

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

CRIMINAL APPEAL NO. 89 OF 2002

1. Vijay S/o Pandurang Jadhav,
Age : 31 years, Occu. Service,
R/o. Kautha, Tq. Hadgaon,
Dist. Nanded.
2. Balaji S/o Bhimrao Jadhav,
Age : 35 years, Occu. Agril.
R/o. As above.
3. Sanjay S/o Pandurang Jadhav,
Age : 27 years, Occu. Agril.,
R/o. As above.
4. Dilip S/o Digambar Jadhav,
Age : 29 years, Occu. Agril.,
R/o. As above.

... Appellants

VERSUS

The State of Maharashtra,
Through Police Station, Hadgaon,
Tq. Hadgaon, Dist. Nanded.

... Respondent
(Orig. Complainant)

.....
Mr S. B. Bhapkar, Advocate for the appellants
Mr S. D. Ghayal, APP for respondent/State
.....

WITH

CRIMINAL APPEAL NO. 267 OF 2002

The State of Maharashtra,
Through Police Station, Hadgaon,
Dist. Nanded.

... Appellant
(Orig. Complainant)

Versus

1. Vijay Pandurang Jadhav,
Age : 31 years,
2. Alaji Bhimrao Jadhav,
Age : 27 years,
3. Sanjay Pandurang Jadhav,
Age : 27 years,
4. Dilip S/o Digambar Jadhav,
Age : 29 years,

All R/o Kautha, Tq. Hadgaon,
Dist. Nanded.

... Respondents
(Orig. Accused)

.....
Mr S. B. Bhapkar, Advocate for the appellants
Mr S. D. Ghayal, APP for respondent/State
.....

WITH
CRIMINAL APPEAL NO. 270 OF 2002

The State of Maharashtra,
Through Police Station, Hadgaon,
Dist. Nanded.

... Appellant
(Orig. Complainant)

Versus

1. Vijay Pandurang Jadhav,
Age : 31 years,
2. Alaji Bhimrao Jadhav,
Age : 27 years,
3. Sanjay Pandurang Jadhav,
Age : 27 years,
4. Dilip S/o Digambar Jadhav,
Age : 29 years,

All R/o Kautha, Tq. Hadgaon,
Dist. Nanded.

... Respondents
(Orig. Accused)

.....
Mr S. B. Bhapkar, Advocate for the appellants
Mr S. D. Ghayal, APP for respondent/State
Mr V. S. Kadam, Advocate for respondent No. 2 in Cr. Appeal No.
270/2002.
.....

CORAM : T. V. NALAWADE &
A. M. DHAVALA, JJ.

Reserved on : 05.10.2017.
Pronounced on : 13.10.2017.

JUDGMENT (PER A. M. DHAVALA, J.) :-

1. All these appeals arise out of the common judgment dt. 04.02.2002 passed by Addl. Sessions Judge, Nanded in Sessions Case No. 47/98, wherein four accused were prosecuted for offences u/s 448, 302 r/w 34 of IPC and they were convicted u/s 325 of IPC and sentenced to suffer RI for three years and to pay fine of Rs. 10,000/- each, in default, to suffer further RI for two months each, with direction to pay fine amount if recovered as compensation to the parents of the deceased.

2. Cri. Appeal No. 89/2002 is filed by the accused persons against the conviction. Cri. Appeal No. 267/2002 is filed by the State against acquittal u/s 302, 448 r/w 34 of IPC whereas; Cri. Appeal

No.270/2002 is for enhancement of sentence for offence punishable u/s 325 r/w 34 of the IPC. Since common question of law and facts are involved, all these appeals are heard commonly and disposed of by this common Judgment.

3. The facts relevant for deciding these appeals may be stated as under : -

On 31.05.1997 at 12:40 AM, Jagdeo Ingle, aged 25 years, r/o Kautha, Tq. Hadgaon, Dist. Nanded lodged a report Exh. 34 at Hadgaon Police Station to the effect that, on the same night at about 2:00 am, while he was sleeping in front of his house at Kautha, all four accused, who are his neighbours, came there and accosted him as to why he was making too many complaints against them and thereafter assaulted him with fist blows, slaps and kicks on his chest, back and right rib. His mother had witnessed the incident. He had suffered minor injuries and he wanted to have medical treatment. PW6 Head Constable - Datta Jarande recorded the said complaint as N.C. case in N.C. register u/s 323/34 of IPC and informed him that he should approach the Court. He also issued a reference letter Exh.35 requesting the Medical Officer, Rural Hospital, to examine and treat the injured and submit certificate. This report of N.C. later on turned out to be dying declaration of the deceased Jagdeo. He

