

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Appeal No. 450 of 2001

Chandansing s/o Dhannasing Patre,
Age 24 years,
Occupation : Agriculture,
R/o Anji, Taluka Kinwat,
District Nanded.

.. Appellant.

Versus

The State of Maharashtra
Through the Police Station Officer,
Mahur, Taluka Kinwat,
District Nanded.

.. Respondent.

Shri. S.S. Choudhari, Advocate, for appellant.

Shri. S.J. Salgare, Additional Public Prosecutor, for
respondent.

**Coram: T.V. NALAWADE &
A.M. DHAVAL, JJ.**

**Judgment reserved on : 08 November 2017
Judgment pronounced on : 20 December 2017.**

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed against the judgment and order of Sessions Case No.49/1997 which was pending in the Court of the learned Additional Sessions Judge, Nanded. The appellant Chandansing is convicted for

offence punishable under section 302 read with 34 of Indian Penal Code and sentence of imprisonment of life is given to him. Accused No.2-Jaswantsing, a brother of present appellant, is acquitted by the trial Court. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :

3) The deceased Tarasing Pund was resident of village Anji, Tahsil Kinwat, District Nanded. The first informant Dharamsing Chahel (PW-1) was the Police Patil of this village at the relevant time. The deceased was Ex-Sarpanch of this village. There were two groups in politics of this village. One group was headed by the deceased Tarasing and the other group was headed by main accused Tejasing. In the elections to the village panchayat of year 1996 the group of the deceased was elected to power and Tejasing was defeated. Due to this politics there was enmity between two groups. After getting bail and after recording of some evidence the main accused Tejasing and one more accused Pratapsing who hail from

Amrawati absconded and so the case of Chandansing and Jaswantsing, two brothers of Tejasing, was separated and it was tried.

4) The incident in question took place on 28-10-1996. On that day from 9.00 a.m. to 11.00 a.m. people had gathered in the office of the Village panchayat Anji for preparation of list of the villagers who were of the category of living below poverty line. The deceased was present in the office of the Village Panchayat for that purpose.

5) At 3.30 p.m. Gram Sevak of Anji namely Paikrao started for village Pandhara from Anji with one Class IV employee of the Village Panchayat. Punjaram, Sarpanch of village Pandhara namely Govindrao Gaikwad and other persons like Laxman Irekar from village Anji and Deorao Hedao of village Belori also started for village Pandhara. The deceased followed them as he also wanted to go to village Pandhara for making some purchases. Police Patil Dharamsing gave company to some of them upto Anji Phata and from there he returned to village Anji.

6) At about 4.30 p.m. Gajansing, a son aged about 16 years of Dharamsing came to him in village Anji from his field and informed that the main accused Tejasing had approached him in the field and had informed that he had murdered Tarasing and the dead body of Tarasing was lying in the brook of village Pandhara. He had asked Gajansing to inform about it to Dharamsing. After hearing about incident from Gajansing, Police Patil, Dharamsing sent two persons like Shekorao Jangale and Ramesh Bhavare of Anji to the brook where the dead body was lying. They visited the place. After returning they told the Police Patil that Tarasing's dead body was lying there. The Police Patil then took these two persons of village Anji and went to the spot. The Police Patil saw the dead body at about 5.00 p.m. He noticed that the neck of Tarasing was virtually cut. The Police Patil then went to Mahur Police Station and gave report about the incident. Crime at CR No.78/1996 came to be registered for offence punishable under section 302 Indian Penal Code against Tejasing at 10.15 p.m.

7) Ashok Mairal (PW-10), Police Sub Inspector, who was attached to Mahur Police Station, took over the investigation and on the same night he went to village Anji. As it was night time, he deputed a constable at the spot for guarding the dead body. He took further steps on 29-10-1996.

8) The investigating officer prepared inquest panchanama of the dead body on 29-10-1996, he prepared the spot panchanama and he referred the dead body for conducting post mortem on it. A pair of chappal of the deceased and two bags apparently of the deceased were found on the spot. There was blood on the spot. These articles and earth mixed with blood and ordinary earth samples were collected from the spot.

