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

CRIMINAL APPEAL NO.420 OF 2002

1. Bhatu Motiram Pimpale,
Age 45 years, Occu. Agri.

2. Kautik Motiram Pimpale,
Age 35 years, Occu. Agri.

Both R/o Navlane,
Tq. Dhule, District Dhule

3. Bhaiyya Gulab Bachhav,
Age 30 years, Occu. Agri.,
R/o Karle, Tq. Sindkheda,
District Dhule

4. Sau. Kamalbai Bhatu Pimpale,
Age 38 years, Occu. Household,
R/o Navlane, Taluka and
District Dhule

5. Sau. Rekhabai Sanjay Nagmal
Age 21 years, Occu. Household,
R/o Anjanvihara, Tq. Sindkheda,
District Dhule

... APPELLANTS
(Orig. Accused No.1 to 5)

VERSUS

The State of Maharashtra
Copy to be served on A.P.P.
High Court of Judicature fo

Bombay, Bench at Aurangabad ... RESPONDENT

.....
Shri B.R. Warma, Advocate for appellants
Mrs. M.A. Deshpande, A.P.P. for respondent
.....

CORAM: SUNIL K. KOTWAL, J.

Date of reserving judgment : 15th December, 2017

Date of pronouncing judgment : 22nd December, 2017

J U D G M E N T :

1. This appeal is directed against the judgment and order of conviction dated 4/7/2002, passed by Additional Sessions Judge, Dhule in Sessions Case No.46/1997. The appellants are original accused and respondent is State of Maharashtra.

2. Facts leading to institution of this appeal are that, the accused Nos.1 to 5 were prosecuted for the offences punishable under Sections 143, 147, 148, 302, 324, 504, 506 read with Section 149 of the Indian Penal Code. Prosecution case in brief is that, the informant Nanda Vishnu Nagmal (P.W.1) was the father-in-law of accused No.5 Rekha Sanjay Nagmal. Informant Nanda used to reside at village Anjanvihire along with his sons namely Sanjay, Nirranjan, Mahendra and Prabhakar. Prior to four years from the date of incident, Sanjay Nagmal married accused No.5 Rekha. However, accused No.5 and her husband Sanjay Nagmal frequently quarreled as Sanjay was doubtful about character

of accused No.5 Rekha. 8 to 10 days before the occurrence, Sanjay left the house of informant on account of quarrel with accused No.5. So also, accused No.5 left her matrimonial home and went to her maternal home at Karlegaon.

3. On 1.10.1996, when informant Nanda Nagmal (P.W.1) was passing by the village road, in front of house of Jairam Patil at about 11.00 a.m., he met with accused No.1 to 5. That time, accused No.1 was holding Babhul log in his hand. Accused No.1 requested the informant Nanda to come to the house of informant. On refusal by informant (P.W.1), accused No.1 to 4 inflicted wooden log blows on his head, back and stomach. Thereafter, accused No.1 to 5 rushed towards house of informant. By that time, Shanubai, wife of Nanda Nagmal, Mahendra Nanda Nagmal and Prabhakar Nanda Nagmal reached to their house as they were called by Niranjan Nanda Nagmal from their agricultural land. All of them were assaulted by accused persons by wooden log blows. Mahendra sustained head injury during the occurrence. Vishvas Tarachand Patil, Jagan Khandu, Mahendra and other villagers rescued the informant and his family members from the clutches of the accused persons. When all accused were trying to run away from village Anandvihire, that time villagers apprehended them.

Informant, his wife Shanubai and injured sons went to Police Station Dondaicha. Police referred them to P.H.C., Dondaicha. Dr. Balchand Jain (P.W.6) examined the injured Nanda (P.W.1), Prabhakar (P.W.3), Mahendra (deceased) and Shanubai (P.W.2) and issued medical certificates (Exhs.32 to 35). As Mahendra and Shanubai were seriously injured, they were referred to Civil Hospital, Dhule for better treatment. Dr. Prabhakar Jagtap, Medical officer, Civil Hospital, Dhule (P.W.10) examined them and issued injury certificates (Exhs.50 to 52). Police Inspector Shashikant Rajhans (P.W.9) obtained F.I.R. Exh.23 from informant Nanda Nagmal at Cottage Hospital, Dondaicha. On the basis of that F.I.R., offences came to be registered under Sections 143, 147, 148, 307, 324, 504, 506 read with Section 149 of the Indian Penal Code. During investigation, he seized three wooden logs as weapons of the offence. By that time, injured Mahendra Nanda Nagmal succumbed to his injuries at Civil Hospital, Dhule on 2.10.1996. Therefore, offence under Section 302 of the Indian Penal Code was registered against the accused persons. Dr. Avinash Ruikar (P.W.5) performed autopsy examination on the dead body of Mahendra Nagmal and issued post mortem notes (Exh.30). By that time, the apprehended accused Nos.1 to 5 were handed over to police by villagers and they were arrested and their blood stained

