quarrel

between appellant / accused no.3 Dasharath and appellant / accused no.1 Kasam on one hand and PW3 Tanvir Qureshi on the other hand continued. He then stated that at that point of time, appellant / accused no.4 Ganesh armed with knife and appellant / accused no.2 Rahim armed with chopper came by rickshaw and appellant / accused no.4 Ganesh gave a blow of knife on backside of PW3 Tanvir Qureshi. As per version of PW4 Noor Mohd., Firoz Nimbargi (deceased), PW2 Anwar Nimbargi and Sharan Nagore intervened and then appellant / accused no.3 Dasharath gave a fist blow to deceased Firoz Nimbargi. This required intervention by his brother PW2 Anwar Nimbargi. Then, according to PW4 Noor Mohd., appellant / accused no.2 Rahim gave blows of chopper on PW2 Anwar Nimbargi. Deceased Firoz Nimbargi then intervened for rescuing PW2 Anwar Nimbargi. As stated by PW4 Noor Mohd., then appellant / accused no.1 Kasam gave a blow of knife taken from appellant / accused no.4 Ganesh to deceased Firoz Nimbargi causing bleeding from stomach as well as mouth of Firoz Nimbargi. Firoz Nimbargi, then, ran towards Parmar Hospital followed by PW2 Anwar Nimbargi. PW4 Noor Mohd.

further testified that one police man caught hold of appellant / accused no.3 Dasharath, appellant / accused no.2 Rahim and appellant / accused no.1 Kasam. In cross-examination of this witness, presence of appellant / accused no.1 Kasam is brought on record by eliciting from his mouth by eliciting from him that as appellant / accused no.1 Kasam had come to the Video Game Parlour with appellant / accused no.3 Dasharath, appellant / accused no.1 Kasam was also taken out of the Video Game Parlour. It is further brought on record that 30 – 40 people gathered at the spot of incident. PW4 Noor Mohd. admitted that he did not intervene in the quarrel. He stated that assailants did not suffer any injuries in the quarrel.

25 This is the eye witness account of the incident given by injured witnesses as well as the informant / PW1 Abhijit Nikude and eye witness PW4 Noor Mohd. If their version is compared then it is seen that PW1 Abijit Nikude is stating that deceased Firoz Nimbargi was assaulted by appellant / accused no.1 Kasam as well as appellant / accused no.2 Rahim by knife. However, rest

of the witnesses namely, PW2 Anwar Nimbargi, PW3 Tanvir Qureshi and PW4 Noor Mohd. are not stating that appellant / accused no.2 Rahim had assaulted deceased Firoz Nimbargi by means of a sharp edged weapon. They are all stating that it is appellant / accused no.1 Kasam who gave blow of knife to deceased Firoz Nimbargi causing bleeding from his mouth as well as stomach. On account of this, it was sought to be argued by the appellants / accused nos.2 to 4 that they deserve acquittal as they had no role in alleged murder of deceased Firoz Nimbargi.

26 Comparison of evidence of these four witnesses goes to show how the entire episode took place within a short span of time inside the Video Game Parlour as well as outside the Video Game Parlour of PW2 Anwar Nimbargi. The cause behind this incident is the incident which took place at about 12 noon of 10th August 2003 with appellant / accused no.4 Ganesh in presence of appellant / accused no.1 Kasam and appellant / accused no.2 Rahim. Congruous evidence of these witnesses goes to show that initially the Video Game Parlour was visited by appellant /

accused no.3 Dasharath with appellant / accused no.1 Kasam. Within a short span of time, appellant / accused no.2 Rahim and appellant / accused no.4 Ganesh reached the spot armed with dangerous weapons like knife and chopper (as described by witnesses) by a rickshaw. The event which followed thereafter cannot permit us to conclude that this was a sheer co-incidence. Appellant / accused no.4 Ganesh immediately joined appellant / accused no.3 Dasharath in the assault and injured PW3 Tanvir Qureshi. Though witnesses are stating that assault was on the back of PW3 Tanvir Qureshi, injury certificate at Exhibit 86 shows that PW3 Tanvir Qureshi suffered injury on left side post aspect chest. The core issue is not the seat of the injury but the fact that PW3 Tanvir Qureshi was assaulted by appellant / accused no.4 Ganesh in the episode. Eventually PW3 Tanvir Qureshi was found to have suffered injury not on back but on left side post aspect of the chest which can be attributable to appellant / accused no.4. Therefore, on this count it cannot be said that evidence of prosecution is infirm or lacunic.