9) On 29-10-1996 some witnesses came forward to inform that they were present on the spot of the incident at the relevant time. The investigation revealed that in all 4 persons were involved in the offence of murder. On 29-10-1996 itself Tejasing and his brother, present appellant, came to be arrested. The clothes of Tejasing and appellant

were taken over. There were blood stains on the clothes. The weapon sword was produced by accused Tejasing and it came to be seized under panchanama. During investigation, brother of present appellant namely Jaswantsing and the fourth accused Pratapsing came to be arrested.

10) During course of investigation the aforesaid articles which were seized from the spot, clothes and weapon were forwarded to C.A. office. Charge-sheet was filed against four accused. Charge was framed. Both these accused pleaded not guilty. The prosecution examined in all 12 witnesses. The present appellant took the defence of total denial. The trial Court has believed the evidence given by the eye witness, direct evidence, and the circumstantial evidence of aforesaid nature is also believed. Benefit to doubt is given to Jaswantsing.

11) The prosecution has relied on direct evidence and some circumstantial evidence like presence of blood stains on the pant of the appellant. The prosecution also relied on the evidence given on motive as Tejasing, the

main accused is a political rival of the group of the deceased. It can be said that the case of the prosecution that Tarasing died homicidal death is not disputed. However, to ascertain truthfulness of the eye witnesses it is necessary to discuss the evidence given on homicidal death.

Homicidal death

12) Dr. Sunil Bhavare (PW-12) has given evidence that he conducted post mortem examination on the dead body on 29-10-1996. He did it between 1.00 p.m. and 3.00 p.m. The post mortem report is proved in his evidence as Exhibit 123. Dr. Sunil Bhavare (PW-12) found following two injuries on the dead body.

(1) Incised wound over anterior side of neck, size 5 x 4 x 3.1/2" cutting the body of cervical vertebrae, trachea, both carotid, ext-jugular vein and oesophagus and other major organ, said injury was grievous in nature within 24 hours by sharp and hard object.

(2) Incised elepticle wound over right lower 1/3 of anterior side of leg cutting of tibia 3" x" 2". Grievous in nature by sharp and hard object within 24 years.

13) Dr. Sunil Bhavare (PW-12) has deposed that the aforesaid injuries were *ante mortem* in nature and the death took place due to injury No.1, cutting of the neck as

it had caused haemorrhagic shock. The post mortem report at Exhibit 123 is consistent with the oral evidence of the doctor. Dr. Sunil (PW-12) found undigested food in the stomach. The post mortem report shows that rigor mortis was developed all over the dead body but decomposition had not started. In the cross-examination, the doctor has deposed that time of 12 to 15 hours was required for formation of rigor mortis all over the body as it was winter season. He has given evidence that the age of the injury was around 24 hours but this time is given approximately.

14) Injury No.1 mentioned above was incised wound. It can be said that considering the size of the neck the weapon used was longer as injury had cut entire neck. Injury No.2 is described as incised elepticle wound. This injury was of smaller size, of 3 inches in length. However, it needs to be kept in mind that it was found at anterior portion of the leg. This injury had gone deep and it had virtually cut tibia. Unfortunately, neither the learned A.P.P. for the State nor the defence counsel obtained opinion of the doctor regarding the weapon which must have caused the aforesaid injuries. Even

when one sword is shown to be recovered during investigation, that sword was not sent to the doctor during investigation for obtaining his opinion and it was not shown to the doctor during his evidence. The only opinion obtained is that such injuries can be caused by hard and sharp object. In view of the nature of the injuries there is clear probability that such injuries must have been caused by hard and sharp object which was having sufficient length and which was heavy. For causing such injuries much force must have been used as the injuries had virtually cut the neck in entirety and the tibia was cut. Such injury can definitely be caused by sword. But at least injury No.2 which was found on the leg cannot be caused by weapon like jambia. It is the case of the prosecution that present appellant was holding jambia and so this circumstance needs to be kept in mind. Further, the circumstance that only aforesaid two injuries were found on the dead body also needs to be kept in mind. No jambia was recovered during the course of investigation.

