

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 66 OF 1995

- | | | | |
|---|-----------------------------------|---|---------------|
| 1 | Sagir Ahmed Nasir Ahemed Ansari |) | |
| | residing at Room No. 11, Mehmood |) | |
| | Maqbool Chawl, Behram Baug, New |) | |
| | Link Road (Near Badar Masjid), |) | |
| | Jogeshwari (West), |) | |
| | Bombay 400 102. |) | |
| | |) | |
| 2 | Abdul Kadar Abdul Razak, |) | |
| | residing at Room No. 5, Shivpujan |) | |
| | Gupta Chawl, Behram Baug, |) | |
| | Jogeshwari (West), |) | |
| | Bombay 400 102. |) | |
| | |) | |
| 3 | Zuberuddin Sartajuddin Munshi, |) | |
| | residing at 17A/3, Gulistan |) | |
| | Co-operative Housing Society, |) | |
| | Kapadia Nagar, C.S.T. Nagar, |) | |
| | Kurla(West), |) | |
| | Bombay 400 070. |) | ..Appellants. |

Versus

The State of Maharashtra.

..Respondent.

WITH

CRIMINAL APPEAL NO. 31 OF 1995

Rais Khan Ahmed Khan.	)	
residing at Room No. 30,	)	
Ground floor, Ahmed Khan's Chawl,	)	

Bandra Plot Road, Jogeshwari,
Bombay 400 060.

)
)..Appellant.

Versus

The State of Maharashtra.

..Respondent.

WITH

**CRIMINAL APPEAL NO. 41 OF 1995
ALONG WITH
CRIMINAL APPLICATION NO. 959 OF 2016
WITH
CRIMINAL APPLICATION NO. 949 OF 2016**

Nijamuddin Sartajuddin Munshi,
residing at Abida House,
Behram Baug, Link Road,
Jogeshwari, Bombay 400 102.

)
)
)
)..Appellant.

Versus

The State of Maharashtra.

..Respondent.

Mr. Shyam Kalyankar, for Appellant Nos. 1 and 2 in Appeal No. 66/95.

Mr. S.R. Phanse, amicus curiae for Appellant in Appeal No. 31/95 and amicus curiae for appellant No. 3 in Appeal No. 66/95.

Mr. Avinash Gupta, Sr. Advocate i/b. Dewani & Associates. for the appellant in Appeal No. 41/95.

Mrs. P.P. Shinde, APP for State.

**CORAM : R.M. SAVANT &
SMT.SADHANA S. JADHAV,JJ
JUDGMENT RESERVED ON: NOVEMBER 30, 2017
JUDGMENT PRONOUNCED ON : DECEMBER 19, 2017.**

JUDGMENT :(PER SMT. SADHANA S. JADHAV,J)

The above Appeals were heard and reserved for Judgment on 20th July,2017. The original accused No.1 – Nizamuddin Sartajuddin Munshi was absconding, this Court has therefore appointed Advocate Shri Shantanu Phanse as amicus curiae to represent the original accused No.1. The non-bailable warrant issued against the original accused was awaiting execution and the police has sought time to execute the same as the earlier attempts had failed. The Judgment was therefore not pronounced. In the meanwhile, the original accused No.1 filed Criminal Application No.1536 of 2017 on 9th November,2017 expressing a desire to surrender and be represented by Senior Counsel Shri Avinash Gupta. Hence, with a view to afford a fair opportunity, this Court allowed the said application, whereby the accused accused No.1 was taken into

custody on 15.11.2017 and fixed the hearing of the Appeal No.41 of 1995 on 30.11.2017 to hear the submissions of the learned Senior Counsel Shri Avinash Gupta. That is how the judgment is now being pronounced today i.e. 19th December, 2017.

2 The Appellants herein are convicted for the offences punishable under section 302, 143, 144, 147, 148, 149, 307 of the Indian Penal Code and sentenced to suffer R.I. for life by the Additional Sessions Judge, Mumbai in Sessions Case No. 634 of 1991 vide Judgment and Order dated 12/1/1995. Hence, this Appeal.

3 The case of the prosecution is as under :

(i) On 8/2/1991 Mohammed Ashfaq Khan Mumtaj Khan lodged a report at the police station alleging therein that he resides in a chawl in room No. 1, which belongs to Shankar Feku Yadav(hereinafter referred to as Shankar Seth). That there are 13 rooms. Shankar Seth had purchased the land from a Parsi trust. The accused No. 1 Nijamuddin and his brother-in-law Abdul Kadar were

claiming the said piece of land and hence, there were civil suits pending between the parties.

(ii) According to the Complainant, on 25/12/1990 Nijamuddin, Zuber, Sagir and Kader had obtained signatures of the complainant on two blank papers under coercion and had taken possession of the residential room. A report was lodged at the Oshiwara Police Station.

(iii) On 8/2/1991 at about 7.45 p.m. the complainant and Shankar Seth were sitting in front of Yadav Lime Depot and chitchatting with Ramkaran Yadav and Shekhar Tiwari. At about 8 p.m. one police constable namely Dhadas who was acquainted with the complainant was going towards Behraum Baug. He was stopped by the complainant. Suddenly 8 to 10 persons came at the spot. They were armed with weapons such as sword, stick. One amongst them had assaulted Dhadas on his head by a stick in his hand from rear side. According to the complainant, Nijamuddin i.e. accused No. 1 had assaulted Shankar Seth with sword at the same time.

(iv) The complainant had also witnessed Abdul Kadar and Nijamuddin Munshi assaulting Shankar Seth on his chest with sword, Sagir and Zuber had assaulted on his hand and on his rib with sword. Nijamuddin assaulted Shankar Seth on his back by sword.

(v) When the assault was going on, the persons accompanying Shankar Seth were initially requesting miscreants not to assault and thereafter, they had run inside the gate to search for some weapons to use in defence.

(vi) The complainant and Harilal Yadav took Shankar Seth to Cooper Hospital. On the way, he had become unconscious.

(vii) That PSI Anpat who was posted at Oshiwara police station had also reached the hospital. The complainant has given description of unidentified persons in the first information report.

(viii) On the basis of the said FIR, Crime No. 72/1991 was registered initially for offences punishable under section 307, 324, 143, 144, 147, 148, 149 of the Indian Penal Code.

(ix) After Shankar Yadav succumbed to the injury Section 302 of the Indian Penal Code was added.

(x) After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions Case No. 634 of 1991. The prosecution examined 20 witnesses to bring home the guilt of the accused.

4 P.W. 1 Mohammed Ashfaq Khan Mohammad Mumtaz Khan is an eye witness to the incident. He has deposed before the Court that he resides in Shankar Seth's Chawl and Shankar Seth happens to be the owner of the said building. Shankar Seth had purchased a piece of land admeasuring about 1200 sq. yards from the Parsi Trust. There was a dispute between the original Accused Nos. 1 to 3 and 5 and Shankar Seth over the said piece of land.