27 Congruous evidence of all these witnesses goes to show that when PW2 Anwar Nimbargi had attempted to intervene to pacify the quarrel and particularly after the appellant / accused no.3 Dasharath gave a blow of fist on face of his deceased brother Firoz Nimbargi, he was assaulted by appellant / accused no.2 Rahim by means of a knife by inflicting multiple injuries on PW2 Anwar Nimbargi. Injury certificate of PW2 Anwar Nimbargi as well as evidence of PW8 Dr.Rajendra Parmar fully corroborates version of all these witnesses. A capital is sought to be made by the defence that witnesses are describing weapon of assault as a chopper where as, wounds suffered by PW2 Anwar Nimbargi are stab wounds. This submission is devoid of merits because witnesses are not expert in determining the type of weapon. Evidence of PW8 Dr.Rajendra Parmar that injuries on PW2 Anwar Nimbargi are possible because of muddemal weapon chopper shown to him is not at all challenged in cross-examination. If we look at the description of weapons seized by Investigating Officer, reflected in detail in recovery panchnama at Exhibits 73 and 78, then it is seen that these weapons were knife and *kukri* capable of

causing stab wounds. These weapons are identified to be weapons of assault by PW1 Abhijit Nikude to PW4 Noor Mohd. As such, the description of weapon as chopper given by these witnesses appears to be incorrect and is of no use to substantiate cause of the defence.

28 The next part of the episode is giving a fatal blow to deceased Firoz Nimbargi. Evidence of Dr.Rajendra Parmar (PW8) and report of postmortem examination (Exhibit 99) of dead body of Firoz Nimbargi shows that he had suffered only one blow of the knife which ultimately proved fatal. Except PW1 Abhijit Nikude, rest of the three witnesses viz., PW2 Anwar Nimbargi, PW3 Tanvir Qureshi and PW4 Noor Mohd., are attributing fatal blow on Firoz Nimbargi by appellant / accused no.1 Kasam only. It appears that except this inconsistency in evidence of PW1 Abhijit Nikude, rest of the part of his version regarding the entire episode of murder of Firoz Nimbargi and assault on prosecution witnesses, is consistent with version of injured eye witnesses as well as PW4 Noor Mohd. The entire incident as stated in foregoing paragraphs took place in

rapid succession in a short span of time as seen even from cross-examination of PW1 Abhijit Nikude. There was an element of shock and surprise to PW1 Abhijit Nikude because of this incident wherein one person of his acquaintance was murdered and at least two persons suffered injuries. Even power of observation differs from person to person. Merely because informant PW1 Abhijit Nikude has stated that appellant / accused no.2 Rahim had also given blows of chopper on deceased Firoz Nimbargi, his evidence cannot be jettisoned on this count by branding him as a liar. It is well settled that “falsus in uno falsus in omnibus” (false in one thing, false in every thing) is neither a sound rule of law nor a sound rule of practice. It is inapplicable to criminal cases in India, as witnesses may be partly truthful and partly false in their evidence. Experience shows evidence of many witnesses contains a grain of untruth or some exaggeration or embellishment. This many a times happens perhaps due to fear in the mind of witnesses that their testimony may be rejected. The court should not disbelieve evidence of such witnesses altogether if they are otherwise trustworthy. Discrepancies in deposition of witnesses

are always there however honest or truthful they may be. Discrepancies caused due to normal error of observation, normal error of memory due to lapse of the time, due to mental disposition, impaired mental faculty due to impact or shock caused due to incident needs to be ignored. The prosecution case would fall only where inconsistencies in it goes to the root of the case. Otherwise, it becomes the duty of the court to sift truth from falsehood by culling out nuggets of truth from evidence of witnesses examined by the prosecution. If such exercise is possible, their evidence cannot be discarded wholly.

