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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1077 OF 2007

1. Tanaji Dharmaraj Patil
 2. Sunil Putalaji Bhosale
 3. Ajitsingh @ Rinkusingh Harendra Pratapsing ... Appellants
- Vs.
- The State of Maharashtra ... Respondent

CRIMINAL REVISION APPLICATION NO. 622 OF 2007

- Smt. Vibhuti Vilas Jadhav ... Applicant
- Vs.
1. The State of Maharashtra
 2. Tulshiram Shankar Yadav
 3. Radhesham Kharbhan Jaiswal
 4. Vijay Laxman Chougule ... Respondents

CRIMINAL APPEAL NO. 948 OF 2014

- The State of Maharashtra ... Appellant
- Vs.
1. Tulshiram Shankar Yadav
 2. Radhesham Kharbhan Jaiswal
 3. Vijay Laxman Chougule ... Respondents

Mr. Shirish Gupte, Senior Advocate i/b. Mr. Ganesh Gole a/w. Ms. Supriya Kak for the appellants/original accused nos. 1 and 2 in Appeal no. 1077 of 2007.

Mrs. U.V. Kejriwal, APP for the Respondent/State.

Mr. S.V. Kotwal i/b. Mr. Ashish S. Sawant, Advocate for the applicant in Revision Application no.622 of 2007.

Mr. A.P. Mundargi, Senior Advocate i/b. Mr. Ganesh Gole, Advocate for original accused no. 7.

Mr. Ganesh Gole, Advocate for original accused no. 6.

Mrs. U.V. Kotwal, APP for the respondent/State in Revision Application no.622 of 2007.

**CORAM: SMT. V.K. TAHILRAMANI &
MRS.MRIDULA BHATKAR, JJ.**

DATE: JULY 5, 2016

JUDGMENT (Per Mrs. Mridula Bhatkar, J.)

Criminal Appeal No. 1077 of 2007 is filed by accused nos. 1 to 3 against conviction. Criminal Appeal No. 948 of 2014 is filed by State against acquittal. Criminal Revision Application No. 622 of 2007 is preferred by the complainant.

2. The incident of assault has taken place on 7th July, 2004. It is the case of the prosecution that deceased Vilas Jadhav residing with his wife/complainant Vibhuti, mother Gangabai and other family members at Ramnagar Digha. He was a social worker. He was working for political party, namely, Rashtravadi Congress party. He used to take initiative to celebrate Ganesh festival and he was a President of Ganpati mandal in that area. However, in the year 2002-03, accused no. 7 Vijay Chougule, who was the leader of Rashtravadi Congress party, told him not to celebrate his traditional Ganesh festival and asked him to work with accused no. 2, as accused no. 2 Sunil Bhosale was celebrating Ganesh festival separately in Ramnagar. However, Vilas Jadhav did not pay heed to this request but celebrated Ganesh festival in the year 2002-03. On this issue, a dispute arose between Vilas Jadhav and Vijay Chougule and his associates. Other accused are the associates and body guards of accused Vijay Chougule. In November, 2003 they attacked Vilas Jadhav in his house, however, he could escape.

3. It is the case of the prosecution that on the night of 7th July, 2004 at around 10.30 a.m. when Vilas Jadhav along with family members was sleeping in the house, suddenly accused nos. 1 to 3 armed with choppers and sword entered the house. Other 7 to 8 unknown persons also entered the house with sticks in their hands. Accused nos. 1 and 2 assaulted Vilas but he could run out of the house from the backside door, however, they chased him and assaulted him. Thereafter Vilas again entered the house and tried to hide in the bathroom of his bedroom. His mother Gangabai PW-15, his wife Vibhuti Jadhav PW-18 and his cousin Sandeep Bhalchandra Jadhav PW-12 tried to intervene and stop the assailants, however, the accused held the witnesses. Accused nos. 1 to 3 and deceased accused nos. 4 and 5 with weapons in their hands brutally assaulted Vilas Jadhav. They left him lying in a pool of blood and ran away. The family members immediately shifted Vilas Jadhav to the hospital and there he was declared dead. At the instance of Vibhuti PW-18, FIR was registered at C.R. No. T-239/2004 under sections 302, 307, 147, 148, 149, 342, 452, 449, 427, 120B, 37(1) r/w. section 135 of Bombay Police Act and under sections. 3 and 25 of Indian Arms Act. The police drew spot panchnama. PW-17 Dr. Mangesh Ramchandra Ghadge conducted postmortem on the body of Vilas Jadhav on 8th July, 2004 and prepared postmortem notes marked Exhibit 95 where the cause of death was mentioned as haemorrhage and shock due

