

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

CRIMINAL APPEAL NO. 239 OF 2013

Ishwar s/o Baliram Hude
Age : 71 years, Occu. Agril. &
Retired Militaryman,
R/o Ramnagar, Degloor Road,
Udgir, Tq. Udgir, Dist. Latur.

...APPELLANT

Versus

The State of Maharashtra

...RESPONDENT

.....

Mr. R.N. Dhorde, senior counsel i/b Mr. V.D. Gunale, Advocate for Applicant
Mr. S.G. Karlekar, APP for Respondent-State

**WITH
CRIMINAL APPEAL NO. 463 OF 2013**

Laxman s/o Pundlik Suvarnakar,
Age : 75 years, Occu. Nil,
R/o Kawthal, Tq. Deoni
Dist. Latur

...APPELLANT

Versus

1. The State of Maharashtra
Through,
Deoni Police Station.
2. Rohidas s/o Sangram Konmare,
Age : 48 years, Occu. Ex-serviceman,
R/o Kavalkhed, Tq. Udgir, Dist. Latur
3. Nabi Jainoddin Sheikh
Age : 37 years, Occu. Agri.
R/o Kawthal, Tq. Deoni,
Dist. Latur.
4. Shivadas s/o Ganpati Umate,
Age : 48 years, Occu. Agriculture
R/o Walandi, Tq. Deoni, Dist. Latur.

5. Vishwanath s/o Ganpati Umate,
Age : 60 years, Occu. Agriculture,
R/o Walandi, Tq. Deoni, Dist. Latur.

...RESPONDENTS

.....

Mr. A. S. Shejwal, Advocate for Appellant

Mr. S. G. Karlekar, APP for Respondent-1

Mr.R.N. Dhorde, senior counsel h/f Mr. V.R. Dhorde, Advocate for respondent
Nos. 2 to 5

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**WITH
CRIMINAL APPEAL NO. 664 OF 2014**

The State of Maharashtra, Through
Police Station Deoni for complainant
Laxman Pundlik Savarnakar,
Age : 70 years, R/o Kawathal,
Tq. Deoni, Dist. Latur

...APPELLANT

Versus

1. Ishwar Baliram Hude,
Age : 64 years, Occu. Retired
Militaryman, R/o Kawathala,
Tq. Deoni, Dist. Latur.
2. Rohidas s/o Sangram Konmare,
Age : 48 years, Occu. Ex-serviceman,
R/o Udgir
3. Nabi Jainoddin Sheikh
Age : 37 years, Occu. Agri.
R/o Kawthal, Tq. Deoni,
Dist. Latur.
4. Shivadas s/o Ganpati Umate,
Age : 48 years, Occu. Agriculture
R/o Walandi, Tq. Deoni, Dist. Latur.
5. Vishwanath s/o Ganpati Umate,
Age : 60 years, Occu. Agriculture,
R/o Walandi, Tq. Deoni, Dist. Latur.

...RESPONDENTS

.....

Mr. S.G. Karlekar, APP for Appellant.

Mr.R.N. Dhorde, senior counsel h/f Mr. V.R. Dhorde, Advocate for respondent
Nos. 1 to 5

**CORAM : S.S. SHINDE AND
K.K. SONAWANE, JJ.**

RESERVED ON : 15th MARCH, 2017.

PRONOUNCED ON : 14th JULY, 2017.

JUDGMENT : (Per : K.K. Sonawane, J.)

1] Being dissatisfied with the judgment and order of conviction under sections 302, 323 of Indian Penal Code and resultant sentence of imprisonment for life and to pay fine of Rs. 3,000/-, in default R.I. for 2 months, and, R.I. for 6 months and to pay fine of Rs.500/-, in default R.I. for 1 month; respectively, the appellant-accused Ishwar Baliram Hude has filed appeal bearing No. 239 of 2013, whereas, the first informant Laxman and prosecution/State both have preferred the appeals bearing No. 463 of 2013 and 664 of 2014 against the judgment and order of acquittal of accused No. 2 to 5, under sections 143, 147, 148, 302, 323 read with 149 of the IPC. These appeals emerge from one and the same judgment and order of learned Additional Sessions Judge, Udgir, Dist. Latur in Sessions Case No. 59 of 2009, therefore, we proceed to deal with these appeals together by this common judgment.

2] The scenario of the prosecution case culled out in brief is that, the ill-fated victim Shilavati was the daughter of first informant- Shri. Laxman Pundlik Suvarnkar residence of village Kawthal, Tq. Deoni, Dist. Latur. The daughter victim Shilavati was the divorcee and residing with parents i.e. first informant Laxman and his wife Vimalbai. The first

informant Laxman and appellant Ishwar Baliram Hude as well as Respondent-accused Rohidas, Nabi Jainoddin and Shivdas all were familiar with each other and on inimical terms due to dispute of land Gut no. 164 of village Walandi. According to first informant Laxman, he was the owner and in possession of contentious land Gut no. 164 whereas, appellant-accused Ishwar, and respondent Rohidas were claiming the title and occupation of land on the basis of document of registered sale deed. There were litigation between them since the year 2005. The first informant Laxman also cast allegation against appellant Ishwar of his involvement in money lending business. He had filed complaints against appellant Ishwar and others for their illegal activities of money lending business.

3] It has been alleged that on 20/06/2008, the first informant Laxman, his wife Vimalbai and daughter Shilavati carried out the agricultural operation in the contentious land Gut No. 164 of village Walandi. Thereafter, at about 9.00 p.m., the trio went to bed in the field. The victim Shilavati and mother Vimalbai, both slept in front of the tin shed erected temporarily in the field. The first informant Laxman went to sleep at some distance from daughter and wife, fearing attack on the part of money lenders. However, in the wee hours of dawn at about 4.30 a.m., the first informant Laxman heard the screams of daughter Shilavati. He immediately woke up and saw that the appellant-accused Ishwar and respondents Rohidas, Nabi Jainoddin, Shivdas and Vishwanath assaulted his daughter Shilavati with boulder, and on seeing him started running towards a percolation tank located on the eastern side of the field. His wife Vimalbai

also awaken at that time. The first informant Laxman made endeavour to chase them but they all pelted the stones towards him and inflicted injuries to his both legs, head etc. It has been asserted that the assailants were intending to kill Laxman, but, they attacked victim Shilavati mistakenly under the belief that first informant Laxman had slept there. The victim Shilavati received fatal injuries on her head and face.