clothes were seized by investigating officer under seizure panchanama (Exh.45). Accused were also referred for medical examination. During the course of investigation, the seized muddemal was referred to Chemical Analyser, Aurangabad for chemical analysis. After completion of the investigation, charge sheet was submitted against accused Nos.1 to 5 before Judicial Magistrate, First Class, Sindkheda for the offences punishable under Sections 302, 307, 143, 147, 148, 302, 324, 504, 506 read with Section 149 of the Indian Penal Code.

4. Offence punishable under Sections 302 and 307 of the Indian Penal Code being exclusively triable by Court of Sessions, this case was committed to Sessions Judge, Dhule. The then Additional Sessions Judge, Dhule framed charge (Exh.9) against accused Nos.1 to 5 for committing offences punishable under Sections 147, 148, 307, read with Section 149 and Section 302 read with Section 34 of the Indian Penal Code. When charge was read over and explained to the accused, they pleaded not guilty and claimed trial.

5. Defence of the accused is that, prior to the date of incident, accused No.5 Rekha was driven out from her matrimonial house by informant and his family members.

Therefore, on the date of incident, all accused went to the house of informant to request the informant and his family members to resume cohabitation of accused No.5 with her husband Sanjay Nagmal. However, when they reached to the house of informant, that time quarrel was going on in between family members of the informant and during that fight, deceased Mahendra sustained injuries. The accused got frightened and started running away. However, they were apprehended by villagers due to misunderstanding. In brief, the defence of the accused is of denial.

6. After considering the oral and documentary evidence placed on record, trial Court was pleased to convict the accused Nos.1 to 5 for the offences punishable under Sections 147, 148, 324 read with Section 149 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for one year under Section 147; rigorous imprisonment for two years under Section 148 and rigorous imprisonment for two years under Section 324 read with Section 149 of the Indian Penal Code. Only accused No.1 was convicted for commission of the offence punishable under Section 304 Part II of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.500/-. The accused were acquitted of

the offence punishable under Section 307 read with Section 149 of the Indian Penal Code. The substantive sentences were to run concurrently.

7. Heard strenuous arguments of Shri B.R. Warma, learned counsel for the appellant and Mrs. M.A. Deshpande, learned A.P.P. for the respondent/ State.

8. Learned counsel for the appellants submits that, the occurrence is divided in two parts. He points out that, the first incident alleged to have occurred on Methi-Karle Road when the informant Nanda (P.W.1) was taking his bullocks to his field. Regarding this incident, he has drawn my attention towards contradictory statements of Nanda (P.W.1) and eye witness Machhindra Patil (P.W.7). He points out that, in the spot panchanama (Exh.17) no signs of struggle are visible, which falsifies the contention of these both witnesses.

9. Regarding the second part of the occurrence, which alleged to have occurred in front of the house of informant Nanda at village Anjanvihire, he took me through the oral evidence of alleged eye witnesses Shanubai (P.W.2), Prabhakar (P.W.3) and Ambar (P.W.4). He has drawn my attention towards contradictions and omissions emerged in

the testimony of these all eye witnesses.

10. Next limb of the argument of learned counsel for the appellants is that, though defence has admitted seizure of the wooden logs (Exh.18), which were alleged to be used as weapon of the offence, those wooden logs were not seized from the possession of accused persons but as per seizure memo itself, those wooden logs were seized from Shri Jagannath Khandu Mahire, who is not examined by the prosecution. He points out that, as per recitals of the panchanama, no blood stains were found on the seized wooden logs. His next submission is that, even the seized muddemal articles were not kept in sealed condition till its examination by Chemical Analyser. Therefore, possibility of tampering of muddemal cannot be ruled out. In the result, the detection of human blood on one of the seized log, is not sufficient to connect any accused with the assault to deceased Mahendra or other prosecution witnesses.

