

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 367 OF 2013

Samadhan s/o Balasaheb Shinde (Patil)
Age 25 years, Occ. Nil,
R/o. Kothala, Tq. Kallam,
District Osmanabad ...Appellant

versus

The State of Maharashtra
Through Police Station,
Kallam, District Osmanabad
(Copy to be served on P.P.
High Court of Bombay,
Bench at Aurangabad) ...Respondent

.....
Mr. M.B. Kolpe, advocate for the appellant
Mr. Y.G. Gujrathi, A.P.P. for respondent-State
.....

WITH
CRIMINAL APPEAL NO. 46 OF 2014

The State of Maharashtra
Through Ramhari Ganpatrao Shinde
Age 47 years, Occ. Agriculture
R/o. Kothala, Tq. Kallam,
District Osmanabad ...Appellant

Versus

1. Netaji Achyut Shinde (Patil),
Age 27 years, Occ. Driver,
R/o. Kothala, Tq. Kallam,
District Osmanabad
2. Balasaheb Kalyanrao Shinde (Patil),
Age major, Occ. R/o. As above ...Respondents

.....
Mr. Y.G. Gujrathi, A.P.P. for appellant-State
Mr. V.B. Deshmukh, advocate for the respondents
.....

**CORAM : S. S. SHINDE AND
V. K. JADHAV, JJ.**

**Date of Reserving
the Judgment : 13.06.2018**

**Date of pronouncing
the Judgment : 16.07.2018**

JUDGMENT (PER V.K. JADHAV, J.) :-

1. The appellant Samadhan Balasaheb Shinde (Patil) has filed criminal appeal No. 367 of 2013 thereby challenging the judgment of conviction dated 07.09.2013, passed by the learned Additional Sessions Judge, Osmanabad in Sessions Case No. 125 of 2011 for the offence punishable under Section 302 r.w. 34 of I.P.C. sentencing the appellant/original accused No.2 Samadhan to suffer R.I. for life and to pay fine of Rs.10,000/- in default to suffer R.I. for two years whereas the State has filed criminal appeal No. 46 of 2014 challenging the very same judgment against acquittal of original accused No.1 and original accused No.3 Netaji Achyut Shinde (Patil) and Balasaheb Kalyanrao Shinde (Patil) respectively, of the offences punishable under Section 302 r.w. 34 of I.P.C.. Since both these appeals arise from same Sessions case, they are being decided by this common judgment.

2. The prosecution version, as unfolded during trial, is as under:-

a. On 5.7.2011, at about 5.30 p.m. in Shivaji Chowk, in front of Raviraj Beer Bar, Kallam, district Osmanabad, all accused persons in furtherance of their common intention assaulted deceased Suhas and inflicted injuries on his person with the help of sword and by fist and kick blows. On the same day, at about 7.15 p.m. deceased Suhas died in the S.R.T.S. Medical College and Hospital, Ambejogai. On the basis of the complaint lodged by P.W.1 Ramhari Shinde, crime No. 80 of 2011 came to be registered at Kallam police station for the offences punishable under Section 302 r.w. 34 of I.P.C. The prosecution case rests upon direct evidence and also dying declaration made by deceased Suhas before the eye witnesses. The learned Additional Sessions Judge, Osmanabad framed charges against the accused persons for the offences punishable under Section 302 r.w. 34 of I.P.C.. All accused persons pleaded not guilty to the charges and claimed to be tried. The prosecution has examined in all 21 witnesses to substantiate the charges levelled against the accused. The defence of the accused is of total denial and false implication out of political enmity and dispute on account of agricultural properties.

b. The learned Additional Sessions Judge, Osmanabad, upon considering the evidence of prosecution witnesses as well as documentary evidence on record, found that the prosecution evidence as against accused No.1 Netaji Shinde and accused No.3 Balasaheb Shinde is doubtful and acquitted them, however, convicted original accused No.2 Samadhan Balasaheb Shinde for the aforesaid offences.

4. Being aggrieved by the said judgment, the appellant Samadhan Balasaheb Shinde (Patil) has filed criminal appeal no. 367 of 2013 thereby challenging his conviction and the State has filed criminal appeal no. 46 of 2014 challenging the very same judgment thereby acquitting accused No.1 Netaji Achyut Shinde (Patil) and accused No.3 Balasaheb Kalyanrao Shinde (Patil), as aforesaid.

5. The learned counsel for the appellant/accused in criminal appeal no. 367 of 2013 submits that the first information report is received to the police station at 5.45 p.m. The said FIR is lodged by Ravi Harkar and Vishwajeet Thombre, who were the eye witnesses. They are not examined by the prosecution as they have specifically stated that two persons have assaulted the deceased. Thus the entire theory put forth by the prosecution in respect of the eye

witnesses and the dying declaration is a concocted story in order to involve the present appellant in the crime due to political rivalry and civil dispute in respect of agricultural land. The prosecution case as a whole, if compared with the FIR which was lodged at 5.45 p.m., there are major omissions and variations which are contrary to the medical evidence. Thus the FIR below Exhibit 85 at 11.45 p.m. is delayed beyond six hours and no explanation for the same is given by the prosecution. Furthermore, considering the medical papers, the deceased was declared dead at 7.30 p.m. The distance between Ambajogai to Kallam is 45 Kms. The FIR ought to have been registered at the most by 9.00 p.m. However, the same is registered at 11.45 p.m. The delay is not explained by the prosecution. Furthermore, there are major contradictions on record in respect of commission of offence whether by two persons or four. The M.L.C. was received to the police station at 6.45 p.m. Thus, it was necessary to register FIR but the same was delayed to construct a different story.

6 The learned counsel for the appellant further submits that all the witnesses examined are relatives and political workers, except the police authorities and Doctors. Further, P.W.1 admits that there was a party programme at Raigavhan. Thus, evidence of the relatives and party workers is contrary to the other documentary

evidence. The eye witnesses examined by the prosecution are relatives. However, no one has informed the police in respect of the said incident till their statements were recorded by the police. This act of the eye witnesses is doubtful. There is unexplained delay in recording statements of eye witnesses as no explanation is given as to why their statements were not recorded immediately. The evidence of eye witnesses is contrary to the first information report received to the police station at 5.45 p.m. as it does not corroborate with the said FIR. Considering the prosecution case as compared with the FIR at 7.30 p.m., there are major omissions and variances in the statements of eye witnesses. All the eye witnesses are interested witnesses and no independent eye witnesses were examined though 52 to 100 people were present at the scene of incident. All the eye witnesses were able to tell the registration number of motorcycle of the accused. They were also telling that some sticker was affixed to the number plate of the motorcycle of the accused, but no one was able to tell the registration number of motorcycle of the deceased or even the colour of the bike. Furthermore, the location of Raviraj Beer Bar was not known to the eye witnesses.