4] The wife of Laxman - Vimalbai visited to the Police of Deoni police station and filed the report that her daughter and husband was beaten up by the appellant Ishwar and his three accomplices on account of disputes of agricultural land. Police registered the non-cognizable case bearing No. 83 of 2008 for the offences under section 323, 504 r/w 34 of IPC and referred the informant Vimalbai to Magistrate under section 155 of Cr.P.C. However, immediately thereafter the appellant Ishwar Hude and respondent-accused Rohidas Konmare filed the report to the Police that they received the information that first informant Laxman, his wife and others killed their daughter and kept her dead body in the tin shed erected in their field. The Police of Deoni, Police station took the entry of the report in the station diary and rushed to the spot to take stock of situation. The Police personnel noticed the victim Shilavati with bleeding injuries on her head. She was not in condition to speak. Police personnel drawn the panchanama of injuries of victim Shilavati and escorted her to Primary Health Center, Walandi. The concern Medical Officer provided first aid treatment and advised to take her to the Government Hospital at Udgir for better medical treatment. Accordingly, the injured Shilavati was shifted to the District Hospital Udgir.

The concerned Medical Officer took efforts to resuscitate the injured Shilavati. Unfortunately, on the very same day at about 07.30 p.m. she succumbed to injuries. Thereafter, the father Laxman visited to the Deoni Police Station and filed the First Information Report. He blamed appellant-accused Ishwar and his accomplices, namely, Rohidas, Nabi-Jainnuddin, Shivdas and Vishwnath for the death of his daughter Shilavati. Pursuant to F.I.R. of first informant Laxman, Police of Deoni Police Station, District Latur, registered the crime bearing No. 56 of 2008 under section 143, 323, 302 of the I.P.C. and set the penal law in motion.

5] I.O. visited to the scene of occurrence and drawn the panchnama of the spot. He recovered the blood stained earth, simple earth, one boulder around 2 Kgs. weight and one Shawl, both stained with blood, broken pieces of bangles etc. from the spot of incident. He recorded the statement of witnesses acquainted with the facts of the case. I.O. apprehended the accused for the sake of investigation. Meanwhile, Police dealt with the mortal remains of deceased Shilavati and drawn the inquest panchnama. The dead-body of victim Shilavati was referred to Medical Officer for autopsy to ascertain the exact cause of death. Medical Experts conducted the post-mortem on her dead body of victim Shilavati and opined that the deceased died due to hemorrhagic shock owing to fracture of scull and nasal bone, etc. I.O. collected relevant documents of P.M.Report. The seized muddemal, viscera and blood sample of the victim were referred to the Forensic Lab for analysis. I.O. collected the C.A. Report. After completion of the investigation, I.O. preferred the

charge-sheet against the accused for the offence punishable under sections 143, 147, 148, 302 and 323 read with 149 of the I.P.C.

6] The learned Magistrate after receipt of charge-sheet and investigation papers under section 173 of Cr.P.C. registered the proceedings bearing R.C.C.No. 63 of 2009 and transmitted the matter to the concerned Sessions Court for trial of the accused within the ambit of law, as the offences levelled against them, were exclusively triable by the Court of Sessions.

7) The learned Sessions Judge, after compliance of procedural formalities, framed the charges against the accused. The substance of accusation were read over and explained to each of the accused in vernacular, but, they pleaded not guilty. In order to bring home guilt of accused, prosecution adduced the evidence of PW-1 Dr. Manoj Uttamrao Hude (Exh.38), PW-2 Sanjay Ramrao Dongargawe (Exh.42), PW-3 Laxman Pundlik Suvarnakar (Exh.53), PW-4 Laxman Hariba Bargalle (Exh.69), PW-5 Madhav Dhondiba Bochara (Exh.65), PW-6 Govind Vithalrao Suvarnakar (Exh.67), PW-7 Dr. Smbhaji Vishwanath Salunke (Exh.71), PW-8 Honaji Bhujangrao Warane (Exh.76), PW-9 Anwarkhan s/o. Umardaraj Khan (Exh.87). The learned Additional Sessions Judge recorded the statement of accused under sections 313 (1)(b) of Cr.P.C. The accused denied the incriminating circumstances and claimed their innocence and false implication in this case. Learned Additional Sessions Judge appreciated the oral and circumstantial evidence adduced on record and concluded that the appellant-accused

Ishwar Baliram Hude is guilty for the offence punishable under section 302, 323 of the IPC and accordingly imposed the punishment as referred above. The learned Additional Sessions Judge, however, did not come across with sufficient evidence for adverse inference against rest of the accused. Therefore, they all were acquitted for the charges pitted against them. The legality and validity of the impugned judgment and order of learned trial court is under challenge in the present appeals.

8] Learned senior counsel Shri Dhorde appearing for appellant-accused Ishwar scathingly assailed that the evidence of key witnesses PW-3 Laxman and court witness Vimalbai is suspicious, dubious and not believable one. There are material discrepancies in the evidence of these witnesses. Their conduct and demeanor at the relevant time appears doubtful and not free from blemish. Learned senior counsel explained that, these witnesses did not attribute specific overt-act or participation of each of the assailants in the alleged incident of assault. These witnesses woke up after the alleged assault on victim Shilavati. Therefore, they did not receive any opportunity to witness the incident. The PW-3 Laxman did not state that he had chased the assailants and at that time he was assaulted by pelting stones. According to the PW-3 Laxman, the assailants, after seeing him awakened from the bed, started running away towards eastern side of the field. The learned senior counsel Shri Dhorde asserted that, when the assailants came to kill PW-3 Lxman, in such circumstances, there was no reason for the assailants to escape from the spot after seeing him. He submits that, the entire story of

the alleged incident propounded on behalf of PW-3 Laxman appears fabricated and concocted one with ill-intention to implicate the accused in this case. He harped on the circumstances that, these witnesses are related and interested witnesses. The prosecution did not examine any independent witness to corroborate their version for adverse inference against accused. The spot was located in the field abutting to road leading to Kauthala village. There were houses of adjoining land owners nearby the alleged spot of incident. It is also brought on record in cross-examination of these witnesses that, passer-by and on lookers were thronged at the spot, but no independent witness came forward to support the prosecution case.