5 According to P.W. 1, when he had been to his native place, he left the keys of his house with the neighbour. That the accused Nos. 1 to 3 and 5 had demanded the said keys from the neighbour and had put on their own lock to the room of P.W. 1. After he returned from his native place, he learnt about it from the

neighbour. He had been to the house of accused No.1 to enquire about the said incident and at that time, the accused Nos. 2 and 5 had assaulted him and he was threatened of dire consequences by the accused No. 1. According to P.W. 1, the accused No. 1 had asked him to sign certain blank papers under coercion. He had lodged complaint about the said incident after 8 days with Oshiwara Police Station. According to prosecution, this part of evidence would substantiate the motive of the accused in commission of the offence.

6 As far as the incident in question is concerned, P.W. 1 has deposed that on 8/2/1991 in the evening he was sitting with Shankar Seth, Ramkaran and Tiwari opposite Yadav Lime Depot at Behram Baug. He was sitting on the bench with Shankar. They had seen constable Dhadas passing by the road. Constable Dhadas was in civil dress. P.W. 1 was acquainted with him. He had called constable Dhadas and exchanged salutation with him and further requested him to have a cup of tea. P.W. 1 was chatting with Dhadas just near the bench. Suddenly accused No. 4 had appeared on the scene behind

constable Dhadas and assaulted him on his head with a wooden stick. Then Accused No. 1 Nijamuddin had assaulted P.W. 1 on his right shoulder with sword and at the same time, 4 to 5 persons were assaulting Shankar Seth.

7 It is further stated that while Shankar Yadav was avoiding the blow he had sustained injury on his right side elbow of his hand. The Accused No. 5 had assaulted Shankar Yadav on his right side ribs below armpit with sword. Nijamuddin had assaulted Shankar on his back with sword. As a result, Shankar had fallen on the ground. Even thereafter, the accused No. 1 continued assaulting Shankar with sword above left side waist. People had started running helter skelter out of fear. Two persons accompanying Shankar Yadav had rushed inside the gate. P.W. 1 had also rushed inside the gate to find some wooden stick in order to assault the accused. Shankar Yadav had fallen unconscious. He was taken to the hospital by Harilal Yadav. Harilal Yadav happens to be the cousin of Shankar Yadav.

8 According to P.W. 1, the deceased had regained consciousness in the taxi and had requested him to take him to the hospital as he was not feeling well. P.W. 1 was also treated as he was injured. He met PSI Anpat at the hospital. P.W. 1 claims to have disclosed the names of the other accused persons to PSI Anpat as well as names of the persons who had mounted assault on Shankar Yadav.

9 P.W.1 has further stated that he had also sustained injuries on his right shoulder and therefore, he had requested Hari to take Shankar to the hospital. That according to P.W. 1, Hari was also present at the time of incident. That when they were in taxi and Shankar was told that they would go to police station, he had told them that he should be first taken to the hospital. P.W.1 had allegedly disclosed the names of accused No. 1 Nijamuddin, Jaber Accused No.5, Abdul Kadar Accused No. 3 and Sagir Accused No. 2. He had also informed PSI Anpat that the above mentioned accused were accompanied by three more unknown persons, whose

description he had given to PSI Anpat. He has proved the contents of the FIR which is marked at Exh. 16.

10 P.W. 1 has referred to the first FIR filed by him at Oshiwara Police Station when he was forcibly evicted from his room by Accused Nijamuddin and others. He had guided the police while conducting the scene of offence panchanama.

11 It is pertinent to note that P.W.1 has categorically stated that on 18/5/1991 he was called at the police station by the police officer and was informed that the accused are arrested and that the Special Executive Magistrate is to visit the police station. That the test identification parade was held at the police station. He has identified his clothes seized in the course of investigation.

12 It is elicited in the cross-examination that there are two Yadav Chawls and he is residing in one of the them. One Ali Mohd is residing in room No. 2 next to him. One Niyazbhai and Mangal Kumar owned garage in the said vicinity. He has expressed his

inability to give the date when the incident had occurred. That the distance between Yadav Chawl and residence of accused Nos. 1, 3 and 5 is about 100 meters. They were also residing in the same chawl. P.W. 1 has feigned ignorance as to whether the chawl belongs to accused Nos. 1, 3 and 5. He had learnt from the deceased that the accused No. 3 is the brother-in-law of accused Nos. 1 and 5. That there was an injunction in favour of Shankar and against accused Nos. 1 and 5. P.W. 1 used to accompany Shankar to the court but could not recollect the date when the injunction order was passed. According to him, the original accused No. 1 had forced him to sign the stamp papers. The accused No. 1 had locked the room of P.W. 1 when he was out of station and therefore, he was constrained to lodge the report against the accused No. 1 at the police station. Deceased Shankar had accompanied him to the police station at the relevant time.

13 It is elicited in the cross-examination that it was PSI Anpat who had taken P.W. 1 from Cooper Hospital to Police station

to enable him to lodge the report in respect of the said incident. P.W. 1 has admitted that apart from havaldar Dhadas he did not know anybody from Oshiwara Police Station. He has also deposed in the cross-examination that Yadav Lime Depot was at the distance of 8 to 10 feet from the place where Shankar was chitchatting with P.W. 1 and other witnesses. That the assailants had come from the rear side of Dhadas. First Dhadas was assaulted and then Shankar and P.W.1. P.W.1 has deposed before the Court that he had seen the faces of the assailants as they had surrounded him. According to PW 1, when the assault commenced, he went to the gate to get some weapon and in search of a piece of wood. In the meanwhile, the accused assailants were fleeing from the spot of incident. That Ramkaran Hari Tiwari and P.W. 1 were requesting the assailants not to assault. He has specifically stated that he was assaulted by sword and another blow was given by stick.

14 P.W. 2 Ramkaran Yadav also claims to be an eye witness to the incident in which Shankar had sustained fatal injuries. He was

acquainted with Shankar for more than 20 to 25 years. That according to P.W. 2, he was also acquainted with P.W. 1 who happens to be the tenant of Shankar Yadav. He has identified the accused before the Court and has reiterated that the accused Nos. 1, 2, 3 and 5 had forcibly taken possession of the room of P.W. 1 and hence, the complaint was lodged against them. They had also forcibly taken possession of the piece of land and two chawls from Shankar Yadav. He has narrated the incident by stating that Shekhar Tiwari, P.W. 1 and 2 were chitchatting. One police constable had come across and greeted them. Ashfaq got up from his seat, walked 5 to 6 steps towards that constable and at that time, 5 to 6 persons had come from behind and mounted assault on them. The first assault was on the constable. P.W. 2 had pointed towards accused No. 4 as the same person who had assaulted the constable by stick on the back of his head. P.W. 2 also claims to have run towards lime depot for getting a stick to retaliate. In the meanwhile Shankar had fallen on the ground in an injured condition with bleeding injuries. Hari and P.W. 1 had taken Shankar to Cooper Hospital.