Direct evidence and other evidence.

15) Laxman Irekar (PW-4) is resident of Anji and he is the only eye witness of the prosecution. He has deposed that on the day of the incident he was proceeding towards Pandhara and he had started at 3.20 p.m. He has deposed that at the distance of half kilometers from Anji and towards the side of Pandhara persons like Gram Sevak, Paikrao, peon of the Panchayat Punjaram, Sarpanch of Pandhara Govindrao and Police Patil of Anji Dharamsing were noticed by him and they were proceeding towards Anji Phata, towards Pandhara side. He has given evidence that Tarasing joined him and two persons were in his company already. He has deposed that at Anji Phata, cross road, Police Patil left the company of the aforesaid persons and he returned to Anji.

16) In respect of the aforesaid part of the incident, the evidence of other witnesses needs to be considered. Dharamsing (PW-1), Police Patil has deposed that on that day at 5.00 p.m. Gram Sevak Paikrao and Sarpanch of Pandhara Govindrao took lunch in his house and then they left for the house of deceased Tarasing. He has disposed

that from the residential place of Tarasing, Sarpanch Govindrao, Gram Sevak Paikrao started towards Pandhara. He has deposed that, Laxman, person from Anji and Deorao of other village followed the aforesaid persons and they went towards Pandhara. He has deposed that afterwards Tarasing started for Pandhara and he followed the aforesaid two groups. He has not given evidence that he had given company to any of the groups upto Anji Phata. His evidence is also not consistent on the time as to when Laxman started for Pandhara.

17) Dharamsing (PW-1) Police Patil gave the first information report, Exhibit 48 on the same day and to the aforesaid evidence of PW-1, there is no corroboration of the contents of the F.I.R. His evidence is consistent with the evidence of Laxman only on the part that Laxman had proceeded towards Pandhara and with him there were persons of other village. His evidence does not show that the deceased had left Anji either with Laxman or with other group in which there were Gram Sevak and the Peon of the Village Panchayat Anji.

18) Punjaram (PW-5), Peon of Village Panchayat, Anji has deposed that at 3.30 p.m. he, Sarpanch Govindrao and Gram Sevak Paikrao started towards Pandhara from Anji. He has disposed that at Anji cross road, Dharamsing left their company and returned to Anji. He has given evidence that when they were proceeding towards Pandhara he had noticed that deceased Tarasing was in the company of Laxman (PW-4) and persons like Deorao and Lallu Boinwad were also in the company of Laxman and they were following them and they were proceeding towards Pandhara. Thus evidence of Punjaram (PW-5) is consistent with the evidence of Laxman to some extent but it is not consistent with the evidence of Dharamsing. The evidence of Laxman also shows that Tarasing had not left Anji with him and he tried to say that Tarasing joined them by running towards them. This evidence also needs to be kept in mind.

19) Laxman (PW-4) has given evidence that he, the deceased Tarasing, Deorao and Lallu Boinwad were all proceeding towards Pandhara on foot and the incident took place when they were at half kilometer distance

from Anji cross road. Thus, the distance of the spot is given as around one kilometer from village Anji but the Police Patil has given different distance in his cross-examination. The investigating Officer did not take care to prepare map of the scene of offence to give the distance between village Anji and the spot of incident.

20) Laxman (PW-4) has given evidence that at the spot of the incident, Tarasing, the main accused came towards them from the bushes and it was their right side. He noticed that Tarasing was armed with sword. He has deposed that accused Chandansing, present appellant, then came forward with dagger. Laxman has deposed that he asked Tejasing not to kill Tarasing and Tarasing shouted for help. He has deposed that Tejasing then cut throat of Tarasing by using sword and after that he, Deorao and Laxman started running away but towards Pandhara.

21) The aforesaid evidence of PW Laxman (PW-4) shows that it is mainly against Tejasing and it shows that the blow was given by Tejasing. He has given evidence

that Chandansing was armed with dagger. His evidence does not show that at that he had noticed the other accused like Jaswantsing or Pratapsing on the spot of offence.

