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

CRIMINAL APPEAL NO.256 OF 2006

Rajkumar @ Rajendra Bhimrao Shitre
Age 40 years, Occ. Mason,
R/o Tirth (Bk.), Tq. Tuljapur,
District Osmanabad

... APPELLANT
(Original Accused No.10)

VERSUS

The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)

... RESPONDENT

.....
Shri R.N. Dhorde, Senior Counsel with
Shri V.R. Dhorde, Advocate for appellant
Shri R.V. Dasalkar, A.P.P. for respondent/ State
.....

WITH

CRIMINAL APPEAL NO.257 OF 2006

1. Ramchandra s/o Govindrao Madje,
Age 55 years, Occu. Service,
R/o Tirth (Bk.), Tq. Tuljapur,
District Osmanabad

2. Neharu s/o Govindrao Madje,
Age 45 years, Occu. Agri.
R/o Tirth (Bk.), Tq. Tuljapur,
District Osmanabad

... APPELLANTS
(Original Accused Nos.6 & 16)

VERSUS

((2))

The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)

... RESPONDENT

.....
Shri R.N. Dhorde, Senior Counsel with
Shri V.R. Dhorde, Advocate for appellants
Shri R.V. Dasalkar, A.P.P. for respondent/ State, assisted by
Mrs. M.A. Kulkarni, Advocate for complainant
.....

CRIMINAL APPEAL NO.260 OF 2006

- 1) Vitthal s/o Kadappa Madje,
Age 36 years
- 2) Ramesh s/o Govind Madje,
Age 38 years
- 3) Murli s/o Bhaurao Madje,
Age 46 years
- 4) Dagadu s/o Ganpat Desai
Age 47 years
- 5) Bhaurao Nivrati Madje,
Age 81 years

(Appeal abated against appellant No.5
as per Court's order dated 27.8.2013)

... APPELLANTS

(Original Accused Nos.1 to 3, 11 & 15)

VERSUS

The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)

... RESPONDENT

.....

((3))

Shri Satej S. Jadhav, Advocate for appellants
Shri R.V. Dasalkar, A.P.P. for respondent/ State

.....

WITH

CRIMINAL REVISION APPLICATION NO.120 OF 2006

Balaji s/o Shivaji Madaje,
Age 35 years, Occu. Agriculture
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad

... PETITIONER

VERSUS

1. The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad)
2. Audambar s/o Gajendra Madje,
Age 39 years, Occu. Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
3. Khandu s/o Kadappa Madje,
Age 26 years, Occu. Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
4. Gajendra s/o Bapu Puri,
Age 56 years, Occu. Priest & Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
5. Chandrakant s/o Kiran Waghmare,
Age 28 years, Occu. Labour,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
6. Maruti s/o Ramrao Nichal,
Age 39 years, Occu. Tailor,
R/o Teerth (Bk.), Tq. Tuljapur,

((4))

District Osmanabad

7. Kumar s/o Parasram Mane,
Age 45 years, Occu. Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
8. Dhanraj s/o Govindrao Madje,
Age 44 years, Occu. Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
9. Jaikumar s/o Dadarao Madje,
Age 44 years, Occu. Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad
10. Machhindra s/o Shripato Bobade,
Age 36 years, Occu. Agriculture,
R/o Teerth (Bk.), Tq. Tuljapur,
District Osmanabad

... RESPONDENTS
(Nos.2 to 10 Orig. Accused)

.....
Mrs. M.A. Kulkarni, Advocate for petitioner
Shri R.V. Dasalkar, A.P.P. for respondent No.1/ State
Shri Satej S. Jadhav, Advocate for respondent Nos.2 to 10
.....

CORAM: T.V. NALAWADE AND
 SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 29th January, 2018

Date of pronouncing judgment : 12th February, 2018

JUDGMENT (PER SUNIL K. KOTWAL, J.) :

1. Criminal Appeal No.256/2006 is preferred by original accused No.10, Criminal Appeal No.257/2006 is preferred by original accused Nos.6 and 16 and Criminal Appeal No.260/2006

is preferred by original accused Nos.1 to 3, 11 and 15 against the judgment and order of conviction under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code, passed by learned Adhoc Addicitional Sessions Judge, Osmanabad in Sessions Case No.195/1999. Criminal Revision Application No.120/2006 is preferred by original informant in the same Sessions Case against the order of acquittal of accused Nos.4, 5, 7 to 9, 12 to 14 and 18. These all appeals and revision arising out of one and the same judgment, are disposed of by this common judgment. The respondent is State of Maharashtra.