11. Learned defence counsel submits that, in the arrest panchanama of the accused, injuries are noted on the body of accused No.1 and 2 and though accused were referred to medical examination, their injury certificates are suppressed by the prosecution. Therefore, non-explanation regarding

injuries found on the body of accused persons is fatal to the prosecution case.

12. Learned counsel for the appellants submits that, possibility cannot be ruled out that when accused had gone to the house of informant to compromise matrimonial dispute in between accused No.5 and son of the informant, that time scuffle arose in between both the parties and during that scuffle, the deceased and other witnesses sustained injuries. He submits that, the evidence is on record does not show as to who inflicted fatal blow on the head of deceased Mahendra.

13. Learned A.P.P. for the State supports the judgment passed by the trial Court on the ground that testimony of informant (P.W.1) is fully corroborated by evidence of five eye witnesses as well as by medical evidence. Her next contention is that, the accused have admitted their presence on the spot on the date and at the time of occurrence. Accused have not filed any complaint to police station against the informant and his family members regarding assault to accused. Even accused have not taken defence of self protection and, therefore, the injuries found on the body of accused as per arrest panchanama, needs no explanation.

14. Learned A.P.P. points out that, medical officer P.W.5, who conducted post mortem examination of the dead body of deceased Mahendra, has proved that the head injury sustained by deceased was sufficient in ordinary course of the nature to cause death. So also eye witnesses have made it clear that only accused No.1 inflicted fatal wooden log blow on the head of deceased Mahendra at the time of occurrence in front of the house of informant. According to A.P.P., all the accused being members of unlawful assembly, having common object to kill Mahendra, all of them are liable with the aid of Section 149 of the Indian Penal Code.

15. Learned A.P.P. has pointed out that, defence has admitted the seizure panchanama of the weapon of the offence – wooden logs. The C.A. Report Exh.57 shows that, on one of the wooden log, human blood was detected. However, no explanation has been furnished by any accused regarding the human blood found on the seized wooden log. Thus, the direct evidence of eye witnesses is also corroborated by circumstantial evidence like seizure of blood stained wooden log from the possession of accused and detection of human blood on the clothes seized from the person of accused at the time of their arrest.

16. On perusal of oral and documentary evidence placed on record, it has come to my notice that entire prosecution case is based on direct evidence of five eye witnesses including the informant Nanda (P.W.1) as well as circumstantial evidence in the form of seizure of blood stained clothes from the person of the accused at the time of their arrest and seizure of blood stained wooden logs which were alleged to be used by accused while committing the offence.

17. Initially, I proceed to consider the circumstantial evidence placed on record by prosecution to ascertain whether it is sufficient to connect the accused with the homicidal death of Mahendra Nanda Nagmal and injuries sustained by P.W.1 to P.W.3. At the stage of arguments, homicidal death of deceased Mahendra is not disputed by the defence.

18. The important circumstantial evidence placed on record by prosecution is the seizure of blood stained clothes from accused Nos.1 to 3 at the time of their arrest. To prove the arrest panchanama Exh.45, prosecution has examined panch Gulabsing Sonawane (P.W.8). During examination-in-chief, he has supported the preparation of arrest-cum-seizure panchanama Exh.45. However, from his cross-examination, it emerges that, the clothes alleged to be seized from accused

Nos.1 to 3 were already in possession of police officer and same clothes were shown to this witness at the time of preparation of panchanama. It is important to note that, this witness nowhere deposed that in his presence police kept those clothes in packet and sealed it. This witness is absolutely silent regarding the sealing of the seized clothes of the accused. Even investigating officer Police Inspector Shri S.V. Rajhans (P.W.9) most negligently deposed about preparation of arrest-cum-seizure panchanama Exh.45. He simply deposes regarding preparation of this panchanama without uttering a word regarding the proper sealing of seized articles. Thus, tampering of these seized clothes of the accused cannot be ruled out. In the circumstances, circumstantial evidence relied by prosecution in the form of seizure of blood stained clothes from accused Nos.1 to 3 has become useless piece of evidence.

19. Similarly, though defence has admitted seizure panchanama of the wooden logs (Exh.18), this panchanama itself indicates that, three wooden logs were seized from Jagannath Khandu Mahire and not from the possession of accused persons. It is most important to note that, seizure panchanama Exh.18 nowhere recites that blood stains were visible on any one of the seized wooden logs. Seizure memo

itself shows that, the seized wooden logs were not kept in sealed condition after wrapping in the paper envelope or cotton bag. Thus, prosecution itself has brought on record every possibility of tampering of this muddemal. In the circumstances, though C.A. Report Exh.57 shows that human blood was found on one of the three wooden logs, that evidence has become absolutely useless evidence.