P.W. 2 claims to have followed the taxi in which Shankar was carried to Cooper Hospital. He also claims to have gone to Oshiwara Police Station at about 11 p.m. where his statement was recorded. That he had identified 3 persons at the identification parade which was held at the police station and that accused No. 4 was one of those 3 persons whom he had identified.

15 It is elicited in the cross-examination that Yadav Lime Depot is run by him. P.W. 2 has also given topography of the scene of offence. He claims to know the accused Nos. 1,2, 3 and 5 since 5 to 6 years prior to the incident as they are residing in their neighbourhood. There were inimical terms between the accused Nos. 3 and 5 and deceased Shankar. That P.W. 1 and 2 and the deceased used to meet regularly and sit together. According to P.W.2, on the date of incident, they were all chitchatting. That the accused mounted assault upon Shankar. He has specifically admitted in the cross-examination that accused No. 1 Nijamuddin was leading the other accused persons. That the accused No. 1 had assaulted

Shankar by sword. Out of seven, two were armed with stick. He had called for help but nobody came on the spot. His servants were inside the depot at the time of the incident and therefore, he had rushed towards the lime depot to search for a stick. He had reported the incident to PSI Anpat which was reduced into writing.

16 P.W.3 Kisan Dhadas was attached to Oshiwara Police Station as a police constable. He has deposed before the court that on the day of the incident when he was passing from the front of Yadav Lime Depot, Mohd. Ashfaq called him. At that time, Mohd. Ashfaq was in the company of 2 to 3 persons. Mohd. Ashfaq was proceeding towards him to extend greeting while Shankar Yadav was sitting on a bench with other person. Suddenly he was given a blow by hard and blunt object on the back of his head. He saw that at the same time, somebody was assaulting Ashfaq. P.W. 2 had rushed into Lime Depot to search for some stick. He had sustained bleeding injuries. When he returned to the spot, he learnt about the fact that Shankar Yadav was assaulted by sword. They all went to Cooper Hospital. Mohd.

Ashfaq was also treated as he had also sustained injury. While Shankar Yadav was admitted in the ICU, Sub-Inspector Anpat who is attached to Oshiwara Police Station had come to the hospital.

17 It is apparent that neither the persons accompanying Shankar Yadav nor the assailants were known to P.W. 3, who had feigned ignorance about the area where the offence had taken. According to him, the distance between the scene of offence and Oshiwara Police Station can be travelled within less than 15 to 20 minutes by auto. It is admitted that Oshiwara Police Station is on the way to Cooper Hospital. It is also admitted that Yadav Lime Depot is surrounded by shops. He had no knowledge as to whether there is telephone connection in the Lime Depot. It is admitted that his supplementary statement dated 19/2/1991 was recorded by PSI Anpat. It is also admitted that he had not seen any person who was accompanying Shankar Yadav in the Lime Depot. P.W.3 has further admitted that he was not knowing Shankar Yadav. It is therefore clear that P.W. 3 is not an eye-witness to the assault upon Shankar

Yadav. P.W. 1 and P.W. 2 are falsified to the extent that they were in Lime Depot searching for sticks to retaliate.

18 P.W.4 Ramjit Sahdev Yadav is the son-in-law of deceased Shankar Yadav. According to him, in the year 1983, Shankar Yadav had purchased a plot of land from a Parsi Trust and also a chawl which he had given on rent. P.W. 1 was one of the tenants in the chawl. He was knowing the accused Nos. 1 to 3 by name. That Zuber Munshi is the brother of accused No. 1. That his father-in-law was on inimical terms with Accused Nos, 1 to 3 and Zuber. The bone of contention was the plot of land which he had purchased from the Parsi Trust. The accused claimed ownership over the said land which the deceased had purchased in a dispute. His father-in-law had filed a civil suit against the accused and P.W. 1 was assisting him. The witness had identified the accused in the court.

19 It is also alleged that on 6/2/1991 the accused Zuber had threatened his father-in-law in the court premises. On 8/2/1991

when P.W. 3 was sitting in Gulab Restaurant at about 8.15 p.m. Manilal informed him that Shankar was lying in a pool of blood at Behram Baug. Manilal happens to be the common relative of Shankar Yadav and P.W. 4.

20 According to P.W. 4, he had rushed to the hospital and met his father-in-law in ICU. Upon enquiry his father-in-law informed him that accused No. 1 and his associates had assaulted him and that they need to be punished. He had also further instructed P.W. 4 that they should take revenge. On 9/2/1991 P.W. 4 had been to Oshiwara police station and at that time 3 accused persons were present in the police station and one of them was Nijamuddin Sataruddin Munshi. His father-in-law also knew Nijamuddin Munshi. The prosecution had introduced the oral dying declaration of Shankar through P.W. 4.

21 It is elicited in the cross examination that he alone had been in the ICU to meet his father-in-law, whereas his mother-in-law

and other family members had not gone inside the ICU nor his father-in-law had enquired with him about other members of the family. It is also elicited that the disclosure statement made by his father-in-law was not conveyed to anybody by him. P.W. 4 has deposed in the cross-examination that Gulab Restaurant is situated at a distance of 1 or 1 ½ k.m. from the scene of offence, from where Manilal had come.

22 P.W.5 Narendra Dhemre is a draughtsman who had drawn the map of the scene of offence. Since the scene of offence is admitted, it would not be necessary to discuss the evidence of the said witness.

23 P.W. 6 Dhirendra Tripathi was Special Executive Magistrate at that time. The Police had contacted him on 17//5/1991. Accordingly, he had visited police station on 18/5/1991. He has selected the panchas at the police station. It is admitted position that the test identification parade was conducted at the police station. He has narrated the steps taken by him in

conducting test identification parade. It is elicited in the cross-examination that he had seen all the 20 dummies in the room of PI Khalkamkar. He had selected the dummies who were about 20 to 35 years old. It is admitted that P.W. 6 had not obtained signatures of all the panchas on all the pages of memorandum of test identification parade. He himself has signed all pages except last page.

24 P.W. 7 Vasantryao Shevale was attached to Juhu Police Station since 7/8/1990. He was posted at Cooper Hospital and was incharge of emergency police register. According to him, on 8/2/1991 when he was on duty, injured was brought to the emergency ward of Cooper Hospital by his brother Harilal Yadav. They were also accompanied by 2 to 3 more persons. The information was given to him by Harilal Yadav. The entry is at number 503.

25 P.W. 8 Ashok Jadhav was officiating as police constable at Oshiwara police station and was a member of crime detection squad.

He has deposed before the court that on 8/2/1991 at about 8.30 p.m. he had accompanied PSI Anpat to Cooper Hospital for investigation. He has then stated that in fact, he had gone for investigation in another case. They had learnt that Shankar Yadav was admitted in ICU and upon further enquiry, they found that he was in an unconscious condition. He has identified the clothes of the injured. It is elicited in the cross-examination that nobody was accompanying the deceased in the ICU. There was no seizure panchanama as far as the clothes of the injured was concerned.