22) Laxman (PW4) has given evidence that he ran towards Pandhara. He has deposed that on the way he met Punjaram (PW 5) and on inquiry made by Punjaram he told Punjaram that Tejasing, Chandansing and Jaswantsing had killed Tarasing. Thus even when he has not given evidence that he had seen Jaswantsing on the spot of incident he has given evidence that he disclosed to Punjaram that Jaswantsing was also involved in the offence. Laxman (PW 4) has given evidence that after informing about the incident to Punjaram, he, Deorao, Laxman and Punjaram all started running towards Pandhara. He has given evidence that on the way they met Gram Sevak Paikrao and they narrated incident to him also. He has given evidence that all of them then went to village Pandhara. He has given evidence that in village Pandhara they took tea in the house of Sarpanch Govindrao, he did shopping of grocery items in Pandhara

and then he returned to Anji by Pandhara - Anji road but not by foot way where the incident had taken place. He has deposed that he and Punjaram reached Anji at 5.00 p.m.

23) Laxman (PW 4) has deposed that after reaching Anji he realised that the villagers already knew about the murder of Tarasing. He has given evidence that he, Punjaram and other villagers then went to the spot and he saw the dead body of Tarasing. He has given evidence that Punjaram was in his company and after seeing the dead body they went to their respective residential places but the evidence shows that he did not inform anything about the incident to anybody from village Anji. He has given evidence that on the next morning Police Patil Dharamsing visited his house and then he told the Police Patil that Tejasing, Chandansing and Jaswantsing had murdered Tarasing.

24) Punjaram (PW-5) has deposed that when he, Gram Sevak Paikrao and Sarpanch Govindrao were proceeding towards Pandhara he heard shouts as "save,

save" and so he started running towards the side from where the shouts were coming. He has deposed that on the way he met Laxman (PW 4), Deorao and Lallu Boinwad and that they were running towards Pandhara side from the brook side. He has deposed that Laxman (PW-4) disclosed to him that Tejasing, Chandansing and Jaswantsing had murdered Tarasing by cutting his throat with sword in the brook. He has deposed that he then went towards the brook and there he saw Tejasing, Chandansing and Jaswantsing and they were armed with sword. He has deposed that he saw the dead body of Tarasing which was lying in the brook. He has given evidence that Jaswantsing gave call to him after seeing him and Jaswantsing gave threat to him that he would also be finished. He has given evidence that due to threat he ran towards Pandhara and he joined others like, Laxman, Gram Sevak Paikrao, Sarpanch Govindrao who were proceeding towards Pandhara. His evidence also shows that from Pandhara by road they returned to Anji but they did not inform anything to the villagers of Anji on the day of the incident.

25) The aforesaid evidence of Punjaram (PW-5) is not consistent with the evidence of Laxman (PW-4). Laxman (PW-4) has deposed that after learning about the incident, Punjaram also started running towards Pandhara with him and Punjaram had not gone to the brook to see as to what had happened. The aforesaid discrepancy creates doubt about the versions of both PW-4 and PW-5.

26) Some omissions in relation to the statements given by the two witnesses were confronted to them by defence counsel and some inconsistent statements were also confronted. Before police Laxman (PW-4) had taken names of Pratapsing, the fourth accused but he has denied in Court that he had taken his name. Relevant portions are marked as A, B and C and those portions are proved in the evidence of PW-10 at Exhibits 110, 11 and 112. This inconsistency is material in view of the evidence given that he saw only Tejasing assaulting the deceased with sword. No substantive evidence is given that even Jaswantsing was present on the spot when Tejasing was assaulting. In the evidence of investigating officer (PW 10) omission is proved which is to the effect that, Punjaram

had not stated in police statement that in his presence Tejasing, main accused had held the deceased and had cut the throat of Tarasing by using sword. This omission is again very material and it creates doubt about the presence of the witnesses on the spot at the relevant time.