7. The learned counsel for the appellant further submits that the evidence of eye witnesses does not inspire confidence as the description of the scene given by each of the eye witnesses is

different and this is major contradiction. P.W.2 has stated that the deceased was assaulted in front of Raviraj Beer Bar. The distance between Hotel Raviraj and the complex is 50 feet. The evidence in respect of registration number of motorcycle is an after thought. P.W.3 has stated that the accused stopped the motorcycle behind Suhas. Thereafter he has stated that motorcycle of Suhas was facing west and accused stopped the bike at south side of Suhas. P.W.4 has stated that the distance between Raj Hotel and Raviraj Beer Bar is 150 feet and the accused parked the vehicle in front of the motorcycle of Suhas. All the witnesses were able to state registration number of motorcycle of the accused, their names, the sticker affixed to the number plate of the motorcycle of the accused, but were unable to tell the colour and registration number of motorcycle of the deceased and the location of Raviraj Beer Bar when the incident had taken place in fraction of minutes.

8. The learned counsel for the appellant further submits that the eye witnesses P.W.3 and P.W.4 are from different villages, there was no possibility of the accused being known to them. Even though, without holding the identification parade they have specifically attributed role to each of the accused. The eye witnesses in their evidence have specifically stated that deceased was able to speak, whereas P.W.1 has admitted that his condition was critical. The

evidence of eye witnesses is also doubtful, as P.W.5 has specifically stated that the police were present when the deceased fell down in the jewellery shop. Thus, there is major contradiction in the evidence of eye witness and P.W.5 in respect of presence of accused and the theory put forth by them.

9. The learned counsel for the appellant further submits that the theory of dying declaration put forth by the prosecution is contrary to the medical evidence as the same is not corroborated by the medical evidence. It was highly impossible to utter words as injury was to right side of maxilla and mandible. If there was injury to upper jaw and lower jaw, it was highly impossible to give dying declaration. If the deceased was in fit condition to speak, he would have been given the case history in the hospital as the same has not been done and relatives have given the history. The deceased was in influence of alcohol, thus the theory put forth of dying declaration is doubtful and could not be the basis for conviction of the present appellant. In the evidence of P.W.1 complainant and P.W.7 Doctor, they have specifically stated that condition of the deceased was critical and he was in shock. Further, P.W.5 shop owner of jewellery has specifically stated that deceased had fallen down in the shop. Thus considering the entire documentary and oral evidence, the dying declaration does not inspire confidence.

10. The learned counsel for the appellant further submits that the recovery of clothes of accused U/s 27 of the Indian Evidence Act is contrary to the settled principles of law, as the distance between the police station to Kothala is 15 to 20 K.M. It takes 15 to 20 minutes to travel to the village Kothala from police station. The police have traveled the distance of 15 to 20 K.M. within five minutes. This itself shows from the recovery panchnama that the recovery of clothes of accused was doubtful and cannot be considered to convict the present appellant. The recovery of clothes of accused U/s 27 is in open place and the same cannot be considered. As regards the recovery of cloths of the deceased, the learned counsel submits that the same is also contrary to the procedure prescribed. The same is also disbelieved by the learned sessions court as recovery of clothes of deceased is contrary to the inquest panchnama and seizure panchnama. Different clothes are shown in the seizure panchnama though inquest panchnama shows some different clothes. There is no explanation given by the prosecution about change of clothes of deceased in the inquest panchnama.

11. The learned counsel for the appellant further submits that the evidence in respect of Muddemal articles is doubtful as the said articles were sealed on 06.07.2011 and after two and half months i.e.

on 18.09.2011 the same were sent for chemical analysis. No evidence to that effect is adduced, nor the investigation officer has given any explanation for the delay of about 2 and half months in sending the Muddemal articles for chemical analysis. Furthermore, the possibilities of tampering the muddemal articles cannot be ruled out as the same were kept in police station in open space.

12. The learned counsel for the appellant further submits that as regards medical evidence is concerned, no blood sample of accused was taken by the investigation officer. There is no evidence to that effect, however, blood group of the accused is shown in the C.A. report. Thus, the report of C.A. in respect of blood groups of accused has no basis as there were no blood samples of the accused persons available. As regards the evidence of prosecution and allegations made against the present accused in respect of kicks and blows, medical evidence does not support the prosecution case. There are no any abrasions or any evidence of kicks and blows on the person of the deceased. Thus the prosecution theory of kicks and blows is contrary to the medical evidence. P.W. 1 has admitted that the condition of deceased was critical and therefore he had referred the deceased for further treatment to Ambajogai. However, this evidence of the expert was not considered by the court.

13. The learned counsel for the appellant further submits that P.W.1 has admitted that father of Netaji and his family are political rivals. Further, he has also admitted that there was a dispute pending in respect of landed property bearing R.C.S. No. 124 of 2000 filed by Pradeep Shrihari Shinde who is cousin brother of the deceased. The learned counsel submits that the evidence would show that uncle of the deceased was also murdered. Father of the deceased was tried for the offence punishable U/s. 302 of I.P.C. The complaints were also filed against P.W.1 and the deceased. There was major defects in seizure of clothes of both, the deceased and the accused. The panchnama u/s 27 is also defective, which is at Exhibit 74 and 75. As per the evidence of panch witness, it takes 15 to 20 minutes to reach the place Kothala by jeep, however, within 5 minutes they have reached the place and started the panchnama. Three investigation officers are changed within a week, out of which one is transferred mid-term. All these circumstances create doubt and possibility of political interference cannot be ruled out. The LAQ was also raised in the legislative assembly due to which there was political interference.

14. The learned counsel for the appellant further submits that the evidence of P.W.8 is ambiguous and not reliable considering the missing of complaint given by him regarding the stolen motorcycle. Further, there is also delay of 7 days in disclosing the same to the

police as P.W. 8 has stated that on the day of incident the accused has confessed him, but he has not given the details regarding the same to the police. On the contrary, he has given missing complaint in respect of his bike. The prosecution has also failed to place on record the details of phone calls in respect of communication by the accused to the present witness, though he has stated that he has received the statement of confession on cell phone. The evidence of P.W.8 is not trustworthy. The prosecution has failed to prove the requirement of Section 34 of I.P.C. as the prosecution has failed to prove common intention, prior meeting of minds or plan. Thus the conviction based on Section 34 of I.P.C. is not corroborated by documentary evidence, medical evidence or oral evidence inspiring confidence of prior meeting of minds.