26 P.W. 9 Girish Jariwala had acted as panch for the seizure of blood stained clothes of the deceased. The said panchanama is at Exh. 37.

27 P.W. 10 Nafiz Shaikh has also acted as panch for the scene of offence. The panchanama is at Exh. 39. He has admitted in the cross-examination that Ashfaq did not show his shop to the panchas but had shown the place where he was assaulted. It is

further admitted that the trail of blood was seen from the bench to the gate of Yadav Lime Depot. It is pertinent to note that wooden planks were found on the bench where the deceased was sitting and chatting with his friends and the trail of blood was found near the bench till the Lime Depot.

28 P.W. 11 Dr. Rajaram Marathe had conducted autopsy on the dead body of Shankar Yadav on 9/2/1991 and the post mortem notes are at Exh. 41. It is admitted in the cross-examination that except injury No. 17, no other injuries were fatal. Injury No. 17 was a cut through and through. Injury No. 17 is incise wound 4.5 x 0.5 x Cavity on 12th rib near vertebral column. Upon perusal of the post mortem notes, it is clear that the other injuries were on elbows, shoulder, supra mammary region, infra mammary region, scapula region and one on the head was incise wound which was 1.5 x 0.5. The cause of death was shock due to multiple injuries.

29 P.W. 12 Dr. Manoj Kumar Shenoy was attached to Cooper Hospital on 8/2/1991. According to him, on that day, Shankar was admitted at about 9.15 p.m. and he expired at about 10.15 p.m. He was admitted in ICU. The Patient was conscious at the time of admission and there is entry to that effect. He did not regain consciousness. The history of assault was given by the constable accompanying the patient that day in the evening. The injury on the 12th rib was the fatal injury. He had also noted in the notes as - "History of assault Unconsciousness since then."

30 P.W. 13 Babasaheb Chougule was attached to Oshiwara Police Station. In the night intervening between 8.2.1991 and 9.2.1991, he was informed about the case. He went to Oshiwara Police Station and saw that Crime No. 72 of 1991 was registered under various sections. He took the charge of investigation from PSI Anpat on 9/2/1991. He had recorded statement of Ramjit Yadav, Gulab Shankar Yadav and had arrested accused Nos. 1, 2 and 3. He had interrogated them on 10/2/1991 he could not recover any

weapon at the hands of accused Nos. 1, 2 and 3. Investigation was then transferred to PI Mr. Bhamre. It is admitted that initially, Crime No. 72 of 1991 was registered under section 307 of the Indian Penal Code and on the next date it was altered to 302 of the Indian Penal Code.

31 P.W. 14 Dr. Rohit Shah was also attached to Cooper Hospital. According to him, the patient was brought at about 8.35 p.m. He had examined the patient. He has given the description of the injuries sustained by the patient as observed by him. The injured Mohd. Ashfaq, Kisan Dhadas were given preliminary treatment and discharged. The witness was cross-examined at length in respect of the injuries sustained by the deceased which are as follows :

- 1 C.L.W. Left side of chest 2 inches above and medium to nipple 2 inches x 1 inch x quarry deep.
- 2 C.L.W Left arm 1 ½ inches x 1/6 inches x quarry deep.
- 3 C.L.W. Left below chest 1 ½ inches x 1/5th inches x quarry deep.
- 4 2 C.L.W. Over back 1 ½ inches x ½ inches x quarry deep.

32 In view of the evidence of P.W.14, it is clear that the cause of death was shock due to multiple injuries and more particularly the incised wounds which are mentioned in the column No. 17 and which are corresponding injuries in column No. 19 and 20. The said injuries are as follows :

- (1) IW (two) 1.5 x 5D x 0.5 & 1 x 5D x 0.5 on parietal region.
- (2) Abrasion 10 cm on right arm laterally.
- (3) IW 5.5 x 2 MD right forearm lateral near elbow.
- (4) IW 4 X 1.5 X MD on right arm medially near elbow.
- (5) IW 7.5 x 1.5 x MD on right interphalangeal space between thumb and index finger.
- (6) IW 2 x 1 X BD on right 1st index index phylangeal.
- (7) IW 1.3. x 0.3 x SD on right middle finger near nail.
- (8) Slicing wound 3 x 2 x SD on left shoulder.
- (9) IW 6 x 1.5 x SD on left supramammary region.
- (10) IW 4.5 x 1 x BD as right arm midway lateral.
- (11) IW 4 x 1.5 x SD on left inframammary region.
- (12) Abrasion 4.5 cm on left forearm medially.

- (13) IW 3 x 0.5 x SD on left wrist medially.
- (14) Abrasion 5 cm on right seepulg.
- (15) Abrasion 10 cm on left lumber region.
- (16) IW 4.5 x 1 X MD on right lumber region.
- (17) IW 4.5 x 0.5 x cavity or 12th rib near vertebral column.
- (18) Abrasion 9 cm on right buttock

The cause of death as shown in post mortem notes is shock and hemorrhage due to multiple injuries. In the substantive evidence, P.W. 14 has categorically stated that the injuries at Sr. 10, 11 and 17 are fatal injuries as they are on the vital part of the body. The substantive evidence of P.W. 14 is in consonance with the substantive evidence of the eye witnesses who have attributed specific overt act to the accused person.

33 P.W. 15 Rupsingh Tadvī was attached to Oshiwara Police Station. He had taken charge of accused No. 5 when he was arrested.

34 P.W. 16 Sunil Malusare was attached as API to Oshiwara Police Station and he had assisted PSI Anpat in the investigation. It is elicited in the cross-examination that the investigating officer was not present in the parade room when the accused No. 4 was subjected to test identification. The accused No. 4 was absconding from 9/2/1991 till 15/2/1991.

35 P.W. 17 Balkrishna Kalkhamkar was transferred to Oshiwara Police station on 27/3/1991. He had taken up the investigation from PI Chougule. He had arrested 3 accused viz. Khaliz Zariwala on 12/5/1991 and Rahiz Khan and Rajesh Solanki on 15/5/1992. According to him, out of them, two persons are absconding. He admits before the court that he had called the Special Executive Magistrate P.W. 6 Dhirendra Tripathi for conducting identification parade and had recorded the statement of the witnesses after the test identification parade was over. He has admitted that he has not prepared the list of documents before taking over the investigation and the index of the said documents was prepared at

the time of filing of the charge-sheet. According to him, he had arrested the accused No. 4 at Jogeshwari. He had made available his own office and also adjoining store room for conducting test identification parade. It is admitted that the staff had made dummies available for the purpose of test identification parade and that the place for conducting test identification parade was selected by the Special Executive Magistrate.

36 P.W. 18 Arjun Sawant was also attached to Oshiwara Police station. He had been to the scene of offence alongwith PSI Anpat. He had drawn the panchanama of clothes of accused Nos. 1, 2 and 3. According to him, the complaint was recorded by PSI Anpat.