had gone to Rural Hospital at 2:40 am (?) where Dr. Sangvikar PW5 examined him and found two contusions one on his back and other on his shoulder. Jagdeo had pains hence as per prosecution version he was taken to Dr. Chakrawar at Hadgaon and to some doctor at Umarkhed. Dr. Chakrawar did not examine him. The dispensary of Doctor at Umarkhed was closed and he was brought back but he was again brought to Rural Hospital at 10:20 am and on re-examination, one contusion on right infra-axillary area of size 1'x½' with suspected fracture of rib was noticed. Then efforts were made to take the injured to Civil Hospital at Nanded but on the way at about 1:30 pm he died. Then inquest and autopsy was conducted on dead body. As per PM notes proved by PW4 Dr. Lomte, the deceased had sustained fractures of 8-9 ribs with perforation of pleura and profusely bleeding injury to lung. Thereafter, FIR of father of the deceased by name Anandrao-PW9 was recorded. The investigation revealed that accused no. 1-Vijay and accused no. 2-Balaji had given blows of iron rod to the deceased while accused nos. 3 and 4 had given fist blows and kick blows. There was old enmity between the deceased and the accused persons. The incident was witnessed by mother PW12-Anjanabai and sister PW10-Annapurna whereas; two friend PW3-Bhagwan and his brother-PW4 Ashok residing in house situated two houses beyond the house of the deceased came there on hearing

shouts at 2:00 am. They had seen all the four accused leaving the spot. The accused were arrested and accused no. 1 discovered all weapons of offence and his blood stained clothes. Those were forwarded to CA office and CA reports were collected. After completion of investigation, the chargesheet was submitted in the court. In due course, the case was committed to the court of Sessions.

4. The ld. Addl. Sessions Judge framed charge at Exh. 5. The accused pleaded not guilty. The prosecution examined 13 witnesses. The defence of the accused is of total denial. It is their case that, the deceased had consumed alcohol and was addicted and fell down from a bike while returning from a movie or subsequent to his examination by Dr. Sangvikar PW5.

5. The ld. trial Judge discarded evidence of assault by iron rod and also found some discrepancies in the evidence of eye-witnesses. It seems that, he mainly relied on the dying declaration and taking into consideration the nature of the acts of the accused, he held that charge u/s 325/34 was only proved. Accordingly, he passed conviction and sentences as referred above. Hence, this appeal.

6. Heard Shri. S. D. Ghayal, ld. APP for the State, Shri. S. B. Bhapkar, ld. Advocate for the respondents and Shri. V. S. Kadam, ld. Advocate for respondents No. 1 & 2 in Cr. Appeal No. 270/2002. Learned advocates have taken us through the evidence on record.

7. Learned APP Shri Ghayal argued that, there is a dying declaration showing the involvement of all the accused. The deceased himself had reported the matter to the police within short time. Unfortunately the deceased could not get proper medical treatment. The incident of assault was witnessed by his mother and sister and also by two neighbours. Admittedly there is a strong enmity between the accused and the deceased and his relatives. The Medical Officer was not careful when the deceased was examined at 2:40 am and he did not notice the major injury which caused rib fractures and internal injury to lungs and pleural which caused his death. He argued that, the evidence of material witnesses is consistent with each other as well as with the medical evidence. The FIR filed by father of the deceased is also filed within short time after the death of deceased-Jagdeo. Hence all the accused should have been convicted u/s 302, 448 r/w 34 of IPC and should have been accordingly sentenced. In the alternative, he submitted that, if this Court accepts

the finding of ld. trial Judge that only offence u/s 325/34 was made out, the sentence imposed by the ld. trial judge is too inadequate. One young person had lost his life due to assault and therefore sentence u/s 325/34 should be substantially increased.