15. The learned counsel for the appellant further submits that P.W. 19, P.W.20 and P.W.21 are the investigation officers in the said crime. P.W.19 admits that he made entry in station diary at 5.45 p.m. Three PSI and 10 constables were deputed to the spot at 5.50 p.m. and they were investigating the crime from 7.50 p.m. to 10.30 p.m. to 11.00 p.m. P.W.19 admits that he had knowledge of incident at 5.50 p.m. In spite of having knowledge about the incident, he has failed to lodge FIR. There are major contradictions in respect of two persons having assaulted one person, though he had made entry of same

crime at 11.45 p.m. in the station diary. P.W. 19 also admits that FIR was delayed and have stated it was delayed beyond six hours. P.W.20 admits that, entries in the station diary are correct. He admits that there is over writing in Muddemal register. He also admits that constable Bale, who had brought clothes, was not examined by the prosecution. Further, he was not able to tell about the change of clothes of deceased as per P.M. notes and seizure panchanama. P.W.20 admits that Muddemal was sent to Aurangabad on 18.09.2011. He admits that he was transferred. P.W.21 admits that requisition for call details was sent, however no details were received. Considering the aforesaid evidence on record, the appeal may kindly be allowed and the conviction of the present appellant may kindly be set aside and he may be acquitted.

Learned counsel for the appellant in criminal appeal No. 367 of 2013, in order to substantiate his submissions placed reliance on the following judgments:-

- i) Pradeep Narayanrao Rajgure vs. State of Maharashtra, reported in 2005 (Supp.) BCR (Cri.) 48,
- ii) Ashraf Hussain Shaikh vs. State of Maharashtra and another, reported in 1996 Cr.L.J. 3147,
- iii) Ganesh Bhavan Patil and another vs. State of Maharashtra,

reported in AIR 1979 SC 135,

- iv) Deoraj Deju Suvarna and others vs. State of Maharashtra reported in 1994 Cr.L.J. 2602,
- v) Phoolchand vs. State of Rajasthan, reported in AIR 1977 SC 315,
- vi) Balvindar Singh vs. State of Punjab, reported in AIR 1996 SC 609
- vii) Swaminathan and other vs. State of Tamilnadu, reported in 2011 (1) SCD9Cri) 519
- viii) Suresh Sakaram Nangare vs. State of Maharashtra, reported in 2012 STPL (LE) 46819 SC.

16. Learned A.P.P. for the respondent State in criminal appeal No. 367 of 2013 and appellant in criminal appeal No. 46 of 2014 submits that entire prosecution case is based upon direct evidence of four eye witnesses, as all these eye witnesses are not shattered in lengthy cross examination. The prosecution has proved the evidence of four independent eye witnesses as consistent and corroborate to each other. Learned A.P.P. submits that the eye witnesses have given details about the incident with names of accused, their role in the assault and also stated in specific about arrival of accused persons at the spot, giving blows without any

altercations. This version of the prosecution witnesses fulfills the requirement of Section 34 of the I.P.C. The evidence of P.W.8 Parmeshwar Patil corroborates the evidence of the eye witnesses. The evidence of P.W.18 Ravindra Oza clearly establish the oral dying declaration of deceased Suhas, which was made voluntarily. Learned A.P.P. thus submits that the learned Sessions Judge has not considered all these aspect while acquitting accused Nos. 1 and 3 i.e. respondents in criminal appeal No. 46 of 2014. In so far as criminal appeal No.367 of 2013, learned A.P.P. submits that the learned Sessions Judge has properly considered the evidence in respect of appellant Samadhan Shinde and has rightly convicted the said accused for the offence punishable under Section 302 r.w. 34 of I.P.C. and there is no error committed by the learned Sessions Judge, to that extent.

Learned A.P.P. for the respondent in criminal appeal No. 367 of 2013 and for appellant in criminal appeal No. 46 of 2014, in order to substantiate his submissions placed reliance on the following judgments:-

- i) Tapinder Singh vs. State of Punjab, reported in 1970 AIR (SC) 1566,
- ii) Gaya Prasad Ramal vs. State of Maharashtra, reported in 1971 AIR(SC) 1112,

- iii) State of Uttar Pradesh vs. P.A. Madhu, reported in 1984 AIR (SC) 1523,
- iv) Masalti Munga Ram, Bhagwati Chandan Sinali, Laxmi Prasad vs. State of Uttar Pradesh, reported in 1965 AIR (SC) 202.

17. Learned counsel for accused Nos. 1 and 3 i.e. respondents in criminal appeal No. 46 of 2014 submits that the prosecution witnesses have deposed that the present respondents-accused assaulted the deceased by fists and kick blows, however, no such injuries were found on the body of deceased and the cause of death of deceased is hemorrhage and shock due to multiple stab injuries, homicidal in nature. There is no specific evidence as to which of accused was instigating assailant accused and there are general allegations against all accused persons. The defence of the respondents is that they were not present at the scene of incident, which is supported by station diary, as the station diary disclosed that two persons came on motorcycle and assaulted the deceased Suhas. The name of the respondents are involved in the said crime due to village politics. Learned counsel submits that provisions of Section 34 of I.P.C. can be attracted when the prosecution must prove that the criminal act has been done in concert with the prearranged plan, mere proof that some accused persons are present on the spot is not sufficient. The prosecution has failed to

examine one Ravi Harkar and Thombre, when these two persons are in fact independent eye witnesses and they informed the police in respect of happening of the incident over telephone. The prosecution have examined three eye witnesses and other two witnesses in respect of dying declaration, but all these witnesses are interested witnesses, as all these witnesses are related to the complainant, hence, their versions are doubtful and untrustworthy. In addition to that, the statements of these witnesses are recorded after 14 hours of the incident, though they are termed as eye witnesses, no statements were recorded though they were available at hospital and police station. Learned counsel submits that if the story of prosecution is taken as it is for the sake of arguments, then also it is not possible that four persons came on one motorcycle and assaulted by means of sword to the deceased. Learned counsel therefore, submits that the criminal appeal No. 46 of 2014 filed by the respondent State against the judgment and order of acquittal of respondents deserves to be dismissed.

Learned counsel for the respondents-accused Nos. 1 and 3 in criminal appeal No. 46 of 2014, in order to substantiate his submissions placed reliance on the judgment in the case of *Dhanapal vs. State by Public Prosecutor, Madras*, reported in (2009) 10 SCC 401.