to multiple injuries with fracture of skull and intracranial haemorrhage. The police seized the clothes of the deceased and recorded statements of all the witnesses. All the accused were arrested on 9th July, 2004. At the instance of accused no. 3 chopper was recovered on 16th July, 2004 under Memorandum Exhibit 48 and at the instance of accused no. 2 sword was recovered on 10th July, 2004 under Memorandum Exhibit 51 and 52. The police sent the articles to Chemical Analyzer and collected the CA report. After completion of the investigation, the police filed charge sheet. It was committed to the Sessions Court. The learned Sessions Judge framed charge. The accused pleaded not guilty and it concluded in conviction of accused nos. 1 to 6. However, accused no. 7 is acquitted. Hence, these Appeals and Revision.

4. The prosecution in all has examined 23 witnesses. PW-12 Sandeep Bhalchandra Jadhav, cousin of the deceased; PW-15 Gangabai Jadhav/mother of the deceased; PW-18 Vibhuti Jadhav/wife of the deceased are the eye-witnesses. The incident has taken place in the house at around 10.30 p.m. PW-1 Milind Jadhav, brother of the deceased, is on the point of motive. PW-3 Ravindra Dattatraya Bhagat is a panch of spot panchnama; PW-6 Rajesh Umashankar Mishra and PW-7 Anil Maruti Bhoir are panchas on recovery panchnama whereby the

weapons, i.e., chopper and sword were recovered at the instance of accused nos. 1, 2 and 3. PW-5 Kumar Chotubhai Pathare is panch on the clothes of accused no. 3; PW-16 Dr. Rajendra Kashinath Hulsure examined the injured Sandeep Jadhav and Gangabai Jadhav. PW-21 Vikas Narayan Phulkar and PW-22 Vijay Eknath Shinde are the officers from Cellphone companies. PW-23 Nasirkhan Rahemankhan Pathan is a Investigating officer. These are the important witnesses. PW-11 Devidas Dagadu Kharge and PW-19 Prashant Ramesh Kambare are the witnesses against accused no. 7, as the case of the prosecution that acquitted accused no. 7 is a mastermind behind the entire plan of murder. However, these two witnesses turned hostile.

5. The learned senior counsel Mr. Gupte has submitted that though the case of the prosecution stands on three eyewitnesses, the presence of these witnesses is doubtful. As per the case of the prosecution, the incident has taken place in the house at around 10.30 p.m. PW-18 Vibhuti Jadhav, being wife of the deceased, might be present but it is doubtful whether she really saw the incident or not. Her evidence is mixed with omissions and contradictions mainly in respect of the role attributed by her to the accused and so also about the identification of accused no. 6 Radhesham Kharbhan Jaiswal. The incident has taken place on 7th July, 2004.

The evidence of Vibhuti Vilas Jadhav is recorded approximately 2 years after the incident. It has also come in evidence that accused no. 6 was the tenant of the deceased and was residing in the same locality, so it is difficult to believe that though Vibhuti knew Radhesham, she could not identify him at the relevant time. He further argued that evidence of PW-15 Gangabai suffers from full of omissions, which are brought on record in paragraph 8 of the cross-examination. He pointed out that if her evidence in paragraph 3 in chief is evaluated after comparing with her evidence in paragraph 8 of the cross and with the evidence of Investigating officer PW-23 in paragraph 17, then her evidence is demolished completely. She has given exaggerated version. She admitted in the cross-examination that 20 to 25 persons entered the house. There were shouts. Identification of accused Radhesham is completely dislodged, as she gave admission in the cross-examination that she did not see the face of the accused at the time of identification parade. Her evidence is not credit-worthy because of the admission she gave about her occupation and illegal activity which she was carrying out. She has admitted that she was selling illicit liquor from her house. She used to bribe the police to run the business. He further submitted that evidence of PW-12 Sandeep Jadhav is also not reliable. He was cousin of the deceased and he is residing in other house so there was no reason for him to be in the house of the deceased at the relevant