8. Per contra, Shri. Bhapkar, ld. Advocate for the accused has argued that the evidence of eye-witnesses is totally concocted. Their presence on the spot is not probable. The improvement in the story by introducing assault by rod makes them incredible and untrustworthy. Admittedly, there was a strong enmity between the accused and the prosecution witnesses since many years. About one month earlier accused nos. 1 and 3 had lodged report against the deceased Jagdeo regarding theft of electric motor and he was arrested and was later on released on bail. PW3 Bhagwan was surety for him and PW10 Ashok is his brother. They are residing at long distance and they could not have been present on the spot immediately after the incident. There are admissions to show that the deceased and Santosh had gone to last movie show from 9.00 to 12.00. According to the accused, while returning on the bike, the deceased, who had consumed liquor, fell down and sustained injuries. The post-mortem report revealed that alcohol was found in his stomach whereas; Doctor has opined that, such injury was possible by fall. He pointed out the major discrepancies in the

evidence of PW5 Dr.Sangvikar. PW4 Dr. Lomte and witnesses stated that Dr. Ghuge and Dr. Sangvikar had examined deceased Jagdeo at 10:20 am. There is evidence to show that the deceased was not properly examined at 2:40 am.

9. The PM notes disclose that deceased died about 2 to 6 hrs after his last meal and admittedly he had taken last meal on the earlier day at 7:00 pm. This medical opinion makes the entire prosecution case incredible and untrustworthy. The so-called oral dying declarations are inconsistent with the medical evidence as well as with the alleged written dying declaration. The deceased had not given any dying declaration at all and exh. 34 does not bear his signature. The entire prosecution story smacks of concoction at every stage. In view of the strong enmity, the accused have been falsely implicated. Accused no. 1-Vijay is serving in a bank at outstation, who is also implicated. Therefore, the conviction and the sentence of the accused u/s 325 r/w 34 is also not sustainable, which may be set aside and the accused should be set free. The appeals against acquittal and for enhancement deserve to be dismissed.

10. Learned advocate for respondent no. 1 & 2 in Cr. Appeal No. 270/2002 supported the judgment and the arguments of Adv. Bhapkar.

11. After carefully going through the record and the arguments advanced by ld. advocates for the parties, the points for our consideration with our findings thereon are as follows :

Sr. No.	Points	Findings
1	Whether the deceased Jagdeo met with homicidal death?	Not proved.
2	Whether the accused nos. 1 to 4 in furtherance of their common intention voluntarily caused hurt to the deceased by fist blows, kick blows and/or by rod and thereby committed his murder or any minor offence?	Not proved.
3	Whether the accused nos. 1 to 4 had in furtherance of their common intention committed house trespass for committing murder?	Not proved.
4	What order?	The appeal no. 89/2002 is allowed. Appeals No. 267 & 270 of 2002 are dismissed. All the accused are acquitted of all the charges.

12. The prosecution has examined 13 witnesses which can be conveniently grouped as follows :

[I] **Eye-Witnesses & witness on spot immediately after the incident.**

(i) PW10 – Annapurna, sister of the deceased.

(ii) PW12 – Anjanabai, mother of the deceased.

(iii) PW3 – Bhagwan & PW11 - Ashok.

[II] Dying Declaration:

(i) Written dying declaration [PW5 & PW6–Datta Jarande]

(ii) Oral dying declaration [PWs 3, 10, 11 & 12].

[III] Medical evidence [PW4 – Dr. Sahebrao Lomte].

(i) PM report [Exh. 29].

(ii) Provisional PM report [Exh. 30].

(iii) PW5 – Dr. Ramesh Sangvikar.

(iv) Medico Legal Certificate [Exh. 32].

(v) CA report of viscera [Exh. 54].

[IV] Other witnesses :

PW13 – API Shrirang Nimanwad, who has proved following documents.

(i) Letter from Medical Officer dt. 31.05.1997, 3:30 pm about death of Jagdeo (Exh. 51).

(ii) Report for PM (Exh. 52).

(iii) Spot panchanama in the courtyard of house of Anandrao (Exh. 23).

(iv) PM Report (Exh. 29).

(v) Covering Letter for sending viscera to CA office (Exh.53).

(vi) CA report of viscera showing no poison (Exh.54).

- (vii) The contradictions of hostile witnesses.
- (viii) The contradictions of Shaikh Shah (Exh. 56)
- (ix) The contradictions of Anandrao (Exh. 57 & 58).
- (x) The contradictions of PW10 Annapurna (Exh.59).
- (xi) The contradictions of PW12 Anjana (Exh. 60).
- (xii) PW1 – Inquest panchanama Bapurao.
- (xiii) Panchanama (Exh.22).