18. The prosecution case mainly rests upon the direct evidence, oral dying declaration of deceased made before some of the prosecution witnesses, coupled with the recovery of blood stained clothes of the accused persons, recovery of motor cycle used in the alleged commission of crime etc. As per the submissions made on behalf of the convicted accused as well as the accused acquitted in the Sessions trial, there is delay of six hours in lodging the F.I.R. Exh.36. F.I.R. Exh. 36 cannot be treated as F.I.R., as the concerned police station has already got the information about the incident at about 5.40 p.m. and there is entry at Sr. No. 39 taken in the station diary by the concerned police, pursuant to the said information. Consequently, the F.I.R. Exh.36 cannot be treated as F.I.R.. The oral dying declaration cannot be taken into consideration as there is no evidence on record to establish that deceased was in fit mental condition to give oral dying declaration. It has also been submitted on behalf of the accused that the so called eye witnesses are highly interested witnesses and in fact they are got up witnesses. Learned defence counsel has also vehemently submitted that since there is delay of six hours in lodging the F.I.R. Exh.36, the possibility of so called eye witnesses having joined hands in deposing against the accused persons cannot be ruled out in absence of honest investigation by the police.

19. Learned Additional Sessions Judge has held that the F.I.R. Exh. 36 cannot be treated as F.I.R. and the same can be treated as statement under Section 162 of Cr.P.C. Learned Additional Sessions Judge has concluded that entry made in the station diary at Sr. No. 39 is the F.I.R. wherein a reference has been given to two assailants only. Learned Additional Sessions Judge, after considering the medical evidence on record discarded the prosecution evidence on the point of oral dying declaration. In para 37 of the judgment, the learned Additional Sessions Judge though observed that the eye witnesses and some of other witnesses are directly or indirectly related to the informant Ramhari, further observed that this fact itself is not sufficient to discard their testimony unless it is brought on record that they are interested witnesses. Learned Additional Sessions Judge in the same para has concluded to the effect that the said eye witnesses are not interested eye witnesses. On careful perusal of the entire judgment, we find that learned Additional Sessions Judge has given importance to station diary entry at Sr. No.39 and without discussing ocular evidence convicted the appellant accused Samadhan on the basis of the evidence of P.W.8 Parmeshwar Patil with regard to the use of motor cycle in the alleged commission of crime by the accused persons. The learned Additional Sessions Judge considered the evidence of P.W.8 Parmeshwar Patil

relevant to connect the appellant accused No.2 Samadhan with the crime alongwith absconding accused by giving importance to station diary entry at Sr. No.39 which discloses the commission of alleged crime by two assailants only. The learned Additional Sessions Judge has not discussed the ocular evidence and on the basis of medical evidence alone has given benefit of doubt to the original accused No.1 and original accused No.3 Netaji Achyut Shinde (Patil) and Balasaheb Kalyanrao Shinde (Patil) respectively.

20. The jurisdiction and obligation of the High Court to re-appreciate the evidence is identical in both the cases involving the acquittal and conviction. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing the appeals against the conviction. In both type of appeals, the power exists to review the entire evidence. The appellate court should exercise its own independent judgment in reviewing the evidence. It is the duty of an appellate court to look into evidence adduced in case and arrive at an independent conclusion as to whether the said evidence can be relied upon or not and even if it can be relied upon, then whether the prosecution case can be said to have been proved beyond reasonable doubt on the said evidence. The credibility of a witness has to be adjudged by the appellate court in drawing inference from proved and admitted facts.

We are well aware of the difference while deciding the appeal against the acquittal and while deciding the appeal against the conviction that an order of acquittal will not be interfered with by an appellate court where the judgment of the trial court is based on the evidence and the view taken is reasonable and plausible. The appellate court will not reverse the view of the trial court merely because different view is possible. We are also aware that merely because the prosecution witness being unshaken in the cross examination is not an acid test on their credibility. The inherent probability or improbability of a fact in issue should be a prime consideration. However, the appellate court can come to its own conclusion about credibility of witnesses.

21. In the instant case, the learned Additional Sessions Judge has given weightage to the station diary entry at Sr. No. 39. On careful perusal of the station diary entry at Sr. No.39 Exh.85, it appears that two persons viz. Ravi Harkar and Vishwajeet Thombre informed to the police on phone that near the corner of Municipal Council complex, adjacent to visitable market, two persons, who came on motorcycle assaulted one person and inflicted blow on his person with the help of sword and the said injured person in order to save his life ran towards jewellery shop and taken shelter there. They informed that the injured person is unconscious and asked to send the police team immediately.

22. The learned counsel appearing for the accused persons in both the appeals, have vehemently submitted that those two witnesses, who have informed to the concerned police on phone at 5.45 p.m. and on the basis of which entry in the station diary was taken at Sr. No.39, were the eye witnesses and they were not examined by the prosecution. Thus, entire theory put-forth by the other eye witnesses and also dying declaration is concocted story in order to involve the accused persons in the crime due to political rivalry and civil dispute in respect of agricultural land. It has also been submitted that the deceased was initially taken to the Government Hospital at Kallam and thereafter to S.R.T.S. Medical College and Hospital Ambajogai. The deceased was declared dead at 7.30 p.m. The distance between Ambajogai and Kallam is hardly 45 kilometers and the said F.I.R. ought to have been registered till 9.00 p.m. at the most, however, F.I.R. Exh 36 came to be lodged at 11.45 p.m.. Even on the basis of the M.L.C. received by the concerned police station, at 6.45 p.m. from the Government Hospital Kallam, no F.I.R. was registered.

23. Learned A.P.P. has vehemently submitted that though entry was taken in the station diary of the police station by the police officer responding to the telephone call, the said cryptic oral message which

did not in terms clearly specify the name of deceased and assailants and as such the same cannot be treated as F.I.R. The mere fact that the said information was the first in point of time, does not by itself clothe it with the character of F.I.R.

24. Thus, considering the rival submissions on the point of F.I.R., the said entry in the station diary at Sr. No.39, though first in point of time, in our considered opinion, was lacking any particulars about the incident, such as time, place, names of assailants and also the deceased. It further appears from entry in the station diary at Sr. No.40 that on the basis of the aforesaid information the police team comprising the A.P.I., P.S.I., and other police staff went towards spot of incident in a jeep. It was a cryptic report and the entry was taken in station diary only for the purpose of visiting the scene of occurrence. The same is evident from entry No. 40 as mentioned above. We are disinclined to treat entry at Sr. No.39 in station diary as the F.I.R. and discard the F.I.R. Exh.36 on this basis. Further the informant P.W.1 Ramhari had gone to the Government Hospital at Kallam on receipt of the information from P.W.2 who happened to be the eye witness to the incident and further took the deceased in ambulance to the Government Hospital at Ambajogai. We will deal with the evidence of P.W.1 alongwith ocular evidence in later part of the judgment but suffice it to say that in absence of the particulars

about the incident, such as time, place, names of the assailants and name of deceased, we are not inclined to treat the entry at Sr. No.39 in the station diary as F.I.R. as concluded by the learned Additional Sessions Judge in the sessions trial.