time. There are omissions in his evidence in respect of the role attributed to the accused and weapons in their hands. The learned senior counsel further argued that PW-16 Dr. Rajendra Kashinath Hulsure had examined Gangabai and Sandeep and had issued injury certificates Exhibits 86 and 87 respectively for the injuries they had sustained. The witness has admitted in the cross-examination that Gangubai was normal and conscious at the time of examination. The injury sustained to Gangabai was not straight but it was curved shape injury and was not possible by weapon like Article L & J, i.e., choppers. The learned senior counsel further submitted that the injuries caused to Sandeep was friction abrasion and were not caused by chopper or stick. Thus, the efforts of the prosecution to bring presence of both the accused at the time of the incident is completely hollow and hence the said evidence is to be discarded. He further submitted that the recovery at the instance of accused no. 3 is on 16th July, 2004 and the said evidence of panchas PW-6 Rajesh Mishra and PW-7 Anil Bhoir is also to be disbelieved. All the accused were arrested on 9th July, 2004. The blood group of deceased is 'A'. No such 'A' blood group is found on the chopper. The CA report Exhibit 151 shows that blood found on the chopper is inconclusive. PW-7 Anil Bhoir is a panch who drew recovery panchnama of sword and chopper at the instance of accused no. 1-Tanaji Patil and accused no. 2-Sunil Bhosale. As per those panchnamas Exhibit 51

and 52, 53 and 54, the articles were recovered twice from the same place and second recovery from the same place cannot be believed under section 27 of the Evidence Act. He prays that the conviction is to be set aside and the Appeal against conviction is to be allowed.

6. The prosecution has also filed Criminal Appeal No. 948 of 2014 against acquittal and the complainant has filed Criminal Revision Application No. 622 of 2007 challenging the order of acquittal of the accused. Learned Prosecutor in reply has defended the conviction of accused nos. 1 to 3 and has placed total reliance on the eyewitnesses, i.e., PW-12 Sandeep Jadhav, PW-15 Gangabai Jadhav and PW-18 Vibhuti Jadhav. She submitted that the contradictions and inconsistencies which are pointed out by the defence are superficial and on the basis of evidence of these 3 witnesses, the prosecution could establish the case against all the accused. Learned APP further submitted that accused nos. 4 and 5 have expired, however, the acquittal of remaining accused especially accused nos. 6 and 7 is illegal. The eyewitnesses PW-12, PW-15 and PW-18 have deposed about accused no. 6 that he was holding stick and assaulted the deceased. She relied on the evidence of Test Identification Parade, i.e. PW-20 Chandrakant Sevak Bhanushali, Special Executive Magistrate. She submitted that PW-18 Vibhuti, wife of deceased, has

identified accused nos. 5 and 6. PW-15 has also identified accused no. 6 in Test Identification Parade. Learned APP while arguing the case against accused no. 7 Vijay Chougule has submitted that there was enmity between accused no. 7 and deceased on account of performing separate Ganesh festival and a conspiracy was hatched and initiated by Vijay Chougule to kill deceased Vilas Jadhav.

7. The learned counsel Mr. Kotwal appearing for the complainant in the Criminal Revision Application adopted the submissions of learned APP on the point of conspiracy. Both the learned APP and learned counsel for the complainant heavily relied on the evidence of motive which is brought on record through the evidence of PW-1 Milind Jadhav, brother of deceased, and all the three eyewitnesses. They argued that in November 2003 there was first attack on Vilas Jadhav, as some persons entered the house. However, Vilas and his brother ran out of the house from back door, so they could escape. Reliance is placed on the evidence of PW-14 Vaishali Vasant Pardhi, who has deposed that prior to the incident of November 2003 she had received phone call from accused no. 7 who after disclosing his identity warned her that if her brother Vilas would not stop celebrating separate Ganesh festival, we would kill him. It was argued that this threat was more than motive and was a part of the conspiracy. Learned APP and