[V] **Spot Panch :**

- (i) Panchanama Exh. 23 (PW1) Bapurao (hostile).
- (ii) PW2-Sheshrao, who on 31.05.1997 at 12:00 noon taken the deceased towards Nanded in the Jeep of PW3 Bhagwan. Deceased died on the way.
- (iii) PW7 Panch and PW8 Datta panch to discovery by accused nos. 1 & 2 (Exh. 38 to 41) turned hostile.
- (v) PW9 Anandrao, the informant and father of the deceased at the relevant time he was in the field. He was informed by his wife PW12 Anjanabai in the morning and he had accompanied his son while he was being taken towards to Civil Hospital, Nanded .

13. The evidence on record shows admissions and suggestions disclosing strong enmity between two parties. PW9-Anandrao has deposed that, about 10 years earlier there was a tenancy dispute of one Sheshrao with Iqbal who was adjacent field owner of PW9-

Anandrao. Pandurang, father of accused nos. 1 & 3 was supporting Sheshrao and was expecting that PW9 should depose about cultivation by Sheshrao. PW9 Anandrao did not agree and therefore their relations were strained.

14. About five years thereafter, Pandurang father of accused nos. 1 and 3 raised suspicion against deceased Jagdeo over theft of bells tied around the neck of bullock. On that count, Jagdeo was beaten by Pandurang and his three sons including accused nos. 1 & 3.

15. The third dispute had taken place about four years earlier and PW9 was cultivating field of Shankarrao More whose field was adjacent to field of Pandurang with a common dhura in between. Accused no. 3 Sanjay had beaten Jagdeo which Anandrao had reported to the police station. Thereafter, there was dispute between Anandrao & Pandurang regarding flowing of waste water by Pandurang in front of house of Anandrao. Anandrao stated that Pandurang had beaten him. Again one year earlier there was boundary dispute between Anandrao and his neighbour Digambar and Digambar had beaten him. Digambar is father of accused no. 4 - Dilip. About one month before the incident, Pandurang and accused nos. 1 and 3 had made allegations that, deceased Jagdeo had

damaged their electric motor. Jagdeo was arrested and PW3 stood surety for him. According to PW9, on 30.04.2017, Pandurang and his two sons accused nos. 1 & 3 and 3 others had been to his house with sticks and threatened to remove Jagdeo from his house for which PW9 had lodged report. The incident took place on 03.05.1997.

16. Though the nature of events which give rise to enmity are not admitted as deposed by the witnesses, the enmity is not in dispute.

17. As per evidence of PW10 - Annapurna and PW12 - Anjanabai (sister and mother of deceased), on 30.05.1997, at about 07:00 pm, they including deceased Jagdeo had meals. Thereafter, Jagdeo went along with Santosh, son of PW3 Bhagwan to watch a movie and PW9 had gone to his field. PW10 & 12 deposed that, at about 11 to 11:30 pm, Jagdeo came back and knocked the door and thereafter they all were sleeping in the courtyard. As per their evidence, at 2:00 am they woke up on hearing shouts of Jagdeo as 'आई मेलो, आई मेलो'. There was one bulb illuminating in the courtyard. They saw that accused no. 1 Vijay gave a blow of rod on the right side of Jagdeo while accused no. 2-Balaji also gave a blow of rod on

his right shoulder. Accused no. 4-Dilip then gave kick and fist blows to Jagdeo. Jagdeo then raised shouts 'पळा, वाचवा'. There is evidence that, PW3 & PW11 came to the spot along with two others. At the same time, the accused had left the spot. PW3 & PW11 stated that they had seen the accused leaving the spot. Surprisingly, PW10 stated that, accused had left the spot by opening the door of drawing room. PW12 Anjanabai, mother of the deceased has deposed the same fact. She stated that, at 2:00 am, on hearing the shouts of Jagdeo he woke up and saw in the light of bulb that accused no. 1-Vijay gave blow of iron rod on right side rib of Jagdeo. Accused no. 2-Balaji gave iron rod blow on shoulder while accused nos. 3 and 4 gave blows of fist and kicks to Jagdeo. She stated that, she also shouted and asked them why Jagdeo was beaten. She also stated that, four accused left the spot through the drawing room door.