9] Learned senior counsel Shri Dhorde criticized that the conduct and demeanor of PW-3 Laxman and his wife Vimalbai appears to be abnormal and against the normal human behaviour at the relevant time. They did not take any endeavour to shift the daughter victim Shilavati to hospital for medical treatment at the earliest. But, they allowed victim Shilavati remain with serious bleeding injuries upto 5.00 p.m., when police arrived at the spot for panchnama of her injuries. Learned senior counsel Shri Dhorde also pointed out that first informant Laxman did not disclose about the alleged incident to the police and maintained silence upto lodging the F.I.R. on 21-06-2008 in the night hours at about 9.00 p.m. There was delay in lodging F.I.R. The circumstances created doubt about the trustworthiness and credibility of the evidence of these interested witnesses. The learned senior counsel Shri Dhorde explained the circumstances about litigation in

between appellant and PW-3 Laxman on account of land dispute. He submits that, the PW-3 embroiled the appellant falsely in this case to derive benefit in the litigation. The spot of incident was intentionally shown located in the contentious land Gat No. 164 with purported motivation to prove his possession over it. The learned senior counsel Shri Dhorde drawn our attention towards the recent proceedings under section 107 of Cr.P.C. initiated against PW-3 Laxman. He contends that these circumstances would show hostile atmosphere in between appellant and PW-3 Laxman. Therefore, learned senior counsel fervidly contends that the evidence of PW-3 Laxman and court witness Vimalbai is required to be discarded. In support of his arguments, he kept reliance on the judgments in the matter of (1) *Bacchu Narain Singh Vs. Naresh Yadav and others AIR 2004 SC 3055*, (2) *Rajeevan and another vs. State of Kerala, AIR 2003 SC 1813* (3) *Harijana Thirupala and ors vs. Public prosecutor, High Court of A.P. , Hyderabad, AIR 2002 SC 2821* (4) *Ram Kumar Pande vs. State of M.P., AIR 1975 SC 1026*, (5) *Babu ram and others Vs. State of Punjab AIR 2008 SC 1260*, (6) *Deepak Kumar vs. Ravi Virmani and others (2002) 2 SCC 737* (7) *Kunju Muhammad Alias Khumani and another vs. State of Kerala (2004)9 SCC 193*, (8) *Sunil Kundu and another vs. State of Jharkhand and others, (2013) 4 SCC 422*.

10] Per contra, learned counsel Shri Shejul appearing for First Informant Laxman being victim, in view of Section 372 of Cr.P.C. vehemently submits that the evidence of eye witness' account on record is sufficient to

nailed the accused in this case. They were inimical to the accused on account of land dispute. PW-3 Laxman had an apprehension of attack from the accused who were indulged in the money lending business. The assailants were intending to eliminate the first informant Laxman but they attacked victim Shilavati in mistake. The assailants were under the belief that the first informant PW- 3 Laxman had slept there covering his face with shawl. According to learned counsel, PW-3 Laxman also sustained injuries on his both legs and head due to assault by the accused with stones. The injuries received to PW-3 Laxman indicate his presence on the scene of occurrence. The evidence of witness Vimalbai strengthens the version of PW-3 Laxman on the material aspect. There are minor discrepancies and contradictions in their evidence but same are not fatal to the prosecution case. The spouses did not seek any help from the villagers or the relatives, that does not mean that their conduct was abnormal and it would affect the veracity of their evidence. The evidence of PW-3 Laxman and his wife Vimalbai establishes the presence of the accused, five in number at the spot, while assaulting victim Shilavati. The assailants attacked Shilavati in prosecution of common object of unlawful assembly. Therefore, they all are guilty under section 302 read with 149 of the I.P.C. for murder of victim Shilavati. He fervidly urged to allow the appeal and upset the impugned order of acquittal of respondent-accused. He prayed to convict all the accused for the charges pitted against them. He relied upon the judgments of the Apex Court in the case of **(1) Sham @ Raju R. Anpur and others Vs. State of Maharashtra, 1997 Cri.L.J. 581, (2) Raj Kumar and others Vs. State of U.P., 2002 Cri.L.J.**

2918, (3) Mallinath Gurusiddhappa Birajdar and others Vs. State of Maharashtra and others, 2011 (4) Bom C. R. (Cri) 1, (4) Mallikarjun Ragati Vs. State of Karnataka, 2006, Cri. L.J. 4298, (5) Dalip Singh Vs. State of Panjab, 1997 Cri.L.J. 3647 (S.C.), (6) Ram Gulam Chaudhury and others Vs. State of Bihar, AIR 2001 SC 2842, (7) G. Parshwanath Vs. State of Karnataka, AIR 2010 SC 2914.

11] Learned APP also stepped into the shoe of learned counsel Shri Shejwal and submits that the impugned findings of the learned trial court for acquittal of the accused are erroneous, illegal and contrary to the provisions of law. Therefore, he prayed to upset the impugned judgment and order and accused be punished according to the provisions of law.

12] We have given anxious consideration to the arguments canvassed on behalf of both sides. We have also delved into the attending circumstances as well as oral and circumstantial evidence adduced on record. We find much force in the arguments advanced on behalf of learned senior counsel Shri Dhorde, appearing for appellant Ishwar and others. In view of the mode and tenor of evidence of PW-3 Laxman and his wife Vimalbai, we are unable to persuade ourselves to subscribe to the findings of conviction against appellant Ishwar expressed by the learned trial court. Moreover, the conclusion of acquittal of rest of the accused for the charges pitted against them does not warrant any interference.