37 P.W.19 Suhas Anpat was attached to Oshiwara Police Station. According to him, on 8/2/1991 at about 8.30 p.m. he had received a message in respect of another case and therefore, he had visited Cooper Hospital and there at about 9 p.m. P.W. 7 contacted him and told him that Shankar Yadav was seriously assaulted by 5 to

6 persons with dangerous weapon and was admitted in ICU in Cooper Hospital. He had kept a constable as guard near the ICU. Shankar Yadav was unconscious. Harilal Yadav and Ramkaran were present in the hospital. He had then taken P.W. 1 Harilal Yadav to the police station and recorded their statement and the same was treated as FIR which is at Exh. 16. He had registered Crime No. 72 of 1991 under section 307 of the Indian Penal Code. PSI Waghmare had recorded panchanama which is at Exh. 39, whereas PW 19 recorded statement of Dhadas on 9/2/1991. He had transferred the investigation to PI Chougule.

38 It is candidly admitted in the cross-examination that the other case about which he received the message was not pertaining to the jurisdiction of Oshiwara Police station. No officers of Goregaon Police Station were present in Cooper Hospital. According to P.W. 19, Shankar Yadav was taken to ICU before 9.15 p.m. When he was in the O.P.D., P.W. 19 could not record his statement. He had not visited the injured in the ICU. The deceased was unconscious in ICU.

In the out patient department also he was unconscious. He has further stated that he was present in the ICU for 10 minutes i.e. from 9.15 p.m. to 9.40 p.m. He had posted his constable inside the ICU. Only to ascertain when the injured would regain consciousness, as he could not record his statement earlier. He had not received information from the constable that the patient had regained consciousness. He admits to have seen the accused Nos. 1, 2 and 3 at the police station on 9/2/1991 in the morning.

39 According to P.W.19, the incident occurred at the gate of Lime Depot. The scene of offence is 10 ft. away from the gate towards road. A suggestion was given that the FIR recorded at the first point of time was destroyed. He claims to have assisted Investigating Officer Chougule in the investigation of the present case. The witness also claims to have made enquiry with Ashfaq Khan and Harilal Yadav.

40 P.W.20 Pravin Chandra Gore was working as Assistant Chemical Analyser at Government Forensic Science Laboratory, Bombay. The prosecution examined him to prove the C.A. report dated 2/7/1991 which was signed by PW. 20. The said report is marked as Exh. 69. In the cross-examination, the witness has admitted that there are 40% persons having 'O' group, 30% with 'B' group, 25% 'A' group and 5% 'AB' group.

41 The accused has examined the defence witness advocate Premchand Choube. He has deposed before the court that accused Nos. 1, 3 and 5 used to visit his office. He was acquainted with Shankar Feku Yadav. The advocate used to park his vehicle near Khalid Timber Mart opposite Beer Bar on Link road. The distance between the Beer Bar and Lime Depot is approximately 80 to 90 feet. There was a telephone connection in Khalid Timber Mart. And that the advocate used to use the said telephone for communication as he did not have a telephone connection in his office. The advocate was present in his office when the incident had occurred. He was sitting

near Khalid Timber Mart alongwith the original accused Nos. 1,3 and 5 as he was discussing the case registered against the original accused Nos. 1, 3 and 5 at Oshiwara Police station. He was in the company of the accused Nos. 1, 3 and 5 till 9 p.m. There was no electric supply in his office at the relevant time and therefore, he was sitting near the Timber Mart.

42 The defence witness has further asserted that he was facing Yadav Lime Depot at the time of the incident. He had not seen the incident as alleged by the prosecution. He had no occasion to help Shankar Yadav at the relevant time. He had not disclosed this fact to anybody till his statement was recorded before the court. He had not caused his appearance for the accused in the present mater at any stage and it was only four months prior to recording of his statement, he had learnt that accused Nos. 1, 3 and 5 have been wrongly framed in the present case. He had not taken any action as a lawyer although he had learnt four months back that the accused Nos. 1, 3 and 5 have been wrongly framed.

43 The witness was questioned by the court and apparently falsified at that stage. It was brought to his notice that in the statement recorded under section 313 of the Code of Criminal Procedure, 1973 none of the accused Nos. 1, 3 and 5 had referred to him.

44 On meticulous examination of the depositions of 20 witnesses examined by the prosecution, it is clear on the face of the record that there are eye witnesses to the incident. P.W.1 who was in the company of the deceased at the time of the incident has stated that the original accused No. 4 i.e. Rais Khan was the one who had taken first step by assaulting constable Dhadas on his head with a wooden log. At that time, the original accused No.1 had assaulted P.W. 1 with sword and at the relevant time, Shankar Yadav was attacked by 4 to 5 persons. According to P.W. 1, accused No. 5 had also assaulted Shankar Yadav on his ribs below arm pit with his sword and thereafter, it was the original accused No. 1 who had continued

assaulting Shankar Yadav with sword. It is pertinent to note that no specific act is attributed to original accused Nos. 2 and 3 except an omnibus statement that 4 to 5 persons had mounted assault upon Shankar Yadav. This has to be read in consonance with the fact that there is no recovery of weapons at the instance of the original accused Nos. 2 and 3.

45 The incident is dated 8/2/1991. The original accused Nos. 1, 2 and 3 were arrested on 9/2/1991. There was no recovery of weapons at the instance of accused No. 1, 2 and 3. It is further pertinent to note that the accused Nos. 2 and 3 were arrested from their residential houses.

46 P.W. 2 Ramkaran Yadav has also claimed to be an eye witness. He was in the company of the deceased at the time of the incident. According to him, Ashfaq had got up to greet constable Dhadas and at that time, 5 to 6 persons mounted assault on them. P.W. 2 has identified the original accused No. 4 as the person who

had assaulted constable Dhadas by stick on the rear back side of his head. There is consistency as far as the role of accused No. 4 is concerned. He had also identified the accused No. 4 as the assailants. In fact, it was P.W. 2 who is running Yadav Lime Depot.

47 As far as the role of the overt act of the accused are concerned, according to P.W. 2, the accused No. 1 had assaulted Shankar with sword. In all there were 7 persons. Two were armed with stick and therefore, he had also rushed towards Lime Depot to search for a stick. He has specifically admitted that accused No. 1 was leading other accused persons. Hence, he is consistent as far as the role of accused Nos. 1 and 4 is concerned. P.W. 3 is the injured witness constable Dhadas. He had met Ashfaq at the relevant time. He fell down with a blow on his head. P.W. 2 had rushed into Lime Depot to search for a stick and when he returned, found that Shankar Yadav was assaulted with sword. Neither the assailants or the companion of Shankar Yadav except Ashfaq were known to P.W. 3.