2. Facts leading to institution of these appeals are that, accused Nos.1 to 18 were prosecuted for the offences punishable under Sections 147, 148, 302 read with Section 149 and Section 324 read with Section 149 of the Indian Penal Code. Prosecution case in nutshell is that, all accused and deceased Dhanraj Takle are residents of village Teerth (Bk.). The deceased Dhanraj formed a registered trust of Nagoba Temple, situated in the same village. The informant Balaji Madje (P.W.2) was one of the trustee of that Trust. Since registration of that Trust, the deceased as well as informant Balaji Madje (P.W.2) had strained relations with all the accused persons. On 1.3.1999 at noon hours, quarrel arose in between wife of informant Balaji Madje

(P.W.2) and wife of accused No.1 Vithal Madje. On that count, at about 5.00 p.m., even Balaji Madje (P.W.2) abused the wife of accused No.1, who is cousin of the informant. On that day, at about 7.00 p.m., deceased Dhanraj Takle was proceeding towards place of "Holi" for offering *Naivedya* with his family members. On way, he met Balaji Madje and when they were talking with each other, that time, all accused persons arrived on the spot armed with sticks, sword and axe. They suddenly assaulted deceased Dhanraj and informant Balaji Madje by stick, axe and sword. Informant (P.W.2) and deceased Dhanraj sustained injuries. Therefore, when Dhanraj was rushed to Government Hospital, Tuljapur, the Medical Officer declared him as dead. Therefore, on the same day, Balaji Madje (P.W.2) lodged F.I.R. Exh.71 at Police Station, Tuljapur. In the result, Crime No.37/1999 was registered against the accused persons under Sections 147, 148, 302, 323, 324 read with Section 149 of the Indian Penal Code. Inquest panchanama Exh.72 of the dead body of the deceased was drawn and it was referred for post mortem examination to Government Hospital, Tuljapur. Dr. Sujata Patil (P.W.9) performed post mortem examination of the dead body of deceased and issued post mortem notes Exh.120. She also examined informant Balaji Madje (P.W.2) and issued injury certificate Exh.119. P.S.I. Pramod Koparde (P.W.10)

carried out investigation of this crime and prepared spot panchanama Exh.73 of the spot of incident near Water Tank and seized blood stained stone, one sword, one sword sheet which were lying on the spot. During the course of investigation, all accused were arrested and their clothes were seized under panchanama Exh.75 to Exh.92. After completion of the investigation, charge sheet was submitted in the Court of Judicial Magistrate, First Class, Tuljapur against all accused persons.

3. Offence punishable under Section 302 read with Section 149 of the Indian Penal Code being exclusively triable by Court of Sessions, this case was committed to Sessions Court, Osmanabad.

4. Charge Exh.34 was framed against accused Nos.1 to 18 for committing offences punishable under Sections 147, 148, 302 read with Section 149 and Section 324 read with Section 149 of the Indian Penal Code. Accused pleaded not guilty and claimed trial.

5. Defence of the accused is that, on the date and time of the incident, the deceased and his companions attacked and assaulted the accused persons by using sword and sticks, and

counter criminal case is pending against the deceased and his companions.

6. The prosecution examined 10 witnesses. After considering the oral and documentary evidence placed on record, learned trial Court pleased to convict the accused Nos.1 to 3, 6, 10, 11, 15 and 16 for the offence punishable under Sections 147, 148, 302 read with Section 149 of the Indian Penal Code. The convicted accused were sentenced to suffer life imprisonment under Section 302 read with Section 149 of the Indian Penal Code and rigorous imprisonment for one year on each count for the offences punishable under Sections 147, 148 of the Indian Penal Code. Accused No.17 died during the pendency of the trial and proceedings against him was abated. Accused Nos.1 to 16 and 18 were acquitted of the offences punishable under Section 324 read with Section 149 of the Indian Penal Code. Accused Nos.4, 5, 7 to 9, 12 to 14 and 18 were acquitted of all the charges. Therefore, these appeals and revisions arise.

7. During the pendency of these appeals and revision, original accused No.15 died and proceedings against him abated.

8. Heard strenuous arguments submitted by Mr. R.N.

Dhorde, learned Senior Counsel and Mr. Satej Jadhav, learned counsel for the appellants – accused and learned A.P.P. for the State. Learned Advocate for the revision applicant adopted the arguments submitted by learned A.P.P.

9. Both the learned counsel for the appellants – accused assailed the judgment and order of conviction on the ground that the three eye witnesses (P.W.1, P.W.2 and P.W.3) examined by the prosecution are closely related with the deceased and, therefore, they are interested witnesses. The next submission of learned counsel for the appellants is that, the testimony of these eye witnesses is in conflict with each other as well as with the contents of F.I.R.