25. Learned counsel for the appellant in criminal appeal No. 367 of 2013 placed reliance on the judgment in the case of ***Pradeep Narayanrao Rajgure vs. State of Maharashtra, reported in 2005 (Supp.) BCR (Cri.) 48***, wherein, in the facts of the said case, the Supreme court held that entry in the station diary made at about 00.05 hours amounts to F.I.R., as the station diary entry discloses, with reasonable certainty commission of cognizable crime by four persons and subsequent statement shall only be considered as statement recorded in the course of investigation under Section 162 of Cr.P.C. In para 10 of the judgment, the Hon'ble Apex Court has reproduced the station diary entry. On perusal of the same, it appears that necessary particulars about names of the assailants and the deceased, use of weapons in the assault are clearly mentioned. On the basis of the said details recorded in the station diary entry the Supreme Court observed that the said station diary entry is made on oral report made by one Rajendra and further the said entry discloses with reasonable certainty commission of cognizable crime by four persons as named by the informant Rajendra. This entry also

discloses that the assault was made and the deceased was lying in front of the house. In the instant case, though the names of informants are disclosed, cryptic information has been given on phone without specifying the names of the assailants so also the deceased and other particulars so as to disclose with reasonable certainty commission of cognizable crime by certain persons.

26. In the instant case, the reasons on the basis of which the learned Additional Sessions Judge attempted to give weightage to entry No. 39 in the station diary are not at all the reasons on the basis of which F.I.R. Exh.36 could be discarded in its entirety. We are of the considered opinion that it is not the case where two views are possible. If the said cryptic information in the form of entry in the station diary at Sr. No. 39 is treated as F.I.R., the same would amount to discard the legal and admissible evidence.

27. The next question would arise as to whether there is delay in lodging the F.I.R. Exh.36 and as such, there is possibility of eye witnesses being highly interested, having joined hands deposing against the accused persons in absence of honest investigation by the police.

28. The incident had taken place at about 5.30 p.m.. After the

incident, deceased Suhas was immediately taken to Rural Hospital, Kallam and as per the M.L.C. Exh.45, he was examined by P.W.7 Dr. Madhukar Suryawanshi at about 6.00 p.m. Till that time, P.W.1 Ramhari Shinde had reached to the Rural Hospital, Kallam. He had seen injuries on the person of deceased Suhas, whose condition was serious at that time. As per the medical advice, injured Suhas was immediately taken to S.R.T.S. Medical College and Hospital at Ambajogai in ambulance. It is not disputed that deceased Suhas died at about 7.15 p.m. at S.R.T.S. Medical College and Hospital, Ambajogai. Deceased Suhas was nephew of P.W.1 Ramhari Shinde. It is the case of the prosecution that during the course of journey in ambulance from Kallam to S.R.T.S. Medical College and Hospital, Ambajogai, deceased Suhas had given oral dying declaration before P.W.1 Ramhari Shinde and the persons accompanied him in the ambulance itself, explaining the cause of injuries sustained by him, disclosing the names of assailants with specific role played by them in the assault and also the weapons used in the assault. Deceased Suhas had also stated in his oral dying declaration as to the spot of incident and arrival of the accused persons on the spot on motorcycle.

29. Learned counsel appearing for the appellant in criminal appeal No. 367 of 2013 and also learned counsel appearing for the

respondents-accused in criminal appeal No. 46 of 2014 have vehemently submitted that P.W.1 Ramhari Shinde got ample time to lodge the complaint immediately in the Police Chowki at S.R.T.S. Medical College and Hospital at Ambajogai or even in the police station at Kallam, however, there is considerable delay of six hours for which no explanation is tendered by the prosecution. They have submitted that P.W.1 Ramhari Shinde has lodged belated complaint deliberately and falsely involving the accused persons in the alleged crime. They have also submitted that the so called eye witnesses are got up witnesses and at the instance of P.W.1 Ramhari Shinde those eye witnesses are joined hands in deposing against the accused persons.

30. We have carefully perused the evidence of P.W.1 Ramhari and also perused the various documents exhibited by the learned Additional Sessions Judge during the course of trial. The learned Additional Session Judge since given importance to the entry at Sr. No.39 in the station diary, has neither discussed the aforesaid ocular evidence nor the submissions on the point of delay. Consequently, we deem it appropriate to fully analyze the factual position in this regard. Though there is no explanation tendered by P.W.1 Ramhari either in his oral evidence or in the F.I.R. Exh.36 about delay in lodging the complaint, however, we cannot ignore that deceased

Suhas was his nephew, aged 38 years at the time of his death. In para 8 of the cross examination, we find that P.W.1 Ramhari had responded to the cross examination and stated that they started return journey from Ambajogai to Kallam at about 9.45 to 10.00 p.m.. It has come in the cross examination of P. W.1 Ramhari that distance between Kallam and Ambajogai is 45 kilometers. Thus, in between 9.45 p.m. to 10.00 p.m. if P.W.1 Ramhari left Ambajogai to reach Kallam then he might have reached to Kallam around 10.45 to 11.00 p.m. We find it difficult to accept the submissions made on behalf of accused that P.W.1 Ramhari who lodged the complaint Exh.36 around 23.45 hours in the police station at Kallam, had an opportunity to cook up the false story and thereby implicate the accused falsely in the crime. In the aforesaid circumstances, we do not think that there is delay in lodging the complaint Exh.36.

31. Learned counsel for the accused persons have placed reliance on the judgment of this Court in the case of **Ashraf Hussain Shah vs. State of Maharashtra, reported in 1996 Cri.L.J. 3147**. In the said case, the Division Bench of this court has considered the delay in lodging the complaint as fatal to the prosecution case for the reason that even though the informants were at the police station for the hours, did not lodge the F.I.R. In the facts of the said case, this Court held that their conduct was highly unnatural and improbable

and was sufficient to hold that they did not see the incident. In the instance case, P.W.1 Ramhari Shinde after returning from S.R.T.S. Medical College and Hospital, Ambejogai, immediately lodged the complaint in the concerned police station and as such there is no delay in lodging the complaint.

32. As per the prosecution story, P.W.2 Balasaheb Kshirsagar, P.W.3 Balkrishna Bhawar, P.W.4 Shivraj Ritapure and P.W.18 Ravindra Mohanlal Oza are eye witnesses to the alleged incident. As per the prosecution case, on 5.7.2011 at about 5.30 p.m. deceased Suhas Shinde came on motor cycle in front of Raviraj Beer Bar and when he was getting down from the motor cycle, all accused persons came there on another motor cycle in front of said Raviraj Beer Bar near deceased Suhas Shinde. The absconding accused Anant Shinde was having sword in his hand, they got down from their motor cycle and absconding accused Anant Shinde gave blows of sword on the face, neck and hand of deceased Suhas and other accused persons gave fist and kick blows to him. Deceased Suhas fell down on the ground. The accused persons were saying that they will kill deceased Suhas. Deceased Suhas anyhow got up and started running from Shivaji Chowk to Sonar Galli (jewellers lane). All the accused persons started chasing by saying that they would kill him. At that time, absconding accused Anant Shinde had sword in his

hand. Deceased Suhas went from market to Kothavale Jewellers. Deceased Suhas had taken shelter inside the shop of said Kothavale Jewellers. He was taken to rural hospital, Kallam from the shop of Kothavale Jewellers, where deceased Suhas was lying in injured condition.