29 In this view of the matter, at the most that part of version of PW1 Abhijit Nikude which states that appellant / accused no.2 Rahim assaulted deceased Firoz Nimbargi with knife, needs to be discarded and rest of his testimony which is in general agreement with version of other witnesses needs to be accepted.

30 For the reasons stated in foregoing paragraphs, we do not find any merit in submission of the learned counsel for

appellants / accused nos.2 to 4 that as there was only one injury on dead body of Firoz Nimbargi, entire case of prosecution suffers from doubt. Similarly, in view of what is stated by us in the foregoing paragraphs, no merits are found in submission of the learned counsel for appellants that as weapon of assault on PW3 Anwar Nimbargi is stated by witnesses as chopper and as the injuries on PW2 Anwar Nimbargi were found to be stab injuries, case of prosecution suffers from doubt. Similarly, seat of injury of person of PW3 Tanvir Qureshi is also inconsequential to doubt the version of the prosecution.

31 PW6 Satyavan Jagtap, Police Constable, was in the vicinity of the spot of incident for purchasing vegetables. He was told by somebody that the fight is going on near Neelkamal theater and therefore he went to the spot. This witness had seen appellant / accused no.3 Dasharath and appellant / accused no.1 Kasam holding Sharan Nagore and appellant / accused no.4 Ganesh assaulting him by knife. This witness had actually apprehended appellant / accused no.4 Ganesh, but other accused

persons were successful in getting appellant / accused no.4 Ganesh free from the hold of this witness. Evidence of PW6 Satyavan Jagtap shows that then he called for assistance. Thereafter, Police Constable Ambekar and Phadke apprehended appellants / accused nos.1 to 3 – Kasam, Rahim and Dasharath on the spot itself. There is no reason to doubt version of PW6 Satyavan Jagtap on this count. He is not a witness who had seen the entire incident. Arrest panchnama at Exhibit 84 which is a document not disputed by the defence shows that these appellants / accused were arrested on the date of incident itself.

32 According to the prosecution case, at the instance of appellant / accused no.1 Kasam and appellant / accused no.4 Ganesh, weapons of offences came to be seized on 11th August 2003 and 14th August 2003 respectively. Congruous evidence of PW7 Gulam Shaikh - panch witness and PW9 Subhash Jadhav – Investigating Officer, shows that on 11th August 2003, appellant / accused no.1 Kasam gave confessional statement (Exhibit 77) which has resulted in recovery of weapon which came to be seized after sealing it vide recovery panchnama Exhibit 78. The

panchnama describes this weapon as *kukri*. Similarly, evidence of PW5 Ramchandra Jadhav – panch witness and that of PW9 Subhash Jadhav – Investigator shows that on 14th August 2003 confessional statement (Exhibit 72) of appellant / accused no.4 Ganesh came to be recorded and this led to recovery of a knife which came to be seized vide recovery panchnama Exhibit 73. These recoveries are effected from a gutter near the spot of the incident. Though it was attempted that these recoveries are from the open space and panch witnesses used for this purpose are stock witnesses of police, evidence of panch witnesses does not show that they are habitual panch witnesses. No infirmity can be found in their evidence. Weapons were seized from the gutter and these appellants / accused were the persons who were actually knowing location of those weapons. Hence, it cannot be said that as the recovery was from open space, it is doubtful. Contemporaneous recovery panchnama shows that those weapons were packed and sealed. CA Report at Exhibit 100 shows that those weapons were having human blood on them. This evidence certainly incriminates appellants.