10. The next limb of arguments of learned counsel for the appellants is that, out of 18 accused persons, only names of 6 accused persons are mentioned in the F.I.R., which creates doubt about involvement of 18 accused. In the circumstances, in absence of evidence of any independent witness, the conviction of the accused cannot be justified.

11. Learned counsel for the appellants submitted that, from the cross-examination of Medical Officer (P.W.9), it

emerges that, injury No.15, which is fatal injury, is not possible due to sharp cutting weapon, but it is possible due to fall on the ground. However, two knives are recovered from the possession of two accused persons. They also pointed out that, eye witnesses do not speak about assault by knife to the deceased. The infirmities on record are fatal to the prosecution case.

12. Learned counsel for the appellants submitted that, during the occurrence, accused persons sustained injuries and the prosecution has not taken pains to explain those injuries, which is sufficient to hold that, the genesis of the occurrence is not established by the prosecution. Learned counsel for the appellants submitted that, no evidence has been brought on record by the prosecution to prove that the accused persons had common object to kill the deceased or they were members of unlawful assembly having common object to kill the deceased and, therefore, the accused cannot be convicted with the aid of Section 149 of the Indian Penal Code. The learned counsel also pointed out that, the eye witnesses are not certain as to who inflicted the fatal injury on the head of the deceased.

13. Learned counsel for the appellants – accused placed reliance on “**Mitter Sen & ors. Vs. State of Uttar Pradesh**”,

reported in **(AIR 1976 SC 1156)**, "**Lakshmi Singh & ors. etc. Vs. State of Bihar**", reported in **(AIR 1976 SC 2263)** and "**Babu Ram & ors. Vs. State of Punjab**" reported in **(AIR 2008 SC 1260)**.

14. Learned A.P.P. for the State submitted that, the prosecution has examined 3 eye witnesses and the infirmities pointed out by learned defence counsel are so minor that, importance cannot be attached to those infirmities. Learned A.P.P. pointed out that, only because the witnesses are closely related with the deceased, their testimony cannot be discarded if otherwise it is trustworthy. According to learned A.P.P., when the dispute in between two parties on account of Nagoba Devasthan Trust is an admitted fact, it provides the motive behind the murder of the deceased.

15. The next limb of the argument of learned A.P.P. is that, at the time of occurrence, all the accused persons were armed with deadly weapons and they together assaulted the deceased which resulted into total 18 injuries on the body of deceased. This indicates that, the unlawful assembly of the accused assaulted the deceased and killed him in furtherance of their common object and, therefore, they can be convicted under

Section 149 of the Indian Penal Code. Learned A.P.P. pointed out that, for conviction under Section 149 of the Indian Penal Code, every member of unlawful assembly need not inflict blow on the body of the deceased/ victim. Learned A.P.P. pointed out that, two knives were recovered from accused Nos.6 and 10 and human blood was found on those weapons which corroborates the testimony of three eye witnesses.

16. The next limb of the argument of learned A.P.P. is that, though Medical Officer (P.W.9) was available to the accused persons, they have not taken steps to get proved the injuries on the body of accused persons and, therefore, explanation need not be furnished for the alleged injuries on the body of accused persons. The last submission of learned A.P.P. is that, the F.I.R. need not contain every details and, therefore, non-mention of names of all the accused persons cannot be treated as fatal circumstance to extend the benefit of doubt in favour of the accused. He prayed for conviction of all the accused persons.

17. The evidence available against accused persons is of two-fold i.e. 'circumstantial' and 'direct'. Circumstantial evidence is in the form of seizure of blood stained clothes from the accused at the time of their arrest and seizure of stick, axe and

two knives from the accused as per their disclosure statements. The direct evidence is in the form of the testimonies of three eye witnesses namely Jayashri Takle (PW-1)-the wife of deceased, Balaji Madje (PW-2)-the informant and one of the trustee of Nagoba Devasthan and Jaiprakash Rankhamb (PW-3), who is the brother in law of deceased. Bhairavnath (PW-4) reached on the spot at some later time.

18. PW-5 to PW-8 are the panch witnesses who have turned hostile and nothing could be elicited which is helpful to the prosecution. Therefore, the testimonies of these all panchas before the Court is useless piece of the evidence.

19. Before analyzing the circumstantial and direct evidence available against the accused, initially we must consider the expert evidence of Dr. Sujata Patil (PW-9), who performed autopsy examination of the dead body of deceased and who examined witness Balaji Madje (PW-2) on 01.03.1999 i.e. on the date of incident. Dr. Sujata Patil (PW-9) has duly proved the injury certificate (Exh.119) and found following two external injuries on the body of Balaji Madje, which were caused within 24 hours and which were simple nature.