27) In the cross-examination, Laxman (PW-4) tried to say that he was proceeding to village Belori to repair bullock cart wheel of aforesaid Lallu Boinwad. He admitted that there is bus to village Belori from Anji Phata and the bus was available at 4.00 p.m. The distance between Anji Phata and Belori is given as 10 kilometers. Thus, in ordinary course if he wanted to go to Belori he would have gone by Bus and there was no reason for using the foot way. Further, no evidence is given that he went ahead to Belori for repairing the wheel of bullock cart. He has given evidence that he purchased grocery items at Pandhara and then he returned to Anji by bus road. These circumstances and conduct of PW-4 create doubt about his presence on the spot.

28) Gulab Kaur (PW 9), widow of deceased Tarasing has given evidence that on the day of the incident she was out of station upto 5.00 p.. She has deposed that at 5.00 p.m. when she returned at Anji Bus stand she noticed that accused Tejasing, Chandansing, Jaswantsing and also Pratapsing were in the field of one Mohan Wanjari. She has deposed that when she returned home, people were talking about murder of Tarasing. Her statement was recorded by police on 29-10-1996. Thus the prosecution tried to give evidence that at 5.00 p.m. this lady had seen all the accused together in village Anji.

29) Gulab Kaur (PW-9) has admitted in her evidence that she had sent complaints to various authorities as she was not satisfied with the investigation made. Copy of that representation is marked as Article A when the copy ought to have been given exhibit as she has admitted in her evidence that she had sent such representation. In the representation she had made allegation that 15 villagers of the village had conspired to murder Tarasing and they had hired a killer from Amrawati. Accused Pratapsing hails from Amrawati. This

representation was sent on 16-11-1996. The representation was sent to all the authorities to whom such grievance can be expressed. This representation and the evidence given show that PW-9 is not that literate and it can be said that somebody had prepared the representation for her. Thus in the representation she had tried to involve not only, Tejasing, Chandansing, Pratapsing and Jaswantsing but also other villagers who were political rivals of Tarasing.

30) The aforesaid discussion shows that the conduct of both PW 4 and P/w 5 was not natural. If they had really witnessed the incident of murder, they would have returned to village Anji from the spot of offence. The spot is situated at a distance of 1 to 2 kilometers from village Anji. The evidence on record shows that the distance between Anji and Pandhara is not that one requires to use vehicle. The subsequent conduct was also not natural. If they had returned Anji at 5.00 p.m. on the same day, they would have informed about incident to the villagers and also the Police Patil. Surprisingly nothing is stated about the Gram Sevak Paikrao and he is not

examined. If Dharamsing (PW-1) really knew that Punjaram (PW-5), Gram Sevak Paikrao and Laxman of village Anji had also gone towards Pandhara and the deceased had also joined with them, in ordinary course he would have tried to collect information from those persons. Copy of the F.I.R. and the substantive evidence does not show that he collected such information or somebody had approached him to give information about the incident as eye witness. These circumstances have created serious doubt about the case of the prosecution as against the appellant.

31) In the evidence of Dharamsing (PW-1) it is brought on record by defence that distance between Mahur and Anji is about 40 kilometers. If as per the version of Laxman and Punjaram they had returned to village at 5.00 p.m. the incident must have taken place prior to 4.00 p.m. If Punjaram (PW 5) is believed then it can be said that, the incident took place after 5.00 p.m. In any case it was possible for Police Patil to approach police at least before 7.00 p.m. to give report. The evidence and the record show that the FIR was registered at 10.15 p.m.

though the investigating officer has tried to say that the F.I.R. was given at 9.30 p.m. Even if the delay caused in giving of the F.I.R. is ignored, this time needs to be considered as much time was available to the Police Patil for making inquiry with the persons who had opportunity as per the case of the prosecution to witness the incident. It needs to be presumed that the Police Patil had made inquiry with the persons who could have witnessed the incident and then he must have given the report. The evidence of PW-4 and PW-5 shows that their return to village at 5.00 p.m. was known to villagers. This village had population of hardly 350. The report was based on the information supplied by son of the Police Patil and it was on the basis of the extra judicial confession of Tejasing. Only name of Tejasing was mentioned in the F.I.R. as the accused and the medical evidence shows that one person could have committed the offence by suing the sword. All these circumstances have created probability that both PW 4 and PW 5 had not witnessed the incident and they are the got-up witnesses.