48 It is pertinent to note that Shankar Yadav had sustained fatal injuries as stated in the post mortem notes. Post mortem notes at Exh. 41 would clearly indicate that deceased Shankar Yadav had sustained as many as 18 injuries. There were two incised wounds on the parietal region, incise wound on supra mammary region, incise wound at left arm lateral incise wound at infra mammary region. Besides, incise wound which were probably defence injuries found on the body of Shankar Yadav, diaphragm was cut and that is injury No. 9, 10 and 11. It is in these circumstances that the evidence of the witness i.e. P.W.4 stating that his father-in-law had informed him that he was assaulted by accused No. 1 and his associates in the ICU would not inspire confidence of the court. In any case, it is an oral dying declaration which is introduced for the first time by P.W. 4. Since the witnesses have not specifically named the rest of the accused, it would be relevant to consider the test identification parade.

49 In this case, the test identification parade was held in the police station. The practice of conducting test identification parade in

the police station is deprecated by this court on several occasions. The Division Bench of this Court in the case of **Ramcharan Bhudiram Gupta vs. State of Maharashtra reported in 1995 Cri. L.J. 4048** has specifically observed as follows :

“16. We strongly deprecate the practice of conducting identification at police stations; a practice which we are informed at the Bar is only prevalent in Greater Bombay. The sooner it is abandoned the better it is because, the probability of the suspects being shown to the witnesses prior to the test identification is always there at the police station. At any rate, on account of such a practice, there is always a lurking suspicion in the mind of the court that the witnesses might have seen the suspects prior to the test identification.

17. In order to make identification evidence beyond reproach, it is high time that an end is put to the practice of holding of identification at police station and identification parades instead are held in jail. This practice would not only enable the police to wash the stigma of showing suspects prior to their identification; a stigma which more than often is unfounded, but has manifold other advantages. Jails have a large population these

days. It would be easy there to find persons similar to the suspects sought to be put for identification. Such similar persons have to be mixed with the suspects at the time of identification.

The identification in jail would not only actually be free from any taint or suspicion but equally importantly it would also appear to be so. It would instil a sense of confidence both in the minds of the suspects sought to be put for identification as well as the court.

Moreover, there are serious lacunas in the test identification parade and hence, the same would not inspire the confidence of this court.

50 In the present case, the accused are being convicted with the aid of section 149 of the Code of Criminal Procedure, 1973 as there were about more than 5 person. According to the learned APP, although P.W. 1, 2 and 3 have not referred to any overt act by the original accused Nos. 2 and 3, presence of the accused as a part of unlawful assembly is sufficient for conviction. Even if no overt act is

attributed to them, according to the learned APP, the common object is writ large on the face of the record.

51 The learned Counsel Mr. Kalyankar appearing for the original accused Nos. 2 and 3 and learned Counsel Mr. Phanse, appointed as amicus for original accused Nos. 4 and 5 had vehemently urged before the Court that the prosecution has miserably failed to prove the case against the accused beyond reasonable doubt. According to the Counsel, non-examination of Harilal Yadav is fatal to the prosecution as according to the learned Counsel, it was Harilal who had taken Shankar to the hospital.

52 It is vehemently urged that PSI Anpat had no reason to be in Cooper Hospital soon after Shankar Yadav was admitted in the hospital. That PSI Anpat has failed to give sufficient reason why he had visited Cooper Hospital, rather how he had learnt about the incident. He had vaguely referred to another case in respect of which he had received message. However, it does not appear that he had

taken any steps in the case for which he had come. It was P.W. 19 Anpat who had met Harilal Yadav and Ramkaran at the hospital and had recorded their statement which was treated as FIR. He has further admitted that the other case which he was referring was of Goregaon Police Station and not of Oshiwara Police Station. It is also admitted by him that the deceased was unconscious in the ICU. This is another reason why the oral dying declaration would not inspire the confidence of the Court.

53 The most important aspect is that P.W. 19 has specifically admitted that he had seen the accused on 9/2/1991 at the police station in the morning. This further makes it clear that the accused had visited police station on the very next day.

54 It is further pertinent to note that Harilal Yadav was summoned for the test identification parade. P.W. 7 Vasantrao Shevale who was posted at Cooper Hospital has stated that the injured was brought by Harilal Yadav. He had mentioned the name of

Harilal Yadav in the register and had also obtained his thumb impression. The facts of the incident were narrated by Harilal Yadav. P.W. 7 has proved the entry No. 503 in the EPR. The EPR which is at Exh. 34 shows that the patient was brought in unconscious condition and there is no evidence that the injured had regained consciousness.

55 In cases where there is direct evidence, it would be necessary to ascertain the motive. The learned Counsel Mr. Phanse has vehemently urged that the only role i.e. attributed to the original accused No. 4 is that he had assaulted the constable and not the deceased. This by itself would indicate that the original accused No. 4 had assaulted constable Dhadas and not the deceased. The learned APP submits that it can be inferred that contused lacerated wound sustained by the deceased could be attributed to an assault by stick at the hands of the accused No.4. However, such presumption cannot be drawn in the absence of the evidence. The cause of death is also shock and haemorrhage due to multiple injuries.

56 In the case of **Darbara Singh vs. State of Punjab** reported in AIR 2013 SC 840, the Hon'ble Apex Court has held that -

“So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved.”

57 P.W. 1 has made an omnibus statement that accused No. 3 had also assaulted Shankar Yadav with sword. However, in the cross-examination, it is admitted that he was surrounded by 3 persons. He had rushed towards the gate to search for weapon. He

had not seen the real assailants of Shankar Yadav but after Shankar Yadav had fallen Nijamuddin original accused No.1 continued to assault him brutally. It is admitted by him that the assault lasted for about a minute or minute and half and that according to him, besides Shankar Yadav, Harilal Yadav, Ramkaran and himself, they were not accompanied by any other person. The evidence that Shankar Yadav was able to speak with P.W. 1 in the taxi is also unbelievable since he had fallen unconscious on the spot.

58 P.W. 2 has also reiterated that there were 7 persons. Accused No. 1 assaulted the deceased by sword. Out of 7 assailants, two were armed with stick. He could identify the persons who had assaulted by stick but the test identification parade does not inspire confidence. The accused Nos. 2 and 3 would be entitled to benefit of doubt. As far as the accused No.4 is concerned, there is no material evidence on record to clearly indicate that he was a part of the unlawful assembly. As far as accused No. 5 is concerned, a fatal injury is attributed to him. Both the eye witnesses were consistent on

the point that the accused Nos. 1, 2, 3 and 5 were assaulting the deceased. Accused No. 4 deserves to be convicted for an offence punishable under section 324 read with section 149 of the Indian Penal Code. Since the fact that he had assaulted constable Dhadas on his head with stick would clearly indicate that he was also armed with a stick. There is evidence on record that the accused Nos. 1 and 5 are relatives. The case was filed against the original accused Nos. 1 and 5 by the deceased. The learned Counsel for the appellant-original accused No. 3 Abdul Kadar Abdul Razak submits that the original accused No. 3 is related to original accused Nos. 1 and 5 and therefore, he has been implicated in the present case.