- (i) Contused lacerated wound of size 1 x 1 x 0.1 cm above left eyebrow, caused by hard and blunt object.

- (ii) Contused lacerated wound of size 2 x 2 x 0.1 cm on scalp frontal region, caused within 24 hours and caused by hard and blunt object. Nature of the injury was simple.

20. Dr. Patil (PW-9), however, admits that the two contused lacerated wounds sustained by Balaji Madje (PW-2) are possible due to fall.

21. Dr. Sujata Patil (PW-9) has duly proved postmortem notes (Exh.120) of the dead body of the deceased. She noticed following 18 external injuries on the dead body of deceased :-

- (1) Incised wound over right upper lid, below eyebrow, horizontally placed, 2 and ½ cm x 2 cm x ½ inch deep, swelling, clotted blood.
- (2) Injury to right eyeball perforated and collapsed, blackish diloloration of skin around eye, edema.
- (3) Skin abrasion right cheek, 2 and ½ x 1 inch reddish black discoloration.
- (4) Skin abrasion right cheek, 1 x ½ inch reddish black discoloration.
- (5) Incised wound above upper lip 4 x ½ cm and 1 inch deep, maxilla right, swelling plus, clotted blood plus.
- (6) CLW lower lip left side irregular edges 3 x 2 cm, swelling plus.
- (7) Incised wound, lower part of chin 5 x 2 x 1 inch deep, swelling right, clothed blood plus.

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- (8) Incised wound below left eye 4 and ½ x 2 cm inch deep fracture nasal bone, swelling plus clotted blood plus.
- (9) CLW – left cheek – 1 inch x ¾ inch.
- (10) CLW – left upper eyelid 1 inch x ½ inch subconjunctival hemorrhage present left eye, blackish discoloration around left eye.
- (11) Incised wound 2 inch x ½ inch on lateral aspect of right calf inch below right knee.
- (12) Multiple small skin abrasion of left medial malleolus.
- (13) Abrasion – 1 cm on left knee medial aspect.
- (14) Incised wound left frontal region, 1 cm behind anti hair line, 1 cm away from midline, 4 x 1 and ½ cm bony deep, swelling and clothed blood.
- (15) CLW – right parietal region 8 x 2 and ½ cm, bone deep horizontally placed, fracture parietal bone present bleeding.
- (16) CLW front of injury 15.2 and ½ x 2 cm, bony deep obliquely placed bleeding, swelling.
- (17) Abrasion 1 cm on right shoulder.
- (18) Abrasion small on right and left thumb and index finger.

She also noticed following internal injuries on the dead body of deceased.

- (1) Fracture of right parietal bone deep, fracture maxilla right.
- (2) Subdural hematoma of 3 x 2 cm right parietal region, related to injury No.15 (17).
- (3) Haematoma behind right eyeball of size 2 x 2 c.m. laceration of brain front lobe related to injury No.2 of Column No. 17.

22. Dr. Sujata Patil (PW-9) opined that external injury No.15 i.e. contused lacerated wound on the right parietal region, bone deep, horizontally placed with fracture of parietal bone of size 7 x 2 x ½ cm is sufficient to cause death in ordinary course of the nature and this injury is possible by a stick. Dr. Sujata Patil (PW-9) also opined that injury Nos.1, 2, 5, 7, 8, 11 and 14 are possible by weapons like sword and axe, which were referred to this witness at the time of recording evidence. In her cross-examination the defence Counsel has only brought on record that the fatal injury Nos.15 and 16 are possible due to fall on a stone. However, from the oral evidence of witnesses on record, it becomes clear that it has nowhere come on record that at the time of occurrence the deceased fell on the stone. Therefore, on the basis of medical evidence together with evidence of eye witnesses which will be discussed in the subsequent part of the judgment, we have no hesitation to hold that the prosecution has proved that the death of the deceased was "homicidal death".

23. Now the next question to be answered is, whether the prosecution can establish that accused persons formed an unlawful assembly and in prosecution of common object of that unlawful assembly, they caused homicidal death of deceased or not?

24. As observed above, all panchas i.e. PW-5 to PW-8 have turned hostile. Therefore, to prove the recovery of weapons as per disclosure statements of the accused persons, the only evidence available is the testimony of Investigating Officer Koparde the then P.S.I. of Police Station, Tuljapur (PW-10). Arrest panchnamas and seizure of the clothes at the time of arrest from the accused persons are admitted by defence and they are at Exh.75 to 92. However, P.S.I. Koparde (PW-10) has merely deposed before the Court that he seized blood stained clothes from the accused under separate panchnamas. It is most important to note that this responsible police officer has nowhere stated in his evidence that at the time of seizure of blood-stained clothes from the accused, those clothes were wrapped in a paper envelope and those clothes were properly sealed in presence of the panchas. Thus, the prosecution cannot establish that the seized clothes from the accused persons were in sealed condition from the time of seizure till those clothes were sent to Chemical Analyzer for examination. Therefore, though on the

shirt of accused Vitthal Madje human blood of 'O' group, which was of deceased, was found by Chemical Analyzer, this important piece of evidence has become useless for lack of proper sealing.