learned counsel Mr. Kotwal, on the point of conspiracy, have further argued that evidence of two hostile witnesses PW-11 Devidas Dagadu Kharge and PW-19 Prashant Ramesh Kambare can be relied to the extent of its admissibility. The learned counsel Mr. Kotwal argued that the omissions are brought on record through Investigating officer PW-23 Nasir Khan Pathan. He further submitted that there is no legal bar for considering such omissions. If these omissions are read and taken into account, then prosecution has established a complete link between accused no. 7 as a conspirator of the murder of the deceased. The evidence of close association of the other accused with accused no. 7 who wanted to eliminate the deceased is brought on record. He had told them to finish the deceased for which he was going to support in all possible ways. On the point of reliability of hostile witness, the learned counsel relied on the judgment of **Bhagwan Singh vs. State of Haryana, reported in (1976) 1 SCC 389**. He also relied on the case of **Vinod Kumar vs. State of Punjab, reported in (2015) 3 SCC 220**.

8. Mr. Mundargi, the learned senior counsel appearing for original accused no. 7 has submitted that the prosecution could not prove the case against original accused no. 7 and, therefore, the learned Judge has rightly acquitted original accused no. 7 from all the offences. He submitted that the accused no. 7 admittedly

was not present at the time of incident and was charged for the conspiracy and murder. However, the prosecution has failed not only to bring evidence in respect of conspiracy but on the point of motive also against accused no. 7. He argued that the incident of November 2003 had occurred due to the dispute between the deceased and one Anjali Keni and her brother. He read over the cross-examination of all the three eye-witnesses and also relied on the cross-examination of Investigating officer PW-23 Nasir Khan Pathan, who gave admissions in respect of dispute between Anjali Keni and the deceased. He pointed out the admissions given by PW-1 as also by the eye-witnesses that there was no political rivalry between the deceased and accused no. 7. In fact the deceased was willing to help the accused in Corporation Election. Though there was dispute in respect of separate celebration of Ganesh festival itself is not sufficient to establish the offence of conspiracy and murder against the accused. He argued that the evidence of CDR in respect of phone numbers cannot be considered at all as the ownership of the said SIM cards is not proved. Thus it is unconnected piece of evidence which the prosecution failed to prove, however, that is rightly discarded by the learned Sessions Judge. Mr. Mundargi has argued on law that State has filed Appeal against acquittal of accused and while appreciating such evidence in the said Appeal, the High Court may disturb the finding if at all there is perverse

appreciation of evidence. However, when two views are possible, then it is not safe on the part of the High Court to set aside the order of acquittal. In support of his submissions, he relied on the following decisions:

- (i) State of Uttar Pradesh through Central Bureau of Investigation vs. Dr. Sanjay Singh & Anr., reported in 1994 Supp (2) SCC 707.
- (ii) Murlidhar alias Gidda & Anr. vs. State of Karnataka, reported in 2014 Cri. L.J. 2365

9. In the present case, original accused nos. 1 to 3 are held guilty for the offence of murder and other offences and are sentenced to suffer life imprisonment. Original accused nos. 4, 5, 6 and 7 are acquitted. So, Appeal against conviction is filed by accused nos. 1 to 3 and the Appeal against acquittal is filed by State against other accused. Accused nos. 4 and 5 are dead. Deceased Vilas Jadhav was killed at his residence. PW-17 Dr. Mangesh Ghadge, Medical officer attached to Rajiv Gandhi Medical College has conducted postmortem on the dead body of Vilas Jadhav. He found 34 external injuries on the dead body. The postmortem notes produced by him are at Exhibit 95. Injuries 1 to 11 are incised bone deep chop wounds and these injuries have caused by sharp and heavy object. He has opined that the cause of death of Vilas Jadhav is haemorrhage and shock due to

multiple injuries with fracture of skull and intracranial haemorrhage. This proves that Vilas was assaulted mercilessly by more than one assailant.