20. In addition to this, Jagannath Khandu Mahire, who produced the wooden logs alleged to be used by accused, is not examined by prosecution. Therefore, prosecution cannot establish that the three wooden logs which were alleged to be used by accused Nos.1 to 3 at the time of commission of the offence were recovered by Shri Jagannath Mahire and same were produced before the police. Climax is that, informant Nanda (P.W.1) admits in his cross-examination that while running away, accused threw the wooden logs on the spot as well as on the roof of his house and same wooden logs were produced by him before police and seized by the police. Thus, otherwise also, seizure of the wooden logs from the possession of the accused has become doubtful. It follows that, identification of these wooden logs by eye witnesses at the stage of evidence has become useless.

21. Additional damaging blow to the circumstantial evidence placed on record is that, prosecution has not taken pains to examine the carrier of the muddemal articles including sample of blood mixed earth, seized from the spot of the incident. In the circumstances, considering the possibility of tampering of seized muddemal, I have no hesitation to hold that the circumstantial evidence placed on record in the form of seizure of blood stained clothes from the accused and seizure of blood stained wooden logs as well as seizure of blood mixed earth sample from the spot of the incident has become absolutely useless and deserves to be ignored.

22. As observed above, as per prosecution case, the incident of assault occurred at two places. First incident of assault to Nanda (P.W.1) alleged to have occurred on Methi-Karle Road at about 11.30 a.m. when Nanda (P.W.1) was proceeding by village road towards his field with his bullocks. The place of second main incident of assault to other witnesses including deceased Mahendra is in front of residence of Nanda (P.W.1).

23. Regarding the first incident, prosecution has placed reliance on testimony of Nanda (P.W.1) and eye witness Machhindra Patil (P.W.7). According to Nanda (P.W.1), on

1.10.1996, at about 11.00 a.m., when he was proceeding by Methi-Karle Road, outside the village he met with accused Nos.1 to 5 and that time, accused Nos.1 to 4 were armed with sticks. According to this witness, those sticks were hidden below the jackets of accused Nos.1 to 4. Accused Nos.1 to 4 suddenly started beating Nanda (P.W.1) by stick and accused No.5 by hand. According to this witness, during this incident, he sustained bleeding injury on his head, back, stomach and leg and in the result, he became unconscious. This witness claims that, his clothes were stained with blood and he was rescued by Trimbak Hiranman Patil, Vishwas Tarachand Patil, Shahana Jairam Patil and Machhindra Mansaram Patil (P.W.7). His further contention is that, after regaining consciousness, he went to police patil and Sarpanch, but did not find them and after 15 to 20 minutes, when he went to his house, at that time, only his son Niranjana was present at the house. Thereafter Niranjana went to field to call the wife and sons of this witness. After arrival of wife and sons of this witness, the second incident of assault occurred in front of his house.

24. However, from his cross-examination, it emerges that, his version regarding hiding of sticks inside the jacket by accused, his claim regarding becoming unconscious and his visit to Police Patil and Sarpanch as well as part played by

accused No.5 is proved to be material omission. Even the F.I.R. Exh.23 nowhere reflects that accused No.5 also assaulted Nanda (P.W.1) on road. F.I.R. recites that, after the first incident of assault, Nanda (P.W.1) followed the accused persons who ran towards the house of Nanda. F.I.R. does not indicate the presence of Machhindra Patil and other witnesses on the spot where Nanda was assaulted on road. Thus, oral testimony of Nanda (P.W.1) regarding the first incident is totally in conflict with his own F.I.R. Exh.23.

25. Macchindra Patil (P.W.7) has brought on record altogether different theory regarding assault to Nanda (P.W.1) on Methi-Karle Road. According to Macchindra Patil (P.W.7), in front of his house informant Nanda (P.W.1) was assaulted by stick only by accused No.1 and 2. According to Macchindra Patil (P.W.7), the accused No.3, 4 and 5 were merely standing on that spot. This witness nowhere deposes regarding wooden log in the hand of accused No.3 and 4 or any role played by them in assault of Nanda (P.W.1). Thus, obviously, the version of Nanda (P.W.1) and Macchindra Patil (P.W.7) is in conflict with each other on material particulars. Even version of Macchindra (P.W.7) that he and other villagers rescued Nanda (P.W.1) from accused and asked Nanda and accused to go to the house of Nanda and not to quarrel in the

village, is proved as material improvement.