25. C.A. report (Exh.134) shows that on the clothes of other accused the human blood of the blood group of deceased was not found. Even the C.A. report of the blood specimen of accused Murli Madje (Exh.137), accused Ramesh Madje (Exh.138), accused Vitthal Madje (Exh.139) and accused Dhanraj Madje (Exh.136) show that their blood group could not be determined by Chemical Analyzer. Therefore, otherwise also the prosecution would not be in a position to establish that on the clothes of the accused the blood detected by Chemical Analyzer was of only deceased. In the circumstances, the evidence relied by prosecution in the form of seizure of blood stained clothes from the accused persons, is of no use to establish the link in between homicidal death of the deceased and the accused persons.

26. So far as seizure of weapons from the possession of accused persons is concerned, the Investigating Officer P.S.I. Koparde (PW-10) merely deposes that as per the statement given by accused Ramesh Madje, he seized one axe from his house under panchnama (Exh.125). However, Investigating

Officer P.S.I. Koparde (PW-10) nowhere deposes as to exactly what statement was given by accused Ramesh Madje regarding the place where the axe was hidden.

27. Similarly, regarding seizure of stick from accused Murli Madje and accused Vitthal Madje, regarding seizure of knife from accused Ramchandra Madje and seizure of knife from accused Rajendra Shitre, the testimony of Investigating Officer P.S.I. Koparde (PW-10), so far as disclosure statements of the accused persons are concerned, is absolutely vague. This witness has not taken pains to prove the exact statement given by these accused persons regarding the place where the respective weapons were hidden.

28. In the case of "**Shankar Gopal Patil V/s State of Maharashtra**", reported in [**2000 ALL MR (CRI) 186**], the Division Bench of this Court ruled that, Section 27 of the Evidence Act requires witness to prove in his deposition, statement of the accused, which relied upon to discover the object and the fact of accused keeping or concealing the object at a particular place. Supreme Court in the case of, '**Amit Singh Bhikamsing Thakur V/s. State of Maharashtra**', reported in [**AIR 2007 SC 676**] has summed up various requirements of Section 27 of the Evidence Act, which are reproduced as follows:

- “(i) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provisions has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
- (ii) The fact must have been discovered.
- (ii) The discovery must have been in consequence of some information received from the accused and not by accused's own act.
- (iv) The persons giving the information must be accused for any offence.
- (v) He must be in the custody of the police officer.
- (vi) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
- (vii) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

establish that as per the statements given by these accused persons those respective weapons were seized, the portion of their respective statement which relates distinctly to the recovery of weapon cannot become admissible in evidence. Therefore, the statements recorded by Investigating Officer of the accused persons regarding the place where the respective weapons were hidden, are not admissible in evidence. In the circumstances, the recovery of respective weapons from these accused persons as per their disclosure statements under Section 27 of the Indian Evidence Act is not properly established by the prosecution.

30. The damaging blow to this circumstantial evidence is that, neither Investigating Officer (PW-10) has deposed that the seized weapons were kept in sealed condition from the time of seizure till it were referred to Chemical Analyzer, nor the prosecution examined Carrier of the weapon to the Chemical Analyzer to establish the sealed condition of the seized weapon till it reached to the Chemical Analyzer for examination. In the circumstances, possibility of tampering of these articles by Investigating Officer when those weapons were kept at Police Station before referring to Chemical Analyzer, is not ruled out by prosecution. In the circumstances, though C.A. report (Exh.134) shows that on the seized axe, sticks and knives blood of the Group of blood of the deceased was detected, for lack of proper

care taken by Investigating Officer, this important piece of circumstantial evidence has become useless.

31. In the circumstances, we have no hesitation to hold that no circumstantial evidence has been placed on record by prosecution to establish the link in between homicidal death of the deceased and accused persons. Therefore, now we proceed to examine the reliability of direct evidence placed on record by prosecution.