10. The prosecution has examined pancha PW-3 Ravindra Bhagat to prove spot panchnama Exhibit 37. He has stated that the spot of the incident was the house of the deceased. The articles, i.e., dinning table, wall clock and cupboard were broken. There was blood on the spot. The hair of the deceased were also found in the room. Panchnama Exhibit 37 corroborates the evidence of panch and gives picture of the situation at the time of the incident. The whole house was ransacked and thus, the prosecution has proved that Vilas Jadhav was brutally murdered at his residence at night.

11. The prosecution has examined 3 eye-witnesses, who are the family members of the deceased. A point was raised by the learned senior counsel for accused nos. 1 to 3 that no independent witness was examined and all the three witnesses, being family members of the deceased, are interested witnesses and therefore, their evidence is to be considered with a pinch of salt. After going through the evidence of these witnesses and other witnesses, it transpires from the record that accused no. 7, other accused and deceased also were active in politics. If the persons are

involved in the politics and there is exhibition of the muscle power, then generally the neighbours or common man do not get involved and invite trouble because of the terror in their mind. Moreover, 34 injuries on the persons of the deceased speak volume regarding force of attack and the manner in which his house was damaged, it was clear that there were more than two persons who entered the house, destroyed the articles and mounted multiple blows on Vilas Jadhav. Though there were shouts or cry for help from the family members of the deceased and has brought on record in the evidence that it was a thickly populated area and the screams were audible to the neighbours, obviously considering the number of assailants and as they were armed with sharp weapons, it is not expected that the outsider may come to rescue or come forward and offer himself/herself as a witness. In such a case of murder which has taken place at night in the house, the presence of family members is natural and obvious.

12. PW-18 Vibhuti Jadhav is a complainant and wife of the deceased. She has stated that the incident has taken place on 7th July, 2004 at around 10.30 p.m. when she, her husband and son were in the bedroom and her mother-in-law and brother-in-law were in the hall, group of people knocked off the door and entered forcibly. She identified accused nos. 1 to 3 by name and stated that they were armed with

weapons and there were other 7 to 8 unknown persons who followed them with sticks in their hands. She has specifically stated that accused no. 1 Tanaji Patil and accused no. 3 Ajitsingh @ Rinkusingh Pratapsing were holding choppers and accused no. 2 Sunil Bhosale was holding sword and some unknown persons were with chopper and sticks. She knew accused nos. 1 to 3 by name and by face and attributed them the role of assaulting her husband with those weapons. She also stated that her husband tried to save himself and ran outside from the rear side of the house, but the accused chased him and he again came back to the house and rushed to the bathroom of his bedroom to save himself from the attack, but all the four assailants followed him and assaulted him on his neck, chest, hands and legs. When her mother-in-law tried to save her son, she also received injuries. One person assaulted her brother-in-law Sandeep PW-12. Her injured husband fell down lying unconscious in a pool of blood. Her mother-in-law and brother-in-law shifted her husband to the hospital but was declared dead. Then she gave information to the police and her statement was recorded. The FIR is marked as Exhibit 99, pursuant to which the offence was registered. On the point of assault, her evidence remained unshaken and she was specific about names and role of accused nos. 1 to 3.

13. PW-15 Gangabai/mother of deceased has also identified accused nos. 1 to 3. She has stated that the incident has taken place on 7th July, 2014 at 11.15 p.m. She stated that these three accused and other 7 to 8 persons have arrived in her house armed with weapons. She corroborated that accused nos. 1 and 3 were holding chopper and accused no. 2 was holding sword and they assaulted Vilas on his neck, chest, hands and legs. While assailing her evidence, the defence pointed out that her admissions in the cross-examination that she had no licence to sell the liquor and she used to pay money to the police to allow her to sell illicit liquor and not to raid her house. These admissions in respect of her illegal activity of selling illicit liquor though are true, her evidence on the point of assault cannot be discredited on this count. The woman has seen her son being killed. She identified three accused who were holding sharp edged deadly weapons. Other persons have also entered the house with sticks. Her evidence is found consistent with the evidence of PW-18 Vibhuti Jadhav and she being the mother, her presence at that time in the house was natural. A person may be carrying out illegal activity and only for this reason, his or her evidence as an eye-witness to the incident, cannot be rejected.