32) F.I.R. under section 154 of the Cr.P.C. is important piece of evidence and it corroborates case of prosecution. It is true that it is not trite law that a person cannot be implicated if he is not named in F.I.R. but the absence of names gives a probability that the person not named was implicated by way of an afterthought. When the name of a person was not given in F.I.R. it becomes the duty of the Court to ascertain whether person named afterward was implicated by way of afterthought or not. It is also true that F.I.R. cannot contradict the testimony of the eye witnesses but it can be used on the basis of principle of *res gestae* to find out as to what the story then told. (reliance placed on **AIR 1972 SC 622 - Damodar Prasad v. State of Maharashtra**).

33) When the name of accused appears in police statement recorded subsequent to recording of F.I.R. and there is delay caused in recording police statement under section 161 of the Cr.P.C. the delay together with absence of name in F.I.R. create suspicion about the version of such witness unless he suitably explains the delay. In the present matter in F.I.R. the names of probable witnesses

like Laxman and Punjaram were there but on 28th their statements were not recorded even when they were available in Anji. In such cases the evidence of witnesses needs to be closely scrutinized to judge the veracity of the witness.

34) The spot panchanama at Exhibit 51 is proved in the evidence of Anant Kadam (PW-2). The spot was shown by Dharamsing (PW-1). The substantive evidence on this spot panchanama shows that the foot way towards Pandhara from Anji goes through the brook and the spot is situated in the *Shivar* of Pandhara. Blood was present on the spot. Two bags of the deceased were lying there and a pair of chappal of the deceased was lying there. On east and west there were bushes and trees. The evidence of Laxman shows that through these bushes Tejasing emerged. Water stream was at the distance of 15 ft from the spot where the dead body was lying. It is already observed that no map of the scene of offence is prepared by investigating agency. Due to this circumstance also it is not possible to believe Laxman and Punjaram. It was necessary to show that spot was visible from some

distance if Tejasing could not be noticed by PW-4 prior to reaching the spot.

35) Evidence of PW-4, PW-5 and the widow of the deceased shows that the deceased was political rival of main accused Tejasing. Though the appellant is real brother of Tejasing, no evidence is given that he was also in politics. Evidence of the widow of the deceased shows that on one occasion there was quarrel between other brother of Tejasing and second wife of Tarasing. Only due to relation of the appellant with Tejasing it is the case of the prosecution that for the present appellant also there was motive for the crime. Only due to the relation, such inference is not possible and evidence needs to be given to prove circumstance under section 8 of Evidence Act.

36) Syed Usman (PW-6), is a panch witness on the panchanama of seizure of weapon, sword. He has given evidence that on 29-10-1996 in Mahur Police Station, sword was seized in his presence under panchanama at Exhibit 91. The blade of the sword had the length of 28 inches and width of 1.1/2 inches. It was having handle of

wood. Exhibit 91 does not show that the panch noticed any blood stains either on the handle or the blade. This circumstance may not be of use in the present matter as the weapon is shown to be seized after its production by Tejasing.

37) Sayed Usman (PW 6) has given evidence that on 29-10-1996 himself one pant and shirt of accused Chandansing were taken over under panchanama at Exhibit 92. In the examination in chief this witness had initially avoided to give evidence but during cross examination made by the learned A.P.P. he admitted all the suggestions given by the learned A.P.P. to him. In the cross-examination taken by the defence counsel he admitted that whenever police call him he goes to the police station for working as panch. Thus he has admitted that he is a stock pancha of police.

38) Exhibit 92, panchanama in respect of seizure of clothes of present appellant shows that one jeans pant was taken over as there were blood like stains on it. This document and the oral evidence show that only label was

pasted on this article for the purpose of identification. The evidence does not show that the clothes ere kept in a packet and the packet was sealed. Even the covering letter with which the property must have been sent to C.A. office is not produced. The C.A. report at exhibit 126 shows that the property was received by C.A. office on 1-12-1996, when the incident had taken place on 28-10-1996. The C.A. report shows that on the pant shown to be taken over from the present appellant human blood was detected.