13] At the threshold, we prefer to deal with the medical evidence of PW-7 Dr. Sambhaji Salunke. He was the Medical Officer in the Primary Health Center, Hasegaon, Tahsil Ausa, District Latur. He accompanied with his associate Dr. Ujwala Jadhav conducted the autopsy, on the mortal remains of deceased Shilavati. While external examination, they noticed contused lacerated wounds (CLW) on the right parieto temporal region, as well as on left eye-brow, left cheek, nose, fore-arms, etc. The Medical Expert came across with multiple broken fracture of left maxillary bone and fracture to the skull. There were internal injuries to the skull and face corresponding with the external injuries. The Medical Experts classified the injuries sustain to victim Shilavati as “Grievous and sufficient to cause death”. The evidence of Medical Expert candidly proved that, the victim Shilavati met with an homicidal death. PW-7 Dr. Salunke produced the post-mortem report on record (Exh.72). In the cross-examination, PW-7 Dr. Salunke stated that in case the medical treatment would have been received to the victim Shilavati at the earliest, the possibility of her survival could not be ruled out. Whatever that may be, ultimately it seems that the victim Shilavati succumbed to injuries which were caused by hard and blunt object and her death was homicidal in nature.

14] The most contiguous issue to be determined in this matter is, as to whether the accused Ishwar and his accomplices were the author of the injuries sustained to victim Shilavati resulting into her death, and thereby responsible for her death. It is not put in dispute that the family of first

informant Laxman and the accused were familiar with each other being residents of same locality as well as having landed property within the neighbourhood of the village Walandi and Deoni. It is an admitted fact that the alleged crime of murder of victim Shilavati has an chequered history of litigations in between first informant Laxman and the appellant-accused. Obviously, they all were on inimical terms with each other. There was hostile atmosphere and animosity amongst them. In such backdrop, we proceed to evaluate the guilt of the accused as alleged by the prosecution.

15] In order to bring home guilt of the accused, prosecution primarily kept reliance on the evidence of first informant - PW-3 Laxman and his wife Vimalbai. PW-3 Laxman deposed that, victim Shilavati was his daughter. The incident occurred on 20-06-2008 in the field Gat No. 164 of village Deoni. At the relevant time, he accompanied with his wife Vimalbai and daughter victim Shilavati were residing in the tin-shed erected in the field. On the day of incident, i.e. on 20-06-2008, in the night they all went to bed in the field. The daughter victim Shilavati and wife Vimalbai slept in front of the tin-shed, whereas, he himself went to sleep at some distance from the wife and daughter in the field fearing the threats of appellant Ishwar. First informant PW-3 Laxman further stated that, in the wee hours of morning at about 4.30 a.m., he heard screams of the daughter Shilavati. Therefore, he woke up and saw that five persons were assaulting his daughter Shilavati by stones. His wife Vimalbai also awakened from bed. According to PW-3 Laxman, on seeing him assailants started running towards

eastern side of his land. While running away from the spot, the assailants flung stones towards him and inflicted injuries to his both legs and head. First informant PW-3 Laxman deposed that, the assailants were intending to kill him, but attacked his daughter Shilavati in mistake, under the belief that, he had slept there. His daughter Shilavati received serious bleeding injuries on her head, face and ears, etc.,. He escorted injured daughter Shilavati at Government Hospital Walandi and thereafter, she was shifted to Government Hospital Udgir. But, she died at about 7.30 p.m. in the hospital. Thereafter, he visited to Deoni Police Station and filed F.I.R. (Exh.54).

16] The evidence of witness Vimalbai is available on record for appreciation. She was examined as court witness in this case. It is to be noted that, at the fag end of the trial, the learned Sessions Judge found that the examination of the Vimalbai, wife of PW-3 Laxman, was essential for the just and proper decision of the case. Therefore, the witness Vimalbai, wife of first informant PW-3 Laxman was summoned under section 311 of the Cr.P.C. for evidence in this case. While examination on oath, the court witness Vimalbai deposed that, on the day of incident i.e. 20-06-2008, she accompanied with husband PW-3 Laxman and daughter Shilavati, carried out the agricultural operations and in the night hours, they went to sleep in the field. She herself and daughter Shilavati slept in front of the tin shed, whereas, her husband Laxman went to sleep at some distance from them. The witness Vimalbai stated that, on the following day i.e. on 21-06-2008 at about 4.30 a.m. after hearing screams of daughter Shilavati, she as well as

her husband woke up and saw that, her daughter was asleep covering her face with shawl of her husband Laxman. She also witness that, the assailants, five in number, including appellant Ishwar, respondents - Rohidas, Nabi, Vishwanath, Shivdas, all were assaulting her daughter with stones at her head and face. She watched the incident in moon light. The witness Vimalbai and her husband raised hue and cry for help. Thereafter, the assailants started running towards percolation tank on eastern side of the land. Her husband Laxman attempted to chase them. But, the assailants attacked him by pelting stones and inflicted injuries on his legs and head. The court witness Vimalbai further added that, no one else came to help them. Her husband told her to go to the Police Station at Deoni and file complaint. Accordingly, she came to Deoni Police Station at about 10.00 a.m. and verbalized the incident to the concerned police. However, the police made her to sit in the police station and at about 4.00 p.m. they obtained her thumb impression on the blank paper. She had disclosed the names of all five assailants in her report to the police. Thereafter, the police informed that her daughter Shilavati was taken to the Government Hospital at Udgir. Therefore, she came to Udgir and saw her daughter writhing in agony in the hospital. She was not in a condition to speak. At last, Doctor declared her daughter dead at about 7.30 p.m.

17] Prosecution adduced the evidence of PW-2 Sanjay Dongergave to prove the spot panchnama. The P.W-5 Madhav Bochre was the panch for panchnama of injuries of witness Shilavati. The PW-6 Gopal was the panch

to inquest panchnama. Prosecution also examined PW-4 Laxman Bargade, Jeep Driver, who carried the injured to Government Hospital at Walandi and later on to Udgir for medical treatment. PW-1 Dr. Hude produced the injury certificate of first informant PW-3 Laxman. PW-8 and PW-9 are the police personnel, who conducted the investigation into the crime.