18. PW3 Bhagwan has deposed about the previous enmity. Accused nos. 1 to 4 are his cousins but they were residing separately. On the fateful day at 3:00 am, while he was asleep, he heard some voice as 'don't beat me' (मला मारू नका) and cries of sisters of Jagdeo from the side of house of Anandrao. Then he along with Vinayak and PW11 Ashok went to the house of Anandrao. That time, they saw all the accused coming out of the drawing room of Anandrao and

standing near the platform of Maruti temple. He deposed that, he identified them in the lamp burning in the drawing room and accused nos. 1 and 2 were having iron rods. He deposed that, they made inquiry with Jagdeo. He deposed about the assault by all accused. PW11 has led similar evidence.

19. Further evidence shows that, PW3 & PW11 took Jagdeo to Hadgaon Police Station. Then police issued a letter for medical examination when Jagdeo was taken to the hospital. PW3 stated that, the nurse present called the doctor and doctor administered some medicine and Jagdeo had vomited the same. However, the doctor did not admit Jagdeo. Hence, Jagdeo was brought to the Police Station and then to his house. Thereafter, PW12 Anjanabai went to the field and called her husband Anandrao and narrated the incident to him. The evidence of PW3 & PW11 disclose that, again at the request of Jagdeo, he had taken him to the Rural Hospital at Hadgaon. Thereafter, he took him to Dr. Chakrawar who declined to examine him. Dr. Chakrawar advised them to go to doctor at Umarkhed for orthopedic treatment. They went to the hospital at Umarkhed but it was closed as it was a holiday. Then they came to Rural Hospital, Hadgaon where Dr Dhage examined Jagdeo and informed them that Jagdeo had a fracture of ribs and there was

danger to his life. Then while they were proceeding to Nanded at about 1:30 am, near Ardhapur, Jagdeo breathed his last. The iron rods are identified.

20. This material evidence of eye-witnesses PW10, PW12, PW3 & PW11 needs to be subjected to close scrutiny in view of previous enmity between the parties.

21. PW6 Dr Sangvikar deposed that, Jagdeo was brought to him on 31.05.1997 at 2:40 am. On examination, he found following injuries.

- (i) Contusion on right side back 2'x1/2'
- (ii) Contusion on upper part of right shoulder 1'x1/2'.

. The injuries were caused by hard and blunt object and within six hours. He deposed that, he again examined Jagdeo at 10:20 am and found one contusion on right infra-axillary area 1'x1/2' caused by hard and blunt object within six hours. His certificate is at Exh. 32 which clearly shows two different timings one for examination at 2:40 am and another at 10:20 am. PW3 Bhagwan has however stated that, in the second visit to Rural Hospital at Hadgaon, Dr. Dhage had examined Jagdeo and not Dr. Sangvikar.

22. After the death, autopsy was conducted on dead body by PW4-Dr. Sahebrao Lomte on 01.06.1997 between 6:00 to 7:30 pm. His evidence and PM notes disclose only one injury i.e. contused abrasion on right infra axillary area horizontally placed 2 x 1 cm. Column no. 9 shows that, the injury earlier shown as on the back was actually an old scar. The evidence shows that, it was related to surgical operation undergone by Jagdeo about 15 days to 1 month earlier to the incident. The Medical Officer did not find the other contusion shown on shoulder.

23. The defence of the accused is that, deceased-Jagdeo had consumed liquor. The PM note shows that, smell of alcohol was found in the stomach of the deceased-Jagdeo. There is however admission that such smell can be found even in case of administering medicines containing alcohol.

24. On careful consideration of this evidence, it does not stand to scrutiny much less a close scrutiny. The post-mortem notes disclose that the deceased died about 2 to 6 hours after his last meal. The evidence shows that, the deceased took his meal on 30.05.1997 at 7:00 pm. There is no evidence to show that thereafter the deceased

was provided food before his death. The medical opinion suggests the time of death as between 12:00 midnight to 3:00 am on 31.05.1997. There is consistent evidence which is not controverted that deceased Jagdeo was alive till about 1 to 1:30 pm on 31.05.1997 i.e. for around 11.5 hours after the assault. Considering the facts it must be assumed that deceased might have taken food again on 31.05.1997 morning and this is the only plausible explanation to reconcile the medical opinion and the evidence of eye- witnesses. On the ground of this medical opinion the consistent evidence of all witnesses that deceased died at about 1:30 pm cannot be discarded.