26. Though P.W.1 and P.W.7 claim that at the time of first incident Nanda (P.W.1) sustained bleeding injury, the spot panchanama Exh.17 does not show even a drop of blood on the spot or any signs of struggle on the spot. Spot panchanama (Exh.17) shows that the spot of first incident is in front of houses of Shantaram Jairam Patil and Hiranman Shivram Patil and not in front of house of Macchindra Patil as claimed by P.W.7. Most damaging blow to the prosecution case is regarding the first incident of assault to Nanda (P.W.1) and his claim regarding sustaining bleeding injury, is that Ambar (P.W.4) has admitted in his cross-examination that, he had not seen any injury on the person of Nanda (P.W.1). As per case of prosecution, after assault to Nanda (P.W.1) on village road, he returned to his house and through his son Niranjan, called his wife Shanubai (P.W.2), Prabhakar (P.W.3) and deceased Mahindra from field and thereafter the second incident of assault by accused occurred in front of residence of Nanda (P.W.1), in which Mahendra sustained fatal injury. However, as observed above, the important eye witness of this second incident namely Ambar (P.W.4) has falsified the version of Nanda (P.W.1) regarding sustaining bleeding injury at the hands of accused at the time of first assault on road.

27. The cumulative effect of above discussed conflicting versions of Nanda (P.W.1) and Macchindra (P.W.7) together with admission of Ambar (P.W.4) and spot panchanama Exh.17 is that, the theory of prosecution regarding the assault to Nanda (P.W.1) on road by accused, is absolutely doubtful and not reliable. I hold that, prosecution miserably failed to prove the first part of the incident i.e. assault to Nanda (P.W.1) by accused on Methi-Karle Road.

28. Before turning towards analysis of direct evidence regarding occurrence of the second part of the incident, I must make it clear that Nanda (P.W.1) has admitted in his cross-examination in para 4 that, there was no quarrel between him and accused persons prior to the present incident in respect of stay of his son Sanjay and daughter-in-law namely Rekha i.e. accused No.5. If there was no dispute in between these two families before the occurrence of incident, then naturally there would be no motive to the accused to assault the in-laws and brother-in-law of accused No.5 which resulted into homicidal death of deceased Mahendra. On the other hand, accused have contended that, on the date and time of the incident, they had paid visit to the house of informant Nanda (P.W.1) and Shanubai (P.W.2) only

to reach accused No.5 to her matrimonial house at Anjanvihire. In other words, when accused had gone to the house of informant to settle and pacify the relationship in between accused No.5 and her in-laws and her husband, in natural course they would have no 'common object' to assault and cause death of one of the family member of husband of accused No.5 or to cause hurt to in-laws of accused No.5. Thus, there is obviously lack of important ingredient of unlawful assembly i.e. common object to use criminal force or to commit offence within meaning of Section 141 of the Indian Penal Code. Thus, only because accused No.1 to 5 went to the house of Nanda (P.W.1), it can not be established that they formed 'unlawful assembly'.

29. To prove the second incident of assault in front of the house of informant (P.W.1), prosecution has placed reliance on testimony of Nanda (P.W.1), his wife Shanubai (P.W.2), son Prabhakar (P.W.3) and alleged eye witness Ambar (P.W.4). No doubt, except Ambar (P.W.4) remaining witnesses are close relatives of deceased Mahendra. However, on that count alone, their testimony cannot be disbelieved, if otherwise it is trustworthy.