18] The intense scrutiny of the entire oral and circumstantial evidence adduced on record reveals that, the entire edifice of the prosecution case is rest on the evidence of PW-3 Laxman and his wife Vimalbai. At the inception, it is to be borne in mind that first informant PW-3 Laxman and his wife Vimalbai, both are interested and related witnesses in this case. In view of the chequered history of litigation since long, the inference can be drawn that these witnesses would get benefit from the result of the prosecution seeing accused persons punished. They were inimical to the accused, following land dispute. The prosecution was reluctant to examine the witness Vimalbai in this case. The prosecution also opposed to call the witness Vimalbai under Section 311 of Cr.P.C. for her examination before the Sessions Court. But, the learned trial court found it imperative to summon the witness Vimalbai for her evidence before the Court to ascertain the truth. In such circumstances, the evidence of these witnesses requires strict scrutiny. However, if the presence of these witnesses at the scene of occurrence cannot be doubted, and their evidence is found consistent with surrounding circumstances and probability of the case, it can be a good foundation for conviction of the accused for the

charges pitted against them. In short, the evidence of these witnesses is required to be analyzed with great care and caution.

19] PW-3 Laxman was the first informant, who filed the FIR and set the criminal law in motion against the appellant-accused. In his evidence, it has brought on record that, in the wee hours of morning, on 21-06-2008 at about 4.30 a.m. he heard the screams of daughter Shilavati. He woke up and saw that the assailants were attacking his daughter with stones, but on seeing him, the assailants started running away from the spot. The assailants also pelted stones towards the first informant PW-3 Laxman and inflicted injuries on his both legs and head. If the spot panchanama (Exh.43) is taken into consideration, it would reveal that there was only one boulder around 2 Kgs. weight smeared with blood on the spot of alleged incident. The police recovered blood stained shawl, broken pieces of bangles, earth stained with blood and simple earth, as well as boulder from the spot under panchanama. It is discernible from the nature of injuries received to victim Shilavati that the injuries caused to her were owing to impact of single blow of boulder having 2 Kg. weight recovered from the spot. There were no other injuries noticed from the dead body of victim Shilavati except at her head and face. If she would have been attacked by five assailants at a time with stones and boulder, the possibility of multiple serious injuries to victim Shilavati including crush injuries could not be ruled out. PW-7 Dr. Salunke, in his cross-examination, explained that the injuries to fore-arm and knees of victim Shilavati would possible while dragging injured from one place to

another. At this juncture, it is to be appreciated that PW-3 Laxman, in his cross-examination stated that due to sunlight his daughter was taken inside the shed. In such attempt, injuries to her fore-arm and knees could be possible while shifting her in the shed for protection from the sunlight. There are no allegations that the assailants dragged his daughter at the time of alleged incident. PW-3 Laxman also did not attribute overt act and active participation of each and every assailant while assaulting his daughter at the time of alleged incident. These circumstances are not compatible with the hypothesis that the victim Shilavati was attacked by five assailants at a time with stones and boulder. Therefore, it is doubtful that the allegations nurtured on behalf of PW-3 Laxman in his FIR against the accused for the incident of assault resulting into serious injuries to his daughter, are trustworthy and believable one.

20] PW-3 Laxman further deposed that assailants were intending to kill him at the time of alleged incident, but by mistake, they attacked his daughter under the belief that he had slept there. He further added that after hearing the screams of his daughter, he woke up and watched the spectacle of assaulting his daughter by the assailants. But, on seeing him, the assailants made their escape good from the spot. He had also stated that while running away the assailants pelted the stones towards him and inflicted injuries to his both legs and head. In view of attending circumstances on record, it is strange to appreciate this version of PW-3 Laxman that the assailants had an intention to eliminate him, but they

assaulted victim Shilavati in mistake under the belief that PW-3 Laxman had slept there, covering his face with shawl. These circumstances do not permit to apply doctrine of transfer of malice to bring the act of assailants within the purview of section 301 of the I.P.C. We are completely at our wit's end that when the motive of assailants was to kill PW-3 Laxman, then for what reason the assailants started running away from the spot, on seeing him awaken from the bed; on the contrary, it was the best opportunity for the assailants to complete their task by attacking PW-3 Laxman in wee hours of the morning on the day of incident. It is preposterous to appreciate the version of PW-3 Laxman that, on seeing him the assailants made their escape good from the spot. The circumstances also caused damage to the credibility of the evidence of PW-3 Laxman for adverse inference against the accused.

21] The witness Vimalbai deposed that her husband PW-3 Laxman attempted to chase the assailants / accused. But, they pelted stones and caused injuries to him. However, PW-3 Laxman did not state about his endeavour to chase the assailants, and, at that time they pelted stones towards him. It is to be noted that, the accused/assailants had no grudge, rancour or malice toward victim Shilavati. There was no reasonable cause for the assailants to onslaught her. According to prosecution, the object of unlawful assembly was to kill PW-3 Laxman. But, the members of unlawful assembly, instead of attacking PW-3 Laxman escaped from the spot on seeing him. It would hard to believe that the assailants had an intention to kill PW-

3 Laxman, but they attacked victim Shilavati in mistake. It remains a conundrum that, even after seeing PW-3 Laxman awaken from the bed, at wee hours of morning, for what reason, the assailants allow to spare him and instead of attacking him, made their escape good from the spot. The occurrence of alleged incident of assault as projected by PW-3 Laxman itself found suspicious and dubious one.

22] In view of attending circumstances, the conduct and demeanor of PW-3 Laxman and his wife Vimalbai seems unnatural and against the human behavioural pattern. PW-3 Laxman in his cross-examination, deposed that, on the day of incident in between 11-00 a.m. to 12-00 noon, near about 20 persons visited to him, but they did not help him. According to panch witness PW-5 Mahadu, while preparing panchnama (Exh.64) of the injuries of victim there were near about 200 villagers thronged at the spot. The police also arrived for panchnama, but PW-3 Laxman or his wife Vimalbai did not disclose about the alleged incident of assault by the accused. Moreover, no one else from the vicinity came forward to depose about the alleged incident of assault on the part of accused. It is also brought on record that there were houses of adjoining land owners in the field nearby the spot of incident. The road leading from village Walandi was a public thoroughfare having traffic of auto rickshaw carrying passengers, but, the prosecution did not examine any independent witness to strengthen the version of related and interested witnesses in this case. The prosecution examined PW-4 Laxman Bargale, Jeep Driver, who carried the injured

Shilavati from the spot of incident to Government Hospital Walandi, and thereafter, to Udgir. But, he had also not stated about the cause of injuries to victim Shilavati, nor PW-3 Laxman disclosed him about the alleged incident. The absence of evidence of independent witness proved fatal to the prosecution case.