33. On careful perusal of the contents of spot panchnama at Exh.48 and the map drawn on it (the prosecution has duly proved the contents of spot panchnama through P.W.9 Pratap Pawar) and also on perusal of the map drawn by the Circle Officer, Division Kallam, the map of spot of actual assault and also the map of Jewellers lane drawn by the Circle Officer, Division Kallam at Exh.51 and 52 (admitted by defence), we find that the spot of assault (incident) is situated in front of Raviraj Beer Bar. The said Raviraj Beer Bar is situated in front of Padmasingh Patil complex. There is road in between Padmasingh Patil complex and Raviraj Beer Bar, which is approximately 100 feet in width. The spot of incident, as shown in the spot panchnama and the map drawn on it, is towards eastern side of Raviraj Beer Bar at a distance of 30 feet on the said road. The statue of Shivaji is at a distance of 135 feet from the spot of incident towards northern side. It further appears from the contents of the spot panchnama that the motor cycle bearing registration No. MH-14/BD-7331 was lying on the spot of incident and there were

blood stains on various parts of the said motor cycle. Furthermore, at a distance of 5 feet from the motor cycle, one chappal of left foot having blood stains and at a distance of 25 feet, another chappal of right foot were found lying. It is not seriously disputed that the incident had taken place on the spot as detailed in the spot panchnama Exh.48. It further appears from the spot panchnama Exh.48 and the map drawn on it that towards northern side of the spot of incident from Shivaji statue, the road goes to Jewellery lane. The said shop is 10x12 feet in size having one counter towards southern side of the shop. There is rexine pasted on the floor and blood was found on the said mattress (rexine). It has been specifically mentioned in the spot panchnama Exh.48 that towards southern side inside of the counter, blood was found on the mattress (rexine). In addition to this, blood was also found on the counter. In the backdrop of contents of the spot panchnama Exh.48 and the map drawn on it, we now discuss the evidence of eye witnesses.

34. P.W.2 Balasaheb Kshirsagar is the witness who has given information about assault to P.W.1 Ramhari on phone. At that time P.W.1 Ramhari was at village Raigavan for party work. He had left the village Raigavan at 5.00 p.m. and reached to Diksal bus stop when he received the phone call from P.W.2 Balasaheb Kshirsagar. P.W. 2 Balasaheb Kshirsagar had informed him about the assault,

weapons used in the assault, name of accused persons and also the fact that deceased Suhas ran towards Sonar Galli and the assailants chased him with sword. P.W. 1 Ramhari accordingly rushed towards the said Sonar Galli (jewellery lane). He was informed by the people gathered there that deceased Suhas was just taken to rural hospital Kallam and accordingly P.W.1 Ramhari immediately went to Rural hospital, Kallam. The name of P.W.2 Balasaheb Kshirsagar is specifically mentioned in the F.I.R. Exh.36 with all details, as discussed above.

35. On careful perusal of deposition of P.W.2 Balasaheb Kshirsagar, it appears that on 5.7.2011 he was standing in front of Padmasingh Patil complex in Kallam. P.W.2 Balasaheb Kshirsagar has deposed about assault, name of the assailants, role played by them in the assault and further chasing to deceased Suhas by the accused persons towards Sonar Galli (jewellery lane) etc. In addition to that, P.W.2 Balasaheb Kshirsagar has specifically given registration number of motor cycle i.e. MH-25/W-1744 on which all accused persons arrived at the spot. He has also explained that there was sticker of Anant Chonde on the motor cycle and all accused ran away from Sonar Galli (jewellery lane) on the said motor cycle. P.W.2 Balasaheb Kshirsagar has also deposed that some two persons took injured Suhas in Rickshaw for primary treatment in the

Government Hospital, Kallam. He had also accompanied them. He has also deposed that P.W.1 Ramhari reached in the rural hospital, Kallam thereafter. He has further deposed that Pradip Mete, Vikas Barkul, Prashant Lomate and Satish Tekale, took deceased Suhas towards S.R.T.S. Medical College and Hospital, Ambajogai in ambulance. He did not accompany them and returned back.

36. P.W.3 Balkrishna Bhawar has deposed that on 5.7.2011 he was standing in front of Keshriya cloth store in Shivaji Chowk. As per the contents of the spot panchnama Exh.48 and the map drawn on it and also map at Exh.51 prepared by Circle Officer, Division Kallam, the said Keshriya cloth store is adjacent to Raviraj Beer Bar. He has also deposed in detail about the entire incident, as deposed by P.W.2 Balasaheb Kshirsagar.

37. P.W.4 Shivraj Bhagwan Ritapure has deposed that on 5.7.2011 at about 5.30 p.m. when he was going from Raj Hotel to Shivaji chowk, at that time he witnessed the entire incident. He has deposed and given details of assault, weapons used in the assault, role played by the accused persons in the assault and further chasing the deceased Suhas towards Sonar Galli (jewellery lane). P.W.2 Balasaheb Kshirsagar is an agriculturist by occupation, P.W.3 Balkrishna Bhawar is professor and P.W.4 Shivraj Ritapure is also an

agriculturist.

38. The ocular evidence of all these witnesses has been assailed by the counsel appearing for the accused persons on the ground that they are highly interested witness as P.W.2 Balasaheb Kshirsagar is the relative of P.W.1 Ramhari, P.W.3 Balkrishna Bhawar is active party worker of N.C.P. and P.W.4 Shivraj Ritapure is also party worker of N.C.P. On careful perusal of evidence of these three witnesses, we are also of the view that their ocular evidence is not at all shaken in the cross examination. We are aware that the prosecution evidence, being unshaken in the cross examination of the witnesses, is not an acid test of their credibility and inherent probabilities and improbabilities of fact in issue should be prime consideration. The evidence of said witnesses cannot be discarded out rightly for the reason that they are relatives and interested witnesses. However, close scrutiny of their evidence is required to be undertaken. We record our conclusion on the basis of their evidence, the spot of incident, the surroundings, as detailed in the spot panchnama Exh.48 and the map drawn on it coupled with the evidence of other eye witnesses that evidence of these three eye witnesses is reliable, trustworthy and consistent. We find no specific reason for all these witnesses to falsely implicate the present accused persons in the crime only for the reason that they are

relatives or party workers of N.C.P. We do not think that they are chance/got up witnesses.