59 As far as motive is concerned also there is material on record to show that it was only original accused Nos. 1 and 5 who had enmity against Shankar Yadav. P.W. 1 has categorically stated that original accused Nos. 1 and 5 used to visit Shankar Seth Chawl to show chawl and garage to other people. However, he was not sure as to whether to sell the premises or give it on rent. P.W. 1 has also

stated that the deceased had obtained stay order against accused Nos. 1, 2 and 4, which would show that the accused Nos. 3 had no connection with the civil suit.

60 All the accused are on bail. The appellant Nizamuddin in Criminal Appeal No. 41 of 1995 was absconding and at present he is jail. The appellant Nos. 1 and 2 in Criminal Appeal No. 66 of 1995 who are original accused Nos. 2 and 3 are present before the Court. The appellant in Criminal Appeal No. 31 of 1995 is original accused No. 4 and the appellant No. 3 in Criminal Appeal No. 66 of 1995 is original accused No. 5. Original accused Nos. 4 and 5 were not represented. Therefore, this Court has appointed learned Counsel Mr. S.R. Phanse as amicus to appear on behalf of original accused Nos. 4 and 5.

61 Standing non-bailable warrant has been issued against the original accused No. 1. It is seen from time to time that the original accused No. 1 is in fact absconding. On 6/9/2017, P.I. of Tilak Nagar

Police Station had filed a report that it was learnt from reliable source that the original accused No. 1 is residing at Flat No. 104, Shelter Park, Kopara Village, Sector 10, Kharghar, Navi Mumbai. However, the said house was locked. Upon realising that the police has kept strict vigilance. It appears that he is absconding. The police has also kept a track on the cell phone mentioned in the report.

62 At the commencement of hearing of this appeal, it was seen that the Counsel for the appellant/accused No. 1 had filed an application seeking recall of the order of cancellation of bail and issuance of non-bailable warrant vide order dated 10/4/2015. The learned Counsel for the appellant/accused No. 1 had placed on record certain medical records to show that the appellant/accused No.1 is ill. Thereafter, this Court had directed that since non-bailable warrant is issued, he should appear before the court and get it cancelled. However, subsequently, the learned Counsel for the appellant/accused No. 1 had submitted that he was in contact with the appellant and has been informed that the appellant is not in a

position to attend before the court as he is hospitalised. Thereafter, on 6/7/2017 it was directed that the matter be placed at 11 a.m. on 7/7/2017.

63 On 7/7/2017 learned Counsel Mr. Kamran Shaikh had mentioned before the Court that the appellant is at his residence and had given the address which is mentioned in the cause title of Criminal Misc. Application No. 959 of 2016. The Deputy Commissioner of Police, Zone-6 was directed to see that the appellant is taken in custody by executing non-bailable warrant and he was to be produced before this court on 11/7/2017.

64 On 11/7/2017 the learned Counsel for the appellant did not remain present and it was reported that the appellant is not residing at the given address. This Court had observed that Mr. Kamran Shaikh appearing for the appellant/accused No. 1 had given two different reasons on two occasions to express the inability of the appellant to remain present before the Court, firstly by stating that

the appellant is seriously ill and secondly that he is admitted in hospital. Therefore, this Court had directed the Deputy Commissioner of Police, Zone-6 to enquire into the whereabouts of the appellant based on the pan card, which was produced for his identification at the time of affirmation. There was a further direction to the police to carry out an enquiry including recording the statement of advocate Mr. Kamran Shaikh and submit report to this Court within one week.

65 Hearing of the matter was deferred from time to time and on 18/7/2017 the report was placed before this Court showing that the statement of advocate Mr. Kamran Shaikh was recorded and the cell phone number was given by advocate Mr. Kamran Shaikh was found to be switched off since 7/7/2017 i.e. after this Court had commenced the hearing of the companion appeals bearing Nos. 66/1995 and 31/1995. Time to time, the police has submitted the report. On 6/9/2017 also the learned APP had submitted on the basis of the report of Tilak Nagar Police Station that efforts are being made to trace the accused.

66 As indicated earlier, this Court had in fact appointed advocate Shri Shantanu Phanse to represent the original accused No. 1 i.e. the appellant in Criminal Appeal No. 41 of 1995. The police had sought time to execute non-bailable warrant and therefore, the Judgment was not pronounced. In the meanwhile the original accused No. 1 filed Criminal Application No. 1536 of 2017 on 9.11.2017 expressing a desire to surrender before the court and and to be represented by the Senior Counsel Shri Avinash Gupta and therefore, this Court in order to give fair opportunity to the accused No.1 had allowed the application and had taken the original accused No. 1 in custody on 15/11/2017. The learned Senior Counsel Shri Gupta was accordingly heard on 30/11/2017.

67 The learned Senior Counsel Shri Gupta has drawn attention of this court to the specific evidence adduced by the prosecution as far as the original accused No. 1 is concerned. According to the learned Senior Counsel, the eye-witnesses are not

reliable witnesses and their evidence does not inspire confidence. According to the learned Senior Counsel, P.W. 1 has deposed before the court that after the assault had ensued upon Shankar Seth, they had rushed inside the Lime Depot to search for some weapon in order to retaliate and when he returned to the scene of offence, he noticed that accused Nos. 1 to 5 and 2 others were fleeing from the scene of offence. According to the learned Senior Counsel, this by itself would indicate that P.W. 1 has not seen the actual assault on Shankar Seth and therefore, his evidence deserves to be discarded. It is also submitted that P.W. 1 had not raised any cry for help although the incident had occurred on the road. The learned Senior Counsel has further drawn the attention of this Court to the cross-examination of P.W. 2 wherein he had stated that Nijam Accused No. 1 was leading those who came from East. All of them assaulted the deceased. He has also drawn the attention of this Court on the part of the cross-examination of P.W. 2, wherein he has deposed as follows :

“All the accused persons came together at the same point of time. They together assaulted us. It is not correct to say that I did not see the accused No. 1 leading that group. I know the

persons leading who came from north. ... I know the persons who was leading the group who came from east.... Nizam Accused No. 1 was leading those who came from east.”

The learned Senior Counsel submits that on the basis of this evidence, it needs to be appreciated that there were two groups who came to the scene of offence. One had come from east direction and the other had come from north direction. Nizam was leading the group who came from east and therefore, according to the learned Counsel the witness in all probabilities could not have seen the incident as narrated by him. It is also submitted that P.W. 1 has specifically stated that when he went in search of stick in Lime Depot, Shankar Seth had fallen on the ground. In fact, this by itself would indicate that P.W. 1 is an eye-witness and had left the spot only after Shankar had fallen down.

68 The next contention of the learned Senior Counsel is that P.W. 1 has specifically stated that Shankar was only breathing when he was taken to hospital and was not in a position to speak. This according to the learned Senior Counsel, should be appreciated in

view of the fact that according to the prosecution there is an oral dying declaration in the hospital in which the name of the accused Nijam is disclosed. It is submitted that P.W. 2 Ramkaran Yadav has stated that at the time of the incident, 3 persons had come from northern side and 4 persons had come from the eastern side. One of them had assaulted Hawaldar(Dhadas) on his rear side. It is submitted that there is no specific evidence as to whether the persons who came from east side or north side had mounted assault on Shankar. It is submitted that P.W. 2 has made an omnibus statement that accused No. 1, 2, 3 and 5 and 2 others started assaulting the deceased Shankar by swords in their respective hands. It is reiterated that P.W. 2 had also gone in search of a stick in order to retaliate and therefore, he had not seen the actual assault.