23] The evidence of court witness Vimalbai also found suspicious and do not inspire confidence. The court witness Vimalbai was one of the eye witness of the incident. But, the prosecution was reluctant to examine her and attempted to suppress the genesis of the crime. Eventually, the concerned trial Court summoned her under section 311 of the Cr.P.C. as a court witness for adducing evidence. However, while appreciating the evidence of court witness Vimalbai, it seems that, the learned trial Court committed error in appreciating her evidence in it's proper prospective. The learned trial Judge overlooked or glossed over the serious pit-falls and infirmities in the version of spouses i.e. court witness Vimalbai and her husband PW-3 Laxman. The conduct and demeanor of the spouses since beginning appear suspicious and doubtful. The court witness Vimalbai at the relevant time was asleep abutting to victim Shilavati. She stated that, on hearing screams of her daughter, she woke up and saw that, accused, five in number, were assaulting her daughter with stones at her head and face. She recognized the assailants in moon light. It is evident from these circumstances that, the witness Vimalbai had an opportunity to recognize the accused as assailants who were five in number. But, when Vimalbai

visited to the police station for lodging report (Exh.83) about the incident, she spill the beans that the incident occurred at about 7.00 a.m. and the accused Ishwar as well as his three accomplices had beaten up her daughter and husband on account of land dispute. The mode and tenor of the report constrained the concerned police to register N.C. No. 83 of 2008 under section 323, 504 read with 34 of the I.P.C. The report of the witness Vimalbai (Exh.83) was not relates to commission of cognizable offence and therefore it cannot be treated as FIR under section 154 of Cr.P.C. merely because it was received to police first in point of time. But, the report (Exh.83) would be appreciated to corroborate or contradict the version of witness Vimalbai under section 157 or 145 of the Evidence Act. It has brought on record that she recognized the assailants in moon light and they were five in number. Therefore, the report (Exh.83), she gave at that time, should contain details about accused, their weapon and injuries caused to her daughter. But, the alleged report does not contain all these details nor she given names of assailants and their overt-acts.

24] The act of omission to disclose the detail particulars of the crime as well as names of all assailants at the earliest to the police by the eye-witness Vimalbai, devastated the gravity of the allegations nurtured against the accused. It would also affect the probabilities of the alleged incident. The court witness Vimalbai ventured to make allegations that the police made her to sit in the police station uptill 4.00 p.m. and later-on, obtained her thumb impression on the blank paper. We find painful to

accept these allegations against public servants. There are no circumstances on record sufficient to create doubt about the integrity of the police at the relevant time in this case.

25] It is also pertinent to note that, after registration of N.C. report of the witness Vimalbai, the appellant-accused Ishwar and Rohidas filed the report to the police of Deoni Police Station and passed on the information that, while they were returning from Aurangabad to Udgir by S.T.Bus, they came to know that PW-3 Laxman and his associate killed their daughter and brought her dead body in their disputed land Gat No. 164 of village Deoni. The police of Deoni Police Station took the entry of the said report in the Station Diary and rushed to the scene of occurrence to take stock of situation. PW-5 Shri Bochare, panch witness, stated about the panchnama of injuries (Exh.66) to victim Shilavati, drawn by the police at the scene of occurrence, and thereafter, she was escorted to the hospital for medical treatment.

26] It is worth to mention that, since occurrence of the incident, in the morning at about 4.30 a.m. till evening at about 5.00 to 5.30 p.m. the injured Shilavati was, lying at the alleged spot of incident, in field Gat No. 164. However, after preparation of injury panchnama (Exh.66) by the police she was shifted to the hospital for medical treatment. The inaction on the part of PW-3 Laxman to shift his injured daughter Shilavati to hospital, at the earliest caused serious dent in the prosecution case. It would smack

something fishy about the anxiety and ill intention of the PW-3 Laxman to embroil the accused taking umbrage of land dispute. There was also preventive action under section 107 of the Cr.P.C. initiated against PW-3 Laxman prior to alleged incident. These circumstances are not only consistent with the innocence of the accused but inconsistent with their guilt as alleged by the prosecution.

27] There were allegations about the delay in lodging the F.I.R. in this case. The alleged incident occurred at about 4.30 a.m. in the morning of 21-06-2008, but PW-3 Laxman lodged the F.I.R. on the very same day at about 9.00 p.m. and it would fatal to trustworthiness and veracity of the version of PW-3 Laxman. It is true that, since beginning, the accused are clamouring about the suspicious conduct and demeanor of the eye witnesses PW-3 Laxman and his wife Vimalbai. They did not seek help from the neighbourers. The alleged spot of incident was located in the field Gat No. 164 of village Deoni. There were houses of adjoining land-owners nearby the spot of incident. The public thoroughfare leading to village Kauthala was also abutting to land Gat No. 164. The auto-rickshaws carrying passengers used to ply on the said road. But, there was no endeavour on the part of PW-3 Laxman and his wife Vimalbai to approach to the police for lodging FIR about the incident at the earliest. PW-3 Laxman remained at the alleged spot of incident through out the day of incident. He sent his wife Vimalbai to lodge the report of incident to the police. According to prosecution, Vimalbai was illiterate and rustic lady. The PW-3 Laxman had an experience about court

litigation and conversant with legal provisions. He would have lodge detail FIR of the crime to set penal law in motion. There was no reason for PW-3 Laxman to send his wife to the police station to lodge report. It was not unfurled that why the PW-3 Laxman did not visit to the police station at the earliest to ventilate grievances against accused and remained idle for a entire day in the field with victim Shilavati.