30. Though Nanda (P.W.1) claims that on 1.10.1996,

initially he was assaulted and injured by accused No.1 to 5 on Methi-Karle Road and therefore, he went to his house and directed his son Niranjan to call Shanubai (P.W.2), Prabhakar (P.W.3) and deceased Mahendra from his agricultural land and after their arrival to the house, accused No.1 to 5 assaulted them including Nanda (P.W.1), the presence of this witness on this spot is doubtful. The reason for this observation is that, from para No.5 of the cross-examination of so called eye witness Shanubai (P.W.2), it emerges that, Nanda (P.W.1) came on the spot after the accused ran away from the place of incident. Even third eye witness Prabhakar (P.W.3) has admitted in para 4 of his cross-examination that, "villagers rescued us and thereafter my father Nanda came from the side of Grampanchayat". The most damaging blow to the prosecution case is the testimony of so called independent eye witness Ambar Suryawanshi (P.W.4), who has deposed in his examination-in-chief that, "On the date of incident, at about 11.00 to 11.30 a.m., accused No.1 to 3 came to the house of Nanda (P.W.1) and that time only third son of Nanda was present in the house." According to Ambar (P.W.4), accused asked the said son of Nanda to call his family members and accordingly, within 5 to 10 minutes Shanubai (P.W.2), Sanjay and deceased Mahendra reached on the spot and that time, on account of exchange of words between Shanubai (P.W.2) and

accused persons, the accused No.1 to 3 started beating Shanubai and others. According to Ambar, after the occurrence of assault to Mahendra and Shanubai, Nanda (P.W.1) reached on the spot and he was assaulted by accused No.1 and 2 by fist and kick blows. Ambar (P.W.4) has made it clear that, he had not seen any injury on the person of Nanda (P.W.1). Thus, genesis of the occurrence is not proved by prosecution, but it is conveniently suppressed by prosecution.

31. In the circumstances, the version of Nanda (P.W.1) that in his presence accused No.1 to 5 initially pelted stones and thereafter accused No.1 and 2 entered inside the house and dragged Shanubai (P.W.2) out of the house and all accused started beating her by sticks, due to which he became unconscious after sustaining bleeding injury and thereafter accused No.1 inflicted stick blow on the head of Mahendra, has become totally unreliable and not trustworthy. In view of above given admissions of Shanubai (P.W.2) and Prabhakar (P.W.3), the informant (P.W.1) was not present on the spot when the incident occurred in front of house of informant.

32. If the evidence of injured eye witnesses Shanubai Nagmal (P.W.2) and her son Prabhakar (P.W.3) is considered

together, it emerges that, they are contradicting each other on every material particulars. Their statements are also in conflict with their statements before the police on every material particulars.

33. According to these both witnesses, on the date of incident, they had been to their field along with the deceased Mahendra. At about 12.00 to 12.30 Noon hours, Shri Niranjana (son of informant) came to that field and informed that, Nanda (P.W.1) was being beaten at the hands of accused. According to Shanubai (P.W.2), Niranjana informed that accused No.1 to 5 were beating Nanda. On the contrary, according to Prabhakar (P.W.3), Niranjana told that accused No.1 was beating Nanda. Thus, since inception these witnesses have started contradicting each other. According to Shanubai (P.W.2), when she reached to her house along with her three sons, that time she saw that accused No.1 to 5 were present in front of her house and accused No.1 was holding axe, accused No.2 to 5 were holding sticks in their hands. To the contrary, according to Prabhakar (P.W.3), only accused No.1 to 3 were armed with sticks. According to Shanubai (P.W.2), accused No.1 inflicted axe blow on her head and other accused had beaten her by sticks. To the contrary, Prabhakar deposes that, initially accused started pelting

stones and that time accused No.1 Bhatu inflicted one stick blow on the head of deceased Mahendra. According to this witness, Shanubai was assaulted by all accused by sticks and fists as well as kicks. He claims that, accused inflicted stick blow on his head, but it landed on his shoulder and on the back side of his thigh. Thus, obviously, these both witnesses have contradicted each other on material particulars regarding the actual occurrence and assault.

34. From the cross-examination of Shanubai (P.W.2) and Prabhakar (P.W.3), it emerges that, the version of these witnesses regarding the incident of assault narrated by them is nothing but material improvement, since beginning till end. On this count alone, these both witnesses have become totally unreliable witnesses who have suppressed the true occurrence from the Court.

35. The cat has come out of the bag when Ambar Suryawanshi (P.W.4) stepped in the witness box. According to Ambar (P.W.4), on the date of incident at about 11.30 a.m., when accused came to the house of Nanda (P.W.1), that time except Niranjan, son of Nanda Nagmal no other family member was present at the house. This statement falsifies the version of Shanubai (P.W.2) and Prabhakar (P.W.3) that

Niranjan informed them in the field that at that time accused were beating Nanda (P.W.1).