69 As far as P.W. 3 is concerned, it is submitted that in fact, P.W. 3 Kisan Dhadas was the first person who was assaulted. He was a constable and yet he had not taken any effective steps to avoid assault on Shankar Seth. The attention of this Court is drawn to the

portion of cross-examination where P.W. 3 has stated that he was present at the scene of offence till he saw all the injured being removed to Cooper Hospital in a motor taxi. Thereafter, he had seen P.W. 1 in the hospital. It is also submitted that P.W. 3 had also not raised shout and that it was only P.W. 1 who had shouted for him.

70 The learned Senior Counsel has criticised the evidence in the nature of dying declaration which had specifically implicated the appellant. In any case, this Court had discarded the evidence in the nature of dying declaration as there is ample evidence on record which would show that the injured was unconscious at the time of admission in the hospital. There is nothing on record to indicate that he had regained consciousness just before he had disclosed about the incident to P.W. 4 and hence, the same does not deserve any discussion.

71 The learned Senior Counsel has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Indira Devi & ors.**

v/s. State of Himachal Pradesh reported in 2016 Law Suit (SC) 592, wherein the Hon'ble Apex Court had considered a case of false implication. The fact of the case in the matter of **Indira Devi(supra)** would not be relevant in the present case. The learned Senior Counsel hence, drawn attention of this Court to the observations in paragraph-7 which reads thus :

“(7) The proposition of law that an injured witness is generally reliable is no doubt correct but even an injured witness must be subjected to careful scrutiny if circumstances and material available on record suggest that he may have falsely implicated some innocent persons also as an after thought on account of enmity and vendetta.”

This is an admitted position in criminal jurisprudence and there cannot be a second opinion on this aspect, but at the same, the facts of each case have to be taken into consideration and the proposition of the law has to be applied in the facts of the case. In the present case, the evidence of P.W. 1 and 2 are reliable and there cannot be any doubt that they are eye witnesses to the incident and they have actually seen the assault on Shankar Seth.

72 The learned Senior Counsel has then placed implicit reliance on the Judgment of the Division Bench of this Court in the case of **Narayan Kanu Datavale v/s. State of Maharashtra reported in 1997 Cr. L.J. At page 1788.** It is in respect of the same proposition of law wherein the Court had discarded the evidence of the injured eye witness. In the instant case, the evidence of P.W. 1 and 3 is not being relied upon as they are injured witnesses and therefore, **Narayan Datavale's** case (supra) would have no relevance in the present case. The Hon'ble Division Bench had observed that -

“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.”

In fact we have scrutinized the evidence of the eye-witnesses and arrived at a conclusion that the sterling testimony of two eye-witnesses as far as the incident in question is concerned cannot be

discarded on immaterial omission and contradiction. The witness has stood the test of scrutiny. Hence, the Criminal Appeal No. 41 of 1995 deserves to be dismissed.

73 The learned Counsel Mr. Phanse has demonstrated before the court that the accused are being falsely implicated only because there was a motive. It is strongly submitted by Mr. Phanse that motive by itself cannot be taken into consideration to hold that the offence under section 302 of the Indian Penal Code is proved.

74 In fact, there is ocular evidence to that effect. This is a case of direct evidence and there is no reason to disbelieve P.W. 1 and P.W. 2 who have established the identity of the original accused Nos. 1 and 5. As far as the original accused No. 1 is concerned, there is cogent and convincing evidence that even after Shankar Yadav had fallen to the ground, the original accused No. 1 continued to assault him. One of the fatal blows just below the arm pit was given by the original accused No. 5.

75 The witnesses were acquainted with the accused and therefore, it also cannot be said that this is a case of mistaken identity. There is no cogent and convincing evidence to hold that the original accused No.4 had in fact, assaulted the deceased. The evidence to the extent that he had assaulted constable Dhadas, at that relevant time, he was armed with stick is established. There is also cogent and convincing evidence to the effect that two accused were holding sticks and assaulting with stick. It is in these circumstances that the original accused Nos. 2 and 3 deserve benefit of doubt, whereas the original accused No. 4 deserves to be convicted under section 324 of the Indian Penal Code and sentenced to the period already undergone.

76 After taking into consideration the submissions made by learned Senior Counsel Mr. Gupta, on behalf of accused No. 1, learned advocate Mr. Phanse on behalf of accused No. 5, this Court is

of the opinion that the conviction against them deserves to be confirmed.

77 Before parting with the Judgment, we record our appreciation for the assistance rendered by learned Counsel Shri S.R. Phanse, appointed as an amicus curiae to espouse the cause of accused Nos. 4 and 5. The learned advocate would be paid professional fees in accordance with law.

78 Hence, following order is passed :

ORDER

(i) The Criminal Appeal No. 66 of 1995 is partly allowed.

(ii) The Judgment and Order of conviction dated 12/1/1995 passed by the Additional Sessions Judge, Mumbai in Sessions Case No. 634 of 1991 against the Appellant Nos. 1 and 2 i.e. accused Nos. 2 and 3 is quashed and set aside. They are acquitted of all the

charges levelled against them. Their bail bonds stand cancelled. Fine amount, if paid, be refunded.

(iii) The Judgment and Order of conviction dated 12/1/1995 passed by the Additional Sessions Judge, Mumbai in Sessions Case No. 634 of 1991 against the appellant No. 3 i.e. accused No. 5 is hereby confirmed. The substantive sentence and sentence of fine are maintained.

(iv) The Judgment and Order of conviction under section 302 of the Indian Penal Code dated 12/1/1995 passed by the Additional Sessions Judge, Mumbai in Sessions Case No. 634 of 1991 against the appellant in Cri. Appeal No. 31 of 1995 i.e. accused No. 4 is quashed and set aside. Instead, the appellant/accused No. 4 is convicted under section 324 of the Indian Penal Code and sentenced to the period already undergone.

(v) The Criminal Appeal No. 31 of 1995 is partly allowed.

(vi) The Criminal Appeal No. 41 of 1995 is dismissed. The Judgment and Order of conviction dated 12/1/1995 passed by the Additional Sessions Judge, Mumbai in Sessions Case No. 634 of 1991 against the appellant in Cri. Appeal No. 41 of 1995 i.e. accused No. 1 is confirmed. The substantive sentence and sentence of fine are maintained.

79 All the appeals are disposed of accordingly.

80. In view of the disposal of the Appeal No.41 of 1995, nothing survives in Criminal Application Nos.959 of 2016 and 949 of 2016 and the same stand disposed of.

(SMT. SADHANA S. JADHAV,J)

(R.M. SAVANT, J)