28] The court witness Vimalbai stated in her cross-examination that while going to the police station, she met with police constable Shri. Rokde, who was on duty in the area of alleged spot of incident. She did not disclose him about the incident. The police personnel arrived at the scene of occurrence in the evening at about 5.00 p.m. for panchnama of injuries of victim Shilavati, at that time also PW-3 Laxman and his wife Vimalbai did not take efforts to ventilate grievances against the accused for the alleged assault resulting into serious injuries to their daughter Shilavati. It has brought on record that, the denizens thronged at the spot and they were insisting to take the injured to hospital prior to injury panchnama (Exh.66), but PW-3 Laxman and his wife Vimalbai did not ask the police to take injured to the hospital. The silence and reticence on the part of PW-3 Laxman and his wife Vimalbai found detrimental to the prosecution case.

29] Undisputedly, the F.I.R. can be used to corroborate or contradict the maker thereof under section 157 or 154 of the Evidence Act (1) to impeach the credibility of the maker if examined as witness, (2) to

show that involvement of accused was not afterthought, (3) to use it as evidence as to conduct of informant under section 8 of the Evidence Act. It is the rule of law that, FIR is the vital and valuable piece of evidence and on account of delay, it would not only gets bereft of the advantage of spontaneity, but danger creeps in of introduction of coloured version, or exaggerated account or concocted story as a result of deliberation and consultation. The object of insisting upon prompt lodging of F.I.R. to police in respect of commission of crime is to obtain early information regarding the circumstances in which the offence was committed, the names of actual assailants, and the role played by each of them, etc. In case, there was delay in F.I.R., it should be satisfactorily explained and if it is not properly explained, it would be unsafe to base conviction on the basis of this delayed F.I.R. In the matter in hand, there was colossal delay of more than 10 to 12 hours to lodge FIR since occurrence of alleged incident. Obviously, it would create doubt about truthfulness of the evidence of PW-3 Laxman and his wife Vimalbai. There was no plausible explanation on the part of prosecution witnesses for delay in lodging the FIR. The conduct and demeanor of key witness of the prosecution appears suspicious and against the human behavioural pattern. If in reality the alleged incident would have taken place in the wee hours of morning, PW-3 Laxman and his wife Vimalbai should have ventilated the grievance against the accused to the onlookers, denizens, passerby, etc., Moreover, there were no efforts to shift their injured daughter Shilavati to the hospital for medical treatment at the earliest. They maintained silence uptill 9.00 p.m. and thereafter the PW-3

Laxman blamed the assailants for injuries sustained to his daughter Shilavati for the first point of time in his FIR (Exh.54). Taking recourse of the legal guidelines delineated in the cases (1) *Bacchu Narain Singh Vs. Naresh Yadav and others AIR 2004 SC 3055*, (2) *Rajeevan and another vs. State of Kerala, AIR 2003 SC 1813* (3) *Harijana Thirupala and ors vs. Public prosecutor, High Court of A.P. , Hyderabad, AIR 2002 SC 2821*, we are of the opinion that there is serious doubt about the occurrence of alleged incident of assault, resulting into fatal injuries to victim Shilavati.

30] The prosecution much more gave emphasis on the legal issue of motive of the crime. There were litigation on account of land dispute in between the PW-3 Laxman and accused. Taking umbrage of the land dispute, the accused with motive to eliminate PW-3 Laxman attacked his daughter in mistake. It is imperative to appreciate that the motive is double edged weapon, which cuts both ways, helping or harming, both the prosecution and the defence. It is to be noted that the motive cannot by itself sustain a criminal charge although proof of motive may lend assistance to the evidence with regard to the actual occurrence; nor an offender can be set free simply for want of motive in the prosecution case. Where there is some motive to commit crime but no reliable evidence is available to connect any of the accused with the alleged crime, the accused persons would entitle to be acquitted for the charges pitted against them. Obviously, the motive is something which prompts a man to form an intention to commit offence. Motive is the reason which induces or activates

a man to do a certain act. In the instant case, we would reiterate that the alleged crime has an chequered history of litigation. Prior to the alleged incident of assault on victim Shilavati, there were complaint against accused under Money Laundering Act as well as there was a proceeding under Section 107 of Cr.P.C. initiated against PW-3 Laxman at the behest of appellant Ishwar. These circumstances are sufficient for drawing an inference that there was hostile atmosphere amongst the accused. The PW-3 Laxman and accused were at logger-heads following the land dispute. According to prosecution, the accused with a motive to eliminate PW-3 Laxman in mistake attacked his daughter. As mentioned supra, the motive is a double edged weapon and when there existed serious enmity between the parties, the motive for accused to kill first informant Laxman and motive for first informant Laxman to implicate the accused was equally balanced; then the court has to look to surrounding circumstances to find out the truth. It is to be noted that the accused came forward with a specific defence that on account of animosities, PW-3 Laxman embroiled them falsely in this case. In view of attending circumstances on record and suspicious nature of evidence of the PW-3 Laxman discussed above, we find substance in the defence propounded on behalf of the accused. We would reiterate that where the evidence of the prosecution witnesses to prove the crime is not satisfactory even strong motive cannot furnish the lacuna in the prosecution case. The factor of motive though relevant is required to be considered alongwith rest of the evidence and it cannot be treated as evidence of crime itself. Therefore, mere enmity in between the accused and PW-3 Laxman

following land dispute, would not be a decisive factor to draw adverse inference against the accused in this case.

31] In catena of cases, the Honourable Apex Court observed that, different persons react differently under given circumstances. It is difficult to lay down a hard and fast rule, as to how and in what manner a person would react and in order to achieve his motive, he could go to what extent in the commission of crime under particular circumstances. It is not possible to measure up the extent of his feelings, desire so as to know, what compelled him to commit a particular act. At this juncture, the circumstances constrained us to appreciate the report filed on behalf of accused Ishwar and Rohidas to the police (Exh.84) prior to F.I.R. Pursuant to which, the police reached to the scene of occurrence to take stock of situation and drawn the panchnama of the injuries of victim Shilavati. This report pointed out the needle of suspicion towards PW-3 Laxman and his wife Vimalbai themselves for the injuries sustained to his daughter. These circumstances also require to be considered as mitigating circumstances favouring the accused.