32. Jayashri Takale (PW-1) is the wife of deceased. She claims that on 01.03.1999 at about 7.00 to 7.30 p.m. when she was proceeding with her mother-in-law to offer 'Naivedya' at the eve of Holi festival, near water tank she heard shouts of her husband and thereafter she witnessed from the distance of 20 ft. that accused Nos.1, 2, 3, 10, 15 and 11 were assaulting her husband Dhanraj Takale by stick and axe. She has only identified these accused persons who were present before the Court on the date of her deposition. Despite of lengthy cross-examination, nothing could be elicited to doubt her presence at the time of the occurrence. Only this witness was confronted with her statement before the police that there was darkness at the time of occurrence. Except that contradiction which is duly proved by Investigating Officer (PW-10), nothing could be

brought on record by defence which affect the credibility of this witness. The suggestions given by learned defence Counsel that her husband and his friends attacked and assaulted the accused persons, have been specifically denied by this witness.

33. Even Balaji Madje (PW-2), who sustained injuries during the occurrence, has corroborated the version of Jayashri Takale (PW-1) regarding assault to deceased Dhananjay Takale by accused by sticks, sword and axe. In the cross-examination of Balaji (PW-2), defence has only brought on record that he is one of the Trustee of Nagoba Devasthan Trust registered by deceased and at the time of incident even accused Bhaurao, Ramesh, Murli, Vitthal and Dhanraj sustained injuries. However, this witness has immediately given explanation that they sustained injuries when they were assaulting the deceased and this witness. Thus, after careful examination of the testimony of this witness, it emerges that nothing could be elicited in his cross-examination to doubt his presence on the spot, when the injuries sustained by this witness are duly proved by Dr. Sujata Patil (PW-9). This witness has also proved his First Information Report (Exh.71) which was lodged to Police Station, Tuljapur promptly after the occurrence of the incident.

34. Jaiprakash Rankhamb (PW-3) is the third eye witness

who has also supported the version of Jayashri (PW-1) and Balaji (PW-2) regarding assault to deceased by accused by stick and axe. This witness has only contradicted the above witnesses by deposing that accused Dhanraj Madje and accused Ramchandra Madje assaulted the deceased by knives. In his cross-examination the defence has tried to bring on record that he is not resident of village Tirthpuri. However, he stood constant.

35. Learned Counsel for the appellants though pointed out that Jayashri (PW-1) and Jaiprakash (PW-3) are closely related witnesses, only because these two witnesses are close relatives of the deceased, their testimonies cannot be discarded. Their relation with the deceased cannot be a ground to brand them as "interested witness". Even though Balaji (PW-2) is not on friendly terms with the accused on account of dispute of Nagoba Devasthan, his testimony cannot be discarded if otherwise it is believable.

36. In view of this trite law, only testimony of these witnesses is to be scrutinized carefully. It is to be noted that presence of Jayashri (PW-1) near the spot is also natural as at that relevant time she was proceeding to offer "Naivedya" at the eve of Holi festival. So also she has made it clear that she witnessed the occurrence from the distance of only 20 ft.

Therefore, though in her statement before the police she stated that there was darkness, that will not be sufficient to create doubt regarding identity of the accused persons who were well known to this eye witness as they are residents of one and the same village. Otherwise also, in the cross-examination of Bhairavnath (PW-4) it has come on record that there was light of electric bulb on the spot at the time of the occurrence. No other material contradictions or omissions have been brought on record in the testimony of Jayashri (PW-1).

37. Balaji (PW-2) is an injured witness and therefore his presence on the spot cannot be doubted. Hon'ble Supreme Court had occasion to consider this aspect in the case of **Abdul Sayeed Vs. State of M.P.**, reported in [**(2010) 10 SCC 259**], in which it is held that :

"Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. 'Convincing evidence is required to discredit an injured witness'.. . . . "

38. In view of this trite law, convincing evidence is required to discredit the testimony of injured witness Balaji (PW-2). However, despite lengthy cross-examination of this witness, the learned defence Counsel could not bring on record any circumstances which create doubt about truthfulness of version of this witness.

39. Even the third eye witness Jaiprakash Rankhamb (PW-3) has successfully faced the cross-examination by defence Counsel. Thus, we do not find anything on record to doubt the presence of these three eye witnesses on the spot and truthfulness of their testimonies.

40. Bhairavnath (PW-4) reached on the spot subsequently after the occurrence. Therefore, his testimony does not carry any importance to prove the occurrence.