33 It is seen from the evidence that appellants / accused nos.1 to 3 were apprehended on the spot and they were arrested at the police station. Exhibit 84 is the panchnama of arrest and seizure of clothes of accused persons. This is a document admitted by appellants. It is seen that appellants / accused nos.1 to 3 were arrested on the day of the incident at about 10.15 p.m. and their clothes came to be seized. Evidence of the Investigator PW9 Subhash Jadhav shows that he had sent clothes of these appellants for chemical analysis. CA Report at Exhibit 100 shows that clothes of appellant / accused no.1 Kasam and appellant / accused no.2 Rahim were stained with blood of "A" and "B" group whereas clothes of appellant / accused no.3 were stained with blood of "B" group. Blood group of appellant / accused no.2 Rahim was "B". Except him, appellants / accused persons had not suffered any bleeding injuries. Therefore, finding of human blood on clothes of appellants / accused nos.1 to 3 duly corroborates the version of prosecution witnesses regarding the incident.

34 It was attempted to show that prosecution case is not free from doubt as injuries on appellants / accused are not explained by the prosecution. Injury Certificate at Exhibit 87 shows that appellant / accused no.1 Kasam has suffered redness of eye and Injury certificate at Exhibit 88 shows that appellant / accused no.2 Rahim has suffered two lacerated wounds on left shoulder of size 1½ inch and 1½ inch x ½ inch whereas rest of appellants / accused have not suffered any injuries. No doubt, it is true that in murder case, non-explanation of injuries sustained by accused at about the time of occurrence and in the course of altercation is very important circumstance by which the court may draw an inference that the prosecution has suppressed the genesis and origin of occurrence. But at the same time, when injuries sustained by accused are minor or superficial and when other evidence of the prosecution is clear and cogent, then non-explanation of such minor injuries on accused cannot outweigh clear and cogent evidence of the prosecution. In the case in hand, injuries on appellants / accused nos.1 and 2 are very minor and superficial. The incident was that of assault on four persons by

four appellants / accused in rapid succession within a short span of time. In that melee suffering such minor injuries by appellants / accused cannot be a circumstance to doubt the version of prosecution. (See Laxmi Singh and Ors. vs. State of Bihar AIR 1976 SC 2263). In this view of the matter, the ratio of ruling in the matter of Ganesh Datt (supra) is not applicable to the instant case.

35 The foregoing discussion as such, makes it clear that evidence of PW1 to PW4 is trustworthy and reliable. In a criminal case, the prosecution is obliged to prove charges beyond all reasonable doubts. Though this standard of proof is a higher standard, there is, however, no absolute standard. Though it was argued that because of various minor discrepancies, the prosecution case is not free from doubt, no substance is found in such submission as the doubt must be that of a reasonable man. It must be actual, substantial and reasonable. The prosecution is not required to meet any and every hypothesis put forward by appellants / accused persons. To be reasonable, a doubt must be

based upon reason and common sense. It should grow out of evidence in the case. The concept of proof beyond all reasonable doubts cannot stretched too much to mean proof of rigid mathematical precision. Therefore, we do not find any merit in submission of the learned counsel for appellants that case of prosecution is doubtful because PW1 Abhijit Nikude had admitted in cross-examination that when he had been to police station, police had not arrested the accused, whereas PW9 Subhash Jadhav – Investigator says that accused were caught red handed. Ultimately, arrest panchnama at Exhibit 84 is an admitted document which shows arrest on the day of the incident. In the matter of **Ganesh Datt (Supra)** the evidence of prosecution was found to be inconsistent and on facts it was held that the prosecution has failed to prove the guilt of the accused therein. Such is not the case in hand.