36. The truth has come before the Court from the further testimony of Ambar (P.W.4) who deposed that, as no family members were present in the house except Niranjan, accused No.1 to 5 asked Niranjan to call his family members and, therefore, Niranjan went towards agricultural land where the family members of Nanda were working. Within 5 to 10 minutes, Niranjan came back to his house along with Shanubai (P.W.2) and her two sons, including Sanjay, son of Nanda Nagmal. In fact, as per prosecution case and recitals of the F.I.R., on the date of incident Sanjay was not present in the village as he had already left house due to quarrel with accused No.5. From the testimony of Ambar (P.W.4), it further emerges that, thereafter there was exchange of words in between Shanubai (P.W.2) and accused persons, which further converted into alleged assault to Mahendra and Shanubai by wooden logs at the hands of accused No.1. This witness claims that, accused No.1 to 3 also assaulted Shanubai and others. From his evidence, it also emerges that, subsequently Nanda (P.W.1) came on the spot and he was assaulted by accused No.1 and 2 by fist and kick blows.

37. However, from the examination-in-chief of Ambar (P.W.4), it becomes clear that, when Nanda (P.W.1) reached on the spot, that time he did not find any injury on the body of Nanda. This statement falsifies the statement of Shanubai (P.W.2) and Prabhakar (P.W.3) that initially Nanda was assaulted by accused persons and, therefore, Niranjana rushed to agricultural land to inform Shanubai and her sons. Regarding assault to Nanda (P.W.1) by fist and kick blows by accused No.1 and 2, Nanda (P.W.1) the informant has nowhere deposed in his evidence that in front of his house he was beaten by accused No.1 and 2 by fist and kick blows. Otherwise also, the version of Ambar (P.W.4) regarding assault to Nanda (P.W.1) by the accused No.1 and 2 by fist and kicks is proved as material improvement, which amounts to contradiction. Thus, obviously Ambar (P.W.4) does not appear to be fully reliable witness.

38. Though Ambar (P.W.4) posed himself as independent witness, he has also conveniently suppressed the genesis of the occurrence. From the arrest panchanama Exh.45 of the accused persons, it emerges that, at the time of arrest, injuries were found on the body of accused No.1 Bhatu Motiram Pimpale and one sutured wound was found on the forehead and two additional wounds were found on the both

hands of accused No.2 Kautik Motiram Pimpale. Even investigating officer (P.W.9) has admitted in his cross-examination that accused No.1 and 2 were having injuries on their person and they were referred to Cottage Hospital for medical examination with forwarding letter Exh.47. He also admits that, he has not received medical examination certificates of these accused persons. Thus, obviously the injuries found on the body of accused persons are conveniently suppressed by the prosecution. Including Ambar (P.W.4), none of the prosecution witness has taken pains to explain how at the time of occurrence accused No.1 and 2 sustained injuries.

39. The Hon'ble Apex Court, in **Laxmisingh and others Vs. State of Bihar** reported in **(AIR 1976 SC 2263)**, observed that, the non-explanation of injuries sustained by accused at about time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw following inferences :

- (i) That, the prosecution has suppressed the genesis and origin of the occurrence and has not presented the true version.
- (ii) That, the witnesses who have denied the presence of the injuries on the person of the accused are lying on

a most material point and, therefore, their evidence is unreliable.

- (iii) That, in case there is a defence version which explains injury on the person of the accused, it is rendered probable so as to throw doubt on the prosecution case.

40. Thus, including Ambar (P.W.4), Shanubai (P.W.2), Prabhakar (P.W.3) and Nanda (P.W.1), who have kept total silence regarding the injuries found on the person of the accused, have suppressed the true genesis of the occurrence and they are not trustworthy witnesses. The Hon'ble Apex Court, in **Bhagwan Sahai & anr. Vs. State of Rajasthan** reported in **(AIR 2016 SC 2714)**, ruled that when the Court came to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also failed to explain the injuries on the person of the accused, the only possible and probable course left open was to grant benefit of doubt to the accused.

41. From the cross-examination of Shanubai (P.W.2) and Prabhakar (P.W.3), it has come on record that, about 40 to 50 persons from the village gathered on the spot at the time of occurrence of the incident. However, prosecution has

not taken pains to examine some independent eye witnesses to establish the true occurrence. Another material lacuna in the prosecution case is that, Niranjana Nanda Nagmal is the star witness who was present in the house since inception till end of the occurrence. This witness had taken active part during the entire occurrence and he met with the accused No.1 to 5 when on the date of occurrence at about 11.30 a.m. they reached to the house of informant. However, without assigning any reason, prosecution has conveniently suppressed this material witness. Therefore, adverse inference is to be drawn against the prosecution that it has withheld the true occurrence from the Court.