14. PW-12 Sandeep Jadhav is another eye-witness, who has deposed and confirmed that the incident has taken place on 7th July, 2004. He also identified

accused nos. 1 to 3 armed with sharp edged weapons. He deposed that Vilas tried to run away from the back door of the house, however, he again came inside and tried to hide himself in the bedroom and bathroom and all the three accused and other unknown persons followed him and assaulted. Subsequently, Vilas was taken to the hospital and he succumbed to the injuries. The presence of Sandeep Jadhav in the house was objected only on the ground that he was not a real brother of the deceased but he was cousin. It was not his house and he had come that night to stay, as he used to stay there occasionally. But this objection appears very superficial and on the point of incident, his evidence is found reliable. Thus, the evidence of these 3 witnesses against accused nos. 1 to 3 is cogent and absolutely reliable. This evidence establishes complete case against accused nos. 1 to 3.

15. The prosecution has examined PW-16 Dr. Rajendra Hulsure. He has deposed that on 7th July, 2004 he was having a night duty and at around 6.50 a.m. on 8th July, 2004 he examined two patients, i.e., PW-12 Sandeep and PW-15 Gangabai. Gangabai sustained incised wound on her left forearm and it was a fresh simple injury and probable weapon used was sharp edged weapon. He has issued medical certificate to that effect, which is marked as Exhibit 86. Exhibit 86 disclosed incised wound on forearm. He also examined Sandeep Jadhav. There

was friction abrasion on right knee superficial and it might have caused by object like stick. He has issued medical certificate to that effect, which is marked as Exhibit 87. The contents in Exhibit 87 corroborates the evidence of doctor. It was argued that these injuries are of simple nature and cannot prove that they were caused in such grave attack. These submissions of the defence cannot be appreciated because these two medical certificates and evidence of doctor proves that these two witnesses were injured. The injuries were fresh. Thus, this fact shows that the evidence of the witnesses that they sustained one injury each when the accused were assaulting deceased is supported. Their presence at the time of incident is thus proved.

16. The prosecution has examined PW-6 panch Rajesh Mishra for recovery of chopper and revolver at the instance of accused no. 3 on 16th July, 2004 (Exhibits 48 and 49) and also PW-7 Anil Bhoir is examined to prove the discovery panchnama of sword at the instance of accused no. 2, i.e. Exhibits 51 and 52 on 10th July, 2004 and also the discovery panchnama of chopper at the instance of accused no. 1 at Exhibits 53 and 54.

17. The defence tried to point out that once there is a discovery of sword at the

instance of accused no. 2 from the gutter and panchnama is drawn Exhibits 51 and 52, then accused no. 1 disclosing that he would also show chopper and led the panchas to the same gutter and took out chopper cannot be covered under section 27 of the Evidence Act. This argument is not sustainable if the evidence of the witness Anil Bhoir and both the panchnamas are read carefully. It was a long gutter and at the end of it, one accused took out the weapon and other accused went away from that spot and at different place but from the same gutter only took out the other weapon. Thus, a fact of place where the weapon was hidden cannot be said was within the knowledge of the police. Two places of discovery are different as the gutter is long and running. Panch Anil Bhoir has deposed about the recovery. The recovery panchnama is also an incriminating and concrete circumstances against accused nos. 1 to 3. We are of the view that accused nos. 1 to 3 have bad case and the prosecution has established the case against these accused. Hence, the Appeal against conviction shall fail. Evidence of chemical analysis through PW-23 Investigating officer Nasir Khan Pathan. CA reports are produced. Articles 14, 15 and 16, i.e., sword and two choppers as per CA report though blood group could not be ascertained, human blood was detected.