39. The prosecution has also examined the owner of said Raviraj Beer Bar and Permit Room P.W.18 Ravindra Mohanlal Oza. P.W.18 Ravindra Oza deposed that on 5.7.2011 he was standing outside the hotel. Deceased Suhas came on his motor cycle in front of his hotel. He has further deposed that the accused persons came there on motorcycle and absconding accused Anant Shinde was having sword in his hand. The said absconding accused Anant Shinde gave blows of sword to deceased Suhas and other accused persons gave fist and kick blows on him. Deceased Suhas fell down on the ground and when he was being beaten, he got up and ran towards Sonar Galli (jewellery lane) from Shivaji Chowk. P.W.18 Oza also followed him. P.W.18 Ravindra Oza has further deposed that all accused persons started chasing deceased Suhas and while chasing they were saying that deceased Suhas should be killed and finished. P.W.18 Ravindra Oza further deposed that deceased Suhas went to Kothavale jewellers and he was lying in the jewellery shop in injured condition. All accused persons ran away on the motor cycle. P.W.18 Ravindra Oza has also given registration number of the said motor cycle. P.W.18 Ravindra Oza is an independent witness, whose presence near Raviraj Beer Bar and Permit Room at the relevant

time cannot be said to be by chance. There is absolutely no reason to discard his evidence. On careful perusal of his cross examination, we find that his evidence remained unshaken though tested extensively in the cross examination. He had also specifically mentioned the name of P.W. 6 Satish Tekale and Pradeep Mete.

40. The prosecution has examined P.W.6 Satish Tekale. Though P.W.6 Satish Tekale has not witnessed the actual incident of assault, according to him, he saw deceased Suhas Shinde came running from Shivaji Chowk with bleeding and absconding accused Anant Shinde came running behind him with sword in his hand. The other accused persons also running with the absconding accused and they were saying that deceased Suhas should be caught and killed. P.W.6 Satish Tekale and Pradeep Mete made futile attempt to intervene in the same. P.W. 6 Satish Tekale has further deposed that deceased Suhas ran towards Kothavale Jewellers in bleeding condition. He has further deposed that all accused persons thereafter fled on one motor cycle bearing registration No. MH-25/W-1744. The said motor cycle was having sticker of Anant Chonde on its front side. He had thereafter rushed to Kothavale jewellers. Deceased Suhas was lying in a pool of blood. He asked deceased Suhas as to what happened and deceased Suhas had disclosed him entire incident of assault with specific role played by each of the accused

and the weapons used in the assault. Thereafter, P.W.6 Satish Takale, Pradeep Mete and some other persons took deceased in auto rickshaw to the Rural Hospital, Kallam.

41. The prosecution has also examined owner of Kothavale Jewellers P.W.5 Ashok Kothavale. He knew deceased Suhas as he was the son in law of the person from his village. On 5.7.2011, he was sitting in his shop. It was 5.35 p.m. Deceased Suhas came running to his shop and fell down inside the shop. Deceased Suhas asked P.W.5 Ashok Kothavale to save him. P.W.5 Ashok Kothavale, after looking outside, saw the mob of 15 to 20 persons. P.W.5 Ashok Kothavale asked deceased Suhas as to what happened and accordingly, deceased Suhas disclosed the entire incident, including names of the assailants, weapons used in the assault and the role played by each of them. P.W.5 Ashok Kothavale has also deposed that P.W.6 Satish Tekale and Pradeep Mete took him to the hospital. The evidence of P.W.5 Ashok Kothavale and P.W.6 Satish Tekale remained unshaken in the cross examination. Both of them have not exaggerated the version in any manner. They had deposed about the incident, as they have witnessed the subsequent chasing and also that deceased Suhas had taken shelter in the jewellery shop owned by P.W.5 Ashok Kothavale. In the backdrop of their independent, trustworthy, reliable and consistent evidence, we do not think that

P.W. 2 to 4 are not reliable and trustworthy witnesses for the reason alone that they are interested witnesses.

42. The evidence of aforesaid eye witnesses was also assailed on the ground that their police statements came to be recorded belatedly. We do not find any substance in this submission. P.W.20 P.I. Surwase has deposed that at about 00.00 hours, he was assigned with the investigation of crime No. 80 of 2011 and thus, he rushed to the spot of incident. In presence of panch witnesses, he has prepared panchnama of the spot, seized the articles lying there, also collected the blood stained soil, small stones etc. He has also visited the shop of Kothavale jewellers and also mentioned the condition at the jewellery shop in the spot panchnama Exh.48. The motor cycle of deceased Suhas lying on the spot also came to be seized. He has deposed that on the very day at about 14.45 hours (2.45 p.m.) he had arrested accused No.1 Netaji under arrest panchnama Exh.82. On the very day he has recorded the statements of 13 witnesses including eye witnesses. In the circumstances, we do not find any delay as such in recording the statements of eye witnesses.

43. The learned Additional Sessions Judge has also discarded the oral dying declaration made by deceased Suhas to P.W.1 Ramhari,

P.W.5 Ashok Kothavale and P.W.6 Satish Tekale on the ground that there was intensive bleeding from the injuries sustained by deceased Suhas and it was one of the reason for hemorrhagic shock. The learned Additional Sessions Judge has also considered the alcohol found in the blood of deceased and observed that it was necessary for the prosecution to prove that deceased Suhas was mentally fit to make oral dying declaration. The learned Additional Sessions Judge has further observed that in absence of any such proof, the evidence on the point of oral dying declaration is not reliable.

44. Due to considerable loss of blood or obstruction to respiration or circulation, lack of oxygen develops, which also causes damage and changes in fluid balance inviting various degrees of shock. The shock usually appears immediately after receiving the injuries, but it may supervene after some time. In the instant case, the prosecution has set up a theory that deceased Suhas, after receiving the injuries, was able to speak and mention the names of his assailants. P.W.7 Dr. Madhukar Suryawanshi had an occasion to see and treat deceased Suhas initially at Government Hospital, Kallam. He has stated in his cross examination that there was heavy bleeding and the patient was impending to land into shock. He has not specifically noted whether deceased Suhas was able to speak. However, P.W.7 Dr. Suryawanshi had noted that because of low blood pressure

deceased was landed into unconsciousness. He has also denied that due to injury No.1 deceased Suhas was not in a position to speak. He has also denied that vocal cords of deceased Suhas were also damaged. P.W.12 Dr. Vishwajeet Pawar has mentioned the external injuries in column No.17 in post mortem report. According to him, there was intensive hemorrhage and the patient may go in shock after bleeding. However, both the witnesses have nowhere given their opinion even after searching examination that deceased Suhas was not in a position to speak. On careful perusal of the postmortem report Exh.63, it appears that no injuries were seen under the scalp and no hemorrhage was seen in the brain. It has come in the evidence of eye witnesses that even after sustaining the injuries and though there was bleeding from the said injuries, deceased Suhas ran towards jewellery shop to save himself and even in the jewellery shop, he made oral dying declaration mentioning the names of his assailants to the owner of the jewellery shop i.e. P.W.5 Ashok Kothavale. Even there are cases that such injured survived for some hours or days after receiving very grave injuries, which would ordinarily have proved rapidly fatal. Even if we consider the time factor, deceased Suhas had disclosed the names of his assailants immediately within few minutes after the assault and even during the course of journey towards S.R.T.S. Medical College and Hospital, Ambejogai in ambulance within half an hour from the alleged assault.