39) The judgment of the trial Court shows that circumstance of presence of human blood on the jeans pant shown to be recovered from the appellant is considered against him when the evidence in this regard does not show preparation of packet of this pant and sealing of the packet and further the evidence of the panch witness is of aforesaid nature. The covering letter is not produced and the property was also sent very late to the C.A. office and no explanation is given in that regard. Due to these circumstances this Court holds that the circumstance of presence of blood stains on the pant

shown to be recovered from the appellant is not that convincing and it is not proved to the satisfaction of the Court.

40) The trial Court has held that provision of section 34 of IPC can be used against the appellant in view of the evidence given by Laxman (PW-4) that the appellant was present on the spot with weapon like jambia. It is already observed that other witnesses have not given evidence that the appellant was holding jambia. Further the medical evidence does not show that jambia was actually used for assaulting Tarasing. On the other hand, the evidence has created probability that only sword was used for assaulting Tarasing. It is already observed that Punjaram (PW-5) had no opportunity to witness the incident and at the most his evidence could have been used for corroboration of the evidence of Laxman (PW-4). Punjaram (PW-5) is not believed by the trial Court also. While discussing the evidence of Laxman (PW-4) this Court has already noted the material omission in relation to previous statement of Laxman. He had not mentioned in the police statement that he had actually seen the

blows given even by Tejasing. This circumstance and the other circumstances already mentioned have created clear probability that Laxman had not seen the actual incident of assault.

41) It can be said that the evidence given as against other accused, Jaswantsing was of similar nature but Jaswantsing is acquitted by the trial Court. When there are aforesaid circumstances the trial Court has not considered those circumstances and due to only the substantive evidence given on the presence of appellant on the spot at the time of the incident by Laxman, the trial Court has convicted him. This Court holds that it is not possible to believe Laxman as he is interested witness and there are aforesaid circumstances creating serious doubt about his version. His conduct of not disclosing the incident on 28-10-1996 itself was not natural. His conduct of going to Pandhara and making purchasing of grocery items after the incident was also not natural. In such a serious case conviction cannot be based on the evidence of the witness like Laxman (PW-4) .

42) Evidence given on time of the incident is highly suspicious in nature. From the post mortem report, column No.17, it can be said that the doctor was expected to mention the age of injuries in this column. The time is recorded as within 24 hours by the doctor. In column 21 the doctor is expected to mention the time of death in relation to the contents in the stomach. At this place no time is mentioned but as already observed the stomach contained undigested food. Thus, the incident in question must have taken place within one hour of taking last meals by Tarasing. The evidence is not given to show when he had taken the last meals. It is already observed that Police Patil (PW 1) has given different version on time of leaving of deceased for Pandhara. As this time is not matching with the time given by Laxman which is well before 5.00 p.m. and as the crime was registered after 10.00 .m., these circumstances have created serious doubt about the time of death, the time of incident. Considering the nature of injury which was inflicted on the neck it does not look probable that the deceased would have survived for more than few minutes. These circumstances have created a reasonable doubt not only about the evidence

given by Laxman (PW-4) and Punjaram (PW-5), but also the case of the prosecution that the present appellant was involved in the incident and he was present on the spot at the relevant time. This Court holds that benefit of doubt needs to be given to present appellant and the trial Court has committed error in giving conviction to the appellant by using provision of section 34 of Indian Penal Code.

43) In the result, the appeal is allowed. The judgment and order of the trial Court convicting the appellant for the offence punishable under section 302 read with 34 of Indian penal Code is hereby set aside. The appellant stands acquitted of this offence. Fine amount, if any paid by the appellant is to be returned to him. Bail bonds stand cancelled.

Sd/-
(A.M. DHAVAL, J.)

Sd/-
(T.V. NALAWADE, J.)