18. The State has moved an Appeal against acquittal of accused nos. 4, 5, 6 and

7. Accused nos. 4 and 5 died during the pendency of the Appeal. So now this Appeal is heard only against accused nos. 6 and 7. Accused no. 6 Radhesham Jaiswal, as per the case of the prosecution, was holding chopper and he assaulted the deceased. Accused no. 6-Radhesham was identified by PW-18 Vibhuti Jadhav and he was holding stick in his hand and accused no. 4 was holding chopper. However, the name of accused no. 6 was not taken by her in the FIR and she also did not state his name in her substantive evidence that accused no. 6 was present at the time of assault. She identified accused no. 6 at the time of Test Identification Parade, however, in the cross-examination, she gave admission that she knew accused no. 6 Radhesham prior to the incident. In the Test Identification Parade, she identified accused no. 6 and she also identified him in the Court. PW-15 Gangabai has stated that she was called after one month in the Thane Jail for Test Identification Parade. She has identified one person with spectacles and he was Radhesham/accused no6. However, she did not identify accused no. 6 in the Court. PW-12 Sandeep Jadhav has stated that besides these four persons, other assailants were holding sticks and he has stated that he is called for Test Identification Parade in Jail and he identified two persons at that time. He identified only one Yadav, i.e. accused no. 5. The learned counsel Mr. Gole for accused no. 6 has submitted that there is no proper identification of accused no. 6 and as per the case of the

prosecution, accused no. 4 was holding chopper. So also the injuries which were fatal were incised wounds and as per the case of the prosecution, accused no. 6 was not the main assailant. He also argued that the evidence of identification parade is not reliable. The learned trial Court has discarded the evidence of PW-20 SEM Chandrakant Bhanushali, who conducted Test Identification Parade.

19. We have considered the evidence against accused no. 6. Only PW-18 Vibhuti has stated that she identified accused no. 6 at the time of Test Identification Parade and she knew him earlier. She also identified him in the Court. Other two witnesses did not identify him at the time of test identification parade. However, it is unsafe to rely on the evidence of Vibhuti on the identification and involvement of accused no. 6 in the assault. If Vibhuti knew accused no. 6 prior to the assault, then she should have given the description of this assailant either at the time of giving first information or in supplementary statement. However, the description is given as unknown person and only on the basis of this uncorroborated, weak sole evidence, we feel that it is not safe to convict accused no. 6 when the trial Court has acquitted him.

20. Accused no. 7 was not present at the time of actual assault. However, as per

the case of the prosecution, he was a mastermind behind the plotting murder of the deceased. The prosecution has brought on record the motive behind this murder. On the point of motive, PW-1 Milind Jadhav, PW-12, PW-15, PW-18 (eyewitnesses), PW-14 Vaishali Pardi/sister of the deceased and also PW-23 Nasir Khan Pathan are examined by the prosecution. All these witnesses have stated that in the year 2003 accused Sunil Bhosale started another Ganesh Mandal in the locality to celebrate Ganesh festival. The deceased used to celebrate Ganesh festival since last 15 years prior to 2003. Accused no. 7 asked deceased not to celebrate separate Ganesh festival and to celebrate with accused no. 2. However, deceased celebrated separate Ganesh festival in the year 2003 and this was an issue between the deceased and accused. In November, 2003 there was attack on the deceased in his house in the same manner as was taken place on the date of incident. On this point, all the witnesses corroborate each other. Though there are some admissions given by the witnesses that there was no political rivalry between the deceased and accused no. 7 and they were working for the same leader, i.e., Minister of the same party, a fact is brought on record that there was a rift on the issue of celebration of Ganesh festival. It appears that accused no. 7 has made it a prestige point. PW-1 Milind Jadhav has deposed that when he along with PW-15 Gangabai went to meet accused no. 7 to inform about the incident of attack in

November, 2003, at that time, accused no. 7 told that deceased should listen to him otherwise he would have to face dire consequences. Gangabai corroborates this threats as she was made to sit outside. Thus, the prosecution has succeeded to bring evidence on the point of motive so also the threats given by accused no. 7 to deceased. The submissions of learned senior counsel that due to Anjali Keni, assault of 2003 has taken place and as admissions are given by PW-23 Nasir Khan Pathan are not wholly correct. There was dispute between Anjali Keni and deceased and some complaint was given and those papers are brought on record through Nasir Khan and which are marked from Exhibits 159 to 172. However, after going through those Exhibits, this pertains to November 2003 complaint but name of present accused no. 2 Sunil Bhosale is mentioned. We accept the case of the prosecution to that extent that there was a strong motive for accused no. 7 to eliminate the deceased, however, we are fully in agreement with the submissions of learned senior counsel that the strong motive cannot be substituted for the evidence of actual conspiracy. Accused no. 7 was not personally present at the time of actual assault. He might have been mastermind of hatching conspiracy of murder of Vilas Jadhav. However, between the motive and actual act, the prosecution needs to bring incriminating circumstances establishing nexus between accused no. 7 and the actual assault. The prosecution has recorded the statements of PW-11 Devidas