Thus, considering the time factor and the distance crossed by deceased even after receiving the injuries, we give importance to the ocular evidence rather than the medical evidence which does not say positively that deceased was not able to speak since landed in shock. Thus we are not in agreement with the observations made by the learned Judge of the trial court. We accept the theory of oral dying declaration made before the eye witnesses as mentioned above, whose oral evidence is also not discarded by the learned Additional Sessions Judge.

45. There are other circumstances, which support the prosecution case in its entirety. The accused assailants had used the motor cycle for arriving at the place of assault and even for fleeing away from the spot of incident. The prosecution has examined P.W.8 Parmeshwar Patil who has deposed that appellant-accused Samadhan had come to his shop at about 4.30 p.m. on the day of incident and took away the bike viz. Bajaj Discover bearing registration No. MH-25/W-1744 from him. The said motor cycle was being used by the brother of P.W.8 Parmeshwar Patil. P.W.8 Parmeshwar Patil gave the said bike to accused appellant Samadhan Shinde. At about 6.00 p.m., the appellant accused Samadhan talked him on mobile and informed about the quarrel with deceased Suhas Shinde. The appellant accused Samadhan also asked P.W.8 Parmeshwar Patil to take

away the said bike which he kept at Kaij, Tq Kaij, District Beed. P.W.8 Parmeshwar Patil has further deposed that he has filed an application in Kaij police station to the effect that the bike was stolen. According to him, he had filed the complaint for the reason that he heard about the said quarrel. In order to avoid the responsibility and to save himself, he had filed the said complaint in the police station. Even after searching examination his evidence remained unshaken. Though the learned Judge of the trial court had considered his evidence to the extent that the appellant-accused Samadhan had made extra judicial confession before him, however, we restrain ourselves to stretch the things to that extent and inclined to consider the evidence of this witness to the extent that accused-appellant Samadhan had taken the said bike from him just half an hour before the alleged incident of assault. It would be necessary to repeat here that eye witnesses have referred the said motor cycle in their deposition alongwith the registration number and also photographs of absconding accused Anant Shinde pasted on the upper portion of head light mentioning the *Saheb* beneath it. The said motorcycle came to be seized at Sonesangavi Phata under panchnama Exh.21. It was abandoned at that place. There is also evidence about blood stained clothes of accused Netaji and appellant-accused Samadhan.

46. Learned counsel appearing for the appellant-accused

Samadhan and also counsel appearing for the respondents-acquitted accused, vehemently submitted that there is no evidence to indicate that the accused have shared the common intention to kill the deceased. Deceased Suhas had not sustained any injuries due to fist and kick blows and as such prosecution has failed to prove the overt act on the part of these accused persons. The prosecution has failed to prove the pre-arranged plan or prior concert of mind and as such application of Section 34 of I.P.C. is wholly irrelevant. We do not find any substance in the submission made on behalf of the accused persons before us. It has come in the ocular evidence that as soon as deceased Suhas got down from his motor cycle, all accused persons came together on another motorcycle and one of the accused persons was holding sword in his hand at that time. The accused persons got down from the motorcycle and absconding accused Anant Shinde assaulted deceased Suhas with the help of sword whereas the accused persons before us assaulted the deceased with the help of fist and kick blows. It was a broad day light assault. All accused persons were asserting that deceased Suhas should be killed at once. Even after the assault, when deceased Suhas had started running towards jewellery shop, all accused persons chased him. All these circumstances unmistakably indicate that there was prior concert of mind of all accused persons to carry out their plan of assault on deceased Suhas. It further appears from

the ocular evidence that all accused persons were knowing about the activities of deceased and accordingly they assaulted him as soon as he got down from his bike. Even the medical evidence on record supports the theory of assault by fist and kick blows. Deceased Suhas had sustained the abrasions which, according to the medical evidence, was possible due to assault by fist and kick blows. Both the Learned counsel appearing for the accused persons placed reliance on the judgments in the cases of ***Swaminathan and other vs. State of Tamilnadu and Suresh Sakaram Nangare vs. State of Maharashtra, (supra)***. However, both the cases cannot be made applicable to the facts and circumstances of the present case.

47. In the circumstances and in view of the discussion in the foregoing paras, we are of the considered view that the prosecution has proved its case against the appellant-accused in criminal appeal No. 367 of 2013 and the accused-respondent Nos. 1 and 2 in criminal appeal No. 46 of 2014. We accordingly proceed to pass the following order:-

O R D E R

- I. Criminal appeal no. 367 of 2013 is hereby dismissed.
- II. Criminal appeal no. 46 of 2014 is hereby allowed. The judgment and order of acquittal dated 07.09.2013 passed by

the learned Additional Sessions Judge, Osmanabad in Sessions Case No. 125 of 2011 to the extent of acquittal of respondent No.1 Netaji Achyut Shinde (Patil) and respondent No.2 Balasaheb Kalyanrao Shinde (Patil) original accused Nos. 1 and 3, respectively, under Section 302 r.w. 34 of I.P.C. is hereby quashed and set aside.

- III. The accused No.1 Netaji Achyut Shinde (Patil) and accused No.3 Balasaheb Kalyanrao Shinde (Patil) both residing at Kothala, Tq. Kallam, District Osmanabad, are hereby convicted for the offences punishable under Section 302 r.w. 34 of I.P.C. and both of them are hereby sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand only) each, in default to suffer rigorous imprisonment for two years.
- IV. The accused No.1 Netaji Achyut Shinde (Patil) and accused No.3 Balasaheb Kalyanrao Shinde (Patil) shall surrender forthwith before the concerned trial court to suffer remaining part of sentence. The accused No.1 Netaji Achyut Shinde (Patil) and accused No.3 Balasaheb Kalyanrao Shinde (Patil) be given set off as per Section 428 of Cr.P.C.
- V. Both the appeals are accordingly disposed of.

(V. K. JADHAV, J.)

(S. S. SHINDE, J.)

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