41. Much reliance has been placed on record by defence on the admission of Balaji (PW-2) and Jaiprakash (PW-3) that during the occurrence even some of the accused sustained injuries. However, these both witnesses have also furnished explanation that at the time of occurrence accused themselves sustained injuries due to their own act. Otherwise also, Dr. Sujata Patil (PW-9) has only admitted in her cross-examination

that on the date of incident she also examined accused Bhaurao Nivrutti Madje, Ramesh Nivrutti Madje, Vitthal Madje and Murlidhar Madje. Though this witness was available to defence Counsel, the learned defence Counsel has not taken pains to bring on record that the injuries sustained by these accused were grievous or were of grave nature. In the circumstances, only because Balaji (PW-2) and Jaiprakash (PW-3) have given vague admission regarding injuries sustained by some of the accused during the occurrence, the onus will not shift on prosecution to explain those injuries. On the other, in **Lakshmi Singh Vs. State of Bihar** (cited supra), the Apex Court has carved out exception that if the injuries sustained by accused are minor, the prosecution need not to give any explanation. Second exception carved out by Apex Court is that if the testimony of witnesses is absolutely trustworthy, only on account of non explanation of injury, benefit of doubt cannot be extended in favour of the accused. Similarly, Apex Court in the case of "**Shriram Vs. State of M.P.**" [(2004) 9 SCC 292] held that mere non explanation of injuries by prosecution may not affect prosecution case in all cases and the said principle applies to cases where injuries sustained by accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested and so probable and creditworthy that it far

outweighs the effect of omission on the part of prosecution to explain injuries. In the case of "**Kashiram Vs. State of M.P.**". (**AIR 2001 SC 2902**), it is held that non explanation of injuries sustained by accused, by itself is not sufficient to discard the prosecution case outrightly.

42. In view of this trite law, when no cogent evidence has been brought on record by defence Counsel to show that accused sustained particular type of grave injury at the hands of deceased and other witnesses, only on the ground of non explanation of injuries found on the body of some of the accused, benefit of doubt cannot be extended in favour of the accused persons. The cases of **Lakshmi Singh Vs. State of Bihar** (supra) and **Baburam Vs. State of Punjab** (supra) relied upon by defence Counsel are distinguishable on facts.

43. The learned defence Counsel also assailed the judgment of trial Court on the ground of non mention of names of many accused in F.I.R. However, in the case of "**Mukesh and another Vs. State and others**" reported in (**2017**) **6 SCC 1**, the Apex Court held that :-

"F.I.R. generally is not an encyclopaedia of facts. Victim is not expected to give details of

incident either in FIR or in brief history given to doctors. Sometimes informant may lack necessary skill and ability to reproduce details of entire incident. Some people may miss even most important details of incident. Therefore, non-mention of name of accused in FIR would not tilt balance of case in favour of accused".

44. Therefore, only because Balaji (PW-2) missed certain names of the accused in F.I.R., that cannot be a ground to extend benefit of doubt in favour of the accused. The case of **Mitter Sen Vs. state of U.P.** (supra) relied on by defence Counsel is distinguishable due to peculiar facts of this case.

45. However, it cannot be ignored that though Jayashri (PW-1) has named accused Nos.15 and 11 as the assailants alongwith accused Nos.1 to 3 and 10, Balaji Madje (PW-2) has nowhere named accused Nos.15 and 11. Accused No.11 is not even named by Jaiprakash (PW-3) as one of the assailant. However, it must be noted that Jayashri (PW-1), Balaji (PW-2) and Jaiprakash (PW-3) are consistent regarding assault by accused Nos.1 to 3 and accused No.10 on deceased by stick and axe. As opined by Dr. Sujata Patil (PW-9), the injuries found on the body of deceased are possible due to stick and axe as well as sword. Therefore, we do not find any illegality in the judgment

passed by learned trial Court while convicting accused Nos.1, 2, 3 and 10 for the offence punishable under Section 302 of the I.P.C.

46. However, accused No.6 is not named by Jayashri (PW-1) as one of the assailant. Therefore, he deserves benefit of doubt. So also accused Nos.5, 7, 9, 4 and 12 are not named by Jayashri (PW-1) as well as by Balaji (PW-2) as assailants. Therefore, their acquittal will be justified. So also accused No.6, 13 and 16 are not named by Jayashri (PW-1). Therefore, they also deserve benefit of doubt. In brief, after careful examination of testimonies of these three eye witnesses, it emerges that except accused Nos. 1, 2, 3 and 10, regarding involvement of remaining accused persons their testimony is in conflict with each other. Therefore, except accused Nos. 1, 2, 3 and 10, other accused deserve benefit of doubt.