36 Let us now examine whether appellants / accused are proved to have committed murder of Firoz Nimbargi and other offences in furtherance of their common intention. Common

intention presupposes prior concert. It requires pre-arranged plan for convicting accused vicariously for the criminal act of another. The act should have been done in furtherance of common intention of all of them. Prior meeting of mind as such is must, apart from participation in crime. Common intention is a question of fact depending upon circumstances of each case. It is to be inferred from the surrounding circumstances and conduct of accused persons. The learned counsel for appellants / accused nos.2 to 4 has rightly placed reliance on judgment of the Apex court in **Criminal Appeal No.2028 of 2009 Raghbir Chand and Others vs. State of Punjab** decided on 5th August 2013 on factors to be considered for determining common intention. In the case in hand, evidence of prosecution shows that in the afternoon of the day of the incident there was some incident at the Video Game Parlour of injured PW2 Anwar Nimbargi involving some of appellants. Then, on the same day at about 8.30 p.m., initially appellant / accused no.1 Kasam and appellant / accused no.3 Dasharath visited that Video Game Parlour and picked up quarrel with PW3 Tanvir Qureshi who was present inside the said Video

Game Parlour. Evidence of prosecution also shows that appellant / accused no.2 Rahim and appellant / accused no.4 Ganesh immediately joined company of appellant / accused no.1 Kasam and appellant / accused no.3 Dasharath. At that time, appellant / accused no.2 Rahim and appellant / accused no.4 Ganesh were armed with sharp edged weapons. Then they all indulged in assaulting PW3 Tanvir Qureshi, PW2 Anwar Nimbargi and deceased Firoz Nimbargi. The sequence in which the occurrence took place and conduct of appellants / accused in visiting the spot of the incident armed with dangerous weapons, reflects prior concert and pre-arranged plan. Therefore, we do not find any error in conclusion of the learned trial court that the crime in question including the murder of Firoz Nimbargi was committed by appellants / accused in furtherance of their common intention.

37 The learned counsel for appellants/accused argued that the offence would not fall under Section 302 of the IPC, but at the most it can be said that death of deceased Firoz Nimbargi

would amount to causing culpable homicide not amounting to murder. For this purpose, reliance is placed on Sanjiv (supra) and Nankaunoo (supra). In the matter of Sanjiv, it was held by the Honourable Apex Court that the act committed by the appellants therein was covered by exception to Section 300 of the IPC, as it was committed without premeditation in a sudden fight in a heat of passion upon a sudden quarrel. In the matter of Nankaunoo, the injury was on the inner part of the left thigh, which is non-vital organ. The Apex Court held that the offence would be under Section 304(I) of the IPC. The learned counsels for the appellant also relied on Hari Shankers v. State of U.P., 2015 ALL MR (Cri.) 2450. In that matter, gut shot caused an injury on the right hand wrist of the deceased. It was held that the said injury could not have caused the death of the deceased and, therefore, conviction of the appellants was altered from Section 302 of the IPC to one under Section 326 of the IPC. It is thus clear that these cases proceeded on their own facts. In the case in hand, the incident of murder of Firoz Nimbargi at about 8.30 p.m. on 10th August 2003 had origin in quarrel, which took

place in the afternoon on that date. Initially, appellant / accused No.1 Kasam and appellant / accused No.3 Dasharath reached the spot to pick the quarrel with PW3 Tanvir Qureshi. They were immediately joined by appellant / accused no.2 Rahim and appellant / accused no.4 Ganesh. At that time these two appellants were armed with deadly weapons. Then they assaulted PW3 Tanvir Qureshi, PW4 Noor Mohd. and deceased Firoz. As such, it cannot be said that the act of appellants was without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel. Therefore, though deceased Firoz Nimbargi had suffered a solitary blow which proved to be fatal, it cannot be said that the appellants/accused are not guilty of offence of murder. The act was certainly with a prior concert and not in a sudden fight in the heat of passion. The seat of the blow on deceased Firoz Nimbargi was left side of his chest and the injury was deep. This reflects the force by which the blow was given. Hence, the appellants/accused were rightly convicted for offence punishable under Section 302 read with Section 34 of the IPC by the learned trial Court.

38 In the result, we find no infirmity with the judgment
and order of conviction and sentence recorded against the
appellants/accused.

39 Therefore, the appeal is devoid of merit and the same
is dismissed.

40 Fees of appointed advocate Ms.Rohini M.Dandekar are
quantified at Rs.5,000/-.

(A. M. BADAR, J.)

(V.K.TAHILRAMANI, J.)