42. On the other hand, defence of the accused is that, few days before the occurrence, accused No.5, who is daughter-in-law of Nanda (P.W.1) and Shanubai (P.W.2), was driven out from her matrimonial home as the family members of Nanda (P.W.1) doubted the character of accused No.5. Though prosecution witnesses have denied these suggestions, the F.I.R. Exh.23 recites that, accused No.5 Rekha was of bad character and on that count, quarrel arose in between Rekha and her husband Sanjay. 8 days before the incident, on account of this quarrel, Sanjay left his house and thereafter even Rekha left her matrimonial home and went to her

maternal home at Karle. In view of these recitals in F.I.R., the contention of defence is most probable that, to pacify the matrimonial dispute of accused No.5 Rekha with her husband and other family members, the accused No.1 to 4 took Rekha to the house of informant Nanda (P.W.1), on the date of incident.

43. From the testimony of Ambar (P.W.4), it has become clear that, after arrival of Shanubai and her sons on the spot of incident, initially there was exchange of words in between Shanubai (P.W.2) and the accused persons, which turned into fight. From the cross-examination of Prabhakar (P.W.3), it has come on record that, at the time of occurrence there was fight in between accused persons and in-laws of accused No.5. Even from the cross-examination of Machhindra Patil (P.W.7), it emerges that, when he went to the house of Nanda (P.W.1), he saw that, scuffle was going on between sons of Nanda (P.W.1) on one hand and accused persons on the other hand, and even Shanubai was in the same scuffle.

44. Thus, probability cannot be ruled out that at the time of free fight in between members of these two families, Mahendra Nagmal would have sustained fatal injury on his

head. Though accused have not specifically taken defence of self protection, probability cannot be ruled out that accused would have exercised their right of private of defence at the time scuffle with the family members of informant. In **Sharad Birdhichand Sarda Vs. State of Maharashtra reported in AIR 1984 SC 1622**, Apex Court ruled that, it is well settled that, whereon evidence two possibilities are available or open, one which goes in favour of the prosecution and other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt.

45. Thus, considering the non-explanation given by prosecution about injuries found on the body of accused, suppression of genesis of the occurrence as well as non-examination of material witnesses and the probability of availing right of self defence by accused at the time of free fight, benefit of doubt deserves to be given to the accused persons.

46. In view of above discussion, I hold that, learned trial Court failed to consider the above discussed important aspect of this case and erroneously convicted accused No.1 to 5 for the offence punishable under Sections 147, 148, 324 read with Section 149 of the Indian Penal Code and

erroneously convicted accused No.1 for the offence punishable under Section 304 Part II of the Indian Penal Code. The judgment and order of conviction passed by Additional Sessions Judge, Dhule in Sessions Case No.46/1997 deserves to be set aside by allowing this appeal.

47. Hence, I pass the following order :

ORDER

- (I) Criminal Appeal No.420/2002 is allowed.
- (II) Judgment and order of conviction dated 4.7.2002, of accused No.1 to 5 for the offence punishable under Sections 147, 148, 324 read with Section 149 of the Indian Penal Code, and of the accused No.1 for the offence punishable under Section 304 Part II of the Indian Penal Code, passed by Additional Sessions Judge, Dhule in Sessions Case No.46/1997 is set aside.
- (III) Accused Nos.1 to 5 are acquitted of the offence punishable under Sections 147, 148, 324 read with Section 149 and under Section 304 Part II of the Indian Penal Code.
- (IV) Bail bonds and surety bonds of accused Nos.1 to 5

shall stand cancelled. Accused Nos.1 to 5 be set at liberty forthwith if not required in any other case.

(V) Fine amount, if any, deposited by accused Nos.1 to 5, be refunded to them after the period of appeal is over.

(VI) Accused Nos.1 to 5 shall execute before the trial Court bail bonds with sureties for the amount of Rs.15,000/- (Rupees fifteen thousand) each to appear before the Supreme Court as and when notices are issued to them in respect of any proceedings filed against this judgment, vide Section 437-A of the Code of Criminal Procedure, and the said bail bonds shall remain in force for a period of six months from today.

(SUNIL K. KOTWAL)
JUDGE

fmp/