47. As observed above, the prosecution has proved beyond reasonable doubt, only involvement of accused Nos. 1, 2, 3 and 10 in the incident of causing homicidal death of deceased Dhanraj Madge. Therefore, assembly of these four persons for committing murder of the deceased cannot be termed as "unlawful assembly" under Section 141 of I.P.C., which requires assembly of five or more persons. Therefore, conviction of even

accused Nos.1 to 3 and 10 for the offence punishable under Sections 147 and 148 of the I.P.C. is bad in law. Even these accused cannot be convicted with the aid of Section 149 of the I.P.C. However, it cannot be ignored that at the time of incident accused Nos.1 to 3 and 10 together assaulted the deceased with deadly weapon like stick and axe. This material is certainly sufficient to hold that in furtherance of their common intention to kill the deceased accused committed murder of the deceased, and therefore, accused Nos.1 to 3 and 10 deserve to be convicted only for the offence punishable under Section 302 read with Section 34 of the I.P.C.

48. So far as acquittal of accused Nos. 1 to 16 and 18 of the offence punishable under Section 324 read with Section 149 of the I.P.C. is concerned, the learned A.P.P. has not disputed the correctness of that acquittal. Otherwise also, Jayashri (PW-1) and Jaiprakash (PW-3) have not whispered a word regarding assault to Balaji (PW-2) by accused persons by stick, as deposed by Balaji (PW-2). Therefore, the view taken by learned trial Court while acquitting these accused persons of the offence punishable under Section 324 read with Section 149 of the I.P.C., is justified and needs no interference.

49. In the result, our conclusion is that only the

conviction of accused Nos.1 to 3 and 10 for the offence punishable under Section 302 read with Section 34 of the I.P.C. is justified. It follows that conviction of accused Nos.1 to 3 and 10 for the offence punishable under Section 302 read with Section 149 is to be modified under Section 302 read with Section 34 of the I.P.C. Even accused Nos.1 to 3 and 10 deserve to be acquitted of the offences punishable under Sections 147 and 148 of the I.P.C. The conviction of accused Nos.6, 11 and 16 deserve to be set aside and they deserve acquittal of all the charges. The acquittal of accused Nos.4, 5, 7, 8, 9, 12, 13, 14 and 18 deserve to be modified. It follows that Criminal Appeal No.256/2006 preferred by accused No.10 against his conviction and Criminal Revision No.120/2006 filed by the informant against the order of acquittal deserve to be dismissed. Criminal Appeal No.257/2006 preferred by accused Nos.6 and 16 against the order of conviction deserves to be allowed. Criminal Appeal No.260/2006 preferred by accused Nos.1 to 3 and 11 deserves to be partly allowed.

50. Hence, the following order.

1. Criminal Appeal No.256/2006 and Criminal Revision Application No.120/2006 are dismissed.
2. Criminal Appeal No.257/2006 is allowed and Criminal Appeal No.260/2006 is partly allowed.

3. The order of conviction passed by Ad hoc Sessions Judge, Osmanabad in Sessions Case No.195/1999 convicting accused Nos.1 to 3, 6, 10, 11, 15 and 16 is modified as under :-
- (i) Accused Nos.1 to 3 and 10 are convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they are sentenced to suffer life imprisonment and to pay fine of Rs. 500/- each, in default to suffer rigorous imprisonment for one month.
 - (ii) Conviction of accused Nos.1 to 3 and 10 for the offences punishable under Sections 147 and 148 of the I.P.C. is set aside.
 - (iii) Conviction of accused Nos.6, 11, and 16 for the offences punishable under sections 147, 148 and 302 read with Section 149 of the Indian Penal Code is set aside and they are acquitted of the offences punishable under Sections 147, 148 and 302 read with Section 149 of the Indian Penal Code. Their bail bonds and surety bonds shall stand cancelled.
 - (iv) Fine amount deposited by accused Nos.6, 11 and 16 before the trial Court be refunded to them after the appeal period is over.
 - (v) Acquittal of accused Nos.4, 5, 7, 8, 9, 12, 13, 14 and 18 of all the charges is confirmed.
 - (vi) Acquittal of accused Nos.1 to 14, 16 and 18 of the offence punishable under Section 324 read with Section 149 of the Indian Penal Code is confirmed.
 - (vii) Accused Nos.1 to 3 and 10 shall surrender to their bail bonds before the trial Court immediately to undergo the

sentence imposed against them.

- (viii) Fine amount deposited by accused Nos.1 to 3 and 10 for the offences punishable under Sections 147 and 148 be refunded to them.
- (ix) Fine amount deposited by deceased accused No.15, who died during pendency of these proceedings, be credited to State.
- (x) Under Section 437-A of the Criminal Procedure Code, accused Nos.4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16 and 18 shall execute before the trial Court bail bonds with sureties for the amount of Rs.15,000/- (Rupees fifteen thousand) each to appear before the Supreme Court as and when notices are issued to them in respect of any proceedings filed against this judgment and the said bail bonds shall remain in force for a period of six months from today.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/