32] Learned counsel Shri Shejwal, relied on the judicial pronouncement in the matter of *Rajkumar and others vs. State of UP* (cited supra) and submits that strained relations in between PW-3 Laxman and accused proved the motive and evidence of prosecution witnesses also corroborated by medical evidence. Therefore, there is no impediment to

convict the accused for the charges pitted against them. He has also relied upon the case of *Sham @ Raju Vs. State of Maharashtra (supra)* as well as the judgment of the Division Bench of this Court in the case of *Mallinath Gurusiddhappa Birajdar and others Vs. State of Maharashtra and others, (supra)* and submits that the injuries received to PW-3 itself establish his presence on the scene of occurrence. Therefore, his evidence cannot be discarded for some discrepancies and contradictions in his evidence. He also relied on the exposition of law by the Apex Court in the matter of *Mallikarjun Ragati Vs. State of Karnataka, 2006 (supra)*.

33] We have carefully examined the legal guidelines delineated in the aforesaid judicial pronouncements but it appears that the facts and circumstances of these judicial pronouncements are not akin to the attending circumstances in the matter in hand. All these cases are distinguishable on the facts as in all these cases some peculiar facts were found which probabilies the case of the prosecution. These judicial pronouncements appear not profitable to the prosecution and seems misplaced in this case. It would not advance the arguments put forth on behalf of first informant PW-3 Laxman.

34] At the cost of repetition, we would like to mention that since beginning, the conduct and demeanour of the PW-3 Laxman and his wife Vimalbai appears incredulous and dubious in nature. They did not lodge FIR about the incident promptly at the earliest and maintained the silence for colossal period of 10 to 12 hours till lodging the FIR at belated stage at about

9.00 p.m. The behaviour of these star witnesses of the prosecution, after the alleged incident also appears unnatural and against normal human behaviour. Therefore, the mere factum of sustaining injuries to the PW-3 Laxman do not make his evidence qualify being cogent and credible for appreciation in this case. It would be unsafe to fasten the guilt on the accused on the version of injured witness PW-3 Laxman and his wife Vimalbai. The Division Bench of this Court at its Principal Seat at Bombay had an occasion to deal with evidence of injured witness in the case of **Narayan Kanu Datavale and others Vs. State of Maharashtra, 1997 Cri. L.J. 1788**, in which, in para 9 it has been observed as under :-

“The short question in this appeal is as to whether the testimony of the three eye-witnesses namely Tukaram, Janardhan and Laxmi who are the brother, son and the mother of the deceased respectively, inspires confidence or not ? Our answer to the same is in the negative. While giving the said answer, we are conscious of the fact that Tukaram and Laxmi are injured witnesses according to the prosecution and normally, this Court is loath to reject the testimony of a injured witness. However, there is no immutable rule of appreciation of evidence that the evidence of injured witnesses should be mechanically accepted as gospel truth for injuries may only at the best ensure presence of a witness but, are no guarantee of his credibility and truthfulness. It is an elementary norm of appreciation of evidence that before the testimony of even an injured witness can be accepted, it has to pass the test of truthfulness and should be in consonance with probabilities. We are reformed in our view, by the decision of the Allahabad High Court, reported in 1984 All LJ 1316, (Vijay Shankar Misra V. State) wherein paragraph 22 their Lordships have observed thus :-

“It is no doubt correct that if a witness is injured, then his presence on the spot at the time and place of occurrence is prima facie established but

for basing conviction solely on the evidence of an injured witness, is necessary that the injured witness must be held to be a wholly reliable witness. Wherein in a case there is the sole evidence of the injured witness against the accused and if it is shown that there is material infirmity and falsity in some part of his evidence, then it will not be at all safe to convict the accused solely on the evidence of the injured witness relying upon the eye-witnesses's account given by him without independent corroboration by material evidence.”

35] In the instant case, the evidence of injured Laxman do not inspire confidence and found not credible. In such circumstances we are of the view that the quality of evidence of witnesses on record is not upto the mark and sufficient to satisfy judicial conscience to record verdict of guilt of accused on such evidence slender in nature. We are not inclined to accept the allegations nurtured on behalf of prosecution against the accused. The death of victim Shilavati was homicidal in nature, but, the prosecution miserably failed to prove the nexus and proximity of the appellant-accused with the alleged cause of death of victim Shilavati. The quality of evidence adduced on record do not permit us to draw an inference against the accused for the charges pitted against them. Therefore, having given due consideration to the evidence of prosecution witnesses on record, we do not find any impediment to absolve the accused for the charges levelled against them. We are of the opinion that the findings expressed by the Trial Court against the appellant Ishwar appears erroneous, illegal and not within the purview of law. However, the conclusion drawn by the learned Trial Court in regard to

acquittal of the rest of the accused for the charges against them appears just, proper and reasonable and it would not warrant any interference.

36] In the result, the Criminal Appeal No.239 of 2013 of appellant Ishwar is hereby allowed and his conviction recorded by the learned Trial Court in Sessions Case No. 59 of 2009 is quashed and set-aside. The appellant Ishwar is acquitted of the offence under section 302, 323 of the Indian Penal Code. It is informed that appellant Ishwar is in jail being a convict in the crime. He be set at liberty forthwith, if not required in any other crime. The fine amount, if any, paid be refunded to appellant- Ishwar. However, the other appeals, i.e. Criminal Appeal No. 463 of 2013 and Criminal Appeal No. 664 of 2014 stand dismissed and disposed of accordingly. Registrar (Judicial) to transmit copy of this judgment and order to the concerned Jail Authority and to the appellant Ishwar, immediately, for further process. The appellant- Ishwar shall furnish the bail bonds of Rs. 15,000/- and surety of like amount under Section 437-A of Cr.P.C. before the concerned trial court at Udgir.

[K.K.SONAWANE]
JUDGE

[S.S. SHINDE]
JUDGE

grt/-