25. The medical evidence in the form of certificate (Exh.32) is highly suspicious. The incident took place at about 2:00 am at Kautha. Thereafter, Jagdeo was brought from Kautha to Police Station and his dying declaration Exh. 34 was recorded by PW6-Head Constable Datta Jarande at 2:40 am. At the very same time, he was examined by Dr. Sangvikar in Rural Hospital at Hadgaon, which is quite improbable. Besides, Dr. Sangvikar had described two contusions one on back and other on right side. Dr Lomte did not notice these two contusions. According to him, there was one old scar of surgical operation on the back of Jagdeo. He found no contusion on right shoulder of deceased-Jagdeo. The evidence of Dr.Sangvikar is contrary to the evidence of Dr. Lomte.

26. According to certificate Exh. 32, Jagdeo himself came along with his relatives. The certificate and evidence of Dr. Sangvikar does not disclose that he was referred by police but according to PW6 Head Constable Datta Jarande, he had issued a reference letter Exh. 35. This reference letter shows only one abrasion on the ribs and some weal marks on chest and back. Pertinently, both these letters as well as injury certificates are silent about assault by rod. The dying declaration Exh. 34 allegedly recorded by PW6 Datta does not refer to any assault by rod. Evidence of PW9-Annapurna, PW12-Anjanabai, PW3-Bhagwan & PW11-Ashok regarding assault by rod is not supported by medical evidence.

27. The evidence shows that, there was long standing enmity and the accused are neighbours of deceased-Jagdeo. We agree with the arguments of learned advocate for the accused that the accused would not have visited the house of deceased at odd hours of 2:00 am only for causing some minor injuries by means of fist blows & kick blows. The dying declaration Exh. 34 discloses that no accused was armed with any weapon, which is suspicious. The certificate Exh.32 initially shows only two injuries and one injury is shown later

on. It is suspicious that this major injury causing fracture of ribs and perforation of pleura and bleeding and damage to the lung was not noticed by Dr. Sangvikar in spite of reference letter showing that the deceased had sustained injuries to the ribs. The subsequent entry in the certificate Exh. 32 was made at 10:20 am. Dr. Sangvikar stated that, he has made it. PW3 Bhagwan stated that Dr. Dhage has made it. There is no signature of Dr. Dhage on the certificate. It was a case of suspected fracture but no x-ray has been produced. This injury was noted at 10:20 but the time 11:45 is shown below the remark column. In view of the contradictions in the PM notes and in the certificate Exh. 32, we have a strong doubts whether the deceased Jagdeo had sustained injuries as shown at sr. nos. 1 and 2 in certificate at Exh. 32 and whether he was actually examined by Dr.Sangvikar or not. It is also doubtful whether the patient was referred or not to the Rural Hospital by PW6-Head Constable Datta Jarande. It is a matter of guesswork that if deceased Jagdeo had gone to the Police Station and his FIR was not recorded and his medical was not carried out, the subsequent events of his death due to the injuries sustained earlier would put a strong blame on the police officer as well as the medical officer and in order to cover up the things, it might have been shown that the statement of Jagdeo was recorded at 2:40 am and at the same time he was referred to

medical examination and Dr. Sangvikar at Rural Hospital had examined and treated him.

28. Even if it is assumed that, the certificate Exh. 32 discloses correct picture of injuries sustained, it is highly improbable that when four accused persons came for assault and give slaps, fist blows and kicks with shoes to Jagdeo, he would have received only three injuries. The introduction of story regarding assault by rod raises a serious question mark on the credibility on the witnesses. Besides, Jagdeo has sustained all injuries on the right side. When four persons were assaulting him, they would have assaulted him from all the sides. He has not sustained a single injury on left side. As earlier discussed, the injuries on the back was old scar of operation. Assault by four persons even for a minute would cause much more number of injuries than two injuries described in certificate Exh. 32.