Kharge and also evidence of one Prashant Kambare. These two witnesses were on the point of conversation of accused no. 7 and other accused in respect of plot of murder, however, these two witnesses did not support the prosecution. The submissions of learned counsel Mr. Kotwal who appeared for the complainant that evidence of hostile witness is also admissible and can be read in evidence and relied are correct. However the said proved omissions from the evidence of hostile witnesses should be such and should inspire confidence to convict the accused. If such evidence is found improbable, then that cannot be believed.

21. In the case of **Bhagwan Singh** (*supra*), the Hon'ble Supreme Court has observed that the prosecution should have avoided requesting the permission to cross-examine the witnesses under section 154 of the Evidence Act and therefore, he is described as a hostile witness and such permission ought not to have been given considering his evidence and therefore it held that the remaining evidence is admissible in the trial and the Hon'ble Supreme Court observed that it was satisfied with the evidence of hostile witness Jagat Singh, Head Constable. If a witness is characterized as hostile witness, his evidence is not completely effaced and there is no legal bar to conviction upon his testimony as the said evidence remains admissible in the trial, if corroborated by other reliable evidence. It is held that if

at all found dependable, then subject to careful scrutiny thereof it can be used for conviction.

22. In the case of **Vinod Kumar** (*supra*), the Hon'ble Supreme Court has placed reliance on the case of **Bhagwan Singh**.

23. In the case of **State of Uttar Pradesh through Central Bureau of Investigation** (*supra*) the Hon'ble Supreme Court while dealing with the circumstantial evidence and on the point of motive has held that “At the highest, the prosecution can only suggest from the circumstances what is or may be the motive for any particular act. However, motive is not a *sine qua non* for bringing the offence of murder or of any crime home to the accused. At the same time, the absence of ascertainable motive comes to nothing, if the crime is proved to have been committed by a sane person but to eke out a case by proof of a motive alone – that too suspicion of motive apparently tending towards any possible crime, is not only a very unsatisfactory but also a dangerous process, because circumstances do not always lead to particular and definite inferences and the inferences themselves may sometimes be erroneous.”

24. In the case of **Muralidhar vs. State of Karnataka** (*supra*) the Hon'ble Supreme Court has laid down three principles which can be culled out as follows:

- (i) Presumption of innocence in favour of an accused and thus strengthened by the order of acquittal;
- (ii) The accused is entitled to the benefit of reasonable doubt;
- (iii) The Appellate Court is generally slow in disturbing the finding of fact recorded by the trial Court, as the Appellate Court deals with baseless evidence.

25. In the backdrop of the ratio laid down by the Hon'ble Supreme Court in the cases mentioned above, the evidence of the witnesses including the hostile witnesses is scrutinized. Though the evidence of a witness who does not support the prosecution is admissible as proved through the Investigating officer and portion is marked, the Court can look into it. However, it has to pass a test of credence. The said evidence should inspire confidence in the mind of the Judge, that evidence which the witness has avoided to state before the Court is if true and reliable evidence, then it is to be believed. The conviction cannot be based on surmises and hypothesis. There is always a gap between might and must. In the case of murder, prosecution has to prove the case to the degree of must and

conviction cannot be based on unconnected links. In this case, evidence of these two hostile witnesses which is proved through Investigating officer, it is not reliable and it is unsafe to believe it. Moreover, the finding given by the learned Sessions Judge while acquitting accused no. 7 is found possible and reasonable and, therefore, we don't think it is legal to take other view.

26. Thus, we are of the view that Appeal against acquittal should fail. Hence, we dismiss the Appeal against conviction filed by accused nos. 1 to 3 and the judgment of conviction is hereby confirmed. We dismiss the Appeal against acquittal filed by the State.

(MRS. MRIDULA BHATKAR,J.)

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