29. The dying declaration Exh, 34 recorded by PW6 Datta is also suspicious. Accused told Jagdeo that he had made so many complaints against them. The complaints were given by the accused against Jagdeo and not by Jagdeo against the accused. There was no immediate occasion for the accused to come for assault at odd hours of 2:00 am. Even in case of assault by rod, one would expect

elongated contusions having more length than the existing one and no such elongated contusions were found corresponding to the shape of weapon. The dying declaration shows assault on chest and back but no injuries were found on chest and back. The dying declaration shows that, deceased Jagdeo had sustained some minor injuries. there is no specific evidence whether fracture of two ribs causing perforation in the pleura and damage to the lung will not create any pains and anybody including the patient would not be aware about its seriousness. It is pertinent to note that, Jagdeo was allegedly assaulted at 2:00 am but he did not receive treatment at all upto 1:30 pm. It is claimed that, he was taken to various doctors. PW3 stated that, doctor in the Rural Hospital did not properly examine him at 2:40 am and some medicines were given by nurse. Then there was attempt to provide him medical help from Dr. Chakrawar who was not orthopedic physician. He referred them to hospital at Umarkhed. Even at Umarkhed there was no doctor. It is difficult to accept that, a person sustaining such a grievous injury which ultimately resulted into his death, did not get any medical help for almost 12 hrs.

30. The admissions of the witnesses that the accused left the spot from the drawing room is highly doubtful how the accused entered the drawing room. If deceased Jagdeo wanted to sleep in

the courtyard why he knocked the door to disturb the sleep of his relatives. If the relatives were sleeping inside the drawing room, till the arrival of Jagdeo why they slept in the courtyard after arrival of Jagdeo that too in the month of winter on 30.12.1997. The spot panchanama does not disclose any incriminating signs as Jagdeo had not sustained any bleeding injuries. There is passing reference that he had sustained minor bleeding but if there would have been minor bleeding it would have been certainly reflected in the certificate Exh. 32 at the time of examination at 2:40 am. Taking into consideration all these facts, we find that the oral evidence of PW3, 10, 11 & 12 is not trustworthy. The might not have seen any assault at all. In fact the attack might not have taken place in the courtyard. Later on Jagdeo might have been found lying somewhere in injured condition. The injury might have been caused by fall as the doctor had opined that such injury is possible by fall. Causing of only one injury in a assault by four accused persons is highly improbable.

31. We find that, the witnesses are suppressing the material facts and are concocting stories. In the light of strong enmity between the parties, it is not possible for us to rely on the oral evidence of PW3, 10, 11 & 12 or on the dying declaration recorded by Head constable - Datta.

32. As far as dying declaration is concerned, if the time permits it is always desirable to get it recorded from Executive Magistrate and it should be recorded after obtaining the medical certificate that the person was in physically and mentally conscious state to make a dying declaration. It is not known at what point of time the prosecution witnesses realize the seriousness of the condition of Jagdeo and likelihood of his death but at no point of time any efforts were made to report the matter to the Executive Magistrate and request him to record the dying declaration. There was no opinion obtained from Medical Officer about sound, physical and mental condition of deceased Jagdeo for making statement and recording the statement of the patient as to cause of death.

33. The so called recoveries in no way support the prosecution case. When the use of rod itself is not proved, its discovery is not incriminating. The alleged blood stained clothes of the accused were not sent to CA.

34. In the light of the facts discussed herein above, we are of the opinion that the deceased might have died due to injuries sustained in accident and the prosecution has failed to prove the

complicity of the accused. Hence, the judgment of the trial court is not sustainable. Hence the appeal of the accused deserves to be allowed. The appeals against acquittal and for enhancement of the sentence deserve to be dismissed. The points for our determination are answered accordingly. Hence we pass the following order.

ORDER

- (i) The Criminal Appeal No. 89/2002 filed by the accused is allowed.
- (ii) The judgment of conviction and sentence u/s 325 r/w 34 of IPC passed against all the accused in Sessions Case No. 47/98 dt. 04.02.2002 is hereby quashed and set aside.
- (iii) The accused are acquitted of all the offences for which they were charged. Their bail bonds stand cancelled. Fine amount, if deposited by them, shall be refunded to them. The accused shall furnish PR bond of Rs.5000/- each with like solvent sureties u/s 437A of the Cr.P.C. before the ld. trial Judge.
- (iv) Criminal Appeals No. 267/2002 and 270/2002 filed by the State are dismissed.

[A. M. DHAVALA]
JUDGE

[T. V. NALAWADE]
JUDGE